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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

AUDREY MARIE BYRUM,

Defendant-Appellant

Supreme Court Case No. 46863-2019

Ada County Case No. CR01-17-19498

APPELLANT'S REPLY BRIEF

APPELLANT'S BRIEF

Appeal from the Magistrate Court of the Fourth Judicial District of the state of Idaho, in and for the County of Ada

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HONORABLE JAMES S. CAWTHON
Magistrate Judge

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STATEMENT

The District Court erred by failing to apply the correct standard when analyzing the magistrate court's decision to deny the motion to suppress. In addition, the District Court erred in citing to foreign jurisdiction to justify upholding the denial of the motion to suppress, instead of relying on Idaho case law, and therefore came to the wrong conclusion regarding the motion to suppress.

I. The District Court Erred by Failing to Apply the Correct Legal Standard.

Contrary to the State's assertion that "the district court recognized and applied the relevant law as set forth above regarding reasonable suspicion and anonymous tips" the District Court did not apply the correct case law. Respondent's Response Brief, p. 9.

a. The District Court Applied Invalid Case Law When Analyzing the Appeal from the Magistrate Court.

The District Court's rationale in refusing to overturn the magistrate's denial of the motion to suppress hinged on a number of federal cases that are not controlling case law in Idaho, and in one instance, is not even controlling under its designated federal jurisdiction. Court Appellate Record, pg. 111-12. Those four cases are *United States v. Malcolm*, 891 F.2d 296, *2 (9th Cir. 1989); *United States v. Sokolow*, 490 U.S. 1; *United States v. Miranda-Sotoloongo*, 827 F.3d 663 (7th Cir.); and *United States v. Cortez*, 449 U.S. 411, 418 (1981).

Malcolm is an unpublished decision and has no precedential value under Ninth Circuit Rule 36-3,[1] and therefore should not have been considered by the District Court when making a decision in this case. To rely on such in light of the federal prohibition on the use of an unpublished decision is an error by the District Court. Specifically, the sentence from *Malcolm*: "The test is not whether the questionable conduct is consistent with innocent behavior, but whether, in considering the 'totality of the circumstances,' it amounts to suspicious activity justifying an investigatory stop." This statement appears nowhere in *U.S. v. Sokolow* and is inherently contradictory to applicable Idaho case law; cf. *State v. Neal*, 159 Idaho, 439, 443, 362 P.3d 514, 518 (2015) ("the test is whether the driving pattern falls outside 'the broad range of what can be described as normal driving behavior.'") .

In addition, *Miranda-Sotolongo* is a Seventh Circuit case, which may be used for persuasive value, but was used by the District Court as the rule of law for Idaho. The specific objection to this announced standard is the sentence: "[A] stop conducted in the face of ambiguity is permissible so long as it remain sufficiently probable that the observed conduct suggests unlawful activity . . . An officer need not be absolutely certain; without specifying mathematical probabilities, the degree of suspicion needed to justify a traffic stop is 'considerably less than proof of wrongdoing by a preponderance of the evidence' and 'obviously less' than the needed probable cause." This statement does not appear in *Cortez*, nor is it the applicable standard for these facts. *See Id., supra*. Moreover, a persuasive rule from

[1] http://cdn.ca9.uscourts.gov/datastore/uploads/rules/rules.htm

another jurisdiction is not appropriate for stating the rule of law in this jurisdiction, though it could be used for analysis or comparison.

However, the District Court quoted from these two cases and applied the statements of the law in these two cases as though the persuasive authority of those cases was mandatory authority. Therefore, the District Court erred in analyzing the magistrate's decision.

The analysis based on the ambiguity of a situation is particularly troubling, as such a standard could lead – and the appellant asserts has in this case led – to an erroneous outcome. Nearly all situations that people face in life are ambiguous, and if an officer is allowed to always err on the side of investigating a criminal offense where there is ambiguity, then the Fourth Amendment to the Constitution has no meaning as there is then a built-in work-around any time Fourth Amendment protections may come into play. Such cannot be the logical result, nor is it appropriate based on the wisdom and experience that enacted those constitutional protections.

Moreover, In footnote 2, Appellate Record, pg. 113, the District Court relied on unpublished opinions from foreign jurisdictions rather than applying Idaho law. *State v. Just*, 2006 WL 2616319 (Minn. Ct. App.) is yet another unpublished case and is designated as not having precedential value and contains additional facts not found in this case. *State v. Dalios*, 635 N.W.2d 94, 98 (Minn. Ct. App. 2001), is from a foreign jurisdiction as well, and the analysis there fails to take into account more than a single decision in a wide array of that foreign jurisdiction's precedent. For example, the Minnesota court had previously held that the single swerve did not provide a basis for a stop. *See State v. Brechler*, 412 N.W.2d 367, 368 (Minn. App. 1987). *Brechler* would be much more probative of the current issue than *Dalios*, which also contains facts which, in Idaho, would constitute its own basis for a stop.

To further illustrate how inappropriate it is to be applying Minnesota to this case, *Kruse v. Commr. of Pub. Safety*, 906 N.W.2d 554 (Minn. App. 2018), states that crossing the fog line is reasonable, articulable suspicion, which Idaho case law squarely contradicts in *Neal*, the very decision the lower courts were called upon to apply in this case.

The cases that remain after excluding the cases that should have have been considered are *Sokolow* and *Cortez*, but only to the extent that they do not conflict with the standard announced in *Neal*. Therefore, contrary to the State's assertion, the District Court did not apply the correct case law and it is necessary and appropriate that this Court apply the appropriate standards and overrule, or order to be overruled, the denial of the motion to suppress.

b. *State v. Neal* and *State v. Emory* Set Forth the Appropriate Standard

Neal was the appropriate case law for the District Court to use in its analysis of the magistrate's denial of the motion to suppress, but that case does not appear in the District Court's decision on appeal. *Neal* details when it is appropriate for an officer to stop a citizen or resident and the *Neal* Court specifically rejected the argument that failing to maintain one's lane of travel by crossing over the fog line provided reasonable, articulable suspicion of wrong-doing. The State now asserts that lesser conduct—remaining inside of the lane—is a sufficient basis to stop someone. Moreover, *Neal*

articulated the appropriate standard for the District Court to apply, which the District Court failed to do: "the 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 at 443, 362 P.3d at 518 (2015), *citing State v. Emory*, 119 Idaho 661, 663-4.

Both the District Court analyzing the magistrate's decision and the magistrate himself failed to recognize the appropriate test to apply in this instance, instead choosing to focus on merely erroneous federal case law instead of the standard articulated in *Neal*. Moreover, the *Neal* Court, in making its pronouncement, looked to cases such as *United States v. Lyons*, 7 F.3d 973, 976 (10th Cir. 1993), *overruled on other grounds by United States v. Botero-Ospina*, 71 F.3d 783, 786-97 (10th, Cir. 1995) ("[I]f failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy.").

If the magistrate or the District Court had analyzed this situation under *Neal* or *Emory*, or any of the supporting case law used in those cases, each Court would have concluded that it was appropriate to suppress the evidence in this case. The government focuses a great deal on any flaws in the driving pattern. However, whether the driving pattern was perfect is not the end of the analysis. A person driving does not need to have a perfect driving pattern. The question is: "whether the driving pattern falls outside 'the broad range of what can be described as normal driving behavior.'" *Neal*, 159 Idaho at 439, 396 P.3d at 518. The *Neal* Court and the *Emory* Court both went further in their analysis in looking at whether there was an innocent explanation for the driving behavior. Neither the magistrate nor the District Court looked for such an explanation; however, there are many explanations that come to mind, including partial night blindness not requiring a prescription; lack of clarity on which exit the driver is looking for and attempting to see which exit they are approaching; and maximizing the use of the lane for safety purposes.

II. The District Court Erred By Reviewing Evidence Not Submitted to the Trial Court, Which the State Now Requests This Court to Review

As noted in the Appellant's Reply on appeal to the District Court:

> At the suppression hearing, the state acknowledged the search was warrantless and accepted the burden of proof. Transcript ("TL") p. 3, 1n. 12-16. The state then called a single witness—Trooper Eric Pesina—to support its claim that an exception to the warrant requirement justified Ms. Byrum's roadside detention. See Tr. p. 2. No exhibits were marked or admitted, though the dispatch audio was played to refresh the trooper's recollection. Tr. p. 2; p. 16, 1n. 10-21.

Clerk's Record on Appeal, 102-04. The Government now has asserted that this should be used during this appeal. Brief of Respondent, 13-14. This evidence was never submitted as evidence, nor should it have been considered as a part of the appellate record in the appeal to the District Court. The recording was used to refresh the officer's recollection and therefore should be disregarded on appeal.

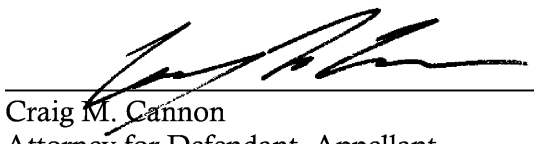
Therefore, the District Court erred by considering evidence that the state elected to not present to the magistrate. *See* ICR 54 (the district court must hear appeals from the magistrate as an appellate proceeding and a transcript must be prepared unless otherwise ordered by the district court); ICR 54(h) (clerk's record is official court file of the criminal proceeding appealed to the district court, including any minute entries or orders together with the exhibits offered or admitted); ICR 54(k) & IAR 30(a) (document to be augmented into appellate record must either bear a legible filing stamp or the movant must establish the document was presented to the trial court by citation to the record or transcript); ICR 54(o) and IAR 35(b)(6) (respondent's brief shall include argument with citations to the transcript and record).

Neither the record, transcripts nor Respondent's Brief reflected that the state presented evidence of the anonymous tipster's statements during a 911 call to the magistrate. The District Court erred by considering this audio. Clerk's record on Appeal, 116. Moreover, the Government now invites the Court to err by considering these statements. Respondent's Brief, p. 15[2]. Any audio played has not been made a part of the Court's record below, and if it has tangentially become a part of the record here, it is limited to the whether the magistrate erred, and is not a factual record to be used in this Court's analysis of whether there was sufficient reasonable suspicion or probable cause to stop Audrey Byrum.

CONCLUSION

The District Court judge erred by not applying the correct Idaho law and by considering evidence not submitted to the magistrate court. Moreover, in analyzing the magistrate's decision, the district court applied standards and case law that are either not applicable to Idaho or not permissible for use as precedent. Therefore, in analyzing the magistrate's decision, the District Court failed to come to the correct conclusion regarding whether there was sufficient basis for an officer to stop Audrey Byrum. We therefore request that this Court reverse the decision of the District Court and order that the evidence be suppressed.

DATED April 7, 2020.



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[2] The audio is not referred to by name, nor quoted from, but bolstering the government's argument based on its existence would not be appropriate on appeal.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on April 7, 2020, I served a true and correct copy of the within and foregoing document by means of ICourt File and Serve:

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