7-18-2019

State v. Fields Appellant's Brief Dckt. 46422

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent. vs. CATHERYN D. FIELDS, Defendant-Appellant,	S.Ct. No. 46422-2018 Lewis Co. CR-2017-294

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Second Judicial District of the State of Idaho
In and For the County of Lewis

HONORABLE GREGORY FITZMAURICE,
District Judge

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A. *Nature of the Case*

Catheryn Fields asks this Court to vacate her convictions for Battery on a Peace Officer While Engaged in Performance of Duties because the jury was not instructed on when a peace officer may make an arrest. Her defense at trial was that the officers involved were not engaged in the performance of their duties because there was no probable cause for the initial arrest and therefore the subsequent batteries were not felonies. The trial court's refusal to instruct the jury that a peace officer making an unlawful arrest is not engaged in the performance of a lawful duty prevented Ms. Fields from effectively arguing her theory of the case to the jury and was not harmless.

B. *Procedural History and Statement of Facts*

1. Pre-trial proceedings

Catheryn Fields was charged by Information with three counts of Battery on a Law Enforcement Officer, under I.C. § 18-915(3)(b). R 52. Count I alleged that she battered peace officer Leonard Bowman while he "was engaged in the performance of his duties[.]" *Id.* Count II alleged the same but named peace officer John Robideau as the victim. Count III alleged the same but named peace officer Mark Pagliaro as the victim. R 53.

Prior to trial, she proposed the following instruction be given:

WHEN PEACE OFFICER MAY MAKE ARREST

INSTRUCTION NO. _____

Idaho law limits when a peace officer may make an arrest. A peace officer may make an arrest when upon immediate response to a report of a commission of a crime there is probable cause to believe that the person arrested has committed an assault or battery.

A peace officer making an unlawful arrest is not engaged in the performance of his or her duties.

R 96. The first paragraph is based upon I.C. § 19-603(6), which provides:

A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

. . . .

6. When upon immediate response to a report of a commission of a crime there is probable cause to believe that the person has committed a violation of section 18-901 (assault), 18-903 (battery), 18-918 (domestic violence), 18-7905 (first-degree stalking), 18-7906 (second-degree stalking), 39-6312 (violation of a protection order), 18-920 (violation of a no contact order), or 18-3302I (threatening violence upon school grounds — firearms and other deadly or dangerous weapons), Idaho Code.

(Since the trial, subsection (6) has been found to violate Article I, § 17 of the state constitution insofar as it permits a warrantless arrest "for a mere misdemeanor not committed in his presence." *State v. Clarke*, No. 45062, 2019 Ida. LEXIS 97, at *15 (June 12, 2019). As explained below, that ruling favors Ms. Fields, as no battery occurred in the presence of the arresting officers.)

Ms. Fields argued that she believed that the evidence would "show that she was unlawfully arrested, because there is evidence from which the jury could conclude that the law enforcement officers lacked probable cause to believe that she had committed an enumerated crime. If they lacked such authority, they were not "engaged in the performance of [their] duties during the incident." R 61-63.

2. Trial proceedings

Lewis County Jail Lieutenant Sheri Busta was off-duty and running an errand in Kamiah. Another off-duty officer, Cindy Busta, was in front of the Hub Restaurant . Sheri Busta heard Ms. Fields yelling at Har-V.[1] T pg. 295, ln. 13-24. "It appeared" to Busta that Ms. Fields "struck the male individual. He went into the The Hub Restaurant. She got into the vehicle and slammed the door." T pg. 296, ln. 1-3. The Bustas went into the Hub to speak to Har-V. Ms. Fields also went into the restaurant. According to Sheri (hereinafter "Busta"), Ms. Fields was "loud, swearing, [and] approached him very aggressively, jabbing her finger at him." T pg. 296, ln. 25 – pg. 297, ln. 1. Busta continued: "I positioned myself between her and Har-V and . . . out of my peripheral, at that time I thought I had seen her hit Har-V in the chest with her right hand." T pg. 297, ln. 2-6.

But Busta was wrong about that. The Hub has a video camera and the recording shows that Ms. Fields did not make contact with Har-V. Defense Exhibit D. Busta admitted on cross-examination that she was mistaken: "[A]fter I reviewed the video I did not see any contact between Ms. Fields and Har-V." T pg. 314. Ms. Fields was physically removed from the Hub by Cindy Trombetta, yet another off-duty officer, who was bartending at the restaurant, and the Hub's owner. T pg. 183, ln. 9; T pg. 297, ln. 8-13.

Again according to Busta, once outside, Ms. Fields "started throwing punches toward Ms. Trombetta." T pg. 289, ln. 1. Trombetta grabbed Ms. Fields, who ended

[1] Har-V's last name may be Wolfson. See T pg. 222, ln. 14-16.

up on the ground. *Id.*, ln. 2-10. Trombetta ended up straddling Ms. Fields and Busta "put her in a twisting arm control[.]" T pg. 299, ln. 3-8. The police were called. *Id*, ln. 10-11.

Kamiah Marshal's Deputy Bowman responded to the call. T pg. 180, ln. 13-20. When he arrived, Ms. Fields was "being held down on the ground" by Trombetta, Busta, and the Hub's owner. *Id.,* ln. 4-11. Lewis County Deputy Robideau arrived directly after. Deputy Bowman decided to place Ms. Fields in handcuffs because she "was on the ground being combative." T pg. 182, ln. 1-10. According to Bowman, Ms. Fields was using some "vulgar verbiage" toward Trombetta and Busta and was struggling against being cuffed. *Id.,* ln. 21-25. This included kicking and scratching. T pg. 183, ln. 2.

Bowman and Robideau decided to move Ms. Fields to a patrol car. Ms. Fields cooperated by standing up. T pg. 184, ln. 13-24. When Ms. Fields began to struggle again, the two decided to "move her back over to the sidewalk." T pg. 185, ln. 11. Bowman saw Ms. Fields kick Robideau "[i]n the leg area." *Id.*, ln. 24. Robideau then told Ms. Fields that she was under arrest. T pg. 237, ln. 2-3.

Bowman said that Ms. Fields was "still being verbally combative and [was] attempting to kick" but also said "[t]here were several points that she made contact with both [him] and Deputy Robideau." T pg. 187, ln. 4-8. Robideau did a "closed fist hammer strike towards her suprascapular," which was euphemistically termed a "pain compliance effort." *Id.*, ln. 10-19. The video shows this. T pg. 216, ln. 2. Robideau explained that there is a nerve bundle "in the shoulder blade which causes

the hand to loosen" when struck. T pg. 258, ln. 8-9.

Ms. Fields was put on the sidewalk again. Her lip was bloodied during this procedure. T pg. 186, ln. 5-17. Bowman testified that while Ms. Fields was handcuffed and being held on the ground, she kicked him and made marks in his wrists with her fingernails. T pg. 190, ln. 1-4. Ms. Fields repeatedly stated, "I didn't do anything wrong" and repeatedly asked "what's my charge[?]" T pg. 217, ln. 15-22. There is no evidence to suggest that Ms. Fields knew that either Busta or Trombetta were off-duty peace officers.

Ms. Fields was cited for resisting and obstructing and for misdemeanor battery on Trombetta. She was never charged for a battery on Har-V. T pg. 222, ln. 3-20.

When Ms. Fields arrived at the Lewis County Jail, she kicked both Bowman and Robideau. T pg. 196, ln. 4 – pg. 197, ln. 6. Ms. Fields also swung at and landed a "glancing blow" on Officer Pagliaro at the jail. She also kicked him. T pg. 245, ln. 22 – pg. 246, ln. 19. Robideau then used his Taser to "dry stun" Ms. Fields. T pg. 247, ln. 3-9.

At the jury instruction conference, Ms. Fields argued that her proposed instruction should be given. Counsel argued:

> MR. MCKENZIE: I think the issue is kind of what my questioning has been on cross related to when an officer is performing his lawful duty and when he is not, and in this situation the officers immediately detained Ms. Fields for purposes of the Fourth Amendment. I believe that the standard from the Supreme Court is basically when a reasonable person would objectively feel like they couldn't leave either by physical force or by the operation of the authority of the uniform or the badge. Both obviously were applied here. So she was being detained with -- under the provisions that would make Fourth

> Amendment of the constitution applicable, but it was done in a way that wasn't lawful. They didn't have the authority or -- definitely will argue that they did not, and the facts will show that they did not, and so they weren't in the performance of their lawful duties, Your Honor.

T pg. 288, ln. 4-19. The state objected to the proposed instruction. It argued that the proposed instruction did not explain that the police may arrest for a felony upon probable cause or that the police may conduct investigatory detentions. T pg. 288, ln. 22 – pg. 289, ln. 10. Ms. Fields stated that she did not have any objection to including additional language from I.C. § 19-603. T pg. 290, ln. 6-10. However, the "biggest problem" for the state was that *State v. Richardson*, 95 Idaho 446 (1973), held that "if a person has a reasonable ground to believe he is being arrested by a peace officer, it is his duty to refrain from using any force or weapon in resisting arrest[.]" T pg. 289, ln. 11-19.

The court noted that it had read *Richardson* and cited the parties to *State v. Kelly*, 158 Idaho 862, 865 (Ct. App. 2015). R 290, ln. 23-24. It found that pursuant to those cases that the instruction was not "required or appropriate." T pg. 290, ln. 10 – pg. 292, ln. 3. The court permitted Ms. Fields to renew her request after all the evidence was submitted. T pg. 292, ln. 1-3.

Ms. Fields entered the video at the Hub along with video from Robideau's dash-cam and body-cam into evidence. T pg. 356, ln. 9-10. Defense Exhibits D-F.

At the end of the evidence, the court stated "[i]t would note that [Ms. Fields's] request for the jury instruction of note in my decision not granting it is of the record." T pg. 358, ln. 25 – pg. 2. Ms. Fields did not have further argument in support of the instruction but noted that her argument was already "on record." T

pg. 359, ln. 4. The requested instruction was not given to the jury. See, R 123-152.

The jury found Ms. Fields guilty of all counts of Battery on a Law Enforcement Officer. R 153.

3. Post-trial proceedings

The court imposed a judgment of conviction. R 166. Ms. Fields filed a timely Notice of Appeal. R 168.

III. ISSUE PRESENTED ON APPEAL

Did the court err in refusing to give the defense requested instruction on when a peace officer may arrest?

IV. ARGUMENT

The Trial Court Erred In Not Giving The Requested Instruction Regarding When An Officer May Make An Arrest.

Idaho Code § 19-2132(a) requires that the trial court must provide to the jury "all matters of law necessary for their information" and must give a requested jury instruction if it determines that instruction to be correct and pertinent. Whether the jury has been properly instructed is a question of law over which this Court exercises free review. *State v. Severson*, 147 Idaho 694, 710 (2009). When reviewing jury instructions, the Court asks whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Bowman,* 124 Idaho 936, 942 (Ct. App. 1993).

A requested instruction must be given where: (1) it properly states the governing law; (2) a reasonable view of the evidence would support the defendant's legal theory; (3) it is not addressed adequately by other jury instructions; and (4) it

does not constitute an impermissible comment as to the evidence. *State v. Fetterly*, 126 Idaho 475, 476-77 (Ct. App. 1994). To meet the second prong of this test, the defendant must present at least some evidence supporting his or her theory, and any support will suffice as long as his or her theory comports with a reasonable view of the evidence. *Fetterly*, 126 Idaho at 476-77; *State v. Kodesh*, 122 Idaho 756, 758 (Ct. App. 1992).

As explained below, the court erred by refusing to give Defendant's Proposed Instruction.

1. The proposed instruction properly states the governing law.

At the time of the trial, the first paragraph of the proposed instruction was a correct statement of the common understanding of Idaho law.[2] Since then, this Court has found that language to be unconstitutional insofar as it permits a warrantless arrest "for a mere misdemeanor not committed in his presence." *State v. Clarke*, No. 45062, 2019 Ida. LEXIS 97, at *15 (June 12, 2019). Today, the law on arrests is more favorable to Ms. Fields because, while it is arguable that the peace officers did not have probable cause to arrest her for the battery on Har-V or an assault on Trombetta, it is beyond dispute that the neither incident took place in their presence.

The second paragraph of the instruction was also a correct statement of the law: "A peace officer making an unlawful arrest is not engaged in the performance of

[2] It read: "Idaho law limits when a peace officer may make an arrest. A peace officer may make an arrest when upon immediate response to a report of a commission of a crime there is probable cause to believe that the person arrested has committed an assault or battery." R 96. Compare, I.C. § 19-603(b).

his or her duties." While the court relied upon *State v. Richardson*, 95 Idaho 446 (1973) and *State v. Kelly*, 158 Idaho 862, 865 (Ct. App. 2015), in refusing the instruction, neither case is applicable here.

First, in *Richardson*, the defendant was charged with the felony of resisting a police officer by means of violence. Former I.C. § 18-2703 (repealed 1981 Idaho Session Laws, ch. 319, sec. pg. 666.) *Richardson* assigned error to the trial court refusal to give his instruction on his right to resist an unlawful arrest. 95 Idaho at 449. *Richardson* held that an individual does not have the right to use force or weapons to resist an unlawful arrest by a known police officer. It wrote, "Regardless of whether the arrest is illegal under the circumstances of the occasion, we hold that an individual may not use force to resist an arrest by one he knows or has good reason to believe is an authorized peace officer in the performance of his duties." *Id*, at 451. Thus, *Richardson* did not address the question of whether peace officers are "engaged in the performance of his duties" when they are effecting an unconstitutional warrantless arrest.

In *State v. Kelly*, *supra*, the defendant was charged under I.C. § 18-915(3)(a) and (b). He argued on appeal that his requested self-defense instruction should have been given. 158 Idaho at 867. The Court of Appeals did not cite *Richardson* and found that self-defense could be asserted. *Id.* However, it found that Kelly did not make a showing that a reasonable person in his circumstances would have believed he or she was in imminent danger of bodily injury. "Thus, Kelly failed to make a prima facie showing of facts to support each element of self-defense." 158 Idaho at

867.

The issues presented in *Richardson* and *Kelly* are not present here. Ms. Fields's proposed jury instruction did not seek to inform the jury that she could resist an illegal arrest or on the elements of self-defense, it sought to inform the jury that a peace officer who is engaged in an unconstitutional seizure "is not engaged in the performance of his or her duties." R 96. Ms. Fields's claim was that she was not guilty of the felony battery on a peace officer because the officers were not "engaged in the performance of [their] duties," an element of the charged offenses. I.C. § 18-915(3)(b). She would not be fully acquitted if the jury found in her favor because she would still be guilty of a misdemeanor battery, even if the peace officers were not engaged in the performance of their duties, under the logic of *Richardson*. And, in fact, the court instructed the jury on the included-offense of simple battery. R 146-151.

More germane is *State v. Wilkerson*, 114 Idaho 174, 178 (Ct. App. 1988), *aff'd* 115 Idaho 357, 358 (1988). There, the Court of Appeals interpreted I.C. § 18-705, the misdemeanor resisting statute, which requires the officer to be "in the discharge, or attempt to discharge any duty of his office." *Id.* The question before the Court was whether section 18-705 "makes it a crime for an individual to obstruct or resist a public officer who is not properly or lawfully discharging a duty as prescribed by law. In other words, how broadly should the 'duty' embodied in section 18-705 be construed?" 114 Idaho at 178. The *Wilkerson* court found that the word "'duty' as used in that statute to encompass only those lawful and authorized acts of a public

officer." 114 Idaho at 180. It continued: "We hold that where an individual refuses to obey an order or obstructs an act of a public officer which is contrary to the law, be it statute or constitution, that individual does not violate I.C. § 18-705. To hold otherwise would clothe an officer with protection from resistance based only on his status as an officer and would render the 'in the discharge, or attempt to discharge, of a duty of his office' language of the statute mere surplusage." 114 Idaho at 180. This Court adopted the Court of Appeals's opinion in *State v. Wilkerson*, 115 Idaho 357, 358 (1988) ("The Court having granted review of the decision of the Court of Appeals, 114 Idaho 174, 755 P.2d 471, and having considered the briefs and arguments of counsel, determines that the case was correctly decided by the Court of Appeals and, thus, its decision shall remain in effect.").

Later cases have followed *Wilkerson*. *See e.g.*, *State v. Bishop*, 146 Idaho 804, 817 (2009) (an illegal pat-down search was not a "duty" under section 18-705); *see also, State v. Gamma*, 143 Idaho 751, 754 (Ct. App. 2006) ("The word 'duty,' as used in this statute, encompasses only lawful and authorized acts of a public officer.") *citing State v. Hollon*, 136 Idaho 499, 502 (Ct. App. 2001); *State v. Wilkerson*, 114 Idaho 174, 180 (Ct. App. 1988); *State v. Hallenbeck*, 141 Idaho 596, 599 (Ct. App. 2005); *State v. Wiedenheft*, 136 Idaho 14, 16 (Ct. App. 2001).

In light of the above, this Court should conclude that the proposed jury instruction, specifically the second paragraph, was a correct statement of the law and that the first *Fetterly* requirement has been established.

2. A reasonable view of the evidence supported Ms. Fields's legal theory.

An arrest, as defined by statute, "is taking a person into custody in a case and in the manner authorized by law." I.C. § 19-601.

> The critical act in effecting an arrest is placing the person in police custody. Instructive of the legislative intent in defining an arrest in terms of 'custody' is the next succeeding section, I.C. § 19-602, which provides:
>
> > 'An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer.'
>
> Under I.C. § 19-601 an arrest is a custodial taking, seizure or detention, and we believe that there must be some action or intent evidencing police custody before an arrest occurs.

State v. Hobson, 95 Idaho 920, 923 (1974).

Here, the officers arrested Ms. Fields when they held her to the ground and handcuffed her upon arrival at the scene. Handcuffing can turn an investigatory detention into an arrest. *See State v. Pannell*, 127 Idaho 420, 424(1995) (finding handcuffing converted investigative stop into arrest and listing cases holding that the use of handcuffs to restrain a suspect exceeded the bounds of an investigatory detention and amounted to an arrest). The *Pannell* Court relied upon *Florida v. Royer*, 460 U.S. 491 (1983), which held that:

> an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, *the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time*. . . . It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.

Id. at 500 (emphasis added, citations omitted), *cited by State v. Pannell*, 127 Idaho at 423.

Here, there is a reasonable view of the evidence that the method used by the police was not the least intrusive means reasonably available to them. When they arrived at the scene, they could have made the off-duty officers remove themselves from the top of Ms. Fields and leave the immediate scene. They then could have assisted Ms. Fields to her feet. They could have explained to her that the women who attacked her, rushed her out of the bar, and knocked her to the ground were off-duty peace officers. They could have asked Ms. Fields for her side of the story. They could have made inquiries as to what actually happened between Ms. Fields and Har-V, including actually asking Har-V if there had been any contact between him and Ms. Fields or watching the Hub's video recording. Given these available less intrusive means, the jury could have found that everything that followed the immediate police restraint on the ground and the handcuffing was outside the performance of the officers' duties. Both Bowman and Robideau admitted that Ms. Fields was not "free to leave the scene" at that point. T pg. 214, ln. 22-23 (Bowman); T pg. 256, ln. 22 (Robideau).

And a reasonable jury could have found that the arrest was illegal because it was made without a warrant, without the officers witnessing a crime being committed in their presence, and without them having probable cause to believe a felony had been committed. *State v. Clarke*, *supra*. The jury could even have found that the officers had committed a crime against Ms. Fields as "[e]very public officer . . . who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will . . . without a regular process or

other lawful authority therefor, is guilty of a misdemeanor." I.C. § 18-703.

In short, there was evidence that the initial arrest, the forced removal from the scene into the police vehicle, and then to the jail were all in violation of law. Thus, the second *Fetterly* requirement is present: There was a reasonable view of the evidence – indeed the state's own witnesses established – that the arrest and continued custody was illegal and the officers were not in the performance of their duties.

3. The proposed instruction is not adequately addressed by the court's instructions.

There are no other jury instructions on this topic. R 123-152. Thus, the third *Fetterly* requirement is present.

4. It does not constitute an impermissible comment as to the evidence.

Finally, the proposed instruction was not a "comment on the evidence," which Black's defines as: "A statement made to the jury or by counsel on the probative value of certain evidence." Black's Law Dictionary, Seventh Edition, pg. 262 (1999). See also, Webster's New World Law Dictionary (2010) (phrase defined as a statement "made during a trial by a judge or lawyer regarding his or her own opinion about the evidence and the credibility of the witnesses."). That was not the case here. *Compare*, *State v. Johns*, 112 Idaho 873, 881 (1987) (where "Johns' 'theory of the case' instruction, was deemed to be an improper comment on the evidence.")

The fourth *Fetterly* requirement is also present.

5. Conclusion.

As all four parts of the *Fetterly* test are present here, the district court erred

in refusing Ms. Fields's proposed instruction.

The Error Is Not Harmless Beyond A Reasonable Doubt.

"A defendant appealing from an objected-to, non-constitutionally-based error shall have the duty to establish that such an error occurred, at which point the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt." *State v. Perry*, 150 Idaho 209, 222 (2010). Here, Ms. Fields has met her burden of proving objected-to error, but the state cannot meet its high burden of proof. There was evidence to support the defense theory that the warrantless arrest was illegal and that the officers were not in the performance of their duty. A rational jury could have adopted her theory and acquitted her.

V. CONCLUSION

In light of the above, Ms. Fields asks the Court to vacate the judgments and sentences, and remand the case for a new trial.

Respectfully submitted this day 18th of July, 2019.

/s/ Dennis Benjamin
Dennis Benjamin
Attorney for Catheryn Fields

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es): Idaho State

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Dated and certified this 18th day of July, 2019.

/s/Dennis Benjamin
Dennis Benjamin