8-27-2008

State v. Nevarez Appellant's Brief Dckt. 34902

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MARCO ANTONIO JIMENEZ, Defendant-Appellant.	)	NO. 34902 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

HONORABLE BARRY WOOD
District Judge

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

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PLAINTIFF-RESPONDENT

IN THE SUPREME COURT OF THE STATE OF IDAHO

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	)	
Plaintiff-Respondent,	)	NO. 34902
	)	
v.	)	
	)	
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	)	
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STATEMENT OF THE CASE

Nature of the Case

Marco Jimenez appeals from district court's Judgment of Conviction Upon a Plea of Guilty to One Felony Count and Order of Retained Jurisdiction, I.C. § 19-2601(4), I.C.R. 33(b), and Order of Commitment. Mr. Jimenez asserts that the district court erred in denying his request for funds to hire an expert to assist him in his motion to suppress and with his defense. Mr. Jimenez further asserts that the district court erred in denying his motion to suppress.

Statement of the Facts and Course of Proceedings

The State charged Marco Jimenez by criminal complaint with robbery, acting in concert with Arturo Flores, Logan Brizzee, and Ramiro Nevarez, and by criminal complaint part II with a use of a firearm enhancement. (R., pp.1-4.) Mr. Jimenez exercised his right to a preliminary hearing. (R., pp.27-29.)

The State's first preliminary hearing witness was John De La Garza, who testified that he worked as a clerk for a Maverick store in Rupert, Idaho. (Tr., Prelim, p.6, L.1 – p.19.) Mr. De La Garza just began working the night shift on October 27, 2006, when he saw two people running toward the door sometime between 12:25 and 12:35 in the morning, while he was counting his till. (Tr., Prelim, p.6, L.25 – p.7, L.19.) The two people ran into the store, one of them pointed a gun and demanded money, and Mr. De La Garza obliged them. (Tr., Prelim, p.8, Ls.10-15.) Mr. De La Garza showed the two the empty till and complied with their request for a bag to put the money in. (Tr., Prelim, p.8, L.16 – p.9, L.11.) The two ran out of the store in the same direction

they ran in from and Mr. De La Garza did not see where they went from there. (Tr., Prelim, p.9, Ls.13-17.)

Mr. De La Garza described the gunman as being dressed in dark jeans, a dark sweatshirt with the hood covering his head, and a dark colored bandana covering his face exposing only his eyes. (Tr., Prelim, p.10, Ls.7-17.) Mr. De La Garza testified that both had black hair and that the person with the gun had nicely groomed eyebrows. (Tr., Prelim, p.10, Ls.18-25.) Mr. De La Garza testified that the person without the gun was wearing jeans, a light colored sweatshirt and a bandana covering the bulk of his face. (Tr., Prelim, p.11, Ls.1-8) The two stole either $62 or $63. (Tr., Prelim, p.11, Ls.18-22.) After the two left the store, Mr. De La Garza called the police who arrived within three minutes and he gave the officers a description of the suspects. (Tr., Prelim, p.11, L.23 – p.12, L.22.)

The State also called Deputy Joe Moore of the Minidoka County Sheriff's Office to testify. (Tr., Prelim, p.51, Ls.11-24.) While on duty the night of the robbery, Deputy Moore received an "all-call" stating that there had been an armed robbery in Rupert, at about 12:45 a.m. (Tr., Prelim, p.53, Ls.1-9.) Deputy Moore was about three miles west of the City of Paul and started heading east toward Paul, knowing that it is about a six or seven minute drive from Rupert to Paul. (Tr., Prelim, p.53, Ls.14-24.) Deputy Moore stated that he did not have any information on which direction the suspects may be heading. (Tr., Prelim, p.54, Ls.7-10.)

Deputy Moore turned on his overhead lights but then decided to turn them off and observe vehicles coming toward him. (Tr., Prelim, p.54, Ls.13-21.) Traffic was extremely light. (Tr., Prelim, p.54, Ls.22-23.) After driving through Paul, he saw the

only car on the highway headed towards him, about one mile away. (Tr., Prelim, p.54, L.24 – p.55, L.7.) He eventually checked the oncoming car's speed believing that a car being involved in some sort of robbery would either be traveling too fast or too slow. (Tr., Prelim, p.55, Ls.8-16.) He checked the oncoming car's speed at 42 MPH – the speed limit was 55MPH – this information raised his interests to a degree. (Tr., Prelim, p.55, L.23 – p.56, L.7.) Deputy Moore was alerted that two Hispanic males committed the robbery wearing hooded jackets and some black stocking caps and bandanas over their faces – he wanted to see who was in the oncoming car, so he slowed down, timing his pass to occur where light emanated from Stimpy's.[1] (Tr., Prelim, p.56, Ls.7-25.)

Deputy Moore alleged that he was traveling about 35 MPH and saw four Hispanics with "several" bald heads in the car in the "low-ride position." (Tr., Prelim, p.57, Ls.1-14.) He testified that he got "quite a bit of reaction" "like goodness or exclamation" with "wide eyes, open mouth" from the individuals inside the car, as he looked through his side mirror as the cars were moving away from each other. (Tr., Prelim, p.57, L.15 – p.58, L.2.) Deputy Moore stated that he slowed down and alleged that he saw "a lot of furtive movements" such as shifting around and moving. (Tr., Prelim, p.58, Ls.7-12.) He testified that most people don't react like that – nobody turned around to look. (Tr., Prelim, p.58, Ls.15-23.) Deputy Moore testified that it took 60 or 70 feet before he could see into the other car by looking in his mirrors. (Tr., Prelim, p.58, L.23 - p.59, L.4.) He felt that these reactions were "[e]xtremely unusual and very suspicious." (Tr., Prelim, p.59, Ls.5-8.)

[1] Stimpy's is later described as a "convenience store/gas station." (Tr., 4/16/07, p.41, Ls.1-2.)

Deputy Moore then turned around and caught up to the car about one-half of a mile later. (Tr., Prelim, p.59, Ls.10-15.) He testified that he "still saw some furtive movement, not quite as exaggerated as through the mirror" until he got close enough to where he felt that "they could feel that I could see them good." (Tr., Prelim, p.59, Ls.16-21.) What "really drew [his] suspicion" was that the car used its blinker before they had to and "nobody uses a blinker to get in one lane or the other when you're the first car in line." (Tr., Prelim, p.59, L.22 – p.60, L.10.) Deputy Moore testified that people trying to do everything right tend to over-exaggerate. (Tr., Prelim, p.60, Ls.11-14.) He testified that people don't normally use their blinkers. (Tr., Prelim, p.61, Ls.6-21.)

Deputy Moore saw the car use its blinker to get in the right lane, travel about two blocks, turn on its blinker again, and make a right hand turn. (Tr., Prelim, p.61, L.24 – p.62, L.8.) He then pulled the car over. (Tr., Prelim, p.62, L.9 – p.63, L.6.) He called dispatch and waited for backup. (Tr., Prelim, p.63, Ls.18-23.) Deputy Moore spotted two hooded sweatshirts, a couple of stocking caps, and at least one dark bandana and eventually removed the four people from the car. (Tr., Prelim, p.74, L.4 – p.75, L.19.) Deputy Moore, joined by another officer, cuffed the four, then notified dispatch asking how to proceed. (Tr., Prelim, p.75, L.20 – p.76, L.8.) Chief White was already on his way with Mr. De La Garza to conduct a slow, drive-by identification and the four were eventually arrested. (Tr., Prelim, p.76, L.9 – p.77, L.15.)

On cross-examination, Deputy Moore testified that it was a dark night and that he did not remember seeing the moon. (Tr., Prelim, p.81, L.19 – p.82, L.1.) He testified that he wanted to time his pass just right to that he would have the benefit of the light from Stimpy's, so he slowed down to 35 MPH when the other car was traveling toward

him at about 42 MPH. (Tr., Prelim, p.82, L.2 p.83, L.12.) Deputy Moore admitted that the on-coming car did not have any interior lights on, but claimed that he could still see inside the car. (Tr., Prelim, p.83, L.22 – p.84, L.3.) Deputy Moore testified that as he passed the other car, he could see into the passenger compartment through his left side mirror despite the fact that it was traveling away from him at a total of 77 MPH and had its taillights on. (Tr., p.86, Ls.2-19) Deputy Moore recognized that the car signaling was legal, but in his view not normal, and that the car never violated any traffic laws, but he pulled the car over anyway. (Tr., Prelim, p.88, L.1 – p.89, L.24.)

The preliminary hearing was continued in order to accommodate witness and attorney schedules. (Tr., Prelim, p.95, L.12 – p.96, L.2.) Eventually, Mr. Jimenez agreed to waive the remainder of his preliminary hearing and the State filed an Information charging Mr. Jimenez with robbery (in concert with the three co-defendants), and an Information Part II alleging the use of a firearm enhancement. (R., pp.32-39.)

Mr. Jimenez filed a Motion for Apportionment of Funds for Expert Witness, pursuant to I.C. § 19-852(a)(2), in order to retain the services of Dr. Marc Green, Ph.D, a visual expert. (R., pp.44-45.) Mr. Jimenez asserted that Dr. Green's assistance was needed both for his defense and for his pursuit of a motion to suppress. (R., pp.44-45.) Dr. Green's curriculum vitae was attached to the motion. (R., pp.44-55.) During the hearing on the motion, counsel for Mr. Jimenez disputed Deputy Moore's ability to make the observations he claimed that he made due to the darkness and the speed at which

his car passed the defendant's. (Tr., 3/9/07, p.15, L.3 – p.16, L.7.)[2] Counsel for Mr. Jimenez argued that the cars would have passed each other at a total of 77 MPH or 112 feet per second, with the headlights from the oncoming car shining and that Deputy Moore would have had only a fraction of a second to make the observations he claimed to make. (Tr., 3/9/07, p.16, L.7 – p.17, L.6.) Recognizing that the car Mr. Jimenez was riding in did not violate any traffic laws, Deputy Moore's alleged observations were of utmost importance. (Tr., 3/9/07, p.17, Ls.7-17.) Counsel informed the court that Dr. Green has won research awards in special and visual affects, illumination on U.S. Air Force pilot performance, and is an expert on subjects such as reaction time and unintentional blindness. (Tr., 3/9/07, p.17, L.18 – p.18, L.11.) The State opposed the motion and the district court took the matter under advisement. (Tr., p.20, L.2 – p.26, L.16.)

Ultimately, the district court entered a written Memorandum Decision and Order on Apportionment of Funds for Expert Witness in which the district court denied the request. (R., pp.72-79.) The district court concluded that the closing speed of the vehicles could be readily determined and that the accuracy of Deputy Moore's statements can be determined by the court without the assistance of an expert. (R., p.78.) Furthermore, the court found that the denial of an expert would not deny Mr. Jimenez fundamental fairness required by the due process clause. (R., p.78.)

Mr. Jimenez also filed a motion to suppress. (R., pp.64-65.) At the hearing on the motion, the parties agreed that the issue to be determined was whether or not

[2] Mr. Nevarez joined Mr. Jimenez in the motion for funds and in the subsequent motion to suppress. (*See* Tr., 3/9/07, *generally*; Tr., 4/16/07, *generally*.)

Deputy Moore had a reasonable articulable suspicion to justify stopping the car. (Tr., 4/16/07, p.31, L.24 – p.33, L.4.) The district court hearing the motion to suppress was different than the court hearing the motion for expert funds.[3] Deputy Moore testified for the State relatively consistently with his testimony during the preliminary hearing although his testimony did vary in some areas. (*Compare* Tr., Prelim, p.51, L.11 – p.95, L.8, *with* Tr., 4/16/07, p.33, L.9 – p.74, L.25.)

Deputy Moore testified that in his training and experience, people driving under the influence, people want to avoid officers, and old people all drive under the speed limit. (Tr., 4/16/07, p.41, L.3 – p.42, L.20.) Deputy Moore testified that the light from Stimpy's is extremely bright and covers about 100 feet in each direction. (Tr., 4/16/07, p.44, L.23 – p.45, L.23.) The light from Stimpy's was behind the car he was passing. (Tr., 4/16/07, p.45, L.24 – p.46, L.1.) Deputy Moore testified that the "low-ride position" he claimed he saw the passengers in, was not out of the ordinary. (Tr., 4/16/07, p.46, Ls.4-13.)

Deputy Moore testified that it was probably fairly obvious that he was slowing down and that he had no blinker on, his Ford Expedition was marked as a sheriff's car, and the passengers watched him, with varying expressions as he went by. (Tr., 4/16/07, p.46, L.18 – p.47, L.17.) Deputy Moore testified "I could see them just before I passed them and only a split second after I passed them. Probably a second. Maybe slightly more, but maybe probably a second." (Tr., p.47, Ls.22-24.) Deputy Moore, without revealing how he could make the calculation in light of the fact that he

[3] The Honorable John Melanson heard the motion for appropriation of funds (R., p.13) and the Honorable Barry Wood heard the motion to suppress (R., p.30).

did not testify that he knew exactly when the robbery occurred and in light of the fact the robbers left on foot, testified that he passed the car at approximately the amount of travel time from the area of the armed robbery. (Tr., p.47, L.25 – p.48, L.5.)

Deputy Moore summarized his subjective reasons for stopping the car as follows: the people inside the car showed a keen interest in him; there were furtive movements once they had seen that he was a police officer; they appeared to be Hispanic and dispatch described the suspects as Hispanics; there were bandanas involved and the individuals were low-riding which he described as being part of a gang culture in the area; they were doing everything above the law such as traveling well below the speed limit and using their blinkers in an appropriate, but unusual manner; and they were in the window of possibility to have traveled from Rupert to where he saw them. (Tr., 4/16/07, p.53, L.16 – p.54, L.21.) Deputy Moore had previously passed two other cars clarifying that the car he stopped was not the only other car on the road that night. (Tr., 4/16/07, p.54, Ls.22-25.) Deputy Moore described the furtive movements as, seeing from his mirror, the "subjects turning around and looking at me, subjects turning and talking to each other in a rushed manner." (Tr., p.55, Ls.5-11.) Furthermore, the car turned its blinker on a whole block before they needed to, but then again the blocks are pretty small. (Tr., 4/16/07. p,56, Ls.17-25.)

On cross-examination, Deputy Moore testified that there was light above and between he and the car. (Tr., 4/16/07, p.60, L.17 – p.61, L.19.) Deputy Moore recognized that the he approached and passed the car at about 112.88 feet per second. (Tr., 4/16/07, p.63, Ls.9-13.) Deputy Moore admitted that he did not see the people in the car when he was approaching it, only when he was passing it, and he had only a

fraction of a second to look inside the car. (Tr., 4/16/07, p.65, Ls.8-24.) Deputy Moore claimed that there was no glare from the light at Stimpy's as he passed the car and that the taillights from the car did not affect his ability to see into the car even though he was traveling away from it at about 112 feet per second. (Tr., 4/16/07, p.65, L.24 – p.67, L.5.) Deputy Moore also admitted that it would not be unusual for a car in that area to begin slowing down as it would be approaching Paul. (Tr., 4/16/07, p.67, Ls.6-25.) He also admitted that signaling when moving into the right lane is a good driving tactic. (Tr., 4/16/07, p.68, Ls.4-15.)

On cross-examination by counsel for Mr. Nevaraz, Deputy Moore testified that the information he received was that the suspects fled on foot and he further testified that there were several ways to leave the store. (Tr., 4/16/07, p.69, L.8 – p.70, L.1.) He testified that neither being Hispanic nor "low-riding" was unusual in Minidoka County. (Tr., 4/16/07, p.70, L.17 – p.71, L.7.)

The district court pointed out it was not the same court that had denied the motion for funds to hire an expert, accepted Deputy Moore's testimony, adopted his observations as the basis for finding reasonable articulable suspicion, and denied the motion albeit by a "thin" margin, and encouraged the defendants to appeal the decision. (Tr., 4/16/07, p.84, L.11 – p.90, L.10.)

During a status conference hearing one week later, the district court further clarified its finding that Deputy Moore's stop was reasonable. (Tr., 4/23/07.) The Court stated that the fact that a firearm was involved in the crime created a heightened need for public safety and, coupled with the nervousness of the people in the car, justified the stop. (Tr., 4/23/07, p.8, L.17 – p.9, L.20.) The court again recognized that defense

counsel did not believe Deputy Moore's claims of what he saw, but found that that was the state of the record. (Tr., 4/23/07, p.9, Ls.14-17.)

Mr. Alvarez ultimately entered into a conditional guilty plea, pleading guilty to the robbery charge preserving his right to appeal the denial of his motion for funds for an expert and his motion to suppress – the State agreed to dismiss the enhancement and to recommend no more that a unified sentence of twenty-five years, with seven years fixed, with the court retaining jurisdiction. (R., pp.115-118; Tr., 7/30/07, p.45, L.1 – p.66, L.7.) Mr. Alvarez later filed a motion to withdraw his guilty plea, which was denied by the district court,[4] and he was sentenced to a unified term of twenty-five years, with ten years fixed, with the court retaining jurisdiction. (R., pp.126-127, 136-142; Tr., 11/5/07, p.79, Ls.3-15; Tr., 12/3/07, p.88, L.1 – p.99, L.10.) Mr. Jimenez filed a timely Notice of Appeal. (R., pp.150-152.)

[4] Mr. Jimenez does not challenge the denial of his motion to withdraw his guilty plea in this appeal.

ISSUES

1. Did the district court abuse its discretion when it denied Mr. Jimenez's request for funds to hire an expert to explain factors that would affect Deputy Moore's ability to perceive what he claimed he saw when Deputy Moore's purported observations were vital to the district court's denial of Mr. Jimenez's motion to suppress in violation of Mr. Jimenez's Fourteenth Amendment Right to due process?

2. Did the district court err when it denied Mr. Jimenez's motion to suppress as Deputy Moore's suspicion upon which he justified his warrantless stop was not objectively reasonable?

ARGUMENT

I.

The District Court Abused Its Discretion When It Denied Mr. Jimenez's Request For Funds To Hire An Expert To Explain Factors That Would Affect Deputy Moore's Ability To Perceive What He Claimed He Saw When Deputy Moore's Purported Observations Were Vital To The District Court's Denial Of Mr. Jimenez's Motion To Suppress, In Violation Of Mr. Jimenez's Fourteenth Amendment Right To Due Process

A. Introduction

Pursuant to Idaho Code § 19-852(a)(2), Mr. Jimenez requested that the district court make funds available in order for him to hire Dr. Marc Green, Ph.D, in order to provide testimony about factors that would influence a person's ability to make the observations Deputy Moore claimed to make under the conditions upon which he claimed to make them. The district court denied the motion finding that the court hearing the motion to suppress would be able to determine the accuracy of Deputy Moore's alleged observations without expert assistance. Mr. Jimenez asserts that the district court abused its discretion in denying his motion because he made an adequate threshold showing of his need for Dr. Green's expertise and because Dr. Green's expert testimony was necessary to ensure that his Fourteenth Amendment Right to due process under the ideals of fundamental fairness was ensured.

B. The District Court Abused Its Discretion When It Denied Mr. Jimenez's Request For Funds To Hire An Expert To Explain Factors That Would Affect Deputy Moore's Ability To Perceive What He Claimed He Saw When Deputy Moore's Purported Observations Were Vital To The District Court's Denial Of Mr. Jimenez's Motion To Suppress, In Violation Of Mr. Jimenez's Fourteenth Amendment Right To Due Process

1. The Right To Expert Assistance For Indigent Defendants Under Idaho Law

The right to expert assistance is grounded in the due process clause of the Fourteenth Amendment and is recognized under Idaho law. In the present case, although Mr. Jimenez requested funds for expert assistance solely under I.C. § 19-852(a)(2), because the Idaho Supreme Court has recognized I.C. § 19-852(a)(2) as including due process considerations, the district court's denial must be considered in light of Mr. Jimenez's Fourteenth Amendment right to due process.

The right of an indigent defendant to receive access to state-funded experts and investigatory assistance is well-established in Idaho, both by statute and case law. Idaho Code § 19-852(a)(2) requires:

> [a] needy person . . . who is under formal change of having committed, or is being detained under a conviction of, a serious crime, is entitled to be provided with the necessary services and facilities of representation (*including investigation and other preparation*). The attorney, services, and facilities and the court costs shall be provided at public expense to the extent that the person is, at the time the court determines need, unable to provide for their payment.

(emphasis added). The statute makes clear that not only is an indigent defendant entitled to the services of an attorney, he or she is also entitled to investigative and other preparation costs and services including, but not limited to, experts.

Well before the United States Supreme Court recognized an indigent defendant's due process-based right to the assistance of necessary experts, (*see Ake v. Oklahoma*,

470 U.S. 68 (1985)), the Idaho Legislature had already given indigent defendants such a right. Idaho Code § 19-852(a)(2) provides that an indigent defendant is not only entitled to appointed counsel, but also to "the necessary services and facilities of representation (including investigation and other preparation)." I.C. § 19-852(a)(2). The Idaho Supreme Court has interpreted this statute and held that "[i]ncluded within the scope of I.C. § 19-852(a) are the fourteenth amendment requirements of due process and equal protection as they apply to indigent defendants." *State v. Olin*, 103 Idaho 391, 394, 648 P.2d 203, 206 (1982).

Though the right of indigent defendants to expert assistance is easy to articulate, the application of that right to an individual request is difficult to apply. The *Olin* Court recognized that authorizing a request for public funds to assist an indigent defendant is not mandatory; rather, when such a request is made the district court is required to evaluate the individual defendant's need for the assistance in light of the circumstances of the case. *Olin*, 103 Idaho at 395, 648 P.2d at 207 (citations omitted). Ultimately, the district court's decision to deny the requested assistance is reviewed under an abuse of discretion standard. *Id.*

Stated generally, when an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry. The sequence of the inquiry is (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989) (*citing Associates Northwest, Inc. v. Beets*, 112 Idaho 603, 605, 733

P.2d 824, 826 (Ct. App. 1987)). Because the legal standards applicable in I.C. § 19-852(a)(2) are grounded in the due process clause, this Court must determine whether the district court's denial of Mr. Jimenez's request is inconsistent with, or violative of, Mr. Jimenez's right to fundamental fairness ground in the due process clause of the Fourteenth Amendment.

2. The District Court Abused Its Discretion In Denying The Motion For Funds As Mr. Jimenez Showed The Necessity Of Dr. Green's Expertise And Its Vitality To His Defense And The District Court Erred In Finding That Dr. Green's Testimony Would Not Assist The Trier Of Fact

In support of his motion, Mr. Jimenez included Dr. Green's curriculum vitae listing his extensive education, experience and publications. (R., pp.46-55.) During the hearing on the motion, counsel for Mr. Jimenez explained to the court that, based upon Deputy Moore's testimony at the preliminary hearing, a vital issue to Mr. Jimenez's defense including his suppression motion would be Moore's ability to make observations of what was allegedly occurring inside the car he passed in the fraction of a second he had to make those observations. (Tr., 3/9/07, p.15, L.3 – p.17, L.6.) Deputy Moore's purported observations were vital to the state's justification for the warrant-less seizure as it was undisputed that the car was not violating any traffic laws. (Tr., 3/9/07, p.17, Ls.7-17.)

Counsel for Mr. Jimenez continued:

> The expert which I have contacted is an individual by the name of Mar[c] Green, PHD. I attached copies of his curriculum vitae to my motion. . . He's had research awards on special and visual affects, illumination on pilot performance with the U.S. Air Force, he's also had a biomedical science research grant on the effects of illuminants on the detection of vertical and oblique stimuli. He's done publications on reaction time: Is it a gun or a wallet, involving perceptual factors . . . He's also done work on

> adaptation affects on the brightness and darkness of brief illuminate changes, which is exactly what we are dealing with here.

(Tr., 3/9/07, p.17, L.18 – p.18, L.11.)

In objecting to the motion, the prosecution did not attempt to argue that Dr. Green was not qualified; rather, they argued that Dr. Green's testimony would not assist the trier of fact and argued it would be an excessive use of state funds. (Tr., 3/9/07, p.20, L.2 – p.22, L.1.) The prosecutor, however, agreed that the motion to suppress was a critical stage of the proceedings and that granting or denying the motion to suppress would likely affect the outcome of the case. (Tr., 3/9/07, p.22, Ls.1-9.)

The district court analyzed the claim in light of I.C. § 19-852 and Idaho Rule of Evidence 702 – the rule authorizing the use of expert testimony. (R., pp.76-78.) Ultimately, the district court found that expert testimony on whether Deputy Moore could have actually observed what he testified he could observe would not assist the trier of fact, and further that it is the fact finder's function to judge the credibility of witnesses. (R., p.78.) The district court's analysis is flawed.

As articulated above, the *Olin* standards, grounded in the due process clause, requires only that the district court examine the need of the defendant for the appropriation requested in light of the circumstances of the case. Both Mr. Jimenez and the prosecution agreed that the suppression issue was vital to the case – specifically, Deputy Moore's claimed perceptions of surprised looks and "furtive" movements in the fraction of a second that he was able to see into the car. As it is the State's burden to prove a valid exception to the warrant requirement, and Deputy Moore's observations in that fraction of a second were a vital part of the State's argument that Deputy Moore had articulated a reasonable suspicion, Dr. Green's expertise was necessary to ensure

that Mr. Jimenez had a fundamentally fair opportunity to challenge Deputy Moore's testimony.

Furthermore, the district court's reliance upon I.R.E. 702 in deciding the motion for funds was inconsistent with the *Olin* standards. Assuming, without conceding, that Mr. Jimenez had a duty to not only show that importance of the expert testimony in light of the facts of his case but also to show that the testimony would be admissible, the district court erred when it found the testimony would not be admissible. The rules of evidence are not applicable in determining preliminary questions of fact necessary to determine the admissibility of evidence when the district court is the trier of fact. I.R.E. 101(e)(1); I.R.E. 104(a). Thus, the district court hearing the motion to suppress should have been afforded the opportunity to hear Dr. Green's testimony and to apply any weight the court felt was appropriate.

Furthermore, to the extent that I.R.E. 702 is applicable in suppression hearings, the plain language of the statue is inclusive not exclusive. I.R.E 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

I.R.E. 702. The rule does not exclude evidence if the trier of fact can make a determination on their own; rather, the rule allows for the presentation of the evidence if it will assist the trier of fact regardless of whether or not the trier of fact could figure something out on their own.[5]

[5] For example, in a murder trial if a jury hears testimony that the defendant admitted to shooting a victim in the chest and a lay witness, such as a police officer, describes finding the victim with a bullet wound to the chest, a trier of fact could certainly determine that the defendant shot the victim in the chest. That would not, however,

Presenting Dr. Green's testimony was vital to Mr. Jimenez's defense. Without being able to present that testimony, the district court was limited in judging Deputy Moore's credibility based solely on witnessing him testify. In essence, the district court was asked just to trust Deputy Moore's ability to perceive surprised looks and "furtive" movements while moving from dark to light at 112 feet per second, first toward and away from the other car, all within a fraction of a second, based upon his demeanor while testifying and his training and experience. Regardless of whether the district court had the capacity to make a credibility determination and factually findings without it, Dr. Green's testimony surely would have assisted the district court in discerning whether his memory was faulty or not Deputy Moore actually observed what he said he observed or whether, in reality, he was relying upon a hunch. As such, the district court abused its discretion in denying Mr. Jimenez's motion for expert funds.

II.

The District Court Erred When It Denied Mr. Jimenez's Motion To Suppress As Deputy Moore's Suspicion Upon Which He Justified His Warrantless Stop Was Not Objectively Reasonable

A. Introduction

Even though the district court was deprived of the benefit of Dr. Green's testimony, and even assuming Deputy Moore's Herculean ability to make observations, in a fraction of a second in less than ideal conditions, traveling at 112 feet per second, the district court erred in denying Mr. Jimenez's motion to suppress. Taking all of

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preclude the prosecution from offering the expert testimony of a pathologist to opine that the victim died of a gunshot wound to the chest under I.R.E. 702.

Deputy Moore's statements as true, he lacked an objectively reasonable articulable suspicion to stop the car in which Mr. Jimenez was riding.

B. The District Court Erred When It Denied Mr. Jimenez's Motion To Suppress

1. Standard Of Review

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 which were supported by substantial evidence, but freely reviews the application of constitutional principles to the facts as found. *State v. Atkinson,* 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996).

2. Applicable Fourth Amendment Jurisprudence

The Fourth Amendment to the United States Constitution and Article I, § 17 of the Idaho Constitution guarantees people the right to be free from unreasonable searches and seizures on the part of government officials. U.S. Const. Amd IV; Idaho Const. Art.I, §17. Warrantless searches and seizures are *per se* unreasonable unless they fall within a specifically established and well-delineated exception to the warrant requirement. *California v. Acevedo,* 500 U.S. 565, 580 (1991); *State v. Murphy,* 129 Idaho 861, 863, 934 P.2d 34, 36 (Ct. App. 1997). When a warrantless search or seizure has occurred, the State bears a heavy burden to justify dispensing with the warrant requirement. *State v. Bower,* 135 Idaho 554, 21 P.3d 491 (Ct. App. 2001) (citing *Welsh v. Wisconsin,* 466 U.S. 740, 749-750 (1984); *State v. Curl,* 125 Idaho 224, 225, 869 P.2d 224, 225 (1993); *State v. Sailas,* 129 Idaho 432, 434, 925 P.2d 1131, 1133 (Ct. App. 1996)).

In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court recognized that investigative detentions are exceptions to the warrant requirement. A so-called *Terry* stop "is justified if there is a reasonable and articulable suspicion that the individual has committed or is about to commit a crime." *State v. Holler*, 136 Idaho 287, 291, 32 P.3d 679, 683 (Ct. App. 2001). Such suspicion must rest on specific, articulable facts. *Florida v. Royer,* 460 U.S. 491, 498 (1983). In determining whether the officer's suspicions were constitutionally reasonable, the reviewing court must look at the whole picture. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). Stopping an automobile and detaining its occupants constitute a seizure within the meaning on the Fourth Amendment regardless of the purpose of the stop or the brevity of the resulting detention. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

In the present case the parties, recognizing that Mr. Jimenez had been seized for Fourth Amendment purposes when the car he was riding in was stopped, agreed that the legal decision the district court was required to make was whether, at the time of the stop, an objectively reasonable articulable suspicion of criminal activity existed as first expressed in *Terry*. (Tr., 4/16/07, p.31, L.24 – p.33, L.4.) However, further development of the *Terry* standard requires this Court to consider additional factors.

First, in justifying his stop, Deputy Moore relied, in part, upon information that he received from dispatch; namely, that an armed robbery had occurred by two Hispanic men who left on foot. When one officer relies upon information supplied by another officer, i.e., through dispatch, the inquiry is into the reliability of the information given to the first officer. *United States v. Hensley*, 469 U.S. 221 (1985). When the information relayed to the officer is not sufficient, in and of itself, to justify a warrantless search, the

officer's own observations may either dispel or corroborate the officer's suspicion. *See e.g. Alabama v. White*, 496 U.S. 325 (1990) (stop justified when officer's observations corroborated information received from an anonymous tipster); *Adams v. Williams*, 407 U.S. 143 (1972) (finding that reasonable suspicion can be based on more than an officer's personal observations such as through information obtained from a reliable source of information).

Additionally, the Idaho Court of Appeals has held that "where officers know that a serious felony has just been committed, the question is narrowed to whether there is a reasonable suspicion that the person under observation is connected with the crime." *State v. Gascon*, 119 Idaho 923, 928, 811 P.2d 1103, 1108 (Ct. App. 1989); *c.f. Cortez, supra* (in case where officers stopped automobile, the question was whether the occupants of the automobile were involved in the illegal alien smuggling activities the officers were investigating).

Thus, the question presented upon review is whether, taking the district court's findings of fact as true, Deputy Moore had an objectively reasonable, articulable suspicion to believe that the passengers in the car he stopped were involved in the armed robbery reported through dispatch. While Deputy Moore may have had a hunch, his suspicion was not objectively reasonable.

3. Deputy Moore Did Not Have An Objectively Reasonable Suspicion Justifying His Stop Of The Car

Deputy Moore had a hunch that the car he stopped, and more specifically the people inside the car, were involved in the armed robbery. His hunch does not justify the stop.

First, the information that Deputy Moore received from dispatch was that two Hispanic males robbed the store and then left on foot in an unknown direction. His statement that he saw four Hispanic males driving in one of many directions away from the store did not corroborate the information he received from dispatch; rather, his purported observations should have served to dispel any suspicion because his observations did not match the information he was provided. While it is certainly conceivable that escaping armed robbers would get into a car and possibly join others, it is equally likely that armed robbers would split up and go their separate ways. The only thing the four passengers in the car had in common with the description given by dispatch was their gender and their ethnicity. As the constitution protects all people within the United States without prejudice towards gender or ethnicity, from an objective standpoint, the fact that there were four Hispanic-appearing people in the car does not justify a suspicion that they were involved in the robbery.

Second Deputy Moore said that the passengers in the car were in the "low-ride" position, which was not uncommon for Minidoka County, and had a look of "goodness or exclamation" when they saw him and that they exhibited "furtive movements." When describing how these movements were "furtive," Deputy Moore testified the passengers were shifting around and moving. He later testified that the passengers looked at each other and looked at him in a "rushed" manner. Taking the legalese out of the equation, Deputy Moore testified that the passengers were surprised to see he was a cop and then moved around in the car. Presumably, Deputy Moore found that the passengers were nervous because they saw he was a cop. However, as the Idaho Court of Appeals has found, "because it is common for people to exhibit signs of nervousness

when confronted with law enforcement regardless of criminal activity, a person's nervous demeanor during such an encounter is of limited significance in establishing the presence of reasonable suspicion." *State v. Gibson*, 141 Idaho 277, 285-86, 108 P.3d 424, 432-33 (Ct. App. 2005) (citations omitted). Shifting around or moving in a car after seeing an officer may be an indication that the passengers in the car did not want to speak to the officer, it does not contribute in any meaningful way to consideration of whether the passengers in this case were involved in the robbery.

Next Deputy Moore found the driving pattern to be suspicious; namely, driving 13 MPH under the speed limit, and using their blinker. Deputy Moore testified that in his experience people who are leaving the scene of a crime they were involved in often either drive too fast or too slow. He also testified that older people often drive too slow especially at night. Presumably, Deputy Moore is aware that sometimes people drive too fast even though they have not committed any crime (other than perhaps the driving too fast itself).

The final straw for Deputy Moore was that the car properly and legally used its blinker to signal a move into the right-hand lane – something unusual for Deputy Moore to witness. Of course, had the car either violated the speed limit or failed to use its signal, Deputy Moore would have been justified in stopping the car, not for suspicion of committing the armed robbery, but for violating the traffic laws. *See State v. Dewbre*, 133 Idaho 663, 911 P.3d 388 (Ct. App. 1999). As counsel for Mr. Jimenez described "This is a perfect example of damned-if-you-do-damned-if-you-don't-kind-of situation." (Tr., 4/16/07, p.77, Ls.12-14.) If it is objectively reasonable for officers to stop a vehicle for following all of the traffic laws and it is objectively reasonable for an officer to stop a

vehicle for violating any one traffic law, an occupant of an automobile could be seized at the whim of an officer both in the presence of, and total absence of, any minor traffic violation. An intrusion into our constitutional right to be free from unreasonable seizures by the whim of an officer is objectively unreasonable.

Of course, in evaluating the suspicion that Deputy Moore articulated, this Court does not look at each piece individually; rather, this Court looks at the situation as a whole, under the totality of the circumstances. The district court engaged in the proper totality of the circumstances analysis and found *State v. Gascon*, 119 Idaho 923, 811 P.2d 1103 (Ct. App. 1989), to be compelling precedent. (Tr., 4/16/07, p.89, Ls.16-19.) In *Gascon*, the Idaho Court of Appeals found that officers who stopped the defendant while he traveled through a roadblock set up after an armed robbery occurred, acted reasonably. *Id.*

In *Gascon*, a man carrying a cardboard box entered a bank in Twin Falls, approached the teller, claimed to have a bomb, and demanded money, received money and then fled on foot. *Id.*, 119 Idaho at 924, 811 P.3d at 1104. The suppression hearing did not yield any indication that the man had a car. *Id.* A radio report went out to law enforcement and included a description of the suspect including the clothes he wore and that he displayed a box claiming to have a bomb. *Id.* Around 11:00 a.m., law enforcement set up a roadblock on the Perrine Bridge which offered the nearest access from Twin Falls to the Interstate. *Id.* The roadblock required cars to move slowly through - giving officers a chance to view the occupants. *Id.* One officer saw a small station wagon with only a male driver and saw the driver lean over into the passenger's side at least twice. *Id.* When three cars back from the roadblock, the officer saw the

car stop completely and the driver lay completely over into the passenger side disappearing from view for a least a second. *Id.* The officer informed other law enforcement that they should stop the car because the driver was "'stuffing something under the seat.'" *Id.* Another officer at the roadblock then saw the driver dip his shoulder as if reaching toward the floorboard. *Id.* He, along with a third officer ordered the car to stop. *Id.* One of the two officers who ordered the car to stop testified that the driver matched the description given of the robber. *Id.* The Court of Appeals found that stopping the defendant in that case was objectively reasonable based upon all of the facts known to the officers at the time. *Id.* 119 Idaho at 928-29, 811 P.2d at 1108-09.

While the circumstances in *Gascon* are similar to the circumstances in the present case, there are important distinctions. First of all, the driver in the car stopped in *Gascon* was alone, just like the robber. In this case, Deputy Moore knew that two people robbed the store and that the car he decided to pull over contained four passengers. Second the officers did not rely upon simply calling the driver's movements "furtive;" rather, they explained that the driver leaned over into the passenger seat at least three times – once momentarily completely disappearing from view – and dipped a fourth time as if reaching toward the floorboard. Third, although not completely clear from the *Gascon* Court's recitation of facts as to when the officer made the observation, at least one of officers observed the driver of the car matched the description given of the robber.[6] In this case, the only "match" was that of ethnicity

[6] In *Gascon*, Trooper Johnston positioned his car about 150 to 200 yards south of the bridge to see oncoming cars with the roadblock in his vantage point. *Gascon*, 119 Idaho at 924, 811 P.3d at 1104. Trooper Johnston observed the driver thrice lean over into the passenger seat and alerted the deputies at the roadblock that they should stop the car over. *Id.* Deputy Webb, at the roadblock, noticed the driver dip toward the

and gender. Thus, the facts in *Gascon* describe a significantly different situation than the facts of this case.

Although there certainly are distinctions, Mr. Jimenez asserts that his case is actually more similar to the situation in *State v. McAfee*, 116 Idaho 1007, 783 P.2d 874 (Ct. App. 1989). In *McAfee*, two officers saw a van at 2:00 a.m. waiting at a stop sign for one or two minutes before abruptly turning the corner and parking at an adjacent curb. *Id.*, 116 Idaho at 1008, 783 P.2d at 875. The van's engine and lights were then turned off. *Id.* Both officers testified that the van was not operating in violation of any traffic laws or criminal statutes; however, they claimed that there had been recent criminal activity in the area. *Id.* In light of the late hour, the erratic operation, and the fact that the van could transport stolen goods, the officers awoke a sleeping Mr. McAfee, ordered him out of the van, and eventually arrested him for suspicion of driving under in the influence. *Id.* The Court of Appeals examined the totality of the circumstances and found that the officers did not have an objectively reasonable suspicion justifying their seizure of Mr. McAfee. *McAfee*, 116 Idaho at 1009, 783 P.2d at 876.

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floorboard, motioned the car to stop, then yelled at the driver to stop. *Id.* Deputy Cogswell, who was with Deputy Webb ordering the car to stop "testified that the driver matched the physical description of the robbery suspect." *Id.* It is not clear whether Deputy Cogswell made this observation before or after the car stopped. However, it is interesting to note that of three trained law enforcement officers in *Gascon*, in broad daylight, from a stationary position, observing slow moving vehicles, only one testified that the driver matched the description of the robber - whereas in the present case, Deputy Moore testified that, at night, going from darkness into an artificially lit area of the highway, traveling at a relative 112 feet per second first toward, and then away from the car, he could discern the number, the gender, the ethnicity, and the actions of the passengers all within a fraction of a second.

The circumstances in Mr. Jimenez's case are very similar to the circumstances in *McAfee*. Both stops occurred late at night and involved a car operating unusually, but legally. In both cases, the officers knew that criminal activity had occurred albeit in Mr. Jimenez's case the criminal activity was admittedly more immediate in time, rather than ongoing and non-specific. Mr. Jimenez asserts that like the officers in *McAfee*, Deputy Moore had no more than a hunch that the car he was riding in was involved in the criminal activities investigated.

Deputy Moore's suspicion can be summarized as follows: Dispatch informed him that two Hispanics robbed a store and left on foot - four people, appearing to be Hispanic, were "low-riding" in a car that was traveling away from the store, on one of multiple routes away from the store, driving 13 MPH below the speed limit - the passengers were nervous and communicating with each other when they saw him - and the driver used the turn signal as required by law. In other words, the people in the car reflected the race and gender of the robbers – but not the numbers – and didn't want to be pulled over. These observations do not describe an objectively reasonable articulable suspicion justifying a stop. These observations describe a subjective hunch on the part of Deputy Moore that two of the Hispanics in the car were the same Hispanics that robbed the Maverick. A hunch is a constitutionally unreasonable basis for a seizure. The district court erred in finding that Deputy Moore's stop was permissible as his actions violated Mr. Jimenez's Fourth Amendment right to be free from unreasonable seizures.

Furthermore, although the district court did not conduct any hearing and the State did not offer any evidence to suggest what if any evidence would have been come

by through means independent of the illegal seizure, all evidence obtained after Mr. Jimenez's illegal seizure should be suppressed as fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

CONCLUSION

Mr. Jimenez respectfully requests that this Court vacate his judgment of conviction, reverse the district court's order denying his request for appropriation of funds for an expert, reverse the order which denied his motion to suppress, and remand the case to the district court for further proceedings..

DATED this 27th day of August, 2008.

JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of August, 2008, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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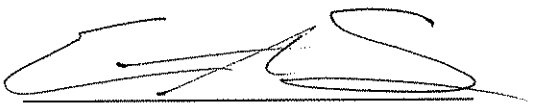

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