12-21-2011

State v. Morgan Appellant's Reply Brief Dckt. 38305

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38305
	)	
v.	)	
	)	
PHILLIP JAMES MORGAN,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

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

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Mr. Morgan appeals from the district court's Judgment of Conviction and Order Retaining Jurisdiction and asserts that the district court erred in denying his motion to suppress. The district court denied Mr. Morgan's motion to suppress based upon a finding that Officer Stace had a reasonable, articulable suspicion that Mr. Morgan had violated either Idaho Code § 49-428 (display of plates and stickers) or Idaho Code § 49-659 (stopping, standing or parking outside business or residential districts). The State now concedes that the district court erred in denying the motion to suppress on these bases recognizing that Mr. Morgan did not, in fact, violate either of these two statutes. (Respondent's Brief, pp.9-10.) However, the State now asserts, for the first time on appeal, that Mr. Morgan's stop was justified based upon an alleged violation of Boise City Code § 10-11-04 (*hereinafter,* B.C.C. § 10-11-04), and further asserts that Officer Stace's belief that Mr. Morgan was either lost or was attempting to avoid him justified his warrantless seizure of Mr. Morgan.

This Reply Brief is necessary to address the State's newly raised arguments. First, Mr. Morgan asserts that this Court should decline to address the State's argument that Mr. Morgan violated B.C.C. § 10-11-04 as it is being raised for the first time on appeal, and the State has not established that the operative facts presented and found by the district court support a finding that Mr. Morgan violated the ordinance. Second, if this Court entertains the State's argument that Mr. Morgan violated B.C.C. § 10-11-04, this Court should find that the ordinance is void *ab initio* as Boise City ceded its ability to regulate the streets of Boise to the Ada County Highway District and has no legal

authority to pass a parking regulation. Third, even if this Court both addresses the alleged violation of B.C.C. § 10-11-04 and finds that the ordinance is valid, it should nevertheless find that the State failed to present sufficient evidence to support a finding that it was objectively reasonable for Officer Stace to believe Mr. Morgan parked in violation of the ordinance. Finally, this Court should affirm the district court's finding that Officer Stace did not have a reasonable, articulable suspicion of criminal activity merely because Mr. Morgan appeared be either lost or trying to avoid him.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Morgan's Appellant's Brief. They need not be repeated in this Reply Brief in depth, but are incorporated herein by reference thereto.

ISSUE

Did the district court err when it denied Mr. Morgan's motion to suppress as his Fourth Amendment right to be free from unreasonable seizures was violated?

ARGUMENT

The District Court Erred When It Denied Mr. Morgan's Motion To Suppress As His Fourth Amendment Right To Be Free From Unreasonable Seizures Was Violated

A. Introduction

The State concedes that the district court erred in finding that Officer Stace had a reasonable, articulable suspicion that Mr. Morgan had violated either I.C. § 49-428 or I.C. § 49-659. (Respondent's Brief, pp.9-10.) This Court should reject the State's alternative argument, raised for the first time in its Respondent's Brief, that Officer Stace had a reasonable, articulable suspicion that Mr. Morgan had violated B.C.C. § 10-11-04, and should further affirm the district court's finding that Officer Stace had no other reasonable suspicion of criminal activity to justify the stop.

B. This Court Should Reject The State's Argument, Raised For The First Time On Appeal, That The Warrantless Stop Was Reasonable Based Upon An Alleged Violation Of B.C.C. § 10-11-04

As a general rule, appellate courts will not review claims raised for the first time on appeal. *See State v. Perry*, 150 Idaho 209 (2010). However, the Idaho Supreme Court has established that because the reasonableness of a seizure is judged by an objective standard, an appellate court may review the propriety of a warrantless seizure, regardless of the district court's ruling on the issue, by reviewing the "operative facts" to see if they justify the warrantless seizure on an alternative basis. *See State v. Julian*, 129 Idaho 133 (1996).

In *Julian*, the defendant was arrested at a hospital, without a warrant, based upon probable cause to believe that he had committed the crime of domestic violence at his home and, during a standard inventory search at the jail, a small vial of cocaine fell

out of the defendant's shoe. *Id.* at 134. The district court granted the defendant's motion to suppress finding that his arrest was unlawful under the then-existing Idaho arrest statute, which arguably barred an arrest for a crime stemming from a "domestic disturbance" when not made at the scene of the disturbance. *Id.* at 134-135; I.C. § 19-603(6) (1993). Recognizing that the existence of probable cause to arrest is an objective standard freely reviewed on appeal, and relying upon *Klingler v. United States*, 409 F.2d 299 (8th Cir. 1969), the "lead opinion" concluded that,

> the officer's decision to cite Julian for domestic battery does not foreclose an inquiry into whether an objective assessment of the facts present at the moment of arrest would lead a person of ordinary prudence to conclude **that probable cause existed to arrest Julian for a felony arising from the same operative facts supporting the domestic battery arrest, i.e. aggravated battery**.
>
> ... [W]e hold that an objective assessment of the facts found by the district court gave the deputies probable cause to arrest Julian for aggravated battery.

Id. at 135-137 (emphasis added).[1] The Court reversed the district court's suppression of the evidence. *Id.*

In the present case, the operative facts presented to and found by the district court do not justify a seizure[2] based upon an alleged violation of B.C.C. § 10-11-04.

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[1] Justice Silak, joined by Judge Lansing, Pro Tem, wrote the "lead" opinion in this case and found that it was not necessary to determine whether the district court correctly interpreted I.C. § 19-603(6). Justice Walters, Pro Tem, joined by Judge Drescher, Pro Tem, found "[t]he Court's lead opinion ably and thoughtfully applies the holding of *Klingler v. United States*, 409 F.2d 299 (8th Cir. 1969)", but determined that the arrest itself did not violate I.C. § 19-603(6). In *State v. Schwarz*, 133 Idaho 463 (1999), a unanimous Court referenced this portion of the *Julian* opinion as the Court's "conclu[sion]." *Id.* at 468 (quoting *Julian*, 129 Idaho at 137.) Therefore, the *Julian* analysis is a correct statement of Idaho law.

[2] The *Julian* Court looked to the operative facts to determine if probable cause to justify a warrantless arrest existed, whereas in the present case, the question is whether a reasonable, articulable suspicion of criminal activity to justify a warrantless seizure is at issue. As both probable cause to arrest and reasonable suspicion to seize are objective

First and foremost, the State failed to prove the existence of the ordinance in the district court. The existence of an ordinance is a factual question that must be proven to the trier of fact. *See Marcher v. Butler*, 113 Idaho 867 (1988); *People v. Buchanan*, 1 Idaho 681 (1878). In *Marcher*, a "slip and fall case" wherein the plaintiff "tersely mentioned a violation of the Blaine County Building Code, but failed to attach a copy of that ordinance" in a response to a motion for summary judgment, the Idaho Supreme Court affirmed the district court's grant of the defendant's summary judgment motion. *Marcher*, 113 Idaho at 867-870. The Court rejected the plaintiff's argument that the district court should have taken judicial notice of the building code, noting that "[]nasmuch as [I.C. § 9-101] only permits a court to take judicial notice of legislative acts, it follows that the court may not take judicial notice of city ordinances or of the various codes adopted under them." *Id.* at 870.

Furthermore, after summary judgment was granted, the plaintiff filed a "'Motion to Alter or Amended Judgment'" and attached a copy of the Blaine County ordinances in question in a supporting memorandum; however, the district court denied the motion. *Id.* at 868-869. In affirming the district court's denial of the plaintiff's motion, the Supreme Court recognized, "[b]ecause this motion attempts to present new information which the trial court did not have before it when rendering its decision granting summary judgment, the motion must be considered a motion for relief from judgment under I.R.C.P. 60(b), at least with regard to the issue of negligence *per se* for violation of a safety statute." *Id.* at 870. The Court determined that the failure to present the

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standards subject to *de novo* review, the "operative facts" analysis should be equally applied to each type of case. *See Julian, supra*; *see also State v. Benefiel*, 131 Idaho 226 (1998).

evidence of the ordinances to the district court was "at best ... a mistaken understanding as to the ability to take judicial notice of municipal ordinances, or at worst, the municipal ordinance argument was not contemplated by Marcher until after the decision granting summary judgment." *Id.* at 871.

Neither the prosecutor nor Officer Stace ever mentioned the existence of B.C.C. § 10-11-04, let alone provide any actual proof that it was legally adopted. (R., pp.40-41; Tr. 6/15/10.) The State cannot make the argument impliedly made by the plaintiff in *Marcher* that it merely misunderstood the rules regarding judicial notice, an excuse the *Marcher* Court did not abide. The State simply did not think of raising this argument until after it received Mr. Morgan's Appellant's Brief and recognized, by its own admission, the district court erred in affirming Mr. Morgan's warrantess seizure on the bases proffered by the prosecutor and Officer Stace. Even if the district court could have taken judicial notice of B.C.C. § 10-11-04, it simply did not do so and this operative fact was not found by the district court. The State's lack of diligence in presenting any evidence of the existence of the parking ordinance in this case should not be glossed over by this Court in the name of affirming the denial of Mr. Morgan's suppression motion, as the State would have this Court do. This operative fact was not proven in the district court and, thus, cannot be cited by this Court as a basis to conclude Mr. Morgan's seizure was reasonable under the Fourth Amendment.

In raising the argument that this Court should find that the stop was justified based upon an alleged violation of B.C.C. § 10-11-04, the State makes the general claim that an appellate Court will affirm the order of a district court where the district court reaches the correct result by an incorrect theory. (Respondent's Brief, p.6 (citing

McKinney v. State, 133 Idaho 695, 700 (1999); *State v. Avelar*, 129 Idaho 700, 704 (1997).) However, the State has not cited any authority that overturns *Julian* and applies this "right result – wrong reason" theory of appellate review in the context of review of a district court's decision that would allow the appellate court to determine a suppression issue based upon facts neither presented nor found by the district court. Indeed, the Idaho Supreme Court reaffirmed the *Julian* analysis in *State v. Schwarz*, 133 Idaho 463 (1999); *see also See State v. Frederick*, 149 Idaho 509, 515 fn.4 (2010) (reiterating the general prohibition against an appellate court hearing an argument for the first time on appeal, but deciding to hear the State's argument that the "good faith exception" to the exclusionary due to a change in United States Supreme Court precedent between the time the case was heard in the district court and the Court of Appeals, and the time the case was heard in the Idaho Supreme Court).

In essence, the State is asking this Court to be a finder of fact.[3] This Court should decline this invitation. It is well established that this Court, as an appellate tribunal, does not engage in its own fact finding on review. *See, e.g., State v. Meister*,

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[3] Curiously, the State has failed to provide sufficient evidence of the existence of B.C.C. 10-11-04 on this appeal. Appendix A of the Respondent's Brief appears to be a printout taken directly from the city's official website. *Compare* Respondent's Brief, Appendix A *with* http://www.cityofboise.org/Departments/City_Clerk/PDF/CityCode/Title10/1011.pdf (pages 3 of 14 to 5 of 14.) However, the city's website itself contains a preface to the purported code sections stating,

> This is the **unofficial copy of the Boise City Code** and does not legally bind the City in anyway. **This Code is published for reference purposes only, it may not reflect recent changes to the code and should not be used for any official purpose**. For an official copy of any part of the Boise City Code - Please contact the Office of the City Clerk. The Boise City Code is the sole property of the City of Boise, any unauthorized use or modification of this code is illegal.

See http://www.cityofboise.org/Departments/City_Clerk/CityCode/index.aspx (emphasis added).

148 Idaho 236, 239 (2009) (concluding that the appellate courts are not fact-finding tribunals and declining to make a determination on the admissibility of the evidence at issue); *Lynch v. Lynch*, 106 Idaho 842, 845-846 (1984) (it is an invasion of the province of the trial for an appellate court to readjudicate controverted facts); *Thomas v. Klein*, 99 Idaho 105, 109 (1978) (scope of appellate review is limited, and appellate court will not retry issues of fact or substitute its view of such issues for the trial court). The State had an opportunity in the district court to present facts sufficient to justify Mr. Morgan's warrantless seizure. By its own admission, the State failed to do so. This Court should not give the State an opportunity to argue facts never presented to or found by the district court in the hope of saving its unconstitutional seizure of Mr. Morgan.

Furthermore, even if this Court excuses the State's failure to prove B.C.C. § 10-11-04 in the district court, there are still inadequate operative facts to justify an appellate finding that the seizure was valid. By its express terms, B.C.C. § 10-11-04(D) (the specific subsection relied upon by the State), does not apply "in a business or restricted parking district." B.C.C. § 10-11-04(D). The State failed to provide any evidence that the location of the stop was neither in a business district nor a restricted parking district. (R., pp.40-41; Tr. 6/15/10.) The district court was not asked to, nor did it make such a finding; therefore, this operative fact was not proven and this Court should not retroactively find Mr. Morgan's seizure was justified based upon the State's newly found appellate theory. (R., pp.40-41, 51-56; Tr. 6/15/10.)

C. If This Court Entertains The State's Argument That Mr. Morgan Violated Boise City Code § 10-11-04, This Court Should Find That Boise City Did Not Have The Authority To Enact This Parking Regulation; Thus, It Has No Legal Effect And Cannot Be The Basis For The Stop

Mr. Morgan asserts that the City did not have the authority to enact the B.C.C. § 10-11-04, as the Ada County Highway District (*hereinafter*, ACHD) and the State have sole jurisdiction over all of the highways located within Ada County, including those within the City of Boise.[4] If the City did not have the authority to enact the ordinance, then Mr. Morgan's stop cannot be justified on the basis of an alleged violation of B.C.C. § 10-11-04.[5]

Mr. Morgan asserts that, other than the State, the ACHD has sole jurisdiction over all highways within Ada County, including those within the City. *Id.* Article III, § 1, of the Idaho Constitution vests all legislative power, other than the referendum and initiative power reserved to the people, in the Legislature. IDAHO CONST. Art. III, § 1. Article XII, § 2, of the Idaho Constitution provides, "Any county or incorporated city or town may make and enforce, within its limits, all such local, police, sanitary and other

[4] Mr. Morgan fully recognizes that this argument is more appropriately made in the district court and generally should not be raised for the first time on appeal. However, the State never attempted to justify Mr. Morgan's warrantless seizure based upon B.C.C. § 10-11-04 until its Respondent's Brief. If this Court entertains the State's new theory for the first time on appeal, due process dictates hearing Mr. Morgan's constitutional and statutory challenge for the first time on appeal as well. *C.f. Wardius v. Oregon*, 412 U.S. 470, 475-476 (1973) ("hold[ing] that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.")

[5] The State cannot rely upon a claim that Officer Stace was acting in "good faith" reliance on B.C.C. § 10-11-04 as Officer State was not acting in reliance of B.C.C. 10-11-04 at all. *See* Tr. 6/15/10, p.14, Ls.20-22; *See also Frederick*, 149 Idaho at 517.

regulations as are not in conflict with its charter or with the general laws." IDAHO CONST. Art. XII, § 2.

State law defines a "[s]ingle highway traffic district" as consisting of "all public highways within the county, *including those within all cities of the county*, but excepting those within the state highway system and those under federal control." I.C. § 40-120(4) (emphasis added.) Idaho Code § 40-113(3) provides, "'Local highway jurisdiction' means a county with jurisdiction over a highway system, *a city with jurisdiction over a highway system*, or a highway district." I.C. § 40-113(3) (emphasis added). Idaho Code. § 40-104(1), in relevant part, provides, "'City system' means all public highways within the corporate limits of a city, with a functioning street department, *except those highways which are ... part of a highway district system ....*" I.C. § 40-104(1) (emphasis added).

From these statutes, it is clear that Idaho cities lack jurisdiction over any highways that are within a single highway traffic district because such highways are no longer part of the city's system of highways. Only the State and the single highway traffic district can exercise jurisdiction over highways located within such a district.

The ACHD was established in 1972, and "is the only consolidated countywide highway district in the State of Idaho."[6] As such, the ACHD has exclusive jurisdiction over any and all highways located within Ada County, including those within the City. Under state law, the term highways includes all "roads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public." I.C. § 40-109(5). Under this definition, Mr. Morgan parked on a "highway" at the time of

his seizure and that highway was within the City of Boise. Therefore, only the ACHD and the State had jurisdiction over his conduct.

Idaho Code § 49-208, in relevant part, provides:

> (1) The provisions of this title shall not be deemed to prevent local authorities with respect to *highways under their jurisdiction* and within the reasonable exercise of the police power from:
>
> (a) Regulating or prohibiting stopping, standing or parking;
> (b) Regulating traffic by means of peace officers or traffic-control devices[.]

I.C. § 49-208 (emphasis added). Idaho Code § 49-207(1), in relevant part, provides, "These provisions of law shall not be construed to prevent cities from enacting and enforcing general ordinances prescribing additional requirements as to speed, manner of driving, or operating vehicles on any of the *highways of such cities* ...." I.C. § 49-207 (emphasis added).

These provisions grant a municipal corporation the ability, in general, to regulate the highways within their boundaries. However, the City of Boise has ceded its authority, granted by the Idaho Constitution and Idaho code, to ACHD. Idaho Code § 40-1310, in relevant part, provides:

> (1) The commissioners of a highway district have *exclusive general supervision and jurisdiction over all highways* and public rights-of-way within their highway system ....
>
> ... .
>
> (8) The highway district board of commissioners shall have the *exclusive general supervisory authority over all public highways, public streets and public rights-of-way under their jurisdiction, with full power to* establish design standards, establish use standards, pass resolutions and *establish regulations in accordance with the provisions of title 49, Idaho Code*, and

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[6] ACHD, "About Us," *at* http://www.achdidaho.org/AboutACHD/Default.aspx (last visited Dec. 20, 2011).

> control access to said public highways, public streets and public rights-of-way.

I.C. § 40-1310 (emphases added). By ceding its power to regulate highways within the City of Boise to the ACHD, the City of Boise ceded its power to enact B.C.C. § 10-11-04.

"Idaho has long recognized the proposition that a municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted to it." *Caesar v. State*, 101 Idaho 158, 160 (1980). In *Black v. Young*, 122 Idaho 302 (1992), this Court noted that, when a city acts without lawful authority, such an act is *ultra vires* and considered null and void. *Id.* at 308-309. Mr. Morgan asserts that it is clear, under any reasonable reading of the relevant provisions of I.C. § 40-1310 and the portions of title 49 set forth above, that the ACHD and the State had exclusive jurisdiction to enact regulations governing the operation of motor vehicles on all highways within Ada County. The City of Boise lacked any such jurisdiction by operation of those statutes.

Mr. Morgan asserts that because the City lacked jurisdiction to enact the ordinance (or any ordinance that regulates the operation of motor vehicles on highways within the ACHD), it is null and void *ab initio* and, as a matter of law, never existed. Because the ordinance was never valid, it cannot be used by the either the State or this Court as retroactive justification for Mr. Morgan's warrantless seizure.

D. If This Court Reaches The Merits Of The State's Argument That Mr. Morgan's Stop Was Justified Due To His Alleged Violation Of B.C.C. § 10-11-04, It Should Find That Under The Facts Presented, It Was Objectively Unreasonable For Officer Stace To Seize Mr. Morgan Based Upon This Alleged Violation

Even if this Court reaches the merits of the State's newly raised claim, it should find that the facts presented do not support a finding that it was objectively reasonable for Officer Stace to believe Mr. Morgan was violating B.C.C. § 10-11-04. As noted in Section B above, the State failed to provide any evidence of the existence of B.C.C. §10-11-04, and further failed to provide any evidence that Mr. Morgan was not parked in either a business district nor a restricted parking zone, both of which are necessary findings of fact to support an objectively reasonable suspicion of Mr. Morgan violating this municipal code section. This Court should decline the State's invitation to affirm the denial of Mr. Morgan's suppression motion based upon its newly proposed theory, in the absence of sufficient evidence to support its theory.

E. Officer Stace Did Not Possess A Reasonable, Articulable Suspicion That Mr. Morgan Was Involved In Criminal Activity To Justify His Seizure

The district court found that "It goes without saying that Officer Stace's suspicion that Mr. Morgan was avoiding him was not the type of suspicion sufficient to permit an investigatory stop and detention." (R., p.53.) The State challenges the district court's legal determination in this regard. The State's argument is without merit.

The State asserts that "[i]t was reasonable for Officer Stace to suspect, based on Morgan's driving pattern and subsequent stop in the street, that ... Morgan was attempting to conceal his actions from him." (Respondent's Brief, pp.13-14.) The State then relies upon *Illinois v. Wardlow*, 528 U.S. 119 (2000) and *United States v. Arvizu*, 534 U.S. 266 (2002), for the position that "[a]ttempts to avoid police, then, are a

pertinent factor in deciding whether an officer has reasonable suspicion of criminal activity." (Respondent's Brief, pp.14-15.)

However, a perceived attempt to avoid police is not, in and of itself, sufficient to justify a warrantless seizure. In *Wardlow*, the defendant's seizure was not justified merely because it looked to the officer like he was trying to avoid police contact; rather, the defendant was in area known for heavy drug trafficking, saw four police cars drive up, dropped a bag he was holding, and ran from the police. *Wardlow*, 528 U.S. at 121-122. The *Wardlow* Court recognized that both being in a high-crime area and "[h]eadlong flight" can be considered, in a totality of the circumstance analysis, when determining whether an officer has an objectively reasonable suspicion that the defendant may be involved in criminal activity, and found that the officer in the present case was justified in suspecting the defendant was involved in criminal activity. *Id.* at 124-125.) This findings are far from radical considering long standing Supreme Court precedent that looks to the totality of the circumstances and objectively reviews the facts as found.

The *Wardlow* Court, continued,

> Such a holding is entirely consistent with our decision in *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), where we held that **when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business**. *Id.,* at 498, 103 S.Ct. 1319. **And any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."** *Florida v. Bostick,* 501 U.S. 429, 437, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Id. at 125 (emphasis added). Importantly, the *Wardlow* Court rejected the State of Illinois' request for a "'bright-line rule' authorizing the temporary detention of anyone who flees at the mere sight of a police officer. *Id.* at 126-127 (J. Stevens *concurring in part, dissenting in part* (recognizing the majority's rejection of the "bright-line rule" request).) In other words, looking like one wants to avoid an interaction with an officer is far different then seeing an officer and running away and seeing an officer and running away is not sufficient, in and of itself, to justify a warrantless seizure.

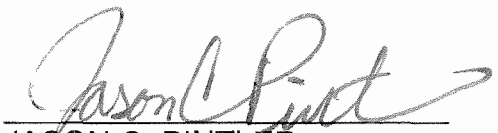
The State basically asks this Court to adopt that which the *Wardlow* Court rejected – a "bright-line rule" that would allow any officer to seize any person at any time merely because that person appeared to be avoiding the officer. The State would have this Court hold that exercising ones rights provides an officer with the very basis to seize a person. Such a holding would write the Fourth Amendment out of existence.

The mere fact that the State can point to additional facts, such as it was 9:20 p.m. on a Friday night, when the officer saw an SUV that did not have a front license plate, and drive around the block and parked along the side of the road, does not make the State's argument more compelling. (*See* Respondent's Brief, pp.13-16.) In reality, the facts relied upon by the State show that Officer Stace had a "hunch" that Mr. Morgan was either up to no good or was just lost, but a hunch is simply not enough to justify a warrantless seizure. *Terry v. Ohio*, 392 U.S. 1 at 27. The district court declined to adopt the State's spurious argument and this Court should decline to overrule the district court on this basis.

CONCLUSION

Mr. Morgan respectfully requests that this Court vacate the district court's order of judgment and commitment, reverse the order which denied his motion to suppress, and remand his case to the district court with instructions that all evidence obtained after his seizure must be suppressed.

DATED this 21st day of December, 2011.



JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of December, 2011, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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DISTRICT COURT JUDGE
E-MAILED BRIEF

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