9-18-2014

State v. Morris Respondent's Brief Dckt. 41933

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. RICHARD G. MORRIS, Defendant-Appellant.	)	No. 41933 Ada Co. Case No. CR-2012-13672

BRIEF OF RESPONDENT

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

HONORABLE MELISSA MOODY
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

JESSICA M. LORELLO
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

JOHN C. DEFRANCO
Ellsworth, Kallas & Defranco PLLC
1031 E Park Blvd
Boise, Idaho
(208) 336-1843

ATTORNEY FOR
DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

Richard Glenn Morris appeals from the judgment entered upon the jury verdict finding him guilty of possession of marijuana. On appeal, Morris challenges the denial of his motion to suppress.

Statement Of Facts And Course Of Proceedings

The district court made the following factual findings, which are relevant to the traffic stop that resulted in the criminal charge against Morris:

> Sometime after midnight on August 1, 2012, Richard Morris and his passenger, Chrystal Phillips, drove away from a well-known drug house. Officer Cromwell was driving three to four car lengths behind Morris when he observed Morris' two right tires entirely cross a white line to the right for a few seconds. It is unknown whether the line demarcated a bike path to the right or parking to the right. In either event, the line marked the right boundary of Morris' lane of travel. Morris was not attempting to avoid obstacles in his lane of travel when he drifted to the right.
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> Based upon his observation, Officer Cromwell initiated a traffic stop on the car Morris was driving. Officer Cromwell informed dispatch at 1:37:47 a.m. that he was initiating the traffic stop. Five seconds later, at 1:37:52 a.m., Officer Cromwell called for a canine officer to assist him with the traffic stop. Morris pulled over on Overland, just to the east of Latah Street.
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> When Officer Cromwell approached the vehicle Morris was driving, Officer Cromwell immediately smelled raw marijuana, which he is trained to detect. Officer Cromwell called probation and parole after learning from defendant Morris that he was on felony probation. Officer Cromwell spoke with probation officer Stacy Lockner. Officer Cromwell told probation officer Lockner that Morris' car had just left a known drug house.
>
> The canine officer, Officer Plaisted, arrived with his dog Turk at 1:42:15 a.m. Turk is certified to alert on various controlled substances, including marijuana, and he alerted on the car Morris was driving. Approximately ½ pound of marijuana was

subsequently found in a purse on the passenger's floorboard where co-defendant Phillips had been sitting.

(R., pp.115-116.)

The state charged Morris with possession of marijuana with intent to deliver. (R., pp.7-8, 38-39.) Morris filed a motion to suppress claiming the traffic stop was unsupported by reasonable suspicion or probable cause because, he argued, he was not straddling the fog line and, even if he was, "such action falls within a broad range of normal driving behavior" that cannot be the basis for a traffic stop. (R., pp.54-55, 57.) The court conducted an evidentiary hearing after which it denied Morris's motion. (R., pp.112-119.)

Following trial, the jury found Morris guilty of the included offense of possession of a controlled substance. (R., p.189.) The court imposed one year in county jail with 128 days suspended and 237 days credit for time served. (R., p.192.) Morris filed a timely notice of appeal. (R., pp.194-196.)

ISSUE

Morris states the issues on appeal as:

> Did The District Court Err By Denying Richard [Morris's] Motion To Suppress?

(Appellant's Brief, p.2 (capitalization original).)

The state rephrases the issue as:

Because the traffic stop was based on a violation of the Idaho Code and because the district court's decision is supported by substantial evidence, has Morris failed to show the district court erred in denying his motion to suppress?

ARGUMENT

Morris Has Failed To Establish Error In The Denial Of His Suppression Motion

A. Introduction

Morris challenges the denial of his motion to suppress, arguing suppression was required because there was no legal basis for the traffic stop. (Appellant's Brief, p.5.) The district court correctly rejected Morris's argument and found there was reasonable articuable suspicion to support the stop based on Morris's traffic infraction.

Morris also "disagrees with the court's determination that there was substantial evidence upon which Officer Cromwell could be deemed a credible witness." (Appellant's Brief, p.6.) Because this Court defers to the trial court's credibility determinations and because there was substantial evidence to support the district court's conclusion that Officer Cromwell was credible regarding Morris's driving pattern, Morris's "disagreement" with the court's credibility determination does not support his request for relief.

Morris has failed to show error in the denial of his suppression motion.

B. 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 that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v. Klingler, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be

drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003).

C. Morris Has Failed To Show Error In The Denial Of His Suppression Motion

Morris challenges the district court's order denying his motion to suppress on two bases: (1) the district court erred in concluding Morris's driving behavior violated the law; and (2) the district court's credibility determination is unsupported by "substantial evidence." (Appellant's Brief, pp.3-7.) Both of Morris's arguments fail.

The district court found that regardless of "whether Morris crossed a line demarcating a bike path or a parking area – both types of crossings would constitute reasonable suspicion that a traffic violation occurred under I.C. § 49-630 or I.C. § 49-637." (R., p.117.) This conclusion is correct.

The plain language of I.C. § 49-637(1) requires drivers travelling on highways divided into two or more clearly marked traffic lanes to drive their vehicles "as nearly as practicable entirely within a single lane." For purposes of I.C. § 49-637(1), the word "lane" means "that portion of the roadway for movement of a single line of vehicles." I.C. § 49-121(4). Similarly, I.C. § 49-630 requires motorists to drive "upon the right half of the roadway" where the highway is of sufficient width. A "roadway" is defined as "that portion of a highway improved, designed or ordinarily used for vehicular travel, exclusive of sidewalks, shoulders, berms and rights-of-way." I.C. § 49-119(19). By crossing over the

line, Morris left his authorized lane of travel and committed a traffic infraction. Morris has failed to show otherwise.

Morris alternatively argues that "a single and slight deviation from the lane of travel falls within the normal range of driving behavior" and, therefore, there was no basis for a traffic stop. (Appellant's Brief, p.5.) Morris's reliance on State v. Emory, 119 Idaho 661, 809 P.2d 522 (Ct. App. 1991), to support this assertion is misplaced.

In Emory, an officer conducted a traffic stop shortly after he observed the defendant "fail[ ] to move for five to six seconds" after the light turned green. 119 Idaho at 662, 809 P.2d at 523. The officer did so even though he followed Emory after this initial observation and watched him "proceed[ ] correctly through another green light" and drive straight but close to a long line of parked vehicles on the side of the road. Id. Upon making contact with Emory, the officer asked if he had been drinking and ultimately arrested Emory for driving under the influence. Id. Emory filed a motion to suppress, arguing the traffic stop was unsupported by reasonable articulable suspicion. Id. The Court of Appeals agreed, concluding Emory's actions "could just as easily be explained as conduct falling within the broad range of what can be described as normal driving behavior." Id., 119 Idaho at 664, 809 P.2d at 525.

Morris's reliance on Emory appears to be based on the mistaken belief that the Court in Emory created a "normal driving behavior" exception to violations of Idaho law that regulate driving. It did not. Indeed, nowhere in the opinion does the Court discuss any statute, much less the statutes the district

court found Morris violated. If anything, Idaho precedent supports the district court's conclusion in this case.

The district court correctly relied on State v. Slater, 136 Idaho 293, 32 P.3d 685 (Ct. App. 2001), in determining that the traffic stop was lawful. (R., p.117.) In Slater, an officer "observed the two right side tires of Slater's vehicle cross the fog line on the side of the highway on-ramp as that vehicle entered the highway." 136 Idaho at 296, 32 P.3d at 688. The officer "followed Slater's vehicle for several miles" and observed Slater travelling at varying speeds before initiating a traffic stop. Id., 136 Idaho at 297, 32 P.3d at 689. Slater moved to suppress the methamphetamine and other evidence that was discovered as a result of the traffic stop, claiming the officer "had no lawful authority to conduct the traffic stop." Id. The district court and the Court of Appeals rejected Slater's claim. Id., 136 Idaho at 297-98, 32 P.3d at 689-690. The Court stated:

> Idaho Code § 49-630(1) requires that a vehicle be driven on the right half of the roadway, except in certain circumstances that are not applicable in this case. The "roadway" means that portion of a highway that is "improved, designed or ordinarily used for vehicular travel." I.C. § 49-119(18). It does not include "sidewalks, shoulders, berms [or] rights-of-way." *Id.* Accordingly, when Officer Burns observed Slater's tires cross the fog line, albeit fleetingly, Burns now possessed the requisite reasonable suspicion that Slater had violated I.C. § 49-630 by driving on the shoulder of the highway, rather than on the "roadway." *See State v. Dewbre*, 133 Idaho 663, 665-67, 991 P.2d 388, 390-92 (Ct. App. 1999). Furthermore, Officer Burns observed Slater proceed down the highway at varying speeds between 10 and 35 miles per hour under the 75 mile per hour speed limit. Based upon Slater's erratic speed and crossing the fog line, Officer Burns had reasonable suspicion that Slater might also be driving under the influence of alcohol and or drugs, I.C. § 18-8004, or was otherwise impaired. Consequently, Slater's motion to suppress based upon alleged unlawfulness of the traffic stop was correctly denied.

Slater, 136 Idaho at 298, 32 P.3d at 690 (alteration original, footnote omitted).

Like Officer Burns in Slater, Officer Cromwell had reasonable articulable suspicion that Morris violated I.C. § 49-630. Morris's efforts to distinguish Slater by advancing an unexplained distinction between a bike lane and a shoulder[1] (Appellant's Brief, p.5), is unpersuasive and inconsistent with the plain language of the relevant statutory provisions. Further, although the Court in Slater also discussed Slater's varying speeds, it did so in the context of finding reasonable articulable suspicion of the separate offense of driving under the influence, which is distinct from whether there was reasonable articulable suspicion that Slater violated I.C. § 49-630. Morris's claim that his allegedly "normal driving behavior" prevented the district court from finding a lawful basis for the traffic stop fails.

Slater next "argues there is not substantial evidence to support the district court's conclusion" that Officer Cromwell's testimony regarding the traffic violation was credible. (Appellant's Brief, p.7.) It is well-established that "[t]he district court is the arbiter of conflicting evidence; its determination of the weight, credibility, inferences, and implications thereof will not be supplanted by this Court's impressions or conclusions from the written record." State v. Howard, 155 Idaho 666, 673, 315 P.3d 854, 861 (Ct. App. 2013) (citing Johannsen v. Utterbeck, 146 Idaho 423, 432, 196 P.3d 341, 350 (2008)). Morris's argument that the district court's specific credibility finding with respect to Officer

[1] There is no factual finding by the district court that the line at issue designated a bike lane. The district court's finding on this point was that it is "unknown whether the line demarcated a bike path to the right or parking to the right." (R., p.115.) Thus, any argument premised upon a finding that the line Morris crossed was a bike lane line is unsupported by the district court's decision.

Cromwell's testimony about Morris's driving is not entitled to the usual deference appears to be based on the fact that the district court found Officer Cromwell's memory "flawed" in other respects. (Appellant's Brief, p.6; R., p.6.) The district court described the "flaws" it perceived in Officer Cromwell's memory as follows:

> Officer Cromwell's testimony at the suppression hearing was problematic, to say the least. There are two areas, in particular, where Officer Cromwell's testimony was demonstrably inaccurate. First, Officer Cromwell testified that when he first saw Morris, they were both driving down the road. Officer Cromwell stated that he followed Morris only because they both happened to be going the same direction. Officer Cromwell denied that he was following Morris because Morris had recently left a well-known drug house. Officer Cromwell denied even seeing Morris leave a well-known drug house. The problem with this testimony is that, on August 1, 2012, right after he stopped Morris, Officer Cromwell told probation officer Lockner that he stopped Morris after Morris left a known drug house. This fact is irreconcilable with Officer Cromwell's testimony to the contrary.
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> Second, Officer Cromwell testified at the suppression hearing that he called for a canine only after he detected an odor of marijuana coming from Morris' car. The "CAD report" shows the opposite; namely, that Officer Cromwell called for a canine before he approached the car Morris was driving, not after. To be clear, the problem with Officer Cromwell's testimony is not that he called for a drug dog before he approached Morris' vehicle. That is fine. The problem with Officer Cromwell's testimony is that it is factually inaccurate.

(R., pp.117-118.)

Despite its concerns about some aspects of Officer Cromwell's testimony, the court nevertheless found Officer Cromwell was "credible" on the issue of "whether Morris' car drifted over a white line on the roadway." (R., p.118.) The district court cited three reasons for its credibility determination:

> (1) its own observation of Officer Cromwell's demeanor when testifying; (2) Officer Cromwell's truthful testimony that he followed Morris for ½ to ¾ of a mile, looking for additional traffic violations

> against Morris but finding none; and (3) the fact that Officer Cromwell told Morris *at the time of the stop* that he pulled him over for crossing a white line.

(R., p.118 (emphasis original).)

Morris cites no authority for the proposition that a district court cannot find a witness credible on one point but not other points or that a finding that a witness is not credible on one or more issues means there is not "substantial evidence" to support a finding of credibility on any issue. To the contrary, a witness can be found credible even if there are inconsistencies in the witness' testimony. See State v. Munoz, 149 Idaho 121, 124-125, 127-128, 233 P.3d 52, 55-56, 58-59 (2010) (noting detective's conflicting testimony but applying principle that "[t]he trial judge is in a far better position . . . to weigh the demeanor, credibility and testimony of witnesses").

Even if this Court were in a position to review the credibility of Officer Cromwell, there is substantial evidence to find that Officer Cromwell was credible in all aspects of his testimony, even those areas about which the district court expressed concern. Officer Cromwell testified that he did not think he told the on-call probation officer that he saw Morris leaving a "known drug house" because Officer Cromwell "didn't see him leave a known drug house." (Tr., p.36, Ls.20-24.) Officer Cromwell said "[t]here is a known drug area" but he did not "recall if that's what [he] said or not." (Tr., p.36, L.20 – p.37, L.8.)

Stacie Lockner, the probation officer who was on-call when the traffic stop occurred, testified that Officer Cromwell reported that Morris "was coming from a known drug house or drug area" and she did not "know why he made the initial

traffic stop." (Tr., p.63, Ls.2-10.) Counsel for Morris then asked: "your notes say, 'Stopped by Officer Cromwell after leaving a known drug house'; is that correct?" (Tr., p.63, Ls.11-13.) Probation Officer Lockner answered, "Yes." (Tr., p.63, Ls.11-14.)

Officer Cromwell's testimony is not "demonstrably inaccurate" just because Probation Officer Lockner's notes reflect that Morris was stopped by Officer Cromwell after leaving a known drug house. Officer Cromwell's testimony was that he did not recall whether he told Probation Officer Lockner that Morris was in a known drug area. That Probation Officer Lockner could recall does not make Officer Cromwell's testimony "demonstrably inaccurate." Further, Probation Officer Lockner's testimony was that Officer Cromwell said Morris "was coming from a known drug house **or** drug area." (Tr., p.63, Ls.8-9 (emphasis added).) That the note reflects "drug house" as opposed to "drug area" also does not demonstrate an inaccuracy in Officer Cromwell's testimony. Even if Officer Cromwell's testimony and Probation Officer Lockner's testimony could not be reconciled, and the district court found one more credible than the other, this does not make Officer Cromwell's inability to remember or his testimony "demonstrably inaccurate."

With respect to Officer Cromwell's memory about the timing of his request for a canine, he testified that he made the request as he was walking up to Morris's car and could smell marijuana. (Tr., p.43, Ls.2-7; see also p.24, L.9 – p.25, L.10.) After reviewing the "CAD report," which was not admitted into

evidence at the suppression hearing[2], Officer Cromwell testified that the stop occurred at 1:37 a.m. and Officer Marshall Plaisted, the canine handler, arrived at 1:42. (Tr., p.29, L.17 – p.30, L.10, p.43, Ls.8-13.) Officer Plaisted later testified that, according to the CAD report, the traffic stop "was entered" at 1:37:47 and the request for a canine was at 1:37:52. (Tr., p.55, L.22 – p.56, L.1.) The state fails to appreciate the "factual[ ] inaccura[cy]" cited by the district court as it relates to Officer Cromwell's testimony and the CAD report. Based on Officer Plaisted's reading of the CAD report, Officer Cromwell requested the canine five seconds after the traffic stop "was entered." There is no readily apparent inconsistency between the testimony about what the CAD report showed and Officer Cromwell's testimony that he requested a canine as he was "walking up to the car and smelling the marijuana," which could have been five seconds after the stop "was entered."[3]

Because there was reasonable articulable suspicion that Morris violated the law by crossing over the white line, thereby failing to maintain his lane, and because the district court's finding that Officer Cromwell was credible on this

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[2] It appears the report was, however, admitted at trial. (Ex. 1, admitted 4-22-13; Register of Actions, entry dated 4/22/2013 ("Jury Trial Started").)

[3] Morris may have been attempting to develop some inconsistency when he asked Officer Plaisted when officers "typically" contact dispatch in relation to a traffic stop and Officer Plaisted answered, the "typical" standard followed by officers is to "advise dispatch first and then turn on your lights and pull the car over." (Tr., p.55, Ls.10-21.) However, Morris never asked Officer Cromwell when he contacted dispatch in this particular case. Compare Munoz, 149 Idaho at 128, 233 P.3d at 59 (noting that during the suppression hearing, the detective was not asked to explain his conflicting testimony).

point is supported by evidence and entitled to deference, Morris has failed to establish any error in the district court's decision denying his motion to suppress.

CONCLUSION

The state respectfully requests this Court affirm the judgment and the district court's order denying Morris's motion to suppress.

DATED this 18th day of September, 2014.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 18th day of September, 2014, served two true and correct copies of the attached RESPONDENT'S BRIEF by placing the copies in the United States mail, postage prepaid, addressed to:

JOHN C. DEFRANCO
Ellsworth, Kallas & Defranco PLLC
1031 E Park Blvd
Boise, Idaho

JESSICA M. LORELLO
Deputy Attorney General

JML/pm