

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37158

STATE OF IDAHO,)	2011 Unpublished Opinion No. 451
)	
Plaintiff-Respondent,)	Filed: April 27, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
KATHERINE JANE POWERS,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Judgment of conviction for two counts of possession of a controlled substance, affirmed.

Molly J. Huskey, State Appellate Public Defender; Heather M. Carlson, Deputy Appellate Public Defender, Boise, for appellant. Spencer J. Hahn argued.

Hon. Lawrence G. Wasden, Attorney General; Elizabeth A. Koeckeritz, Deputy Attorney General, Boise, for respondent. Elizabeth A. Koeckeritz argued.

MELANSON, Judge

Katherine Jane Powers appeals from her judgment of conviction for two counts of possession of a controlled substance. Specifically, Powers asserts that the district court erred by denying her motion to suppress. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

The following facts were revealed through testimony and other evidence presented at the hearing on Powers’s motion to suppress. A Boise patrol officer was monitoring a house which was known to the officer to have been involved in drug activity. The officer observed Powers exit the home after only a few minutes, place something in the trunk of her car, and drive away. Suspecting that Powers may have been involved in some sort of drug activity, the officer began following Powers in his vehicle. As Powers approached a stop sign intersection, the officer

observed Powers stop her car across the marked limit line, with the front of her vehicle protruding into the intersection, which was a violation of the Boise City Municipal Code.¹ The officer activated his emergency lights to initiate a traffic stop, and Powers pulled her vehicle into an alleyway. Prior to making contact with Powers, the officer notified dispatch that he was performing a stop of a vehicle and requested a narcotics unit with a drug dog to come to the scene.

The officer approached Powers's vehicle and notified her that he pulled her over for failing to stop behind the marked limit line at an intersection. The officer also indicated that Powers had pulled into the crosswalk at that intersection. He asked Powers for her driver's license and proof of insurance. Powers provided a cracked driver's license and stated that, because she was in the process of moving, she did not have her proof of insurance with her in the car. Powers also gave the officer her new address in Nampa. The officer returned to his vehicle to run Powers's information through dispatch.

Approximately six and a half minutes after the officer stopped Powers, the narcotics unit and drug dog arrived at the scene. The officer asked Powers to step out of her car just as the narcotics unit arrived. The patrol officer was still receiving information from the Nampa dispatch when he approached Powers's car and told her to sit down near his vehicle while the narcotics officer ran a drug dog around her car. The patrol officer asked Powers about an incident involving weapons in Canyon County, the purchase of her car, and where she was coming from when she was pulled over.

Within fifteen seconds of its first run around Powers's car, the drug dog alerted. The narcotics officer approached Powers and inquired whether she had drugs or weapons in the car. Powers responded that she did not. The narcotics officer then returned to the car to allow the drug dog to sniff the interior of Powers's vehicle. The patrol officer informed Powers that, if the drug dog did not alert to the presence of drugs in her car, the officer would only cite her for a failure to carry proof of insurance.

¹ A limit line is not defined within the Boise City Municipal Code. However, based on the evidence presented during the hearing on the motion to suppress, it appears that a limit line is the marked line on the street near the stop sign at an intersection, indicating where the driver is required to stop.

The drug dog alerted on the interior of Powers's car. During a search, the narcotics officer found controlled substances and paraphernalia in the center console. Powers was placed under arrest. However, the patrol officer did not immediately fill out a police report because the narcotics unit wished to work with Powers as part of a continuing drug investigation. Powers subsequently declined to participate in the investigation and, as a result, the patrol officer completed the police report two months after the stop. Powers was later charged with two counts of possession of a controlled substance, I.C. § 37-2732(c), and one count of possession of drug paraphernalia, I.C. § 37-2734A.

Powers filed a motion to suppress the evidence discovered in her car, asserting that the patrol officer unreasonably extended the stop of her vehicle by waiting for the drug dog to arrive before issuing her a citation for failure to provide proof of insurance. In addition, at the hearing on the motion, Powers presented evidence to demonstrate that there was no stop sign at the intersection of 29th and Bannock streets, where the officer testified he saw her fail to come to an appropriate stop. In response to this evidence, the officer testified that he must have been mistaken about the numbered street name and stated that Powers must have failed to correctly stop at the intersection of 28th and Bannock streets. At the conclusion of the hearing, the district court requested supplemental information regarding the presence of a stop sign at the intersection of 28th and Bannock streets. The state provided aerial photographs of the intersection, as it existed in 2007, which illustrated that the intersection at 28th Street had a stop sign but did not have a crosswalk.

The district court denied Powers's motion to suppress, concluding that the officer was forthright about his mistake regarding the street name and did not appear to be lying about the location of the intersection where he observed Powers's failure to stop at the limit line. The district court also held that the officer did not unreasonably extend the scope of the stop. Pursuant to a plea agreement, Powers entered conditional guilty pleas to two counts of possession of a controlled substance, and the state dismissed the remaining charge. Powers appeals, challenging the denial of her motion to suppress.

II.

STANDARD OF REVIEW

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact that are supported by substantial evidence, but we freely review 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). For instance, the reasonableness of a given search or seizure is a question of law over which we exercise independent review. *State v. Morris*, 131 Idaho 562, 565, 961 P.2d 653, 656 (Ct. App. 1998). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

III.

ANALYSIS

Powers argues that the district court's finding that she failed to stop at the intersection of 28th and Bannock streets was clearly erroneous. As a result, Powers contends that the officer did not have reasonable suspicion to stop her vehicle. In addition, Powers asserts that the district court erred when it concluded that the officer did not unreasonably extend the duration of the traffic stop.

A. Finding of Fact

A traffic stop by an officer constitutes a seizure of the vehicle's occupants and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). Under the Fourth Amendment, an officer may stop a vehicle to investigate possible criminal behavior if there is a reasonable and articulable suspicion that the vehicle is being driven contrary to traffic laws. *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Flowers*, 131 Idaho 205, 208, 953 P.2d 645, 648 (Ct. App. 1998). The reasonableness of the suspicion must be evaluated upon the totality of the circumstances at the time of the stop. *State v. Ferreira*, 133 Idaho 474, 483, 988 P.2d 700, 709 (Ct. App. 1999). The reasonable suspicion standard requires less than probable cause but more than mere speculation or instinct on the part of the officer. *Id.* An officer may draw reasonable inferences from the facts in his or her

possession, and those inferences may be drawn from the officer's experience and law enforcement training. *State v. Montague*, 114 Idaho 319, 321, 756 P.2d 1083, 1085 (Ct. App. 1988). Suspicion will not be found to be justified if the conduct observed by the officer fell within the broad range of what can be described as normal driving behavior. *Atkinson*, 128 Idaho at 561, 916 P.2d at 1286.

Powers asserts that the officer's testimony during the suppression hearing was contradictory, was inconsistent, and did not support the district court's finding that Powers failed to stop at the intersection limit line at 28th and Bannock streets. Thus, she argues, the state failed to demonstrate that the officer possessed reasonable suspicion to justify the stop of her vehicle, rendering the later search of her vehicle unlawful.

This Court faced a similar issue in *State v. Davis*, 139 Idaho 731, 85 P.3d 1130 (Ct. App. 2003). Davis was stopped for speeding and was subsequently arrested for driving under the influence of alcohol. Davis filed a motion to suppress, asserting that the officer did not have reasonable suspicion for the stop. In the police report, the officer stated that he measured Davis's speed by using the pacing method. However, the officer testified during the suppression hearing that he used a radar gun to check Davis's speed. At the hearing, the officer admitted that the police report was inaccurate and that he remembered that he had used the radar gun after reviewing a videotape of the stop. The district court found the officer's hearing testimony to be credible and denied Davis's motion. This Court affirmed, holding that the officer provided a reasonable explanation for the discrepancy between his report and his testimony and that the trial court was in the best position to determine the credibility of witnesses. *Davis*, 139 Idaho at 734, 85 P.3d at 1133. *See also State v. Munoz*, 149 Idaho 121, 127-28, 233 P.3d 52, 58-59 (2010) (affirming the denial of a motion to suppress based on the district court's credibility determination where the district court favored one version of an officer's testimony over an inconsistent version given at a previous hearing).

Here, the officer initially testified that Powers stopped her vehicle in the middle of a crosswalk on 29th and Bannock streets, in violation of the Boise City Municipal Code. The officer's recording of his encounter with Powers revealed that he initially advised Powers that the traffic violation occurred at an intersection on 30th Street. The officer immediately corrected his statement and told Powers that the violation took place on 29th Street. After being confronted with evidence at the suppression hearing that the intersection on 29th Street did not

have a stop sign, the officer testified that he must have been confused about the name of the numbered streets and that it was likely that Powers failed to correctly stop just one block over, at 28th and Bannock streets. When confronted with the error in his police report regarding the name of the street where Powers allegedly failed to stop, the officer explained that the report was written months after his encounter with Powers due to her possible cooperation in a drug investigation. The officer also explained that he believed that the intersection where Powers failed to stop was a four-way stop. After the hearing, the state presented supplemental evidence that a four-way stop intersection existed at 28th and Bannock streets with a stop line, but no crosswalk on the pavement.

After reviewing the testimony presented at the hearing, the district court held:

Although there is some inconsistency, this Court finds [that the officer] did not make these mistakes with the intent to mislead or justify his stop. Rather, given the evening hour, his obvious lack of exactness when recalling the street, and his forthrightness in stating that he could have been mistaken as to the intersection, the fact that his written report was delayed by an attempt to obtain cooperation of [Powers] in investigating drug activity, as well as all other evidence and testimony submitted in this matter, the Court finds that the violation occurred, and that it occurred at the intersection of 28th Street and Bannock. Moreover, this Court finds that the violation gave ample justification for a finding of reasonable suspicion, and that the stop was not a violation of [Powers's] Fourth Amendment Rights.

As mentioned above, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *Valdez-Molina*, 127 Idaho at 106, 897 P.2d at 997. The district court had the opportunity to observe the officer's demeanor and to assess his candor and credibility during his testimony at the suppression hearing. Similar to the officer in *Davis*, the officer here provided a reasonable explanation for his inconsistent testimony, which the district court could properly accept. *See Davis*, 139 Idaho at 734, 85 P.3d at 1133. Therefore, the district court's finding that the officer stopped Powers for crossing a limit line at 28th and Bannock streets was supported by substantial evidence and was therefore not clearly erroneous.

B. Scope of Detention

Powers next contends that the scope of her traffic stop was unreasonably extended when the patrol officer did not issue her a citation for failure to provide proof of insurance prior to the drug dog's sniff of the exterior of her vehicle. The determination of whether an investigative detention is reasonable requires a dual inquiry--whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *State v. Roe*, 140 Idaho 176, 181, 90 P.3d 926, 931 (Ct. App. 2004); *State v. Parkinson*, 135 Idaho 357, 361, 17 P.3d 301, 305 (Ct. App. 2000). An investigative detention is permissible if it is based upon specific articulable facts which justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity. *State v. Sheldon*, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003). Such a detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. *Roe*, 140 Idaho at 181, 90 P.3d at 931; *State v. Gutierrez*, 137 Idaho 647, 651, 51 P.3d 461, 465 (Ct. App. 2002). In this regard, we must focus on the intensity of the detention, as well as its duration. *Roe*, 140 Idaho at 181, 90 P.3d at 931. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. *Roe*, 140 Idaho at 181, 90 P.3d at 931; *Parkinson*, 135 Idaho at 361, 17 P.3d at 305. Brief inquiries not otherwise related to the initial purpose of the stop do not necessarily violate a detainee's Fourth Amendment rights. *Roe*, 140 Idaho at 181, 90 P.3d at 931.

The United States Supreme Court has held that a drug dog sniff of a vehicle's exterior is not a search and therefore may be done during a traffic stop without reasonable suspicion of drug activity. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005). It is therefore not necessarily a Fourth Amendment violation for an officer, who has stopped someone for a traffic violation, to ask unrelated questions about drugs and weapons or to run a drug dog around the perimeter of the vehicle. *See, e.g., Parkinson*, 135 Idaho at 362-63, 17 P.3d at 306-07. In *Caballes*, a narcotics officer ran a drug dog around the exterior of Caballes's car while a patrol officer was writing a speeding citation for Caballes. On appeal, the United State Supreme Court noted that the duration of the stop was entirely justified by the traffic offense and the "ordinary inquiries" incident to such a stop. *Caballes*, 543 U.S. at 408.

Similarly, in *Parkinson*, this Court concluded that the scope of a traffic stop was not unlawfully extended when a narcotics officer ran a drug dog around the exterior of Parkinson's

vehicle while a patrol officer contacted dispatch and began writing a citation for failure to provide proof of insurance. *Parkinson*, 135 Idaho at 362-63, 17 P.3d at 306-07. We noted that a reasonable investigation of a traffic stop includes asking for a driver's license and registration, requesting that the driver sit in the patrol car, and other general questioning that may or may not relate to the initial purpose of the traffic stop. *Id.* at 363, 17 P.3d at 307.

Powers argues that the facts here are most similar to those in *State v. Aguirre*, 141 Idaho 560, 112 P.3d 848 (Ct. App. 2005). In *Aguirre*, an officer began following a suspicious vehicle and observed the vehicle leave a parking lot without coming to a complete stop. The officer called for backup prior to initiating a stop of Aguirre's vehicle for a traffic violation. After two other officers arrived, the officer asked Aguirre why he was acting suspiciously; requested Aguirre's license, registration, and proof of insurance; asked if Aguirre possessed anything illegal; and requested Aguirre's permission to search his vehicle. Aguirre provided the requested information, answered that he did not possess anything illegal, and refused to grant the officer permission to search his vehicle. At that time, the officer ran a drug dog around Aguirre's vehicle. The dog alerted on a rear wheel well, and a search of Aguirre's vehicle revealed a weapon. Aguirre was then arrested for illegal possession of a firearm. On appeal of the denial of Aguirre's motion to suppress, this Court held that the drug dog's sniff of Aguirre's vehicle unlawfully extended the scope of the traffic stop because the officers had abandoned the initial purpose of the stop--the issuance of a traffic citation--prior to the drug dog sniff. *Aguirre*, 141 Idaho at 564, 112 P.3d at 852. *See also Gutierrez*, 137 Idaho at 652, 51 P.3d at 466 (holding that it was impermissible for an officer to question a driver about matters unrelated to a traffic stop after the officer had fulfilled the purpose of the stop by issuing a written warning to the driver).

Testimony at Powers's motion to suppress hearing revealed that the narcotics officer arrived at the scene of the traffic stop approximately six and a half minutes after the patrol officer initiated the stop. The patrol officer testified that he asked Powers to step out of her car as the narcotics officer arrived at the scene because it was standard practice during the presence of a drug dog for occupants of a vehicle to exit. The patrol officer also testified that, at the time he was asking Powers to exit the vehicle, he was still in contact with Nampa dispatch regarding

Powers's criminal history in Canyon County.² This testimony is supported by the recording of Powers's encounter with the patrol officer, during which the patrol officer is heard asking dispatch about a warrant and a correctional facility. The recording also reveals that the officer notified Powers that a drug dog would walk around her car and informed her that a drug dog sniff was common during routine traffic stops. Based on information he received from Nampa dispatch, the officer then asked Powers about her participation in an incident in Canyon County involving weapons. Powers explained to the officer the circumstances surrounding the incident. Less than one minute later, the narcotics officer approached Powers and informed her that the drug dog was "really interested" in her car. While it is difficult to tell from the recording exactly when the drug dog alerted on the exterior of Powers's vehicle, the narcotics officer testified at the motion hearing that the dog alerted within fifteen seconds of approaching the car. It appears from the recording that this must have occurred while the patrol officer was explaining the parameters of the drug dog sniff or discussing Powers's involvement in the weapons case in Canyon County.

The narcotics officer asked Powers whether she had any drugs or weapons in her vehicle, to which Powers responded that she did not. The narcotics officer then returned to Powers's vehicle and allowed the drug dog to sniff the car's interior. At that time, the patrol officer informed Powers that, if the drug dog did not alert to anything in the interior of her vehicle, he would only issue her a citation for her failure to provide proof of insurance. Once the drug dog alerted on the exterior of Powers's car, the scope of the stop was extended from general questioning during a traffic stop to a drug investigation. The dog subsequently alerted on the center console inside the vehicle, where the narcotics officer discovered controlled substances and paraphernalia. Powers was then placed under arrest.

Relying on *Aguirre*, Powers argues that, because the patrol officer did not begin issuing her a citation for failure to provide proof of insurance prior to the drug dog sniff of the exterior of her car, the patrol officer abandoned the initial purpose for the stop and focused the investigation on Powers's possible drug activity. In *Aguirre*, the driver had provided his license, registration, and proof of insurance and the officers were no longer inquiring about Aguirre's criminal history or following up on information received about Aguirre from dispatch. As a

² The officer testified that, in addition to his routine call to Boise dispatch, he made an additional call to Nampa dispatch due to Powers's recent move there.

result, this Court held that the officers had abandoned the investigation of the initial traffic stop prior to the drug dog sniff and affirmed the district court's granting of the motion to suppress. *Aguirre*, 141 Idaho at 564, 112 P.3d at 852. Here, like the officer in *Parkinson*, the patrol officer was continuing an investigation related to the traffic stop during the dog's sniff of the vehicle's exterior. The recording reveals that the patrol officer was still receiving information from dispatch regarding Powers's criminal history at the time that the narcotics unit arrived and continued to discuss that history with Powers for about two minutes after she exited the vehicle and the drug dog began its exterior sniff. Such investigation into Powers's criminal history and possible weapons charges was a part of the ordinary inquiries of a traffic stop and therefore did not extend the scope of the stop. As mentioned above, the testimony at the hearing on the motion to suppress revealed that the drug dog alerted on Powers's vehicle within fifteen seconds of its external sniff. At that time, probable cause existed to extend the traffic stop to search the interior of Powers's vehicle for weapons or drugs. *See State v. Gallegos*, 120 Idaho 894, 898, 821 P.2d 949, 953 (1991). Therefore, the district court did not err by concluding that the scope of the traffic stop was not unreasonably extended by the use of the drug dog.

IV.

CONCLUSION

The district court's finding that the officer stopped Powers for crossing a limit line at the intersection at 28th and Bannock streets was supported by substantial evidence and was therefore not clearly erroneous. In addition, the district court did not err by concluding that the scope of the traffic stop was not unreasonably extended by the use of a drug dog. Therefore, the district court did not err in denying Powers's motion to suppress. Accordingly, Powers's judgment of conviction for two counts of possession of a controlled substance is affirmed.

Chief Judge GRATTON and Judge LANSING, **CONCUR.**