

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 38172

STATE OF IDAHO,	)	2011 Unpublished Opinion No. 662
	)	
<b>Plaintiff-Respondent,</b>	)	<b>Filed: October 17, 2011</b>
	)	
v.	)	<b>Stephen W. Kenyon, Clerk</b>
	)	
<b>GUSTAVO MARQUEZ ACOSTA,</b>	)	<b>THIS IS AN UNPUBLISHED</b>
	)	<b>OPINION AND SHALL NOT</b>
<b>Defendant-Appellant.</b>	)	<b>BE CITED AS AUTHORITY</b>
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Kathryn A. Sticklen, District Judge. Hon. James Cawthon, Magistrate.

Order of the district court affirming the magistrate’s denial of motion to dismiss and denial of motion to suppress, affirmed.

Hammond Law Office, PA; Richard L. Hammond, Caldwell, for appellant.

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

GRATTON, Chief Judge

Gustavo Marquez Acosta appeals from the district court’s order affirming the magistrate’s denial of his motion to dismiss and denial of his motion to suppress. We affirm.

**I.**

**FACTUAL AND PROCEDURAL BACKGROUND**

Acosta was stopped by an Idaho State Police Trooper on Interstate-184 for weaving within his lane and making an improper lane change. The officer detected a strong odor of alcohol on Acosta’s breath and from within the vehicle. He noticed that Acosta’s eyes were bloodshot and asked if he had been drinking. Acosta admitted to consuming two beers and the officer asked him to step out of the vehicle. The officer realized that Acosta’s primary language was Spanish and requested a Spanish-speaking officer to assist. The officer administered, in English, several field sobriety tests (FSTs) which Acosta failed. The assisting officer arrived and aided in re-administering one of the tests in Spanish. Acosta similarly failed this test and was

placed under arrest for driving under the influence of alcohol (DUI). Subsequent breath alcohol test results were over the legal limit.

Acosta received a citation for DUI, first offense, Idaho Code §§ 18-8004(1)(a); 18-8005(1), and was ordered to appear before a magistrate between March 10 and March 17, 2009. Acosta appeared on March 16 and was informed that he could not enter a plea because the State had not yet filed the citation. On March 17, the State filed an amended citation charging Acosta with a greater crime of DUI, second offense, I.C. §§ 18-8004(1)(a); 18-8005(4). That same day, the magistrate conducted an ex parte hearing with the State and found probable cause for the amended charge. Acosta was served with the new citation and ordered to appear between April 15 and April 29, 2009.

Acosta pled not guilty to the amended charge and filed a motion to dismiss on the grounds that the State failed to seek leave to amend the citation. Acosta filed a separate motion to suppress and a motion to dismiss asserting that the case should be dismissed for lack of probable cause, arguing particularly that the FSTs results should not be considered in the determination of probable cause because the instructions were not given in Spanish, Acosta's native language. The magistrate denied both motions and Acosta entered a guilty plea, preserving his right to appeal.

Acosta appealed the denial of his motions to the district court which affirmed the magistrate's decisions. Acosta again appeals.

## II.

### ANALYSIS

#### A. Amended Citation

Acosta argues that his constitutional and statutory rights were violated because: (1) the citation he received upon arrest was not filed with the court until after the date set for his appearance, denying him the right to plead to the initial charge; (2) the State did not seek leave to amend the citation to DUI, second offense; and (3) the process rendered his court appearance beyond the twenty-one-day requirement. First, Acosta makes no attempt in his opening brief to identify a constitutional or statutory right which he contends was violated. In his reply brief, Acosta cites generally to cases which state that a defendant has due process rights, but makes no argument of how his due process rights were violated under the circumstances. A party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263,

923 P.2d 966, 970 (1996). We will not consider Acosta's constitutional and statutory rights claims.

Acosta's argument rests solely upon Idaho Misdemeanor Criminal Rules 3(d) and 5(a) and (d). Idaho Misdemeanor Criminal Rule 5(a) states that the "citation shall require the defendant to appear in court on the citation at the time certain which shall not be less than five (5) nor more than twenty-one (21) days after the date of the citation." In addition, I.M.C.R. 5(a) provides that "[i]f a defendant appears on a citation within the time stated in the citation and the citation has not been delivered to the court, the court may dismiss the citation." Idaho Misdemeanor Criminal Rule 3(d) states:

The court may amend or permit to be amended any process or pleading at any time before the prosecution rests including the alleging of a lesser included offense, but no greater or different offense may be charged if substantial rights of the defendant are prejudiced. If an amendment of a citation complaint is made, the court, may, in its discretion, grant a continuance of the trial for good cause.

In his opening brief, Acosta makes no argument that the magistrate abused its discretion in any fashion. He makes only a conclusory assertion in his reply brief that the magistrate abused its discretion by denying the motions. Once again, a party waives an issue on appeal if either authority or argument is lacking. *Zichko*, 129 Idaho at 263, 923 P.2d at 970.

In any event, no abuse of discretion has been shown. When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

First, Acosta has failed to demonstrate any right to enter a plea on an initial citation. Second, in this case, the State received permission for the amended citation on the day it was filed because the magistrate found probable cause for DUI, second offense, and allowed the State to proceed with its case. Acosta has shown no violation of his rights relative to the probable cause hearing under I.M.C.R. 4(e). Thus, the State did not improperly amend the citation. Third, the initial citation, as well as the amended citation, did as required by I.M.C.R. 5(a), set the appearance within twenty-one days. Finally, Acosta has demonstrated no prejudice to his

substantial rights. He argues that he had a right to plead to the lesser charge in the initial citation which was prejudiced because he was precluded from doing so, and the amended citation exposed him to the greater offense of DUI, second offense. As noted, Acosta has shown no right to plead to the initial charge. Moreover, prejudice of the nature claimed by Acosta would always flow from an amendment to add or increase charges. Prejudice, in this context, is in the surprise or inability to adequately prepare or present a defense, which has not been shown by Acosta. *Cf. State v. Montoya*, 140 Idaho 160, 165, 90 P.3d 910, 915 (Ct. App. 2004). Acosta has failed to demonstrate an abuse of discretion by the magistrate.

#### **B. Probable Cause**

Acosta contends that his rights under the Fourth Amendment were violated because the officer lacked probable cause for his arrest. On appeal, he also asserts that the State violated his rights under both the federal and state constitutional rights to due process and equal protection when field sobriety tests were not administered in Spanish, his native language. Acosta did not argue due process and equal protection violations to the magistrate. While he attempted to insert these issues into the appeal to the district court, the district court analyzed his claim under probable cause. Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Therefore, we will not consider Acosta's due process and equal protection claims.

Acosta asserts that the officer lacked probable cause to arrest him. In particular, he contends that the FSTs were invalid and should have been suppressed or disregarded in the probable cause analysis because he had a constitutional right to have the instructions given in Spanish. Acosta argues that without the FSTs, there was no probable cause to arrest him for DUI, and the magistrate should have accordingly dismissed the case. As noted, we will not consider whether Acosta had a constitutional right to receive the FSTs instructions in Spanish. However, we will consider the FSTs in the context of the probable cause analysis.

This Court's review of a probable cause determination is bifurcated. We defer to the lower court's findings of fact when supported by substantial evidence. *State v. Armbruster*, 117 Idaho 19, 784 P.2d 349 (Ct. App. 1989). However, we exercise de novo review over the question whether the facts as found constitute probable cause. *State v. Middleton*, 114 Idaho 377, 380, 757 P.2d 240, 243 (Ct. App. 1988). Probable cause is the possession of information that would lead a person of ordinary care and prudence to believe or entertain an honest and

strong presumption that a person they have placed under arrest is guilty of a crime. *See State v. Julian*, 129 Idaho 133, 136, 922 P.2d 1059, 1062 (1996).

This Court has previously held that probable cause to arrest a suspect for DUI may exist, absent any FSTs results. *Arnbruster*, 117 Idaho at 20, 784 P.2d at 350 (superseded by statute on other grounds). In *Arnbruster*, a state police officer stopped the defendant for crossing the fog line twice and driving with a broken taillight. *Id.* The officer testified that the defendant had bloodshot and glazed eyes, smelled of alcohol, and had slurred speech. *Id.* at 19, 784 P.2d at 349. The defendant also admitted to consuming alcohol, and was placed under arrest after failing several FSTs. *Id.* at 19-20, 784 P.2d 349-350. On appeal, the defendant contended that the FSTs were invalid, and that probable cause did not exist without the test results. *Id.* at 20, 784 P.2d 350. We disagreed and held that the defendant's erratic driving, smell of alcohol, admitted consumption of alcohol, slurred speech, and bloodshot eyes were sufficient to support probable cause for DUI. *Id.*

Even if we disregard the FSTs evidence, the officer had probable cause to arrest Acosta.<sup>1</sup> The arresting officer had nearly ten years of experience and was a master DUI instructor. Initially, Acosta passed the officer in the lane of travel next to the side of the road where the officer was parked, rather than moving to the lane further away, as would be expected. The magistrate found that, after the officer began to follow, Acosta moved from the left side of his lane of travel to the right, coming extremely close to the fog line, and then moved back again to the left side of the lane. Then, Acosta activated his turn signal for several seconds, but did not change lanes. Acosta next moves back to the right side of the lane of traffic and then again to the left and crosses over the divider line into the other lane of travel. Only after he was in the other lane of travel did he activate his blinker for two blinks and then turn it off. After the officer activated his overhead lights to perform the stop, Acosta pulled to the left side of the road and stopped with his vehicle a quarter to halfway into the left lane of travel. The officer signaled

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<sup>1</sup> We do not hold that the FSTs evidence cannot be considered. First, the magistrate found that the officer was “able to administer the field sobriety tests to Mr. Acosta.” Additionally, the magistrate found that “Mr. Acosta, despite his limited ability with English, was able--it's apparent from the video in some form--to converse with the trooper. He's apparently able to understand the instructions related to the test.” These factual findings are supported by the record. Finally, the second Spanish-speaking officer assisted in re-administering one of the FSTs, and Acosta failed as he had before.

Acosta to move to the right lane shoulder. Upon making contact, the officer noticed a strong smell of alcohol coming from the vehicle as well as Acosta's breath. Acosta's eyes were bloodshot and he admitted to consuming two beers. The magistrate's findings are supported by our independent review of the record and clearly demonstrate that the officer had probable cause to arrest Acosta for DUI without regard to the FSTs.<sup>2</sup>

### **III. CONCLUSION**

Acosta has failed to demonstrate that his rights were violated or that the magistrate abused its discretion in regard to the filing of the amended citation. Ample evidence supported the determination of probable cause to arrest Acosta for DUI. The district court's decision affirming the magistrate's denial of Acosta's motions to dismiss and suppress is affirmed.

Judge LANSING and Judge GUTIERREZ **CONCUR.**

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<sup>2</sup> Acosta appears to argue that, on the other hand, a DUI suspect has a right to have FSTs performed in order to dispel or disprove intoxication. Acosta cites no direct authority for this proposition, and we are aware of none.