

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37096

STATE OF IDAHO,)	2011 Unpublished Opinion No. 632
)	
Plaintiff-Respondent,)	Filed: September 26, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
BRIAN SCOTT CLINK,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Cassia County. Hon. Michael R. Crabtree, District Judge.

Judgment of conviction and unified sentence of ten years, with a minimum period of confinement of one year, for drug trafficking in marijuana, affirmed

Molly J. Huskey, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Russell J. Spencer, Deputy Attorney General, Boise, for respondent.

GRATTON, Chief Judge

Brian Scott Clink pled guilty to drug trafficking in marijuana, Idaho Code § 37-2732B(1). The district court sentenced Clink to a unified term of ten years with one year determinate. Clink appeals from his judgment of conviction and sentence, asserting that the district court erred in denying his motion to suppress evidence, and that the district court abused its discretion by imposing an excessive sentence.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On January 22, 2009, Idaho State Police Officer Barrett was involved in a drug interdiction special emphasis patrol. He was parked, observing traffic in the median of Interstate 84 in Cassia County, when he noticed a Toyota extended-cab pickup truck traveling in the westbound lane of I-84. He saw that the vehicle had oversized tires that extended beyond or outside the coverage of the truck’s fenders, in possible violation of I.C. § 49-949(2)(a), which

requires fenders to extend to at least the width of the tire on the vehicle. Officer Barrett followed the vehicle, confirmed his observation regarding the equipment violation, and stopped the vehicle.

Officer Barrett parked his patrol car to the rear of the vehicle and as he approached the driver, he observed a total of three people in the vehicle. The trooper instructed Clink, the driver, to step out of the vehicle and directed him to the area between the rear of the vehicle and the front of the patrol car.

Officer Barrett asked Clink where he was traveling from. Clink said they were coming from Arizona. Officer Barrett asked Clink how much he had to drink that day and mentioned that he noticed Clink's eyes were bloodshot. Clink stated that a gunshot wound caused his eye to water in cold weather. Officer Barrett continued to ask questions regarding where Clink had been. Clink said they had been in Phoenix, near the university, and gave an unclear description of where this area was located in Phoenix. Officer Barrett instructed Clink to stand near the front of the patrol car and Officer Barrett approached the passenger side of the vehicle to speak with the passengers. The elapsed time of the traffic stop at this point was approximately two minutes.

Officer Barrett opened the passenger door and asked the passengers where they were traveling from. One of them said they were coming from Tucson. Officer Barrett told the passengers he smelled a very strong odor of marijuana in the vehicle. One of the passengers responded, "I understand." Officer Barrett then asked the passengers to be honest and tell him where the marijuana was located. One of the passengers told Officer Barrett there was a "joint" and a pipe in the door handle on the passenger door. These items were in Officer Barrett's plain sight after his attention was directed to them and he seized the items. Barrett asked the passengers if there was additional marijuana in the vehicle, but did not receive an answer. Officer Barrett asked one of the passengers to exit the vehicle and placed him under arrest for possession of marijuana and possession of paraphernalia. At this point, approximately four minutes had elapsed.

While Officer Barrett was speaking with the passengers, additional police officers arrived, including a police officer with a drug dog. One of these officers asked the remaining passenger to exit the vehicle. The drug dog then entered the vehicle and alerted on the backseat. At this point, approximately seven minutes had elapsed. The interior of the vehicle was then searched and two pounds of marijuana was located under the backseat. Officer Barrett returned

to where Clink had been standing and told him that the reason he had stopped him was because of the fender violation. After the officers removed the marijuana from the vehicle Clink stated, “you might as well cuff me and take me now.”

The two remaining passengers were placed under arrest, advised of their *Miranda*¹ rights, and all three vehicle occupants were then taken to the Cassia County Jail. The total time elapsed from the initiation of the traffic stop to the seizure of the marijuana under the backseat was approximately thirteen minutes.

The State charged Clink with trafficking in marijuana. Clink filed a motion to suppress and, following a hearing, the district court denied the motion. Pursuant to a plea agreement, Clink conditionally pled guilty, reserving his right to appeal both the adverse ruling on his motion to suppress as well as his sentence, and the prosecutors agreed to recommend a unified sentence of ten years with one year determinate and the minimum fine of \$5,000. The district court entered a judgment of conviction and sentenced Clink to a unified term of ten years with one year determinate and the minimum fine. Clink filed a timely notice of appeal.

III. ANALYSIS

Clink contends that the district court abused its discretion by denying his motion to suppress because the stop of his vehicle was unlawfully extended, requiring the suppression of all evidence obtained after that point. In the alternative, Clink contends that the district court abused its discretion by imposing an excessive sentence of ten years with one year determinate upon his guilty plea to trafficking in marijuana. The State contends Clink has failed to establish that the traffic stop was unlawfully extended. It also contends that Clink is estopped from challenging his sentence because of invited error or, in the alternative, that the district court did not abuse its discretion when it sentenced Clink.

A. Motion to Suppress

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). At a

¹ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

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).

The Fourth Amendment to the United States Constitution guarantees every citizen the right to be free from unreasonable searches and seizures. *State v. Salois*, 144 Idaho 344, 347, 160 P.3d 1279, 1282 (Ct. App. 2007); *State v. Cerino*, 141 Idaho 736, 737, 117 P.3d 876, 877 (Ct. App. 2005). Its purpose is “to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement agents, in order to ‘safeguard the privacy and security of individuals against arbitrary invasions.’” *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (quoting *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312 (1978)). The stop of a vehicle constitutes a seizure of its occupants and is therefore subject to Fourth Amendment restraints. *Prouse*, 440 U.S. at 653; *State v. Roark*, 140 Idaho 868, 870, 103 P.3d 481, 483 (Ct. App. 2004); *State v. Robertson*, 134 Idaho 180, 184, 997 P.2d 641, 645 (Ct. App. 2000); *State v. Flowers*, 131 Idaho 205, 208, 953 P.2d 645, 648 (Ct. App. 1998); *State v. Sevy*, 129 Idaho 613, 614-15, 930 P.2d 1358, 1359-60 (Ct. App. 1997); *Atkinson*, 128 Idaho at 561, 916 P.2d at 1286. Although a vehicle stop is limited in magnitude compared to other types of seizures, it is nonetheless a “constitutionally cognizable” intrusion and therefore may not be conducted “at the unbridled discretion of law enforcement officials.” *Prouse*, 440 U.S. at 661. Because a traffic stop is limited in scope and duration, it is analogous to an investigative detention and is analyzed under the principles set forth in *Terry v. Ohio*, 392 U.S. 1 (1968). *Prouse*, 440 U.S. at 653; *State v. Stewart*, 145 Idaho 641, 644, 181 P.3d 1249, 1253 (Ct. App. 2008).

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); *Flowers*, 131 Idaho at 208, 953 P.2d at 648. 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). Clink does not dispute that Officer Barrett had reasonable suspicion to stop his vehicle for the fender violation.

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). An investigative 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). There is no rigid time-limit for determining when a detention has lasted longer than necessary; rather, a court must consider the scope of the detention and the law enforcement purposes to be served, as well as the duration of the stop. *United States v. Sharpe*, 470 U.S. 675, 685-86 (1985); *State v. Soukharith*, 570 N.W.2d 344, 355 (Neb. 1997). Where a person is detained, the scope of detention must be carefully tailored to its underlying justification. *Roe*, 140 Idaho at 181, 90 P.3d at 931; *Parkinson*, 135 Idaho at 361, 17 P.3d at 305. 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. However, 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. Any routine traffic stop might turn up suspicious circumstances that could justify an officer asking further questions unrelated to the stop. *State v. Myers*, 118 Idaho 608, 613, 798 P.2d 453, 458 (Ct. App. 1990). The officer's observations, general inquiries, and events succeeding the stop may--and often do--give rise to legitimate reasons for particularized lines of inquiry and further investigation by an officer. *Id.* Accordingly, the length and scope of the initial investigatory detention may be lawfully expanded if there exist objective and specific articulable facts that justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity. *Id.*

Clink contends that Officer Barrett unlawfully extended the stop of his vehicle because he "abandoned" the investigation into the purported basis for the traffic stop--the width of

Clink's tires--and instead "immediately engaged [Clink] and his passengers in questioning on entirely unrelated matters in pursuit of a drug interdiction investigation." He argues that Officer Barrett lacked any reasonable, articulable suspicion to support those questions; and thus, the questions unlawfully extended the stop of Clink's vehicle. The State argues that Officer Barrett did not extend the stop and that even if the two minutes between stopping the vehicle, talking to Clink, and then talking with the passengers extended the stop, it was not unlawful.

The Idaho Supreme Court has stated "a police officer's brief detention of a driver to run a status check on the driver's license, after making a valid, lawful contact with the driver, is reasonable for purposes of the fourth amendment." *State v. Godwin*, 121 Idaho 491, 495, 826 P.2d 452, 456 (1992). An officer conducting a legal traffic stop may permissibly ask for consent to search the vehicle while the driver is still detained, when that request only momentarily extends the stop. *State v. Silva*, 134 Idaho 848, 852-53, 11 P.3d 44, 48-49 (Ct. App. 2000). Brief inquiries or other investigation techniques unrelated to the initial purpose of the stop do not necessarily violate a detainee's Fourth Amendment rights if they do not extend the duration of the stop. *Roe*, 140 Idaho at 181-82, 90 P.3d at 931-32. In *Parkinson*, 135 Idaho at 362-63, 17 P.3d at 306-07, this Court held that it was permissible for one officer to question a vehicle's driver about drugs and weapons and to take a drug dog around the vehicle while another officer was busy checking with dispatch on the driver's status and writing out a traffic citation. It is also within an officer's discretion to instruct the driver to exit or remain in the vehicle during a lawful stop. *Id.* at 363, 17 P.3d at 307.

Even though detentions must ordinarily be temporary and last no longer than necessary to effectuate the purpose of the stop, when the investigative detention discloses evidence of other possible crimes, the officer may expand the duration and focus of the detention. *State v. Brumfield*, 136 Idaho 913, 916-17, 42 P.3d 706, 709-10 (Ct. App. 2001) (holding that a stop to investigate the operation of an unregistered automobile justifiably developed into an investigation for drug activity and the sixteen-minute delay in waiting for the canine unit was reasonable). The length and scope of an investigatory detention may be expanded if objective and specific, articulable facts exist to justify the suspicion that a detained person is engaged in criminal activity. *State v. Grantham*, 146 Idaho 490, 496, 198 P.3d 128, 134 (Ct. App. 2008). In *Grantham*, this Court held that the officer's observations during the encounter together with his training and experience gave rise to reasonable suspicion and that the officer's request for

background information and a drug dog to search the vehicle were held to be reasonable methods of investigating this suspicion. *Id.* at 497, 198 P.3d at 135.

Clink relies on *State v. Aguirre*, 141 Idaho 560, 112 P.3d 848 (Ct. App. 2005), to support his contention that law enforcement unlawfully extended the stop of his vehicle. In *Aguirre*, this Court found that the probable cause to search the interior of defendant Aguirre's truck was acquired through an unconstitutional expansion of the traffic stop. *See id.* at 564, 112 P.3d at 852. An officer assisting in a traffic stop noticed Aguirre "circling" the scene; he also recognized the vehicle and recognized Aguirre as a convicted felon with a history of firearm use. *Id.* at 561, 112 P.3d at 849. The officer followed Aguirre until two more officers arrived. Then the officer decided to issue a citation after he did not come to a complete stop prior to entering the roadway. *Id.* One of the newly-arrived officers pulled Aguirre over. *Id.* The officer that had followed Aguirre made contact, asked why Aguirre had been circling the area of the other stop, and then requested Aguirre's driver's license, registration, and insurance. *Id.* at 562, 112 P.3d at 850. After receiving the documents, the officer asked if Aguirre had anything illegal in his vehicle, and Aguirre indicated that he did not. The officer then asked permission to search the truck; Aguirre refused. *Id.* The officer told Aguirre that he would run a drug dog around the pickup. *Id.* The drug dog alerted on the rear wheel well, but did not alert in the cab of the vehicle. Nevertheless, the officer searched the cab of Aguirre's vehicle and found a semi-automatic handgun. *Id.* At that point, Aguirre was arrested for illegal possession of a firearm. *Id.*

In coming to the conclusion that the police had unlawfully extended the traffic stop, this Court found multiple facts were significant. *Id.* First, after Aguirre had been stopped, there was no effort made by the police to pursue the initial purpose of the stop. *Id.* at 562-63, 112 P.3d at 850-51. Second, the deputy requested Aguirre's license, registration and proof of insurance although his driving information was available to the officers even before he was stopped and he had pulled over at their signal. *Id.* Third, there were multiple officers on hand, but "the collective effort of the police was uniformly directed at a drug investigation completely unrelated to the traffic stop." *Id.* at 564. 112 P.3d at 852. These things taken together showed the original purpose of the stop, to issue a traffic citation, was "immediately abandoned." *Id.* Finally, the officers acted without reasonable suspicion of a drug-related offense when they requested permission to search and later employed a drug dog. *Id.* The Court found that "[i]n light of all

these facts, . . . the use of the drug dog impermissibly extended the duration of the detention authorized by *Terry*.” *Id.*

This case is factually distinguishable from *Aguirre*. The officer in this case was alone for the first few minutes while dealing with Clink and his passengers. The officer did not “immediately abandon” the initial purpose of the stop--Clink’s traffic violation. The brief two-minute exchange between Officer Barrett and Clink and then the passengers, which turned up evidence of a more serious crime, was not an immediate abandonment of the traffic infraction investigation. Asking Clink to step outside the vehicle, whether for convenience or safety, was reasonable. *See Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977). Officer Barrett next asked Clink where he was coming from. Asking a driver about his destination and purpose is generally considered part of a reasonable investigation during a traffic stop. *See Grantham*, 146 Idaho at 496, 198 P.3d at 134. When Officer Barrett questioned Clink about where they were coming from, he responded that they were coming from Arizona, and upon further questioning, Clink stated that they were in Phoenix, near the university, but was unsure of the exact location. Clink then told Officer Barrett that his brother would know better where the college was, signaling back toward the truck. Officer Barrett then contacted the passengers in the truck, following up on the question of where they were coming from and asking for identification. A police officer may also generally request identification from anyone legitimately stopped without implicating the Fourth Amendment. *See Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 185-86 (2004). This rule applies equally to passengers. *See United States v. Diaz-Castaneda*, 494 F.3d 1146, 1152-53 (9th Cir. 2007). During this exchange with the passengers, Officer Barrett detected the overwhelming odor of marijuana and, upon asking that it be turned over, was directed to marijuana and paraphernalia in plain sight. While Officer Barrett did not immediately ask for Clink’s license and registration, Clink’s unclear response to Officer Barrett’s first question--where they were coming from--and Clink’s suggestion that his brother would know better, led Officer Barrett back to the truck. Officer Barrett’s activity and questions did not constitute an immediate abandonment of the purpose of the stop. After the encounter with the passenger indicating the location of the marijuana, Clink was advised of the reason he was initially stopped.

Officer Barrett, upon making contact with Clink, noticed that his eyes were bloodshot. Although Clink told Officer Barrett that the reason for his bloodshot eyes was because he had been

shot in the eye which caused them to water in cold weather, Barrett was under no obligation to believe this explanation. While bloodshot eyes alone are not enough to establish reasonable suspicion that a crime is being committed, *see State v. Grigg*, 149 Idaho 361, 364, 233 P.3d 1283, 1286 (Ct. App. 2010), bloodshot eyes, coupled with other evidence, may be enough to establish reasonable suspicion. *See State v. Pick*, 124 Idaho 601, 605, 861 P.2d 1266, 1270 (Ct. App. 1993) (holding that reasonable suspicion existed to detain defendant when defendant had bloodshot eyes, admitted to consuming alcohol, and slurred her speech). When Clink's vehicle was stopped, Officer Barrett noticed that a passenger was smoking a cigarette, which he knew from his training and experience was sometimes done to mask the odor of alcohol or drugs. *See Brumfield*, 136 Idaho at 916-17, 42 P.3d at 709-10 (recognizing the significance of suspects using masking odors, such as a cigar, in attempting to cover drug odors). Clink's bloodshot eyes, the passenger smoking a cigarette, and Clink's inability to answer Officer Barrett's questions with certainty about where they were coming from, instead deferring to his passenger to answer that question, reasonably led Officer Barrett to continue his investigation to the point of detecting the marijuana and are specific, articulable facts that constituted reasonable suspicion justifying extension of the stop.²

Officer Barrett acted within the bounds of a reasonable investigation. Clink has failed to demonstrate that the district court erred in determining that extension of his detention was not unlawful or unreasonable under the circumstances. Accordingly, the district court did not err in denying Clink's motion to suppress the marijuana or any statements made by Clink.

B. Excessive Sentence

Clink next challenges the indeterminate portion of his sentence as excessive under the facts and circumstances of his case. The State argues that Clink is estopped from challenging the length of his sentence under the doctrine of invited error, or in the alternative that the district court did not abuse its discretion when sentencing Clink.

² Clink also claims this case is analogous to *State v. Gutierrez*, 137 Idaho 647, 51 P.3d 461 (Ct. App. 2002), but once again this case is distinguishable on the facts. In *Gutierrez*, this Court found that it was impermissible for an officer to question a driver about matters unrelated to the traffic stop *after* the officer had fulfilled the purpose of the stop by issuing a written warning to the driver. *Id.* at 653, 51 P.3d at 467. "The original purpose for the detention of [the defendant] and his passengers was to issue a warning or citation for speeding, and that purpose was accomplished when [the officer] issued the warning. The continued detention thereafter to question [the defendant] about drugs, alcohol and weapons cannot be justified as part of the traffic stop." *Id.* In this case, the officer had not fulfilled the purpose of the traffic stop when he questioned Clink and his passengers.

The doctrine of invited error applies to estop a party from asserting an error when his or her own conduct induces the commission of the error. *Thomson v. Olsen*, 147 Idaho 99, 106, 205 P.3d 1235, 1242 (2009). One may not complain of errors one has consented to or acquiesced in. *Id.* In short, invited errors are not reversible. *Id.* Clink agreed to the plea agreement negotiated through counsel. At sentencing, Clink's attorney urged the district court to accept the plea agreement including the sentencing recommendation. The district court imposed the recommended sentence. Clink invited any error relative to the length of his sentence and may not assert it on appeal.

Despite any invited error, Clink has not demonstrated that his sentence was excessive. An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

Clink asserts that the district court abused its discretion when it failed to properly consider the mitigating factors in his case, specifically his potential for rehabilitation. Contrary to Clink's assertion, upon complete review of the record, we conclude that the district court properly considered the mitigating factors as well as the goals of sentencing and did not abuse its discretion in imposing sentence. Clink has failed to demonstrate that the district court abused its discretion.

IV.
CONCLUSION

The district court did not err in denying Clink's motion to suppress. The district court did not abuse its discretion in sentencing Clink. Accordingly, Clink's judgment of conviction and sentence are affirmed.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**