

IN THE SUPREME COURT OF THE STATE OF IDAHO

JASMINE REAGAN)
 Petitioner)

vs)

IDAHO TRANSPORTATION DEPARTMENT)
DRIVER SERVICES DEPARTMENT)
 Respondent)

Case No. CV-47865-2020

RESPONDENT’S BRIEF

BRIEF OF RESPONDENT

JUDICIAL REVIEW FROM THE IDAHO DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT FOR BONNER COUNTY

HONORABLE JAY GASKIL
DISTRICT COURT JUDGE

Fred Palmer
Attorney at Law
3997 Bottle Bay Rd.
Sandpoint, ID 83860

Susan K. Servick
Attorney at Law
1424 Sherman Ave. #300
Coeur d’ Alene, ID 83814

Attorney for Respondent

Attorney for Appellant

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II. STATEMENT OF CASE

A. Nature of case

Respondent accepts Appellants statement as presented.

B. Course of Proceedings

Respondent accepts Appellants statement as presented.

C. Statement of Facts

D. Respondent adds to Appellants Statement of Facts as follows:

On March 3rd, 2019, Corporal J. Deal, Sandpoint City Police Dept.(Officer Deal). was dispatched on a disclosed informant complaint of erratic driving occurring in Bonner County while descending down Schweitzer Mountain Road. The reporting party, Tracy Dubai, was not associated with law enforcement. No driving was observed by Officer Deal or any other member of law enforcement. She followed the vehicle until it parked at 210 Seven Sisters Rd in Kootenai, Id. Officer Deal responded to the 210 Seven Sisters address and located the vehicle in the drive way. His chest cam recorded all audio and video activity from the time he arrived through transport to the Bonner County jail “R. p.73”.

As is obvious from a review of Officer Deal’s chest cam “R. p.73”, from the start he was assuming Dubai’s report was true and he was assuming the Reagan was impaired by alcohol while driving. This was a DUI investigation. Officer Deal did not ask Dubai to sign a citation for Reckless Driving, nor did he sign and deliver a citation to Eric Blomdahl, who was on the porch alone barbequing when Officer Deal arrived.

High-lights of their exchange, starting at about 0.40 on the DVD counter (downloaded from Officer Deal’s chest cam) are:

Q Can you get her for me?

A. What's this about?

A. About her driving. I mean, we can make the real easy or really hard. You don't want to get her in trouble. I don't want to get her in trouble. But I have to do my job. She's probably been drinking, right? From what I've gotten from people following her down the mountain, how often she went into the ditch, could have been killed or killed someone else. So bad, some people from Washington actually followed her here. Probably she's been drinking. I would assume that. I know you've had a little bit to drink. I know she's had one in the past. So, again, let's make it easy for me. Blomdahl enters the home, speaks to Reagan and Reagan comes out "R. p.73".

Blomdahl testified, for multiple reasons, he felt he was required to enter the home and get Reagan "Tr. p.13-17". Once he entered, he said "Jasmine you have to go-there is a police officer outside. You have to talk to him." "Tr. 17, L.10-11".

Reagan testified Blomdahl looked scared and nervous when he told her she had to go outside. "Tr. p.18, L.21-25" Reagan came out. After a brief conversation, Officer Deal conducted field testing. After the field sobriety test was completed, he led Reagan to his patrol car. As she was being handcuffed, Reagan asked if she was being arrested. Officer Deal said yes "R. p.73 at 18: 42-50 on counter". He again told her she was under arrest when she asked about caring at home for her daughter "R. p.73 at 19:50 on counter". He then played the advisory tape, administered a breath test and transported Reagan to the Bonner County Sheriff's Office for booking.

Prior to the administrative hearing, counsel for Reagan requested a subpoena of all recordings of law enforcement contacts with Dubay. The Hearing Officer refused to issue

this subpoena, stating it was irrelevant. (R. pgs.62, 68). Counsel then advised the Hearing Officer that this recording was relevant because Officer Deal did not observe Reagan's driving and he did not have a warrant. (R. p. 70).

With these additional facts, Respondent accepts Appellant's statement of facts as true and accurate

III. ADDITIONAL ISSUES PRESENTED ON APPEAL

- A. Was Reagan seized by Officer Deal in violation of her Right to Privacy?
- B. Was the failure to issue a subpoena duces tecum a violation of Reagan's Right to Procedural Due Process?
- C. Is Respondent entitled to Attorney's Fees and Cost?

IV. ARGUMENT

A. Introduction

The parties and the District Court have applied State v Clarke, 165 Idaho 393, 446 P.3d 451 to the DUI arrest of Reagan from the initial ALS Hearing to this appeal.

Appellant seeks to distinguish Clarke, but it has never disputed Clarke's application to a DUI. The District Court's decision applied Clarke without addressing if a DUI misdemeanor is within the scope of Clarke

Respondent submits that any objection to Clarke's application to a DUI arrest improperly raises a new issue not raised on appeal to the District Court. This issue has been waived by Appellant.

B. Response to Standard of Review

Idaho Code 67-5279 sets the standards of review in administrative appeals. An

Appellate Court may, among other reasons, overturn an agency's decision where it's findings, inferences, conclusions, or decisions violate constitutional provisions or are arbitrary, capricious or an abuse of discretion (Idaho Code 67-5279(2)(a)(d)).

The reviewing court is obligated to reverse an administrative decision if the substantial rights of an individual have been prejudiced because the administrative ruling was arbitrary and capricious (Allen v Lewis and Clark St. College, 105 Id. 447, 670 P. 2d 858(1983). To meet the arbitrary and capricious test, the agency must articulate a rational connection between the facts found and the conclusions made (Envtl. Def. Ctr., Inc, v E.P.A.,334 F.3D at 858 n. 36 (9th Cir. 2003)).

The court may also overturn an agency decision where its findings, inferences, conclusions, or decisions violate constitutional provisions (Idaho Code 67-5279(2)(a)). The court freely reviews the trial courts application of constitutional principles in light of the facts (St. v Clarke 165 Idaho 393, 446 P.3d 451 (2019)). Here, that review focuses on the Article I, Section 17 of the Idaho Constitution.

C .There was no Legal Cause to Arrest Reagan

For purposes of brevity, Appellant's two issues have been treated by Respondent's first argument. If Reagans arrest was without legal cause, the legality of her stop is moot.

The District Court found there was no legal cause to arrest Reagan for two reasons. First, the Hearing Officer's review on finding probable cause was based, in part, on irrelevant facts. Second, The District Court ruled as a whole the

Hearing Officer's finding of probable cause to arrest was made without substantial evidence. As such, the Hearing Officer's ruling was arbitrary, capricious or an abuse of discretion.

St. v Clarke, (supra, 165 Idaho 393, 446 P.3d 451 (2019)) resolves the question of legal cause to arrest Reagan. It prohibits the warrantless arrest for completed misdemeanors that are not committed in the officer's presence. Although *Clarke* did not expressly address the constitutionality of warrantless, out of the presence DUI arrests under Idaho Code section 49-1405. *Clarke* did apply its holding to warrantless arrests for "serious offenses" causing "substantial damage to victims and children, as well as the community." (See I.C. section 32-1408(1), as cited by *Clarke*,(supra, *St, Clarke*, 165 Idaho at 399, 446 P.3d at 457.) A suspected DUI is among those "serious offenses" listed in Idaho Code section 14-1405(1). As such, a DUI is subject to the same Constitutional analysis as those "serious " crimes described in Idaho Code section 19-603(6). Therefore, pursuant to the analysis in *Clarke*, the powerful policy considerations which uphold Idaho Code section 14-1405(1)(c) must yield to the requirements of the Idaho Constitution.

Here, the record is clear. Substantial evidence shows Reagan was arrested after the completion of her alleged misdemeanor. Conclusive evidence shows Reagan was arrested before her breath test. Officer Deal told Reagan she was under arrest twice when she was cuffed in the back seat of his patrol vehicle. At this point there was a full scale seizure of Reagan by physical force and show of authority (*State v Ferreira*, 133 Idaho at 479, 988 P.2d at 705). As such, Reagan was under

arrest within the meaning of the Fourth Amendment of the U.S. Constitution, Article I, Section 17 of the Idaho Constitution and Idaho Code 19-602.

The Court has recognized under certain circumstances, even when in handcuffs, a person is being held during an investigative detention. This is not one of those circumstances. Absent a compelling threat of imminent danger to the officer, placing handcuffs on a suspect is not a necessary part of the investigative detention. Reagan's investigative detention was converted into an arrest when she was handcuffed and placed into Officer Deal's patrol car (State v Pannell, 127 Idaho at 424, 901 P.2d at 13250).

1.

Appellant seeks to distinguish Clarke by claiming that in the case of an Administrative suspension, the offending act is not completed until the breath test is taken and failed.

This argument strays. The issue is if Reagan met her burden of proving, when arrested, that there was not legal cause to arrest (Idaho Code 18-8002A(7)(b)). Clarke does not inhibit law enforcement's legal basis to detain a suspect for a DUI investigation or to request evidentiary testing, even if law enforcement did not observe the suspect commit a Vehicle Code violation. However, Reagan was placed under arrest before submitting to evidentiary testing. Therefore, Clarke does apply, rendering the arrest to be without legal cause. The Hearing Officer's finding that there was legal cause for Reagan's arrest was in error. Reagan has met her burden of proof that the Officer did not have legal cause to arrest required by Idaho Code section 18-8002A(7)(b). This provision is presumptively

a progeny of the exclusionary rule, which was described our dearly departed Justice Steven Bistline in *St v Guzman*, 122 Idaho 981, 842 P.2d 660 as:

“...a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal right of the party aggrieved.”

2.

Appellant argues that the Hearing Officer had evidence which created a reasonable suspicion and, thus had legal cause to request evidentiary testing. This argument is based on findings 10-16 of the Hearing Officer’s Findings (R., P 83-84). Appellant claims these findings are legal cause to believe Reagan was DUI despite Clarke. Reagan acknowledges that those cases cited by Appellant in *State v Martinez-Gonzales*, 152 Idaho 775, 275 P.3d 1 (Ct. App. 2012), provide authority to request evidentiary testing on less evidence that officer Deal possessed. However, those cases are pre-Clarke and, at least in *Martinez-Gonzales*, the arrest was made after the breath test was administered.

Appellant may be claiming that law enforcement may independently establish legal cause to arrest even if the misdemeanor was completed out of the presence

of law enforcement. This argument also fails for 2 reasons:

First, under the precedent of Clarke:

“The dispositive issue in this appeal is whether a police officer violates Article I Section 17 of the Idaho Constitution by making an arrest for a misdemeanor offense that occurred outside his presence but for which probable cause exists” (165 Idaho 393 at 396, 446 P.2d 451 at 459).

“In light of the foregoing, based upon the state of the common law in 1889, we conclude that the framers of the Idaho Constitution understood that Article I, section 17 prohibited warrantless arrests for completed misdemeanors.”(165 Idaho 393, p.401, 446 P.2d 451 at 459).

In Clarke, the Defendant admitted committing the act occurring outside police presence (while claiming it was consensual). This admission, like Officer Deal’s field test, provided an independent basis to arrest. Notwithstanding an independent basis, Clarke determined if the completed misdemeanor took place outside the officer’s presence it was unconstitutional.

Further, well before Clarke, the independent source doctrine established if evidence was obtained by exploiting an illegal arrest, the exclusionary rule applies to bar all evidence obtained after the arrest (St. v Weber, 116 Idaho 449, 776 P2d. 458). Weber deals with a factual scenario similar to this case. After an illegal arrest for DUI (not witness the driving or actual physical control), the officer informed Weber he was under arrest, applied handcuffs and place him in her patrol car, played the ALS tape and then administered the breath test. The Court found that because the breath test was so intertwined with the unlawful arrest Weber’s consent to take the breath test did not purge the taint of the illegal arrest. (State v Weber, 116 Idaho at 453, 776 P. 2d at 462).

Second, even though the breath test is civilly required under section 18-2002A with Administrative penalties distinct from criminal penalties, if the Court finds the breath test results were obtained from an independent source, the evidence must still be suppressed. In an administrative civil forfeiture action, currency seized in violation of a constitutionally based knock and announce statute was inadmissible under our exclusionary rule. The Court explained that given the

important policies served by the knock and announce statute and the quasi-criminal nature of the forfeiture proceedings, violations extend to administrative forfeitures. (Richardson v Four Thousand Five Hundred Forty Three Dollars, 120 Idaho 220, 814 P.2d 952 (Ct. App. 1991)) Clarke found that an important constitutional right is the protection against warrantless arrests that occur outside police presence. As in Richardson, the right expressed in Clarke extends to Administrative Suspensions under Idaho Code section 18-8002A. Thus, inadmissible test results acquired under Idaho Code section 18-8002A would not be available as an independent source.

D. Reagan was Seized Illegally

The District Court did not address if Officer Deal violated Reagan's Right to Privacy when he compelled a 3rd party, Eric Blomdahl, to enter Reagan's home and order her to exit her home and come out on its porch to discuss her driving. When Officer Deal arrived at the home, he was acting solely on Dubay's call. Officer Deal had no warrant and apparently did not want to make the effort to obtain one. Inside, everyone was gathering for dinner, Reagan, her 4 yr old daughter, and her daughter's elderly grandmother. Blomdahl was barbequing enchiladas for dinner (Tr. p.14 L.25-p.26, 4). Officer Deal did not follow Reagan to her home. He did not know how long she had been there. This was not in hot pursuit of a possible felon trying to evade law enforcement. Officer Deal knew he could not just walk into the home. Instead he coerced Blomdahl to enter the home and produce the suspect.

Reagan's initial contact with Officer Deal on her porch was not consensual.

Factors to be considered to determine voluntary consent, under the totality of circumstances test, include attitude and tone of the officer and understanding of rights by the subject (*St. v Garcia*, 143 Id 774, 776). Here, the court is asked to focus on whether Reagan was aware of her right to refuse Officer Deal's "request" and if she understood she was free to simply remain in her home and ignore Officer Deal. Reagan contends Officer Deal's use of language, physical movements and tone of voice indicate that compliance to his "request" was required. Officer Deal's hard way/easy way statement was reasonably taken as a threat. Blomdahl, 43, had no prior police contact. He did not know what this meant-hogtied on the porch (Tr. p.14. L7-14)? As Officer Deal spoke, the battery end of his Maglite can be seen on his chest cam video being waived at Blomdahl (R. p.73, Tr p.18, L.7-10). When Blomdahl went inside he felt like it was a requirement (Tr. p.18, L.22). He told Reagan "you have to go...there's a policeman outside. You have to talk to him" (Tr. p.20, L. 10-11). To Reagan, who has known him for a while, Blomdahl appeared like she had never seen him before, nervous and scared. Reagan recalled him saying "you need to go outside right now because there is a policeman officer. You have to go out" (Tr. p.21, L. 21-25). In effect, Blomdahl was involuntarily acting as an agent of law enforcement. Officer Deal was acting on information alleged to have occurred outside his or any other law enforcement officer's presence. This is no different than a warrantless home entry by Officer Deal.

The 4th Amendment applies to protect against warrantless home intrusions by a private party if that party is acting as an instrument or agent of the Government.

The test to determine agency is (1) if the government acquiesced in the intrusive conduct; (2) if the citizen intended to assist law enforcement; and (3) if the citizen acted at the government's request (*Skinner v Railway Labor Executives*, 489 US 602, 614(1989)).

In the absence of exigent circumstances, police may not enter a home without a warrant to arrest for suspected DUI. When the government's interest is to arrest for a minor offense, the presumption of unreasonableness is difficult to rebut (*State v Wren*, 115 Id 618, 621 (*Citing US V Welsh*, 633 US at 749-750)). In *Wren*, prior to a warrantless police entry, the suspect, appearing to be drunk, was seen by a private party serving off the road into a field. The court found hot pursuit for a misdemeanor was not an exigent circumstance. All Officer Deal had to do was obtain a search warrant or have Dubay sign a citation for Reckless Driving which he could then serve himself on Reagan.

The Hearing Officer found, without substantial evidence, that Blomdahl entered voluntarily at Officer Deal's request. All evidence obtained as a result of Blomdahl's entrance was obtained by subterfuge. Officer Deal's tactics were an is a violation of Idaho Code 67-5279(3)(a).

E. Reagan was denied Procedural Due Process

The minimal constitutional due process requirements for administration hearings are timely and adequate notice and opportunity to be heard that is meaningful and appropriate to the nature of the case. . *Hawkins v ITD*, 161 Idaho 173, 384 P.3d 420 (2016)(*citing Bell v Burson*, 402 U.S. 535, 541-42(1971)). In *Hawkins*, the Court took the trouble to outline the repeated warnings it has given to ITD about

its abuse of the subpoena process. (supra, Hawkins v ITD 161 Idaho at 177, 384 P.3d at 424).

1

Here is perhaps the most egregious example to date of ITD'S subpoena abuse. Concerns over the reliability and veracity of the Dubai's information prompted a request for a subpoena duces tecum of all recordings of all contacts with law enforcement (R. p.69). This request was deemed irrelevant by the Hearing Officer (R.p.68). On March 16, 12 days before the ALS hearing, Counsel then emailed the Hearing Officer explaining the recordings were relevant because, among other reasons, Officer Deal "did not observe Mrs. Reagan drive or enter her home. He did not have a warrant"(R.p.70). The reasons for Officer Deal's confrontation and threats made to Blomdahl and his DUI field investigation of Reagan was Dubai's information. The Hearing Officer did not reply to Counsels follow up explanation of the relevance of obtaining a recording of Dubai. At her hearing Reagan argued the failure to issue this subpoena was a due process violation. The Hearing Officer did not address this argument in his ruling.

A review of the Hearing Officer's Findings of Fact shows the relevance of the recordings of the informant's contacts. He finds Officer Deal was entitled to rely on the Dubai's claims as a basis to require Reagan, through Blomdahl, to exit her home. This was a warrantless seizure based solely on Dubai's information. Reliability and veracity of the Dubai and the content of her information is the central issue in determining probable cause. Recordings of the source of that information are clearly relevant.

2.

The mere “possibility” that a recording may have revealed facts discrediting the arresting officer or helped to prepare a defense is insufficient (*supra*. *Hawkins v ITD*, 161 Id 173, 384 P.3d 420 (2016)).

Here, Officer Deal’s sworn affidavit states his probable cause to stop and arrest Reagan was based, in part, on information from Tracey Dubay. He stated Dubay claimed she followed a vehicle down from Schweitzer Ski Resort. The vehicle almost went into the ditch and into oncoming traffic multiple times. A female was driving. She was waisted, had been crying, and her eyes were red. The informant did not say if she personally observed this driving or how she knew the driver was a female, was “waisted” and had blood shot eyes. Deal states when contacted, Reagan denied poor driving and she did not know why the police wanted to talk with her. (R. p. 49). If Reagan’s statement is untrue, she can be held accountable. Dubay, although disclosed, may not necessarily be held accountable. She is a Washington resident according to Deal. (R. p. 73) The record does not show if she provided contact information. Reagan’s statement to Officer Deal is specific evidence that the content of the tip may have been false. Subpoenaing the informant to appear at the hearing was not possible. She was from Washington (R. p. 73). Without the opportunity to review communications with the informant, neither the Hearing Officer nor Reagan was able to determine whose version of the driving was accurate. If produced, the recording would help resolve who was telling the truth.

The recordings content is part of Officer Deal’s Affidavit. It was admissible

without foundation by statute. Without the recording, most of the affidavit's statements from Dubay cannot be rebutted. Did the informant personally observe the driving? What were the road conditions? Was it snowing? Was Reagan on ice/slush when she almost entered a ditch or when she was close to hitting oncoming traffic? These details are critical to determining the cause of her allegedly erratic driving.

The inability of Counsel to review Dubay's statements, in a case where the misdemeanor (driving) took place outside police presence, is highly prejudicial.

F. Reagan is entitled to Attorney's Fees and Costs

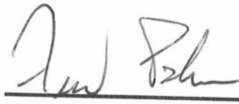
In any civil judicial proceeding involving as an adverse party a governmental entity, the court **shall** award the prevailing party reasonable attorney fees and other reasonable expenses. IC 12-117. ITD's decision to appeal after issuance of *State v Clarke*, (165 Idaho 393, 446 P.3d 451 (2019)) was without a reasonable basis in fact or law. ITD has been warned three times not to engage in subpoena abuse. Its conduct as outlined in this case shows a disregard of those warnings.

V. CONCLUSION

Reagan's warrantless arrest for a completed misdemeanor outside the presence of law enforcement violated the Idaho Constitution. The warrantless seizure of Reagan from inside her home violated the Idaho and US Constitutions. The Hearing Officer's refusal to issue a subpoena for recordings of Dubay's contacts with law enforcement violated the procedural due process provisions of the Idaho and US Constitutions. The District Courts decisions should be affirmed.

As the prevailing party, Reagan should be awarded attorney's fees and costs.

DATED this 19th day of August, 2020.



Fred Palmer
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was I-Court E-Filed this 19th day of August to:

Susan Servick, Attorney
susan@servicklaw.com

Clerk of the Idaho Supreme Court and the Idaho Appellate Court
isc.idaho.gov



Fred Palmer
Attorney for Respondent