IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. SCOTTIZE DANYELLE BROWN, Defendant-Appellant.	)	S.CT. NO. 17-0367

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HONORABLE NATHAN A. CALLAHAN, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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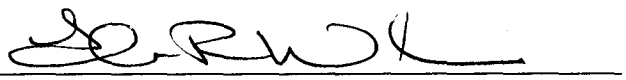
CERTIFICATE OF SERVICE

On the 12th day of January, 2018, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Scottize Brown, 101 Reed St., Waterloo, IA 50703.

APPELLATE DEFENDER'S OFFICE



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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. TO THE EXTENT THE STATE CONTESTS ERROR PRESERVATION, SHOULD BROWN HAVE RAISED AN ALTERNATIVE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL?

Authorities

State v. Heath, 929 A.2d 390, 403 (Del. Super. Ct. 2006)

State v. Ochoa, 206 P.3d 143, 156 (N.M. Ct. App. 2008)

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II. WHETHER THE IOWA SUPREME COURT SHOULD RECOGNIZE THAT PRETEXTUAL STOPS VIOLATE ARTICLE I SECTION 8 OF THE IOWA CONSTITUTION AND ADOPT THE BURDEN-SHIFTING TESTS USED BY OTHER STATES?

Authorities

State v. Griffin, 691 N.W.2d 734, 736-37 (Iowa 2005)

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III. WHETHER THE TRAFFIC STOP FIGURES PROVIDED TO THE COURT HIGHLIGHT THE DISPROPORTIONAL IMPACT OF PRETEXTUAL STOPS ON PEOPLE OF COLOR?

Authorities

Michael R. Smith, Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making, 15 Geo. Mason U. Civ. Rts. L.J. 219, 220 (Spring 2005)

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STATEMENT OF THE CASE

COMES NOW Defendant-Appellant Scottize Brown, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's brief filed on December 27, 2017.

While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain arguments made by the State.

ARGUMENT

I. TO THE EXTENT THE STATE CONTESTS ERROR PRESERVATION, BROWN HAS RAISED AN ALTERNATIVE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The State does not dispute Brown has preserved error on her claim that the Iowa Constitution prohibits pretextual stops, but contends error was not preserved on any claim that there was no probable cause for the stop. State's Brief pp. 14, 43. Although trial counsel did not specifically address probable cause for the stop of Brown's vehicle based on the traffic infractions, this claim is nonetheless properly before this Court

based on her alternative claim of ineffective assistance of counsel. Def.'s Brief pp. 89-91.

During the suppression hearing, trial counsel referenced other states that had invalidated pretextual stops under their state constitutions. (Supp. Tr. p. 31 L.9-16). The first step in the burden-shifting tests adopted in both Delaware and New Mexico is for the State to establish probable cause for the stop of the vehicle. State v. Heath, 929 A.2d 390, 403 (Del. Super. Ct. 2006); State v. Ochoa, 206 P.3d 143, 156 (N.M. Ct. App. 2008). If this Court is to address pretextual stops using a framework similar to that adopted in Heath and Ochoa, the Court must consider the stated probable cause for the stop.

Notably, it is the State's burden to establish probable cause for the stop. State v. Tyler, 830 N.W.2d 288, 293 (Iowa 2013). The State did make such an argument at the suppression hearing, citing two violations of Chapter 321. (Supp. Tr. p. 26 L.12-p. 27 L.2). Trial counsel then moved to the second prong of the burden-shifting test and attacked the stated reasons for the stop by pointing to the unrelated purpose

that actually motivated the stop. State v. Heath, 929 A.2d at 403. (Supp. Tr. p. 30 L.5-p. 31 L.8).

To the extent trial counsel may not have independently challenged the probable cause for the stop based on the alleged traffic infractions, Brown asserts trial counsel rendered ineffective assistance. Trial counsel was obviously aware of the tests adopted in Heath and Ochoa, and should have been aware of the need to address probable cause in the first step. (Supp. Tr. p. 31 L.9-16). Any failure to properly address the probable cause analysis as part of the pretextual stop claim is encompassed in Brown's alternative claim of ineffective assistance of counsel and is appropriately before this Court for its consideration. Def.'s Brief p. 91.

II. THE IOWA SUPREME COURT SHOULD RECOGNIZE THAT PRETEXTUAL STOPS VIOLATE ARTICLE I SECTION 8 OF THE IOWA CONSTITUTION AND ADOPT THE BURDEN-SHIFTING TESTS USED BY OTHER STATES.

The State concedes Waterloo Police Officer Justin Brandt made a pretextual stop of the vehicle Brown was driving. The State correctly acknowledges Brandt's admission that he would

not have stopped Brown's vehicle for any traffic infraction but for the fact he was curious about the owner's gang affiliation. State's Brief p. 11. The only question before this Court, then, is whether Brown is entitled to suppression of the evidence and fruit obtained from the pretextual stop under the Iowa Constitution.

First, the State suggests State v. Griffin is controlling stare decisis for claims of pretextual government action. State's Brief p. 22. State v. Griffin, 691 N.W.2d 734 (Iowa 2005). Griffin addressed the issue of pretextual arrests, not pretextual stops, and therefore is not directly controlling in this case. Id. at 736-37. Furthermore, Griffin was decided 13 years ago, and members of the Iowa Supreme Court have since expressed concerns about the validity of pretextual traffic stops. State v. Harrison, 846 N.W.2d 362, 370-72 (Iowa 2014)(Appel, J., dissenting); State v. Coleman, 890 N.W.2d 284, 287, 300 (Iowa 2017).

Second, the State's analysis regarding cases decided subsequent to Heath, Ochoa, and the Washington Supreme

Court cases of State v. Ladson, is incomplete. See State v. Heath, 929 A.2d 390 (Del. Super. Ct. 2006); State v. Ochoa, 206 P.3d 143 (N.M. Ct. App. 2008); State v. Ladson, 979 P.2d 833 (Wash. 1999). For instance, the State argued that "the Delaware Supreme Court in Turner v. State explicitly affirmed a trial court's denial of a motion to suppress that relied on Heath...." State's Brief p. 26-27 (quoting Turner v. State, 25 A.3d 774, 777 (Del. 2011). The Delaware Supreme Court did affirm the trial court's suppression ruling, but specifically held that Turner had failed to properly present a constitutional argument and therefore the court did not directly address the merits of the state constitutional claim. Turner v. State, 25 A.3d 774 at 777.

With respect to New Mexico, it is true that the New Mexico Supreme Court has afforded greater privacy rights to automobiles under its state constitution than what was originally available under the Fourth Amendment. State v. Cardenas-Alvarez, 25 P.3d 225, 231 (N.M. 2001). This difference is not due to the Court finding any flaw in the federal

analysis or any structural difference between the two constitutions, but because of distinctive state characteristics relating to border searches. Id. at 230-31. New Mexico rejected federal law that allowed prolonging a border checkpoint stop. Id. at 231. Of course, both federal and Iowa courts now recognize officers must have reasonable suspicion of criminal activity to prolong a traffic stop. Rodriguez v. United States, 575 U.S. ___, ___, 135 S.Ct. 1609, 1612-17 (2015); In re Pardee, 872 N.W.2d 384, 391 (Iowa 2015).

The State also mixes apples with orange when it uses vehicle search cases such as State v. Storm to counter arguments challenging pretextual stops. State's Brief p. 29, 38-40 (citing State v. Storm, 898 N.W.2d 140, 146-47 (Iowa 2017)). Although Article I Section 8 of the Iowa Constitution refers to both searches and seizures, the two are entirely different things. Iowa Const. art. I § 8. It is one thing to illegally stop or "seize" a vehicle; it is another thing to then "search" that vehicle once it has been seized. When an officer stops an automobile and detains its occupants, the actions of

the officer constitute a seizure. Delaware v. Prouse, 440 U.S. at 653, 99 S.Ct. at 1396. It is the unreasonable stop that is at issue in this case.

The State's citation to State v. Arreola, 290 P.3d 983 (Wash. 2012), is likewise unhelpful to its cause. State's Brief p. 30-32. Arreola addressed a mixed-motive stop, as opposed to a purely pretextual stop, but did not walk back its earlier ruling in Ladson. State v. Arreola, 290 P.3d 983, 990-91 (Wash. 2012). Further, the Arreola decision permitted mixed-motive stops only if the traffic infraction was "an actual, conscious, and independent cause of the traffic stop." Id. at 991. There is no such justification here, as even the State acknowledged "the police officer explained he would not have stopped the defendant for non-functioning license plate lamps, veering over a center line, and accelerating through a yellow light if he had not checked the owner's name in the computer." State's Brief p. 11. The actual and conscious cause of the stop was Brandt's curiosity about the owner's gang affiliation – nothing more.

The State's arguments that Brown's proposed burden-shifting test is unworkable are also unavailing. First, there is no need to define which subjective factors are permissible and which are not. A stop is either independently and legitimately based on probable cause or reasonable suspicion to believe a traffic infraction or other criminal activity has occurred or it is not. Delaware v. Prouse, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 884, 95 S.Ct. 2574, 2582 (1975). Any other controlling motivation for the stop is an unconstitutional one.

The State argues that Brandt's stop of Brown's vehicle was not based on her race but upon the owner's gang affiliation. State's Brief pp. 33-34. Brown does not contend Brandt knew the driver was a black woman, but the State's argument is a red herring. Brandt did not stop and had no plans to stop the vehicle for the supposed traffic infractions. He admittedly stopped the vehicle solely out of curiosity regarding the owners' gang affiliation. (Ex. A 41:25). It does not matter whether

Brandt's subjective purpose was based on race or on mere curiosity – either way the stop was an impermissible seizure.

The briefs in this case talk about race not because race is the only subjective basis on which officers stop motorists, but because pretextual stops have a disproportionate impact on people of color as addressed in Brown's brief and the amicus brief filed by the American Civil Liberties Union [ACLU] of Iowa. But any stop of a motorist based on subjective reasons that do not amount to probable cause or reasonable suspicion for the seizure must be treated with the rigorous review the Iowa Constitution demands.

Brown is not suggesting that officers have to explain why they did not pull over every speeding car they encountered. State's Brief p. 35. What officers should be expected to do, however, is to explain the true reasons they pulled over the cars they did stop and provide a constitutionally permissible basis for doing so. Brandt provided his reasons in this matter, and those reasons are not sufficient to justify the warrantless seizure of Brown's vehicle.

Finally, Brown suggests that the concern expressed by amicus Iowa County Attorneys Association [ICAA] about subjecting officers to personal liability pursuant to State v. Godfrey, 898 N.W.2d 844 (Iowa 2017), is overblown. First and foremost, Brown is not seeking monetary or punitive damages under Iowa search and seizure clause, but simply seeking enforcement of the clause through its traditional remedy of exclusion. See generally State v. Cline, 617 N.W.2d 277 (Iowa 2000)(discussing history of exclusionary rule), abrogated on other grounds by State v. Turner, 630 N.W.2d 601, 606 n.2 (Iowa 2001)(clarifying scope of review).

Second, ICAA is asking this Court to essentially offer an advisory opinion on a factual scenario not presented by this case. See Hartford-Carlisle Sav. Bank v. Shivers, 566 N.W.2d 877, 884 (Iowa 1997)(court has neither authority nor duty to render advisory opinions). ICAA's primary concern appears to be with motorists who are stopped and not criminally charged. That is not the situation before this Court. Furthermore, absent a criminal court's finding that the State violated Article I

section 8 of the Iowa Constitution, the risk of litigation the ICAA fears already exists. In theory, any driver can currently sue an officer for violating his or her rights. The officer would have the opportunity to defend the claim and establish the stop was truly based upon probable cause to believe the driver committed a traffic infraction or was engaged in other criminal activity and not simply the officer's curiosity or hunch.

On a related note, the State argues Brown has adequate recourse in a selective enforcement claim under the Equal Protection Clause. State's Brief p. 37. While Brown questions whether an equal protection claim is truly viable for the reasons addressed in her brief, it is worth noting that Godfrey involved an equal protection claim. State v. Godfrey, 898 N.W.2d 844 (Iowa 2017). ICAA focuses on the three justices who determined the Iowa Civil Rights Acts [ICRA] did not provide an adequate legislative remedy for a violation of equal protection principles, while a majority, in fact, found it did. See generally id. To the extent ICAA fears a claim based on a racially-biased traffic stop may end up resulting in monetary damages, this

appears to already be the case if one assumes an equal protection challenge is viable. Lastly, even the justices who held the ICRA was not an adequate remedy for constitutional violations did not address the issue of qualified immunity, finding the issue was not before the Court. Id. at 879.

The motion to suppress should have been granted and Brown's conviction should be dismissed.

III. THE TRAFFIC STOP FIGURES PROVIDED TO THE COURT HIGHLIGHT THE DISPROPORTIONAL IMPACT OF PRETEXTUAL STOPS ON PEOPLE OF COLOR.

The briefs for the State and ICAA spend considerable time dissecting the studies and statistics cited by the ACLU of Iowa. Notably, neither brief disagrees or disavows the studies and statistics cited in Brown's brief. Def.'s Brief pp. 39-44, 72-75.

The amicus brief filed by the ACLU of Iowa used numbers that were readily available. Unlike other states, Iowa does not have a statute mandating that law enforcement agencies keep data on the race, ethnicity, or other identifying information of persons subjected to traffic stops, the reasons for the stops, whether the stop resulted in a search, or whether a citation was

issued or an arrest conducted. See Michael R. Smith, Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making, 15 Geo. Mason U. Civ. Rts. L.J. 219, 220 (Spring 2005)(noting at time of publication that at least 17 states passed law requiring law enforcement agencies to keep such data). Therefore, the ACLU of Iowa used the raw numbers provided to it by the selected law enforcement agencies.

The ACLU of Iowa's brief compares the proportion of traffic stops of people of color to the proportion of those groups in the county's population according to the most recent census. It is accurate to say that using census data as an external benchmark is not ideal, though it is not useless. See David A. Harris, The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection, 66 SUM Law & Contemp. Probs. 71, 86-90 (Summer 2003)(discussing use of census data as an external benchmark). Unfortunately, all attempts to measure racial bias in traffic stops appear to have some methodological weakness. See generally, Greg Ridgeway & John MacDonald,

Methods for Assessing Racially Biased Policing, in Race, Ethnicity, and Policing: New and Essential Readings 180-204 (S. Rice & M. White, eds., 2010). One of the more promising external benchmarks would be an observational study in which both the race and violator status of drivers in the geographical area of interest are recorded. David A. Harris, The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection, 66 SUM Law & Contemp. Probs. 71, 84-86 (Summer 2003). See, e.g., State v. Soto, 734 A.2d 350, 360 (N.J. 1996) ("Statistics may be used to make out a case of targeting minorities for prosecution of traffic offenses provided the comparison is between the racial composition of the motorist population violating the traffic laws and the racial composition of those arrested for traffic infractions on the relevant roadway patrolled by the police agency."). Unfortunately, Brown is unaware of any such studies that have been conducted in Iowa.

Whatever weaknesses the ACLU of Iowa's analysis may have in using census data, it is nonetheless telling that the disparities it found are similar to racial disparities found in

other studies conducted in the Midwest. The Iowa City study by Christopher Barnum touted by ICAA found people of color accounted for 10 percent of drivers in the city but 19 percent of traffic stops. Kathy A. Bolten, Iowa Studies Show Blacks Stopped More Often Than Whites (Aug. 15, 2015), http://www.desmoinesregister.com/story/news/crime-and-courts/2015/08/16/black-iowa-racial-profiling-studies/31787611/. Officers were about twice as likely to arrest a minority driver than a white driver during a stop. Dr. Christopher Barnum, ICPD Traffic Stop Analysis, p. 50 http://www8.iowa-city.org/weblink/0/doc/1524344/Electronic.aspx (last viewed July 10, 2017).[1] Officers were also about twice as likely to ask a minority driver for permission to search his or her vehicle, even though hit rates resulting from the

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1. It is worth mentioning that, for some unknown reason, whites and Asians were placed into the same category while all other minorities were grouped together. Dr. Christopher Barnum, ICPD Traffic Stop Analysis, p. 13 http://www8.iowa-city.org/weblink/0/doc/1524344/Electronic.aspx (last viewed July 10, 2017); Summary of Results of ICPD Traffic Study 2015, https://www8.iowa-city.org/weblink/0/doc/1524345/Electronic.aspx (last viewed July 10, 2017).

searches were about the same for minority and non-minority drivers. Id. These are comparable to numbers found in studies conducted in Missouri and Nebraska, and to numbers found in a large-scale study conducted by Stanford University. 2016 Traffic Stops in Nebraska: A Report to the Governor and Legislature on Data Submitted by Law Enforcement, https://ncc.nebraska.gov/sites/ncc.nebraska.gov/files/doc/Traffic_Stops_in_Nebraska_COMPLETE_FINAL_0.pdf (March 2017); Illinois Department of Transportation, Illinois Traffic and Pedestrian Stop Study, 2016 Annual Report, http://www.idot.illinois.gov/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2016/2016%20ITSS%20Executive%20Summary.pdf; Missouri Attorney General, 2016 Vehicle Stops Executive Summary, https://www.ago.mo.gov/home/vehicle-stops-report/2016-executive-summary#summary (last visited January 8, 2017).

There is another way to approach the issue of racial bias in traffic stops that negates the concerns regarding appropriate external benchmarks. Instead of using the county population

as the denominator, one can instead use the traffic stop data themselves as the denominator and look for racial disparities in consent searches and hit rates as indicators of underlying racial bias. David A. Harris, The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection, 66 SUM Law & Contemp. Probs. 71, 91-92 (Summer 2003). The theory underlying this approach assumes an officer would not ask for consent to search a vehicle if he or she had probable cause or another legal basis to conduct a search. Id.

The Iowa City study is telling in this regard. Officers were twice as likely to ask a minority driver for permission to search his or her vehicle, even though hit rates resulting from the searches were about the same for minority and non-minority drivers. Dr. Christopher Barnum, ICPD Traffic Stop Analysis, p. 50, http://www8.iowa-city.org/weblink/0/doc/1524344/Electronic.aspx (last viewed July 10, 2017). The data the ACLU obtained from the Waterloo Police Department also indicated

minorities were more likely to be subjected to searches than were whites. ACLU Amicus brief pp. 21-22.

In the end, however, this Court does not need to determine if people of color are unfairly targeted for traffic stops and searches to decide this case. While the issue of racial bias in policing is an important one for the justice system, it is undisputed in this case that Brandt stopped Brown's vehicle only because he was curious about the vehicle owner's gang affiliation and not because of any traffic infraction. (Ex. A 41:25); State's Brief p. 11. The Iowa Constitution does not permit officers to stop vehicles out of curiosity. Brown's motion to suppress should have been granted. Her conviction, sentence and judgment should be vacated and her case remanded for dismissal.

CONCLUSION

For all of the reasons discussed above and in her Brief and Argument Defendant-Appellant Scottize Brown respectfully requests this Court vacate her conviction, sentence and judgment and remand her case to the District Court for

dismissal.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $2.97, and that amount has been paid in full by the Office of the Appellate Defender.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 3,113 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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