11-19-2012

State v. McDonald Appellant's Brief Dckt. 39559

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. DAVID R. MCDONALD, Defendant-Appellant.	)	NO. 39559 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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STATEMENT OF THE CASE

Nature of the Case

David R. McDonald appeals from the judgment of conviction entered following the denial of his motion to suppress and his entry of a conditional guilty plea. On appeal, he asserts that the district court erred when it denied his motion to suppress because the search conducted pursuant to his probation agreement was not supported by reasonable suspicion.

Statement of the Facts and Course of Proceedings

Mr. McDonald was charged by Information with possession of a controlled substance (methamphetamine). (R., pp.17-18.) The charge stemmed from a warrantless search of Mr. McDonald's locked bedroom, conducted by misdemeanor probation officer Mary Gomez on April 28, 2011, with the assistance of Officer Ibarra of the Caldwell Police Department. (R., pp.27-30.) Mr. McDonald filed a Motion to Suppress, supported by his affidavit, challenging the legality of the search of his bedroom under the Fourth Amendment to the United States Constitution and Article I, Section 17, of the Idaho Constitution. (R., pp.24-30.)

At the evidentiary hearing on the motion to suppress, Michelle McDonald testified that she is the mother of Mr. McDonald with whom she leased the home at which the search occurred. On April 28, 2011, she resided in the home with Mr. McDonald, his wife Jennifer, and two of Jennifer's minor daughters. (Tr.Vol.I,[1] p.4,

[1] Two volumes of transcripts were prepared on appeal. The first, containing transcripts of the evidentiary hearing held on a motion to suppress and a hearing at which that motion was argued, will be cited to as "Tr.Vol.I." The second, containing transcripts of the change of plea hearing and the sentencing hearing, will be cited to as "Tr.Vol.II."

L.10 – p.5, L.7.) The house has three bedrooms and a "bonus room." Each of Jennifer's two daughters had her own bedroom, Ms. McDonald occupied the master bedroom, and Mr. McDonald and Jennifer "had converted the bonus room into like their bedroom." The bonus room had a lock on it similar to those used on bathroom doors with "one of those little holes in it." (Tr.Vol.I, p.5, Ls.8-20.)

At approximately 7 p.m. on April 28, 2011, Mr. McDonald's "probation officer showed up at the door with a police officer and asked if [Mr. McDonald] was at home." Ms. McDonald allowed them entry. When asked, she showed them where Mr. McDonald's bedroom was. They tried to open his bedroom door, but were unable to do so because it was locked. The probation officer then asked the police officer to unlock it, to which he replied, "I can't." Ms. McDonald was then asked to unlock the door, which she did using a barbecue skewer. (Tr.Vol.I, p.6, L.2 – p.8, L.20.) The probation officer and police officer then entered Mr. McDonald's bedroom. After they'd been inside the bedroom for a while, the probation officer came out and asked Ms. McDonald if she could "get ahold of him [Mr. McDonald]." Ms. McDonald then called Mr. McDonald, told him that his probation officer and a police officer were there, and the probation officer talked to him on the phone. They were there for approximately two hours, during which time Mr. McDonald was never present. Ms. McDonald wasn't sure whether the bedroom door was locked every day, but that she "respected their boundaries, so I didn't check their doorknob every day to see if it was locked." She further testified she never went into their room, but they shared the common areas of the house, specifically "[t]he living room and the kitchen." (Tr.Vol.I, p.8, L.21 – p.12, L.2.)

Misdemeanor probation officer Mary Gomez testified that Mr. McDonald was one of her misdemeanor probationers, and that she had been supervising him since approximately March 2011 on a drug paraphernalia charge. Mr. McDonald was convicted on July 20, 2009, and signed a misdemeanor supervision agreement on July 31, 2009. The judgment of conviction was admitted as State's Exhibit No. 1, and the supervision agreement was admitted as State's Exhibit No. 2. A term of the supervision agreement relevant to the motion to suppress reads as follows: "I will permit officers of Canyon County Probation Department to search my person, vehicle, residence, or any other property under my control without a warrant at any time, day or night upon reasonable suspicion to ensure compliance with the Agreement of Supervision." (Tr.Vol.I, p.13, L.8 – p.18, L.13; State's Exhibit No. 2.)

Ms. Gomez testified that "[t]here were several factors" that caused her to conduct an unannounced visit of Mr. McDonald's home that day, namely,

> First he was – he had tested positive previously for methamphetamines.[2] He was placed on color call-in for random UAs. And on – on April 20, he was – I'm sorry. On April 18, he missed – he went in to do a UA at Global Drug Testing, [during] which they discovered he was trying to falsify his urine sample by using a device. So after that he was to get enrolled in treatment. I contacted the treatment facility.[3] He had not done so, so then at that point I decided to come and pay him a home visit.[4]

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[2] The positive samples were provided on January 26 and February 1. Between February 1 and April 18, Mr. McDonald participated in one other UA, on March 1, which came back "clean." (Tr.Vol.I, p.23, L.13 – p.24, L.11.)

[3] Ms. Gomez later testified that on March 1, 2011, she ordered Mr. McDonald to enroll in a cognitive self-change class administered by the probation department, which was to begin on March 9, 2011. After she discovered that he had failed to attend the class, she ordered him to enroll with Bell Counseling. On April 15, 2011, she learned that he was not in treatment at Bell Counseling. (Tr.Vol.I, p.25, L.3 – p.27, L.9.)

[4] Ms. Gomez later testified that the home visit was conducted during her regular monthly ride-along with the Caldwell Police Department because "Mr. McDonald was on the list [of her probationers]." (Tr.Vol.I, p.28, Ls.2-16.)

(Tr.Vol.I, p.18, L.14 – p.19, L.14.) Ms. Gomez had last had contact with Mr. McDonald when she met with him on April 13, 2008. (Tr.Vol.I, p.24, Ls.12-17.)

When she arrived at Mr. McDonald's home, she advised Ms. McDonald she was there to conduct a home visit and "[t]old her to . . . show me to his room." She discovered that the door was locked, at which point Ms. McDonald "mentioned that he always locked it." After Ms. Gomez looked at Officer Ibarra, he said "she [Ms. McDonald] would have to be the one to unlock it if we needed in." At that point, Ms. McDonald retrieved an item from the kitchen and used it to unlock the door. Ms. Gomez then entered the bedroom, asked for Officer Ibarra to assist with the search, and noticed a "Whizzinator on the top of the bed with urine, so that was an indication of a violation there." She explained that a Whizzinator is a device used "to falsify urine samples." She did not find anything else of note in the room. (Tr.Vol.I, p.19, L.15 – p.22, L.17.)

Officer Ibarra then testified that Ms. Gomez asked him to "help assist her [in] searching the house." He described his role in the search of the bedroom as follows,

> I walked around the bed area and opened the dresser, and there was a hat. And inside the hat there was a green jar. So I took the green jar out of it, opened it up, and there was like white crystal substance inside of it and a small bag of green, leafy stuff.

(Tr.Vol.I, p.35, L.19 – p.36, L.2.) He conducted field tests of the two substances, which came back presumptively positive for methamphetamine and marijuana. (Tr.Vol.I, p.36, Ls.3-13.)

Following the evidentiary hearing, defense counsel submitted a brief in support of the motion to suppress, the crux of which appears to be "that none of the information [supporting reasonable suspicion] was ripe or fresh and that there was no current

reasonable suspicion supporting the probation officers [sic] home visit." (R., pp.38-41.) At oral argument on the motion, defense counsel also asserted that the search was improper because Mr. McDonald was not present when the search was conducted. (Tr.Vol.I, p.51, L.8 – p.52, L.6.) The State conceded that Ms. McDonald had neither actual nor apparent authority to consent to a search of Mr. McDonald's bedroom, instead arguing that the search was appropriate because Ms. Gomez had reasonable suspicion to justify conducting a search under the terms of the probation agreement. (Tr.Vol.I, p.52, L.10 – p.55, L.3.)

In ruling on Mr. McDonald's motion to suppress, the district court identified the relevant issue to be "whether Probation Officer Gomez had reasonable suspicion that Defendant McDonald was violating the conditions of his probation and/or the Agreement of Supervision at the time of the search at issue and whether the search was reasonably related to confirmation of the suspected violation." (R., p.57.) In concluding that such reasonable suspicion existed, the district court noted,

> Gomez testified that, after two positive tests for methamphetamine in January and February of 2011, she directed Mr. McDonald, on two separate occasions in March and April, to enroll in cognitive self-change treatment and Mr. McDonald failed to do so. In fact, Mr. McDonald misrepresented to Probation Officer Gomez that he had made contact with Canyon County's in-house treatment provider. Gomez learned, on April 15, 2011, that Mr. McDonald failed to comply with her second directive that he enroll in treatment at Bell Counseling. More importantly, on April 18, 2011, Gomez was notified that Mr. McDonald had attempted to falsify his UA, using a device, on or about that date.
>
> Officer Gomez made her visit to Defendant's residence on April 28, 2011, in conjunction with her regularly-scheduled ride-along with the Caldwell Police Department, within ten days of receiving notice that Mr. McDonald had attempted to falsify his UA. The court concludes that this was not an unreasonable amount of time. The ten-day period between Gomez's receipt of notice and the search, standing alone, does not require the conclusion that Gomez could not have possessed reasonable suspicion

that the search of Mr. McDonald's room on April 18, 2011, would produce evidence of a violation of Mr. McDonald's probation.

(R., p.58.)

Mr. McDonald then pled guilty to possession of a controlled substance (methamphetamine) conditioned on his ability to appeal from the denial of his motion to suppress.[5] (Tr.Vol.II, p.2, L.20 – p.10, L.5.) Ultimately, the district court imposed a unified sentence of five years, with two years fixed, suspended in favor of four years of probation. (Tr.Vol.II, p.23, L.7 – p.24, L.11.) Mr. McDonald filed a Notice of Appeal timely from entry of the judgment of conviction. (R., p.75.)

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[5] The plain language of Idaho Criminal Rule 11(a)(2) requires that a conditional guilty plea include a reservation of the right "in writing" specifying the "adverse ruling" from which the appeal may be taken. It also requires the consent of the prosecuting attorney. I.C.R. 11(a)(2).

In this case, defense counsel failed to submit a reservation of the right in writing, failed to specify the adverse ruling from which the appeal could be taken, and failed to establish – on the record – that the prosecuting attorney consented to the conditional guilty plea. (*See* Tr.Vol.II, p.2, L.20 – p.10, L.5.) Fortunately, the district court specified the adverse ruling, and explained that it had "been noted for the record." (Tr.Vol.II, p.5, Ls.10-16; Tr.Vol.II, p.20, Ls.17-20 ("[T]here was a motion to suppress and [we] had a hearing on it, and I denied that motion. And you entered a conditional plea, reserving your right to challenge the ruling.").)

With respect to the remaining deficiencies, Mr. McDonald notes that this Court has held that lack of compliance with the writing requirement and a failure to secure the express consent of the prosecutor on the record is not fatal on appeal, so long as "[i]t is determinable with specificity that the prosecuting attorney and defense counsel entered into [such] an agreement . . . ." *State v. Anderson*, 129 Idaho 763, 764-65 (1997).

Nevertheless, defense counsel is wise to heed the Supreme Court's advice, given in *State v. Manzanares*, 152 Idaho 410 (2012), in which it explained "that the best practice is to explicitly set forth the adverse rulings which are being reserved for appeal in the conditional plea agreement. If the agreement lacks such specificity, there is a risk that the appellate court will be unable to determine from the record what the parties sought to reserve for appeal." *Manzanares*, 152 Idaho at 422.

ISSUE

Did the district court err when it denied Mr. McDonald's motion to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. McDonald's Motion To Suppress

A. Introduction

Mr. McDonald asserts that the district court erred when it denied his motion to suppress evidence discovered during the warrantless search of his bedroom because his probation officer did not have reasonable suspicion to support the search, as required under the terms of his probation agreement, and because, due to the delay in executing the search, the search was not reasonable.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact which were supported by substantial evidence, but will freely review the application of constitutional principles to the facts as found. *State v. Atkinson,* 128 Idaho 559, 561 (Ct. App. 1996).

C. The District Court Erred When It Denied Mr. McDonald's Motion To Suppress

In this case, it is undisputed that the only potential exception to the warrant requirement, upon which the search of Mr. McDonald's bedroom could be justified, was the condition of his probation requiring him to permit a search "upon reasonable suspicion to ensure compliance with the Agreement of Supervision." (Tr.Vol.I, p.52, L.10 – p.55, L.3 (State conceding that Ms. McDonald had neither actual nor apparent authority to consent to a search of Mr. McDonald's bedroom, and instead arguing that the probation officer had reasonable suspicion to do so); State's Exhibit No. 2.)

A warrantless search is considered *per se* unreasonable under both the Idaho and United States Constitutions, unless it falls under a well-recognized exception to the warrant requirement. *State v. Klingler*, 143 Idaho 494, 496-97 (2006) (citing *State v. Nunez*, 138 Idaho 636, 640 (2003)). One such exception "is a nonconsensual search of probationers and their property by probation or parole officers." *Id.* at 497 (citing *State v. Anderson*, 140 Idaho 484, 486 (2004)). The State bears the burden of establishing the applicability of a well-recognized exception to the warrant requirement. *Anderson*, 140 Idaho at 486.

"A probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). The Fourth Amendment's warrant requirement is not always applicable, specifically in those situations involving "special needs" of the government. Probation "is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large. That permissible degree is not unlimited, however . . . ." *Id.* at 875. "[W]e think it enough if the information provided indicates, as it did here, only the likelihood ('had or might have guns') of facts justifying the search." *Id.* at 880. "When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." *United States v. Knights*, 534 U.S. 112, 121 (2001).

A reasonable suspicion determination involves an examination of "the 'totality of the circumstances' of each case to see whether the detaining officer[6] has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citation omitted). "[T]he concept of reasonable suspicion is somewhat abstract." *Id.* at 274 (citation omitted). "Articulating precisely what 'reasonable suspicion' . . . mean[s] is not possible." *Ornelas v. United States*, 517 U.S. 690, 695 (1996).

The Indiana Court of Appeals has addressed what consideration to give to the alleged staleness of information used to support a finding of reasonable suspicion. Specifically, it has held that "instead of reviewing the purported staleness of the information as a separate and independent factor . . . the better approach is to assess the age of the information as an element contributing to the totality of the circumstances." *Washburn v. State*, 868 N.E.2d 594, 601 (Ind. Ct. App. 2007). Other appellate courts have taken a similar approach. *See, e.g., State v. Spillner*, 173 P.3d 498, 508-09 (Haw. 2007); *United States v. Cortez-Galaviz*, 495 F.3d 1203, 1209 (10th Cir. 2007).

In *Cortez-Galaviz*, the Tenth Circuit addressed the weight to be given the timeliness of information when assessing whether reasonable suspicion exists to support a traffic stop of a person known by the officer to have had his license suspended recently. It explained why a period of several weeks between the last check

[6] While this case deals with the legality of a detention, there is no reason to believe that the definition of reasonable suspicion changes when it concerns a probation search.

of the driver's license status and the stop was not fatal to a finding of reasonable suspicion, explaining,

> [T]imeliness of information is but one of many factors in the mix when assessing whether reasonable suspicion for an investigatory detention exists, and the relative importance of timeliness in that mix depends on the nature of the criminal activity at issue. Thus, for example, when the legal infraction at issue typically wears on for days or weeks or months (like, say, driving without a license or appropriate emissions and safety certifications), rather than concludes quickly (like, say, jaywalking or mugging), the timeliness of the information on which the government relies to effect an investigative detention "recedes in importance" compared to other factors, such as the type and duration of offense at issue.

Cortez-Galaviz, 495 F.3d at 1209 (internal citations omitted).

In the context of searches conducted pursuant to a parole condition, the Tenth Circuit has concluded that such searches are justifiable without a warrant and upon only reasonable suspicion because the ability of the supervising agent to act promptly is crucial. Specifically, the Court reasoned, "To adequately deter misconduct and protect the public, parole agents must be permitted to act *expeditiously* upon reasonable suspicion of a parole violation." *United States v. Lewis*, 71 F.3d 358, 363 (10th Cir. 1995) (emphasis added). The United States Supreme Court has explained that dispensing with the warrant requirement for probation searches is constitutionally-permissible, in part, because "the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct, and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create." *Griffin*, 483 U.S. at 876 (internal citations omitted).

In Mr. McDonald's case, the information known to the probation officer – that he had attempted to fake a urine test using a Whizzinator – was ten days old at the time of the search. Furthermore, the probation officer did not explain whether she suspected

that Mr. McDonald was still in possession of the Whizzinator, or whether the staff at the urine testing facility had confiscated the device upon its discovery. The probation officer further failed to explain what evidence of a violation of his probation she suspected would be found in Mr. McDonald's bedroom. Finally, the probation officer failed to act expeditiously upon receipt of the information, choosing instead to wait until a regularly-scheduled ride-along with a police officer ten days later, and appeared to have engaged in an open-ended, general search of Mr. McDonald's bedroom.[7] Given the fact that a key justification for allowing warrantless searches of probationers' homes based only on reasonable suspicion is that prompt discovery of violations is essential in deterring misconduct and protecting the community, the fact that the probation officer waited ten days weighs heavily against a finding that the search in this case was reasonable.

For the reasons set forth herein, Mr. McDonald respectfully requests this Court vacate the judgment of conviction, reverse the order denying his motion to suppress, and remand this matter to allow him to withdraw his guilty plea.

CONCLUSION

Mr. McDonald respectfully requests this Court vacate the judgment of conviction and reverse the order which denied his motion to suppress.

DATED this 19th day of November, 2012.

SPENCER J. HAHN
Deputy State Appellate Public Defender

[7] The apparently-unlimited scope of the search can be easily inferred from the testimony of Officer Ibarra that he was asked by the probation officer to "help assist her in searching the house." (Tr.Vol.I, p.35, Ls.19-20.)

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of November, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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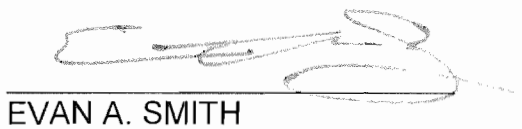

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