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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. BRANDON DEAN KINGSLEY , Defendant-Appellant.	)	NO. 39917 KOOTENAI COUNTY NO. CR 2011-17608 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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FILED - COPY
FEB - 4 2013
Supreme Court ____ Court of Appeals ____
Entered on ATS by: ____

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STATEMENT OF THE CASE

Nature of the Case

Brandon Dean Kingsley appeals from his judgment of conviction for possession of a controlled substance, methamphetamine. Mr. Kingsley pleaded guilty but preserved the right to appeal from the denial of his motion to suppress. He asserts that the district court erred by denying that motion.

Statement of the Facts and Course of Proceedings

The following facts are taken from the district court's findings of fact on Mr. Kingsley's motion to suppress: On September 27, 2011, Mr. Kingsley was present at the home of Steven Andersen, who was on felony supervised probation. (R., p.54.) That day, members of the North Idaho Violent Crimes Task Force, accompanied by Mr. Andersen's probation officer arrived to conduct a "probation search" of Mr. Andersen's residence. (R., p.54.)

When the members of the task force arrived, Mr. Kingsley was in the driveway talking on a cell phone. (R., p.55.) Detective Mark Todd testified that he was concerned that Mr. Kingsley might be a lookout in the front of the house. (R., p.55.) Detective Todd approached Mr. Kingsley and ordered him to get off of the phone. (R., p.55.) He then asked Mr. Kingsley to come over to where he was located, which was where the driveway ended at the sidewalk, about 20 feet from where Mr. Kingsley was standing. (R., p.55.)

Mr. Kingsley complied and Detective Todd asked him if he had any weapons on him. (R., p.55.) Mr. Kingsley responded that he had some "glass" on him; Detective Todd asked Mr. Kingsley if he could take it and Mr. Kingsley replied, "yes." (R., p.55.)

Detective Todd asked Mr. Kingsley to turn around for a pat search, and Mr. Kingsley told the detective that it was in this front sweatshirt pocket. (R., p.55.) In a pouch was a clear glass pipe that Detective Todd recognized as paraphernalia. (R., p.55.) Detective Todd put the pipe in the back of a vehicle in the driveway and continued his pat search when Mr. Kingsley volunteered that he had a "bindle" in his left front pocket. (R., p.56.) The detective found a small baggy with a white crystalline substance in it and a clear glass pipe with residue in it. (R., p.56.)

The detective then read Miranda warnings to Mr. Kingsley, and then Mr. Kingsley advised another officer that the substance was, "meth." (R., p.56.) This happened at about 3 pm; Detective Todd had no prior contact with Mr. Kingsley. (R., p.56.)

Mr. Kingsley was charged with possession of a controlled substance, methamphetamine, and possession of drug paraphernalia. (R., p.26.) He moved to suppress all evidence obtained in his case. (R., p.42.) The district court denied the motion. (R., p.54.) Mr. Kingsley then entered a conditional guilty plea to possession of methamphetamine, preserving the right to appeal from the denial of his motion to suppress. (R., p.85; 89.) The district court imposed a unified sentence of four years, with two years fixed, and the court retained jurisdiction. (R., p.96.) Mr. Kingsley appealed, and he asserts that the district court erred by denying his motion to suppress.

ISSUE

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

ARGUMENT

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

A. Introduction

Mr. Kingsley asserts that he was detained the moment Detective Todd ordered him to get off his cell phone. Because that detention was not supported by reasonable, articulable suspicion, Mr. Kingsley submits that the district court erred by denying his motion to suppress.

B. Standard of Review

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

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

In its order denying Mr. Kingsley's motion to suppress, the district court addressed four issues. Mr. Kingsley will address these four issues, but in different order. First, Mr. Kingsley will address his detention by Detective Todd. Then he will address the district court's conclusions regarding probation searches.

1. Probable Cause/Reasonable Suspicion to Detain And Frisk Mr. Kingsley

The court addressed whether there was probable cause to detain and frisk Mr. Kingsley. (R., p.62.) The court found that there was no indication Mr. Kingsley "acted suspiciously, made furtive movements, or raised a reasonable suspicion that he

was armed and/or dangerous. Kingsley was merely present at a location suspected of criminal activity." (R., pp.63-64.) The court also noted that at the preliminary hearing, Detective Todd testified that he had no previous contact with Mr. Kingsley, but at the suppression hearing, Detective Todd testified that he was aware of "one sale" by Mr. Kingsley. The district court determined that the testimony at the preliminary hearing was more accurate because it occurred closer to the events in question. (R., p.64.) The court further found that, "the State has presented the Court with no evidence to suggest that Kingsley was engaged in a joint enterprise with Anderson or had a suspicious demeanor, made suspicious statements, or acted suspiciously." (R., p.65.) The court concluded,

> In the present case, all Detective Todd knew was Kingsley was in the driveway of Andersen, a person he knew was selling drugs. Detective Todd did not have any other evidence connecting Kingsley to Andersen. The State has provided the Court with nothing to indicate Kingsley was a lookout, or that law enforcement had knowledge of his role as [a] lookout upon their arrival.

(R., p.66.) The court then held that there was no probable cause to search Mr. Kingsley because, "all we have is Kingsley standing on Andersen's driveway holding a cell phone with the garage door very slightly open. An individual's mere proximity to people suspected of criminal activity, or presence in a location where a search warrant is executed, is not insufficient to give rise to probable cause to search that individual." (R., p.66.) Mr. Kingsley agrees. Further, as set forth below, not only was there no probable cause for the stop or search of Mr. Kingsley, there was no reasonable suspicion either.

2. Other Reasons to Inquire of And Frisk Mr. Kingsley

Mr. Kingsley submits that, in light of the findings of fact the court found, the court's analysis should have ended because there was neither probable cause nor reasonable suspicion to stop Mr. Kingsley. However, the court continued to address other reasons to detain Mr. Kingsley. The court believed that there five key events to examine.

First, Detective Todd told Mr. Kingsley to get off the phone. (R., p.68.) The court found that, while this was a directive to Mr. Kingsley, it was, "not a restraint on Kingsley's liberty. There is nothing about the directive 'get off the phone' that would cause Kingsley to believe he was not free to leave." (R., p.68.) The district court erred.

The Court of Appeals recently addressed the distinction between an order an a request in *State v. Linenberger*, 151 Idaho 680 (Ct. App. 2011.) The court noted,

> Not all encounters between the police and citizens involve the seizure of a person. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *State v. Jordan*, 122 Idaho 771, 772 (Ct.App.1992). Only when an officer, by means of physical force or show of authority, restrains the liberty of a citizen may a court conclude that a seizure has occurred. *State v. Fry*, 122 Idaho 100, 102 (Ct.App.1991). A seizure does not occur simply because a police officer approaches an individual on the street or other public place, by asking if the individual is willing to answer some questions or by putting forth questions if the individual is willing to listen. *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Florida v. Royer*, 460 U.S. 491, 497 (1983). Unless and until there is a detention, there is no seizure within the meaning of the Fourth Amendment and no constitutional rights have been infringed. *Royer*, 460 U.S. at 498. Even when officers have no basis for suspecting a particular individual, they may generally ask the individual questions and ask to examine identification. *Fry*, 122 Idaho at 102. **So long as police do not convey a message that compliance with their requests is required, the encounter is deemed consensual and no reasonable suspicion is required**. *Id.*

Id. at 684 (emphasis added). There is nothing about an order to "get off the phone" that suggests that compliance is optional or that a reasonable person would feel free to

leave. A person free to leave would have the freedom to go about their business, including speaking on the telephone. This was an order that constituted a seizure of Mr. Kingsley.

The district court recognized *Linenberger*, but concluded, "if Linenberger was not detained in his fact situation (being *told* to get off his own boat), there is simply no way Kingsley was detained in the instant case when Detective Todd *asked* Kingsley to come over to him." (R., p.71.) Mr. Kingsley was detained prior to being asked to come over to Detective Todd because he was ordered to get off his phone. The district court's conclusion is based on a misreading of *Linenberger*.

In *Linenberger*, there was conflicting evidence regarding the directive to leave the boat. The officers testified that they asked, not ordered, Mr. Linenberger to step to the dock to talk. *Linenberger*, 151 Idaho at 684. Mr. Linenberger claimed that he had been ordered. *Id.* The Court of Appeals noted, "[t]he district court determined that the testimony of the detective and police officers was credible and that Linenberger had been asked, not ordered as Linenberger claimed, to step to the dock to talk. *Id.* Linenberger hardly stands for the proposition that an order is not a seizure.

The moment that Mr. Kingsley was ordered to get off his phone, he was detained. An investigative stop is permissible only 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 (Ct.App. 2003). Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts. *Terry,* 392 U.S. at 21. The quantity and quality of information necessary to establish reasonable suspicion is less than that

necessary to establish probable cause. *Alabama v. White,* 496 U.S. 325, 330 (1990). Still, reasonable suspicion requires more than a mere hunch, or "inchoate and unparticularized suspicion." *United States v. Sokolow,* 490 U.S. 1, 7 (1989). Whether an officer possessed reasonable suspicion is evaluated based on the totality of the circumstances known to the officer at or before the time of the stop. *Sheldon,* 139 Idaho at 983.

As the district court found in this case, "all we have is Kingsley standing on Andersen's driveway holding a cell phone with the garage door very slightly open. An individual's mere proximity to people suspected of criminal activity, or presence in a location where a search warrant is executed, is sufficient to give rise to probable cause to search that individual." (R., p.66.) Mr. Kingsley submits that, if, "all we have" is Mr. Kingsley standing in the driveway of a probationer while speaking on a cell phone, the State did not establish reasonable, articulable suspicion that he was, or was about to be, engaged in criminal activity. There is absolutely no indication that the officers believed he was armed or dangerous. The officers had no evidence that Mr. Andersen was dealing drugs that day. Thus, the detention of Mr. Kingsley, which began at the point he was ordered off of his phone, was not supported by reasonable suspicion.

The district court's analysis continued, however. The next fact the court found important was that Detective Todd "asked" Mr. Kingsley to come over to him and that, "this is not a detention according to the Idaho Court of Appeals. (R., p.69.) However, in the very next sentence, the court stated, "[a] brief detention of Kingsley to determine his status was proper," citing to *State v. Pierce*, 137 Idaho 296 (Ct. App. 2002). (R., p.69.) As set forth above, by the time Detective Todd "asked" Mr. Kingsley to come talk to him,

he was detained because he had been ordered off his phone. Further, *Pierce* is inapplicable to this case.

In *Pierce*, officers executed a no-knock warrant on premises believed to be the location of a methamphetamine lab. *Id.* at 297. The warrant authorized the search of the home, a barn, stable, and several vehicles on the premises. *Id.* As they approached the premises, the officers encountered Pierce standing in a driveway approximately fifteen to twenty feet from the home. Id. The officers did not know Pierce and did not know whether Pierce was arriving at or leaving the premises. *Id.* Pierce was ordered to get down on the ground and was handcuffed. *Id.* During the search, items consistent with the production of methamphetamine were found inside the home and barn. *Id.* The lead investigating officer found documents containing Pierce's name on them in the barn, and the officer noted that the barn contained a living area. *Id.* Approximately ten minutes after Pierce was handcuffed, the officer contacted Pierce and observed that Pierce had orangish-brown stains on his hands. *Id.* The officer also smelled an odor on Pierce that the officer associated with the processing of methamphetamine. *Id.* Pierce was then arrested. *Id.*

The Court of Appeals found that Pierce's detention was reasonable, because, "[a] warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 298 (citing *Michigan v. Summers*, 452 U.S. 692 (1981). Application of this rule involves an assessment of the character of the intrusion and its justification. *Summers,* 452 U.S. at 701. The Court of Appeals held that, "[a]lthough the factual posture in *Summers* involved the detention of a resident of the home searched, the

Summers opinion does not suggest that the rule cannot be applied to persons found on the premises to be searched who are not readily ascertainable as residents or occupants." *Pierce*, 137 Idaho at 298. The Court of Appeals concluded that the detention was reasonable based upon its character and justification. *Id.* at 299. Based on *Pierce*, the district court in this case found the detention justified based on its short duration. (R., p.73.)

However, *Pierce*, and the *Summers* rule upon which it is based, is completely inapplicable to the current situation. Pursuant to this rule, officers possess the limited authority to detain the occupants of the premises *when they have a warrant.* In *Summers*, the United States Supreme Court noted, "[o]f prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there. *Summers*, 452 U.S. at 701. The *Summers* Court's conclusion is that, "**[i]f the evidence** that a citizen's residence is harboring contraband **is sufficient to persuade a judicial officer** that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home. *Id.* 704-05 (emphasis added).

In this case, there was no evidence of any kind presented to a judicial officer and there was no warrant. Thus, the *Summers/Pierce* rationale is completely irrelevant to this case. Thus, the district court's conclusion that the detention was reasonable because of its short duration, pursuant to *Pierce*, is error. (R., p.72.)

The remainder of the district court's order is premised on its conclusion that Mr. Kingsley was either never detained, or, if he was detained, it was permissible pursuant to the officers' authority to detain the occupants of the premises they search. As set forth above, this is error, and all the evidence obtained after the illegal detention must be suppressed as fruit of the illegal detention. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

3. Search of Andersen's Residence

With regard to this issue, the district court stated that Mr. Kingsley may have raised a challenge to the search of Mr. Andersen's residence by the North Idaho Violent Crimes Task Force pursuant to Mr. Andersen's probation officer's authority to do so. (R., p.59.) Mr. Kingsley submits that this issue has little relevance to the current appeal as he did not seek to suppress any evidence taken from the search of the house and there is no indication that Mr. Kingsley would have had standing to contest such a search had he made that challenge. However, one holding by the district court bears mentioning.

The district court noted that, pursuant to *State v. Owsley*, 128 Idaho 786 (Ct. App. 1996), that, "an independent determination by the probation officer is a necessary predicate to a lawful probation search, and the probation officer may simply act as a 'stalking horse' for police." (R., p.60.) The district court determined that it had no information before it regarding whether the task force improperly requested the probation officer to perform the search of whether the task force provided the probation officer with information which prompted her to reach the independent decision to conduct a search. (R., p.60.) The court then concluded that it had, "no evidence before

it as to why the Task Force did or did not opt to seek a warrant," and, because it was Mr. Kingsley's burden to raise the issue, the court would not decide the issue sua sponte. (R., p.60.) The court then noted that, although a probation search must serve the ends of probation, there was no evidence that the search was *not* related to the ends of probation. (R., p.61.) Mr. Kingsley agrees that there is a lack of evidence in the record regarding the reason for the probation search or of the procedure that led to the search. Moreover, there is no evidence in the record that Mr. Andersen consented to searches as a condition of his probation. However, Mr. Kingsley disagrees that it was his burden to demonstrate that the search was invalid; when a search is conducted without a warrant, the burden is on the State to prove an exception to the warrant requirement. *See, e.g., State v. Reynolds*, 146 Idaho 466, 470 (Ct. App. 2008). The State did not prove that the proposed probation search was valid. Thus, the district court's holding that, because Mr. Kingsley did not demonstrate the search was improper, it would assume the search was proper, was error.

4. Probation Searches in General

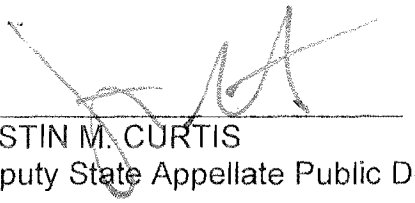
Next, the district court noted that searches incident to a term and condition of probation can also include searches of others present at the place to be searched. (R., p.61.) Again, Mr. Kingsley believes this issue to be of little relevance because he was not challenging the search of the residence. The court determined that, had evidence been presented that Mr. Kingsley was aware that Mr. Anderson was on probation, he may have had no expectation of privacy in any room on the premises; however, the court held that no evidence was presented on that subject. (R., p.62.) Thus, the court assumed that Mr. Kingsley did not know that Mr. Andersen was on probation. (R.,

p.62.) Mr. Kingsley agrees with this conclusion to the extent that it is relevant on appeal.

CONCLUSION

Mr. Kingsley respectfully requests that this Court vacate his judgment of conviction and reverse the order denying his motion to suppress.

DATED this 4th day of February, 2013.



JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of February, 2013, 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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