1-3-2013

State v. Ellis Respondent's Brief Dckt. 39226

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	NO. 39226
	)	
Plaintiff-Respondent,	)	Dist. Ct. No. CR-2011-1686
	)	Ada County
vs.	)	
	)	
MARK LEE ELLIS,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Mark Lee Ellis appeals from his conviction for two counts of possession of sexually exploitative material. Specifically, Ellis challenges the denial of his suppression motion.

Statement of the Facts and Course of the Proceedings

The relevant facts as found by the district court in its decision and order denying Ellis' motion to suppress are as follows:

> The defendant was arrested on an agent's warrant for a parole violation on March 17, 2010. A Parole Commission warrant was issued on March 25, 2010 for the arrest of the defendant. He was arrested on the Parole Commission warrant on March 26, 2012. After his arrest, the defendant's parole officer was contacted by a neighbor who said that she had been asked by the defendant to go into his apartment and take his methamphetamine pipe, some drugs, DVDs, and cell phones from a "secret" compartment or room. On March 30, 2010, as a result of the neighbor's call, the parole officer went to the defendant's apartment and contacted the defendant's landlord. The parole officer mentioned that the defendant had talked about a "secret room" near the kitchen and the landlord explained that the "secret room" was a maintenance area on the porch outside of the defendant's apartment which only the landlord and his maintenance worker were supposed to use and access. The landlord then went to the area and opened it up. The area was closed and then the parole officers and the landlord entered the defendant's apartment and accessed the "secret room" from the defendant's apartment. The parole officer recovered paraphernalia, controlled substances, CDSs/DVDs [sic], and cell phones and booked them into evidence. The DVDs were examined by a detective who found file names consistent with child pornography. Based upon a review of the file names, a search warrant was sought to permit a more extensive forensic analysis of the multiple telephones seized and the CDs/DVDs. On July 27, 2010, the Parole Commission entered formal findings that the defendant had violated his parole and recommended that his parole be revoked.

(R., pp.193-194.)

The state charged Ellis with ten separate counts of possession of sexually exploitative material with a sentencing enhancement for being a persistent violator. (R., pp.152-155, 165-166.) Ellis filed a motion to suppress and two amended motions to suppress asserting the warrantless search violated his rights. (R., pp.31-36, 41-46, 104-109.) At a hearing on the motion, the parties offered no testimony, instead submitting the issues on their briefing. (Tr., pp.6-9.) The district court took the matter under advisement, ultimately denying the motion to suppress in a written order:

> In conclusion, the defendant lacked any reasonable expectation of privacy in the storage area/"secret room" because it was a maintenance area that he was not actually authorized to use. Even if he were authorized to use it and had a reasonable expectation of privacy, the landlord also had full access to the area and the right to consent to its search. Moreover, the fact that he was trying, from custody, to arrange for the destruction of evidence created an exigency that justified an immediate search to prevent the removal and destruction of evidence. Finally, although this is a question of first impression in Idaho, the mere fact that the defendant was in custody did not invalidate his prior valid Fourth Amendment waiver which he gave as a condition of receiving parole. For all of these reasons, the motion to suppress is denied.

(R., p.200.)

Ellis entered a conditional guilty plea to two counts of possession of sexually exploitative material, the state dismissed the remaining eight charges and withdrew the persistent violator sentencing enhancement, and with agreed to recommend a sentence of five years fixed followed by five years indeterminate on one count and a 5 year indeterminate sentence to be served consecutively on the remaining charge. (R., p.202, 205-211; Tr., 19, L.9 – p.30, L.22.)

The district court sentenced Ellis to five years fixed followed by five years indeterminate on Count II and five years indeterminate on Count IV to be served consecutively. (R., pp.218-221; Tr., p.47, L.7 – p.51, L.4.) Ellis timely appeals. (R., pp.225-229.)

ISSUE

Ellis states the issue on appeal as:

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

(Appellant's Brief, p. 5.)

The state rephrases the issue as:

Has Ellis failed to show that the district court erred in denying his suppression motion?

ARGUMENT

Ellis Has Failed To Show That The District Court Erred In Denying His Suppression Motion

A. Introduction

The district court denied Ellis' motion to suppress on four grounds. First, it found Ellis lacked a reasonable expectation of privacy in the maintenance room searched. (R., p.200.) Second, it found the landlord validly consented to the search of the maintenance room. (Id.) Third, it concluded Ellis' attempt to have a neighbor remove incriminating evidence of criminal conduct from the maintenance room created an exigency allowing a search to be conducted without a warrant. (Id.) Finally, the district court held Ellis' arrest on a suspected parole violation did not suspend his valid Fourth Amendment waiver entered as a condition of parole. (Id.)

Ellis argues "he has standing to challenge the State's entrance into his apartment and its subsequent discovery of contraband based on a trespass theory." (Appellant's brief, p.6-12.) Ellis further asserts that the district court erred in finding there was a valid Fourth Amendment waiver in effect at the time of the search or that there were circumstances present that justified the finding of third party consent or exigent circumstances. (Appellant's brief, pp.12-29.) Ellis' claims fail. A review of the record, in light of the applicable legal standards, supports the district court's conclusion that the search of the maintenance room adjoining Ellis' apartment was justified.

As such, the district court did not err when it denied Ellis' 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, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts." State v. Diaz, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007). 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. Fleenor, 133 Idaho 552, 555, 989 P.2d 784, 787 (Ct. App. 1999). The appellate court also gives deference to any implicit findings of the trial court supported by substantial evidence. State v. Brauch, 133 Idaho 215, 218, 984 P.2d 703, 706 (1999).

C. Ellis Has Failed To Establish A Reasonable Expectation Of Privacy In The Maintenance Room

The Fourth Amendment protects against governmental intrusion upon an individual's reasonable expectation of privacy. Oliver v. United States, 466 U.S. 170, 177 (1984); Katz v. United States, 389 U.S. 347, 361 (1967). Thus, as a threshold matter, "one who challenges the legality of a search must establish that he or she had a legitimate expectation of privacy in the thing searched." State v. Harwood, 133 Idaho 50, 52, 981 P.2d 1160, 1162 (Ct. App. 1999) (citing Rawlings v. Kentucky, 448 U.S. 98, 104 (1980)). Here, the thing searched was "a maintenance area on the porch outside of the defendant's apartment which only the landlord and his maintenance worker were supposed to use and

access." (R., p.194.) Ellis has failed to establish he had a reasonable expectation of privacy in that maintenance room.

Ellis asserts:

> [he] need not prove he had a reasonable expectation of privacy in the storage area in order to establish standing because Officer Kiehl's decision to trespass into Mr. Ellis' apartment created the standing necessary for Mr. Ellis to challenge the legality of the search of his apartment on the basis of the Fourth Amendment.

(Appellant's brief, p.12.) Ellis supports his position with the United State's Supreme Court's decision in US v. Jones, 132 S.Ct. 945 (Jan. 23, 2012). In Jones, the Court stated that "when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." Jones 132 S.Ct. at 951 (quoting U.S. v. Knotts, 460 U.S. 276, 286 (1983) (concurring opinion)). The Court held that installation of a GPS tracking device on a vehicle constituted a search requiring a warrant. Id. Contrary to Ellis' position, however, not all trespasses will result in a violation of the Fourth Amendment. See Jones, 132 S.Ct. at 953 ("an intrusion on an 'open field' did not constitute a Fourth Amendment search even though it was a trespass at common law" (citation omitted).

The only issue in Jones was whether GPS tracking constituted a "search." The Court found "the Government physically occupied private property for the purpose of obtaining information." Jones, 132 S.Ct. at 949. Here, there is no doubt there was a search of the maintenance room. Ellis must still show that he had a valid privacy interest in the place searched. Ellis has not established he

had a reasonable expectation of privacy in this maintenance room. Nor has he shown any "trespass" occurred. Finally, he has failed to show that even if there was a trespass it rose to the level of being a Fourth Amendment violation.

The entry into Ellis' apartment was not a search of his apartment, nor did the utilization of his apartment as an access to the maintenance room eliminate the need of Ellis to establish a reasonable expectation of privacy in such room in order to contest the search. The maintenance room was accessed by the landlord from the porch outside Ellis' apartment, where the landlord noticed that "items near the door that would open into Mark Ellis's apartment had been moved." (R., p.67 (Defendant's Ex. 3).) Upon making this observation, the landlord locked up the room, retrieved screwdrivers, and went in through Ellis' apartment where he used a screwdriver to open the door because it did not have a door handle allowing ready access from Ellis' apartment. (R., pp.67-68 (Defendant's Ex. 3).) Thus, the record indicates that the need to access the maintenance room through the apartment was created by Ellis, who trespassed into the room and moved items. More importantly, the parole officer did not acquire information by trespass because he only gained access to a place he had permission to be and Ellis's consent to parole searches means he was not a trespasser in the apartment.

D. Ellis Has Failed To Establish The District Court Erred In Denying His Motion To Suppress

Ellis has also failed to show any entry or search was not justified by his Fourth Amendment waiver as a condition of parole. Ellis argues the search of

the maintenance room was not a valid parole search because the state did not introduce the original Fourth Amendment waiver into the record at the suppression hearing[1] and the Fourth Amendment waiver was not in effect at the time of the search because of Ellis' arrest and subsequent incarceration. (R., pp.12-23.) The district court correctly held the "issuance of a warrant is not the equivalent of the revocation of a parole," thereby not acting to suspend the conditions of parole including the waiver of Fourth Amendment rights. (R., pp.196-198.)

Below and on appeal Ellis relies on language in Idaho Code § 20-228 for his position that his Fourth Amendment waiver was no longer in effect once a warrant was issued alleging a violation of his parole. (Appellant's brief, pp.23.) The statute reads as follows:

> The commission for pardons and parole, in releasing a person on parole, shall specify in writing the conditions of parole, and a copy of such conditions shall be given to the person paroled. Whenever the commission finds that a parolee may have violated the conditions of parole, the written order of the commission, signed by a member or members of the commission or the executive director, shall be sufficient warrant for any law enforcement officer to take into custody such person, and it is hereby made the duty of all sheriffs, police, constables, parole and probation officers, prison officials and other peace officers, to execute such order. Such warrant shall serve to suspend the person's parole until a determination on the merits of the allegations of the violation has been made pursuant to a revocation hearing. From and after the issuance of the warrant and suspension of the parole of any convicted person and until arrest, the parolee shall be considered a fugitive from justice. Such person so recommitted must serve out the sentence, and the time during which such prisoner was out on

[1] The district court noted in denying Ellis' motion to suppress that "[t]here [was] no question, that when [Ellis] was granted parole, he was subject to a valid requirement that he submit to warrantless searches" (R., p.198) as well as the fact that Ellis had "not challenged the validity of the waiver" (R., p.196).

> parole shall not be deemed a part thereof; unless the commission, in its discretion, shall determine otherwise, but nothing herein contained shall prevent the commission from again paroling such prisoners at its discretion.

I.C. § 20-228.

Ellis' reliance on State v. Fuller, 138 Idaho 60, 57 P.3d 771 (2002), for the position that issuance of a parole violation warrant rendered his previously valid Fourth Amendment waiver void (Appellant's brief, pp.15-20) is misplaced as this Court determined I.C. § 20-228 did not control the "resolution of the motions to suppress" in Fuller's case. Fuller, 138 Idaho at 63, 57 P.3d at 774. Ellis was still on parole for his conviction. As the district court noted: "[t]he issuance of a warrant is not the equivalent of the revocation of parole. Parole cannot be revoked until there is a due process hearing." (R., p.197.) Although arrested on an allegation that he had violated the terms and conditions of his parole, Ellis was still entitled to a hearing to determine if he had in fact violated his parole. Only then could his parole be revoked. Mattoon v. Blades, 145 Idaho 634, 181 P.3d 1242 (2008) (abrogated on other grounds by Verska v. Saint Alphonsus Regional Medical Center, 151 Idaho 889, 265 P.3d 502 (2011)). See Morrissey v. Brewer, 408 U.S. 471 (1972) (state must provide due process prior to revocation of parole); see also People v. Ely, 76 Cal.App.3d 1006, 143 Cal.Rptr. 344 (1978) (parole consent to search still effective after parole suspended from commitment for substance abuse treatment); People v. DuBose, 17 Cal.App.3d 43, 48, 94 Cal.Rptr. 376, 379 (Cal.App. 1971) (at the time of arrest, defendant's legal status was that of parolee whose parole was subject to revocation for cause, and also that of escapee and fugitive from justice; this status continued

pending ultimate disposition of the charges of parole violation). Because Ellis remained a parolee until the final disposition of the allegations of parole violation, he was still under obligation to conform his conduct to the terms of parole – including terms such as not engaging in criminal conduct and submitting to searches. Suspension of parole served only to suspend his limited physical freedom pending resolution of the parole violation charges.

Ellis asserts his parole was "suspended" by his arrest on the Parole Commission's warrant prohibiting a warrantless search for evidence of previous violations of his parole. Ellis describes the situation in terms of a contract:

> Since parole is technically revoked it logically follows that the parole agreement is either suspended or terminated and, therefore unenforceable. Another way to think about it is through contract law. Once Mr. Ellis lost the benefit of the parole agreement, release from custody, the State can no longer enforce the agreement.

(Appellant's brief, p.17.) Ellis' contract argument fails on two levels. First, parole cannot be "technically revoked" by the issuance of a warrant. A revocation can only be accomplished by a decision entered by the Parole Commission following a hearing. That had not yet happened when Ellis' parole officer went to his home to search the storage room attached to Ellis' apartment upon obtaining information that Ellis was attempting to destroy evidence of further violations. Additionally, the mere allegation of a violation does not relieve a parolee of the benefit of the agreements or his rights therein. Ellis still had the right to a hearing to determine if he had violated the terms prior to a revocation.

Had Ellis no longer been subject to warrantless searches of a condition of his parole, the officer was still justified in searching for evidence of a parole

violation. Parolees and probationers enjoy a reduced expectation of privacy against governmental intrusion. Samson v. California, 547 U.S. 843 (2006); United States v. Knights, 534 U.S. 112 (2001). Thus, a probationer is subject to warrantless searches by a probation officer if that probation officer has reasonable suspicion the probationer has violated probation. Knights, 534 U.S. at 121-22; State v. Anderson, 140 Idaho 484, 487-88, 95 P.3d 635, 638-39 (2004) (defendant released on own recognizance after conviction but before sentencing is subject to search upon reasonable suspicion); State v. Adams, 146 Idaho 162, 164, 191 P.3d 240, 242 (Ct. App. 2008) (probation searches based on suspicion are reasonable "[e]ven in the absence of a warrantless search condition").

In State v. Klingler, 143 Idaho 494, 496-98, 148 P.3d 1240, 1242-44 (2006), this Court upheld the search of a probationer based on reasonable suspicion even though there was no Fourth Amendment waiver applicable at the time of the search. In Turek, the Idaho Court of Appeals recognized that "well-developed law in this area establishes that probation searches may be conducted without consent when the officers are there to investigate reasonable suspicion of violation of probation terms." State v. Turek, 150 Idaho 745, 748, 250 P.3d 796, 799 (Ct. App. 2011) (citing Klingler and distinguishing State v. Pinson, 104 Idaho 227, 657 P.2d 1095 (Ct. App. 1983), in which a probation search based on reasonable suspicion was upheld where there was no consent to search as a condition of probation).

Here Ellis' parole officer had reasonable suspicion that Ellis was in violation of his parole because he was in possession of drug paraphernalia and controlled substances based on a call from Ellis' neighbor with information that Ellis wanted her to go into his apartment to remove incrirninating evidence. (R., p.193.) Because the parole search was justified by reasonable suspicion it was constitutionally proper and as such, should be affirmed by this Court. See, e.g., McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999); State v. Avelar, 129 Idaho 700, 704, 931 P.2d 1218, 1222 (1997) (where the lower court reaches the correct result by a different theory, the appellate court will affirm the order on the correct theory).

Additionally, the information the parole officer had that Ellis was reaching out from custody to have incriminating evidence removed supports the district court's finding the search was "justified on the basis of exigent circumstances." (R., pp.195-195.) It is well settled that entries necessitated by "exigent circumstances" do not offend the warrant requirement. Michigan v. Tyler, 436 U.S 499, 509 (1978); State v. Curl, 125 Idaho 224, 225, 869 P.2d 224, 225 (1993); State v. Sailas, 129 Idaho 432, 434, 925 P.2d 1131, 1133 (Ct. App. 1996). "Under the exigent circumstances exception to the warrant requirement, the need to prevent the destruction of evidence is justification for what would otherwise be illegal police conduct." State v. Hoak, 107 Idaho 742, 748, 692 P.2d 1174, 1180 (1984); accord Mincey v. Arizona, 437 U.S. 385 (1978) (irnminent risk of destruction of evidence is an exigency that justifies a warrantless search); State v. Bunting, 142 Idaho 908, 912, 136 P.3d 379, 383

(Ct. App. 2006) (same); State v. Rusho, 110 Idaho 556, 559, 716 P.2d 1328, 1331 (Ct. App. 1986) (same). In order for the this exception to apply, the police must have probable cause to believe that evidence is present in the place to be searched and must also possess "a reasonable belief that unless they act, the evidence will be destroyed." Hoak, 107 Idaho at 748-49, 692 P.2d at 1180-81 (footnote omitted); accord Rusho, 110 Idaho at 559, 716 P.2d at 1331 (citing Mincey, 437 U.S. 385) ("Probable cause and a compelling emergency, such as imminent destruction of evidence... must be shown."). Applying these principles in this case, the district court correctly ruled that the officers were justified by exigent circumstances in accessing the maintenance room through Ellis' apartment to prevent the destruction of evidence. Because Ellis had "contacted his neighbor from the jail to get her to remove evidence," it was reasonable of the parole officer to "conclude that haste was essential." (R., p.196.)

Finally, Ellis maintains any consent given by the landlord to search the maintenance room through Ellis' apartment was invalid because the landlord did not have the authority to consent to a search of his apartment itself. (Appellant's brief, p.25.) As discussed in Section "C" above, the access of the maintenance room, for which Ellis has failed to establish a reasonable expectation of privacy, through Ellis' apartment was necessitated by Ellis' own actions of trespassing in the maintenance room and moving items which required entrance through his apartment. As the district court correctly concluded in finding valid consent by the landlord to search the maintenance room, "the landlord could consent to the search of the storage area because the landlord possessed common authority

over that area even if the defendant's access were legitimate." (R., p.195.) See State v. Misner, 135 Idaho 277, 279, 16 P.3d 953, 955 (Ct. App. 2000) (Permission for a warrantless search "need not come from the defendant; it may be obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.")

CONCLUSION

The state respectfully requests this Court to affirm the judgment and district court's order denying Ellis' motion to suppress.

Dated this 3rd day of January 2013,

NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of JANUARY 2013 served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

SHAWN F. WILKERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm