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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 vs.)
)
 DAVID D. PURDUM,)
)
 Defendant-Appellant.)

NO. 33073

FILED - COPY
APR 20 2017
Suprema Court _____ Court of Appeals _____
Entered on AIS by: _____

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ONEIDA**

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STATEMENT OF THE CASE

Nature of the Case

David D. Purdum appeals from the judgment of conviction entered upon his conditional guilty plea to possession of a controlled substance challenging the denial of his motion to suppress.

Statement of the Facts and Course of the Proceedings

On October 8, 2003, the district court filed an order¹ in a separate case placing Purdum on probation for possession of methamphetamine (hereafter "Probation Order"), which required Purdum to "submit to random blood, breath and/or urine analysis upon the request of the Court, his probation officer or any law enforcement official." (R., p.95.) Just prior, on September 26, 2003, Purdum signed a "Community Corrections Agreement of Supervision" (hereafter "Community Corrections Agreement", Exhibit d). In paragraphs 6 and 8 respectively, Purdum agreed to submit to the search of his person and property and submit to controlled substances tests as requested by his supervising officer or agent of the Division of Community Corrections Services. (Id.)

Two years later, Officer Reeder, "who knew that [Purdum] was on probation and who knew the terms of that probation" (R., p.58), saw Purdum and decided to stop him and request a urinalysis test (R., p.4). Officer Reeder, in his

¹ Purdum moved to augment the record with the district court's order the same day he filed his opening brief. (Motion to Augment and Statement in Support, Docket No. 33073, filed June 15, 2007). He later filed a revised motion. (Revised Motion to Augment and Statement in Support, Docket No.33073, filed June 19, 2007.) The Idaho Supreme Court granted Purdum's revised motion to augment by order on June 28, 2007. (Order, Motion to Augment, Docket No. 33073, June 28, 2007.) The pages of the order are numbered consecutively with the record for the convenience of the court.

patrol vehicle, approached Purdum while Purdum was exiting his parked vehicle and talking on a cell phone. (Id.) As Officer Reeder approached, and before Officer Reeder could ask Purdum to stop, Purdum "took approximately ten steps then bolted." (Id.) Officer Reeder activated his patrol lights and sounded his horn to "make [Purdum] aware that I wanted to talk to him." (Id.) When Officer Reeder exited his car and located Purdum hiding under a tarp in a shed, he ordered Purdum out and asked Purdum why he ran. (Id.)

Purdum continued to talk on the cell phone and Officer Reeder advised Purdum twice more to stop talking on the phone, but Purdum continued to talk. (R., p.4.) Officer Reeder then advised Purdum that if he did not stop talking, then he would arrest Purdum for obstruction. (Id.) Officer Reeder told Purdum that he was going to pat him down for weapons and Purdum "said he had a knife in his right pants pocket then reached in his pocket." (Id.) Officer Reeder told Purdum to keep his hands out of his pockets and place them on the patrol car. (Id.) However, as Officer Reeder began to perform a search and before any items were obtained from Purdum's person, Purdum fled for the second time. (R., pp.4-5.)

Officer Reeder pursued Purdum, and after Purdum tripped and fell, Officer Reeder made contact with Purdum. (R., p.5.) Officer Peterson arrived to assist, and both the officers took Purdum into custody. (Id.) Officer Reeder advised Purdum that he was under arrest for obstruction, read Purdum his Miranda rights, and searched him incident to arrest. (Id.) Officer Reeder discovered multiple lighters and a butane lighter on Purdum's person, as well as a butane torch, a

propane torch, Visine, and urinary supplement pills in Purdum's vehicle. (Id.) Relying on his training and experience that these items are associated with meth use, Officer Reeder opened the motor compartment of Purdum's vehicle and discovered a "meth bong" inside the air filter compartment of Purdum's vehicle. (Id.) Officer Reeder then arrested Purdum for possession of a controlled substance (I.C. § 37-2732(c)(1)). (R., p.6.)

The state charged Purdum with possession of a controlled substance (I.C. § 37-2732(c)(1)) by information (R., p.22), and alleged that Purdum violated terms 5, 6, 12, and 9 of the Probation Order (R., pp.63-65). Purdum moved to suppress "because there was lack of probable cause or a valid reason for initially stopping or searching the defendant." (R., pp.27-28 (emphasis added)). The state and Purdum stipulated to the facts as set forth in the police report (R., pp.3-7), the terms of the Community Corrections Agreement (Exhibit d), and that Purdum's probation officer did not request that the officer stop and search Purdum (12/15/2005 Tr., p.1, L.15 – p.4, L.11). In his brief, Purdum argued that "the officers who stopped Mr. Purdum had no 'individualized reasonable suspicion' Mr. Purdum was involved in criminal conduct." (R., p.40.)

After a hearing on January 27, 2006 (R., pp.51-52), the district court determined that based on the express language of the Probation Order, Purdum "consented to warrantless searches as a term of his probation, and . . . consented to allow any probation or law enforcement officer to request a blood, breath, or urine test, [so] the deputy did not need reasonable suspicion to make

the stop.” (R., p.60.)² Purdum entered a conditional guilty plea preserving the right to challenge the denial of his motion to suppress. (R., pp.65-66, 68.) Purdum timely appeals.

² A transcript of this hearing is not part of the record on appeal and the minutes (R, pp.51-52) do not indicate that the court took any further evidence.

ISSUE

Purdum states the issue on appeal as:

Did the district court err in denying Mr. Purdum's Motion to Suppress by concluding that Mr. Purdum had waived all of his Fourth Amendment rights as a condition of probation?

(Appellant's brief, p.4.)

The state rephrases the issue as:

Has Purdum failed to show the district court erred in denying his motion to suppress?

ARGUMENT

The District Court Correctly Denied Purdum's Motion To Suppress

A. Introduction

Purdum claims on appeal, as he did below (R., pp.27, 40), that the officers did not have the authority to stop him and make a request for a drug test without a reasonable suspicion and he only waived his Fourth Amendment Rights to stops and searches performed by his probation officer. (Appellant's brief, pp.6-10.) However, the Probation Order plainly states that Purdum "shall submit to random blood, breath and/or urine analysis upon the request of the Court, his probation officer or any law enforcement official." (R., p.95 (emphasis added).) If Purdum agreed to submit to a search of his blood, breath, and urine upon request of a law enforcement officer as he concedes, it follows that Officer Reeder had the authority to stop Purdum and make the request without any separate and distinct reasonable suspicion that Purdum was violating the terms of his probation.

Moreover, because the officers had probable cause to arrest Purdum for obstruction of an officer and the officers in fact arrested Purdum for this crime, the searches of Purdum were justified as a search incident to arrest. The district court's order denying Purdum's motion to suppress should be affirmed.

B. Standard of Review

The standard of review of a suppression motion is bifurcated. An appellate court accepts the trial court's findings of fact which are supported by substantial evidence, but freely reviews the application of constitutional principles

to the facts as found. State v. Atkinson, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a hearing, 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).

C. According To Paragraph 8 Of The Probation Order The Officer Could Stop Purdum And Request A Random Blood, Breath, Or Urine Analysis Drug Test

In both the trial court (R., p.27) and on appeal (Appellant's brief, pp.6-10) Purdum directly challenges Officer Reeder's authority to stop him initially and request a drug test (Appellant's brief, pp.7-8), and argues that because Officer Reeder did not have the authority to stop him under the terms of the Community Corrections Agreement. The state submits that because paragraph 8 of the Probation Order required Purdum to "submit" to a drug test by "any law enforcement officer" (R., p.95), it follows that Officer Reeder could stop Purdum and request a drug test without any separate reasonable suspicion that Purdum was violating the terms of his probation.

"Idaho appellate courts have long recognized that parolees and probationers have a diminished expectation of privacy and will enforce Fourth Amendment waivers as a condition of parole or probation." State v. Cruz, 2007 Opinion No. 41, p.4 (June 12, 2007) (citing State v. Gawron, 112 Idaho 841, 843, 736 P.2d 1295, 1297 (1987); State v. Peters, 130 Idaho 960, 963, 950 P.2d 1299, 1302 (Ct. App. 1997)); State v. Devore, 134 Idaho 344, 347, 134 P.2d 153, 156 (Ct. App. 2000); State v. Spencer, 139 Idaho 736, 738-740, 85 P.3d 1135 ,

1137-1139 (Ct. App. 2004). Also, a court may impose terms of probation that restrict constitutional rights as long as the term bears a reasonable relation to the defendant's criminal activities and the court gives the defendant notice of the terms. State v. Russell, 122 Idaho 515, 518-519, 835 P.2d 1326, 1329-1330 (1991) (opinion vacated in part on other grounds by State v. Russell, 122 Idaho 488, 835 P.2d 1299 (1992)). "A defendant may decline probation, should he consider its terms too onerous, and demand instead to be sentenced by the court." State v. Tesheep, 122 Idaho 759, 760, 838 P.2d 888, 889 (Ct. App. 1992) (citing State v. Sandoval, 92 Idaho 853, 861, 952 P.2d 350, 358 (1969)); State v. Franklin, 87 Idaho 291, 298, 392 P.2d 552, 555 (1964); State v. Breeden, 129 Idaho 813, 816, 932 P.2d 936, 939 (Ct. App. 1997).

Purdum was a probationer subject to the terms of a court order that he accepted. Paragraph 8 of the Probation Order required him to "submit" to a drug test when requested by a law enforcement officer. (R., p.95.) In fact, Purdum concedes that he was "subject to a search of his blood, breath, or urine" by law enforcement officers pursuant paragraph 8 of the Probation Order. (Appellant's brief, p.10.) It follows that if Purdum is to submit to a request for a drug test, then a law enforcement officer can approach Purdum and stop him to make the request. The record shows that Officer Reeder stated that he intended to stop Purdum "because of [Purdum] being on felony probation and his probation stating that any officer may stop him and ask for a UA." (R., p.4.) Purdum stipulated that the officer approached him to request a drug test. (R., p.4;

12/15/2005 Tr., p.1, L.15 – p.4, L.11). There is no indication the officer approached Purdum for any other purpose.

Purdum argues that Officer Reeder was required to possess a separate reasonable suspicion that Purdum was violating his probation in order to stop Purdum and ask for a urinalysis test. (Appellant's brief, pp.6-8.) This argument is unreasonable because probationers like Purdum would be able to forever evade court ordered random drug testing by simply running off. As stated recently in State v. Cruz, such a situation allows probationers "to play this shell game with [] officers [which] would defeat the state's substantial interest in closely monitoring" probationers. State v. Cruz, Docket No. 31880, 2007 Opinion No. 41, p.7 (June 12, 2007).

Importantly, Purdum never challenged paragraph 8 as unreasonable or unrelated to the goals of probation, and has never claimed that he did not voluntarily accept probation and its terms, or that he did not have notice of the term. (R., pp.44-45.) Based on paragraph 8 of the Probation Order and the stipulated facts, the district court correctly concluded that the officer could stop Purdum and request a drug test. (R., pp.59-60.)

Because Paragraph 8 requires Purdum to "submit" to a request for a drug test by a law enforcement officer, Purdum's argument is ultimately irrelevant. The district court's order denying his motion to suppress should be affirmed.

D. The Search Of Purdum's Person Was Justified As A Search Incident To Arrest

Although neither the Probation Order, nor the Community Corrections Agreement gave Officer Reeder the same authority to search Purdum's person

or property as it gave Purdum's probation officers, Officer Reeder's searches of Purdum are otherwise justified. Where the lower court reaches the correct result by relying on an incorrect legal theory, the appellate court will affirm the result under the correct legal theory. 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); see also State v. Rhoades, 134 Idaho 862, 864, 11 P.3d 481, 483 (2000). The alternative theory need not have been raised before the trial court. State v. Kerley, 134 Idaho 870, 874, 11 P.3d 489, 493 (Ct. App. 2000). The state submits that Officer Reeder's search of Purdum and his vehicle are justified as a search incident to arrest for obstruction of an officer.

A search incident to a valid arrest is among the well-delineated exceptions to the warrant requirement and, thus, does not violate the Fourth Amendment proscription against unreasonable searches. Chimel v. California, 395 U.S. 752, 762-63 (1969); State v. Moore, 129 Idaho 776, 781, 932 P.2d 899, 904 (Ct. App. 1996). Pursuant to this exception, the police may search an arrestee incident to a lawful custodial arrest. United States v. Robinson, 414 U.S. 218, 235 (1973); Moore, 129 Idaho at 781, 932 P.2d at 904. It is of no consequence whether the search is conducted before or after the arrest is made. Rawlings v. Kentucky, 448 U.S. 98, 111 (1980). However, the probable cause to arrest must be apparent before the search is conducted. State v. Johnson, 137 Idaho 656, 662, 51 P.3d 1112, 1118 (Ct. App. 2002).

Probable cause is the possession of information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong

suspicion that a person they have placed under arrest is guilty of a crime. See State v. Julian, 129 Idaho 133, 136, 922 P.2d 1059, 1062 (1996). Probable cause is not measured by the same level of proof required for conviction. Id. Rather, probable cause deals with the factual and practical considerations on which reasonable and prudent persons act. Brinegar v. United States, 338 U.S. 160, 175 (1949); Julian, 129 Idaho at 136, 922 P.2d at 1062. When reviewing an officer's actions, the court must judge the facts against an objective standard. Julian, 129 Idaho at 136, 922 P.2d at 1062. That is, would the facts available to the officer, at the moment of the seizure or search, warrant a reasonable person in holding the belief that the action taken was appropriate. Id. A probable cause analysis must allow room for mistakes on the part of the arresting officer but only the mistakes of a reasonable person acting on facts which sensibly led to his or her conclusions of probability. Kerley, 134 Idaho at 874, 11 P.3d at 493.

Officer Reeder had probable cause to arrest Purdum for obstruction of an officer once Purdum ran from him. Idaho Code section 18-705 provides:

Every person who wilfully resists . . . any public officer, in the discharge, or attempt to discharge, of any duty of his office . . . when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars (\$1,000), and imprisonment in the county jail not exceeding one (1) year.

Three elements must be proven to demonstrate the offense of resisting and obstructing an officer: (1) the person who was resisted, delayed or obstructed was a law enforcement officer, (2) the defendant knew that the person was an officer, and (3) the defendant also knew at the time of the resistance that the officer was attempting to perform some official act or duty. I.C. § 18- 705; State

v. Adams, 138 Idaho 624, 67 P.3d 103 (2003). The word "duty" encompasses both lawful and authorized acts of an officer. State v. Wiedenheft, 136 Idaho 14, 16, 27 P.3d 873, 875 (2001).

Officer Reeder's status as a law enforcement officer has never been challenged, and the record (R., pp.4-6) and Purdum's own arguments (Appellant's brief, pp.5-10) support this conclusion. Also, Purdum knew that Officer Reeder was an officer because Officer Reeder approached Purdum in a patrol car with lights. (R., p.4.) Finally, Purdum knew at the time he ran off that he was on probation and subject to terms and conditions that required him to communicate with law enforcement officers, and that the Probation Order required law enforcement officers to perform some duties of supervision (i.e., requesting drug tests). Moreover, Officer Reeder indicated he wanted to talk with Purdum when he turned on his patrol lights. (R., p.4.) The record, then, shows that from the time Purdum first ran from his truck (R., p.4.), Officer Reeder had probable cause to arrest him for obstruction, and Officer Reeder indicated he would arrest Purdum for this crime when Officer Reeder first made contact with Purdum in the shed (R., pp.4-5). Officer Reeder then arrested Purdum prior to the search of his person and vehicle for the offense of obstruction of an officer. (R., p.5.)

"The permissible scope and purposes of a search incident to arrest is not limited to the removal of weapons but includes the discovery and seizures of evidence of crime and articles of value which, if left in the arrestee's possession, might be used to facilitate his escape." Moore, 129 Idaho at 781, 932 P.2d at

904. Once Officer Reeder had arrested Purdum, he could search Purdum's person for evidence of crimes and any articles of value that Purdum may use to further facilitate his escape.

E. The State's Interests Outweighed Purdum's Significantly Reduced Privacy Rights Such That Officer Reeder Could Search Purdum's Vehicle Based On A Reasonable Suspicion That It Contained Methamphetamine

When officers searched Purdum incident to arrest they found evidence that gave rise to a reasonable suspicion that Purdum was using methamphetamine. Because probationers do not have the same expectation of privacy, this reasonable suspicion justified the search of the car. "The United State's Supreme Court recently analyzed the constitutionality of warrantless searches of parolees and probationers under the general Fourth Amendment approach of examining the totality of the circumstances." State v. Cruz, 2007 Opinion No. 41, Docket No. 31880, p.4 (June 12, 2007) (citing United States v. Knights, 534 U.S. 112, 118 (2001)). The Supreme Court concluded:

[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests . . . Inherent in the very nature of probation is that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled.' "

Knights, 534 U.S. at 118-119 (citing Wyoming v. Houghton, 526 U.S. 295, 300, 119 S.Ct. 1297 (1999), Griffin v. Wisconsin, 483 U.S. 868, 874, 107 S.Ct. 3164 (1987)).

On balance, the search of Purdum's vehicle was justified because Purdum had a significantly reduced expectation of privacy that was outweighed by the

government's interest in furthering the goals of probation-rehabilitation and the protection of society such that Officer Reeder needed only a reasonable suspicion to search Purdum's vehicle. As evidenced by the Fourth Amendment waivers Purdum agreed to in paragraph 6 of the Community Corrections Agreement and paragraph 14 of the Probation Order, even though these applied to probation officers, Purdum received significantly diminished privacy rights while on probation. Moreover, the mere fact that Purdum was subject to these conditions shows that they were necessary to "further [state's] the two primary goals of probation-rehabilitation and protecting society from further criminal violations." Knights, 534 U.S. at 119, 122 S.Ct. at 592. On the side of the state's interest, like most probationers Purdum was "more likely than the ordinary citizen to violate the law" Griffin, 483 U.S. at 880, and had "even more of an incentive to conceal [his] criminal activities and quickly dispose of incriminating evidence . . . because probationers are aware that they may be subject to supervision and face revocation of probation and possible incarceration," Knights, 534 U.S. at 120, 122 S.Ct. at 592. In fact, at the time of the search of Purdum's vehicle, Purdum was under arrest for violating the law and fled the scene in an attempt to conceal his criminal activities. The state's interest, then, outweighs Purdum's privacy rights such that under Knights, Officer Reeder needed only possess a reasonable suspicion to conduct a search of Purdum's vehicle.

"[T]he degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable."

Knights, 534 U.S. at 121, 122 S.Ct. at 592. Officer Reeder had a reasonable suspicion that Purdum, who was subject to search conditions, was engaged in criminal activity such that the intrusion into his vehicle was reasonable. Officer Reeder knew that Purdum was on probation for methamphetamine possession (R., p.4), and had just arrested Purdum for violating the law (R., p.5).

Officer Reeder discovered multiple items related to methamphetamine use on Purdum's person during the search incident to arrest: two bic lighters and one butane lighter (R., p.5). Based on these items and Purdum's prior conviction, Officer Reeder continued his search into the vehicle Purdum was seen fleeing just prior to his arrest. (Id.) There, Officer Reeder discovered more evidence of methamphetamine use: a butane torch and a can of butane in the glove box, as well as a bottle of Visine and a bottle of Golden Seal urinary supplements and a number 8 pool ball in the center console. (R., p.5.) Moreover, in the "back of the vehicle," Officer Reeder discovered a propane torch. (Id.) Based on his training and experience, Officer Reeder identified the items as associated with methamphetamine use and proceeded to search Purdum's engine compartment because "that's where drugs and paraphernalia are hidden." (R., p.5.) Based upon the totality of the circumstances and his training and experience, Officer Reeder's search of the engine of Purdum's vehicle produced the homemade bong and methamphetamine. (Id.)

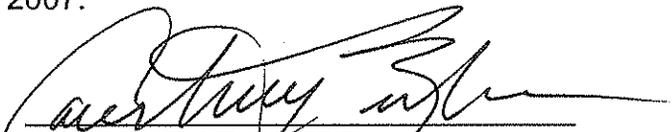
Purdum's challenge to the search of his person or vehicle fails because Officer Reeder conducted a lawful search of Purdum's vehicle. Purdum makes no attempt on appeal to meet his burden and show otherwise. As a result, the

district court reached the right conclusion by denying Purdum's motion to suppress and the order should be affirmed.

CONCLUSION

The state respectfully requests this Court to affirm the denial of Purdum's motion to suppress.

DATED this 30th day of August, 2007.

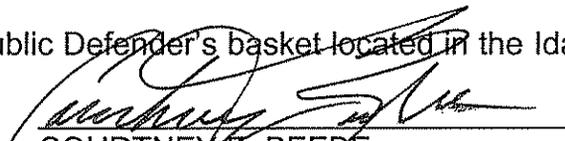

COURTNEY E. BEEBE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th of August 2007, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

ERIC D. FREDRICKSON
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.


COURTNEY E. BEEBE
Deputy Attorney General

CEB/pm