3-31-2015

Brummett v. State Respondent's Brief Dckt. 42466

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID BRUMMETT,	)	
	)	No. 42466
Petitioner-Appellant,	)	
	)	Canyon Co. Case No.
vs.	)	CV-2011-3850
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

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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District Judge

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Nature of the Case

David Brummett appeals from the summary dismissal of his post-conviction petition.

Statement of Facts and Course of Proceedings

The Union Pacific railroad tracks near 11th Avenue North, Nampa are protected by a chainlink fence with barbed wire on top. (R., Vol. II, p. 172 (7/10/08 Tr., p. 6, Ls. 1-20).) Union Pacific also posted a large no trespassing sign. (Id.) Officer Davis saw Brummett walking on the railroad tracks. (R., Vol. I, p. 27; Vol. II, pp. 107, 172.) Brummett was wearing headphones. (R., Vol. II, p. 172 (7/10/08 Tr., p. 6, L. 21 – p. 7, L. 6).) Officer Davis repeatedly yelled to get Brummett's attention, but he ignored Officer Davis. (Id.)

Only after Officer Davis raised his voice as loud as he could, did Brummett walk over to the chain link fence to talk to Officer Davis. (Id.) Officer Davis told Brummett that he was on private property and he needed Brummett to come down to where Brummett could cross the fence and they could talk. (R., Vol. II, p. 172 (7/10/08 Tr., p. 7, L. 7 – p. 8, L. 12).) Brummett eventually started walking in the direction Officer Davis indicated. (Id.)

Brummett then walked out into the middle of the tracks and just stopped. (Id.) Officer Davis kept yelling at him, but Brummett just ignored him. (Id.) Officer Davis started to climb over the fence. (R., Vol. II, p. 172 (7/10/08 Tr., p. 8, Ls. 3-12).) Brummett took off running. (Id.) Brummett ran towards a slow moving train and climbed through the middle of two railroad cars. (R., Vol. I, p.

27.) The train stopped just in time for Officer Davis to go through the same two railroad cars. (Id.) Brummett continued to run, but eventually tripped and fell. (Id.) He got up and refused Officer Davis' commands to get on the ground. (Id.) Officer Davis tackled Brummett and put him in handcuffs. (Id.) During a brief pat-down, Officer Davis found marijuana in Brummett's left front pants pocket. (R., Vol. I, pp. 27-28.) Before Officer Davis put Brummett in the patrol car he also found a hypodermic needle in his jacket pocket and a spoon with white crystal residue. (R., Vol. I, p. 28; Vol. II, p. 172 (7/10/08 Tr., p. 8, L. 13 – p. 9, L. 8).) The white crystal residue tested positive for methamphetamine. (R., Vol. I, p. 28; Vol. II, pp. 107, 172 (7/10/08 Tr., p. 8, L. 13 – p. 9, L. 8).)

After Brummett was advised of his Miranda rights, Brummett admitted that the methamphetamine and marijuana were his. (R., Vol. II, p. 107.) Brummett said he ran from Officer Davis because he thought Officer Davis would search him and find the marijuana. (Id.) Union Pacific Rail Road advised Officer Davis that Brummett would have had to climb the fence to get onto their railroad tracks at that location. (Id.) The state charged Brummett with possession of methamphetamine, trespass, possession of paraphernalia, resisting and obstructing and possession of marijuana. (R., Vol. II, pp. 106, 134-136.)

After a preliminary hearing, Brummett was bound over to district court. (R., Vol. II, pp. 167, 170-178.) The state added a Persistent Violator enchantment. (R., Vol. II, pp. 184-185.) Brummett's counsel sent him a letter explaining that a motion to suppress was not warranted because Brummett ran from police. (R., Vol. I, p. 37.) Brummett's counsel provided Brummett with

copies of the police report and applicable case law. (Id.) The letter also urged Brummett to consider the state's plea offer, because the state offered to dismiss the persistent violator enhancement. (Id.) Brummett's counsel also sent him a second letter explaining that he would not file a motion to dismiss because such a motion would be frivolous. (R., Vol. I, p. 35.)

Brummett agreed to plead guilty to felony possession of methamphetamine. (R., Vol. II, p. 197.) Pursuant to the plea agreement, the state dismissed the misdemeanors – trespass, resist and obstruct, paraphernalia, and possession of marijuana – and dismissed the persistent violator enhancement. (R., Vol. II, pp. 202-207.) The district court sentenced Brummett to seven years with three years fixed. (R., Vol. II, pp. 208-210.) The district court ordered the sentence to run concurrent with Brummett's Ada County sentence. (Id.)

Brummett filed a Petition and Affidavit For Post Conviction Relief. (R., Vol. I, pp. 3–55.) The district court appointed post-conviction counsel. (R., Vol. I, pp. 62-64, 97-98.) The state filed an Answer. (R., Vol. I, pp. 71-73.)

The district court entered an Order of Conditional Dismissal. (R., Vol. II, p. 265-274.) The Order of Conditional Dismissal gave Brummett notice of the court's intent to dismiss and provided its reasons for the dismissal. (See R., Vol. II, pp. 265-274.) In part, the district court gave notice that Brummett failed to provide admissible evidence that his counsel was ineffective for declining to file a motion to suppress based upon the claim that the officer lacked reasonable suspicion that Brummett was trespassing. (R., Vol. II, pp. 271-272.) The district

court gave Brummett 20 days to respond. (R., Vol. II, p. 273.) Brummett moved for additional time to respond and the district court granted the motion. (R., Vol. II, pp. 275-278.) Brummett filed an Objection to the Order of Conditional Dismissal. (R., Vol. II, pp. 279-284.) Brummett argued that he was not trespassing because there was an opening in the fence and he did not see the no trespassing signs. (R., Vol. II, p. 283.)

The district court entered a Memorandum Decision and Order of Dismissal. (R., Vol. II, pp. 285-289.) The district court rejected Brummett's argument and held that Officer Davis "had a reasonable suspicion that [Brummett] was committing criminal activity, particularly when [Brummett] ran from police." (R., Vol. II, pp. 287-288.) The district court also found that that motion to suppress would have been denied because the officer "acted reasonably within his community caretaking function to make sure that [Brummett] was off of the railroad tracks because trains frequently pass along the same tracks that [Brummett] was walking on." (R., Vol. II, p. 288.) In conclusion the district court held:

> This Court finds that [Brummett's] claim for ineffective assistance of counsel fails because there was no showing that his attorney's performance was deficient and because [Brummett] cannot show a reasonable probability that a motion to suppress would likely have succeeded, thus counsel's failure to pursue the motion was not prejudicial to [Brummett's] case.

(R., Vol. II, p. 288.) The district court dismissed Brummett's post-conviction petition. (R., Vol. II, p. 290.) Brummett timely appealed. (R., Vol. II, pp. 292-295.)

ISSUE

Brummett states the issues on appeal as:

> 1. Did the district court err in summarily dismissing Mr. Brummett's petition without giving notice as required by I.C. § 19-4906(b)?
>
> 2. Did the district court err in concluding that Mr. Brummett had not raised a genuine issue of material fact as to ineffective assistance of counsel because the community caretaker exception to the Fourth Amendment allows police to chase, tackle, arrest, and search a person who, while near railroad tracks, is on a public street and in no apparent danger of being injured by a train or anything else and presents no threat to safe railroad operations? U.S. Const. Amends 4, 6, and 14; Idaho Const. Art. I, §17.
>
> 3. Did the district court err in concluding that Mr. Brummett had not raised a genuine issue of material fact as to ineffective assistance of counsel because the fact that he ran from the police, with nothing more, was sufficient to justify tackling, arresting and searching him? U.S. Const. Amends 4, 6, and 14; Idaho Const. Art. I, §17

(Appellant's brief, pp. 6-7.)

The state rephrases the issue as:

1. Has Brummett failed to show the district court erred when it summarily dismissed his post-conviction petition?

ARGUMENT

Brummett Failed To Show The District Court Erred When It Summarily Dismissed His Post-Conviction Petition

A. Introduction

On appeal Brummett argues the district court failed to give adequate notice of the reasons for the summary dismissal. (Appellant's brief, pp. 7-8.) Specifically, Brummett argues that the district court did not give him adequate notice of the "community caretaking" reason for dismissal. (Id.) However, the primary reason the district court dismissed his petition was that a motion to suppress would have failed because Officer Davis had reasonable suspicion to believe Brummett was engaged in criminal activity. (See R., Vol. II, pp. 265-274, 285-289.) Brummett does not challenge this notice.

Brummett also argues that his criminal counsel was ineffective for declining to file a motion to suppress challenging Officer Davis' reasonable articulable suspicion for the stop. (Appellant's brief, pp. 8-12.) Brummett is incorrect. Brummett's criminal counsel was not ineffective for declining to file a motion to suppress because a motion to suppress would not have been successful. Officer Davis had reasonable suspicion to stop Brummett and probable cause to arrest Brummett for trespass and resisting and obstructing. (See R., Vol. I, p. 27; Vol. II, pp. 107, 172 (7/10/08 Tr., p. 6, L. 1 – p. 8, L. 12).) Any motion to suppress would have failed and, therefore the district court did not err when it dismissed Brummett's post-conviction petition.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. The District Provided Proper Notice Of Its Intention To Dismiss Brummett's Petition

Brummett claims that the district court dismissed his petition without providing him proper notice. (Appellant's brief, pp. 7-8 (citing I.C. § 19-4906(b).) "When the court considering the petition for post-conviction relief is contemplating dismissal sua sponte, it must notify the parties of its intention to dismiss and must provide its reasons for the potential dismissal." Banks v. State, 123 Idaho 953, 954, 855 P.2d 38, 39 (1993) (citations omitted); see also I.C. § 19-4906(b). The purpose of the notice requirement of I.C. § 19-4906(b) is to give the petitioner the opportunity to provide further legal authority or evidence to establish a genuine issue of material fact. Fetterly v. State, 121 Idaho 417, 418, 825 P.2d 1073, 1074 (1991); State v. Christensen, 102 Idaho 487, 489, 632 P.2d 676, 678 (1981).

Brummett argues that since the "community caretaking" reasoning was not discussed in the Conditional Notice of Dismissal, but was used in the Memorandum Decision and Order of Dismissal, he was not given proper notice. (Appellant's brief, pp. 7-8.) While the district court's order did discuss the

community caretaking function, the district court's dismissal was primarily based on the finding that Officer Davis had reasonable articulable suspicion that Brummett was trespassing and Brummett's counsel was not ineffective for refusing to file a motion to suppress. (R., Vol. II, pp. 287-288.) In the Memorandum Decision and Order of Dismissal the district court wrote:

> Based on these facts, this Court finds that the arresting officer had a reasonable suspicion that petitioner was committing criminal activity, particularly when the defendant ran from police.

(R., Vol. II, p. 288.) The district court's Order of Conditional Dismissal gave Brummett notice of the court's intention to dismiss because the officer had reason to believe Brummett was trespassing. (See R., Vol. II, pp. 265-274.) Brummett does not claim that he was given inadequate notice regarding this basis for dismissal. (See Appellant's brief, pp. 7-8.) Therefore, the district court gave Brummett adequate notice of the reason for the dismissal of his petition.

Even if the notice regarding community caretaking was inadequate, it was harmless. If a petitioner is "not left with an 'invisible target' and is able to respond in a meaningful way to the district court's notice of intent to dismiss," then any lack of adequate notice is harmless. Baker v. State, 142 Idaho 411, 422-423, 128 P.3d 948, 958-959 (Ct. App. 2005); see also Franck-Teel v. State, 143 Idaho 664, 671, 152 P.3d 25, 32 (Ct. App. 2006) ("Nevertheless, if Franck-Teel's response to the state's motion for summary dismissal reveals that she understood the basis for dismissal..., then we will conclude that the inadequacy of notice was harmless error."). Brummett understood the basis for the dismissal. Brummett's objection attempted to address whether Officer Davis had

reasonable suspicion that Brummett was trespassing. (See R., Vol. II, pp. 279-284.) This was the primary basis for the dismissal. (See R., Vol. II, pp. 285-289.) There was no invisible target and any inadequate notice was harmless.

D. Brummett Failed To Show The District Court Erred When It Dismissed His Ineffective Assistance Of Counsel Claim

The district court summarily dismissed Brummett's petition for post-conviction relief because Brummett failed to raise a genuine issue of material fact. (R., Vol. II, pp. 265-274, 285-289.) "Idaho Code § 19-4906 permits a court to rule summarily on applications for post-conviction relief." Workman, 144 Idaho at 523, 164 P.3d at 803. "A court may grant the motion of either party under I.C. § 19-4906(c), or may dismiss the application sua sponte under I.C. § 19-4906(b)." Id. Summary disposition of a post-conviction petition "is appropriate if the applicant's evidence raises no genuine issue of material fact." Id. at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b),(c)). "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). In order to survive summary dismissal of a claim alleging ineffective assistance of counsel, the petitioner "must establish that: (1) a material issue of fact exists as to whether counsel's performance was deficient; and (2) a material issue of fact exists as to whether the deficiency prejudiced the claimant's case." Schoger v.

State, 148 Idaho 622, 624, 226 P.3d 1269, 1271 (2010) (citing Strickland v. Washington, 466 U .S. 668, 687-88 (1984)).

"In a post-conviction proceeding challenging an attorney's failure to pursue a motion in the underlying criminal action, the court properly may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance." Boman v. State, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App. 1996) (citing Huck v. State, 124 Idaho 155, 158, 857 P.2d 634, 637 (Ct. App. 1993)). "Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the Strickland test." Id. (citing Huck, 124 Idaho at 158, 857 P.2d at 637). "If the motion lacked merit and would have been denied, counsel ordinarily would not be deficient for failing to pursue it, and, concomitantly, the petitioner could not have been prejudiced by the want of its pursuit." Huck, 124 Idaho at 158-159, 857 P.2d at 637-638.

Brummett argues that his criminal counsel was ineffective because he did not file a motion to suppress. (Appellant's brief, p. 13.) He argues that a motion to suppress would have likely been granted because there was no reasonable articulable suspicion that Brummett was engaged in criminal activity. (R., Vol. I, p. 11-12.) Brummett is incorrect.

Brummett was not seized and his Fourth Amendment rights were not implicated until Officer Davis physically seized Brummett and placed him under arrest. See California v. Hodari D., 499 U.S. 621, 629 (1991) (pursuit by police

did not constitute a seizure and defendant was not seized until he was tackled); State v. Agundis, 127 Idaho 587, 590-591, 903 P.2d 752, 755-756 (Ct. App. 1995). A mere show of authority, where the subject does not submit, does not constitute a seizure within the meaning of the Fourth Amendment. Agundis, 127 Idaho at 590-591, 903 P.2d at 755-756 (citing Hodari D., 499 U.S.at 625). Where the subject does not submit, the officer's orders to stop do not constitute a seizure and do not implicate the Fourth Amendment. Id. Brummett did not submit to Officer Davis' verbal instructions. Brummett was not seized until Officer Davis tacked Brummett and placed Brummett under arrest. (See R., Vol. II, p. 172 (7/10/08 Tr., p. 8, Ls. 13-17).)

At the time Officer Davis tackled Brummett, Officer Davis had reasonable suspicion to stop Brummett and probable cause to arrest Brummett. An investigatory stop "is permissible 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. Moran–Soto, 150 Idaho 175, 181, 244 P.3d 1261, 1267 (Ct. App. 2010) (citing State v. Sheldon, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003)). Whether an officer had reasonable suspicion to conduct an investigatory seizure is determined by the totality of the circumstances. State v. Rawlings, 121 Idaho 930, 932, 829 P.2d 520, 522 (1992). "Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability." Alabama v. White, 496 U.S. 325, 330 (1990). "Reasonable or 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 presumption that such person is guilty." State v. Julian, 129 Idaho 133, 136, 922 P.2d 1059, 1062 (1996) (citation omitted). "Probable cause is not measured by the same level of proof required for conviction." Id. Probable cause deals with "the factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians, act." Id. (citations omitted.)

At the time Officer Davis tackled Brummett Officer Davis had reasonable suspicion and probable cause to believe that Brummett committed the crimes of trespass and resisting and obstructing. Officer Davis observed Brummett walking on railroad tracks protected by a chain linked, barbed wire fence and labeled no trespassing. (See R., Vol. I, p. 27; Vol. II, pp. 107, 172 (7/10/08 Tr., p. 6, L. 1 – p. 8, L. 12).)

> Q. And when you arrived what did you see?
>
> A. I observed the defendant, Mr. Brummett walking along the railroad tracks, eastbound. He was on the other side of a chain linked, barbed wire fence, walking towards the train station from 11th Avenue North. Or 11th Avenue it kind goes from north to south right there.
>
> Q. Are there any sort of no trespassing signs in that area?
>
> A. On the opposite side there is. The – have observed a large no trespassing sign on the east side of 11th Avenue.
>
> Q. How about anything on the west side of 11th Avenue?
>
> A. I can't honestly say that there's no trespassing signs but the chain linked fence and the barbed wire kind of tell the story.

(R., Vol. II, p. 172 (7/10/08 Tr., p. 6, Ls. 1-20).) In 2008, the applicable portion of the trespass statute stated:

> A. Every person who willfully commits any trespass, by either:
> ...
> 9. **Entering without permission of the owner or the owner's agent, upon the real property of another person which real property is posted with "No Trespassing" signs**, is posted with a minimum of one hundred (100) square inches of fluorescent orange paint except that when metal fence posts are used, the entire post must be painted fluorescent orange, or other notices of like meaning, spaced at intervals of not less than one (1) sign, paint area or notice per six hundred sixty (660) feet along such real property; provided that where the geographical configuration of the real property is such that entry can reasonably be made only at certain points of access, such property is posted sufficiently for all purposes of this section if said signs, paint or notices are posted at such points of access; or
> ...
> Is guilty of a misdemeanor

I.C. § 18-7008(9) (2008) (emphasis added). Officer Davis knew the railroad area where Brummett was walking was marked with a large no trespassing sign and protected by a chainlink and barbwire fence. (See R., Vol. II, pp. 106-108, 172 (7/10/08 Tr., p. 6, Ls. 1-20).)

This Court can also consider Brummett's flight. Brummett argues that his flight, by itself, does not rise to the level of reasonable articulable suspicion for a stop. (Appellant's brief, pp. 11 (citing Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673 (2000).) However, flight may be considered as one factor in the totality of factors to decide reasonable articulable suspicion. See Wardlow, 528 U.S. at 125 ("Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put an remain silent in the face of police questioning"); Padilla

v. State, ___ Idaho ___, ___ P.3d ___, 2014 WL 7263699, *5 (Ct. App. 2014) (the United States Supreme Court had declined to adopt per se rules regarding flight, but retained the totality of circumstances analysis when considering whether reasonable suspicion existed).[1] One "key" factor is whether the flight occurred upon the defendant noticing the police. Padilla, 2014 WL 7263699 *6 (citing Wardlow, 528 U.S. at 124). There is no question that Brummett knew he was running from police. He ran from Officer Davis after talking to him. (R., Vol. II, p. 172 (7/10/08 Tr., p. 6, L. 21 – p. 8, L. 17).) Brummett later explained that he ran because he did not want the police to find the marijuana in his pocket. (R., Vol. II, p. 107.)

Brummett argued that he was not trespassing because he did not see any no trespassing signs and he was able to find an opening in the fence. (R., Vol. II, pp. 282-283.) However, for purposes of this reasonable suspicion and probable cause analysis, whether Brummett saw a no trespassing sign is irrelevant. Reasonable suspicion and probable cause is dependent the information possessed by police, not the information possessed by the defendant. See White, 496 U.S. at 330; Sheldon, 139 Idaho at 983, 88 P.3d at 1223; Julian, 129 Idaho at 136-137, 922 P.2d at 1062-1063.

Officer Davis knew the Union Pacific had placed a large no trespassing sign, he knew the train tracks were protected by a chainlink and barbed wire fence, he saw Brummett walking on the train tracks, and he saw Brummett ran

[1] The decision in Padilla is not yet final. The state's petition for review is pending.

away from him. (See R., Vol. I, p. 27; Vol. II, pp. 107, 172 (7/10/08 Tr., p. 6, L. 1 – p. 8, L. 12).) Officer Davis had reasonable suspicion and probable cause to believe that Brummett was trespassing.

Officer Davis also had reasonable suspicion and probable cause to believe that Brummett committed the crime of resisting and obstructing officers. Idaho Code § 18-705 states:

> **§ 18-705. Resisting and obstructing officers**
>
> Every person who wilfully resists, delays or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office or who knowingly gives a false report to any peace officer, 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.

I.C. § 18-705.[2] After Officer Davis got Brummett's attention, Brummett refused to walk to a place where they could talk, ignored Officer Davis instructions and fled from Officer Davis. (See R., Vol. I, p. 27; Vol. II, pp. 107, 172 (7/10/08 Tr., p. 6, L. 1 – p. 8, L. 17).) Officer Davis reasonably believed Brummett willfully resisted, delayed and obstructed him in the attempted discharge of his duty. See e.g. State v. Quimby, 122 Idaho 389, 391, 834 P.2d 906, 908 (Ct. App. 1992) (defendant's flight from police can provide a basis for probable cause to arrest for resisting and obstructing). Officer Davis had probable cause to arrest Brummett for trespassing and resisting and obstructing. Therefore any

[2] The current version of Idaho Code § 18-705 was in effect in 2008 when Brummett was arrested.

suppression motion would have failed and the decision to not file such a motion was not ineffective assistance of counsel.[3]

E. The Search After The Stop Was Not Raised Below And Should Not Be Considered On Appeal

For the first time on appeal, Brummett argues that Officer Davis' search of his person was not justified and thus there was no basis for the seizure of marijuana that resulted in the arrest. (Appellant's brief, p. 12 (citing Hoffman v. State, 153 Idaho 898, 905, 277 P.3d 1050, 1057 (Ct. App. 2012).) This was not raised before the district court. (See, R., pp. Vol. II, 267-274, 279-284, 285-289.) It is well established that issues not raised below may not be considered for the first time on appeal. See e.g. Sanchez v. Arave, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). This Court should decline to consider this issue not raised below.

Even if this Court considers the search, Brummett's argument is not supported by the record. Brummett argues that it was Officer Davis' discovery of the marijuana which lead to his arrest. (Appellant's brief, p. 12.) However, the probable cause affidavit submitted by Officer Davis stated that he "placed [Brummett] into custody for Resist and Obstruct." (R., Vol. II, p. 107.) At the

[3] As an alternate basis, the district court found that Brummett's detention was warranted by the police's community caretaking function. (R., Vol. II, pp. 287-288 (citing State v. Cutler, 143 Idaho 297, 302, 141 P.3d 1166, 1171 (Ct. App. 2006); State v. Page, 140 Idaho 841, 844, 103 P.3d 454, 457 (2004).) Officer Davis had reasonable suspicion to stop and probable cause to arrest Brummett and because this decides the issue on appeal, the state will submit the community care taking argument on the record below.

preliminary hearing, Officer Davis testified that he placed him under arrest before he did the pat-down. (See R., Vol. II, p. 172 (7/10/08 Tr., p. 8, Ls. 13-21).) Officer Davis' search was justified by several different exceptions, including the search incident to arrest (for trespass and obstruct and delay) and a Terry protective search for weapons. See Terry v. Ohio, 392 U.S. 1, 27 (1968); State v. Pedersen, 157 Idaho 790, ___, 339 P.3d 1194, 1995-1996 (Ct. App. 2014). Brummett's new argument is unsupported by the record and law.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court.

DATED this 31st day of March 2015.

TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of March 2015, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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TED S. TOLLEFSON
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TST/pm