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State v. Moran-Soto Appellant's Brief Dckt. 36166

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. ROBERTO MORAN-SOTO, Defendant-Appellant.	)	NO. 36166 APPELLANT'S BRIEF

BRIEF OF APPELLANT

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

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Nature of the Case

Following his entry of a conditional guilty plea to possession of a controlled substance with the intent to deliver, Mr. Moran-Soto timely appeals from the judgment. Mr. Moran-Soto asserts that the district court erred when it denied his motion to suppress a bindle of suspected controlled substance seized during a warrantless search of his person. Mr. Moran-Soto asserts that his consent to the search of his pocket was involuntarily given. In addition, because the officers did not have probable cause to arrest him until after the search of his pocket, the district court erred in relying upon the doctrine of inevitable discovery.

Statement of the Facts and Course of Proceedings

Wearing police uniforms, badges, and guns, Sergeant Hoadley and Officer Hemmert entered the El Sureno bar. (Tr.11/13/08, p.57, L.25 – p.58, L.16.)[1] Sergeant Hoadley saw two men sitting at the bar, as well as a bartender behind the bar. (Tr.11/6/08, p.32, L.20 – p.33, L.9) The officer saw one of the patrons, Mr. Castro, look at the officers and then immediately push a napkin away from himself onto the bartender's lower side of the bar. (Tr.11/6/08, p.14, Ls.22-25, p.33, Ls.12-16, p.34, Ls.7-12.) Not having found the people they were looking for, Officer Hemmert decided to do a "bar check." He walked behind the bar to examine the license, then walked the

[1] The record on appeal contains numerous transcripts, including two hearings on the Motion to Suppress. For ease of reference, the transcripts of the hearings on the Motion to Suppress will be cited by the date of the hearing held, and the Preliminary Hearing transcript, of which the district court took judicial notice during one of the hearings on the Motion to Suppress will be cited as "PH Tr."

length of the bar. As he did so, he saw the crumpled napkin with plastic hanging out. (Tr.11/06/08, p.9, Ls.3-10.) Believing that the napkin may contain drugs, he opened the napkin and found two plastic baggies with a crystal substance inside. (Tr.11/06/08, p.9, L.17 – p.10, L.1.) Everyone in the bar was told "to stay where they were at...." (Tr.11/06/08, p.16, Ls.13-16.)

Because the napkin was found on the bartender's side of the bar near some sunglasses and a soda can, Officer Hemmert decided to detain the bartender. However, the bartender didn't want to be detained so he "physically resisted" and was ultimately handcuffed. (Tr.11/06/08, p.13, L.10 – p.14, L.21; PH Tr., p.15, Ls.16-21.) Officer Hemmert also handcuffed Mr. Castro. (Tr.11/06/08, p.17, Ls.2-3.) These two men were separated from each other so that the officers could "talk to them to get their stories." (Tr.11/06/08, p.41, Ls.6-8.)

While being questioned, Mr. Castro, the man that had pushed the napkin away from himself upon seeing the officers enter the bar, told the officers that Mr. Moran-Soto, the other bar patron who had been sitting next to Mr. Castro, "was attempting to sell methamphetamine at the bar." (Tr.11/06/08, p.42, Ls.24-25, p.57, Ls.2-17; Tr.11/13/09, p.123, Ls.1-5.)

Sergeant Hoadley took responsibility for "dealing with" Mr. Moran-Soto. (Tr.11/06/08, p.17, Ls.4-6; p.40, Ls.17-18.) Sergeant Hoadley asked Mr. Moran-Soto for identification, and Mr. Moran-Soto provided "some sort of Mexico identification card." (Tr.11/06/08, p.46, Ls.10-15.) After looking over the card and running Mr. Moran-Soto's name through dispatch, the sergeant "set the card back down on the bar." (Tr.11/06/08, p.47, Ls.1-3.) At this time, Mr. Moran-Soto did not know that he had the right to remain

silent or that he had "the right not to have them search [his] pockets." (Tr.11/6/08, p.82, Ls.10-17.)

Sergeant Hoadley asked Mr. Moran-Soto, in English, if he had anything illegal on him. According to the district court's factual findings, Mr. Moran-Soto responded in English, told the officer that he did not, and then told the officer to "check." (Tr.11/06/08, p.47, L.7 – p.48, L.8; Tr.11/13/08, p.121, Ls.1-4.) Sergeant Hoadley asked Mr. Moran-Soto to empty his pockets, and Mr. Moran-Soto complied. The officer then asked again if "he had anything else, and the defendant raised his arm and said, check...." (Tr.11/13/08, p.121, Ls.8-11.) The officer reached into Mr. Moran-Soto's pocket and found a plastic bindle, which the officer believed contained controlled substances. (Tr.11/13/09, p.121, Ls.10-15.) Upon finding the bindle in Mr. Moran-Soto's pocket, Sergeant Hoadley "considered that he may have a role in this drug deal." (Tr.11/6/09, p.56, Ls.2-9.) Mr. Moran-Soto was "detained in handcuffs and advised of his rights." (Tr.11/6/09, p.53, Ls.1-2.)

Sergeant Hoadley read Mr. Moran-Soto his *Miranda*[2] rights in English, and Mr. Moran-Soto told the officer "he didn't understand what I was saying." (Tr.11/6/08, p.51, L.16 – p.52, L.6.) Thereafter the officer asked the owner of the bar to translate the rights and read the rights one line at a time. (Tr.11/6/08, p.53, L.19 – p.54, L.19.) Although the officer believed the bar owner was translating what he was saying, the officer did not know the Spanish words used in the *Miranda* warning. (Tr.11/6/08, p.54, Ls.4-19.) When subsequently questioned Mr. Moran-Soto told Sergeant Hoadley that the plastic bindle from his pocket was his. (PH Tr., p.26, L.22 – p.27, L.1.)

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[2] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Mr. Moran-Soto was charged with possession of a controlled substance with intent to deliver. (R., pp.20-21.) His counsel filed a motion to suppress the controlled substances found in Mr. Moran-Soto's pocket "as a result of the warrantless seizure and search of his person." (R., pp.24-25.) In addition, Mr. Moran-Soto filed an affidavit which asserted that he did not speak or understand the English language, but "The officer indicated to me, by making motions, that I had to empty out my pockets." (R., p.26.) In an Amended Motion to Suppress and Notice of Hearing, counsel for Mr. Moran-Soto further requested "an Order suppressing the admissions/confessions made to law enforcement as being un-warned and coerced." (R., p.32.)

Following two hearings on the suppression motions, the district court determined that, "It's clear from the testimony that the defendant did not – was not totally adept at English, that he spoke some English, and that the conversation – regardless of the officer's limited Spanish, they didn't speak in Spanish." (Tr.11/13/08, p.121, Ls.16-22.) As regards the search of Mr. Moran-Soto, the district court found:

> We have a simplified conversation about emptying your pockets, do you have anything else, check and see. And I believe the communication level taken in the totality of the circumstances was sufficient at that stage, that the defendant understood the questions, and that the search was voluntary, using the term "check." He also testified here that he'd been working in this country for several years, although they speak Spanish on his job.

(Tr.11/13/08, p.123, L.25 – p.124, L.9.) The district court concluded:

> As to the search of the defendant's pocket to which the items were found, I'm denying that motion.... I believe the officers have laid sufficient foundation for me to believe, based on the preponderance of the evidence, that there was sufficient communication and understanding between Officer Hoadley and the defendant.
>
> He was requesting that he empty his pockets, which he did to the bar. Despite the fact that the officers were in uniform, had cuffed other people, and that there was a -- I can't deny there was a certain aspect

> about this that just as a course of nature – the defendant wasn't cuffed at that point.
>
> And he – he was being interviewed by the officer, and he asked if he had anything else, and he told him to check. I don't find that this was coerced to the point that it was an involuntary consent by the defendant to have the officer check his pockets, any more than it would be when the person is under arrest at his house and he consents to the officer to enter...It's a case that's open for argument, but I believe the state's met its burden.

(Tr.11/13/08, p.124, L.24 – p.126, L.7.) The district court further found that, even if Mr. Moran-Soto had not consented to the search, the packet in his pocket would have been inevitably discovered by police.

> Certainly when the [sic] Officer Hemmert went behind the bar, the reasonable conclusions were when he discovered they were drugs that it was either the bartender or Mr. Castro had the drugs. And I think that was a fair agreement, and that they didn't conclude the defendant had the drugs.
>
> It's then accompanied by statements by those individuals that the defendant was trying to sell drugs. That is sufficient enough probable cause for an officer to make a determination to arrest. And if – and if that arrest would have been made, there would have been a search incident to arrest, and that drug in the pocket would have been discovered anyway.

(Tr.11/13/08, p.126, L.18 – p.127, L.6.)

As regards the suppression of any statements made by Mr. Moran-Soto, the district court stated, "I don't find that the state's proven by a preponderance of the evidence that [the *Miranda* rights] were communicated in a fashion that could be clearly understood by the defendant." (Tr.11/13/08, p.123, Ls.9-14.) The court explained the differing decisions on Mr. Moron-Soto's understanding of what was said by noting, "the Miranda warnings are a complicated level of items that have significant impact, and we don't know that [the bar owner] interpreted those correctly. And so I can't find that the defendant was presented his rights." (Tr.11-13-08, p.124, Ls.10-14.) Thus, the district

court suppressed Mr. Moran-Soto's statement regarding his ownership of the bindle. (Tr.11/13/08, p.124, Ls.18-23.)

Mr. Moran-Soto eventually entered a conditional guilty plea reserving his right to appeal the district court's denial of his motion to suppress. (R., pp.39, 48-49.) The district court imposed a unified sentence of ten years, with three years fixed, but suspended the sentence and placed Mr. Moran-Soto on probation. (R., pp.53-54.) Mr. Moran-Soto filed a Notice of Appeal timely from the Judgment and Commitment and Order of Probation on Suspended Execution of Judgment. (R., pp.53, 63.)

ISSUE

In light of the State's failure to meet its burden of showing that Mr. Moran-Soto voluntarily consented to the search of his person or that the item removed from Mr. Moran-Soto's pocket would have been inevitably discovered by officers, did the district court err when it denied Mr. Moran-Soto's motion to suppress the item removed from his pocket?

ARGUMENT

In Light Of The State's Failure To Meet Its Burden Of Showing That Mr. Moran-Soto Voluntarily Consented To The Search Of His Person Or That The Item Removed From Mr. Moran-Soto's Pocket Would Have Been Inevitably Discovered By Officers, The District Court Erred When It Denied Mr. Moran-Soto's Motion To Suppress The Item Removed From His Pocket

A. Introduction

Mr. Moran-Soto asserts that the State failed to meet its burden of proving that he voluntarily consented to Sergeant Hoadley's search of his person. In addition, he asserts that State failed to meet its burden of proving that the officers had probable cause to arrest him. Thus, the district court erred when it denied his motion to suppress the item found in his pocket.

B. Because The State Failed To Meet Its Burden Of Showing That Mr. Moran-Soto Voluntarily Consented To The Search Of His Person, The District Court Erred When It Denied Mr. Moran-Soto's Motion To Suppress The Item Taken From His Pocket

The district court denied Mr. Moran-Soto's motion to suppress the item removed from his pocket by Sergeant Hoadley. (Tr.11/13/08, p.124, L.24 – p.126, L.7.) As regards the search of Mr. Moran-Soto, the district court found that Mr. Moran-Soto "understood the questions, and that the search was voluntary, using the term "check." (Tr.11/13/08, p.123, L.25 – p.124, L.9.) Although the court recognized that the officers were in uniform and had handcuffed people, the court didn't find that the consent was "coerced to the point that it was an involuntary consent...." (Tr.11/13/08, p.124, L.24 – p.126, L.7.) Mr. Moran-Soto asserts that, based upon the totality of the circumstances, the district court erred in finding that he voluntarily consented to the search of his person.

In reviewing a district court order denying a motion to suppress evidence, the standard of review is bifurcated. *State v. Purdum*, 147 Idaho 206, 207, 207 P.3d 182, 183 (2009) (citation omitted). The appellate court accepts the trial court's findings of fact unless they are clearly erroneous. *Id.* However, the appellate court may freely review the trial court's application of constitutional principles in light of the facts found. *Id.*

The Fourth Amendment protects "[t]he *right of* the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; Idaho Const. Art. I, § 17. "Warrantless searches are presumptively unreasonable and the State bears the burden to demonstrate that a warrantless search either fell within a well-recognized exception to the warrant requirement or was otherwise reasonable under the circumstances." *State v. Martinez*, 129 Idaho 426, 431, 925 P.2d 1125, 1130 (Ct. App. 1996) (citation omitted). The United States Supreme Court has held that when evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure. *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (*citing Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Weeks v. United States*, 232 U.S. 383 (1914)).

Sergeant Hoadley searched Mr. Moran-Soto without having first obtained a search warrant. (PH Tr., p.31, Ls.3-5.) As a result, the search of Mr. Moran-Soto is presumptively unreasonable. However, *a search conducted with consent that was* freely given is one exception to the warrant requirement. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973). The State must prove, by a preponderance of the evidence,

that the consent to search was voluntary as opposed to being the result of duress or coercion, direct or implied. *Schneckloth,* 412 U.S. at 221. A voluntary decision is "the product of an essentially free and unconstrained choice by its maker," while an individual's consent is involuntary "if his will has been overborne and his capacity for self-determination critically impaired." *Schneckloth,* 412 U.S. at 225. To determine whether a subject's will was overborne in a particular case, the court must assess "the totality of all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation." *Id.* at 226. Whether consent was granted voluntarily, or was the product of coercion, is a factual determination to be based upon the surrounding circumstances, accounting for subtly coercive police questions and the possibly vulnerable subjective state of the party from whom consent is elicited. *Id.* at 229.

> A determination of voluntariness is not dependent "on the presence or the absence of a single controlling criterion." *Schneckloth,* 412 U.S. at 226, 93 S.Ct. at 2047, 36 L.Ed.2d at 862. Factors to be considered include whether there were numerous officers involved in the confrontation, *Castellon v. United States,* 864 A.2d 141, 155 (D.C.2004); *United States v. Jones,* 846 F.2d 358, 361 (6th Cir.1988); the location and conditions of the consent, including whether it was at night, *United States v. Mapp,* 476 F.2d 67, 77-78 (2d Cir.1973); whether the police retained the individual's identification, *United States v. Chemaly,* 741 F.2d 1346, 1353 (11th Cir.1984); whether the individual was free to leave, *Ohio v. Robinette,* 519 U.S. 33, 39-40, 117 S.Ct. 417, 421, 136 L.Ed.2d 347, 354-55 (1996); *Chemaly,* 741 F.2d at 1353; *State v. Gutierrez,* 137 Idaho 647, 651, 51 P.3d 461, 465 (Ct.App.2002); and whether the individual knew of his right to refuse consent, *Schneckloth,* 412 U.S. at 248-49, 93 S.Ct. at 2058-59, 36 L.Ed.2d at 875; *Chemaly,* 741 F.2d at 1353; *State v. Jones,* 126 Idaho 791, 793, 890 P.2d 1214, 1216 (Ct.App.1995). Although the presence of multiple officers does not, standing alone, establish coercion, and there is no requirement that police inform the individual he is free to leave or that he has a right to refuse consent, these factors are nevertheless relevant when assessing the totality of the circumstances. *See Robinette,* 519 U.S. at 39-40, 117 S.Ct. at 421, 136 L.Ed.2d at 354-55; *Schneckloth,* 412 U.S. at 248, 93 S.Ct. at

2058, 36 L.Ed.2d at 875; *Jones*, 846 F.2d at 361; *Chemaly*, 741 F.2d at 1353; *Castellon*, 864 A.2d at 155; *Gutierrez*, 137 Idaho at 651, 51 P.3d at 465; *Jones*, 126 Idaho at 793, 890 P.2d at 1216.

State v. Garcia, 143 Idaho 774, 778, 152 P.3d 645, 649 (Ct. App. 2006).

In the case at bar, the State failed to prove by a preponderance of the evidence that Mr. Moran-Soto made a free and unconstrained choice to allow Sergeant Hoadley to search him. Mr. Moran-Soto was confronted with two uniformed officers wearing both badges and guns. (Tr.11/13/08, p.57, L.25 – p.58, L.16.) Prior to the search of Mr. Moran-Soto, Officer Hemmert had ordered everyone "to stay where they were at...." (Tr.11/06/08, p.16, Ls.13-16.) Even Sergeant Hoadley agreed that Mr. Moran-Soto was detained at the time of the search. (Tr.11/6/08, p.44, Ls.17-21.) Having taken Mr. Moran-Soto's identification, looking over the card and running Mr. Moran-Soto's name through dispatch, the sergeant didn't return the card, but rather simply "set the card back down on the bar." (Tr.11/06/08, p.47, Ls.1-3.) Finally, even if Mr. Moran-Soto, whose English understanding is extremely limited at best, didn't understand the order to remain where he was, he had witnessed the result of resisting the officers' commands. When the bartender failed to comply with the orders of the officers, a physical altercation ensued and he was placed in handcuffs. (Tr.11/06/08, p.13, L.10 – p.14, L.21; PH Tr., p.15, Ls.16-21.) Although Mr. Moran-Soto had seen this, the officers didn't tell him that he was free to leave. (Tr.11/6/08, p.60, Ls.20-22.)

Based upon the totality of the circumstances, the State failed to meet its burden of proving by a preponderance of the evidence that Mr. Moran-Soto's consent to the search was a free and unconstrained choice. Rather, the evidence shows that it was

coerced. Thus, the district court erred when it denied Mr. Moran-Soto's motion to suppress the evidence obtained as a result of the search of his person.

C. Because The Officers Did Not Have Probable Cause To Arrest Mr. Moran-Soto Prior To The Search Of His Pockets, The District Court Erred When It Found That The Officers Would Have Inevitably Discovered The Bindle In Mr. Moran-Soto's Pocket

The district court found that, even if Mr. Moran-Soto had not consented to the search of his person, the bindle in his pocket would have been inevitably discovered by police.

> Certainly when the [sic] Officer Hemmert went behind the bar, the reasonable conclusions were when he discovered they were drugs that it was either the bartender or Mr. Castro had the drugs. And I think that was a fair agreement, and that they didn't conclude the defendant had the drugs.
>
> It's then accompanied by statements by those individuals that the defendant was trying to sell drugs. That is sufficient enough probable cause for an officer to make a determination to arrest. And if – and if that arrest would have been made, there would have been a search incident to arrest, and that drug in the pocket would have been discovered anyway.

(Tr.11/13/08, p.126, L.18 – p.127, L.6.) Mr. Moran-Soto asserts that, prior to the search the officers did not have probable cause to arrest him, and did not effectuate an arrest. Thus, the district court erred in finding that the item taken from his pocket would have been inevitably discovered even absent the involuntary search.

1. Because The State Failed To Prove By A Preponderance Of The Evidence That Prior To Searching Mr. Moran-Soto An Arrest Actually Took Place, Or Was In The Process Of Taking Place, The District Court Erred In Concluding That The Inevitable Discovery Doctrine Applied In This Case

In determining that officers would have inevitably discovered the bindle in Mr. Moran-Soto's pocket, the district court found that there was sufficient probable

cause for arrest and "and if that arrest would have been made, there would have been a search incident to arrest, and that drug in the pocket would have been discovered anyway." (Tr.11/13/08, p.126, L.18 – p.127, L.6.) However, because the inevitable discovery doctrine is not based upon what an officer could or should do, but rather upon what is actually happening, the district court erred.

The Idaho Court of Appeals has recognized that the inevitable discovery doctrine is not based upon a determination of the various options law enforcement officers had, but rather is based upon what the officers were actually doing.

> The underlying rationale of the inevitable discovery doctrine is that a preponderance of the evidence proves that some action that actually took place, or was in the process of taking place, would have led to the discovery of the evidence that was already obtained through unlawful police action. *See Nix,* 467 U.S. 431, 448-49, 104 S.Ct. 2501, 2511-12, 81 L.Ed.2d 377, 390-91 (where an already underway search operation would have inevitably discovered a murder victim's body). The inevitable discovery doctrine was not intended to allow a court to consider what actions the authorities should or could have taken and in doing so then determine that lawful discovery of already unlawfully obtained evidence would have been inevitable. *See United States v. Reilly,* 224 F.3d 986, 995 (9th Cir.2000); *State v. Holman,* 109 Idaho 382, 392, 707 P.2d 493, 503 (1985).

State v. Bunting, 142 Idaho 908, 916-17, 136 P.3d 379, 387-88 (Ct. App. 2006).

In the present case, the officers were not in the process of effectuating an arrest of Mr. Moran-Soto. There is also no evidence that officers were contemplating an arrest of Mr. Moran-Soto at the time he was searched. (*See generally*, Trs. 11/6/08, 11/13/08.) Rather, unlike the other two suspects, prior to searching Mr. Moran-Soto officers had *not* handcuffed him. (Tr.11/6/08, p.43, Ls.4-22.)

Because the State failed to prove by a preponderance of the evidence that prior to searching Mr. Moran-Soto an arrest actually took place, or was in the process of

taking place, the district court erred in concluding that the inevitable discovery doctrine applied in this case.

2. Even Assuming, *Arguendo*, That The Doctrine Of Inevitable Discovery Applies To This Case, Because The Officers Did Not Have Probable Cause To Arrest Mr. Moran-Soto Prior To The Search, The State Failed To Prove That The Bindle Would Have Been Inevitably Discovered

a. The District Court's Factual Finding That There Was A Statement By The Bartender That Mr. Moran-Soto Was Attempting To Sell Drugs Is Clearly Erroneous

In determining whether the officers had probable cause to arrest Mr. Moran-Soto, the district court found that the officers' knowledge of the existence of the drugs behind the bar was "accompanied by statements by those individuals that the defendant was trying to sell drugs." (Tr.11/13/08, p.126, L.18 – p.127, L.1.) Counsel for the State did assert during argument that an officer had testified that both Mr. Castro and the bartender had alleged that Mr. Moran-Soto had attempted to sell drugs. (Tr.11/13/08, p.108, L.19 – p.109, L.4.) Based upon the State's argument, and from the district court's use of plural terms, it appears that the district court found that more than one person told the officers that Mr. Moran-Soto had attempted to sell drugs. Mr. Moran-Soto asserts that the district court's finding that more than one person made such a statement is clearly erroneous.

On appeal, this Court reviews the findings of fact of the district court for whether those findings are clearly erroneous. *See, e.g., Medina v. State*, 132 Idaho 722, 725, 979 P.2d 124, 127 (Ct. App. 1999). A finding is clearly erroneous if it is not supported by substantial and competent evidence. *Id.* "Substantial evidence is such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion." *See, e.g., Gustaves v. Gustaves*, 138 Idaho 64, 67, 57 P.3d 775, 778 (2002).

Sergeant Hoadley testified that the allegation that Mr. Moran-Soto had attempted to sell a controlled substance was made by Mr. Castro. (Tr.11/6/08, p.34, Ls.7-12, p.42, Ls.16-25, p.57, Ls.2-17.) There was no testimony presented that indicated that anyone other than Mr. Castro alleged that Mr. Moran-Soto attempted to sell a controlled substance. (*See generally*, Trs. 11/6/08, 11/13/08.)

Because the evidence established only that Mr. Castro alleged that Mr. Moran-Soto had attempted to sell a controlled substance, the district court's finding that more than one person made this allegation is clearly erroneous. Thus, the district court erred in relying upon it's erroneous finding to determine that the officer's had probable cause to arrest Mr. Moran-Soto and this Court should not rely upon that finding in reviewing this case.

b. The Officers Did Not Have Probable Cause To Arrest Mr. Moran-Soto Prior To The Search

Because the only evidence that the officers possessed indicating that Mr. Moran-Soto had committed a crime was the self-serving statement of Mr. Castro, the officers did not have probable cause to arrest Mr. Moran-Soto prior to the search.

Whether an arrest is constitutionally valid "depends upon whether, at the moment the arrest was made, the officers had probable cause to make it-whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379

U.S. 89, 91 (1964); *see also* I.C. § 19-603 (providing that a police officer may arrest a person without a warrant, "when a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it."); *State v. Alger,* 100 Idaho 675, 677, 603 P.2d 1009, 1011 (1979) (defining probable cause in the context of I.C. § 19-603 as "information that 'would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion'" that the subject of arrest is guilty).

In determining whether officers had reasonably trustworthy information sufficient to warrant a prudent man in believing that he had committed or was committing an offense, the reliability of the informant and the basis of the informant's knowledge must be considered. *Cf. Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995) (addressing probable cause for issuance of a search warrant); *see also Beck v. Ohio*, 379 U.S. 89, 95, n.6 (1964) (applying standards for determining probable cause for a search warrant to the question of whether there was probable cause for an arrest).

Where the information has come from a "citizen informant," disclosure of the person's name and address will ordinarily be sufficient to show the informant's veracity and reliability. *State v. Peterson*, 133 Idaho 44, 47, 981 P.2d 1154, 1157 (Ct. App. 1999). However, where the informant is part of the criminal milieu, officers must have more than simply the name and address of the informant. *Dunlap*, 126 Idaho at 907, 894 P.2d at 140. The additional evidence of reliability may be provided by the informant's acknowledgment that he or she has participated in criminal activity. *Peterson*, 133 Idaho at 47, 981 P.2d at 1157. This is because if the informant's identity is known, the "risk and opprobrium" from acknowledgment of criminal conduct is

correspondingly greater, and thus the hearsay assertions of a known informant may be given more credibility. *Id.* However, "Once a person believes that the police have sufficient evidence to convict him, his statement that another person is more important to his criminal enterprise than he gains little credibility from its inculpatory aspect." *U.S. v. Hall*, 113 F.3d 157, 159 (9th Cir. 1997).

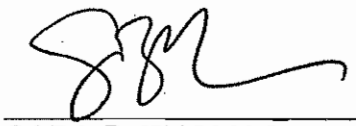
In the present case, prior to the search of Mr. Moran-Soto, the officers did not have reasonably trustworthy information sufficient to warrant a prudent man in believing that he had committed or was committing an offense. The only evidence that the officers possessed was Mr. Castro's statement that Mr. Moran-Soto had attempted to sell him a controlled substance. (Tr.11/06/08, p.42, Ls.24-25, p.57, Ls.2-17; Tr.11/13/09, p.123, Ls.1-5.) At that time, Mr. Castro was handcuffed and being interrogated by Officer Hemmert. (Tr.11/6/08, p.14, Ls.22-25, p. 42, Ls.16-25, p.43, Ls.8-16.) Mr. Castro was also the only person Sergeant Hoadley had actually seen touch the napkin and bindles that Officer Hemmert had found on the bar. (Tr.11/06/08, p.33, L.12 – p.34, L.17.) As a result, Mr. Castro had every incentive to point the finger at someone else. Mr. Castro's statement cannot even be said to be reliable based upon its inculpatory nature as he was merely passing the blame for the drugs already found on to Mr. Moran-Soto. Thus, the statement lacked any evidence of credibility at all.

Because the only evidence possessed by the officers prior to the search of Mr. Moran-Soto lacked credibility, the officers did not have probable cause to arrest him. *See Beck*, 379 U.S. at 91; *see also* I.C. § 19-603. The district court, therefore, erred when it denied Mr. Moran-Soto's motion to suppress the evidence found during the search of his person based upon the inevitable discovery doctrine.

CONCLUSION

Based upon the above argument and authority, Mr. Moran-Soto respectfully requests that this Court vacate the district court's order of judgment and commitment and reverse the order which denied his motion to suppress.

DATED this 9th day of November, 2009.



SARA B. THOMAS
Chief, Appellate Unit

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of November, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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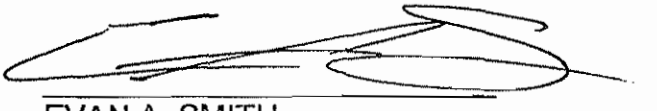

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SBT/eas