10-26-2011

State v. Robinson Appellant's Brief Dckt. 38816

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Appellant,	)	NO. 38816, 38839
	)	
vs.	)	
	)	
LARRY M. ROBINSON,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

The State of Idaho appeals from the district court's order suppressing evidence.

Statement Of The Facts And Course Of The Proceedings

The state charged Larry M. Robinson with possession of methamphetamine and harboring a wanted felon. (R., pp. 31-33.) The state also charged him with grand theft. (R., pp. 59-60.[1]) Robinson moved to suppress "all evidence found at the residence." (R., p. 72.)

Amber Prewitt is a probation officer and was supervising Greg Diagneau on misdemeanor probation. (Tr., p. 7, L. 11 – p. 8, L. 18; Prelim. Tr., p. 25, Ls. 3-12.) Diagneau lived in Robinson's house. (Prelim. Tr., p. 77, Ls. 3-20.) As part of his probation Diagneau had signed a Fourth Amendment waiver which read: "During the term of my probation, I WAIVE my Fourth Amendment rights to Search and Seizure, based upon a reasonable request of any Probation Officer and/or Peace Officer. This includes the entire residence, vehicles, outbuildings and curtilages." (State's Exhibit 1, Terms and Conditions of Probation, p. 2, ¶ 12 (in record at p. 100); see also R., p. 105; Tr., p. 21, L. 19 – p. 22, L. 7.) Diagneau had tested positive twice for the presence of controlled

[1] The cases were combined for purposes of suppression below (R., pp. 146-48) and have been joined for purposes of appeal (Order Consolidating Appeals (June 10, 2011)).

substances and then stopped appearing for his scheduled urinalyses. (Tr., p. 9, Ls. 12-22.) Officer Prewitt wished to make contact with Diagneau to find out if he was in fact in compliance with probation and whether he had missed his appointments due to known transportation problems. (Tr., p. 9, L. 24 – p. 11, L. 4.) She also wished to search his residence for controlled substances because she suspected he was not appearing for his appointments because he was using drugs. (Tr., p. 11, Ls. 5-17; Prelim. Tr., p. 27, Ls. 10-21.)

Police officers accompanied Officer Prewitt on the probation search because they believed a wanted felon was hiding from police at the house where Diagneau and Robinson lived. (Tr., p. 10, Ls. 12-18; p. 11, L. 18 – p. 12, L. 2; Prelim. Tr., p. 7, L. 10 – p. 9 L. 8.) Police presence was usual because the probation officers do not carry guns and rely on the police for protection and security. (Tr., p. 13, L. 21 – p. 14, L. 8; Prelim. Tr., p. 26, L. 23 – p. 27, L. 9.) After being let in to the house by Diagneau's girlfriend, the police officers secured the residence before the probation officers entered. (Tr., p. 11, L. 18 – p. 12, L. 10; p. 40, L. 19 – p. 41, L. 15.) Officer Prewitt made contact with the probationer, Diagneau. (Tr., p. 12, Ls. 10-12; Prelim. Tr., p. 30, Ls. 5-12.) She informed him at that time that they were present to conduct a search. (Prelim. Tr., p. 30, Ls. 5-12; R., p. 107; see also Prelim. Tr., p. 39, Ls. 12-15 (Lieutenant Wardle also told Diagneau the reason the police and probation officers were there).)

At about the time that officers entered they heard the master bedroom door close. (Tr., p. 29, Ls. 15-23; Prelim. Tr., p. 46, L. 23 – p. 48, L. 10; p. 56, Ls. 5-15.) The other bedroom doors were open. (Prelim. Tr., p. 48, L. 22 – p. 49,

L. 2.) Officers found the wanted felon hiding under a sink in the master bathroom. (Tr., p. 12, Ls. 13-17; Prelim. Tr., p. 51, Ls. 3-22; p. 64, Ls. 7-16.) He had recently showered in the master bathroom and had his clothes, keys and other items in the master bedroom and was getting dressed in the master bedroom when the police arrived. (Prelim. Tr., p. 69, Ls. 9-17.)

During the course of the probation interview and search Diagneau's girlfriend and her female friend from California asked to use the bathroom and, when granted permission, both used the master bathroom. (Tr., p. 16, L. 2 – p. 17, L. 11.) The only hygiene products in the house were also located exclusively in the master bathroom. (Tr., p. 15, L. 1 – p. 16, L. 1.)

Probation officers found hypodermic needles and other paraphernalia in the master bedroom. (Tr., p. 12, Ls. 18-24; p. 30, Ls. 17-21; Prelim. Tr., p. 56, L. 16 – p. 58, L. 14.) Diagneau informed the officers that he had moved out of the back bedroom and it was no longer his. (Tr., p. 13, Ls. 1-8.) At that point officers stopped the search and went to apply for a search warrant. (Id.) Thereafter the state applied for, and obtained, a search warrant for the residence. (R., pp. 15-26.)

The district court suppressed the evidence found pursuant to the search warrant on two bases. (R., pp. 120-130.) First, it concluded that the initial search was improper because it "began prior to Mr. Diagneau being informed of the search and at no point was a reasonable request made to conduct the search." (R., p. 125.) It then found no apparent or actual authority for Diagneau's consent because the evidence the state presented regarding

authority had been discovered in the course of the search itself. (R., pp. 127, 129.) The state timely appealed. (R., pp. 142-45, 147-53.)

ISSUES

1. Did the district court err when it concluded that the initial search was not reasonable under the Fourth Amendment as a valid probation search?

2. Did the district court err when it concluded it should not consider evidence gathered from the initial search to determine whether there was authority for the probationer to consent to the search?

ARGUMENT

I.
The District Court Erred When It Concluded That The Initial Search Was Not Reasonable Under The Fourth Amendment As A Valid Probation Search

A. Introduction

The district court, ostensibly applying State v. Turek, 150 Idaho 745, 250 P.3d 796 (Ct. App. 2011), held that the search was invalid because it "began prior to Mr. Diagneau being informed of the search and at no point was a reasonable request made to conduct the search." (R., pp. 123-25.) The court's analysis is error for two reasons. First, the Turek analysis applies to *suspicionless* searches; probation searches supported by reasonable suspicion such as in this case are constitutionally reasonable without any probation waiver whatsoever. Because the officers had suspicion Diagneau was in violation of his probation the search was constitutionally reasonable and the scope of his Fourth Amendment waiver was entirely irrelevant. Second, even if reviewed under the auspices of the probationary waiver, because officers informed Diagneau of their purpose they complied with the terms of Diagneau's waiver under the holding in Turek.

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. Klingler, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006).

C. The Probation Search Was Justified By Reasonable Suspicion The Probationer Was In Violation Of His Probation

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 case relied upon by the district court, 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 the probation officer had reasonable suspicion that Diagneau was in violation of his probation because he was using controlled substances. Thus, whether the Fourth Amendment waiver Diagneau executed as part of his probation justified the search is irrelevant to this case. Because the probation search was justified by reasonable suspicion it was constitutionally proper. The district court erred by holding otherwise.

D. The Search Was Within The Scope Of The Fourth Amendment Waiver

Even if the district court's analysis were relevant, it is still in error. In Turek, the similarly worded probation condition "require[d] that the probationer be informed of an officer's intent to conduct an impending search." Turek, 150 Idaho at 752, 250 P.3d at 803. Here Diagneau was informed of the purpose of the police and probation presence in his home upon his initial contact. (Prelim. Tr., p. 39, Ls. 12-15 (Lieutenant Wardle told Diagneau the reason the police and probation officers were there upon contacting him just after entry); Prelim. Tr., p. 30, Ls. 5-12 (probation officer Prewitt informed Diagneau of purposes of visit upon contacting him); see also R., p. 107 (affidavit of officer Prewitt).) Under the holding of Turek this search was properly within the scope of the probation Fourth Amendment waiver.

To the extent the district court found that the probationary search for contraband preceded the providing of notice the district court is in both legal and clear factual error. In its factual findings the court stated, "Ms. Prewitt began a discussion with Mr. Diagneau while police officers were searching all rooms of the home." (R., p. 122.) In its analysis the court stated, "The police officers

continued searching the other rooms of the residence while Ms. Prewitt entered and began informing Mr. Diagneau of the search and its purpose." (R., p. 124.) This was legal error because the district court failed to recognize the difference between a protective sweep and a probationary search for contraband. It was clear factual error because the evidence presented shows that the officers notified Diagneau of the search upon their first contact with him, which preceded the search, and because it was the probation officers, not police, who conducted the search for contraband and that search occurred after Diagneau had been twice informed that he was being subjected to a probationary search.

A protective sweep is justified "when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." Maryland v. Buie, 494 U.S. 325, 337 (1990). Protective sweeps are allowable to protect officers conducting a search. State v. Schaffer, 133 Idaho 126, 982 P.2d 961 (Ct. App. 1999). Here it was entirely reasonable for the police officers to enter and secure the residence in anticipation of the probation search because there was reason to believe an at-large felon attempting to avoid the police had harbored at the residence. Because the police were engaged in a protective sweep, and not the probation search, and because no permission to conduct the sweep was required, the district court erred as a matter of law when it concluded that the actions of the officers constituted the probationary search which could only be conducted after notification to the probationer.

The court also erred on the facts. The evidence presented showed that Lieutenant Wardle entered the house first, made contact with Diagneau, and explained the purpose of the police and probation presence. (Prelim. Tr., p. 39, Ls. 5-15.) Only after that was done did the probation officers start searching. (Prelim. Tr., p. 39, Ls. 16-19.) Likewise, probation officer Prewitt entered the home immediately after probation officer Vansant (who conducted the probation search that revealed the paraphernalia), made contact with Diagneau and informed him of the intent to search, apparently before Vansant started the search of the back bedroom. (Prelim. Tr., p. 29, L. 6 – p. 30, L. 12.) In short, there is no evidence that the probation search upon which the suppression motion was predicated occurred before Diagneau was notified. On the contrary, there is clear evidence that notice of probation search was given twice before the search was conducted.

Even if the start of the search had preceded the notice, the search was still reasonable. The district court cited no authority for the proposition that the exact timing of the notice and the search was constitutionally significant where both occurred contemporaneously. The state submits that like a search incident to arrest where the search is not invalidated even if it precedes the formal arrest but is still contemporaneous, Rawlings v. Kentucky, 448 U.S. 98, 111 (1980); State v. Gibson, 141 Idaho 277, 282, 108 P.3d 424, 429 (Ct. App. 2005); State v. Johnson, 137 Idaho 656, 662, 51 P.3d 1112, 1118 (Ct. App. 2002); State v. Schwarz, 133 Idaho 463, 468, 988 P.2d 689, 694 (1999), the timing of the notice

relative to the search did not render the probationary search constitutionally unreasonable because they were contemporaneous.

To the extent the district court concluded that the lack of a "request" is fatal, the court also erred. The holding in Turek was "that a probation condition that requires a probationer to submit to a search 'at the request of' an officer requires that the probationer *be informed* of an officer's intent to conduct an impending search." 150 Idaho at 753, 250 P.3d at 804 (emphasis added). This was not a game of *Jeopardy*; failure to present the notice in the form of a question did not render it unreasonable.

Finally, if the district court concluded that the request was not "reasonable," it erred. The evidence established very good reasons for the probationary search—namely that the evidence suggested Diagneau was using controlled substances in violation of the terms of his probation. Although the state does not believe the court actually found the search unreasonable in this sense, it did include the lack of a reasonable request in its analysis. (R., p. 125.) If the court was concluding the request was unreasonable it erred.

The actions of the probation officers and police officers in this case were in full compliance with the Fourth Amendment requirements articulated by the court of appeals in Turek. Diagneau was twice provided notice of the intent to conduct a probationary search. That the police conducted a protective sweep to secure the premises and that the notice was not framed as a question did not render the probation search constitutionally unreasonable.

II.
The District Court Erred When It Concluded It Could Not Consider Evidence Gathered From The Initial Search To Determine Whether There Was Authority For The Probationer To Consent To The Search

A. Introduction

The district court determined that because the evidence relied on by the state to show actual authority was acquired during the course of the search and was not known to the state prior to the search the state had failed to show actual authority.[2] (R., pp. 127-29.) To the extent the district court was holding that the state obtained such evidence through an improper search, such was erroneous as explained above. To the extent the district court was holding that the state may support its claim of actual authority only with evidence within its knowledge prior to the search, such is directly contrary to law.[3]

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[2] In so ruling the district court relied on the Idaho Court of Appeal's holding in State v. Hansen, 2010 WL 2773331, Docket No. 35519 (Idaho App., July 15, 2010), wherein the Idaho Court of Appeals found insufficient evidence to show that the parolee living on Hansen's property had authority to consent to a probation search of the bathroom. The state notes that this holding was reversed by the Idaho Supreme Court after the district court issued its order. State v. Hansen, 151 Idaho 342, 256 P.3d 750 (2011).

[3] Although its conclusion was that the state failed to show that it was aware of the communal nature of the bathroom by evidence it acquired before the search, the district court also mentioned that some of the facts did not necessarily show that the bathroom was communal. (R., pp. 127-28.) It is the state's position that this did not constitute an alternative holding. To the extent it might be considered such the court erred. The totality of the facts shows communal use of the bathroom. Such facts include that the only toiletries in the house were in that bathroom and Diagneau's girlfriend and her friend visiting from California clearly used the master bathroom as their primary bathroom. In addition, the only reason the door to the master bedroom was closed (a fact cited by the district court) was that Bean, the wanted felon, who was using the master bathroom to shower, closed it as soon as he heard the police enter.

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. Klingler, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006).

C. The State May Support Its Claim Of Actual Authority With Evidence Found In The Course Of The Search

Voluntary consent to enter or search premises from a person with authority to consent vitiates the need for a warrant.[4] State v. Brauch, 133 Idaho 215, 219, 984 P.2d 703, 707 (1999) (citing United States v. Matlock, 415 U.S. 164, 170 (1974)). Actual authority to consent to a search arises from "mutual use of the property by persons generally having joint access or control for most purposes, as in the case of married couples or joint tenants." State v. Brauch, 133 Idaho 215, 219, 984 P.2d 703, 707 (1999) (internal quotation omitted). Under this joint access and mutual use rationale, a third party probationer who, as a condition of probation waives his Fourth Amendment rights and consents to searches, may validly consent to a warrantless search of a residence if he has actual authority over it, even if it is shared by others. See State v. Misner, 135

[4] As more fully set forth above, the police conducted a protective sweep of the house, including the master bedroom and bathroom. The scope of the probation consent did not limit the scope of the protective sweep. State v. Schaffer, 133 Idaho 126, 982 P.2d 961 (Ct. App. 1999). Thus, the court erred in suppressing any evidence related to the harboring charge because such evidence was discovered by the police in the course of the protective sweep.

Idaho 277, 16 P.3d 953 (Ct. App. 2000). To determine whether a party had actual authority to consent to a search, a court may rely on evidence discovered during the challenged search. State v. Buhler, 137 Idaho 685, 689-90, 52 P.3d 329, 333-34 (Ct. App. 2002).

In the portion of its opinion addressing actual authority the district court stated that observations that the master bathroom was communal and accessed only through the master bedroom "were made after the initial search of the residence" and such evidence was unknown "prior to the search." (R., p.127.) The district court concluded that "the State was not aware of the possible communal nature of the master bathroom prior to conducting the search." (R., pp. 127-28.) Because the district court required the state to prove actual authority by evidence known to it before the search and did not consider the evidence found as a result of the search, it erred as a matter of law. Reversal and remand for consideration of this evidence is appropriate.

CONCLUSION

The state respectfully requests this Court to reverse the district court's determination that the probation search was invalid, and to vacate the district court's conclusion that the probationer lacked authority to consent to a search of the entire house and remand for application of the correct legal standards to that question.

DATED this 26th day of October, 2011.

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of October, 2011, 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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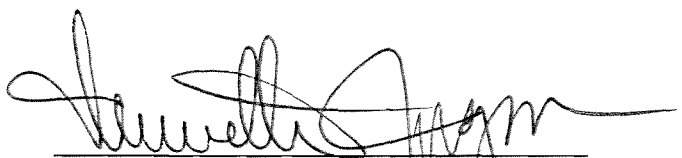

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