7-14-2016

State v. Tsui Respondent's Brief Dckt. 43838

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 43838**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR-2015-3976**
	)	
TERENCE PAK SING TSUI,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature Of The Case

Terence Pak Sing Tsui appeals from the judgment entered upon his conditional guilty plea to possession of methamphetamine. Tsui claims the district court erred in denying his motion to suppress.

Statement Of Facts And Course Of Proceedings

The state charged Tsui with possession of methamphetamine, possession of marijuana, and possession of paraphernalia. (R., pp.8-9, 16-17, 22-23.) Tsui filed a motion to suppress, claiming he was illegally searched. (R., pp.41-45.) The court held a hearing after which it denied Tsui's suppression motion. (See generally Supp. Hrg. Tr.) Tsui thereafter entered a conditional guilty plea to possession of methamphetamine, reserving his right to appeal the court's denial of his motion to suppress, and the state agreed to dismiss the two misdemeanor charges. (R., pp.69-77; see generally 11/12/2015 Tr.) The court imposed a unified five-year sentence, with one year fixed, but suspended the sentence and placed Tsui on probation. (R., pp.88-90.) Tsui filed a timely notice of appeal. (R., pp.101-102.)

ISSUE

Tsui states the issue on appeal as:

> Did the district court err when it denied Mr. Tsui's motion to suppress?

(Appellant's Brief, p.4.)

The state rephrases the issue on appeal as:

Has Tsui failed to establish the district court erred in denying his motion to suppress?

ARGUMENT

Tsui Has Failed To Establish Error In The Denial Of His Suppression Motion

A. Introduction

Tsui contends the district court erred in denying his motion to suppress. (Appellant's Brief, pp.5-13.) Specifically, Tsui asserts the district court erred in concluding the frisk of Tsui was legally justified and in concluding that the discovery of marijuana that led to Tsui's arrest (and later discovery of methamphetamine and paraphernalia) was not the result of the frisk. (Appellant's Brief, pp.5-13.) Tsui's claims fail. The district court correctly concluded that Tsui was not entitled to suppression based on an allegedly unlawful pat search since the discovery of contraband was not the result of the frisk. Alternatively, Tsui has failed to show error in the district court's conclusion that the frisk was lawful.

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). The power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. State v. Valdez-Molina, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); State v. Fleenor, 133 Idaho 552, 555, 989 P.2d 784, 787 (Ct. App. 1999).

C. The District Court Correctly Applied The Law To The Facts In Denying Tsui's Motion To Suppress

"There is no reasonable expectation of privacy from lawfully positioned agents with inquisitive nostrils." State v. Rigoulot, 123 Idaho 267, 273, 846 P.2d 918, 924 (Ct. App. 1992) (quotations and citations omitted). Thus, "no search in the Fourth Amendment sense occurs when an officer, lawfully present at a certain place, detects odors emanating from a private premises." Id. at 272-273, 846 P.2d at 923-924.

Officer Martinez encountered Tsui when he and another parole officer were performing a parole check at Robert Dickson's residence. (See Supp. Hrg. Tr., p.7, L.3 – p.10, L.20.) As Officer Martinez "got close" to Tsui, he could smell a "pretty strong" odor of marijuana. (Supp. Hrg. Tr., p.25, Ls.8-14.) Officer Martinez further explained that as he was "pat searching [Tsui's] torso and as [he] moved down his torso, [he] could smell marijuana pretty strong." (Supp. Hrg. Tr., p.25, Ls.18-20.) Officer Martinez asked Tsui "if he had marijuana on him," and Tsui answered, "Yes." (Supp. Hrg. Tr., p.25, L.25 – p.26, L.1.) Officer Martinez then asked Tsui "if he would show it to [him] and [Tsui] retrieved the bag out of his pocket." (Supp. Hrg. Tr., p.26, Ls.2-4.) Based on this evidence, the district court concluded the marijuana in Tsui's pocket was not discovered "from the pat search," but was the result of what Officer Martinez could smell followed by Tsui's consensual act of giving Officer Martinez the marijuana. (Supp. Hrg. Tr., p.34, L.3 – p.35, L.1.) The district court further found the methamphetamine was lawfully discovered pursuant to a search incident to arrest. (Supp. Hrg. Tr., p.35, Ls.3-7.)

On appeal, Tsui claims the district court's conclusion was incorrect because, he argues, the state did not meet its burden of proving Officer Martinez would have inevitably discovered the marijuana without the frisk, which Tsui contends was unlawful. (Appellant's Brief, pp.11-12.) Tsui's claim fails legally and factually.

"The inevitable discovery doctrine applies when a preponderance of the evidence demonstrates that the information would have inevitably been discovered by lawful methods." State v. Bunting, 142 Idaho 908, 915, 136 P.3d 379, 386 (Ct. App. 2006) (citations omitted). The inevitable discovery doctrine has no application in this case because the marijuana in Tsui's possession was discovered by a lawful method in the first instance, *i.e.*, pursuant to plain smell and Tsui's consensual act of giving Officer Martinez the marijuana,[1] and the methamphetamine and paraphernalia in Tsui's possession was lawfully discovered pursuant to a search incident to arrest. State v. LaMay, 140 Idaho 835, 838, 103 P.3d 448, 451 (2004) (citations omitted) ("Searches incident to arrest are one of the well-established exceptions to the warrant requirement."). Thus, contrary to Tsui's assertion on appeal, this Court need not consider the inevitable discovery doctrine.

Tsui's factual assertion that Officer Martinez did not or could not smell the marijuana on Tsui but for the frisk is unwarranted. Officer Martinez initially explained that, as he got close to Tsui, he detected a "pretty strong" smell of

[1] Tsui has not claimed below or on appeal that his act of giving Officer Martinez his marijuana was not consensual; he only claims that it was discovered as the result of an illegal pat search. (See R. pp.41-45; Supp. Hrg. Tr., p.15, L.5 – p.16, L.11, p.17, Ls.16-23, p.29, L.22 – p.30, L.6; Appellant's Brief, pp.5-13.)

marijuana. (Supp. Hrg. Tr., p.25, Ls.10-14.) Officer Martinez's discussion of that odor relative to Tsui's torso was in response to a specific question about the "sequence" of the smell in relation to the pat search. (Supp. Hrg. Tr., p.25, Ls.15-20.) That elaboration does not negate Officer Martinez's initial indication that he could smell the odor of marijuana as he got close to Tsui. Even if Officer Martinez would not have smelled the marijuana without frisking Tsui, Tsui has failed to show error in the district court's determination that the frisk was valid.

Under the Fourth Amendment, it is constitutionally permissible for "an officer to conduct a limited self-protective pat down search of a detainee in order to remove any weapons." State v. Henage, 143 Idaho 655, 660, 152 P.3d 16, 21 (2007) (citing State v. Wright, 134 Idaho 79, 82, 996 P.2d 298, 301 (2000)). Such searches are "evaluated in light of the facts known to the officers on the scene and the inference of the risk of danger reasonably drawn from the totality of the circumstances." Henage, 143 Idaho at 660, 152 P.3d at 21 (quotations and citation omitted). The ultimate inquiry is an objective one, which requires the court to consider whether the facts available to the officer would "warrant a man of reasonable caution in the belief that the action taken was appropriate." Id. (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968)). "Several factors influence whether a reasonable person in the officer's position would conclude that a particular person was armed and dangerous." State v. Bishop, 146 Idaho 804, 819, 203 P.3d 1203, 1218 (2009). The factors include whether: (1) "there were any bulges in the suspect's clothing that resembled a weapon"; (2) "the encounter took place at night or in a high crime area"; (3) "the individual made

threatening or furtive movements"; (4) "the individual indicated that he or she possessed a weapon"; (5) "the individual appeared to be under the influence of alcohol or illegal drugs"; (6) the individual "was unwilling to cooperate"; and (7) the individual "had a reputation for dangerousness." Id. (citations omitted). "Whether any of these circumstances, taken together or by themselves, are enough to justify a [pat] frisk depends on an analysis of the totality of the circumstances." Id.

With respect to the circumstances surrounding the frisk of Tsui, the district court found that "around 11:00 p.m. parole officers Pino and Eli Martinez visited the residence of parolee, Mr. Dickson, who at the time was under felony supervision. [Tsui] was present at the residence at the time of the probation officers' visit." (Supp. Hrg. Tr., p.30, Ls.8-13.) When the parole officers entered the residence, Dickson was upstairs with Tsui. (Supp. Hrg. Tr., p.10, Ls.7-20.) Dickson came downstairs first and Officer Martinez asked him if anyone else was upstairs; Dickson indicated "he had a friend up there." (Supp. Hrg. Tr., p.10, Ls.7-16.) "[A] short time later, [Tsui] started coming down the stairs," with his hands in his sweatshirt pocket. (Supp. Hrg. Tr., p.10, Ls.19-20, p.24, Ls.14-17.) Officer Martinez asked Tsui if he had any weapons, which Tsui denied, but Tsui was "nervous, didn't make much eye contact, [and] kept scanning the room when he got down to the bottom of the stairs." (Supp. Hrg. Tr., p.10, L.24 – p.11, L.5, p.22, Ls.10-15.) Officer Martinez also noted that, prior to entering the residence, they encountered a man sitting in a car outside Dickson's house who said he was "waiting for a friend" who lived across the street. (Supp. Hrg. Tr., p.19, L.25 –

p.20, L.6.) That individual also did not "want[ ] to make much eye contact" with the officers. (Supp. Hrg. Tr., p.20, Ls.10-12.) Due to safety concerns, Officer Martinez told Tsui he was going to pat search him for weapons, and did so, but he did not remove anything from Tsui's pockets. (Supp. Hrg. Tr., p.11, L.6 – p.12, L.14, p.23, L.19 – p.25, L.9.) Based on the evidence presented, the district court concluded:

> In this case, under the circumstances within which the officers entered the residence, under the way that the defendant presented to the officers and after the parolee came downstairs, I do find that there was reason to believe or to suspect that Mr. Tsui may have been armed and then a pat search was reasonable under those circumstances.

(Supp. Hrg. Tr., p.33, L.20 – p.34, L.2.)

On appeal, Tsui first complains "it is not clear what 'circumstances' the district court is referring to with respect to the officers' entry into Mr. Dixon's residence" since there was no evidence of Dixon's "criminal history" or evidence that his residence "was or had been a place of known criminal activity." (Appellant's Brief, p.7.) Obviously the district court was not referring to Dixon's "criminal history" or evidence of "criminal activity" at Dixon's house in referencing the circumstances surrounding the officers' entry into his home since no such evidence was presented; rather, the court was referring to the evidence actually presented, which included the individual the officers encountered outside Dixon's house and the delay in Tsui coming downstairs after the officers entered the residence. Tsui's confusion on this point does not demonstrate error.

Tsui next notes the lack of any evidence that Tsui "had a bulge in his pocket that resembled a weapon, made any threatening or furtive movements,

appeared to be under the influence of alcohol or drugs, or was unwilling to cooperate with the officers in any way," which are factors that are relevant to whether there was reasonable suspicion to believe he was armed and dangerous. (Appellant's Brief, p.7.) While Tsui is correct that there was no evidence of any of these factors, this combination of factors is not necessarily required in order to justify a frisk. Although the Court in Bishop indicated the foregoing factors "influence whether a reasonable person in the officer's position would conclude that a particular person was armed and dangerous," it did not foreclose the consideration of other factors that could also influence a reasonable person's assessment of the situation. Bishop, 146 Idaho at 819, 203 P.3d at 1218; State v. Crooks, 150 Idaho 117, 121, 244 P.3d 261, 265 (Ct. App. 2010) ("Notably, the *Bishop* Court did not indicate that its list of factors to consider in determining the reasonableness of a belief that a suspect is armed and dangerous was exhaustive."). Ultimately, a frisk is constitutional so long as the officer can "demonstrate how the facts he or she relied on in conducting the frisk support the conclusion that the suspect posed a risk of danger." Id. (citations omitted). In Tsui's case, the district court focused on other relevant considerations, which included "the way [Tsui] presented to the officers" after Dixon had already come downstairs. Tsui initially had his hands in his sweatshirt pocket, was nervous, and was "scanning" the room. Based on these facts, the district court found it was reasonable for Officer Martinez to conclude that Tsui posed a risk of danger and, as such, a frisk was warranted.

Tsui's comparison of the facts of his case to State v. Henage, 143 Idaho 655, 152 P.3d 16 (2007), is not persuasive. (Appellant's Brief, pp.8-9.) In Henage, the Court found the officer lacked reasonable articulable suspicion to frisk because the officer testified he knew Henage from prior encounters, had always known him to be "polite" and "cooperative," which was consistent with Henage's behavior during the particular encounter at issue, and that, although Henage told the officer he had a knife on him, the officer returned the knife, which was a Leatherman, to Henage after being made aware of its presence. Id. at 661-662, 22-23. Unlike in Henage, Officer Martinez had no such experience with Tsui, and the circumstances surrounding the encounter, which included being inside the home of a felony parolee where others were present, were reasonably perceived as posing a risk of danger.

Tsui has failed to establish any error in the denial of his suppression motion.

CONCLUSION

The state respectfully requests that this Court affirm Tsui's conviction for possession of methamphetamine.

DATED this 14th day of July 14, 2016.

_/s/ Jessica M. Lorello__
JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of July, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

ANDREA W. REYNOLDS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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/s/ Jessica M. Lorello
JESSICA M. LORELLO
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JML/dd