

8-9-2016

## State v. Tsui Appellant's Reply Brief Dckt. 43838

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 43838
	)	
v.	)	ADA COUNTY NO. CR 2015-3976
	)	
TERENCE PAK SING TSUI,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

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**REPLY BRIEF OF APPELLANT**

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

---

**HONORABLE LYNN G. NORTON**  
District Judge

---

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## STATEMENT OF THE CASE

### Nature of the Case

In his opening brief, Terence Pak Sing Tsui argued the district court erred in denying his motion to suppress because the probation and parole officer who frisked him during a residence check of a third party did not have reason to believe, at the moment of the frisk, that Mr. Tsui was armed and presently dangerous, and the illegal drugs were discovered on Mr. Tsui as a result of the frisk, and would not have been discovered but for the frisk. In response, the State argues the district court correctly concluded the frisk was lawful, and the drugs were not discovered as a result of the frisk. The State's arguments are unpersuasive and not supported by the record. This Court should vacate Mr. Tsui's conviction, reverse the order denying his motion to suppress, and remand this case to the district court for further proceedings.

### Statement of Facts and Course of Proceedings

Mr. Tsui included a statement of facts and course of proceedings in his opening brief, which he incorporates herein by reference.

ISSUE

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

## ARGUMENT

### The District Court Erred When It Denied Mr. Tsui's Motion To Suppress

#### A. Introduction

At the moment Officer Elias Martinez frisked Mr. Tsui, a reasonably prudent person in the officer's position would not have been justified in concluding Mr. Tsui was armed and presently dangerous. The district court erred in concluding the frisk was lawful. The district court also erred in concluding the illegal drugs discovered on Mr. Tsui were not discovered as a result of the frisk. It is clear from Officer Martinez's testimony at the suppression hearing that he did not smell marijuana until he was standing right next to Mr. Tsui, "pat searching his torso." (11/5/15 Tr., p.25, Ls.18-19.) Because the drugs were discovered on Mr. Tsui as a result of the illegal frisk, they should have been suppressed.

#### B. The Frisk Of Mr. Tsui Violated The Fourth Amendment Because, At The Moment Of The Frisk, Officer Martinez Did Not Have Reason To Believe Mr. Tsui Was Armed And Presently Dangerous

The district court concluded Officer Martinez had reason to believe Mr. Tsui was armed "under the circumstances within which the officers entered the residence [and] under the way that [Mr. Tsui] presented to the officers and after the parolee came downstairs." (11/5/15 Tr., p.33, L.20 – p.34, L.2.) The district court erred. Officer Martinez did not indicate specific and articulable facts which, taken together with rational inferences from those facts, in light of his experience, justified his suspicion that Mr. Tsui was armed and dangerous at the moment of the frisk. See *State v.*

*Bishop*, 146 Idaho 804, 818-19 (2009) (stating test for determining whether a frisk is reasonable under the Fourth Amendment).

Mr. Tsui stated in his opening brief that “it is not clear what ‘circumstances’ the district court is referring to with respect to the officers’ entry into Mr. Dixon’s residence.” (App. Br., p.7.) The State argues in its brief that the district court was referring to “the individual the officers encountered outside [Mr.] Dixon’s house and the delay in [Mr.] Tsui coming downstairs after the officers entered the residence.” (Resp. Br., p.8.) These factors add nothing to the analysis contained in Mr. Tsui’s opening brief and do not suggest the frisk was lawful.

Officer Martinez testified that when he and his colleague arrived at Mr. Dixon’s residence on the evening of March 18, 2015, they observed a vehicle “out in front” with a male in the driver’s seat. (11/5/15 Tr., p.19, L.25 – p.20, L.3.) Officer Martinez asked the driver if he was at Mr. Dixon’s house and he said, “No, I’m waiting for a friend,” and indicated he was waiting for someone across the street. (11/5/15 Tr., p.20, Ls.3-6.) Officer Martinez testified this was “an odd situation” because “it was late at night” and “[t]he individual was not wanting to make eye contact.” (11/5/15 Tr., p.20, Ls.10-13.) There was no further evidence regarding this individual, no identification of this individual, and no argument as to how this individual’s presence may have contributed to a concern that Mr. Tsui was armed and dangerous.

It is likewise unclear how Mr. Tsui’s supposed “delay” in coming downstairs may have contributed to a concern that he was armed and dangerous. (Resp. Br., p.8.) Officer Martinez testified that the woman who let them in to Mr. Dixon’s residence summoned Mr. Dixon by saying, “Robby,” and then Mr. Dixon came downstairs.

(11/5/15 Tr., p.21, Ls.2-7.) Officer Martinez asked Mr. Dixon “if there was anybody else in the house and he said he had a friend upstairs.” (11/5/15 Tr., p.21, Ls.8-12.) There was no testimony about the length of time it took Mr. Tsui to come downstairs, and the district court found that Mr. Tsui came downstairs “shortly after Mr. [Dixon].” (11/5/15 Tr., p.30, Ls.18-20.) Mr. Tsui’s supposed “delay” in coming downstairs could not have contributed to a reasonable suspicion that he was armed and dangerous when he was not called downstairs and came down shortly after the person who was called.

In addition to these “circumstances,” the district court concluded Officer Martinez’s frisk of Mr. Tsui was lawful based on “the way that [Mr. Tsui] presented to the officers” after he came downstairs. (11/5/15 Tr., p.33, L.20 – p.34, L.2.) Mr. Tsui presented to the officers by walking downstairs and denying he had weapons on him. (11/5/15 Tr., p.23, Ls.13-24.) Officer Martinez testified he believed Mr. Tsui was armed and presently dangerous because he was nervous and because, though he denied having weapons, people often lie about that. (11/5/15 Tr., p.24, Ls.9-13, 22-25.) As argued by Mr. Tsui in his opening brief, the fact that Mr. Tsui was nervous and that people may lie about not having weapons would not justify a reasonably prudent person in concluding that Mr. Tsui was armed and presently dangerous at the moment of the frisk. (See App. Br., pp.7-10.) The district court thus erred in concluding the frisk was lawful.

C. The Illegal Drugs Were Discovered On Mr. Tsui As A Result Of The Illegal Frisk And Would Not Have Been Discovered But For The Frisk

The district court concluded the marijuana was not discovered on Mr. Tsui as a result of the frisk because “Officer Martinez actually smelled the marijuana based on his training and experience.” (11/5/15 Tr., p.34, Ls.3-7.) Mr. Tsui does not contest that, based on his training and experience, Officer Martinez was able to identify the odor he smelled when he was patting down Mr. Tsui’s torso as that of marijuana. The critical question is whether Officer Martinez would have detected an odor of marijuana in the absence of the illegal frisk.

Officer Martinez testified at the suppression hearing that he smelled marijuana as he was patting down Mr. Tsui. (11/5/15 Tr., p.12, Ls.3-14.) Recognizing the sequence of events as critical, the prosecutor asked Officer Martinez on redirect to “please sequence it for us, the smell of the marijuana to the pat search and how that worked.” (11/5/15 Tr., p.25, Ls.15-17.) Officer Martinez answered, “As I was pat searching his torso and as I moved down his torso, I could smell marijuana pretty strong.” (11/5/15 Tr., p.25, Ls.18-22.) Officer Martinez never testified that he was able to smell marijuana prior to the pat search, and the district court did not make a finding to that effect.

The States cites *State v. Rigoulot*, 123 Idaho 267, 272-73 (Ct. App. 1992), for the proposition that “no search in the Fourth Amendment sense occurs when an officer, lawfully present at a certain place, detects odors emanating from a private premises.” (Resp. Br., p.4.) As Mr. Tsui explained in his opening brief, *Rigoulot* has no applicability here because *Rigoulot* did not involve application of the exclusionary rule. (See App. Br., pp.12-13.) The Court of Appeals concluded in *Rigoulot* that the officers’ detection of marijuana did not constitute a search when they smelled the marijuana in an area of

the curtilage that would be occupied by ordinary visitors. 123 Idaho at 272-73. *Rigoulot* does not stand for the proposition that an officer's detection of the odor of marijuana should not be suppressed when the odor is only detected because of an unlawful frisk.

The exclusionary rule "applies to evidence obtained directly from the illegal government action and to evidence discovered through the exploitation of the original illegality, or the fruit of the poisonous tree." *Bishop*, 146 Idaho at 811 (citations omitted). "The test is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of the original illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* (quotation marks and alterations omitted). Officer Martinez's detection of an odor of marijuana on Mr. Tsui cannot be distinguished or purged from the primary taint of the unlawful frisk. Officer Martinez would not have detected the odor absent the frisk, and his detection of the odor thus stems directly from the frisk. The district court should have suppressed the marijuana found on Mr. Tsui and the methamphetamine discovered in the subsequent search incident to his arrest.

### CONCLUSION

For the reasons stated above, as well as those set forth in his opening brief, Mr. Tsui respectfully requests that this Court vacate his conviction, reverse the district court's order denying his motion to suppress, and remand this case to the district court for further proceedings.

DATED this 9<sup>th</sup> day of August, 2016.

\_\_\_\_\_/s/\_\_\_\_\_  
ANDREA W. REYNOLDS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9<sup>th</sup> day of August, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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E-MAILED BRIEF

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\_\_\_\_\_/s/  
EVAN A. SMITH  
Administrative Assistant

AWR/eas