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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	No. 44023
Plaintiff-Respondent,	)	
v.	)	Kootenai County Case No. CR-2006-14940
OLAF HANSON,	)	
Defendant-Appellant.	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Olaf Hanson appeals from re-entry of judgment for unlawful possession of a firearm, possession of marijuana, possession of drug paraphernalia, providing false information to a law enforcement officer, and driving while suspended.

Statement Of The Facts And Course Of The Proceedings

Officer Smith stopped Hanson's car for having a broken taillight and expired registration. (P.H. Tr., p. 4, L. 13 – p. 5, L. 12.) Before and after the vehicle stopped, Hanson reached down between and behind the seats for a significant period. (P.H. Tr., p. 5, L. 13 – p. 6, L. 14.) When asked what he was doing reaching down and behind the seats, Hanson initially claimed he was doing nothing, then claimed he was "playing with his keys," and then claimed he was "playing with a cell phone." (P.H. Tr., p. 7, Ls. 3-11.) Officer Smith asked Hanson to step from the vehicle and secured his consent to conduct a pat-down for weapons. (P.H. Tr., p. 7, Ls. 12-23.) After asking questions about ownership of the car and asking for license and paperwork, Officer Smith returned to what Hanson had been doing when reaching down between and behind the seats. (P.H. Tr., p. 7, L. 24 – p. 9, L. 13.) Officer Smith thereafter asked Hanson for consent to search the car, which Hanson granted. (P.H. Tr., p. 9, Ls. 14-22.) Officer Smith found marijuana in the area where Hanson had been reaching. (P.H. Tr., p. 9, L. 23 – p. 10, L. 11.) Officers also found a gun in a bag behind the driver's seat. (P.H. Tr., p. 11, Ls. 17-23; p. 13, Ls. 16-19; p. 15, Ls. 1-23.)

The state charged Hanson with unlawful possession of a firearm, possession of marijuana (less than three ounces), possession of drug paraphernalia, providing false information to a law enforcement officer, and driving while suspended, with a persistent violator enhancement. (R., pp. 60-62.) He moved to suppress the evidence against him. (R., pp. 72-75.)

The district court concluded that the facts relevant to the suppression motion were that about three minutes after Hanson exited the car and Officer Smith frisked him, Officer Smith asked, "What's under the seat? I'm gonna go look," to which Hanson replied that it was his cell phone. (01/03/07 Tr., p. 13, L. 25 – p. 14, L. 10.) The conversation then went in a different direction for three minutes as the officer explained the reasons for the stop. (01/03/07 Tr., p. 13, Ls. 10-18.) Then Officer Smith asked for permission to search the car. (01/03/07 Tr., p. 13, Ls. 19-21.) Hanson initially responded that the car was not his, but after the officer explained that he was asking him because he was the driver, Hanson granted consent. (01/03/07 Tr., p. 14, L. 21 – p. 15, L. 5.) The district court denied the motion to suppress, finding under the totality of the circumstances that Hanson voluntarily consented to a search of the car. (R., pp. 89-90; 01/03/07 Tr., p. 25, L. 14 – p. 34, L. 3.)

Hanson pled guilty to providing false information and driving while suspended. (R., p. 95.) A jury found him guilty of unlawful possession of a firearm, possession of marijuana, and possession of drug paraphernalia. (R., pp. 181-82.) After Hanson waived the jury and stipulated to a court trial on Part II of the information, the district court found him to be a persistent violator. (R.,

pp. 110-18.) The district court imposed a sentence of eight and one-half years with two and one-half years determinate on the sole felony conviction and retained jurisdiction, entering judgment on January 22, 2008. (R., pp. 231-38.) On the misdemeanors the district court imposed sentences of 180 days with 180 days credit for time served for driving without privileges, 180 days with 180 days credit for time served for possession of drug paraphernalia, 365 days with 365 days credit for time served for providing false information, and 365 days with 365 days credit for time served for possession of marijuana. (R., pp. 235-38.) Hanson filed an appeal, but the appeal (docket number 34991) was dismissed. (R., pp. 242-57, 274.)

On June 12, 2008, the district court exercised its retained jurisdiction and placed Hanson on probation. (R., pp. 258-59, 267-72.) Hanson filed a notice of appeal from the judgment placing him on probation. (R., pp. 260-61.) This appeal (docket number 35447) was also dismissed. (R., pp. 275, 324, 331, 333, 365.)

While the appeal in docket 35447 was pending, probation violation proceedings were initiated against Hanson. (R., pp. 276-79, 290-93, 307-09.) The district court found Hanson in violation of his probation and, in a judgment entered either January 14 or 15, 2009, reduced the determinate portion of the sentence to one and one-half years, and executed the sentence. (R., pp. 321-22, 361-63.)

Hanson filed for post-conviction relief in 2012. (See, e.g., R., p. 419.) The parties stipulated that Hanson "be allowed to pursue his appeal" from the

judgment filed on June 12, 2008, placing him on probation during the retained jurisdiction. (R., pp. 419-28.) The district court initially reentered the amended judgment on the probation violation, originally filed on December 1, 2009 (R., pp. 442-45), and then reentered the January 22, 2008 judgment (R., pp. 460-67[1]). Hanson appealed from the reentered judgment. (R., pp. 469-80.)

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[1] Even though the district court never reentered the judgment as stipulated to by the parties, any error associated with this action is moot. Under the Appellate Rules as they existed upon filing the June 13, 2008 notice of appeal, the retention of jurisdiction tolled the time for filing the appeal. I.A.R. 14(a) (2007). Thus, an appeal from the judgment entered at the end of the retained jurisdiction period conferred jurisdiction on this Court for all matters decided before the entry of the first judgment. However, because the judgments entered on the misdemeanors are not within the scope of such tolling (because jurisdiction was not retained in relation to them) and because the judgments on the misdemeanors were not reentered or, on this record, the subject of post-conviction relief, only the judgment on the felony for unlawful possession of a firearm is subject to this appeal.

ISSUE

Hanson states the issue on appeal as:

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

(Appellant's brief, p. 6.)

The state rephrases the issue as:

Has Hanson failed to show error in the district court's finding that Hanson voluntarily consented to the search of his car?

ARGUMENT

Hanson Has Failed To Show Error In The District Court's Finding That Hanson Voluntarily Consented To The Search Of His Car

A. Introduction

The district court found, under the totality of the circumstances, that Hanson granted voluntary consent to search his car. (01/03/07 Tr., p. 25, L. 14 – p. 32, L. 11.) As to Officer Smith's statement, "I'm gonna look," the district court determined that, in the context of the video of the encounter, the statement was not a claim of legal authority to search Hanson's car and did not, under the totality of the circumstances, render Hanson's consent involuntary. (Id.) Hanson challenges this finding, asserting that his consent to search was a mere acquiescence in Officer Smith's stated authority to search regardless of consent. (Appellant's brief, pp. 8-19.) Application of the correct legal standards shows that Hanson has failed to show clear error in the district court's factual findings.

B. Standard Of Review

"[W]hether a consent to a search was voluntary is a question of fact, and our standard of review requires that we accept a trial court's factual findings unless they are clearly erroneous." State v. Jaborra, 143 Idaho 94, 97, 137 P.3d 481, 484 (Ct. App. 2006). "In a suppression hearing where voluntariness is an issue, the power to assess the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence, and draw factual inferences is vested in the trial court." State v. Ballou, 145 Idaho 840, 846, 186 P.3d 696, 702 (Ct. App. 2008).

C. Hanson Has Failed To Show Clear Error In The District Court's Factual Finding That He Voluntarily Consented To The Search Of His Car

"The voluntariness of a consent to search must be determined from the totality of the circumstances." State v. Thorpe, 141 Idaho 151, 153, 106 P.3d 477, 479 (Ct. App. 2004). "The State's burden to show that consent was freely and voluntarily given cannot be met by 'showing no more than acquiescence to a claim of lawful authority.'" State v. Tietsort, 145 Idaho 112, 118, 175 P.3d 801, 807 (Ct. App. 2007) (quoting Bumper v. North Carolina, 391 U.S. 543, 550 (1968)). An officer's "false, erroneous or baseless representation" of the ability to conduct a search without consent "weighs against a finding of voluntariness." Tietsort, 145 Idaho at 118–19, 175 P.3d at 807–08. However, voluntariness "is not impaired simply because one is faced with two unpleasant choices" such as "choosing between consenting to the search and allowing [contraband] to be discovered and not consenting and risking arrest" or "consenting to a search or having his premises searched pursuant to a warrant." State v. Garcia, 143 Idaho 774, 779, 152 P.3d 645, 650 (Ct. App. 2006).

The district court determined that Officer Smith, in the context of questioning Hanson about what he was fidgeting with between or behind the seats asked, "What's under the seat, you might as well tell me, I'm gonna look." (01/03/07 Tr., p. 13, L. 25 – p. 14, L. 7; p. 26, Ls. 16-22.) Hanson responded that it was his cell phone. (01/03/07 Tr., p. 14, Ls. 7-10.) The conversation then went "off on a tangent" that included an explanation for the traffic stop for about three minutes. (01/03/07 Tr., p. 14, Ls. 10-20.) After that Officer Smith asked for, and got, permission to search. (01/03/07 Tr., p. 14, L. 19 – p. 15, L. 20.) The district

court stated that, "in [its] view of the tape" of the encounter, the statement about looking was not a "false and erroneous statement" because "in this particular circumstance" the statement might have merely referred to looking at what was in plain view and was "not the same as the officer actually saying" that he was going to search the car. (01/03/07 Tr., p. 26, L. 15 – p. 27, L. 23.) In the totality of the circumstances, the comment was not "unnecessarily coercive." (01/03/07 Tr., p. 27, L. 23 – p. 28, L. 7.) Having found, under the totality of the circumstances, that the statement "I'm gonna look" was not a declaration of legal ability to search the car regardless of whether Hanson granted permission, and was therefore not coercive, the district court did not err in finding no violation of Hanson's rights.

Hanson argues the district court erred because he merely acquiesced to the officer's claim of lawful authority, either because the officer's statement was an erroneous claim of lawful authority to search the car or because a "reasonable person" would have understood it to be such. (Appellant's brief, pp. 8-19.) The flaw in this argument is that voluntariness of consent is a factual question that will not be reversed absent a showing of clear error. Jaborra, 143 Idaho at 97, 137 P.3d at 484. Moreover, Hanson has failed to cite any authority that a "reasonable person" standard applies instead of the totality of the circumstances. City of Meridian v. Petra Inc., 154 Idaho 425, 450, 299 P.3d 232, 257 (2013) ("We will not consider issues cited on appeal that are not supported by

propositions of law, authority or argument." (internal quotations omitted)).[2] Hanson does not claim clear error, and therefore his argument fails.

Even if Hanson's argument could be considered as claiming clear error, it would fail. "Where an incomplete record is presented to an appellate court, missing portions of the record are presumed to support the action of the trial court." Peasley Transfer & Storage Co. v. Smith, 132 Idaho 732, 744, 979 P.2d 605, 617 (1999). The district court's findings were based primarily on a videotape of the encounter which was admitted as an exhibit. (01/03/07 Tr., p. 13, L. 25 – p. 16, L. 3; p. 26, L. 15 – p. 29, L. 8.) Hanson acknowledges, and does not challenge, the district court's conclusion that the exhibits were destroyed by the court clerk in compliance with I.C.A.R. 38 because Hanson failed to exercise diligence to preserve them. (Appellant's brief, p. 5.) Hanson cannot show clear error in factual findings derived from exhibits that are not part of the record.

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[2] The state is aware of situations in the consent context where the reasonable person standard applies to the *officer*, apparently under the general theory that an unreasonable belief by the officer, even if sincerely held, will not justify an otherwise unreasonable search or a seizure. See, e.g., State v. Fancher, 145 Idaho 832, 839, 186 P.3d 688, 695 (Ct. App. 2008) ("Law enforcement officers may not simply accept a person's invitation to enter premises if the surrounding circumstances are such that a reasonable person would doubt that person's authority to consent and not act without further inquiry." (internal quotes, brackets and ellipses omitted)); State v. Ballou, 145 Idaho 840, 849, 186 P.3d 696, 705 (Ct. App. 2008) ("The standard for measuring the scope of consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect." (internal quotations omitted)). Hanson cites to cases interpreting the *scope* of consent under the "reasonable person" standard (Appellant's brief, p. 18) without analysis or authority of how such a standard would supplement or supplant the totality of the circumstances standard.

The district court found that the officer did not make a show of authority to which Hanson merely acquiesced. Rather, under the totality of the circumstances Hanson voluntarily consented to a search of the car. Hanson has failed to show that the district court's findings were clearly erroneous. As such, Hanson has failed to show error by the district court.

CONCLUSION

The state respectfully requests this Court to affirm the district court's judgment.

DATED this 3rd day of August, 2017.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of August, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd