6-24-2016

State v. Lee Appellant's Brief Dckt. 44001

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NOS. 44001 & 44002**
Plaintiff-Respondent,	)	
	)	**PAYETTE COUNTY**
	)	**NOS. CR 2015-766 & CR 2015-768**
v.	)	
	)	
TREVOR GLENN LEE,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

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

_____

HONORABLE SUSAN E WIEBE
District Judge

_____

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Nature of the Case

Trevor Glenn Lee appeals from the district court's denial of his motion to suppress. The district court erred in concluding that a police officer's frisk of Mr. Lee was reasonable. A reasonably prudent person in the position of the police officer would not have been justified in concluding that Mr. Lee presented a risk of danger where he was stopped on the sidewalk, was reluctant to make contact with the officer, had fled from a previous encounter with the officer, and said he had a pocket knife. The district court also erred in concluding that a search conducted by the officer when Mr. Lee was being detained for driving without privileges was a search incident to his arrest for possession of a controlled substance, when the officer had not discovered any controlled substances prior to the search. This Court should vacate Mr. Lee's conviction, reverse the district court's order denying his motion to suppress, and remand this case to the district court for further proceedings.

Statement of Facts and Course of Proceedings

Officer Jonathon Laurenson observed Mr. Lee driving a blue Chevrolet pickup truck at approximately 7:45 p.m. on May 16, 2015. (5/26/15 Tr., p.4, L.15 – p.5, L.24.) Officer Laurenson recognized Mr. Lee from a traffic stop that had occurred "a couple months prior where drugs and narcotics were seized out of [Mr. Lee's] vehicle." (5/26/15 Tr., p.5, Ls.7-16.) Officer Laurenson suspected Mr. Lee might be driving without a valid license and confirmed through dispatch that Mr. Lee's license was suspended. (5/26/15 Tr., p.6, Ls.5-17.) Officer Laurenson observed Mr. Lee park his vehicle in a gas station parking lot, exit his vehicle, and then enter the gas station store.

(5/26/15 Tr., p.6, Ls.5-13.) Officer Laurenson observed Mr. Lee leave the gas station store and walk away from the gas station and away from his vehicle. (5/26/15 Tr., p.7, Ls.3-7.) Officer Laurenson activated his lights, exited his patrol car, and made contact with Mr. Lee on the sidewalk. (8/7/15 Tr., p.10, Ls.5-7.) Mr. Lee "appeared to be reluctant" and "didn't want to have contact" with Officer Laurenson. (8/7/15 Tr., p.10, Ls.7-8.)

Officer Laurenson advised Mr. Lee he would be issuing him a citation for driving without privileges. (5/26/15 Tr., p.8, L.23 – p.9, L.1.) He asked Mr. Lee if he was carrying any weapons and Mr. Lee said, "I have a pocket knife," and indicated towards his back pocket. (8/7/15 Tr., p.10, Ls.16-18; Mot. to Suppress, Ex. A, 20:41:55-20:42:02.) Officer Laurenson testified he "wanted to do a weapons pat search based on his demeanor and everything like that for my safety." (5/26/15 Tr., p.11, Ls.15-19.) After he began the patdown, Officer Laurenson observed "a very large bulge" in the left front pocket of Mr. Lee's pants. (5/26/15 Tr., p.12, Ls.2-7; 8/7/15 Tr., p.10, L.23 – p.11, L.2.) He felt the area of the bulge and detected several items, one of which he believed to be a pocket knife. (8/7/15 Tr., p.11, Ls.6-9.) Officer Laurenson asked Mr. Lee if he could remove the items from his pocket, but Mr. Lee did not consent. (5/26/15 Tr., p.11, Ls.20-23.) Officer Laurenson then removed the items one at a time by pushing them up from the outside of Mr. Lee's pocket. (8/7/15 Tr., p.11, Ls.10-15.) Officer Laurenson recovered two small round Carmex containers,[1] one long cylindrical Chapstick

[1] The district court referred to the small round containers as Chapstick containers, but they are actually Carmex containers, not Chapstick containers. (*See* Mot. to Suppress, Ex. A, 21:00:02-45.)

container, a money clip, a small tin canister, and a pocket knife. (5/26/15 Tr., p.13, Ls.5-12; 8/7/15 Tr., p.11, Ls.15-17.)

After recovering these items, Officer Laurenson handcuffed Mr. Lee, placed him in the back of his patrol car, and told him, "You're just being detained right now, you understand?" (8/7/15 Tr., p.11, Ls.21-23; Mot. to Suppress, Ex. A, 20:45:36-40.) Officer Laurenson said, "You're going to get a citation for driving without privileges. In the meantime, you're going to sit in the back of my car." (Mot. to Suppress, Ex. A, 20:45:58-46:02.) Officer Laurenson testified that he did not intend to arrest Mr. Lee for driving without privileges. (5/26/15 Tr., p.24, Ls.12-14; 8/7/15 Tr., p.12, Ls.22-24.) He testified that he "detained [Mr. Lee] because [he] recognized the objects that came out of his pocket to be probably more than likely paraphernalia." (5/26/15 Tr., p.24, Ls.9-11.)

After detaining Mr. Lee, Officer Laurenson opened and searched the containers he had found in Mr. Lee's pocket. (8/7/15 Tr., p.13, Ls.6-13.) He first opened the "most worn Chapstick container" and found a green leafy substance that he recognized to be marijuana. (5/26/15 Tr., p.17, Ls.9-17; 8/7/15 Tr., p.13, L.24 – p.14, L.3.) Officer Laurenson then opened the tin canister and found a "clear little baggy with some powdery residue in it." (8/7/15 Tr., p.14, Ls.4-10.) After searching all of the containers, Officer Laurenson arrested Mr. Lee for possession of a controlled substance. (Mot. to Suppress, Ex. A, 20:50:09-22, 20:55:55-58.)

Mr. Lee was charged by Information with felony possession of a controlled substance in CR 2015-768. (R., pp.52-53.) He was charged with misdemeanor possession of a controlled substance, misdemeanor possession of paraphernalia, and

misdemeanor driving without privileges in CR 2015-766. The two cases were consolidated in the district court. (R., p.27.) Mr. Lee filed a motion to suppress, challenging the constitutionality of Officer Laurenson's frisk and his search of the containers he found in Mr. Lee's pocket. (R., pp.95-97.) The State filed a response, arguing the frisk and search of the containers was lawful under *Terry v. Ohio*, 392 U.S. 1 (1968). (R., pp.103-09.) The district court held a hearing, at which Officer Laurenson testified. (R., pp.110-11.) Following the hearing, both parties submitted supplemental briefing. (R., pp.114-22, 123-29, 141-47, 148-52.)

The district court denied Mr. Lee's motion to suppress. (R., pp.154-64.) The district court first concluded that Officer Laurenson's frisk of Mr. Lee was authorized pursuant to *Terry*. (R., pp.156-58.) The district court explained, "[Mr.] Lee's reluctant attitude and noncompliance with Officer requests, coupled with the bulge in his front pocket and his previous encounter with law enforcement, could lead a reasonable person to infer that he was armed and dangerous." (R., p.157.) The district court then concluded that Officer Laurenson exceeded the scope of a permissible *Terry* frisk when he opened the containers he found in Mr. Lee's pocket because he did not have reason to believe the containers posed a threat to officer safety. (R., pp.157-58.) The district court concluded, however, that the search of the containers was permissible as a search incident to Mr. Lee's arrest because the search was "substantially contemporaneous" with the arrest. (R., p.162.) Mr. Lee filed a motion to reconsider, which the district court denied. (R., pp.166-72, 173-75.)

The parties then entered into a plea agreement, pursuant to which Mr. Lee pled guilty to felony possession of a controlled substance and the State dismissed the

misdemeanor charges and recommended that Mr. Lee be placed on probation for a period of three years. (R., pp.186-90.) Mr. Lee reserved his right to appeal from the denial of his motion to suppress. (R., p.189.) The district court sentenced Mr. Lee to a unified term of four years, with 18 months fixed, and then suspended the sentence and placed Mr. Lee on probation for a period of four years. (R., p.216.) The judgment was entered on February 12, 2016, and Mr. Lee filed a timely notice of appeal on March 1, 2016, referencing both case numbers. (R., pp.218-23, 224-29.) The district court entered separate judgments dismissing the misdemeanor charges in CR 2015-766 on February 5, 2016. (R., pp.249-54.)

ISSUE

Did the district court err in denying Mr. Lee's motion to suppress?

ARGUMENT

The District Court Erred In Denying Mr. Lee's Motion To Suppress

A. Introduction

The district court erred in concluding that Officer Laurenson's frisk of Mr. Lee was authorized pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), because a reasonably prudent person in the officer's position would not have been justified in concluding that Mr. Lee was armed and presently dangerous at the time of the frisk. Regardless of whether the frisk was authorized pursuant to *Terry*, the district court correctly concluded that Officer Laurenson exceeded the scope of a *Terry* frisk when he opened the containers he found in Mr. Lee's pocket. However, the district court erred again in concluding that Officer Laurenson's search of the containers was authorized pursuant to the search incident to arrest exception to the warrant requirement. Mr. Lee was not, and could not have been, arrested for possession of a controlled substance prior to the search of the containers. Officer Laurenson's search of the containers was not a search incident to Mr. Lee's arrest; it was a search that led to his arrest. Both the initial frisk and the search of the containers found in Mr. Lee's pocket violated Mr. Lee's rights under the Fourth Amendment and the district court erred in denying his motion to suppress.

B. Standard Of Review

This Court uses a bifurcated standard to review a district court's order on a motion to suppress. *State v. Danney*, 153 Idaho 405, 408 (2012). The Court will accept the trial court's findings of fact "unless they are clearly erroneous." *State v. Wulff*, 157

Idaho 416, 418 (2014). However, the Court exercises free review of "the trial court's application of constitutional principles to the facts found." *Danney*, 153 Idaho at 408.

C. Officer Laurenson's Frisk Of Mr. Lee Violated His Right To Be Free From Unreasonable Searches Because, At The Moment Of The Frisk, The Officer Did Not Have Reason To Believe That Mr. Lee Was Armed And Presently Dangerous

The Fourth Amendment to the United States Constitution prohibits unreasonable searches. U.S. Const. amend. IV. In order to be reasonable, a search must be authorized by a warrant based on probable cause, unless an exception to the warrant requirement applies. *See State v. Bishop*, 146 Idaho 804, 818 (2009). One exception to the warrant requirement is a patdown for weapons, as recognized by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 27 (1968). *See id.* Under *Terry*, an officer may conduct a limited patdown for weapons, referred to as a frisk, if "at the moment of the frisk, the officer has reason to believe that the individual he or she is investigating is armed and presently dangerous to the officer or to others and nothing in the initial stages of the encounter dispels the officer's belief." *State v. Crooks*, 150 Idaho 117, 119 (Ct. App. 2010). "The purpose of this exception is to enable an officer to continue the contact with the individual without fear of violence." *State v. Davenport*, 144 Idaho 99, 101 (Ct. App. 2007) (citation omitted).

Whether a frisk is reasonable is a question of law over which this Court exercises free review. *See State v. Holler*, 136 Idaho 287, 292 (Ct. App. 2001). "The test is an objective one that asks whether, under the totality of the circumstances, a reasonably prudent person would be justified in concluding that the individual posed a risk of danger." *Bishop*, 146 Idaho at 818 (citations omitted). "To satisfy this standard,

the officer must indicate specific and articulable facts which, taken together with rational inferences from those facts, in light of his or her experience, justify the officer's suspicion that the individual was armed and dangerous." *Id.* at 818-19 (quotation marks and citations omitted). "Although an officer need not possess absolutely certainty that an individual is armed and dangerous, an officer's inchoate and unparticularized suspicion or hunch is not enough to justify a frisk." *Id.* at 819 (quotation marks and citation omitted).

Under the totality of the circumstances, a reasonably prudent person would not have been justified in concluding that Mr. Lee posed a risk of danger at the time of the frisk. The district court concluded the frisk was reasonable based on Mr. Lee's "reluctant attitude and noncompliance with Officer requests, coupled with the bulge in his front pocket and his previous encounter with law enforcement." (R., p.157.) The district court clearly erred in two of the factual findings that are relevant to this analysis. First, the district court found Mr. Lee "did not verbally respond" when Officer Laurenson asked him if he was carrying any weapons. (R., p.155.) This finding is clearly erroneous, as Mr. Lee can be heard on the video recording stating, "I have a pocket knife," in response to Officer Laurenson's question. (Mot. to Suppress, Ex. A, 20:41:55-20:42:02.) Second, Officer Laurenson did not observe a bulge in Mr. Lee's front pocket until after he began the frisk. (5/26/15 Tr., p.12, Ls.2-7; 8/7/15 Tr., p.10, L.23 – p.11, L.2.) Thus, the bulge could not have been one of the factors that justified the frisk, as the district court found.

What we have, then, is Mr. Lee's reluctant attitude and noncompliance and the circumstances of his previous encounter with law enforcement. Mr. Lee's reluctant

attitude and noncompliance suggest that he did not want to interact with Officer Laurenson; they do not suggest he was armed and presently dangerous. This is supported by the circumstances of Mr. Lee's previous encounter with law enforcement, when he ran away from Officer Laurenson, but was not violent, did not have any weapons on him, and did not physically resist in any way. (5/26/15 Tr., p.8, Ls.9-17; 8/7/15 Tr., p.20, L.21 – p.21, L.2; p.22, Ls.4-14.) In the present case, Mr. Lee admitted to having a pocket knife on him, but there is absolutely no indication he intended to use it (or anything else) as a weapon.

In *State v. Henage*, a police officer conducted a frisk of the passenger of a vehicle that had been pulled over for a broken taillight. 143 Idaho 655, 657-58 (2007). The officer decided to conduct the frisk after observing the passenger's nervous behavior and learning the passenger had a knife. *Id.* at 658. The Court reversed the district court and held that the frisk was unlawful. *Id.* at 662-63. The Court reasoned that the passenger's nervous appearance did not justify the conclusion that he was armed and presently dangerous because the officer "did not connect [the passenger's] nervousness with anything tending to demonstrate a risk to his safety." *Id.* at 662-62. And the passenger's admission that he had a knife did not justify the frisk because the fact that someone possesses a weapon does not necessarily mean that the person poses a risk of danger. *Id.* at 662. The circumstances in *Henage* indicated that the passenger was not dangerous because he did not act threatening, did not have a reputation for violence, did not make any furtive movements, and was cooperative and polite. *Id.* at 661-62.

In *State v. Bishop,* the officer who frisked the defendant testified that he conducted the frisk for officer safety, but did not identify any objective facts supporting his conclusion that his safety was in danger. 146 Idaho at 819. The Idaho Supreme Court reversed the district court's denial of the defendant's motion to suppress, explaining "there was evidence that [the defendant] was acting nervous and may have been under the influence of a narcotic, [but] those facts alone are not enough to justify the frisk." *Id.* at 820. The Court noted that the officer did not testify that the defendant "behaved in an aggressive or threatening manner or that, based on his experience, suspects under the influence of narcotics tend to resort to violence." *Id.*

When asked at the preliminary hearing why he wanted to frisk Mr. Lee, Officer Laurenson answered that he "wanted to do a weapons pat search based on his demeanor and everything like that for my safety." (5/26/15 Tr., p.11, Ls.15-19.) At the suppression hearing, Officer Laurenson was asked, "Now, why did you pat search him? What was your reason?" and he responded, "For safety." (8/7/15 Tr., p.11, L.24 – p.12, L.1.) An officer's inchoate and unparticularized concern for his safety is simply not enough to justify a frisk. *See Bishop*, 146 Idaho at 819. The facts articulated by Officer Laurenson, taken together with the rational inferences from those facts, cannot justify his subjective impression that Mr. Lee was armed and presently dangerous at the moment of the frisk. The district court thus erred in concluding the frisk was permissible under *Terry*.[2]

[2] If the Court agrees that the district court erred in concluding the frisk was permissible under *Terry*, it need not reach the next issue, as the containers would not have been found but for the wrongful frisk. The containers, and the drugs found inside, would thus be considered fruits of the wrongful frisk, and subject to suppression. *See Wong Sun v. United States*, 371 U.S. 471, 485 (1963); *State v. Koivu*, 152 Idaho 511, 518-19 (2012).

D. Officer Laurenson's Search Of The Containers He Found In Mr. Lee's Pocket Also Violated Mr. Lee's Right To Be Free From Unreasonable Searches Because It Was Not Authorized Pursuant To The Search Incident To Arrest Exception To The Warrant Requirement

The district court concluded that Officer Laurenson's search of the containers he found in Mr. Lee's pocket was a permissible search incident to arrest because, prior to the search, Officer Laurenson had probable cause to arrest Mr. Lee for driving with a suspended license and "the search and arrest were substantially contemporaneous." (R., p.162.) A search conducted incident to arrest is one of the well-recognized exceptions to the warrant requirement. *See State v. LaMay*, 140 Idaho 835, 838 (2004).

> A search incident to arrest permits police to search an arrestee following a lawful custodial arrest and is premised upon the dual justifications of necessity to (1) protect the officer and other persons in the vicinity from any dangerous objects or weapons in the possession of the person arrested; and (2) prevent concealment or destruction of evidence within the reach of the arrestee.

Id. (citing *Chimel v. California*, 395 U.S. 752, 763 (1969).

The district court's conclusion that Officer Laurenson's search of the containers he found in Mr. Lee's pocket was a search incident to arrest ignores the fact that Officer Laurenson did not arrest Mr. Lee for driving with a suspended license either prior to or after the search. Before searching the containers, Officer Laurenson handcuffed Mr. Lee, placed him in the back of his patrol car and told him he was going to receive a citation for driving with a suspended license. (8/7/15 Tr., p.11, Ls.21-23; Mot. to Suppress, Ex. A, 20:45:36-20:46:02.) Officer Laurenson then searched the containers and, based on the fruits of that search, arrested Mr. Lee for possession of a controlled substance. There is no "search incident to citation" exception to the warrant requirement and, while a search conducted incident to arrest need not precede the

arrest in order to pass constitutional muster, the fruits of the search cannot provide the probable cause for the arrest. The district court's denial of Mr. Lee's motion to suppress must be reversed.

1. The Search Of The Containers Cannot Be Justified As A Search Incident To Arrest Because The Probable Cause For The Arrest Was Provided By The Fruits Of The Search

Mr. Lee was not, and could not, have been arrested for possession of a controlled substance prior to the search of the containers found in his pocket. It was the search of those containers that provided probable cause for Mr. Lee's arrest for possession of a controlled substance. Because the search of the containers provided the probable cause for the arrest, it was a not a lawful search incident to arrest. *See Smith v. Ohio*, 494 U.S. 541, 543 (1990) (per curiam) (holding warrantless search of defendant's bag could not be justified as a search incident to arrest when defendant was arrested for drug abuse only after drug paraphernalia was found in his bag).

The district court relied on *State v. Chapman*, 146 Idaho 346 (Ct. App. 2008), and *State v. Johnson*, 137 Idaho 656 (Ct. App. 2002), for the proposition that a search that precedes an arrest can constitute a valid search incident to arrest. (R., pp.160-61.) This proposition is true, as far as it goes, but it does not apply here because Officer Laurenson did not have probable cause to arrest Mr. Lee for possession of a controlled substance prior to the search which resulted in evidence of that offense.

In *State v. Chapman*, the Court of Appeals considered "whether the trooper's search inside [the defendant's] clothing, where cocaine was found, was lawful." 146 Idaho at 351. The district court held the search was permissible as a search incident to arrest because the officer possessed probable cause to arrest the defendant for

possession of cocaine prior to the search. *Id.* The Court of Appeals affirmed, stating that "[s]o long as the search and arrest are substantially contemporaneous, and the fruits of the search are not required to establish probable cause for the arrest, the search need not precisely follow the arrest in order to be incident to that arrest." *Id.* (citation omitted). The Court concluded that the search was a lawful search incident to arrest because "the facts known to the trooper gave rise to probable cause to arrest [the defendant] for possession of cocaine before the search that revealed the cocaine." *Id.* at 352.

In *State v. Johnson*, the Court of Appeals held that the defendant's admission to having marijuana in his pocket created probable cause for the officer to arrest him for possession of marijuana, and the officer's seizure of a bag of marijuana from the defendant's pocket was therefore a valid search incident to arrest. 137 Idaho at 662. The Court held that the fact that the officer removed the marijuana from the defendant's pocket prior to the formal arrest "does not invalidate the search." *Id.*

In both *Chapman* and *Johnson*, the officers had probable cause to arrest the defendants for two particular offenses prior to conducting searches which resulted in further evidence of those offenses. The same is not true here. Officer Laurenson did not have probable cause to arrest Mr. Lee for possession of a controlled substance prior to the search which resulted in evidence of that offense. *Chapman* and *Johnson* are thus inapposite. The district court erred in concluding that the search of the containers taken from Mr. Lee's pocket was a search incident to his arrest for possession of a controlled substance, when he was not and could not have been arrested for that offense absent the fruits of the search.

2. The Search Of The Containers Cannot Be Justified As A Search Incident To Citation Because There Is No Search Incident To Citation Exception To The Warrant Requirement And The Search Of The Containers Did Not Implicate Either Of The Historic Rationales For The Search Incident To Arrest Exception

Officer Laurenson told Mr. Lee he was going to receive a citation for driving with a suspended license, and then searched the containers he found in Mr. Lee's pocket. (8/7/15 Tr., p.11, Ls.21-23; Mot. to Suppress, Ex. A, 20:45:36-20:46:02.) The United States Supreme Court has held that where an officer issues only a citation or summons, the search incident to arrest exception to the warrant requirement does not apply. *See Knowles v. Iowa*, 525 U.S. 113, 118 (1998) (rejecting a "search incident to citation" exception to the warrant requirement). The *Knowles* Court held that when the historic rationales for the search incident to arrest exception are not present, the justification for the search is immediately withdrawn. *Id.* at 118-19; *see also LaMay*, 140 Idaho at 840 (discussing *Knowles*); *State v. Pederson*, 157 Idaho 790, 794 (Ct. App. 2014) ("[A]ll searches incident to arrest must be tethered to the *Chimel* justifications.").

In the present case, neither of the two historic rationales for the search incident to arrest exception applied. *See Knowles*, 525 U.S. at 116 (discussing historic rationales for the search incident to arrest exception). First, Officer Laurenson did not need to disarm Mr. Lee in order to take him into custody. Mr. Lee was handcuffed and detained in the back of Officer Laurenson's patrol car at the time Officer Laurenson searched the containers. Second, there was no way the content of the containers could have provided evidence for the offense of driving without privileges, which is the offense for which Mr. Lee was being detained. *See id.*; *see also Arizona v. Gant*, 556 U.S. 332, 344 (2009) (holding search of the passenger compartment of defendant's car was

unreasonable because police could not reasonably have believed that evidence for the offense of driving without privileges might have been found in the search and because police could not reasonably have believed the defendant could have accessed his car at the time of the search).

As the district court correctly recognized, Officer Laurenson opened the containers he found in Mr. Lee's pocket because he suspected they contained evidence of drugs. (R., p.158, n.3.) Obtaining evidence relevant to a new offense is not one of the justifications for the search incident to arrest exception to the warrant requirement. The district court erred in concluding that Officer Laurenson's search of the containers he found in Mr. Lee's pocket was authorized pursuant to the search incident to arrest exception to the warrant requirement and its order denying Mr. Lee's motion to suppress must be reversed.

CONCLUSION

Mr. Lee 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 24th day of June, 2016.

_____/s/_____
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of June, 2016, 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:

TREVOR GLENN LEE
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SUSAN E WIEBE
DISTRICT COURT JUDGE
E-MAILED BRIEF

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_____/s/_____
EVAN A. SMITH
Administrative Assistant

AWR/eas