3-15-2018

State v. Racehorse Respondent's Brief Dckt. 45274

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45274**
Plaintiff-Respondent,	)	
	)	**Bannock County Case No.**
v.	)	**CR-2016-16275**
	)	
TYSON I. RACEHORSE,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

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STATEMENT OF THE CASE

Nature of the Case

Tyson Irwin Racehorse appeals from the judgment of the district court entered upon his guilty plea to possession of methamphetamine. On appeal Racehorse argues the district court erred when it denied his motion to suppress.

Statement of Facts and Course of Proceedings

Quinn Steimlosk is the Senior Loss Prevention Specialist at Albertsons grocery store. (2/23/17 Tr., p. 10, L. 23 – p. 13, L.1) One of Mr. Steimlosk's primary duties is to catch shoplifters. (See id.) Mr. Steimlosk saw Racehorse go to the service deli and get a dinner deal bag. (2/23/17 Tr., p. 13, L. 9 – p. 15, L. 7.) Racehorse then took some Astroglide off the shelf and concealed it in the dinner deal bag. (Id.) Racehorse got two beers from the cooler. (Id.) Racehorse then used the self-checkout and scanned the dinner deal bag and only one of the two beers. (Id.)

Mr. Steimlosk and another store employee waited until Racehorse passed through the first set of exit doors before they stopped Racehorse. (2/23/17 Tr., p. 15, L. 8 – p. 17, L. 16.) Mr. Steimlosk told Racehorse that he was with the Loss Prevention Department and told him that they needed to speak with him about the items he failed to purchase. (Id.) Racehorse cooperated, and they went to the office. (Id.)

Once they were in the office, Mr. Steimlosk asked Racehorse to place his purchased items on the counter and to empty his pockets, show his waistline and remove his jacket. (2/23/17 Tr., p. 19, L. 15 – p. 21, L. 11.) Mr. Steimlosk asked him to do these things for "the safety of [himself] and other associates and customers" and to recover any

stolen merchandise. (Id.) Racehorse removed several items from his pockets, including cash and a syringe. (Id.) Mr. Steimlosk noticed a pack of cigarettes in Racehorse's jacket, but he just set the jacket aside. (Id.) The Astroglide was located in the dinner deal bag, and the second, unpaid for, beer was in one of the shopping bags. (Id.) The pack of cigarettes remained in Racehorse's jacket. (2/23/17 Tr., p. 34, Ls. 17-20, p. 37, Ls. 14-19.) Mr. Steimlosk talked to Racehorse about his failure to purchase the Astroglide and second beer. (2/23/17 Tr., p. 21, L. 25 – p. 22, L. 18.) Mr. Steimlosk then contacted the Pocatello Police Department and requested they send an officer. (2/23/17 Tr., p. 22, Ls. 19-24.)

Officer Miller was dispatched to Albertsons in response to Mr. Steimlosk's report of an individual concealing items in the store. (2/23/17 Tr., p. 55, Ls. 7-13.) Mr. Steimlosk informed Officer Miller that Racehorse failed to pay for the Astroglide and one of the beers. (2/23/17 Tr., p. 24, L. 21 – p. 25, L. 5, p. 57, L. 11 – p. 60, L. 1.) Officer Miller gave Racehorse *Miranda*[1] warnings. (2/23/17 Tr., p. 57, L. 11 – p. 60, L. 1.) Racehorse told Officer Miller he would answer questions. (2/23/17 Tr., p. 60, Ls. 2-7.) Racehorse admitted to concealing one item with the intent to take it from the store, but claimed it was an accident he did not pay for the second item. (2/23/17 Tr., p. 60, Ls. 12-23.) Officer Miller asked Racehorse about the syringe. (2/23/17 Tr., p. 60, L. 24 – p. 64, L. 21.) Racehorse claimed he was holding the syringe for a family member, who needed it for medical purposes. (Id.)

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

Officer Miller asked Racehorse if he had anything illegal in his jacket. (2/23/17 Tr., p. 65, L. 21 – p. 66, L. 21.) Racehorse said, "No. You can check." (Id.) Officer Miller clarified and asked if it was okay if he checked the jacket, and Racehorse said "Yes." (Id.) Officer Miller checked the jacket and found, in the right front pocket, a packet of cigarettes. (2/23/17 Tr., p. 66, L. 22 – p. 67, L. 13.) Inside the packet of cigarettes Officer Miller found a small plastic bag containing a white crystalline substance. (Id.) The white crystalline substance appeared to be methamphetamine. (Id.) Officer Miller placed Racehorse under arrest. (2/23/17 Tr., p. 67, L. 14 – p. 68, L. 22.) During the search incident to arrest Officer Miller found another bag containing what appeared to be methamphetamine in Racehorse's right front small change pocket. (Id.)

The state charged Racehorse with possession of methamphetamine with the intent to deliver and with a persistent violator enhancement. (R., pp. 71-74.) Racehorse filed a motion to suppress, arguing that any evidence obtained from Racehorse was the product of an unconstitutional search and should be suppressed. (R., pp. 89-90.) The district court held a hearing. (R., pp. 93-94.)

Mr. Steimlosk testified that he observed the officer read Racehorse the *Miranda* warnings and saw the officer search and find the baggies with a crystal substance. (2/23/17 Tr., p. 25, L. 10 – p. 26, L. 11.) Officer Miller testified that his conversation with Racehorse was civil and Racehorse was cooperative. (2/23/17 Tr., p. 66, Ls. 3-12.) Nicole Arzola, the front end assistant manager/cashier at Albertsons who assisted Mr. Steimlosk, testified that she was not sure when the cigarettes were removed from Racehorse's jacket. (2/23/17 Tr., p. 87, L. 16 – p. 91, L. 23.) However, she thought the

cigarettes might have been removed from the pocket before the police arrived. (Id.) Officer Cartwright testified, but he did not recall all of the items that Officer Miller pulled from Racehorse's pockets. (2/23/17 Tr., p. 94, L. 3 – p. 99, L. 7[2].) After the hearing both parties submitted briefs. (See 2/23/17 Tr., p. 105, L. 7 – p. 107, L. 17; R., pp. 100-116.)

The district court entered a Memorandum Decision and Order denying Racehorse's motion to suppress. (R., pp. 117-124.) The district court found that Mr. Steimlosk's request that Racehorse empty his pockets was done for his own purposes and law enforcement did not know or consent to the search and thus the Fourth Amendment was not implicated. (See id.) The district court also found that there was no evidence that Officer Miller coerced Racehorse into granting consent to search his jacket. (See id.) The district court found there was substantial and competent evidence that Racehorse freely and voluntarily gave his consent to search his jacket, where the cigarette pack and the first baggie of methamphetamine were found. (R., pp. 121-122.)

Racehorse and the state entered into a Rule 11 Plea Bargain Agreement. (R., pp. 133-135.) Under the terms of the agreement, Racehorse agreed to plead guilty to the amended charge of possession of methamphetamine and reserved the right to appeal the suppression ruling. (See id.) The agreement also bound the court to impose a sentence that would run concurrently with Racehorse's pending parole violation. (See 5/8/17 Tr.,

[2] The pages of the transcript file appear to be slightly out of order. After page 96, the transcript of the February 23, 2017 suppression hearing abruptly ends, and the transcript of the July 10, 2017 sentencing hearing begins. However, after the July 10, 2017 sentencing transcript, the February 23, 2017 suppression hearing transcript restarts on page 97.

p. 111, L. 5 – p. 112, L. 7.) Racehorse entered a guilty plea. (R., pp. 150-152; 5/8/17 Tr., p. 108, L. 5 – p. 120, L. 5.) The district court sentenced Racehorse to three years with 10 months fixed, to run concurrently with his sentences in other cases. (R., pp. 160-161, 163-166; 7/10/17 Tr., p. 141, L. 19 – p. 144, L. 1.) Racehorse timely appealed. (R., pp. 167-170.)

ISSUE

Racehorse states the issue on appeal as:

> Did the district court err by denying Mr. Racehorse's motion to suppress?

(Appellant's brief, p. 6.)

The state rephrases the issue as:

> Has Racehorse failed to show the district court erred when it denied Racehorse's motion to suppress?

ARGUMENT

The District Court Did Not Err When It Denied Racehorse's Motion To Suppress

A. Introduction

Mr. Steimlosk asked Racehorse to empty his pockets and place the items from his pockets on the table. (R., p. 118.) No police officers were present, nor did law enforcement know or consent to Mr. Steimlosk's request. (R., pp. 119-120.) The district court found that this search did not implicate the Fourth Amendment because Mr. Steimlosk was a private citizen and not a government official. (See id.) On appeal, Racehorse argues that the district court erred when it found Mr. Steimlosk was not acting as a government official. (See Appellant's brief, pp. 7-8.) Racehorse is mindful that there was "substantial evidence" to support the district court's finding, but nonetheless argues the district court clearly erred. (See id.) Racehorse's argument is without support in the record and in law.

The district court also found that Racehorse freely and voluntarily gave consent to Officer Miller to search his jacket (sometimes referred to as a coat) in which Officer Miller found the cigarette pack that contained the first baggie of methamphetamine. (R., pp. 121-122.) On appeal, Racehorse challenges the district court's finding that the cigarette pack was in Racehorse's jacket when Racehorse gave Officer Miller consent to search it. And, pointing to evidence that he contends shows the cigarette pack was actually on the table, Racehorse argues Officer Miller's search of the cigarette pack

exceed the scope of his consent.[3] (See Appellant's brief, pp. 8-10.) Again Racehorse is "mindful" that there is substantial evidence that the cigarette pack was in Racehorse's jacket, but nonetheless argues that the district court clearly erred. (See id.) Racehorse's argument is without support in the record and in law.

B. Standard Of Review

In reviewing an order denying a motion to suppress evidence, the appellate court applies a bifurcated standard of review. State v. Anderson, 154 Idaho 703, 302 P.3d 328 (2012) (citing State v. Purdum, 147 Idaho 206, 207, 207 P.3d 182, 183 (2009)). The appellate court will accept the trial court's findings of fact unless they are clearly erroneous but will freely review the trial court's application of constitutional principles to the facts found. Id.

C. Racehorse Has Failed To Show Clear Error In The District Court's Findings That Mr. Steimlosk Was Acting As A Private Individual And That Racehorse's Cigarette Pack Was In His Jacket When Officer Miller Asked To Search Racehorse's Jacket

The district court found that the Fourth Amendment was not implicated when Mr. Steimlosk asked Racehorse to empty his pockets because Mr. Steimlosk was a private individual who was not conducting a search on the behalf of law enforcement. (R., pp.

[3] Racehorse raised this issue below. (See R., pp. 101-103.) Although the district court did not explicitly find Officer Miller's search was within the scope of Racehorse's consent, it implicitly did so when it concluded Officer Miller discovered the cigarette pack while searching Racehorse's jacket pursuant to Racehorse's voluntary consent.

119-11.) The district court also found there was substantial and competent evidence that Racehorse freely and voluntarily gave his consent to Officer Miller to search his jacket, in which the cigarette pack and first baggie of methamphetamine were found. (R., pp. 121-122.) Racehorse has failed to show the district court clearly erred in either determination.

1. Mr. Steimlosk Was Acting As A Private Individual And Thus His Request That Racehorse Empty His Pockets Does Not Implicate The Fourth Amendment

Mr. Steimlosk's request that Racehorse empty his pockets and place items on the table did not even implicate the Fourth Amendment because Mr. Steimlosk was a private citizen and not a government official. "It is firmly established that evidence obtained through a private search, even though wrongfully conducted, is not excludable under the fourth amendment unless government officials instigated the search or otherwise participated in a wrongful search." State v. Kopsa, 126 Idaho 512, 517, 887 P.2d 57, 62 (Ct. App. 1994) (citing State v. Pontier, 103 Idaho 91, 94, 645 P.2d 325, 328 (1982); State v. Johnson, 110 Idaho 516, 519, 716 P.2d 1288, 1291 (1986); State v. Castillo, 108 Idaho 205, 207, 697 P.2d 1219, 1221 (Ct.App.1985)). "However, where a private party acts as an agent of the State in effecting a search, Fourth Amendment protections are implicated." State v. Breese, 160 Idaho 841, 843, 379 P.3d 1111, 1113 (Ct. App. 2016) (citing United States v. Walther, 652 F.2d 788, 791 (9th Cir.1981); Kopsa, 126 Idaho at 517, 887 P.2d at 62). "The burden of proving governmental involvement in a search conducted by a private citizen rests on the party objecting to the evidence." Id. (citing Kopsa, 126 Idaho at 517, 887 P.2d at 62). There is a "gray area" between the extremes of "overt governmental participation in a search and the complete absence of such

participation." Kopsa, 126 Idaho at 517, 887 P.2d at 62 (citing State v. Crawford, 110 Idaho 577, 579, 716 P.2d 1349, 1351 (Ct. App. 1986); United States v. Walther, 652 F.2d 788, 791 (9th Cir.1981)). "Gray area" cases should be analyzed on a case-by-case basis, referring to certain general principles. Breese, 160 Idaho at 843, 379 P.3d at 1113 (citing Kopsa, 126 Idaho at 517, 887 P.2d at 62)). "One such principle is that *de minimis* or incidental contacts between a citizen and law enforcement prior to or during the course of a search do not subject the search to Fourth Amendment scrutiny." Id. at 843-844, 379 P.3d at 1113-1114 (citing Kopsa, 126 Idaho at 517, 887 P.2d at 62). "In order to bring a private citizen's actions within the purview of the Fourth Amendment, the government must be involved either directly as a participant or indirectly as an encourager." Id. at 844, 379 P.3d at1114 (citations omitted). "Thus, when analyzing whether the person conducting the search is acting as an instrument or agent of the government, we consider two critical factors—whether the government knew of and acquiesced in the intrusive conduct and whether the party performing the search intended to assist law enforcement efforts or further his or her own ends." Id. (citing Walther, 652 F.2d at 791; Kopsa, 126 Idaho at 517, 887 P.2d at 62).

The district court found that law enforcement did not even know about Mr. Steimlosk's search. (R., pp. 120-121.) The district court also found that Mr. Steimlosk conducted the search for his own ends and the search was not intended to assist law enforcement. (Id.)

> Therefore, this Court concludes that law enforcement did not know or consent to Steimlosk's requirement that Racehorse empty his pockets. Furthermore, Steimlosk's requirement that all persons detained for shoplifting empty their pockets is not done to assist law enforcement, but is to protect the safety of

> Steimlosk and other staff at the store. As such, the search conducted by Steimlosk prior to law enforcement arriving on scene was initiated by Steimlosk for his own purposes and not for the benefit of law enforcement, and the protections afforded under the Fourth Amendment are therefore not implicated.

(R., pp. 120-121.)

On appeal, "Racehorse acknowledges that he presented no evidence that the officer knew of or acquiesced in Mr. Steimlosk's request that Mr. Racehorse empty his pockets, but he asserts that Mr. Steimlosk intended to aid the government when making that request." (Appellant's brief, p. 8 (citing Kopsa, 126 Idaho at 517, 887 P.2d at 62).) Racehorse argues that, because Mr. Steimlosk did not tell Racehorse he could put his items back into his pocket, Mr. Steimlosk was attempting to leave the items on the table, which would aid law enforcement. (See id.) Racehorse argues the district court's factual findings were clearly erroneous. (See id.) Racehorse's argument is unsupported by the record and the law.

As acknowledged by Racehorse, the district court's factual finding is supported by substantial evidence. (Appellant's brief, p. 8.) Mr. Steimlosk's request that Racehorse empty his pockets was not intended to aid the police. Mr. Steimlosk testified that he asked Racehorse to empty his pockets, for "the safety of [himself] and other associates and customers" and to recover any stolen merchandise. (2/23/17 Tr., p. 19, L. 15 – p. 21, L. 11.)

> Q. So when you got to the office area that were you headed to, what did you do?
>
> A. I asked Mr. Racehorse to place the purchased items that were in bags down on the counter. I asked him to empty his pockets, pulled them inside out, show me his waistline, show me his sockline, and take – remove his jacket.

Q. And why do you have – I guess, why did you ask Mr. Racehorse to do those various things and why did you check those portions of his person?

A. For the safety of myself and other associates and customers, to remove all merchandise and recover all merchandise that was not paid for and to validate that there is no weapons on the subject, for my safety and the safety of our employees and customers.

(2/23/17 Tr., p. 19, L. 15 – p. 20, L. 6.)

Mr. Steimlosk not telling Racehorse to put the items back into his pockets also was not intended to aid police. Mr. Steimlosk testified that telling a shoplifter to put items back into his pockets was something he simply did not do. (See (2/23/17 Tr., p. 36, Ls. 6-24.)

Q. Okay. And after all of those items were removed from his person, did he place them on the table or the counter or whatever it was?

A. Yes.

Q. And after you determined that there was no stolen items on his person, and no weapons on his person, did you instruct him that he could put those items back in his pockets?

A. No, I did not.

Q. Why is that?

A. Um, it's not something that I do with any subject ever.

Q. Well, I know you say it's not something you do. Did you want the police to observe that when they showed up?

A. Not necessarily, no. It's just my standard procedure that –

(Id.) Thus, there is substantial and competent evidence to support the district court's finding that Mr. Steimlosk's search was not done with the purpose of assisting law enforcement. Racehorse has failed to show the finding is clearly erroneous.

However, even if the district court did clearly err when it determined that Mr. Steimlosk did not intend to assist law enforcement, it does not matter. Whether a private individual intended to assist law enforcement only becomes a factor in the "gray area" cases. See Breese, 160 Idaho at 843, 379 P.3d at 1113; Kopsa, 126 Idaho at 517, 887 P.2d at 62. "Gray area" cases only arise when governmental participation is between the extremes of "overt governmental participation in a search and the complete absence of such participation." Kopsa, 126 Idaho at 517, 887 P.2d at 62 (citations omitted). This is not a "gray area" case. Here, there was a complete absence of governmental participation. No officer was present for the initial search. Law enforcement did not even know about Mr. Steimlosk's search, let alone consent to such a search. (See R., pp. 120-121.) There is a complete absence of governmental participation and thus the "gray area" analysis is irrelevant.

In addition, Racehorse has failed to show he is entitled to suppression of the methamphetamine. When a defendant moves to suppress evidence the defendant bears the threshold burden of showing a factual nexus between the illegality and the state's acquisition of the evidence. See State v. Kapelle, 158 Idaho 121, 127, 344 P.3d 901, 907 (Ct. App. 2014); State v. Dahl, 162 Idaho 541, 400 P.3d 629, 634 (Ct. App. 2017). The first baggie of methamphetamine was discovered after Racehorse consented to Officer Miller's search of his jacket. (See 2/23/17 Tr., p. 65, L. 21– p. 67, L. 13.) The second baggie was found after Officer Miller placed Racehorse under arrest and searched him. (2/23/17 Tr., p. 67, L. 14 – p. 68, L. 22.) Racehorse asks to suppress "any evidence

seized as a result" of Mr. Steimlosk's search, but has failed to show that the evidence would not have been discovered but for allegedly unconstitutional conduct.

2. There Is Substantial And Competent Evidence That The Cigarette Pack Was In Racehorse's Jacket When Officer Miller Asked For, And Received, Consent To Search The Jacket

The district court found that Racehorse gave voluntary consent to search his jacket. (R., pp. 121-122.)

> The facts in this case show that after arriving at the Albertson's store, Officer Miller informed the Defendant of his *Miranda* rights, and the Defendant freely agreed to talk. Officer Miller and Racehorse then discussed why Racehorse was in possession of a syringe. Based upon the answers provided by Racehorse, Officer Miller's training and experience led him to believe that individuals possessing syringes may also possess illegal controlled substances, prompting Officer Miller to ask Racehorse if he could search his jacket. Racehorse agreed to Officer Miller's request and gave permission to search. (*See* Suppression Hrg. At 57:15-60:21.) Based upon the testimony of Officer Miller regarding the events of the day in question and a review of the totality of the circumstances, this Court finds that there is substantial and competent evidence sufficient to demonstrate that Racehorse freely and voluntarily gave his consent to that search of his jacket. There is no evidence of coercion.

(R., p. 122.)

A warrantless search conducted pursuant to valid consent does not violate the Fourth Amendment. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (citations omitted); State v. Varie, 135 Idaho 848, 852, 26 P.3d 31, 35 (2001). Consent is valid if it is free and voluntary. Schneckloth, 412 U.S. at 225-26 (citations omitted). The voluntariness of an individual's consent is a question of fact to be determined based upon the totality of the circumstances. Varie, 135 Idaho at 852, 26 P.3d at 35 (citing Schneckloth, 412 U.S. at 248-49). In order to be valid, consent cannot be the result of duress or coercion, either direct or implied. Schneckloth, 412 U.S. at 248.

Whether a consent to a search was voluntary is a question of fact, the determination of which is reviewed on appeal for clear error. State v. Reynolds, 146 Idaho 466, 472, 197 P.3d 327, 333 (Ct. App. 2008); State v. Stewart, 145 Idaho 641, 648, 181 P.3d 1249, 1256 (Ct. App. 2008). "Findings will not be deemed clearly erroneous if they are supported by substantial evidence in the record." Stewart, 145 Idaho at 648, 181 P.3d at 1256 (quoting State v. Jaborra, 143 Idaho 94, 98, 137 P.3d 481, 485 (Ct. App. 2006)).

"The standard for measuring the scope of a suspect's 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?" Florida v. Jimeno, 500 U.S. 248, 251 (1991) (citing Illinois v. Rodriguez, 497 U.S. 177, 183-189 (1990); Florida v. Royer, 460 U.S. 491, 501-502 (1983) (opinion of WHITE, J.); *id.*, at 514, (BLACKMUN, J., dissenting)). The United State Supreme Court explained, "The scope of a search is generally defined by its expressed object." Id. (citing United States v. Ross, 456 U.S. 798 (1982)). "A reasonable person may be expected to know that narcotics are generally carried in some form of a container." Id.

On appeal, Racehorse does not challenge the finding that Officer Miller had valid consent to search Racehorse's jacket. (See Appellant's brief, pp. 8-10.) Instead Racehorse argues that the district court's factual finding that the cigarette pack was in Racehorse's jacket was clearly erroneous. (See id.) Racehorse is "mindful" that there is substantial evidence supporting the district court's finding, but nonetheless argues the

finding is clearly erroneous. (See id.) The district court did not clearly err; there was substantial competent evidence that the cigarette pack was in Racehorse's jacket.

Mr. Steimlosk testified that he saw the cigarette pack in Racehorse's jacket, but just set it aside.

> Q. And did you observe anything that [Racehorse] removed from his person when you asked him to empty his pockets? Checked his waistband? His socks?
>
> A. Yes. Mr. Racehorse removed several items. There was a large quantity of cash, there was a needle, there was – there was a pack of cigarettes that was in the jacket, and I did not – I just set the jacket – after confirming that that was all that was in the jacket, I just set that aside.

(2/23/17 Tr., p. 20, Ls. 11-21.) Mr. Steimlosk further testified that the cigarette pack was still in Racehorse's jacket when Racehorse took off the jacket:

> Q. Ok. And you said something about a pack of cigarettes in the coat?
>
> A. Yes.
>
> Q. Did he remove those as well?
>
> A. No. He removed the jacket.
>
> Q. And you're saying the cigarettes were still in the jacket?
>
> A. The cigarettes were still in the jacket, yes.

(2/23/17 Tr., p. 34, Ls. 12-20.) He also testified the cigarettes were still in the jacket when the police arrived:

> Q. And it's your testimony that the cigarettes were not removed from the coat pocket before the police arrived?
>
> A. I felt the coat pockets and I saw a pack of cigarettes in there, but I didn't remove the cigarettes.

(2/23/17 Tr., p. 37, Ls. 14-19.) Mr. Steimlosk repeatedly testified that the cigarette pack remained in Racehorse's jacket pocket. (2/23/17 Tr., p. 38, L. 21 – p. 39, L. 14, p. 42, Ls. 13-18, p. 43, L. 4 – p. 44, L. 2.)

Officer Miller testified that he spoke to Racehorse about the syringe to determine whether it was drug paraphernalia. (2/23/17 Tr., p. 61, L. 21 – p. 64, L. 25.) Officer Miller asked Racehorse if he had anything illegal in his coat. (2/23/17 Tr., p. 65, L. 21 – p. 66, L. 21.) Racehorse said "No. You can check." (Id.) Officer Miller then clarified that it was okay that he check the coat. (Id.) Racehorse said "Yes." (Id.)

Q. And upon him telling you that, how did you proceed?

A. I searched the pockets of the black Carhartt jacket that was on the counter.

Q. And during that search, what did you discover, if anything?

A. In his right front pocket of the coat there was a pack of cigarettes.

Q. And what did you do with that pack of cigarettes?

A. I opened it to look inside.

Q. And what did you observe?

A. A small plastic bag containing a white crystalline substance.

(2/23/17 Tr. p. 66, L. 22 – p. 67, L. 10; see also p. 78, L. 25 – p. 79, L. 3.) The only potentially contrary evidence came from Ms. Arzola, who testified that she was not sure when the cigarettes were removed from Racehorse's jacket. (2/23/17 Tr., p. 87, L. 16 – p. 91, L. 23.) But she thought the cigarettes may have been out of the pocket before the police arrived. (Id.) However, she could not remember if it was Mr. Steimlosk or the police officer who removed the cigarettes from Racehorse's jacket. (2/23/17 Tr., p. 88,

Ls. 8-14.) Regardless, even if there is conflicting testimony (which there really is not here), the resolution of those conflicts were the province of the district court. Here the district court found that the cigarette pack was in Racehorse's jacket and Racehorse gave valid consent to Officer Miller to search his jacket. Racehorse has failed to show the court's finding was clearly erroneous and, thus, has failed to show any basis for suppression.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court

DATED this 15th day of March, 2018.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th day of March, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

MAYA P. WALDRON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd