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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45274
Plaintiff-Respondent,)	
)	BANNOCK COUNTY NO. CR 2016-
v.)	16275
)	
TYSON I. RACEHORSE,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
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BRIEF OF APPELLANT

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

HONORABLE ROBERT C. NAFTZ
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Mr. Racehorse pled guilty to possessing methamphetamine, but reserved the right to challenge the district court's denial of his motion to suppress. He contends that the district court erred in denying that motion on two grounds: First, mindful that Mr. Racehorse presented no direct evidence that Mr. Steimlosk acted as a government agent when he ordered Mr. Racehorse to empty his pockets, he asserts that the district court erred by concluding as much. Second, mindful that substantial evidence supports the court's finding that the cigarette pack was in Mr. Racehorse's coat pocket when Mr. Racehorse gave Officer Miller consent to search the coat, he contends that the cigarette pack was in fact on the table and thus the search exceeded the scope of Mr. Racehorse's consent. This Court should vacate Mr. Racehorse's judgment of conviction, reverse the order denying the motion to suppress, and remand this case for further proceedings.

Statement of Facts and Course of Proceedings

The State charged Mr. Racehorse with possession of methamphetamine with the intent to deliver, and as a persistent violator, after Mr. Racehorse was caught shoplifting at Albertson's and had methamphetamine on him. (R., pp.8-9, 71-72.) Mr. Racehorse filed a motion to suppress any and all statements and evidence against him under the U.S. and Idaho Constitutions (R., pp.88-89), and the court set the matter for a hearing. Four witnesses testified at the hearing on the motion to suppress: two Albertson's employees and two officers.

Mr. Steimlosk, a loss prevention officer, testified that he saw Mr. Racehorse pay for only two of four items he had with him as he went through the self-checkout line. (Tr., p.13, L.9-p.15, L.1.) Mr. Steimlosk stopped Mr. Racehorse as he was leaving the store and took him to an

office. (Tr., p.15, L.8–p.18, L.18.) The front end manager, Ms. Arzola, joined them as a witness. (Tr., p.15, L.11–p.16, L.20, p.85, L.2–p.86, L.7.)

Once inside the office, Mr. Steimlosk asked Mr. Racehorse to place his merchandise on the table, empty his pockets onto the table, show him his waistline and sock line, and take off his coat. (Tr., p.19, L.15–21.) Mr. Steimlosk testified that he did that to ensure that he recovered all of the stolen merchandise and to ensure that Mr. Racehorse did not have any weapons on him. (Tr., p.19, L.22–p.20, L.6.) According to Mr. Steimlosk, Mr. Racehorse took several things out of his pockets: “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.” (Tr., p.20, Ls.15–21.) On cross examination, Mr. Steimlosk said that neither he nor Mr. Racehorse removed the pack of cigarettes from the jacket. (Tr., p.34, Ls.12–20, p.37, L.14–p.44, L.11.) Ms. Arzola testified that she was sitting behind Mr. Racehorse, so she could not see where the cigarette pack came from and could not remember who had pulled it out. (Tr., p.88, Ls.3–20.) But after defense counsel pressed her, she testified that she thought either Mr. Steimlosk or Mr. Racehorse had taken the cigarette pack out of the jacket and placed it on the counter before the police arrived. (Tr., p.88, L.21–p.90, L.12.)

After talking to Mr. Racehorse about shoplifting, Mr. Steimlosk called for a police officer. (Tr., p.21, L.25–p.22, L.24.) He testified that he did not tell Mr. Racehorse that he could put his belongings back in his pockets, but denied that he neglected to do so because he wanted the police to see the belongings when they got there. (Tr., p.36, L.11–p.37, L.10.) Officer Miller got to Albertson’s first, and Officer Cartwright arrived shortly after. (Tr., p.94, L.19–p.95, L.2.)

When Officer Miller got to Albertson’s, he read Mr. Racehorse his Miranda rights and Mr. Racehorse agreed to talk. (Tr., p.57, L.3–p.60, L.7.) After talking to Mr. Racehorse about

the items he hadn't paid for and the syringe on the table, Officer Miller asked if Mr. Racehorse had any illegal drugs. (Tr., p.60, L.12–p.64, L.21.) Mr. Racehorse said he did not. (Tr., p.64, Ls.17–25.) When Officer Miller asked if there was anything illegal in his coat, Officer Miller testified that Mr. Racehorse said, “No. You can check.” (Tr., p.65, L.23–p.66, L.18.) Officer Miller testified that he looked in the coat pockets, found a pack of cigarettes, opened it, and found what he believed to be methamphetamine inside. (Tr., p.66, L.22–p.67, L.15.) Mr. Steimlosk confirmed that he saw one of the officers take the pack of cigarettes out of Mr. Racehorse's coat. (Tr., p.46, L.18–p.47, L.1.) Ms. Arzola testified that she remembered Officer Miller looking in the cigarette pack after getting permission to search the jacket and Mr. Racehorse. (Tr., p.91, Ls.3–23.) And Officer Cartwright testified that Officer Miller took at least one item out of Mr. Racehorse's coat, but he did not mention the cigarette pack specifically. (Tr., p.98, L.15–p.99, L.7.)

At that point, Officer Miller arrested Mr. Racehorse, searched him incident to arrest, and found another bag of what he believed to be methamphetamine in the pocket of Mr. Racehorse's pants. (Tr., p.67, L.14–p.68, L.22.)

After the hearing, both parties filed a brief on the motion to suppress. Mr. Racehorse first argued that Officer Miller unlawfully searched the cigarette pack. (R., pp.102–03.) He asserted that the cigarette pack was on the table, not in Mr. Racehorse's coat, when the officers arrived, and thus Mr. Racehorse's consent to search his coat did not give Officer Miller permission to search the cigarette pack. (R., pp.101–03.) Second, Mr. Racehorse argued that Mr. Steimlosk acted as a government agent when he detained Mr. Racehorse and ordered him to empty his pockets. (R., p.103.) In response, the State first asserted that the facts showed Mr. Steimlosk asked Mr. Racehorse to empty his pockets as a matter of policy for safety purposes, and so he

was not acting as a government agent. (R., pp.108–11.) Second, it argued that Mr. Racehorse voluntarily consented to the search of his coat, which contained the cigarette pack,¹ and thus the search was lawful. (R., pp.111–16.)

The court denied Mr. Racehorse's motion. Regarding Mr. Steimlosk's request that Mr. Racehorse empty his pockets, the court concluded that Mr. Steimlosk did not act as an agent of the government. (R., pp.120–21.) The court held as much because Mr. Steimlosk testified that he asks every shoplifting suspect to empty his or her pockets for safety reasons and does not do so to aid law enforcement, and because the officers did not know about or consent to that request. (R., p.120.) The court next held that Mr. Racehorse had voluntarily consented to search the coat and cigarette pack. (R., pp.121–22.) That conclusion rested on the court's finding that the cigarette pack was in Mr. Racehorse's coat, not on the counter, when Officer Miller arrived and asked to search the coat. (R., p.118 ("Racehorse removed from his pockets a large quantity of cash and a needle (syringe). Steimlosk also observed a pack of cigarettes in Racehorse's jacket.") (internal citations omitted), p.119 ("Officer Miller asked if he could search the Defendant's jacket, and the Defendant gave him permission to search. In searching the Defendant's jacket, Officer Miller removed a cigarette package and also found a plastic baggie containing a white crystalline substance that Officer Miller believed was Methamphetamine.") (internal citations omitted).)

Mr. Racehorse later reached a conditional, binding plea agreement with the State in which the State dismissed the possession with intent to deliver charge and persistent violator enhancement in exchange for Mr. Racehorse's guilty plea to simple possession of

¹ In the same paragraph, the State also stated that the cigarette pack was on the table when Officer Miller arrived. (R., p.114.)

methamphetamine. (R., pp.133–34, 138–40.) The parties agreed that Mr. Racehorse’s sentence, which they left to the court’s discretion, would run concurrently to his other sentence. (R., pp.134, 140.) Mr. Racehorse reserved his right to challenge the denial of his motion to suppress on appeal. (R., pp.134, 141.) The court accepted Mr. Racehorse’s plea (Tr., p.108, L.5–p.120, L.13), and later sentenced him to a fixed term of ten months, with an indeterminate term of three years (Tr., p.141, Ls.19–21; R., pp.163–65). Mr. Racehorse timely appealed. (R., pp.167–69.)

ISSUE

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

ARGUMENT

The District Court Erred By Denying Mr. Racehorse's Motion To Suppress

Mr. Racehorse contends that the district court erred in denying his motion to suppress on two grounds: First, the court incorrectly concluded that Mr. Steimlosk did not act as a government agent when he ordered Mr. Racehorse to empty his pockets. Second, the court erroneously found that the cigarette pack was in Mr. Racehorse's coat pocket when Mr. Racehorse told Officer Miller that he could check to see if anything illegal was in the coat, and thus incorrectly held that the search did not exceed the scope of Mr. Racehorse's consent.

A. Standard Of Review

When reviewing a motion to suppress, this Court defers to the district court's factual findings unless clearly erroneous, but exercises free review over questions of statutory construction and the district court's application of constitutional principles in light of the facts found. *State v. Donato*, 135 Idaho 469, 470 (2001). Factual findings are clearly erroneous if they are not supported by substantial evidence in the record. *State v. Linenberger*, 151 Idaho 680, 686 (Ct. App. 2011).

B. Mr. Steimlosk Acted As A Government Agent When He Had Mr. Racehorse Empty His Pockets

The U.S. and Idaho Constitutions prohibit unreasonable governmental searches and seizures. U.S. CONST. amend. IV; IDAHO CONST. art. I, § 17. "[E]vidence 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. Pontier*, 103 Idaho 91, 94 (1982) (citing *Burdeau v. McDowell*, 256 U.S. 465 (1921); *Walter v. United States*, 447 U.S. 649 (1980)). "The government must be involved either

directly as a participant or indirectly as an encourager of the private citizen's actions in order to bring those actions within the purview of the fourth amendment." *State v. Kopsa*, 126 Idaho 512, 517 (Ct. App. 1994) (citing *State v. Crawford*, 110 Idaho 577, 579 (Ct. App. 1986)). To determine whether a private citizen acted as a government agent, courts consider: "(1) government knowledge and acquiescence, and (2) the private party's intent in making the search." *Id.* The defendant has the burden of proving that a private citizen acted as a government agent when conducting the search. *Id.*

Mr. Racehorse acknowledges that he presented no evidence that the officers 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. *See Kopsa*, 126 Idaho at 517. In particular, Mr. Steimlosk testified that he did not tell Mr. Racehorse that he could put his belongings back in his pockets before the police arrived. (Tr., p.36, L.11–p.37, L.10.) Mindful that Mr. Steimlosk denied that he neglected to do so because he wanted the police to see the belongings when they got there and thus the court's finding is supported by substantial evidence, Mr. Racehorse asserts that the court's finding was clearly erroneous. *See id.*; *Linenberger*, 151 Idaho at 686. Therefore, Mr. Steimlosk acted as a government agent when he ordered Mr. Racehorse to empty his pockets and the court should have suppressed any evidence seized as a result.

C. Officer Miller Exceeded The Scope Of Mr. Racehorse's Consent When He Searched The Cigarette Pack

The U.S. and Idaho Constitutions prohibit unreasonable searches and seizures. U.S. CONST. amend. IV; IDAHO CONST. art. I, § 17. Warrantless searches are presumptively unreasonable, unless the State proves that the search falls within a well-recognized exception to

the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *State v. Weaver*, 127 Idaho 288, 290 (1995). A search conducted with consent is one exception to the warrant requirement. *Schneckloth*, 412 U.S. at 219; *State v. Turek*, 150 Idaho 745, 747 (Ct. App. 2011). “[W]hen the basis for a search is consent, the government must conform to the limitations placed upon the right granted to search.” *State v. Thorpe*, 141 Idaho 151, 154 (Ct. App. 2004) (citing *United States v. Ward*, 576 F.2d 243, 244 (9th Cir. 1978); *Mason v. Pulliam*, 557 F.2d 426, 429 (5th Cir. 1977)). The State must prove both that the defendant gave consent to search and that he gave that consent voluntarily. *Schneckloth*, 412 U.S. at 222; *State v. Garcia*, 143 Idaho 774, 778 (Ct. App. 2006). If it fails to meet that burden, the Court must exclude evidence discovered as a result of the violation as the “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *see also State v. Koivu*, 152 Idaho 511, 519 (2012).

The court erred by concluding that Mr. Racehorse consented to the search of the cigarette pack. The court’s holding turned on its finding that the cigarette pack was in Mr. Racehorse’s coat when he gave Officer Miller consent to search his coat. (R., pp.118–19, 121–22.) Mindful that substantial evidence supports that finding, *see Linenberger*, 151 Idaho at 686, Mr. Racehorse contends that the finding was clearly erroneous. Although Officer Miller testified that the cigarette pack was in the coat (Tr., p.66, L.22–p.67, L.15), and Mr. Steimlosk confirmed as much on cross examination (Tr., p.34, Ls.12–20, p.37, L.14–p.44, L.11), Mr. Steimlosk’s testimony on direct examination seemed to indicate otherwise. He testified that Mr. Racehorse took several things out of his pockets before the officers arrived: “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.” (Tr., p.20, Ls.15–21.) And Ms. Azrola testified that, although she couldn’t see well, she thought

either Mr. Steimlosk or Mr. Racehorse had taken the cigarette pack out of the coat and placed it on the counter before the police arrived. (Tr., p.88, L.3–p.90, L.12.) Mr. Racehorse therefore contends that the cigarette pack was on the table when he consented to the search of his coat, and so Officer Miller exceeded the scope of his consent. The court should have suppressed the evidence found in the cigarette pack, as well as any fruits of that search.

CONCLUSION

Mr. Racehorse respectfully requests that this Court vacate his judgment of conviction, reverse the order denying the motion to suppress, and remand this case for further proceedings.

DATED this 21st day of December, 2017.

_____/s/_____
MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of December, 2017, 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:

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