5-21-2018

State v. Marsh Appellant's Brief Dckt. 45634

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45634**
Plaintiff-Respondent,	)	
	)	**BANNOCK COUNTY NO. CR 2017-4445**
v.	)	
	)	
WARDWELL WAYNE MARSH, JR.,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

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 STEPHEN S. DUNN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Wardwell Marsh contends the district court erred by denying his motion to suppress the evidence found on his person because the officers did not have probable cause to justify the warrantless search of his person. The district court made several clearly-erroneous findings of fact and it used an improper bright-line rule rather than the appropriate totality-of-the-circumstances analysis established in Idaho and United States Supreme Court precedent. As a result, this Court should reverse the order denying Mr. Marsh's motion to suppress and remand this case for further proceedings.

Statement of the Facts and Course of Proceedings

Mr. Marsh was one of two passengers in a car which Officer Eric Miller stopped for not having a front license plate as it pulled into a driveway.[1] (Tr., p.3, Ls.13-23.)[2] The driver, who had stepped out of the car at the outset of the stop, asked Mr. Marsh to get out of the car so he could get his registration information out of the glove compartment. (Tr., p.5, Ls.16-18.) Mr. Marsh was instructed to stand nearby under another officer's supervision. (Tr., p.17, L.16 - p.18, L.8.) Officer Miller collected Mr. Marsh's identification, checked for warrants, and found none. (Tr., p.8, Ls.2-8.) Officer Miller told Mr. Marsh that they did not have probable cause to search his person without his consent, and Mr. Marsh refused to consent to such a search. (Tr., p.7, Ls.12-17, p.14, Ls.21-24.)

[1] The district found that no one in the car lived at that particular house. (R., p.80.) However, none of the witnesses testified to that fact during the hearing on the motion to suppress. (*See generally* Tr.)

[2] All references to "Tr." in this brief are to the transcript of the hearing on the motion to suppress which was held on June 21, 2017.

Officer Miller was actually more interested in the driver because the officer had noticed puncture marks on the driver's arm when he had stepped out of the car. (Tr., p.5, Ls.16-18.) Additionally, the officer testified: "While [the driver] was going through the glove box, I did see an orange cap laying on the floor in the front passenger area." (Tr., p.5, L.25 - p.6, L.2; *but see* R., p.81 (district court found that Officer Miller saw the syringe cap when Mr. Marsh was getting out of the car).) Officer Miller noticed a syringe cap on the floor of the car where the driver was sitting. (Tr., p.5, L.25 - p.6, L.8, p.13, Ls.4-8; *but see* R., p.81 (the district court concluding the officer saw the cap as Mr. Marsh was getting out of the car).) Officer Miller called for a drug dog to come to the scene. (Tr., p.8, Ls.12-17.) He also learned that the driver's license was suspended. (Tr., p.8, Ls.8-11.) While he was writing the citations for the driver, the drug dog arrived and alerted at the still-open passenger door. (Tr., p.8, L.23 - p.9, L.10.) The officers searched the car and found an Altoids tin containing "a small plastic bag" of methamphetamine between the driver's seat and the center console. (Tr., p.9, Ls.17-25; *but see* R., p.81 (the district court finding the tin contained "baggies" of methamphetamine).)

Officer Miller proceeded to search both Mr. Marsh and the other passenger who had been in the car. (Tr., p.10, Ls.20-25.) Officer Miller testified that the Altoids tin was within reach of all three people in the car. (Tr., p.11, Ls.2-4.) However, he subsequently clarified that the other passenger had been released without charges because nothing of interest within her "lunge area." (Tr., p.19, Ls.3-10.) Mr. Marsh continued to object to the search of his person. (Tr., p.15, Ls.18-19.) However, the district court indicated he admitted that he had drugs on his person during that search. (R., p.81; *but see generally* Tr. (no testimony that he made such an admission).) Officer Miller ultimately found drugs on Mr. Marsh's person and placed him under arrest for possessing those drugs. (Tr., p.11, Ls.18-23.)

Mr. Marsh moved to suppress the drugs found on his person, arguing they were found as the result of an unlawful warrantless search. (R., pp.58-59, Tr., p.26, L.10 - p.30, L.10, p.32, L.3 - p.33, L.7.) Specifically, he contended that the dog alert only gave the officers probable cause to search the car, not his person, and that his mere presence in the place drugs were found did not give rise to probable cause to search him. (Tr., p.30, Ls.8-10.) The district court rejected that argument, concluding that, because the officers had actually found drugs in the car along with the syringe cap, they inherently had probable cause to search all the occupants of the car. (R., pp.87-88.)

Subsequently, Mr. Marsh entered a conditional guilty plea preserving his right to challenge the district court's decision on his motion to suppress. (R., p.106.) The district court imposed a unified sentence of five years, with three years fixed, which it suspended for a four-year term of probation. (R., p.139.) Mr. Marsh filed a notice of appeal timely from the judgment of conviction. (R., pp.138, 144.)

ISSUE

Whether the district court erred by denying Mr. Marsh's motion to suppress the evidence found on his person.

ARGUMENT

The District Court Erred By Denying Mr. Marsh's Motion To Suppress The Evidence Found On His Person

The standard of review on a motion to suppress is bifurcated, with the appellate court deferring to the district court's factual findings which are supported by substantial evidence, but freely reviewing the application of the law to those facts. *State v. Gibson*, 141 Idaho 277, 281 (Ct. App. 2005).

A. The District Court Made Several Findings Of Fact Which Were Contrary To Or Not Based On The Evidence Elicited At The Motion To Suppress Hearing

The district court errs when it considers assertions of fact which, while they may appear elsewhere in the record, were not actually testified to or presented in admitted exhibits during the hearing on the motion to suppress. *State v. Smith*, 162 Idaho 878, 885 n.6 (Ct. App. 2017) ("[I]t would be improper to consider these facts on appeal as they were not presented to the district court at the time the motion to suppress was being considered."), *State v. Babb*, 136 Idaho 95, 97 (Ct. App. 2001) (holding that the district court improperly relied on assertions of fact in the prosecutor's brief which had not actually been proved by the evidence offered in regard to the motion to suppress).

In this case, the district court made several findings of fact which were contrary to or not based on the evidence elicited at the hearing on the motion to suppress:

- The district court found that no one in the car lived at the house where the car had pulled up to at the start of the traffic stop. (R., p.80.) However, none of the witnesses offered any testimony regarding who lived in that house. (*See generally* Tr.)
- The district court found that Officer Miller saw the syringe cap when Mr. Marsh was getting out of the car even though Officer Miller clearly testified: "While [the driver]

was going through the glove box, I did see an orange cap laying on the floor in the front passenger area." (*Compare* R., p.81 *with* Tr., p.5, L.25 - p.6, L.2.)

- The district court found there were "baggies" of methamphetamine in the Altoids tin even though Officer Miller testified that "[t]here was *a* small plastic bag" containing methamphetamine in the tin. (*Compare* R., p.81, *with* Tr., p.9, Ls.23-25 (emphasis added).)
- The district court found that Mr. Marsh admitted that he had drugs on his person while the officer was searching him. (R., p.81.) None of the witnesses testified to Mr. Marsh making such a statement. (*See generally* Tr.) In fact, Officer Miller testified that Mr. Marsh "objected to the consent after we located the Altoids tin in the car." (Tr., p.15, Ls.14-19.)

Because none of those factual findings are supported by the evidence elicited in regard to the motion to suppress, those factual findings were not supported by competent evidence. *Smith*, 162 Idaho at 885 n.6; *Babb*, 136 Idaho at 97. As a result, these factual findings are clearly erroneous. *See, e.g.*, *State v. Bishop*, 146 Idaho 804, 810 (2009) (reiterating that, when not supported by substantial and competent evidence, findings of fact are clearly erroneous).

Rather than consider the evidence elicited at the hearing on the motion to suppress, it appears the district court based those factual findings on statements in Officer Marsh's police report. (*Compare* R., pp.80-81 *with* R., p.11 (copy of the police report attached to the probable cause affidavit filed in support of the initial complaint).) The police report was not presented or admitted as evidence during the motion to suppress proceedings. (*See generally* R., Tr.) The district court erred by considering that as evidence. *Smith*, 162 Idaho at 885 n.6; *Babb*, 136 Idaho at 97.

Since those factual findings were clearly erroneous, this Court should not consider them, and should consider the evidence actually elicited in regard to the motion to suppress in its free review of the application of the law in this case instead. (*See* Section B, *infra*.)

B. Applying The Proper Legal Analysis, There Was No Probable Cause To Justify The Search Of Mr. Marsh's Person

The Fourth Amendment protects against unreasonable searches and seizures of "persons, houses, papers, and effects." U.S. CONST. amend IV. The occupants of a car have a heightened expectation of privacy in their persons than in the car itself. *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999); *Gibson*, 141 Idaho at 281. Therefore, even though the officer might have probable cause to search a vehicle, the passenger's mere presence in that vehicle is not a sufficient basis to search the passenger's person. *Gibson*, 141 Idaho at 282. Rather, whether an officer can search a passenger's person depends on whether there was probable cause that *the passenger* has engaged in criminal conduct based on the totality of the circumstances. *Id*. at 283 (nothing probable cause needs to be particularized to the person or place to be searched); *accord Maryland v. Pringle*, 540 U.S. 366, 371, 373-74 (2003) (reaffirming the requirement for particularity and distinguishing *United States v. Di Re*, 332 U.S. 581, 592-94 (1948), because the evidence in *Di Re* was particularized to one of the people in the car, whereas no such singling out was evident in the facts in *Pringle*).

Thus, in *Gibson*, even though a drug dog had alerted on the car, the officers did not have probable cause to search the passenger himself because the totality of the circumstances *vis-à-vis* the passenger did not show any particularized indication of his involvement in the suspected criminal activity. *Id*. at 284-85. For example, the officers had no prior information regarding Mr. Gibson's involvement in drug activities, evasive conduct by the defendant, or that he was

present in a high crime area. *Id*. at 285. Furthermore, the officers had searched the car in *Gibson* and found no drugs. *Id.* at 285 (distinguishing, *inter alia*, *Pringle* on that basis). Absent that sort of particularized information, the officers did not have probable cause to search Mr. Gibson despite the dog alert. *Id*. at 286.

In *Pringle*, on the other hand, the officers received consent to search the car and found $763 dollars of "rolled-up cash" in the glove compartment of the car as well as five glassine bags of cocaine between the back-seat armrest and the back seat of the car. *Pringle*, 540 U.S. at 368. Upon questioning, none of the three men in the car claimed ownership of the drugs or the cash. *Id*. at 368-69. The Supreme Court explained that, given the totality of the circumstances in that case, the presence of the large amount of drugs, which were accessible to all three men, as well as the presence of the cash in the glove compartment, established probable cause that all three men were involved in a clandestine effort to traffic drugs, and thus, established probable cause to believe all of them had knowledge of, and exercised dominion over, the cocaine. *Id*. at 371-72, *see id*. at 372 n.2 (noting the particular impact of the presence of the cash as a factor within the totality of the circumstances). Because the officers had that probable cause, their decision to arrest Mr. Pringle did not violate the Fourth Amendment, and his subsequent confession to owning the drugs was admissible. *Id.* at 369, 374.

Rather than engage in the totality-of-the-circumstances analysis called for in *Pringle*, the district court in Mr. Marsh's case, citing *State v. James*, 148 Idaho 574, 578 (2010), concluded that the presence of drugs in the car inherently gave officers probable cause to arrest all the occupants therein. (R., p.87 n.3.) That bright-line analysis is not proper, and is not actually supported by *James*. The *James* Court noted that contraband had been found in a hair "scrunchy" in the car and, upon questioning, none of the occupants admitted ownership of it.

James, 148 Idaho at 575. Thus, the *James* Court's conclusion reflects the conclusion in *Pringle* – that presence of drugs in a car and no evidence that it singles out one particular occupant is enough to create probable cause that all the occupants had knowledge of and dominion over the contraband.[3] *Compare id. with Pringle*, 540 U.S. at 371-72. However, just as *Pringle* did not set a bright-line rule to that effect, nothing in *James* suggests that the same conclusion was dictated in all cases where drugs were found in a car. *See generally id.*

After all, the totality of the circumstances are necessarily analyzed on a case-by-case basis. *See, e.g., State v. Wulff*, 157 Idaho 416, 419 (2014). In fact, that is precisely the reason the United States Supreme Court has routinely rejected bright-line rules in the Fourth Amendment context. *See, e.g., Missouri v. McNeely*, 569 U.S. 141, 158 (2013) ("While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake."); *Georgia v. Randolph*, 547 U.S. 103, 125 (2006) ("But the Fourth Amendment does not insist upon bright-line rules. Rather, it recognizes that no single set of legal rules can capture the ever-changing complexity of human life. It consequently uses the general terms 'unreasonable searches and seizures.' And this Court has continuously emphasized that reasonableness is measured by examining the totality of the

[3] The *James* Court noted the limited nature of the evidence presented in the district court. *James*, 148 Idaho at 578. Thus, for example, there is no indication as to whether there was evidence that the hair scrunchy was more likely the property of the lone female occupant of the car, as opposed to either of the two men (hair length, and thus, potential need of a hair scrunchy, being a matter of personal style choices). *See generally id*. However, since the question in that case was whether *the defendant* had met his threshold burden to establish that he was in custody for *Miranda* purposes, the absence of such evidence weighed against him. *See id*. Here, however, such a conclusion is improper because *the State* bore the burden to prove that an exception to the warrant requirement applied. *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (unanimously holding that warrantless searches are *per se* unreasonable unless the State proves an exception to the warrant requirement applies).

circumstances.") (internal quotation and modifications omitted). Therefore, the district court misread *James* by concluding it established a bright-line rule that the presence of drugs always creates probable cause to arrest all the occupants of the car.

To the extent the district court correctly read *James*, that would mean *James* is inconsistent with *Pringle*, since *James* would create a bright-line rule, rather than the totality-of-the-circumstances analysis called for in *Pringle*. As such, if the district court correctly read *James*, this Court should overrule *James* to the extent it is inconsistent with controlling United States Supreme Court precedent on this issue of federal constitutional law. *See Houghland Farms v. Johnson*, 119 Idaho 72, 77 (1990) (holding that this Court will follow precedent unless it is manifestly wrong, unjust, or unwise, or overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice).

Thus, properly considering the totality of the circumstances as *Pringle* directs, this case is more like *Gibson* and *Di Re* than *Pringle* and *James*. In *Pringle*, the particularized probable cause was that all the occupants in the car were trafficking drugs, as evidenced by the five separate glassine bags of cocaine and the noteworthy roll of money. The "small plastic bag" found in this case does not have the same impact in the totality of the circumstances that the larger quantity of separately-packaged drugs had in *Pringle*. The personal use amounts of drugs found in the Altoids tin in the driver's car does not indicate a joint venture to deal drugs. Rather, it singles out the driver as the party who possessed the drugs. After all, it was the driver, not Mr. Marsh, who had puncture marks on his arm. Additionally, the officer saw the syringe cap on the floor on the passenger side of the car after *the driver* had sat in that seat and opened the glove compartment of his car.

There was also no evidence of a joint venture between the people in the car like there was in *Pringle*. There was no noteworthy roll of cash. The Altoids tin was not really accessible to the other people in the car, evidenced by the fact that the officers let the other passenger leave without charges specifically because nothing of interest had been found within her "lunge area." There was no other evidence suggesting Mr. Marsh had knowledge of or dominion over the Altoids tin. Rather, the totality of those circumstances further indicates the Altoid's tin was the driver's personal stash of drugs.

Since the totality of the circumstances in this case single out the driver as the party who possessed the contraband, the totality of the circumstances in this case indicates that, like in *Gibson* and *Di Re*, there was no probable cause particularized to Mr. Marsh that would justify the warrantless intrusion into his heightened expectation of privacy in his person. As such, the fruits of that unlawful search should have been suppressed.

CONCLUSION

Mr. Marsh respectfully requests this Court reverse the order denying his motion to suppress and remand this case for further proceedings.

DATED this 21st day of May, 2018.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of May, 2018, 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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