4-1-2014

# State v. Gosch Appellant's Brief Dckt. 40895

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| STATE OF IDAHO,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>KIRK JULLIARD GOSCH,<br><br>Defendant-Appellant. | NO. 40895<br><br>KOOTENAI CO. NO. CR 2005-403<br><br>APPELLANT'S BRIEF |

# BRIEF OF APPELLANT

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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## STATEMENT OF THE CASE

### Nature of the Case

Kirk Julliard Gosch appeals from his judgment of conviction for manufacturing a controlled substance (marijuana), possession of a controlled substance with the intent to deliver (marijuana), and possession of marijuana in excess of three ounces. Mr. Gosch was convicted following a jury trial and district court imposed unified sentences of five years, with two years fixed, and placed Mr. Gosch on probation. Mr. Gosch now appeals, and he asserts that the district court erred by denying his motion to suppress.

### Statement of the Facts and Course of Proceedings

Following the execution of a search warrant at a residence in Hayden, Idaho, Mr. Gosch was charged with trafficking in cocaine, manufacturing a controlled substance (marijuana), possession of a controlled substance with the intent to deliver (marijuana), and possession of marijuana in excess of three ounces. (R., pp.57-58.)

Mr. Gosch filed a motion to suppress. (R., p.67.) The following facts were found by the district court after an evidentiary hearing on the motion: On December 2, 2004, Mr. Gosch was stopped in his vehicle by Hayden City police officers and cited for possession of marijuana and paraphernalia. (R., p.154.) His criminal history included a prior arrest in October, 2003, for possession of paraphernalia. (R., p.154.) This information was communicated to the Idaho State Police, who had reports dating back approximately two years of Mr. Gosch's involvement in marijuana smuggling between Canada and Kootenai County. (R., pp.154-55.)

In late December, 2004, the ISP conducted a garbage pull at Mr. Gosch's residence, where officers found several plastic baggies with corners cut of, as well as some baggies with a white powdery substance in them. (R., p.155.) On January 6, 2005, the ISP again conducted another garbage pull, finding heat-sealed plastic bags, some bearing labels which were markings used to denote grades of marijuana from Canada. (R., p.155.) Officers also found plant stems which tested positive for marijuana, several large butane gas cylinders, and two broken glass jars which tested positive for THC. (R., p.155.) Finally, they found several zip lock baggies which contained a green leafy substance and from which emanated a strong odor of marijuana. (R., p.155.)

As a result, Detective Terry Morgan applied for and received a search warrant for Mr. Gosch's residence at 11974 N. Rimrock Road and for a black 1996 Jeep registered to Mr. Gosch. (R., p.155.) Prior to the execution of the search warrant, Detective Carlock observed Mr. Gosch and two other individuals carrying items from the residence to an area where two vehicles were parked. (R., p.155.) The Detective testified that she observed items being placed in both the black Jeep and a white Suzuki. (R., pp.155-56.)

Kootenai County Police Deputy Shaw assisted in the execution of the warrant. (R., p.162.) While on the premises, Deputy Shaw walked his drug dog around the Suzuki, which alerted on the vehicle. (R., p.162.) Cocaine and marijuana were subsequently found in the trunk of the Suzuki. (R., p.156.) In the house, officers found several devices used for the ingestion of marijuana and several glass vials which contained suspected "honey oil," a refined marijuana substance. (R., p.156.) Officers also seized from the house multiple empty glass vials, packaging materials, a bottle of

MSM (commonly used as a cutting/bulking additive for cocaine distribution), and scales. (R., p.156.)

Mr. Gosch filed a motion to suppress, asserting that some of the information in support of the search warrant was stale and that the search of the Suzuki was illegal because it was not covered by the search warrant. (R., p.132.)[1] The State asserted that the search of the Suzuki was valid pursuant to the automobile exception and that the evidence found in the Suzuki would inevitably have been discovered. (R., pp.84, 88.)

The district court held that the search was valid pursuant to the automobile exception. (R., p.159.) The court held that the Suzuki was "readily mobile" and that the drug dog alert provided probable cause for the search. (R., p.161.)

Mr. Gosch subsequently took his case to trial, where he was acquitted of trafficking in cocaine but found guilty of the marijuana-related offenses. (R., p.266.) The district court imposed concurrent unified sentences of five years, with two years fixed, and suspended the sentences.[2] (R., p.314.) Initially, counsel for Mr. Gosch failed to file an appeal from his judgment of conviction, but Mr. Gosch received his appellate rights back through post-conviction proceeding. *See Gosch v. State*, 154 Idaho 71 (Ct. App. 2012). Mr. Gosch now appeals. (R., p.355.) He asserts that the district court erred by denying his motion to suppress.

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[1] The district court held that, because counsel for Mr. Gosch failed to provide the court with a transcript of the search warrant hearing and did not cite with specificity the facts relied upon by the magistrate that were stale, Mr. Gosch had failed to meet his burden that the warrant was not supported by probable cause. (R., p.158.) Mr. Gosch does not challenge this holding on appeal.

[2] Mr. Gosch has satisfied his sentences, making any sentencing claims moot.

## ISSUE

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

## ARGUMENT

## I.

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

### A. Introduction

Mr. Gosch asserts that because the State failed to prove that the white Suzuki parked at his residence was "readily mobile," the State failed to prove that the automobile exception applied. He therefore asserts that the district court erred by denying his motion to suppress.

### B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, this Court accepts the trial court's findings of fact that are supported by substantial evidence but freely reviews the application of constitutional principles to the facts as found. *State v. Atkinson,* 128 Idaho 559, 561 (Ct. App.1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez–Molina,* 127 Idaho 102, 106 (1995).

### C. The District Court Erred By Denying Mr. Gosch's Motion To Suppress

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend IV. The Fourth Amendment is enforceable against the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *State v. Johnson*, 110 Idaho 516, 524 (1986). The Idaho Constitution provides its own, similar protections against

unreasonable searches and seizures. IDAHO CONST. Art. I, § 17; *State v. Donato*, 135 Idaho 469, 471 (2001).

Warrantless searches are *per se* unreasonable. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). Therefore, a warrantless search is presumed to violate the Fourth Amendment unless the State demonstrates that one of the well-established and well-delineated exceptions to this requirement is applicable to the facts. *Id.* at 390-91; *see also State v. Holton*, 132 Idaho 501, 503-04 (1999) (holding the same standard applies to Art. I, § 17 of the Idaho Constitution).

One of those exceptions is the automobile exception, which allows officers to search the vehicle and containers therein if they have probable cause that contraband is inside. *United States v. Ross*, 456 U.S. 798, 823-24 (1982); *State v. Gallegos*, 120 Idaho 894, 898 (1991). The United States Supreme Court has stated, "[o]ur first cases establishing the automobile exception to the Fourth Amendment's warrant requirement were based on the automobile's 'ready mobility,' an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear." *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (citing *California v. Carney,* 471 U.S. 386, 390–391 (1985); *Carroll v. United States,* 267 U.S. 132 (1925)). "More recent cases provide a further justification: the individual's reduced expectation of privacy in an automobile, owing to its pervasive regulation." *Id.* Thus, the standard for the automobile exception is: "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." *Id.* In *Carney*, the Supreme Court explained, "when a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a

place not regularly used for residential purposes – temporary or otherwise – the two justifications for the vehicle come into play." *Carney*, 471 U.S. at 392-93.

Parked cars may be searched so long as they pass this test – they are readily mobile and there is probable cause to believe they contain contraband. *See Id.* In *Labron*, the United States Supreme Court reversed two cases from Pennsylvania involving the searches of parked cars. *Id.* at 939. In the first case, "police observed respondent Labron and others engaging in a series of drug transactions on a street in Philadelphia. The police arrested the suspects, searched the trunk of a car from which the drugs had been produced, and found bags containing cocaine." *Id.* In the second case,

> an undercover informant agreed to buy drugs from respondent Randy Lee Kilgore's accomplice, Kelly Jo Kilgore. To obtain the drugs, Kelly Jo drove from the parking lot where the deal was made to a farmhouse where she met with Randy Kilgore and obtained the drugs. After the drugs were delivered and the Kilgores were arrested, police searched the farmhouse with the consent of its owner and also searched Randy Kilgore's pickup truck; they had seen the Kilgores walking to and from the truck, which was parked in the driveway of the farmhouse.

*Id.* The Supreme Court held that the automobile exception applied to both of these situations. *Id.* at 940. In these cases, the vehicles were readily mobile – in the first case, the vehicle was parked on a city street, a temporary location. *See id.* In the second case, after the drug deal was made in the parking lot, both Randy Lee Kilgore drove to the farmhouse to complete the transaction; therefore, Randy Kilgore's vehicle was readily mobile. *See id.*

In this case, the district court held that the Suzuki was readily mobile and relied on three cases: *United States v. Hatley*, 15 F.3d 856 (9th Cir. 1994), *United States v. Markham*, 844 F.2d 366 (6th Cir. 1988), and *State v. Bottelson*, 102 Idaho 90 (1981).

In *Hatley*, the Ninth Circuit held that the vehicle at issue, "was not *actually* mobile, it was *apparently* mobile. There was nothing apparent to the officers to suggest the car was immobile. It was not up on blocks, and there is no information in the record to indicate the tires were flat or that wheels of the car were missing." *Hatley*, 15 F.3d at 859. Mr. Gosch asserts that this analysis should be rejected because it places the burden on the defendant to show that a car is immobile, when the burden of establishing an exception to the warrant requirement is always on the State. Just as the State must demonstrate probable cause, it must also demonstrate that a vehicle is readily mobile.

In *Markham*, the appellant asserted that a warrant could have been obtained while the vehicle was unattended and under surveillance, and therefore, there were no exigent circumstances related to vehicle's mobility. *Markham*, 844 F.2d at 368. The Sixth Circuit rejected this, holding that ready mobility was not the only basis for the automobile exception. *Id.* The Sixth Circuit noted that its case presented a "variation on *Carney* because the vehicle searched was parked in a private driveway" but held that the search was valid pursuant to *Carney*. *Id.* Mr. Gosch submits that that this rationale should be rejected, as Carney specifically identified the situations that give rise to the exception: "When a vehicle is being used on the highways, **or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes** – temporary or otherwise – the two justifications for the vehicle exception come into play." *Carney*, 471 U.S. at 392-93. Thus, the automobile exception applies in two scenarios: 1) a traffic stop, where the automobile exception most often arises; and 2) when the vehicle is readily capable of such use and is found stationary in a place not regularly used for residential purposes. In this case,

Mr. Gosch's vehicle was at the residence, and thus was not in a place "not regularly used for residential purposes."

The Idaho Supreme Court's decision in *Bottelson* is not contrary to this proposition. In *Bottelson*, the third case relied on by the district court in this case, officers drove by the farmhouse of Jeff and Bonnie Rice, who were friends of one of the officers. *Bottelson*, 102 Idaho at 91. *Id.* The officer knew that his friends would normally not be at home at the time of day that he drove by. *Id.* The officer saw a vehicle that did not belong to the Rices in the driveway; the trunk was open and the defendant was standing at the rear of the automobile. *Id.* The defendant shut the trunk when he saw officers approach. *Id.* One officer observed a window missing from the Rices' residence, and the other officer observed that a door leading from the front porch into the house was standing open. *Id.* The defendant was then directed to open the trunk the vehicle; he complied, and various items belonging to the Rices were found in the vehicle. *Id.*

The Idaho Supreme Court held that the defendant, who presented no evidence at the suppression hearing, failed to establish an expectation of privacy in the vehicle. *Id.* at 92. However, even assuming that the defendant could have made such a showing, the court held that the search was valid. *Id.* The Court correctly noted that the automobile exception "rests not only on the mobility rationale, but also on," the reduced expectation of privacy. *Id.* at 93. The Court concluded:

> As measured by the constitutional standards reflected in the cases cited above, we think that the officers in the case at bar were justified under the fourth amendment in searching the trunk of the Pontiac without first obtaining a warrant. There was abundant probable cause that the automobile contained evidence of a crime. The foreign automobile backed up to the house with its trunk open, the removed window pane, the opened porch door, the defendant's closing of the trunk door when the officers arrived, the suspicious automobile registration, and all the other

> circumstances evident to the officers clearly made it highly probable that a burglary was being committed and that evidence of the crime was in the trunk of the Pontiac.

Id. at 93. The Court therefore held that the search was valid. Id. *Bottelson*, however, does not control the outcome of this case. The *Bottelson* Court never addressed the issue of whether the vehicle was "readily mobile," and for good reason. The probable cause to search the vehicle was evidence indicating that a burglary was in progress and that the vehicle was being used to perpetrate that burglary. The only conclusion that can be drawn from the facts in *Bottelson* was that the defendant drove the vehicle to the residence, took items belonging to the Rices, and was going to use the vehicle to leave. Thus, the mobility of the vehicle, which did not belong to the owners of the residence and therefore would not normally be parked there, was never in dispute.

In the instant case, the district court stated,

> In the present case, Defendant contends that since the Suzuki "was not about to be moved" and was "secure where it was," the mobility concerns that justify the automobile exception were not present when the Suzuki was searched without a warrant. This assertion is simply not supported by existing case law. The distinction between -vehicles that may be searched without a warrant and those that may not is not made based on whether or not the subject vehicle is "secure" or "not about to be moved." Rather, the distinction primarily rests on the ability of the subject vehicle to be readily moved to another location. Here, the Suzuki was located in a driveway in close proximity to Defendant's residence. There was no testimony that it was mounted on blocks, had flat tires or was otherwise inoperable. *Cf. Hatley*, at 859. Contrary to Defendant's argument, the actions of the Defendant on the day of the search indicate that he was using, or was about to use, both the Suzuki and the Jeep to transport belongings from his residence to another location, which in and of itself indicates that the Suzuki was capable of being moved in the manner contemplated by the automobile exception. The fact that the Suzuki was parked in a residential driveway and without an operator when the warrantless search commenced does not place the Suzuki outside of the automobile exception.

(R., p.161.) Mr. Gosch does not disagree with the district court that the fact the Suzuki was not about to be moved means that a vehicle is not readily mobile. If that were the

case, the defendants in *Labron* would have prevailed because the vehicle searches in those cases were made after the defendants had been arrested and thus there was no danger that the vehicle would be moved by them. *See Labron*, 518 U.S. at 939. However, the burden is still on the State to prove both ready mobility and probable cause. And there is simply no evidence that the Suzuki was mobile. As the district court noted, it was stationary in a residential driveway. And as is set forth above, "When a vehicle is being used on the highways, **or if it readily capable of such use and is found stationary in a place not regularly used for residential purposes** – temporary or otherwise – the two justifications for the vehicle exception come into play." *Carney*, 471 U.S. at 392-93 (emphasis added). Mr. Gosch's vehicle was not being used on the highway and it was found stationary at a residence. The two justifications for the exception are not in play here. No officer testified to ever seeing the vehicle move (and the district court found no facts indicating that it had been recently moved.) Finally, simply placing property in a vehicle is insufficient to demonstrate that the vehicle is readily mobile, especially when a car is parked at a residence - the trunk of a vehicle can be used for storage just as easily as for transport.

As is set forth above, the standard for the automobile exception is: "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." *Labron,* 518 U.S. at 940. In a traffic stop scenario, this is non-issue because the vehicle will be moving prior to the stop. When the vehicle is stationary, however, the State must prove that it is readily mobile. When it is found stationary in a place not regularly used for residential purposes, such a city street or a gas station, it is more reasonable to conclude that the vehicle is mobile because it had to be moved to get to that location. A residential

driveway, however, is very different, and that is why *Carney* emphasizes places not regularly used for residential purposes. The term, "readily mobile," must mean something, and if it can mean a vehicle parked in a driveway where there is no evidence that it has been recently driven, the term means next to nothing, and the only concern is probable cause. Because the automobile exception requires both ready mobility and probable cause[3], and because the State presented no evidence of ready mobility, the district court's order must be reversed.

## CONCLUSION

Mr. Gosch requests that the district court's order denying his motion to suppress be reversed, that his convictions be vacated, and that this case be remanded for further proceedings.

DATED this 1st day of April, 2014.

JUSTIN M. CURTIS
Deputy State Appellate Public Defender

[3] Mr. Gosch does not challenge the district court's holding that the State had probable cause once the drug dog alerted on the vehicle. An alert by a reliable, trained canine unit provides probable cause. *Florida v. Harris*, ___ U.S. ___, 133 S. Ct. 1050, 1059 (2013). Mr. Gosch only challenges the mobility finding.

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of April, 2014, 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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