7-3-2014

State v. Gosch Respondent's Brief Dckt. 40895

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	No. 40895
Plaintiff-Respondent,	)	
	)	Kootenai Co. Case No.
vs.	)	CR-2005-403
	)	
KIRK JULLIARD GOSCH,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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 the judgment entered upon the jury verdicts finding him guilty of manufacturing marijuana, possession of marijuana with intent to deliver, and possession of marijuana in excess of three ounces. On appeal, Gosch challenges the denial of his motion to suppress.

Statement Of Facts And Course Of Proceedings

After conducting surveillance on property located in Hayden, Idaho, Detective Terry Morgan obtained a search warrant to search "the premises of 11974 North Rimrock Road" and a "black 1996 Jeep . . . located in [the] driveway"; Gosch lived at the residence and owned the Jeep identified in the warrant. (R., pp.31-33; Tr.[1], p.9, L.24 – p.10, L.4.) The search warrant was based upon probable cause to believe the property identified in the warrant would contain evidence of drug crimes. (R., pp.31-33.) When law enforcement executed the warrant, the Jeep was no longer at the residence; however, a white Suzuki, which was registered to an unknown female[2] and which was also present during the earlier surveillance, was parked in the driveway. (Tr., p.9, L.13 – p.10, L.12.) A certified drug dog alerted on the Suzuki and a subsequent search of that car revealed marijuana and a "white powder substance," suspected to be

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[1] There are several transcripts included in the record on appeal. The transcript of the suppression hearing is included twice – as an individual transcript and as part of days one and two of the jury trial. All transcript references in this brief will be to the individual suppression hearing transcript.

[2] Law enforcement later determined the Suzuki also belonged to Gosch. (See Tr., p.10, Ls.5-21; R., p.21.)

cocaine. (R., p.35; Tr., p.80, L.25 – p.82, L.12, p.86, L.21 – p.93, L.7, p.109, L.24 – p.110, L.9.) Several drug-related items were also located in Gosch's residence. (R., pp.35-36.)

The state charged Gosch with trafficking in cocaine, manufacturing marijuana, possession of marijuana with the intent to deliver, and possession of marijuana in excess of three ounces. (R., pp.46-48, 57-59.) Gosch filed a motion to suppress, asserting "the warrant was insufficient and/or the search was warrantless and/or the arrest by the officers was unlawful and without legal justification." (R., p.67.) The district court denied the motion as well as Gosch's subsequent request for an interlocutory appeal regarding his request for suppression. (R., pp.154-163, 186, 201-203.) Gosch proceeded to trial at which a jury found him guilty of manufacturing marijuana, possession of marijuana with intent to deliver, and possession of marijuana in excess of three ounces, but acquitted him of the trafficking in cocaine charge. (R., pp.266-267.) The court imposed concurrent unified five-year sentences with three years fixed, but suspended the sentences and placed Gosch on probation.[3] (R., pp.314-320.)

Gosch timely appealed from the Amended Judgment, re-filed pursuant to relief granted in post-conviction. (R., pp.346, 350-353.)

[3] One month after the court placed Gosch on probation, the state filed a Report of Probation Violation. (R., pp.321-324.) Gosch admitted the allegations and disposition of the violations was included in a global resolution involving other criminal charges, which resulted in revocation of Gosch's probation and reduction of the fixed terms of his sentences from three years to one year. (R., pp.333-340, 343-345.) Gosch notes in his brief that he has served his sentences. (Appellant's Brief, p.3.)

ISSUE

Gosch states the issues on appeal as:

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

(Appellant's Brief, p.4.)

The state rephrases the issue as:

Should this Court affirm the district court's order denying Gosch's motion to suppress on one of the following bases: (1) an authorized search of particular premises includes vehicles located on the premises; (2) the automobile exception applies to vehicles parked at a residence without affirmative proof that the automobile is "readily mobile"; or (3) inevitable discovery?

ARGUMENT

Gosch Has Failed To Establish Error In The Denial Of His Suppression Motion

A. Introduction

Gosch challenges the denial of his motion to suppress, arguing suppression was required "because the State failed to prove that the white Suzuki parked at his residence was 'readily mobile,'" and therefore failed to prove the automobile exception applied. (Appellant's Brief, p.5.) Gosch's argument fails for several reasons. Because the Suzuki was located on the premises authorized to be searched pursuant to the warrant, the search of the Suzuki was proper regardless of the applicability of the automobile exception. Even if the Suzuki is not considered part of the premises, the search was proper under the automobile exception because the information available to law enforcement supported the conclusion that it was readily mobile and the district court correctly concluded as much. Finally, the inevitable discovery doctrine prevents exclusion of any evidence recovered from the Suzuki in this case. Gosch has, therefore, failed to show error in the denial of his suppression motion.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v. Klingler, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006). The credibility of the

witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003).

C. The Suzuki Was Properly Searched As Part Of The Premises

The search warrant issued by the magistrate authorized a search of the premises located at 11974 Rimrock Road in Hayden, Idaho. (R., p.33.) The testimony presented at the suppression hearing established that the Suzuki, along with Gosch's Jeep and a white GMC truck were parked in the driveway at Gosch's residence on Rimrock Road and one of the detectives conducting surveillance on the day the warrant was obtained and executed observed Gosch and other individuals carrying items out of the residence and placing them in the vehicles parked in the driveway, including the Suzuki. (Tr., p.7, L.16 – p.9, L.16, p.40, L.10 – p.43, L.17.) The district court's Memorandum Opinion supports these factual findings (R., pp.155-156), Gosch does not dispute them (see generally Appellant's Brief, p.2), and these facts support a conclusion that the Suzuki was properly searched as part of the premises identified in the warrant. United States v. Gottschalk, 915 F.2d 1459 (10th Cir. 1990), is instructive.

In Gottschalk, "a magistrate issued a valid warrant authorizing the search of the residence of William Bailey located in Copperton, Utah, as well as two other nearby residences. Neither Gottschalk nor his vehicle were mentioned in the warrant, and Gottschalk was not a target of the investigation or the warrant." 915 F.2d at 1459-1460. In fact, the "warrant did not specifically list any vehicles to be searched, but rather authorized the search of the entire premises for

methamphetamine" and other items related to the manufacture of methamphetamine. Id. at 1460. When the search was conducted, Gottschalk's vehicle, a yellow Cadillac, was "parked in the driveway of the Bailey residence in an inoperable state," and had been for several weeks. Id. In addition, an informant reported seeing the suspects "moving objects from the trunk of a yellow automobile parked in the driveway into Bailey's garage." Id. Gottschalk's Cadillac was searched based on a "belief that the Cadillac was the yellow vehicle described by the informant, and because the car was parked on the premises where abundant evidence of drug trafficking and weapons offenses had already been found." Id. Law enforcement also believed the Cadillac "might be another stolen vehicle," since a "number of stolen vehicles and stolen car parts were found during the search of the three residences." Id. Several weapons as well as engine parts were found in the Cadillac's trunk. Id.

The district court suppressed the evidence found in the Cadillac after concluding the search was improper since Bailey, "the owner of the premises described in the search warrant, was not the owner of the Cadillac and because the evidence did not establish that the Cadillac was under his dominion and control," taking it outside of the search authorized by the warrant. Gottschalk, 915 F.2d at 1460. The Tenth Circuit Court of Appeals reversed, stating:

> A search warrant authorizing a search of a certain premises generally includes any vehicles located within its curtilage if the objects of the search might be located therein. One circuit has added a limitation to the general rule: that the vehicle to be searched must be owned or controlled by the owner of the premises searched. Although this limitation has been applauded by some commentators, it has been explicitly rejected by at least one circuit and several other courts.

Gottschalk, 915 F.2d at 1461 (internal case citations, quotations, and ellipsis omitted).

Because the Suzuki was on the premises of the address authorized to be searched and because the objects of the search might have been (and were) located therein, the search of the Suzuki was proper under the warrant. The failure to specifically identify the Suzuki or any other vehicle in the warrant, as the Jeep was, does not mean the rule articulated in Gottschalk does not apply. Indeed, specifically identifying the Jeep merely served the purpose of allowing the Jeep to be searched regardless of its location. In fact, consistent with this point, the Jeep was not on the premises when the warrant was executed but was located and returned to Rimrock Road and searched after the warrant issued. (Tr., p.9, Ls.3-5, p.23, L.17 – p.25, L.12.)

Even applying the limitation stated in Gottschalk – that the scope of the warrant "include[s] those automobiles either actually owned or under the control and dominion of the premises owner or, alternatively, those vehicles which appear, based on objectively reasonable indicia present at the time of the search, to be so controlled," 915 F.2d at 1461 – the search of the Suzuki would still fall squarely within the premises authorized by the warrant in this case based on the movement of items from Gosch's residence into the car and the discovery that the Suzuki was his. Compare Gottschalk, 915 F.2d at 1461-1462. This Court can therefore affirm the district court's order denying Gosch's suppression motion on this basis. See Total Success Investments, LLC v. Ada County Highway Dist., 148 Idaho 688, 696, 227 P.3d 942, 950 (Ct. App. 2010) ("an

appellate court may affirm the district court's decision if an alternative legal basis supports it"); Idaho Schools for Equal Educational Opportunity v. Evans, 123 Idaho 573, 580, 850 P.2d 724, 731 (1993) ("where an order of the district court is correct but based upon an erroneous theory, this Court will affirm upon the correct theory").

D. The Search Of Gosch's Vehicle Was Justified By Probable Cause To Believe It Contained Contraband

Even if the warrant's authorization to search the premises did not encompass the Suzuki, the search of the Suzuki was appropriate pursuant to the automobile exception. "There are . . . exceptions to the general rule that a warrant must be secured before a search is undertaken; one is the so-called 'automobile exception.'" California v. Carney, 471 U.S. 386, 390 (1985). The automobile exception authorizes a warrantless search of a vehicle and the containers therein when there is probable cause to believe the vehicle contains contraband or evidence of criminal activity. California v. Acevedo, 500 U.S. 565, 572 (1991); United States v. Ross, 456 U.S. 798, 824-25 (1982). "Probable cause is established if the facts available to the officer at the time of the search would warrant a person of reasonable caution in the belief that the area or items to be searched contained contraband or evidence of a crime." State v. Yeoumans, 144 Idaho 871, 873, 172 P.3d 1146, 1148 (Ct. App. 2007) (citing Ross, 456 U.S. at 823; see also Florida v. Harris, ___ U.S. ___, 133 S.Ct. 1050, 1055 (2013). "[W]hen a reliable drug-detection dog indicates that a lawfully stopped automobile contains the odor of controlled substances, the officer has

probable cause to believe that there are drugs in the automobile and may search it without a warrant." Yeoumans, 144 Idaho at 873, 172 P.3d at 1148 (quoting State v. Gibson, 141 Idaho 277, 281, 108 P.3d 424, 428 (Ct. App. 2005).

A reliable drug-detection dog alerted on the Suzuki, providing probable cause to believe the Suzuki contained drugs. The district court found as much and Gosch concedes this fact on appeal. (R., p.162; Appellant's Brief, p.12 n.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.").) Instead, Gosch argues that the district court erred in finding the Suzuki was "readily mobile," contending the state had the burden of proving such and failed to do so. (Appellant's Brief, pp.5-12.) Gosch is incorrect .

In Carney, the Supreme Court noted its cases "have consistently recognized ready mobility as one of the principal bases of the automobile exception." 471 U.S. at 390. "The mobility of automobiles . . . creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." Id. at 391 (citation and quotations omitted). "However, although ready mobility alone was perhaps the original justification for the vehicle exception, . . . later cases have made clear that ready mobility is not the only basis for the exception." Id. "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." Id. (citation and quotations omitted).

Accordingly, "[e]ven in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception." Id. "These reduced expectations of privacy derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways." Id. at 392 (citation omitted).

While "ready mobility" is *one* of the justifications underlying the automobile exception, the Supreme Court has never held that the state has the burden of proof of the existence of the justifications for the exception in any particular case. Rather, the automobile exception allows a warrantless search where there is probable cause to believe the automobile contains contraband or evidence of a crime. Yeoumans, 144 Idaho at 873, 172 P.3d at 1148. While the state has the burden of proving the existence of probable cause, it does not have the burden of proving one or more of the justifications for the exception. Gosch has cited no authority to the contrary. (See Appellant's Brief, p.8.) Gosch's *argument* to the contrary is premised upon the following italicized language from Carney, which, in context, reads:

> *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.* First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling. At least in these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.

471 U.S. at 392-393 (quoted, in part, in Appellant's Brief at p.11) (emphasis added).

According to Gosch, the italicized language above precludes the search of the Suzuki under the automobile exception because the Suzuki "was not being used on the highway and it was found stationary at a residence" and therefore "[t]he two justifications for the exception are not in play here." (Appellant's Brief, p.11.) The Suzuki's location does not establish that it was not readily mobile nor subject to regulation. A vehicle is not readily mobile only when it is actually mobile or has been seen driving. If that were true, the term "readily" would be superfluous in expressing the rationale for the automobile exception and the entire purpose of the exception would be undermined because the point is to allow a search of the automobile before it moves, *i.e.*, becomes unavailable. Carney, 471 U.S. at 393. Moreover, the Supreme Court in Carney applied the automobile exception to a motor home that was never seen moving. Id. at 388. Nor does the Suzuki's presence in Gosch's driveway demonstrate, as Gosch contends, that the regulation justification is "not in play." Regardless, as noted, the state was not required to prove the existence of any underlying justification, including that the Suzuki was in fact regulated, in order for the automobile exception to apply.

With respect to Gosch's argument that the automobile exception does not apply when a car is parked in a place "regularly used for residential purposes" (Appellant's Brief, p.9), the Tenth Circuit Court of Appeals has correctly rejected this interpretation of the language of Carney. The defendant in United States v.

Ludwig, 10 F.3d 1523, 1529 (10th Cir. 1993), made a similar argument to which the court responded: ". . . Ludwig misunderstands *Carney*. The question is only whether the 'vehicle was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle.'" As in Ludwig, the Suzuki was "obviously not being used as a residence" and could, therefore, be searched under the automobile exception once there was probable cause to believe it contained contraband. Id.

Even if the state was required to prove the Suzuki was "readily mobile," it met its burden in this case. On this point, the district court correctly concluded:

> 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. . . . 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. [United States v.] Hatley, [15 F.3d 856, 859 (9th Cir. 1994)]. Contrary to Defendant's argument, the actions of the Defendant on the day of the search indicated 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 residence driveway and without an operator when the warrantless search commenced does not place the Suzuki outside of the automobile exception.

(R., p.161.)

Gosch's only argument that the court's finding of ready mobility is erroneous is that "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." (Appellant's Brief, p.11.) While Gosch's storage hypothesis could theoretically be true, this does not mean the facts cited by the court are inadequate to establish ready mobility. Cf. State v. Nicolescu, 156 Idaho 287, ___, 323 P.3d 1248, 1252 (Ct. App. 2014) ("the existence of an alternative innocent explanation does not negate the fact that the officers had reasonable grounds to believe Nicolescu was intoxicated"). Gosch suggests that, in order to establish ready mobility, there must be evidence that the car "has been recently driven."[4] (Appellant's Brief, p.12.) Not only is this evidentiary standard unsupported by any authority, it is contrary to the purpose of the exception and to cases applying it. See, e.g., Carney, supra.

Gosch is incorrect in his assertion that the state is required to prove one or more of the underlying justifications underlying the automobile exception in order for the exception to apply. Even if the Court concludes otherwise, the district court's conclusion that the Suzuki was readily mobile is supported by the evidence. Gosch has failed to establish otherwise.

E. Even If The Search Of The Suzuki Was Not Proper Pursuant To The Warrant Or The Automobile Exception, The Evidence In The Suzuki Would Have Inevitably Been Discovered

Assuming that the search of the Suzuki was not properly included as part of the premises or did not fall within the automobile exception, exclusion of the evidence discovered therein would be improper under the inevitable discovery

[4] 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." (Appellant's Brief, p.10.)

doctrine. See State v. Buterbaugh, 138 Idaho 96, 101-102, 57 P.3d 807, 812-813 (Ct. App. 2002) (inevitable discovery doctrine is an exception to the exclusionary rule). Where the prosecution establishes by a preponderance of proof that the evidence at issue inevitably would have been found by lawful means, then exclusion of the evidence is improper even if it was actually obtained by constitutionally improper means. Nix v. Williams, 467 U.S. 431, 444 (1984); Stuart v. State, 136 Idaho 490, 497-98, 36 P.3d 1278, 1285-86 (2001). The underlying rationale of this rule is that suppression should leave the prosecution in the same position it would have been absent the police misconduct, not a worse one. Nix, 467 U.S. at 442-44; Buterbaugh, 138 Idaho at 102, 57 P.3d at 813.

In response to Gosch's suppression motion, the state sought application of the inevitable discovery doctrine in the event the district court found the search otherwise improper. (R., pp.88-89.) After seeing the items moved from Gosch's home to the Suzuki and obtaining a positive alert on the Suzuki, the police undoubtedly would have been able to obtain a separate search warrant for the Suzuki. Indeed, Gosch concedes on appeal that probable cause to search the Suzuki existed "once the dog alerted on the vehicle." (Appellant's Brief, p.12 n.3.) Application of the inevitable discovery doctrine would, therefore, prevent exclusion of any evidence from the Suzuki in this case.

F. If This Court Concludes That The Suzuki Was Not Properly Searched Under Any Theory, Any Error In The Denial Of The Suppression Motion Is Harmless At Least As To Gosch's Conviction For Manufacturing Marijuana

An error "will be deemed harmless if the appellate court is able to declare, beyond a reasonable doubt, that there was no reasonable possibility that the event complained of contributed to the conviction." State v. Thumm, 153 Idaho 533, 537, 285 P.3d 348, 352 (Ct. App. 2012) (citation omitted). If this Court finds error in the denial of the suppression, any error is harmless at least as to the manufacturing marijuana charge.

The manufacturing marijuana charge was based on "compounding or converting or processing marijuana into honey oil" and the jury was so instructed. (R., pp.58, 167, 252.) The honey oil was found in Gosch's home along with several other items related to the manufacture of marijuana. (See R., p.35.) Thus, even assuming the evidence in the Suzuki should have been suppressed, there was still ample evidence to, at a minimum, convict Gosch of manufacturing marijuana.[5]

CONCLUSION

The state respectfully requests this Court to affirm the judgment and the district court's order denying Gosch's motion to suppress.

DATED this 3rd day of July 2014.

JESSICA M. LORELLO
Deputy Attorney General

[5] Because the jury acquitted Gosch of trafficking in cocaine (R., p.266), suppression of the cocaine found in the Suzuki (R., p.35) would be moot.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of July 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General