10-18-2018

State v. Roller Appellant's Brief Dckt. 45903

Electronically Filed
10/18/2018 10:44 AM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45903**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-16-26401**
v.	)	
	)	
MICHAEL WAYNE ROLLER,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Michael Roller challenges the district court's denial of his motion to suppress evidence obtained following a police officer's photograph of the VIN of a motorcycle, which was partially covered by a tarp in the bed of a pickup truck. Mr. Roller maintains the district court erred by determining the officer observed the motorcycle VIN in open view and, as such, did not search the truck bed. Mr. Roller submits the officer did not observe the VIN in open view, searched the concealed area of the motorcycle in order to photograph the VIN, and conducted this search without probable cause or a warrant. Due to the unlawful search, Mr. Rollers maintains the district court should have granted his suppression motion.

Statement of the Facts and Course of Proceedings

In late August 2016, around 4:00 or 5:00 a.m., Officer Churchfield with the Meridian Police Department was patrolling near a Walmart store. (Tr., p.14, Ls.14–24, p.49, Ls.19–22.) He observed a truck with a Gem County license plate parked in the Walmart parking lot. (Tr., p.15, Ls.3–7.) Vehicles regularly park there overnight. (Tr., p.49, L.24–p.50, L.2.) This truck, however, piqued Officer Churchfield's interest because he used to be a police officer with the City of Emmett, located in Gem County. (Tr., p.11, Ls.15–21.) Officer Churchfield ran the Gem County license plate number "and the name that [came] back [was] a name that [was] generally familiar to" him. (Tr., p.50, Ls.5–7.) He did not know the vehicle's owner though. (Tr., p.50, Ls.7–8.) A warrants check indicated a different person with the owner's last name had an extraditable warrant. (Tr., p.50, Ls.8–11.)

Undeterred, Officer Churchfield approached the truck and saw Mr. Roller asleep in the front seat. (Tr., p.17, Ls.2–5, p.17, L.25–p.18, L.2.) Officer Churchfield recognized Mr. Roller

from a year-old investigation in Gem County. (Tr., p.12, Ls.9–12, p.17, Ls.4–5, p.50, Ls.13–23.) Back in August 2015, Officer Churchfield had worked on a Gem County burglary and motorcycle theft case. (Tr., p.11, L.22–p.12, L.3.) The motorcycle was a Harley Buell, and another officer had told Officer Churchfield that he had seen Mr. Roller "with a Buell." (Tr., p.13, Ls.7–10.) In addition, Officer Churchfield found some of the motorcycle owner's property with a couple of Bi-mart cards, including one belonging to Mr. Roller, in a box in a building that Mr. Roller "was working on." (Tr., p.13, Ls.7–20.) To investigate, Officer Churchfield had gone to a third party's house in Horseshoe Bend to speak with Mr. Roller, but Mr. Roller declined. (Tr., p.13, L.21–p.14, L.3.) Officer Churchfield left for the Meridian Police Department without completing his investigation of the stolen Buell. (Tr., p.14, Ls.10–13.)

Once Officer Churchfield recognized Mr. Roller from the old Gem County case, he then "paid attention" to what he saw in the truck bed: a motorcycle. (Tr., p.15, L.23–p.16, L.4.) The motorcycle's front half was covered by an opaque tarp and secured by straps and rope. (Tr., p.16, Ls.5–9, p.18, L.9, p.51, Ls.8–13, p.51, Ls.19–22.) The motorcycle "looked like it could have been" the stolen Buell, but Officer Churchfield was not sure. (Tr., p.16, Ls.15–17, p.26, L.24–p.29, L.12, p.51, Ls.16–18.) He saw numbers on a part of the motorcycle covered by the tarp, but he could not make them out from his vantage point outside the truck bed. (Tr., p.29, L.19–p.30, L.8.) So, after backup arrived to keep an eye on the sleeping Mr. Roller, Officer Churchill reached into the truck bed with his cellphone, manipulated his phone in between the tarp straps and rope, and took a photograph of the VIN. (Tr., p.18, Ls.9–21, p.30, Ls.4–22.) Since it was dark outside, Officer Churchill had to use the flash on his phone. (Tr., p.30, Ls.2–6.) Officer Churchill used the photograph to read the VIN and called it in to the Emmett Police Department. (Tr., p.19, Ls.1–4, p.55, Ls.16–19.) After some confusion with the numbers, Officer Churchill

confirmed that the last six numbers matched the numbers of the stolen motorcycle. (Tr., p.19, Ls.5–17.) Officer Churchill arrested Mr. Roller. (Tr., p.19, L.18–p.20, L.9, p.56, L.22–p.57, L.2.)

The State filed a Complaint alleging Mr. Roller committed the crime of grand theft by possession of stolen property (the motorcycle), in violation of I.C. §§ 18-2403(4), -2407, -2409. (R., pp.9–10.) The magistrate held a preliminary hearing and bound Mr. Roller over to district court. (R., pp.26–29; *see also* Prelim. Hr'g Tr.) The State filed an Information charging Mr. Roller with grand theft. (R., pp.30–31.)

Mr. Roller then moved to suppress all evidence obtained as a result of the illegal search. (R., p.68.) In his memorandum in support, he argued Officer Churchfield unlawfully searched the truck bed when he reached into the truck bed and under the tarp to photograph the motorcycle's VIN. (R., pp.70–75.) He contended the open view doctrine was inapplicable because Officer Churchfield had to reach into the truck bed and under the tarp and use his phone's camera plus a flashlight in order to see the VIN. (R., pp.70–75.) The State argued Officer Churchfield did not violate Mr. Roller's expectation of privacy by using his phone camera to view the VIN on the motorcycle. (R., pp.87–89, 91.) The State also argued, in the alternative, Officer Churchfield had probable cause to search the truck bed. (R., pp.89–91.)

The district court held a hearing on the motion to suppress. (*See generally* Tr., p.6, L.1–p.59, L.11.) Officer Churchfield testified, and the parties stipulated to the admission of State's Exhibit 1, four videos from Officer Churchfield's body cam. (Tr., p.11, L.1–p.39, L.15.) Officer Churchfield's conduct in photographing the VIN can be seen in the second video, saved as "AXON_Flex_Video_2016-08-22_0534_Churchfield 2." (State's Ex. 1.) In the video, Officer Churchfield is shown taking two pictures of the motorcycle: first, a yellow tag on the front of the motorcycle frame, which is not covered by the tarp, and, second, through the straps and under the

tarp near the bell housing for the gears. (State's Ex. 1, 0:44–1:06.) Officer Churchfield testified his photograph of the VIN "is the one that is on the bell housing for the gears," but he believed this was the first photograph, not the second. (Tr., p.35, L.4–p.36, L.2.)

The district court took a recess, heard argument by the parties,[1] and then issued a ruling from the bench. (Tr., p.39, L.19–p.57, L.13.) The district court first ruled: "[T]his expectation of privacy to an open bed pickup is only to those items that are completely covered. To the extent they can be seen, there is no expectation of privacy because the pickup is open and anyone walking by the pickup could see what is in the pickup." (Tr., p.51, L.23–p.52, L.4.) Next, the district court determined the VIN was in open view because Officer Churchfield "did not move the tarp, did not move the straps, may have touched the rope, but the photograph is simply what could be seen in open view when highlighted with a flashlight or enhanced by the light of a flashlight." (Tr., p.55, Ls.5–10; *see also* Tr., p.53, L.5–p.55, L.23.) The district court found that Officer Churchfield obtained the VIN from the first photograph, not the second. (Tr., p.54, Ls.12–15.) The district court held "this is a case of a nonintrusive vantage point." (Tr., p.55, Ls.20–21.) The district court acknowledged the "outcome . . . would be different" if Officer Churchfield's camera was "stuck under the inside of the tarp to get a picture of what clearly [he] could not see with his own eyesight." (Tr., p.54, Ls.16–20.) Alternatively, the district court held that Officer Churchill had probable cause to search for the VIN in the truck bed. (Tr., p.55, L.24–p.57, L.7.) Accordingly, the district court orally denied Mr. Roller's motion to suppress. (Tr., p.57, Ls.8–13.)

Pursuant to a plea agreement with the State, Mr. Roller entered a conditional guilty plea to the charged offense. (Tr., p.60, Ls.12–22, p.69, L.14–p.70, L.24; R., pp.106–07.) He reserved

his right to appeal the district court's denial of his motion to suppress. (Tr., p.60, Ls.15–17; R., p.106.) The district court placed Mr. Roller on probation, with an underlying sentence of eight years, with two years fixed. (Tr., p.92, Ls.12–16.) Mr. Roller timely appealed from the district court's judgment of conviction. (R., pp.120–24, 127–24.)

[1] At the hearing, Mr. Roller also argued Officer Churchfield did not have probable cause for the search. (Tr., p.39, L.25–p.41, L.10.)

ISSUE

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

ARGUMENT

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

A. Introduction

Mr. Roller challenges the district court's denial of his motion to suppress in three parts. First, he argues the district court erred by finding Officer Churchfield obtained the VIN from his first photograph of the motorcycle. He submits substantial and competent evidence shows Officer Churchfield obtained the VIN from the second photograph taken through the straps and under the tarp near the motorcycle's bell housing. Second, Mr. Roller asserts Officer Churchfield conducted a search of the motorcycle by intruding into a constitutionally protected area to obtain the second photograph. Third, Mr. Roller argues Officer Churchfield did not have probable cause of criminal activity to conduct the search. For these reasons, Mr. Roller submits the district court erred by denying his suppression motion.

B. Standard Of Review

The Court uses a bifurcated standard to review a district court's order on a motion to suppress. *State v. Danney*, 153 Idaho 405, 408 (2012). "The Court accepts the trial court's findings of fact if supported by substantial evidence." *State v. Watts*, 142 Idaho 230, 234 (2005). "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. Hunter*, 156 Idaho 568, 570 (Ct. App. 2014). The Court exercises free review of "the trial court's application of constitutional principles to the facts found." *Danney*, 153 Idaho at 408.

C. The District Court Should Have Granted Mr. Roller's Motion To Suppress Because Officer Churchfield Conducted A Warrantless Search, Without Probable Cause, Of The Partially Covered Motorcycle In Mr. Roller's Truck Bed

"The Fourth Amendment of the United States Constitution protects citizens from unreasonable search and seizure. A search and seizure, conducted without a warrant issued on probable cause, is presumptively unreasonable." *State v. Hansen*, 138 Idaho 791, 796 (2003) (citations omitted); *see also* U.S. CONST. 4th amend. "Article I, Section 17 of the Idaho Constitution nearly identically guarantees that '[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.'" *State v. Green*, 158 Idaho 884, 886 (2015) (alteration in original). "Evidence obtained in violation of the Fourth Amendment is subject to the exclusionary rule, which requires unlawfully seized evidence to be excluded." *State v. Lee*, 162 Idaho 642, 647 (2017) (citing *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963); *State v. Page*, 140 Idaho 841, 846 (2004)). The State bears the burden to show the warrantless search falls within a well-recognized exception to the Fourth Amendment's warrant requirement. *Halen v. State*, 136 Idaho 829, 833 (2002).

Here, Mr. Roller asserts Officer Churchfield conducted a warrantless search without probable cause when he reached through the straps and under the tarp to take the second photograph of the motorcycle VIN. Mr. Roller first contends the district court lacked substantial and competent evidence to find Officer Churchfield obtained the VIN from his first photograph of the yellow tag on the motorcycle frame. Mr. Roller maintains the evidence clearly showed Officer Churchfield observed the VIN from the second photograph taken in the interior of the motorcycle. Due to the intrusion into the covered truck bed, Mr. Roller submits Officer

Churchfield conducted a warrantless search without probable cause. This unlawful search requires suppression of all evidence stemming from the illegal intrusion.

1. The District Court Erred By Finding Officer Churchfield Obtained The VIN From The First Photograph

The district court's factual finding that Officer Churchfield obtained the VIN from the first photograph, not the second, was clearly erroneous. Specifically, the district court found: "I asked the officer when did he get the VIN number and he said based on the first shot which is approximately at a minute into the second video file of Exhibit 1." (Tr., p.54, Ls.12–15.) Factual findings must be supported by substantial and competent evidence. *State v. Henage*, 143 Idaho 655, 659 (2007). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Green*, 149 Idaho 706, 708 (Ct. App. 2010) (quoting *State v. Byington*, 132 Idaho 589, 593 (1999)). Here, the evidence was inadequate to support the conclusion that Officer Churchfield observed the VIN from the first photograph on the yellow tag of the motorcycle frame.

The evidence showed Officer Churchfield observed the VIN from his second photograph near the bell housing for the gears. Officer Churchfield testified that he photographed the VIN by reaching his phone "in between the tarp tie-downs." (Tr., p.18, Ls.9–11.) On cross-examination, Officer Churchfield agreed that he needed to reach inside the bed of the truck and through the straps to photograph the VIN. (Tr., p.30, Ls.4–16.) He did not testify that he obtained the VIN from the first photograph of the yellow sticker on the motorcycle frame. Moreover, Officer Churchfield's bodycam video supports his testimony that he obtained the VIN from the second picture. The video shows Officer Churchfield take a photograph of the yellow sticker on the frame near the front wheel of the motorcycle and then reach through the straps and under the tarp

for the second photograph near the bell housing. (State's Ex. 1, 00:44–1:06.) After Officer Churchfield takes the two photographs, the video shows him examining his phone, and the photograph on his screen is the second one, which shows a VIN etched in metal, not a yellow sticker. (State's Ex. 1, 1:06–1:55.) During this time, the video shows another officer reach into the truck bed with his flashlight to read the VIN from inside the motorcycle near the bell housing, again not the yellow sticker on the frame. (State's Ex. 1, 1:40–1:58.) Finally, the district court's inquiry with Officer Churchfield indicated he obtained the VIN from the bell housing, which was the second photograph:

> THE COURT: Sir, at what point did you determine the VIN number? Was it the first camera shot you took? There were numerous camera shots When was the VIN number determined.
>
> THE WITNESS: I think the *one I went off of is, what I remember, is the one that is on the bell housing for the gears. You can kind of see that one. It is the lower one.* That is with one, when I looked at the photograph I had, that is the one I was using to write down and compare and that [sic]. That is why they weren't matching all the numbers is because I think those beginning numbers have something to do with parts or something like that. And the last --
>
> THE COURT: I am not concerned with that. *Is it the first picture you took with your camera* --
>
> THE WITNESS: *I believe so.*
>
> THE COURT: -- *that you got the VIN number that you ultimately used?*
>
> THE WITNESS: *Yes.*
>
> THE COURT: Are you sure of that?
>
> THE WITNESS: *That's what I remember. I don't remember using any other shots.*
>
> THE COURT: Thank you.

(Tr., p.35, L.4–p.36, L.3 (emphasis added).) Although Officer Churchfield told the district court that he believed he used the first photograph for the VIN, he stated this photograph was of the bell housing for the gears, which was clearly the second photograph.

Based on Officer Churchfield's testimony and his bodycam video, there was not relevant evidence for a reasonable mind to accept the conclusion that Officer Churchfield observed the VIN from the first photograph of the yellow sticker. All relevant evidence pointed to the second photograph—Officer Churchfield testified that he reached through the straps and under the tarp to photograph the VIN near the bell housing, and his bodycam video shows his use of the second photograph, not the first. In addition, Officer Churchfield informed the district court that he "went off" the photograph of the VIN from the bell housing, which was the "lower" photograph. Officer Churchfield's reference to this being the first photograph was mistaken when considered in conjunction with his bodycam video. That statement alone was not relevant evidence to support the district court's finding that Officer Churchfield observed the VIN from the first photograph. To the contrary, substantial and competent evidence supported a finding that Officer Churchfield observed the VIN from the second photograph. Therefore, the district court clearly erred by finding Officer Churchfield observed the VIN from the first photograph.[2]

[2] Mr. Roller notes the district court's factual finding that Officer Churchfield observed the VIN in the first photograph, not the second, is not entirely clear. In its findings, the district court also discussed Officer Churchfield's movement near the straps and tarp, as well as the second officer's reading of the VIN—which would tend to reference the second photograph. (Tr., p.52, Ls.19–22, p.54, L.2–p.55, L.10.) Accordingly, Mr. Roller makes this argument regarding the factual findings in an abundance of caution to ensure this issue is properly briefed on appeal, should this Court determine the district court found Officer Churchfield observed the VIN from the first photograph. If this Court determines the district court found Officer Churchfield used the second photograph, Mr. Roller respectfully refers this Court to his argument in Parts 2 and 3.

2. The District Court Erred By Ruling Officer Churchfield Observed The VIN In Open View

Because Officer Churchfield observed the VIN from the second photograph, Officer Churchfield did not observe the VIN in open view. Rather, Officer Churchfield engaged in a search by intruding the constitutionally protected area of the covered truck bed to photograph the VIN.[3] Mr. Roller submits this unlawful search occurred under either the Fourth Amendment's common-law property rights standard or its reasonable exception of privacy test. The district court therefore erred by ruling Officer Churchfield did not search the truck bed and only saw the VIN from "a nonintrusive vantage point." (Tr., p.55, Ls.20–21.)

The open view doctrine recognizes "a police officer's observations made from a location open to the public do not constitute a search." *State v. Christensen*, 131 Idaho 143, 146 (1998). Those observations are not a search because "one cannot have a reasonable expectation of privacy in what is knowingly exposed to public view." *Id.* (citations omitted). Thus, under the open view doctrine, an officer does not conduct a search when observing "incriminating evidence or unlawful activity from a non-intrusive vantage point." *State v. Clark*, 124 Idaho 308, 313 (Ct. App. 1993) (citations omitted).

"[A]n officer is only permitted the scope of observation ascribed to a reasonably respectful citizen." *State v. Limberhand*, 117 Idaho 456, 462 (Ct. App. 1990) (citations omitted). For example, an officer's observations of a vehicle's exterior or the vehicle's interior illuminated with a flashlight fall within the open view doctrine. *State v. Ramirez*, 121 Idaho 319, 322 (Ct. App. 1991). An officer may use the information gained from the open view observations to justify a subsequent search or seizure in a protected area. *Clark*, 124 Idaho at 313 n.3. However,

the open view doctrine does not justify a warrantless search or seizure "into an area where a privacy interest does exist." *Id.* If a privacy interest exists, the officer must have a justification under the Fourth Amendment for that intrusion or seizure.[4] *Id.*

Here, Officer Churchfield's observation of the VIN, obtained from his second photograph, did not occur in open view, but through a search of the covered truck bed. Officer Churchfield did not observe the motorcycle VIN from the exterior of the truck or by shining a flashlight inside the truck bed. Rather, Officer Churchfield reached inside the truck bed, through the straps, and under the tarp of photograph the interior of the motorcycle. This is far beyond the scope of observation of a reasonably respectful citizen. *Limberhand*, 117 Idaho at 462. Applying either a trespassory test or legitimate expectation of privacy standard, Officer Churchfield engaged in a search of the partially covered truck bed.

a. Common-Law Property Rights Test

Any invasion by an officer into a protected area constitutes an unlawful intrusion. The United States Supreme Court has repeatedly held a minimal intrusion into a vehicle constitutes a

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[3] In the district court, Mr. Roller maintained Officer Churchfield observed the VIN from the second photograph. (*See* R., pp.71, 72; Tr., p.36, Ls.7–13, p.41, L.11–p.42, L.12, p.49, L.5, p.49, L.25–p.50, L.5.)

[4] Unlike the open view doctrine:

> [t]he plain view exception allows police officers to make warrantless *seizures* of evidence viewed from a location where the officer has a right to be. *Horton v. California*, 496 U.S. 128 (1990). Thus, the plain view exception applies to warrantless seizures of readily visible items, not warrantless searches. Warrantless searches are properly analyzed under the open view doctrine.

Christensen, 131 Idaho at 146. Put another way, "the plain view doctrine refers only to the circumstances where an officer has a prior justification for an intrusion into a constitutionally protected area or activity and in the course of that intrusion spots and seizes incriminating evidence." *Clark*, 124 Idaho at 312.

search.[5] For example, in *New York v. Class*, the United States Supreme Court held an officer conducted a search within the meaning of the Fourth Amendment when he momentarily reached into the car's interior to move papers obscuring the VIN on the dashboard. 475 U.S. 106, 108, 111, 114–18 (1986). The United States Supreme Court clarified the intrusion was not the officer's viewing of the VIN itself (which is not protected under the Fourth Amendment), but rather his actual invasion into the car's air space: "While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police." *Id.* at 114–15. *See also Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987) (officer conduced a search for Fourth Amendment purposes when he moved stereo equipment to read the serial number). The Court of Appeals also recognized this "clear distinction"—merely viewing a VIN is not a search, but an actual physical intrusion into the vehicle is. *State v. Metzger*, 144 Idaho 397, 401 (Ct. App. 2007). Later, in *United States v. Jones*, the United States Supreme Court held the government conducted a search within in the meaning of the Fourth Amendment when the police installed a GPS device on the exterior vehicle. 565 U.S. 400, 404–05 (2012). The United States Supreme Court had "no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id.*

[5] The United States Supreme Court has adopted a similar rule for intrusions into the home. *E.g.*, *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013); *Kyllo v. United States*, 533 U.S. 27, 37 (2001). Recently, in *Collins v. Virginia*, the United States Supreme Court held that the automobile exception does not allow an officer, "uninvited and without a warrant," to enter the curtilage of a home to search a parked vehicle. 138 S. Ct. 1663, 1668 (2018). Consistent with these principles, this Court held an officer's physical intrusion by inserting her foot through the threshold to keep the door open constituted a search: "It was not necessary for the officer's entire body to cross the threshold in order to constitute an entry under the Fourth Amendment. '[A]ny physical invasion of the structure of the home, by even a fraction of an inch, [i]s too much.'" *State v. Maland*, 140 Idaho 817, 822 (2004) (alterations in original and internal citations and quotation marks omitted) (quoting *Kyllo*, 533 U.S. at 37).

The United States Supreme Court also highlighted the government's conduct in "physically occupied private property for the purpose of obtaining information." *Id.* at 404. The United States Supreme Court later clarified in *Florida v. Jardines* that the "reasonable expectation of privacy" test to determine whether a search occurred is no substitute for "the traditional property-based understanding of the Fourth Amendment." 133 S. Ct. 1409, 1417 (2013). "[T]he Fourth Amendment's property-rights baseline . . . keeps easy cases easy." *Id.* "[W]hen the government gains evidence by physically intruding on constitutionally protected areas," "a search occurred." *Id.*

In this case, Officer Churchfield physically intruded the covered area of Mr. Roller's truck bed. As established in *Class*, *Jones*, *Jardines*, and *Metzger*, the Fourth Amendment prohibits invasions into the protected spaces of a vehicle (and sometimes the exterior of a vehicle as recognized in *Jones*) absent a warrant or well-delineated exception. Here, Officer Churchfield intruded the protected airspace of the truck bed when he reached into the bed, through the straps, and under the tarp to photograph the VIN near the motorcycle's bell housing. Officer Churchfield had authority to walk to the edge of the truck bed and take as many photographs as desired from that location, such as the first photograph of the yellow tag. That conduct would fall under the open view doctrine. But, once Officer Churchfield passed the threshold of the truck bed into the area covered by the tarp, even just momentarily to take a photograph, Officer Churchfield conducted a search under the Fourth Amendment. Officer Churchfield gained a view of the VIN "as a direct result of an intrusion into a place where a privacy interests exists." *Metzger*, 144 Idaho at 401. "A search is a search, even if it happens to disclose nothing but" the inner gears of a motorcycle. *Hicks*, 480 U.S. at 325. His conduct in invading the airspace of the truck bed constituted a search for Fourth Amendment purposes.

b. Reasonable Expectation Of Privacy Test

This Court has also used the reasonable expectation of privacy standard to determine whether a search occurred. "The constitutional safeguards of the Fourth Amendment protect an individual's legitimate expectation of privacy, which has been defined as a subjective expectation of privacy that society is prepared to recognize as reasonable." *State v. Dreier*, 139 Idaho 246, 251 (Ct. App. 2003) (citing *Oliver v. United States*, 466 U.S. 170, 177 (1984); *State v. Donato*, 135 Idaho 469, 471 (2001); *Clark*, 124 Idaho at 316). "A person challenging a search has the burden of showing that he or she had a legitimate expectation of privacy in the item or place searched." *State v. Pruss*, 145 Idaho 623, 626 (2008). The determination of a reasonable expectation of privacy involves a two-part inquiry: "(1) Did the person have a subjective expectation of privacy in the object of the challenged search? and (2) Is society willing to recognize that expectation as reasonable?" *Id.* If this Court does not base its decision on the property-rights test, Mr. Roller also meets the reasonable expectation of privacy standard.[6]

[6] Mr. Roller notes that the district court may have ruled Mr. Roller had a reasonable expectation of privacy in the portions of the motorcycle covered with the tarp. The district court stated:

> . . . The Court finds that if the entire load in the pickup, as we can all imagine in the State of Idaho, someone's pickup bed is entirely covered by a tarp such that you can't see anything under the tarp, this clearly would have been an illegal search. But that is not the factual situation presented to the Court.
>
> . . . .
>
> So the Court finds that this expectation of privacy to an open bed pickup is only to those items that are completely covered. To the extent they can be seen, there is no expectation of privacy because the pickup is open and anyone walking by the pickup could see what is in the pickup. So the next question becomes, with that reduced expectation of privacy for an open bed pickup, was the VIN number in plain or open view?

(Tr., p.50, L.25–p.51, L.7, p.51, L.23–p.52, L.7.) Later on, the district court determines the VIN was in open view. (Tr., p.52, L.5–p.57, L.13.) Thus, although the district court appeared to

First, Mr. Roller had a subjective expectation of privacy in the portions of the motorcycle covered by the tarp and straps or otherwise hidden from view. In *Pruss*, for example, this Court upheld the district court's factual finding that the defendant had a subjective privacy interest in his hooch because the defendant attempted to camouflage it "so that it would not be readily observable" and individuals generally have subjective privacy interests in their dwellings. *Id.* at 626. Here, Mr. Roller made certain parts of the motorcycle not readily observable by covering it with a tarp and securing it with straps. This is a deliberate step to conceal certain parts of the motorcycle from the public. This action of hiding parts of the motorcycle demonstrated a subjective privacy interest in those areas. Thus, Mr. Roller has shown a subjective expectation of privacy in the tarp-covered portions of the motorcycle in the truck bed.

Second, society is willing to recognize an expectation of privacy in covered items in a truck bed as reasonable. Although individuals generally have a reduced expectation of privacy in vehicles, "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. 443, 461–62 (1971). The interior of a vehicle remains protected from "unreasonable intrusions by the police." *Class*, 475 U.S. at 114–15. An expectation of privacy in a vehicle extends to areas concealed from view, such as the glove compartment, under the seats, closed containers, and the trunk. *See Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *Cf. Rakas v. Illinois*, 439 U.S. 128, 148–49 (1978) (holding that *passengers* of a vehicle do not have a privacy

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recognize that the "outcome . . . would be different if the camera is stuck under the inside the tarp to get a picture of what clearly the officer could not see with this own eyesight," (Tr., p.54, Ls.16–19), the district court ultimately determined Mr. Roller had no reasonable expectation of privacy in the VIN. As such, Mr. Roller addresses the reasonable expectation of privacy test herein.

interest in the glove compartment, under the seats, or the trunk). Mr. Roller submits that the privacy interest in covered items in a truck bed is similar to the trunk of a vehicle. For example, other jurisdictions have held an individual does not have a reasonable expectation of privacy in an *open* truck bed. *State v. Grillo*, 578 A.2d 677, 679 (Conn. App. Ct. 1990) (no expectation of privacy in clear plastic bag in open truck bed); *State v. Aultman*, 287 S.E.2d 580, 582 (Ga. Ct. App. 1981) (no expectation of privacy in knife sheaths in uncovered truck bed); *see also United States v. Green*, 925 F.3d 1471, 1991 WL 17461, at *4 (9th Cir. 1991) (unpublished) (no expectation of privacy in hammer in open truck bed); *see also State v. Ellis*, 99 Idaho 606, 608 (1978) ("An unlocked and partially open trunk of an unattended automobile at the scene of an apparently on-going crime does not rise to the dignity of an area of anticipated privacy."); *State v. Dreier*, 139 Idaho 246, 252 (Ct. App. 2003) (no expectation of privacy in contents of open gym bag exposed to view of others). It follows that items concealed or covered in a truck bed maintain the same expectation of privacy as a closed trunk of a vehicle. *See Illinois v. Caballes*, 543 U.S. 405, 416 n.6 (2005) (Souter, J., dissenting) ("closed car trunks are accorded some level of privacy protection"). An expectation of privacy in a concealed item in a truck bed is objectively reasonable.

Further, an expectation of privacy in items covered by a tarp in a truck bed should not be diminished because the individual lacks the financial means to purchase a camper shell or other permanent cover for his truck bed.

> For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.

United States v. Ross, 456 U.S. 798, 822 (1982). For example, in *Collins*, the United States Supreme Court rejected the State's proposed bright-line rule that the automobile exception should allow the police's entry into the curtilage of a home to search a vehicle unless the vehicle was located in a fixed, enclosed structure like a garage. *Collins*, 138 S. Ct. at 1674–75. The United States Supreme Court rejected this rule, in part, because the rule "automatically would grant constitutional rights to those persons with the financial means to afford residences with garages in which to store their vehicles but deprive those persons without such resources of any individualized consideration as to whether the areas in which they store their vehicles qualify as curtilage." *Id.* at 1675. In short, the Fourth Amendment does not distinguish between "worthy" and "unworthy" containers. *Ross*, 456 U.S. at 822. As such, Mr. Rollers submits this Court should not distinguish between a permanent truck bed cover and the use of a tarp to conceal items in a truck bed. Both demonstrate the same intent to protect items from public view. Based on the above, Mr. Roller submits society recognizes a reasonable privacy interest in covered items in a truck bed.

c. Officer Churchfield Searched The Partially Covered Truck Bed

In sum, Officer Churchfield's conduct of reaching into the truck bed, through the straps, and under the tarp to take a photograph of the inner portion of the motorcycle was a search. Under the Fourth Amendment's property rights test, Officer Churchfield intruded or trespassed into the protected airspace of the vehicle. Under the reasonable expectation of privacy test, Officer Churchfield invaded an area in which Mr. Roller has a subjective expectation of privacy and society recognized that interest as objectively reasonable. Therefore, the district court erred by ruling Officer Churchfield observed the VIN in open view and did not search Mr. Roller's covered truck bed. This warrantless search, without justification, requires suppression of all

evidence obtained from the search. *See Wong Sun*, 371 U.S. at 488 (evidence obtained through unconstitutional police conduct subject to exclusion); *State v. Bishop*, 146 Idaho 804, 810–11 (2009) (same).

3. The District Court Erred By Ruling Officer Churchfield Had Probable Cause To Search The Partially Covered Truck Bed

Lastly, Mr. Roller asserts the district court erred by ruling Officer Churchfield had probable cause to search the covered truck bed. The district court made this ruling in the alternative, since it first ruled Officer Churchfield observed the VIN in open view. (Tr., p.55, L.24–p.57, L.7.) Accordingly, if this Court determines a search occurred (as argued above in Part 2), Mr. Roller contends Officer Churchfield did not have probable cause to justify the warrantless search.

The automobile exception is an exception to the warrant requirement. It "allows police to search a vehicle without a warrant when there is probable cause to believe the vehicle contains contraband or evidence of a crime." *State v. Anderson*, 154 Idaho 703, 706 (2012) (citing *State v. Buti*, 131 Idaho 793, 800 (1998)). "Probable cause is established when the totality of the circumstances known to the officer at the time of the search would give rise—in the mind of a reasonable person—to a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (citing *State v. Josephson*, 123 Idaho 790, 792–93 (1993)). "Probable cause is a flexible, common-sense standard, and a practical, nontechnical probability that incriminating evidence is present is all that is required." *Id.* (citing *Texas v. Brown*, 460 U.S. 730, 742 (1983)).

Here, Officer Churchfield did not have probable cause at the moment he reached into the covered truck bed to photograph the motorcycle VIN near the bell housing. Officer Churchfield saw a legally parked vehicle in a store parking lot. (Tr., p.49, L.19–p.50, L.2.) The motorcycle,

Gem County license plate, and Mr. Roller's presence may have given rise to reasonable suspicion, but these facts did not establish probable cause to permit the warrantless intrusion. In particular, the fact that Officer Churchfield's past investigation of a stolen motorcycle was a year old cuts against a determination of probable cause. Moreover, Officer Churchfield "could not determine what kind of motorcycle it was." (Tr., p.51, Ls.16–18.) This fact also weighs against a finding of probable cause. Looking at the totality of the circumstances, Officer Churchfield's observation of a partially covered motorcycle in the bed of a legally parked Gem County truck with Mr. Roller asleep in the front seat did not establish probable cause to search the truck bed.

Therefore, Mr. Roller asserts the district court erred by determining Officer Churchfield had probable cause to search the vehicle. Lacking probable cause, Officer Churchfield had no lawful justification for the warrantless intrusion through the straps and under the tarp to photograph the motorcycle VIN near the bell housing. This was an unconstitutional search, in violation of Mr. Roller's Fourth Amendment rights. For these reasons, Mr. Roller contends the district court should have granted his motion to suppress.

CONCLUSION

Mr. Roller respectfully requests this Court reverse or vacate the district court's order denying his motion to suppress, vacate his judgment of conviction, and remand this case for further proceedings.

DATED this 18th day of October, 2018.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of October, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, electronically as follows:

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JCS/eas