7-11-2014

State v. Armstrong Respondent's Brief Dckt. 41458

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 41458
Plaintiff-Respondent,	)	
	)	Ada Co. Case No.
vs.	)	CR-2013-2538
	)	
DUSTIN THOMAS ARMSTRONG,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE MELISSA MOODY
District Judge

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Nature Of The Case

Dustin Thomas Armstrong appeals from the judgment entered upon his conditional guilty plea to grand theft, claiming the district court erred in denying his motion to suppress.

Statement Of Facts And Course Of Proceedings

On February 23, 2013, Jean Boyer called the nonemergency dispatch line to request a police officer's assistance. Ms. Boyer reported that her adult son, Armstrong, lived with her and had come into the house that morning and asked her if she had "some accounts with money in it, and he knew that they were for him." (Tr., p.28, L.24 - p.30, L.17.) Ms. Boyer told Armstrong that there were no accounts and no money, and he responded, "That's fine. I'll have my attorney take care of it." (Tr., p.30, Ls.18-21.) Ms. Boyer told her son to "pack [his] stuff and leave[,]" knowing that he was high on methamphetamine because she had seen similar behavior when he was on methamphetamine in the past. (Tr., p.30, Ls.22-25; p.34, L.14 - p.35, L.4.) Ms. Boyer went into her office and as she sat at her computer, Armstrong entered the room and told her, "I just want you to know, Mom, when I turn 39, I will have family benefits on my dead mom." (Tr., p.31, Ls.1-5.) Ms. Boyer told Armstrong, "I'm not dead yet, and I'm not staying here[,]" then she went to her sister's residence and called the nonemergency police officer because she "wasn't going back until someone showed up there." (Tr., p.31, Ls.6-10.) Later that day, Ms. Boyer received a phone call from a

female Boise police officer,[1] and informed the officer about the statements Armstrong made to her that morning, and that she assumed Armstrong was using methamphetamine. (Tr., p.32, L.1 - p.33, L.4.)

Boise City Police Officer Mattie Chally responded to Ms. Boyer's "narcotics call" and, prior to locating Armstrong, she verified he was on felony probation or parole. (Tr., p.47, L.3 - p.48, L.3.) Officer Chally spotted Armstrong's vehicle, which was the only vehicle parked in a credit union parking lot, and requested the assistance of other officers to enter the credit union and contact Armstrong. (Tr., p.49, L.12 - p.50, L.3.) As requested, two officers went into the credit union, and after Armstrong identified himself, they told him to complete his business and they would talk to him outside. (Tr., p.57, L.25 - p.58, L.19.)

Officer Chally talked to the on-call probation and parole officer, Laila Jeffries, who, after confirming Armstrong was a parolee, requested that the police officers conduct a K-9 search of his vehicle for her.[2] (Tr., p.37, L.14 - p.39, L.19; p.44, Ls.14-16 ("Can you please search with the K9 unit for me."); p.50, L.23 - p.51, L.10.) Condition Number 8 of Armstrong's signed conditions of parole stated, "Parolee will submit to a search of person or property, to include residence and vehicle, at any time and place by

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[1] It appears that the female Boise City Police Officer Ms. Boyer spoke to was Officer Chally. (See Tr., p.47, L.22 - p.48, L.3 (Officer Chally testified that she confirmed Armstrong's parole status before she "made contact with Mr. Armstrong *or the calling party.*").)

[2] Neither Parole Officer Jeffries, nor any other Probation and Parole officer, were present when the K-9 team searched Armstrong's car. (Tr., p.44, Ls.12-22.)

any agent of Field and Community Services and s/he does waive constitutional right to be free from such searches." (St. Ex. 1; Tr., p.25, L.2 - p.26, L.13.)

Officer Jerry Walbey, a certified K-9 handler with the Garden City Police Department, went to the credit union and conducted a K-9 search of the exterior, then the interior, of Armstrong's vehicle. (Tr., p.88, L.22 - p.90, L.10.) The K-9 alerted on a safe that was behind the driver's seat. (Tr., p.89, Ls.20-24.) Officer Walbey turned the safe over to Officer Chally, who was given a key by Ms. Boyer which opened the safe. (Tr., p.52, L.5 - p.53, L.5; p.90, Ls.17-19; p.94, L.4 - p.95, L.2.) The safe was owned by Ms. Boyer. (Tr., p.93, Ls19-23.) Inside the safe, officers found Ms. Boyer's personal identifying information, financial documentation, and a checkbook belonging to her. (Prelim. Tr., p.9, L.25 - p.10, L.16.)

The state charged Armstrong with grand theft for the wrongful taking, obtaining and/or withholding "a safe containing a checkbook and/or financial documents from the owner, Jean Boyer . . . ." (R., pp.37-38.) Armstrong filed a Motion to Suppress, seeking to suppress all evidence seized as a result of his detention and subsequent search of his vehicle without a warrant. (R., pp.54-55.) Armstrong later filed an Amended Motion to Suppress, additionally seeking to suppress all statements, admissions, and confessions he may have made prior to being given his *Miranda* warnings. (R., pp.63-64.)

After a suppression hearing, the district court granted Armstrong's motion to suppress the physical evidence on the basis that Condition Number 8 of Armstrong's parole agreement waived his right to be free from searches conducted by agents of Field and Community Services, and the police officers who searched Armstrong's

vehicle were not agents of Field and Community Services.[3] (Tr., p.121, L.12 - p.122, L.20.) The court also suppressed all statements Armstrong made to law enforcement that were the result of the discovery of the safe, on the basis that such statements were "fruit of the poisonous tree." (Tr., p.126, Ls.6-24.)

The state filed a Motion to Reconsider and a supporting brief (R., pp.93-94, 96-105), and Armstrong filed a brief in response (R., pp.106-108). The district court subsequently entered an Order Granting State's Motion to Reconsider Ruling and Denying Defendant's Motion to Suppress Evidence, concluding, under the dictionary definition of the word "agent," the police officers who conducted the search of Armstrong's vehicle at the request of Parole Officer Jeffries were, in fact, acting as agents of Field and Community Services. (R., pp.109-118.) The district court denied Armstrong's motion to suppress the physical evidence -- namely, the safe and its contents -- seized during the search of his vehicle. (Id.) Given its revised ruling that the police officers were agents of Parole Officer Jeffries, the court also denied Armstrong's motion to suppress statements he made to police officers. (Id.)

Armstrong subsequently entered a conditional guilty plea to grand theft, reserving the right to appeal the denial of his motion to suppress. (R., pp.125-129.) The court

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[3] The district court's decision to suppress the physical evidence seized from Armstrong's car appears to be based on the court's recall of Officer Jeffries' testimony "that Boise City police officers are not agents of Field and Community Services." (Tr., p.121, L.23 - p.122, L.1.) When asked by the prosecutor what she meant when she said that, Officer Jeffries explained, "They're not part of Idaho Department of Corrections," and added that, in the course of her employment, she uses them to help her do things such as vehicle searches, and regularly asks other agencies in the area to conduct those searches. (Tr., p.42, L.5 - p.43, L.6.)

imposed a unified three-year sentence, with one year fixed, and Armstrong timely appealed. (R., pp.134-141.)

ISSUE

Armstrong states the issue on appeal as:

> In light of the fact that article X, section 5 of the Idaho Constitution specifically places the duty of control, direction, and management of parole on the Board of Corrections, did the district court err when it determined that an on-call probation and parole officer can delegate that constitutional duty to local police, thereby making them agents of the Board?

(Appellant's Brief, p.6.)

The state rephrases the issue on appeal as:

Has Armstrong failed to establish error in the denial of his suppression motion?

ARGUMENT

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

A. Introduction

Armstrong argues that the district court erred in denying his motion to suppress because (1) under article X, § 5 of the Idaho Constitution, Parole Officer Jeffries had no authority to delegate her supervision duties to local police officers to search Armstrong's vehicle without a warrant, and (2) the conditions of parole signed by Armstrong only allowed "actual agents" of Field and Community Services to conduct a warrantless search of Armstrong's vehicle. (Appellant's Brief, pp.7-14.) Armstrong's arguments fail for several reasons.

First, Armstrong's argument on appeal is predicated on his contention that his Parole Officer Jeffries could not request police officers to act as her agent because article X, § 5 of the Idaho Constitution precludes such a "delegation" of her duties. Because Armstrong did not present that argument to the district court, he has failed to preserve it for appeal. Even if Armstrong's argument is considered, article X, § 5 of the Idaho Constitution is irrelevant in determining whether the search of Armstrong's vehicle violated his constitutional rights. Next, under the plain meaning of Armstrong's conditions of parole, police officers were agents of the parole officer, and were entitled to act on her behalf by searching Armstrong's vehicle. Finally, even without any conditions of parole, the search of Armstrong's vehicle was reasonable because, as a parolee, he had a lessened expectation of privacy.

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. Diaz, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007).

The interpretation and construction of a statute present questions of law over which the appellate court exercises free review. State v. Thompson, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004).

C. Insofar As Armstrong's Issue Is Based On Article X, § 5 Of The Idaho Constitution, It Was Not Preserved For Appeal And Otherwise Fails On The Merits

It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal. State v. Vondenkamp, 141 Idaho 878, 885, 119 P.3d 653, 660 (Ct. App. 2005) (citing State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000)). Moreover, I.R.E. 103(a)(1) requires "a party opposing proffered evidence" to "make a timely objection stating the specific ground of objection unless the specific ground is apparent from the context." Id. "An objection on one ground will not preserve a separate and different basis for excluding the evidence." Vondenkamp, 141 Idaho at 885, 119 P.3d at 660 (citing State v. Norton, 134 Idaho 875, 880, 11 P.3d 494, 499 (Ct. App. 2000); State v. Enyeart, 123 Idaho 452, 454, 849 P.2d 125, 127 (Ct. App. 1993)); State v. Holland, 135 Idaho 159, 161-162, 15 P.3d 1167, 1169-1170 (Ct. App. 2000) (holding that a defendant

has the burden to present grounds for his motion to suppress to the trial court, and may not raise alternative suppression grounds for the first time on appeal.)

On appeal, Armstrong argues that his Parole Officer Jeffries did not have authority to utilize Boise City police officers as her agents to conduct a search of Armstrong's vehicle. Armstrong's argument is based on article X, § 5 of the Idaho Constitution, which, he contends, precludes the parole officers from utilizing police officers as their agents because they are not allowed to delegate their duties:

> The district court found that Boise police officers were such agents because a probation and parole officer authorized them to search Mr. Armstrong's car. However, this finding presupposed that a probation and parole officer has the authority to delegate the responsibility of searching a parolee. The Idaho constitution places the duty to control, direct, and manage parole on the Board of Corrections [sic]. . . . Because the probation and parole officer did not have the authority to delegate the constitutional duty to another entity, the Boise police were not agents falling within the scope of Mr. Armstrong's waiver.
>
> . . . The district court denied Mr. Armstrong's motion to suppress finding, "[t]he parole agent in this case authorized Boise City Police Officers to act in her place in conducting a search of the Defendant's vehicle. This is the very definition of an agent." (R., pp.116-117.) At the heart of this ruling, and what it presupposes, is that Ms. Jeffries, a probation and parole officer, had the authority to delegate the Board of Correction's constitutional duty to control, direct, and manage parole to another entity. Because Ms. Jeffries did not have that authority, the district court erred in finding that Boise police officers were agents of Field and Community Services and authorized to search under the terms of Mr. Armstrong's waiver.

(Appellant's Brief, pp.7-8.)

However, in the district court, Armstrong did not argue that article X, § 5 of the Idaho Constitution *ipso facto* prevented the parole officer from allowing law enforcement officers from other agencies to act as her agent. In fact, article X, § 5 of the Idaho Constitution was not mentioned in the district court, either in court or in the pleadings

and briefs. (See generally R., pp.54-55, 63-64, 65-68, 71-78, 84-88, 96-108; Tr., pp.6-130.) Rather, the sole question presented by Armstrong in the lower court was whether the term "agent" in paragraph 8 of the conditions of parole (St. Ex. 1, p.2) included only personnel of Field and Community Services, or, as the state contended, any law enforcement officer acting at the behest of a parole officer. Because Armstrong did not argue in the district court what he now argues on appeal, he has failed to preserve this issue, and this Court should not consider it.

Moreover, article X, § 5 of the Idaho Constitution is irrelevant in determining whether the search of Armstrong's vehicle violated his constitutional rights; it reads:

> **State prisons -- Control over. --** The state legislature shall establish a nonpartisan board to be known as the state board of correction, and to consist of three members appointed by the governor, one member for two years, one member for four years, and one member for six years. After the appointment of the first board the term of each member appointed shall be six years. This board shall have the control, direction and management of the penitentiaries of the state, their employees and properties, and of adult felony probation and parole, with such compensation, powers, and duties as may be prescribed by law.

Nothing in article X, § 5 of the Idaho Constitution precludes parole officers from using law enforcement officers from other agencies as "agents" to assist in the performance of a parole officer's duties.

Armstrong's theory that article X, § 5 of the Idaho Constitution establishes a non-delegable set of duties that the Board of Correction (and presumably, its employees) cannot ask others to assist in as agents is meritless -- none of the cases cited by

Armstrong hold as much.[4] (See Appellant's Brief, pp.7-14.) Even if the overall "control, direction and management" of parole are non-delegable duties of the Board of Correction, it does not mean that a parole officer -- acting under the control, direction and management of the Board -- cannot enlist the assistance of a police officer to act as her agent in fulfilling her duties. See Beitzel v. Coeur d'Alene, 121 Idaho 709, 713, 827 P.2d 1160, 1164 (1991) ("Where a city has a nondelegable duty, the city may be liable not only for its own negligence in failing to carry out the duty, but also for the failure of others whom the city has authorized to carry out it's [sic] duty."); Herbst v. Bothof Dairies, Inc., 110 Idaho 971, 974, 719 P.2d 1231, 1234 (Ct. App. 1986) ("a principal may be directly liable for harm that occurs when an agent performs a nondelegable task that the 'principal Is under a duty to perform with care'") (quoting Second Restatement § 251(a) (1958)). Conversely, a police officer does not assume "the control, direction and management" of parole by merely conducting a search of a parolee's vehicle at a parole officer's request. Armstrong has failed to show any error in the district court's denial of his suppression motion.

[4] Armstrong quotes Mellinger v. State Dept of Corrections, 114 Idaho 494, 499, 757 P.2d 1213, 1218 (Ct. App. 1988), as stating, "'The enabling acts of the legislature involved no delegation of authority[.]'" (Appellant's Brief, p.8.) However, in referring to the Board of Correction and the Commission of Pardons and Parole, the Mellinger decision states, "The enabling acts of the Legislature involved no delegation of *legislative* authority to either body." Mellinger, 114 Idaho at 499, 757 P.2d at 1218 (emphasis added).

D. Armstrong Has Failed To Show The District Court Erred In Denying His Suppression Motion By Determining That The Vehicle Search Was Permissible As A Condition Of Parole

Armstrong argues that because his waiver "only encompassed actual agents of Field and Community Services, the warrantless search violated [his] constitutional rights to be free from unreasonable searches and seizures" under the Fourth Amendment of the United States Constitution and article 1, § 17 of the Idaho Constitution. (Appellant's Brief, p.13 (capitalization and punctuation modified).) Armstrong adds that his waiver "was limited to searches conducted by agents of Field and Community Services[,]" and "[a]s argued above, the Boise police officers were not such agents."[5] (Id.)

The district court ruled that the police officers who conducted the search of Armstrong's vehicle at Parole Officer Jeffries' request, were, in fact, acting as her agents. The court explained:

> The parole-agreement waiver in this case stated:
>
> > Parolee will submit to a search of person or property, to include residence and vehicle, at any time and place by any agent of Field and Community Services and s/he does waive constitutional right to be free from such searches.
>
> Defendant agreed to this term of the parole-agreement. Defendant agreed that he had no Fourth Amendment right to be free from a search "by any agent of Field and Community Services." Because this waiver was valid, the only question for the Court is whether the Boise City Police Officers who conducted the search were acting as agents of Field and

[5] The state assumes Armstrong is arguing that paragraph 8 of his conditions of parole (St. Ex. 1, p.2) precluded anyone other than Field and Community Services personnel from searching his car. However, it appears possible Armstrong is completing the argument that is founded on the idea that article X, § 5 of the Idaho Constitution precludes unrelated law enforcement officers from ever acting as agents of a parole officer. In the latter event, the state relies on its prior arguments concerning that state constitutional provision.

> Community Services when they conducted the search. The Court finds that, as a matter of law, they were.
>
> Black's Law Dictionary defines agent as "[o]ne who is authorized to act for or in place of another; a representative." *Black's Law Dictionary* 9th ed. (2009). The parole agent in this case authorized Boise City Police Officers to act in her place in conducting a search of the Defendant's vehicle. This is the very definition of an agent. The fact that the parole officer did not personally attend the search is of no constitutional consequence. *Cf. United States v. Richardson*, 849 F.2d 439, 442 (9th Cir. 1988) (noting that requiring the probation officer's physical presence during every probation search would unnecessarily interfere with the twin goals of probation: rehabilitation of the probationer and protection of society), overruled on other grounds by *United States v. Knights*, 534 U.S. 112, 121-22 (2001).
>
> Defendant's motion to suppress the evidence is denied.

(R., pp.115-117 (footnotes omitted).)

The state relies on the district court's well-reasoned and succinct ruling, as set forth above. Armstrong has failed to show any error in the district court's analysis and conclusion that, under the dictionary definition of "agent," the police officers were acting as agents of the parole officer when they searched Armstrong's vehicle pursuant to the parole officer's authorization.

E. The Parole Search Was Justified By Reasonable Suspicion That Armstrong Was In Violation Of His Parole

Even without Armstrong's signed conditions of parole, the search of his vehicle by police officers was justified.

Parolees and probationers enjoy a reduced expectation of privacy against governmental intrusion. Samson v. California, 547 U.S. 843 (2006); United States v. Knights, 534 U.S. 112 (2001). The United States Supreme Court has held that probationers and parolees, due to their status as such, have a diminished expectation of

privacy for purposes of the Fourth Amendment. United States v. Knights, 534 U.S. 112 (2001). The Idaho Supreme Court recognized this same diminished expectation of privacy in State v. Gawron,112 Idaho 841, 843, 736 P.2d 1295, 1297 (1987), stating: "persons conditionally released to societies have a reduced expectation of privacy, thereby rendering intrusions by government authorities 'reasonable' which otherwise would be unreasonable or invalid under traditional constitutional concepts." Applying this principle to the police search of Armstrong's vehicle -- at the request of the parole officer -- supports the conclusion that the search was not unconstitutional. The Supreme Court's opinion in Samson v. California, 547 U.S. 843 (2006), is instructive.

In Samson, the Court "granted certiorari to decide whether a suspicionless search, conducted under the authority [of a statute authorizing a search without a warrant or probable cause], violates the Constitution." 547 U.S. at 846. The Court held "it does not." Id. In reaching this conclusion, the Court noted its prior conclusion in Knights that probationers and parolees have a diminished expectation of privacy. Id. at 847-849. The Court reasoned:

> As we noted in *Knights*, parolees are on the "continuum" of state-imposed punishments. On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment. As this Court has pointed out, parole is an established variation on imprisonment of convicted criminals . . .. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements.
>
> . . . The extent and reach of [California's] parole conditions clearly demonstrate that parolees . . . have severely diminished expectations of privacy by virtue of their status alone.

547 U.S. at 850 (citations and quotations omitted).

Based upon a parolee's reduced expectation of privacy and the state's interests in the ability to regulate those released on parole, the Court in Samson concluded that "[i]mposing a reasonable suspicion requirement" on the ability to search a parolee "would give parolees greater opportunity to anticipate searches and conceal criminality." Samson, 547 U.S. at 854. Accordingly, the Court held "that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Id. at 856.

Although Samson involved actions taken pursuant to a statute that permitted suspicionless searches, the holding of the case stands for the broader proposition that such searches do not violate the Fourth Amendment. 547 U.S. at 856. It logically follows from this holding that police officers could do precisely what they did in this case without running afoul of the Fourth Amendment, *i.e.*, search the vehicle belonging to Armstrong, who was on parole, without any suspicion whatsoever. Indeed, police officers exceeded this minimum standard by virtue of their knowledge that Armstrong was, as reported by his mother, under the influence of methamphetamine and talking about her being dead. Armstrong was in violation of his parole by apparently being under the influence of methamphetamine, thereby providing a reasonable basis, if not a "reasonable suspicion," for searching his vehicle.

Because the search of Armstrong's vehicle was constitutionally permissible, he has failed to show he is entitled to suppression of any evidence found as a result of that search.

CONCLUSION

The state respectfully requests that this Court affirm Armstrong's conviction.

DATED this 11th day of July, 2014.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of July, 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SARA B. THOMAS
STATE APPELLATE PUBLIC DEFENDER

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

John C. McKinney
Deputy Attorney General

JCM/pm