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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45863-2018**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CR-2017-13367**
	)	
BRANDON LEE ANDERSON,	)	
	)	
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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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Brandon Lee Anderson appeals from his judgment of conviction for possession of marijuana, possession of paraphernalia, delaying an officer, attempted unlawful entry, and two counts of felony battery on a police officer. He claims the district court erred by denying his motion to suppress evidence.

Statement Of The Facts And Course Of The Proceedings

The district court made the following factual findings relevant to this appeal:

> [O]n July the 23rd of 2017 at about 12:23 a.m., at least that's what the preliminary hearing facts had indicated, Deputy Ballman of the Kootenai County Sheriff's Office was on patrol in the Dalton Gardens area.
>
> And, in fact, I think the—I think just the Dalton Gardens area it was testified to, but in Kootenai [C]ounty, and observed an individual ultimately identified as the defendant, Mr. Brandon Anderson, walking down the roadway. The Court's familiar with the Dalton Gardens area and is familiar that largely there are no sidewalks along those areas. That it's a roadway and then the side of the road and then on to people's property, either lawns or driveways or maybe fields.
>
> But he saw who was ultimately identified as Mr. Anderson, the defendant, walking down one of the roadways in Dalton Gardens. And Deputy Ballman turned his vehicle around. And in response to turning the vehicle around to come back to contact Mr. Anderson, the defendant, Mr. Anderson walked up to the front door of a house. A house that was blacked out. No porch light on it. And just walked up to the front porch of this residence.
>
> Deputy Ballman asked if he lived there. Got no response at first. Eventually said no. Asked him what he was doing there. There was no response at first but eventually said he was going to ask for some water at between midnight and 1:00 o'clock in the morning at a darkened house. May have said something about, well, I know somebody a few houses away and maybe I was going to get some water from them. Pretty vague answers for sure.

> Deputy Ballman at some point there called Mr. Anderson over to him and asked him his name. May have told him to stand by the patrol car. And in that time frame another deputy by the name of [Franssen] had advised Deputy Ballman that he knew who was out with Deputy Ballman and this was Brandon Anderson and he had warrants out for his arrest.

(11/17/17 Tr., p.26, L.10 – p.27, L.25.)

Deputy Franssen arrived on scene and, based on the five active warrants, informed Anderson "he was under arrest." (Prelim. Tr.[1], p.9, Ls.6-14; p.14, Ls.10-16.) Anderson then "took off," jumping fences and running through the neighborhood. (Id., p.9, L.11 – p.10, L.6.)

So Deputy Ballman chased after him. (Id., p.9, L.24 – p.10, L.2.) Ballman eventually caught Anderson and grabbed him "in an attempt to place him under arrest." (Id., p.11, Ls.19-21.) At that point Anderson "immediately began fighting with" Deputy Ballman, landing "multiple strikes." (Id., p.11, L.25 – p.12, L.1.) Deputy Ballman sprayed Anderson in the face with OC spray; but Anderson, undaunted, started "striking [the officer] in the head." (Id., p.12, Ls.1-25.) After Ballman grabbed ahold of Anderson's shirt in an attempt to subdue him, Anderson managed to "slip out" of the slugfest and dart away. (Id., p.13, Ls. 13-17; R., p.29.)

Deputy Franssen continued the pursuit and spotted Anderson, now shirtless, "trying to break into the back sliding glass door of a residence." (R., p.36.) Anderson "forced the screen door open" but the sliding glass door would not open, so Anderson

[1] The preliminary hearing transcript, which the district court took judicial notice of during the motion to suppress hearing (11/17/17 Tr., p.19, Ls.9-18), can be found on pages 1 through 12 of the augmented record on appeal.

started kicking it. (Prelim. Tr., p.27, Ls.15-23; R., p.36.) Deputy Franssen caught up to Anderson and pulled him away from the house and down to the ground. (Prelim. Tr., p.28, Ls.5-8.) Anderson struggled, pushing and "mule kicking" Deputy Franssen until the deputy "[got] control over him and [got] him handcuffed." (Id., p.28, L.4 – p.29, L.6.) Deputy Franssen ended up with a scratched hand, "an open cut on [his] right elbow" a jammed ring finger, "secondary OC exposure," and a neck injury. (Id., p.29, Ls.10-15.) Even after Anderson was handcuffed, he "continued to struggle and resist." (Id., p.29, Ls.5-6.)

Additional deputies eventually arrived and helped contain Anderson and search him. (Id., p.29, Ls.8-9.) They found "marijuana, a glass pipe with burnt residue, and several scrapers" in Anderson's "front pants pockets." (R., p.36.) Anderson was ultimately charged with possession of marijuana, possession of paraphernalia, attempted unlawful entry, delaying an officer, providing false information (for initially giving the police officers a false name), and two counts of felony battery on law enforcement. (R., pp.55-58.)

Anderson filed a motion to dismiss the false information charge (which was granted and is not at issue on appeal) (R., pp.76-79), and a motion to suppress (R., pp.72-75, 80-81). Anderson argued that the "possession of Marijuana and Paraphernalia charges should be suppressed as [fruit] of the poisonous tree because Mr. Anderson was detained without reasonable suspicion of criminal activity." (R., p.72 (emphasis altered).) The district court denied the motion, concluding 1) that reasonable suspicion justified the original detention; and 2) that, in any event, Anderson was "searched incident to [the]

arrests and he had committed offenses by running for it and by resisting," which led to the discovery of "the items found on him." (11/17/17 Tr., p.30, L.1 – p.31, L.18.)

Anderson pleaded guilty to the attempted unlawful entry charge prior to trial. (R., p.94; 12/4/17 Tr., pp.25-31.) The remaining charges proceeded to trial and Anderson was found guilty of possession of marijuana, possession of paraphernalia, delaying an officer, and both counts of felony battery on law enforcement. (R., pp.151-52.)

Anderson received credit for time served for the misdemeanor counts. (R., pp.168-71.) The district court sentenced Anderson to two concurrent five-year sentences with two years fixed, retaining jurisdiction, for the felonies. (R., pp.172-74.) Anderson timely appealed. (R., pp.175-78; 187-91.)

ISSUES

Anderson states the issue on appeal as:

Did the district court err in denying Mr. Anderson's motion to suppress?

(Appellant's brief, p.5)

The state rephrases the issues as:

I. Has Anderson failed to show the evidence should be suppressed, because he has failed to address the district court's holding that the evidence was found in a search incident to arrest?

II. Has Anderson failed to show the district court erred in denying the motion to suppress?

ARGUMENT

I.
Anderson Fails To Show The Evidence Found On His Person Should Be Suppressed Because He Has Failed To Challenge The District Court's Conclusion That The Evidence Was Discovered In A Search Incident To Arrest

"Where a lower court makes a ruling based on two alternative grounds and only one of those grounds is challenged on appeal, the appellate court must affirm on the uncontested basis." Rich v. State, 159 Idaho 553, 555, 364 P.3d 254, 256 (2015) (quoting State v. Grazian, 144 Idaho 510, 517-18, 164 P.3d 790, 797-98 (2007)). To preserve arguments on appeal parties must raise issues in their opening briefs. Patterson v. State, Dep't of Health & Welfare, 151 Idaho 310, 321, 256 P.3d 718, 729 (2011) ("In order to be considered by this Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief.").

The district court found that the Anderson was appropriately detained in the first instance, and that "all the evidence that flows from that appropriate detention is appropriately gathered evidence." (11/17/17 Tr., p.31, Ls.9-11.) But the district court additionally denied suppression because the evidence was collected incident to a lawful arrest:

> When Mr. Anderson ran for it, he was then seized and arrested. *He was searched incident to those arrests and he had committed offenses by running for it and by resisting and then the items found on him.* So *based on that, the Court is denying Defendant's Motion to Suppress Evidence….*

(11/17/17 Tr., p.31, Ls.12-17 (emphasis added).)

Anderson has only challenged the reasonable suspicion underlying the initial encounter that he purports was a detention. (See Appellant's brief, pp.6-9.) He does not mention, much less challenge, the district court's conclusion that his motion was also

being denied because he "committed offenses" by running and resisting and he was "searched incident to those arrests." (See Appellant's brief.) Accordingly, the district court's decision must be affirmed on this uncontested basis.[2]

II.
Anderson Fails To Show The District Court Erred In Denying His Motion To Suppress Evidence

A. Introduction

Turning to the merits, Anderson argues the district court erred in denying his motion to suppress. He makes one claim: "The district court erred in concluding the officer who observed Mr. Anderson walking after midnight in a suburban neighborhood wearing all black had reasonable and articulable [suspicion] of criminal activity." (Appellant's brief, p.1.) Anderson avers that, instead, "Officer Ballman detained Mr. Anderson based on a hunch." (Appellant's brief, p.6.)

Anderson's argument is incorrect for two reasons and irrelevant for several others. It is incorrect because, as the state argued below (but the district court erroneously disagreed with), the initial encounter between Anderson and the officer was not a detention but a consensual encounter. Alternatively, even if the initial encounter was a detention it was supported by ample reasonable suspicion that cannot credibly be described as a "hunch."

---

[2] Anderson's arrest for felony battery and attempted unlawful entry was proper even if this Court concludes that the initial stop was unlawful, as explained in section II.H below. Thus, the search incident to arrest exception is a ground for affirming that is independent from the court's decision on the initial stop. Therefore, the district court's decision can and must be affirmed on this uncontested basis.

And even assuming the initial encounter was an improper stop it would be irrelevant to the ultimate question of whether the evidence should be suppressed. Anderson fled from the police; thus, under State v. Zuniga, 143 Idaho 431, 146 P.3d 697 (Ct. App. 2006), his ultimate capture by police was a new detention that was supported by reasonable suspicion. Moreover, Anderson had several valid arrest warrants and the search was attenuated from any initial improper detention. Not only that, but Anderson was ultimately searched incident to an arrest for attempted unlawful entry—a charge he ultimately pleaded guilty to, "waiv[ing] all non-jurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings." State v. Al–Kotrani, 141 Idaho 66, 69, 106 P.3d 392, 395 (2005).

Anderson was also searched incident to an arrest for two counts of battery on law enforcement. Regardless of the propriety of the initial stop, the battery arrest was proper because defendants are not entitled to attack the police following an unlawful detention. State v. Lusby, 146 Idaho 506, 509, 198 P.3d 735, 738 (Ct. App. 2008). In light of the proper arrest for battery the district court's ultimate conclusion was correct: Anderson was appropriately searched incident to arrest. (11/17/17 Tr., p.31, Ls.12-15.) At any rate, even assuming a flawed initial stop, Anderson fails to show 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, 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 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, 897 P.2d 993, 997 (1995); State v. Fleenor, 133 Idaho 552, 555, 989 P.2d 784, 787 (Ct. App. 1999). The appellate court also gives deference to any implicit findings of the trial court supported by substantial evidence. State v. Brauch, 133 Idaho 215, 218, 984 P.2d 703, 706 (1999).

C. The Initial Encounter Was Consensual

"An encounter between a law enforcement officer and a citizen does not trigger Fourth Amendment scrutiny unless it is nonconsensual." State v. Willoughby, 147 Idaho 482, 486, 211 P.3d 91, 95 (2009) (citations omitted). To constitute a seizure, the officer must, "by means of physical force or show of authority," in some way restrain an individual's liberty. Id. This "requires words or actions, or both, by a law enforcement officer that would convey to a reasonable person that the officer was ordering him or her to restrict his or her movement." Id. (citations omitted). "[A] request for identification or mere questioning is not enough, by itself[,] to constitute a seizure." State v. Landreth, 139 Idaho 986, 990, 88 P.3d 1226, 1230 (2004) (citations omitted). "This is so because the person approached need not answer any question put to him and may decline to listen to the questions at all and go about his business." State v. Osborne, 121 Idaho 520, 523-524, 826 P.2d 481, 484-485 (Ct. App. 1991) (citing Florida v. Royer, 460 U.S. 491, 497-498 (1983)). "Thus, where an officer merely approaches a person who is standing on the street, or seated in a non-moving vehicle located in a public place, and poses a few

questions, no seizure has occurred." Id. (citation omitted). The relevant inquiry is whether, under the totality of the circumstances, "a reasonable person would feel free to disregard the law enforcement officer"; if so, "then the encounter is consensual." Willoughby, 147 Idaho at 486, 211 P.3d at 95.

Some examples of facts that might show a seizure, "even where the person did not attempt to leave,"

> would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

State v. Liechty, 152 Idaho 163, 168, 267 P.3d 1278, 1283 (Ct. App. 2011) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)). "Other circumstances that may indicate seizure include whether the officer used overhead emergency lights and whether the officer took action to block a vehicle's exit route." Id. (citing Willoughby, 147 Idaho at 487-88, 211 P.3d at 96-97; State v. Schmidt, 137 Idaho 301, 302-03, 47 P.3d 1271, 1272-73 (Ct. App. 2002); State v. Fry, 122 Idaho 100, 103, 831 P.2d 942, 945 (Ct. App. 1991)).

Anderson argued below that the initial encounter between himself and Deputy Ballman was a detention. (R., p.74; 11/17/17 Tr., p.22, L.16 – p.23, L.3.) The district court agreed: "I think Brandon Anderson was detained at the point that the deputy said, 'Well, come on over here and let me ask you your name and ask you some questions.'" (11/17/17 Tr., p.30, Ls.18-21.)

This was an error. The initial encounter between Deputy Ballman and Anderson was consensual. As the state pointed out below, when Deputy Ballman arrived he was

not brandishing a weapon nor were his overhead lights activated. (11/17/17 Tr., p.16, L.25 – p.17, L.5.) During the encounter Ballman was four feet away from Anderson and never touched Anderson. (11/17/17 Tr., p.9, Ls.10-15; p.17, Ls.8-10.) There was no "threatening presence" of additional officers during the initial encounter. (See Prelim Tr., p.9, Ls.4-14.) There was no evidence that the deputy's "language or tone of voice indicat[ed] that compliance with the officer's request might be compelled." (See 11/17/17 Tr., p.8, L.24 – p.9, L.5.) As such his invitation to "come on over here and let me ask you your name and ask you some questions" was much closer to a polite request than a command. (11/17/17 Tr., p.30, Ls.18-21.)

Moreover, while Anderson made much ado below about "Deputy Ballman [placing] Mr. Anderson between himself and the patrol vehicle," this factor was insufficient to show a detention. (R., p.74.) There is no indication in the record that Deputy Ballman or the patrol vehicle were blocking Anderson's exits or freedom of movement. (See 11/17/17 Tr., p.12, Ls.13-16.) Anderson was walking that night, not driving; so he was perfectly capable of walking away if he wanted to make an exit. (See 11/17/17 Tr., p.6, L.24 – p.7, L.17.) Anderson's eventual flight demonstrated exactly that.

The sum facts in the record are therefore insufficient to show a detention. And the single factor noted by the district court—the deputy's invitation to "come on over here" for questioning—was insufficient, on its own, to show a detention.

Idaho's appellate courts will affirm a district court's correct legal conclusion even where the district court applied an incorrect theory to reach that result. See State v. Garcia-Rodriguez, 162 Idaho 271, 275-76, 396 P.3d 700, 704-05 (2017) (declining to

adopt a "wrong result-wrong theory" rule, but affirming the propriety of the "right result-wrong reason" rule: "[w]hile the State properly observes that this Court has corrected lower court decisions based on legal error, we did so when the lower court reached the correct result albeit by way of erroneous legal reasoning"); see also State v. Akins, 164 Idaho 74, 423 P.3d 1026, 1034-35 (2018).

The state recognizes that the Idaho Court of Appeals recently narrowed the "right result-wrong theory" doctrine. In State v. Islas, the Court concluded that "[i]n order for the trial court to be affirmed on the 'right result-wrong theory' basis, the alternate theory on which the district court is affirmed must still have been presented below." 2019 WL 1053379, *8, ___ P.3d ___ (March 6, 2019, *petition for review pending*). But even under this more restrictive interpretation, the doctrine would still apply here. That is because the state explicitly argued in its briefing and oral argument that the initial encounter was consensual. (11/17/17 Tr., p.24, Ls.7-19; Aug. R., pp.5-6, 8.) Thus, there is no question that this argument was presented below and is a viable ground for affirming now.

While the district court incorrectly concluded that Anderson was detained its ultimate conclusion was correct and should be affirmed. Because Anderson was not detained during the initial encounter the district court properly denied the suppression motion.

D. Even Assuming The Initial Encounter Was A Detention It Was Supported By Ample Reasonable Suspicion

Pursuant to the Fourth Amendment of the United States Constitution a detention "is permissible if it is based upon specific articulable facts which justify suspicion that the

detained person is, has been, or is about to be engaged in criminal activity." State v. Sheldon, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003) (citing Terry v. Ohio, 392 U.S. 1, 21 (1968); United States v. Cortez, 449 U.S. 411, 417 (1981)). Whether an officer had reasonable suspicion to conduct an investigatory seizure is determined by the totality of the circumstances. State v. Rawlings, 121 Idaho 930, 932, 829 P.2d 520, 522 (1992).

The state disagrees that Anderson was detained as explained above. However, assuming there was a detention, the district court correctly concluded that plenty of reasonable suspicion supported it:

> I think—in fact, I find, as a conclusion here, that at the point that Mr. Anderson left the roadway and walked up to a darkened house with no porch light on in the middle of the night after a police car had turned around and the beginning of an attempt to contact that person, that there was reasonable and articulable suspicion that a crime was afoot.
>
> I mean, that's a suspicious criminal activity for a person to do that. That was heightened then when the answer was given, Well, I'm going to ask for some water at this darkened out house and I don't live here and I may know somebody down the street that I might ask them for water. I forget how that exactly went. But all of that was suspicion that criminal activity was afoot.
>
> I don't think the attenuation doctrine really needs to be applied at all here. I think Brandon Anderson was detained at the point that the deputy said, "Well, come on over here and let me ask you your name and ask you some questions." But the Court finds he was appropriately detained on a reasonable and articulable suspicion of criminal activity being afoot.
>
> Even though one could not say this was the crime being committed, this was absolutely good police work to be finding out a little more about this fellow under these circumstances. And to detain him for the investigation of whether a crime had actually been committed or not.
>
> So the Court doesn't find that it was not a detention or that the—an illegal detention was attenuated by Mr. Anderson running for it, the Court

finds this was an appropriate detention at the time that he called Mr. Anderson over.

(11/17/17 Tr., p.30, L.1 – p.32, L.9.)

The district court's conclusion was undoubtedly right. It is self-evidently suspicious that Anderson was dressed in all black late at night in the type of area where prior burglaries had been reported (11/17/17 Tr., p.6, L.19 – p.7, L.7; p.18, Ls.1-6); that Anderson "immediately" walked up to a completely darkened house after the officer made contact (11/17/17 Tr., p.10, L.21 - p.11, L.6; p.13, L.20 – p.14, L.15); and that—after some hesitation—Anderson informed the officer that the house was not his, and that he "was going to ask the occupants[[3]] for some water" (11/17/17 Tr., p.14, L.16 – p.15, L.10). The district court correctly concluded this was suspicious, and that it was constitutionally proper (and good police work) to detain Anderson in light of the facts. (11/17/17 Tr., p.30, L.1 – p.31, L.11.)

On appeal Anderson pooh-poohs this inevitable conclusion, dismissing the officer's rationale behind the detention: "Officer Ballman detained Mr. Anderson based on a hunch. This was not good police work." (Appellant's brief, p.6.) Anderson likewise claims that "[h]ere, Officer Ballman had only a hunch that Mr. Anderson might have been involved in criminal conduct when he observed him walking on the side of the road 'wearing all black.'" (Appellant's brief, p.8.) Anderson's anti-hunch position fails

[3] The district court alternatively found that Anderson "[m]ay have said something about, well, I know somebody a few houses away and maybe I was going to get some water from them." (11/17/17 Tr., p.27, Ls.10-16.) Of course, it would be even *more* suspicious if that was what Anderson said, as his presence at the first house would have been even less explicable.

to persuade because it is inapplicable here. The record shows that Deputy Ballman was not acting on a hunch.

A "hunch" is a "feeling or guess based on intuition rather than fact." See Hunch, Oxford Living Dictionary, https://en.oxforddictionaries.com/definition/hunch (last visited April 9, 2019). And here Deputy Ballman's suspicions were based not on intuition, but on plenty of known suspicious facts. There was the fact that Anderson was wearing all black late at night while prowling the type of neighborhood where prior burglaries had occurred. (11/17/17 Tr., p.6, L.19 – p.7, L.7; p.18, Ls.1-6.) There was the fact that Anderson started walking towards the unlit house only after seeing the squad car. (11/17/17 Tr., p.10, 21 - p.11, L.6; p.13, L.20 – p.14, L.15.) And there was the fact that Anderson never claimed to know anyone who lived there. (See 11/17/17 Tr., p.14, Ls.16-23.) To top it off, there was Anderson's unconvincing explanation: he claimed he was going to ask the residents for some water. (11/17/17 Tr., p.14, L.16 – p.15, L.10.)

All of these facts taken together paint a manifestly suspicious picture. The most trusting homeowner would be suspicious of a stranger dressed in black skulking up to their home after midnight. A police academy freshman patrolling this area would have an inkling to stop and investigate the same. Even Inspector Clouseau would be suspicious of Anderson's unsatisfying explanation—because who marches up to strangers' unlit homes in the middle of the night to get water? The whole encounter was overflowing with glaring suspicious facts; all Deputy Ballman did was perceive them. Panning his reasonable, inescapable conclusion as a "hunch" simply fails to contend with the facts that supported it.

Anderson's actions provided ample reasonable suspicion to detain him for investigation. Anderson fails to show the district court's conclusion was incorrect.

E. Assuming Arguendo The Initial Encounter Was An Improper Stop, Anderson Was Properly Searched Following His Flight And Subsequent Seizure

The state argued in the alternative below that even assuming Deputy Ballman improperly detained Anderson during their initial encounter, Anderson's flight ended any initial detention and justified the eventual search and seizure. (Aug. R., p.9; 11/17/17 Tr., p.24, Ls.3-6, 17-19.) The state's position was that "[w]hatever argument [Anderson] may have had regarding his alleged illegal detention during his initial encounter with Deputy Ballman, he abrogated when he fled from the encounter. Much like the defendant in [State v. Zuniga, 143 Idaho 431, 146 P.3d 697 (Ct. App. 2006)], when [Anderson] fled he was no longer the subject of an unlawful detention." (Aug. R., p.9.)

Because the district court concluded the initial detention was justified it did not address this argument. (See 11/17/17 Tr., p.30, Ls.17-18; p.31, Ls.5-9.) However, on appeal, even if this Court concludes the initial encounter was improper, it should affirm on this alternative basis. After Anderson fled any initial detention ceased and the subsequent seizure, now supported by reasonable suspicion, would have been proper.

Fleeing from the police is by its very nature suspicious. "Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." Illinois v. Wardlow, 528 U.S. 119, 124 (2000). The Idaho Supreme Court has accordingly found reasonable suspicion and a justified detention in a case with similar facts to this one:

> In this case, the facts available to the officer were that he saw Mr. Padilla walking down an alley at about 2:00 a.m.; that he turned on his car's headlights and drove to a place near Mr. Padilla, positioned the car so that Mr. Padilla could clearly see that it was a marked police car, and stopped; and that, as he began getting out of the car, Mr. Padilla fled. Mr. Padilla did not merely run away down the sidewalk, alley, or street when the officer began getting out of the police car. He ran between two houses and jumped over a fence. Considering the totality of the facts available to the officers, they had a reasonable, articulable suspicion to believe criminal activity may be afoot and could seize Mr. Padilla in order to investigate their suspicion.

Padilla v. State, 161 Idaho 624, 627, 389 P.3d 169, 172 (2016). The Padilla Court therefore concluded that "the seizure of Mr. Padilla did not violate his rights under the Constitution of the United States." Id.

Not only is flight from police suspicious, but a seized defendant who flees from the police terminates the detention—even if the detention was unlawful. That was the case in Zuniga, where the defendant's "initial detention by Detective Lathrop was unreasonable under Fourth Amendment protections." 143 Idaho at 436, 146 P.3d at 702. But Zuniga "decided to forgo the opportunity to challenge his seizure" properly; i.e., by complying with the officer's commands and raising the issue later in a suppression hearing. Id. "Instead," Zuniga "chose to terminate the seizure through escape from [the detective's] authority." Id.

The Court concluded that "[i]t would be a fiction for us to hold that Zuniga was still under seizure by Lathrop while he was running away and no longer submitting or yielding to Lathrop's authority." Id. And as a result, the Court would not suppress the evidence that was later found as fruit of the poisonous tree:

> Accordingly, we hold that when Zuniga disobeyed Detective Lathrop's order to remain seated and fled from the scene, he was no longer the subject of an unlawful detention. The chase by Detective Lathrop did not

> constitute a new seizure under [California v. Hodari D., 499 U.S. 621, 627 (2010)], until Zuniga was tackled by Lathrop. The methamphetamine discarded by Zuniga and dropped by him when he was tackled was not the fruit of the poisonous tree. The district court correctly concluded that the evidence should not be suppressed.

Zuniga, 143 Idaho at 437, 146 P.3d at 703.

That same conclusion would inevitably apply here. Even assuming the initial encounter was an unlawful detention, Anderson ceased being detained the moment he took off running. His headlong flight from the officers (coupled with all the other suspicious facts already noted) was necessarily suspicious and justified a fresh seizure. Thus, even assuming the initial encounter was unlawful the subsequent seizure (and ultimate search) was proper and should be upheld on this alternative basis.

F. Alternatively, Even Assuming Anderson Was Initially Improperly Detained, The Attenuation Doctrine Applies

The state presented an additional alternative argument below: that "even if there had been a wrongful detention, said detention would be sufficiently attenuated from the recovery of the Marijuana and paraphernalia, due to the discovery of five active warrants." (Aug. R., p.8.) Because the district court concluded that Anderson was properly seized it did not consider whether the attenuation doctrine would apply here. (See 11/17/17 Tr., p.30, Ls.17-18; p.31, Ls.5-9.) While the district court did not reach the attenuation question, if this Court reaches the question, it should conclude that the attenuation doctrine applies.

Under the attenuation doctrine, evidence gathered following an improper stop may nevertheless be admitted "when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so

that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016) (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)). To determine whether the attenuation doctrine applies, courts look to three factors: "the elapsed time between the misconduct and the acquisition of the evidence"; whether there were any intervening circumstances, such as an arrest warrant; and whether the police misconduct "is *purposeful* or *flagrant*." State v. Cohagan, 162 Idaho 717, 721-22, 404 P.3d 659, 663-64 (2017) (emphasis in original, citing Strieff, 136 S. Ct. 2056).

In Cohagan, while the existence of an arrest warrant weighed "strongly in favor of attenuation," the court found there was no attenuation due to purposeful or flagrant police misconduct. 162 Idaho at 721-726, 404 P.3d at 663-668. In that case there was "no 'bona fide investigation'"—the officers had "no cause" to stop the defendant, not only because they had already identified him, but "because both Officer Otto and Officer Curtis himself had already confirmed that Cohagan was not the suspected individual." Id. at 723-24, 404 P.3d at 665-66. In other words, "there was simply no reason for Officer Curtis to stop Cohagan and run a warrant check." Id. at 724, 404 P.3d at 666. Because the attenuation doctrine does not allow "unjustified, suspicionless seizure of citizens," the attenuation doctrine was inapplicable in that case. Id. at 726, 404 P.3d 668.

Here, as explained above, there was abundant suspicion and justification for the officer to stop Anderson. (See 11/17/17 Tr., p.30, L.1 – p.31, L.11.) Officer Ballman was justified in investigating the matter and he quickly discovered that Anderson had several active arrest warrants. Because this was nothing like an unjustified, suspicionless search, and because the active warrants were an intervening circumstance strongly

favoring the state, the attenuation doctrine would apply here, and exclusion would be improper regardless of the propriety of the detention.

G. Regardless Of The Propriety Of The Initial Stop, Anderson Was Properly Searched Incident To Arrest For Attempted Unlawful Entry (Which He Pleaded Guilty To), And Felony Battery On An Officer (Which Was A Lawful Charge In Any Event)

The district court concluded that Anderson was properly detained and "therefore, all of the evidence that flows from that appropriate detention is appropriately gathered." (11/17/17 Tr., p.31, Ls.8-11.) Moreover, the district court additionally concluded that the evidence was properly seized during a search incident to arrest:

> When Mr. Anderson ran for it, he was then seized and arrested. He was searched incident to those arrests and he had committed offenses by running for it and by resisting and then the items found on him. So based on that, the Court is denying Defendant's Motion to Suppress Evidence….

(11/17/17 Tr., p.31, Ls.12-17.)

This conclusion is uncontested on appeal and should be affirmed as a matter of course, as explained in Section I above. Rich, 159 Idaho at 555, 364 P.3d at 256. But this conclusion should also be upheld on the merits, should this Court reach them. Regardless of the propriety of the initial stop Anderson was searched incident to arrest for attempted unlawful entry and for felony battery on a police officer, among other things. (R., p.16; 11/17/17 Tr., p.27, Ls.23-25; Prelim. Tr., p.14, Ls.10-12.)

"A warrantless search is presumptively unreasonable unless it falls within certain special and well-delineated exceptions to the warrant requirement." State v. Kerley, 134 Idaho 870, 873, 11 P.3d 489, 492 (Ct. App. 2000) (citing Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); State v. Ferreira, 133 Idaho 474, 479, 988 P.2d 700, 705

(Ct. App. 1999)). A search incident to arrest is a well-established exception to the warrant requirement and, as such, does not violate the Fourth Amendment. Chimel v. California, 395 U.S. 752, 762-63 (1969); Kerley, 134 Idaho at 874, 11 P.3d at 493.

Anderson was arrested for attempted unlawful entry, among other things. (R., p.16; 11/17/17 Tr., p.27, Ls.23-25; Prelim. Tr., p.14, Ls.10-12.) He eventually pleaded guilty to this charge. (R., p.94; 12/4/17 Tr., pp.25-31.) The record does not show that Anderson's guilty plea reserved any rights to challenge the decision on the motion to suppress. (See R., p.94; 12/4/17 Tr., pp.25-31.) As such, Anderson's guilty plea "waive[d] all non-jurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings." Al–Kotrani, 141 Idaho at 69, 106 P.3d at 395.

Consequently, Anderson's single-issue appeal challenging the suppression order cannot undo the attempted unlawful entry conviction—because he has waived any 4th Amendment challenge with respect to that charge. Id. And because Anderson was properly arrested for attempted unlawful battery (R., p.16), the search incident to that arrest was likewise proper, and its fruits should not be suppressed. Chimel, 395 U.S. at 762-63.

Anderson was also arrested for battering the deputies. (R., p.16; 11/17/17 Tr., p.27, Ls.23-25; Prelim. Tr., p.14, Ls.10-12.) This arrest would likewise be proper in any event because even unlawfully detained defendants have no "underlying right" to attack law enforcement. This common-sense proposition was adopted in Idaho in State v. Lusby:

> We begin by noting that Lusby's use of physical violence against the officer was a crime and was not justified by the officer's unlawful entry into her home. It is well established that an individual may not use force to

> resist a peaceable arrest by one she knows or has good reason to believe is a police officer, even if the arrest is illegal under the circumstances. Although a person may resist the use of unreasonable force, she has "no underlying right to resist the officers' attempt to make a peaceable arrest." "[I]f a person has reasonable ground to believe he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest." Instead, an individual subjected to illegal arrest should later pursue rights and remedies afforded by the civil or criminal law.

146 Idaho 506, 509, 198 P.3d 735, 738 (Ct. App. 2008).

The Lusby Court adopted the "nearly universal rule in American jurisdictions that when a suspect responds to an unconstitutional search or seizure by a physical attack on the officer, evidence of this new crime is admissible notwithstanding the prior illegality." Id. at 510, 198 P.3d at 739. Indeed, "although officers may have conducted an unconstitutional search or seizure, a subsequent attack on the officer is a new crime unrelated to any prior illegality." Id. The Court accordingly held that because the officers there "did not derive evidence of this new criminal conduct from any exploitation of the unlawful entry," the "evidence of Lusby's alleged battery on an officer or other forceful resistance is not suppressible." Id. And therefore, the "evidence of the battery, evidence of other criminal acts in resisting or obstructing the officer, and evidence of paraphernalia found in the search incident to Lusby's arrest are admissible." Id.

That same result would apply here. Regardless of the propriety of the initial stop Anderson had no underlying right to attack the officers. Id. The evidence of the attack was not "derive[d] … from any exploitation" of the initial stop, just as the evidence of the battery in Lusby was not derived from the unlawful entry. See id. Because the battery on the officers was "a new crime," evidence of which was "admissible notwithstanding" any

alleged prior illegality, the felony battery arrest was proper. Id. And, therefore, "the search incident" to that arrest was likewise proper. Chimel, 395 U.S. at 762-63.

One anticipatory note on preservation: the state admittedly did not raise the search incident to arrest exception in its argument below. (See Aug. R.; 11/17/17 Tr., pp.24-25.) But this issue is nevertheless preserved because it was *actually decided* by the district court below. The court concluded the evidence was properly found in a "search[] incident to those arrests," and then gave Anderson a chance to comment. (11/17/17 Tr., p.31, Ls.12-22.) Anderson made no noises below (and none on appeal) about the court's conclusion that the items were found pursuant to a search incident to arrest. (See 11/17/17 Tr., p.31, Ls.12-22; see Appellant's brief.)

The Idaho Supreme Court recently clarified that "if the issue was argued to, *or decided by*, the district court it can form the basis for review by this Court." State v. Jeske, ___ Idaho ___, 436 P.3d 683, 689 (2019) (emphasis added). This is because there is a "distinction between issues not formally raised below and issues that 'never surfaced' below." Id. Thus, if an issue "surfaced below" because the district court actually ruled on it—such as the blood draw in Jeske or the search incident to arrest here—it is consequently preserved "and will be addressed" by Idaho's appellate courts. Id. Because the district court decided the items here were properly seized pursuant to a search incident to arrest this issue is preserved for this Court's review. (11/17/17 Tr., p.31, Ls.12-18.)

H. The Felony Convictions And Attempted Unlawful Entry Conviction Should Not Be Vacated In Any Event

Anderson frames his request for relief in the broadest possible terms: he asks this Court to "vacate his judgment of conviction" in its entirety, which would include the

felony battery on law enforcement convictions and the attempted unlawful entry conviction. (See Appellant's brief, p.10.)

But even assuming Anderson prevails on the merits challenging the initial stop, the felony counts should still not be vacated. As just explained, Anderson had no underlying right to attack the police officers. Lusby, 146 Idaho at 509-10, 198 P.3d at 738-39. This holds true *even if* the initial stop was unlawful (see id.), which is the only thing Anderson has ever claimed on appeal (see Appellant's brief). So even if Anderson prevails on his only issue and successfully suppresses the marijuana and paraphernalia on account of an unlawful stop, it would not affect the felony battery counts. The felony counts should, therefore, be affirmed in any event.

Similarly, even if Anderson prevails on appeal his attempted unlawful entry conviction should not be vacated. Anderson pleaded guilty to attempted unlawful entry and the record does not show he reserved any right to appeal the district court's suppression order with respect to it. (See R., p.94; 12/4/17 Tr., pp.25-31.) That guilty plea "waive[d] all non-jurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings" with respect to that conviction. Al–Kotrani, 141 Idaho at 69, 106 P.3d at 395. Thus, because a victory on this appeal cannot undo Anderson's conviction for attempted unlawful entry, that conviction should likewise not be vacated.

CONCLUSION

The state respectfully requests this Court affirm the judgment of conviction. Alternatively, the state respectfully requests the Court vacate the judgment of conviction only as to the misdemeanor possession and paraphernalia counts, and reverse and remand the district court's suppression order only with respect to those counts.

DATED this 24th day of April, 2019.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24th day of April, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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KDG/dd