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State v. Floyd Appellant's Brief Dckt. 42636

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. WAYNE RAY FLOYD, Defendant-Appellant.	NO. 42636 CANYON COUNTY NO. CR 2014-4572 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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STATEMENT OF THE CASE

Nature of the Case

Wayne Ray Floyd timely appealed from the district court's judgment of conviction. On appeal, Mr. Floyd asserts that the district court erred when it denied his motion to suppress the State's evidence, *to wit*, methamphetamine. Specifically, he argues that his consent for police to enter his home was the product of coercion.

Statement of the Facts and Course of Proceedings

At approximately 8:00 P.M. in early February 2014, Officer Richardson and Officer Finley were in separate unmarked patrol cars and were looking for two wanted men. (07/31/14 Tr., p.7, Ls.7-21, p.10, L.1 - p.11, L.3, p.23, Ls.3-10.) Officer Richardson noticed two men walking on a street and thought they might be the two people for which he was looking. (07/31/14 Tr., p.7, L.22 - p.8, L.6.) Officer Richardson activated his lights and started talking with the two men. (07/31/14 Tr., p.8, Ls.9-11, p.10, Ls.4-12.) About thirty to forty seconds after Officer Richardson initially contacted the two men, Officer Finley pulled his car over and approached Officer Richardson's location. (07/31/14 Tr., p.23, L.5 - p.24, L.7.) Both of the officers were wearing police uniforms and had visible firearms. (07/31/14 Tr., p.10, Ls.13-24, p.24, Ls.2-18.)

Officer Richardson quickly determined that the two men, Mr. Floyd and Jose Alvarez, were not the people for which he was looking. (07/31/14 Tr., p.8, Ls.12-16.) During that conversation, Officer Richardson noticed that Mr. Floyd's eyes were dilated and that he smelled of burnt marijuana. (07/31/14 Tr., p.9, Ls.4-11.) Officer Richardson then asked Mr. Floyd if he had been using marijuana and Mr. Floyd said he had just smoked some at his house. (07/31/14 Tr., p.9, Ls.12-18.) Officer Richardson "offered to collect the paraphernalia at [Mr. Floyd's] house, and [Officer Richardson] would

dispose of it." (07/31/14 Tr., p.11, Ls.14-21.) Mr. Floyd said he was "okay" with that plan, because "it had been agreed upon that if [Officer Richardson] retrieved the paraphernalia, [Mr. Floyd] would [not] be charged with intoxicated pedestrian." (07/31/14 Tr., p.11, Ls.21-22, p.18, Ls.2-16.)

Since Mr. Floyd's house was about half of a city block from the place where he was stopped by Officer Richardson, Officer Richardson and Officer Finley followed Mr. Floyd as he walked back to his home. (07/31/14 Tr., p.11, L.23 - p.12, L.1.) Without further conversation, Officer Richardson, Officer Finley, and a third unnamed police officer entered Mr. Floyd's home and followed Mr. Floyd into a bedroom. (07/31/14 Tr., p.12, Ls.2-11, p.37, Ls.10-12.) Upon entering the bedroom, Officer Richardson noticed a woman sitting on a bed and explained to her about the plan to take the paraphernalia. (07/31/14 Tr., p.12, Ls.13-14.) The woman opened a drawer, and Officer Richardson noticed a metal pipe, a glass pipe, and a silver pill vial. (07/31/14 Tr., p.12, Ls.15-24.) Officer Richardson then asked Mr. Floyd and the woman if he could search the rest of the bedroom for drugs or drug paraphernalia. (07/31/14 Tr., p.13, Ls.8-15.) At that point, the woman left the room and Mr. Floyd directed Officer Richardson to the remaining contraband located in the bedroom. (07/31/14 Tr., p.14, Ls.8-17.) During this search of the bedroom, Officer Richardson discovered a spoon with residue that tested positive for methamphetamine. (07/31/14 Tr., p.13, L.21 - p.14, L.7.)

Mr. Floyd was charged, by Information, with possession of a controlled substance, methamphetamine, and manufacturing with intent to deliver paraphernalia. (R., pp.14-15.) Mr. Floyd filed a suppression motion and a statement in support,

wherein he argued that his initial consent to the police's entry into his home was the product of coercion. (R., pp.21-23.)

A hearing on Mr. Floyd's suppression motion was held, and Officer Richardson's initial conversation with Mr. Floyd was the pivotal issue. Officer Richardson testified that he asked Mr. Floyd if "we could go back and get [the marijuana pipe], and [Mr. Floyd] said yes." (07/31/14 Tr., p.19, L.23 - p.20, L.5.) Officer Richardson conceded it was possible that Mr. Floyd thought that Officer Richardson was going to wait outside of Mr. Floyd's home while Mr. Floyd retrieved the pipe. (07/31/14 Tr., p.20, Ls.6-9.)

Based on the forgoing, the district court found that there was no express verbal consent for the officers to enter Mr. Floyd's home. (07/31/14 Tr., p.40, Ls.16-20.) The district court found that "the statement of . . . Officer Richardson, that Mr. Floyd consented to all of them going back to the home to retrieve the paraphernalia necessarily implied that they would have to go inside the home to retrieve the paraphernalia, because that's where the paraphernalia was." (07/31/14 Tr., p.41, Ls.10-17.) The district court also found its conclusion was supported by the fact that Mr. Floyd walked to his home, let the officers into the home, led the officers to the room, and consented to the subsequent search of the room. (07/31/14 Tr., p.41, Ls.18-24.)

As mentioned above, Mr. Floyd argued that his consent was the product of coercion because of the combination of Officer Richardson's promise that Mr. Floyd would not be arrested. (R., pp.21-24; 07/31/14 Tr., p.34, L.23 - p.37, L.20.) The district court asked Mr. Floyd if he had any authority for the proposition that a promise by police to not arrest a defendant in return for the defendant's consent to a search is coercive (07/31/14 Tr., p.37, L.21 - p.38, L.5.) Mr. Floyd's counsel said that the promise was a

factor relevant to the determination of whether Mr. Floyd's consent was coerced. (07/31/14 Tr., p.37, L.21 - p.38, L.5.) The district court never expressly addressed this theory, and, as mentioned above, ruled that Mr. Floyd consented to Officer Richardson's request because Officer Richardson asked if "they" could go back to Mr. Floyd's home. (07/31/14 Tr., p.39, L.4 - p.42, L.18.)

Pursuant to a plea agreement, Mr. Floyd pleaded guilty to possession of a controlled substance and preserved his ability to challenge the denial of his suppression motion on appeal. (R., pp.29-34, 37-38.) Thereafter, the district court imposed a unified sentence of four years, with one year fixed, but suspended the sentence and placed Mr. Floyd on probation. (R., pp.47-50.) Mr. Floyd timely appealed. (R., pp.57-58.)

ISSUE

Did the district court err when it denied Mr. Floyd's motion to suppress the evidence discovered in Mr. Floyd's home following an unlawful search under the Fourth Amendment of the United States Constitution and Article I Section 17 of the Idaho Constitution?

ARGUMENT

The District Court Erred When It Denied Mr. Floyd's Motion To Suppress The Evidence Discovered In Mr. Floyd's Home Following An Unlawful Search Under The Fourth Amendment Of The United States Constitution And Article I Section 17 Of The Idaho Constitution

A. Introduction

Mr. Floyd argues that he was overcome by Officer Richardson's coercion when he allowed Officer Richardson to enter his home. There are various factors pointing to an atmosphere of involuntary consent, which included Mr. Floyd's initial nighttime seizure, the arrival of another police officer in a separate vehicle, and Officer Richardson's promise that Mr. Floyd would not be arrested if he cooperated with Officer Richardson.

B. Standard Of Review

Idaho appellate courts apply a bifurcated standard of review upon a challenge to a trial court's ruling on a motion to suppress. First, an appellate court defers to the district court's findings of fact unless those findings are clearly erroneous. *See, e.g., State v. Willoughby*, 147 Idaho 482, 485 (2009). Second, this Court reviews *de novo* the trial court's application of constitutional and legal principles to the facts as found. *Id.* at 485-486.

C. Law enforcement's Entry Into Mr. Floyd's Home Was Not Exempted From The Warrant Requirement Under The Consent Exception

Mr. Floyd has liberty interests which are protected by the Fourth Amendment of the United States Constitution, which provides: 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." Further, Mr. Floyd has similar liberty interests

protected under Article I Section 17 of the Idaho Constitution.[1] *See State v. Christensen*, 131 Idaho 143, 146 (1998) ("Like the Fourth Amendment, the purpose of Art. I, § 17 is to protect Idaho citizens' reasonable expectation of privacy against arbitrary governmental intrusion."). "A warrantless search is presumptively unreasonable unless it falls within certain special and well-delineated exceptions to the warrant requirement." *State v. Tyler*, 153 Idaho 623, 626 (Ct. App. 2012). The State has the burden to establish the applicability of an exception to the warrant requirement. *State v. Fee*, 135 Idaho 857, 861 (Ct. App 2001).

A recognized exception to the warrant requirement is commonly referred to as the consent exception. A search conducted with freely given consent is an exception to the warrant requirement. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973). It is the State's burden to prove, by a preponderance of the evidence, that the consent was voluntary rather than the result of duress, coercion, direct or implied. *Id.* at 221. A voluntary decision is one that is "the product of an essentially free and unconstrained choice by its maker." *Id.* at 225. An individual's consent is involuntary, on the other hand, if his/her "will has been overborne and his capacity for self-determination critically impaired." *Id.* In determining whether a defendant's will was overborne, the court must assess "the totality of all surrounding circumstances of the accused and the details of the interrogation." *Id.* at 226. Accordingly, whether consent was granted voluntarily, or was the product of coercion, is a factual determination to be based upon the surrounding circumstances, accounting for subtly coercive police questions and the

[1] Mr. Floyd is arguing under the Idaho Constitution because Idaho's exclusionary rule is more expansive than its federal counterpart. *See State v. Koivu*, 152 Idaho 511 (2012).

possibly vulnerable subjective state of the party from whom consent is elicited. *Id.* at 229.

"Factors to be considered include whether there were numerous officers involved in the confrontation, the location and conditions of the consent, including whether it was night, whether the police retained the individual's identification, whether the individual was free to leave, and whether the individual knew of [his/her] right to refuse consent." *State v. Rector*, 144 Idaho 643, 645 (Ct. App. 2007). Additionally, it has been held that a police officer's promise for leniency, including promises not to arrest a defendant in return for a defendant's consent to a search constitutes a factor which can be considered when evaluating whether consent was voluntarily provided. *See State v. Kysar*, 114 Idaho 457 (1988); *see also State v. Garcia*, 143 Idaho 774, 780 (Ct. App. 2006).

In this case, there are various factors present which support the conclusion that Mr. Floyd's consent was coerced. Officer Richardson stopped Mr. Floyd at night on a street which was not well lit. (07/31/14 Tr., p.7, L.7 - p.8, L.8, p.9, Ls.24-25.) Officer Richardson approached Mr. Floyd in an unmarked police car and suddenly activated his lights. (07/31/14 Tr., p.10, Ls.1-12.) This would convey a show of authority and would also convey that this stop was unique in that he was not approached by a marked police car. The intimidating nature if this stop was exacerbated when Officer Finley arrived at the scene between thirty to forty seconds after Officer Richardson stopped Mr. Floyd. (07/31/14 Tr., p.24, Ls.2-8.) It should be noted that Officer Finley was acting as cover officer and kept his distance from and did not speak with Mr. Floyd, which further adds to the intimidating nature of this contact. (07/31/14 Tr., p.24, L.19 - p.25, L.22.)

Additionally, both of the officers were wearing police uniforms and had visible firearms. (07/31/14 Tr., p.10, Ls.13-24, p.24, Ls.2-18.)

After Officer Richardson determined that Mr. Floyd and Mr. Alvarez were not the men he was looking for, he started asking incriminating questions. (07/31/14 Tr., p.8, L.9 - p.9, L.18.) Officer Richardson only asked incriminating questions and did not engage in any small talk, which conveyed that this was not a consensual encounter. (*See generally* 07/31/14 Tr.) Officer Richardson never told Mr. Floyd he was free to leave or otherwise terminate the encounter with Officer Richardson. (07/31/14 Tr., p.19, Ls.19-22.) It was in this coercive and intimidating atmosphere that Officer Richardson suggested that he would not arrest Mr. Floyd for being an intoxicated pedestrian if Mr. Floyd agreed to take Officer Richardson and Officer Finley back to his home to get Mr. Floyd's drug paraphernalia. (07/31/14 Tr., p.11, Ls.14-22, p.18, L.7 -p.20, L.5.) Under those circumstances, a reasonable person in Mr. Floyd's position would not feel free to refuse Officer Richardson's request. Moreover, the promise not to arrest Mr. Floyd if he cooperated would have created a false sense of security which undermined Mr. Floyd's ability to refuse to cooperate with Officer Richardson.

Further support for Mr. Floyd's position can be found in *State v. Rector*, 144 Idaho 643 (Ct. App. 2007). In that case, two police officers were patrolling when they observed Rector walking away from the direction of an apartment where drug activity was suspected. *Id.* at. 643-644. The police officers stopped their unmarked police car and approached Rector on foot. *Id.* at 644. The officers were in plain clothes, but had visible firearms. *Id.* One of the officers asked Rector how she was doing and Rector asked if the officer had a search warrant. *Id.* The officer did not tell Rector that she was free to leave or that she could refuse to answer his questions. *Id.*

The conversation between the police and Rector continued and one officer frisked Rector because she kept touching one of her pant pockets after being told not to do so. *Id.* Rector then asked if she could smoke a cigarette and a police officer said yes. *Id.* After removing a cigarette from her pocket, the officer asked her what she had in her pocket and Rector said she had some candies and some "miscellaneous stuff." *Id.* The officer then asked to see the contents of her pockets and Rector pulled out some candy and a bag with a white powdery substance, which was subsequently determined to be methamphetamine. *Id.*

Rector filed a suppression motion arguing that she was coerced into emptying her pocket. *Id.* The district court agreed with Rector and suppressed the methamphetamine. *Id.* The State appealed and the Court of Appeals affirmed the district court, holding:

> [T]he district court found that Rector's act of pulling the methamphetamine from her pocket was not an act of free will but the product of coercive circumstances. The court identified several factors contributing to a coercive atmosphere, including the facts that Rector had been confronted by two armed officers at night and had been questioned, frisked, and then subjected to further questioning. The court also noted that by asking the deputies for permission to smoke, Rector had demonstrated that she did not consider the encounter to be consensual but rather considered herself to be under the control of the deputies.
>
> The deputy's testimony at the suppression hearing provides substantial evidence supporting each of the district court's predicate factual findings. It additionally shows that Rector had evidenced an unwillingness to talk to the deputies by asking at the outset whether they had a search warrant, that Rector had not been informed of her right to refuse consent, and that she had not been told that she was free to leave. These further facts add support to the district court's finding that Rector's disclosure of the contents of her pocket was not consensual.

Id. at 646.

When the relevant factors present in this matter are compared to those in *Rector*, this case was far more intimidating than *Rector*. In this case and in *Rector*, Mr. Floyd

was approached by two police officers at night. However, Officer Richardson activated his overhead lights and Officer Finley arrived at the scene between thirty and forty seconds after Mr. Floyd was stopped. Both of these events created an atmosphere which was more coercive than the one in *Rector*, because the use of the headlights was more intimidating than being approached by two officers on foot. Additionally, this stop was more intimidating than *Rector*, because in *Rector* both of the officers approached Rector at the same time. In this case, Officer Finley's later arrival would have escalated the initial show of authority exacerbating the intimidating nature of the encounter. Moreover, in *Rector* the police officer asked Rector to disclose the contents of her pockets. In this case, Mr. Floyd was also promised that he would not be arrested if he complied with Officer Richardson's arrest.

Since Mr. Floyd's consent was the product of coercion the remedy is suppression of the State's evidence. Pursuant to the Fourth Amendment of the United States Constitution and Article I Section 17 of the Idaho Constitution, the remedy is suppression of the State's evidence. *State v. Arregui*, 44 Idaho 43 (1927); *State v. Guzman*, 122 Idaho 981 (1992).

If it is determined that Mr. Floyd's initial consent for police to enter his home was the product of coercion, then Mr. Floyd's subsequent consent to search his bedroom was also tainted by the prior coercion and all of the evidence discovered in Mr. Floyd's home must be suppressed. "If evidence is not seized pursuant to a recognized exception to the warrant requirement, the evidence discovered as a result of the illegal search must be excluded as the 'fruit of the poisonous tree." *State v. Van Dorne,* 139 Idaho 961, 963 (Ct. App. 2004) (citing *Wong Sun v. United States,* 371 U.S. 471 (1963)). Moreover, "When police conduct has violated an accused's constitutional rights

before he consents to a search, the State must prove that the consent was not procured by exploitation of the previous illegality." *State v. Tietsort*, 145 Idaho 112, 117 (Ct. App. 2007). This includes all of the evidence used to establish a basis for Mr. Floyd's possession conviction.

In sum, Mr. Floyd's consent in this matter was not voluntarily given because the circumstances surrounding Mr. Floyd's interaction with Officer Richardson would have communicated to a reasonable person he was required to comply with Officer Richardson's request to enter Mr. Floyd's home.

CONCLUSION

Mr. Floyd respectfully requests that this Court reverse the district court's order denying his motion to suppress and remand this case to the district court for further proceedings.

DATED this 7th day of May, 2015.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of May, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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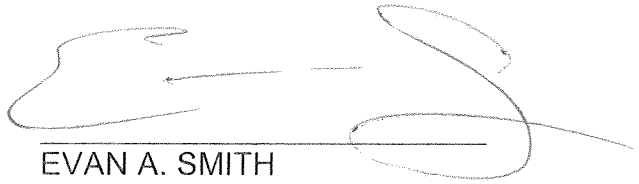

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