

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 46366-2018
 Plaintiff-Respondent,)
) Bannock County Case No.
 v.) CR-2017-10916
)
 OMAR R. ROSALES-HENSLEY,)
)
 Defendant-Appellant.)
 _____)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BANNOCK**

HONORABLE STEPHEN S. DUNN
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Omar R. Rosales-Hensley appeals from the judgment entered upon his conditional guilty plea to possession of a controlled substance (methamphetamine). On appeal, Rosales-Hensley challenges the denial of his motion to suppress.

Statement Of Facts And Course Of Proceedings

The facts underlying Rosales-Hensley's conviction for possession of methamphetamine, as determined by the district court from testimony presented at the suppression motion hearing, are as follows (with bracketed references to the record):

On September 14, 2018,^[1] Officer McClure of the Pocatello Police Department stopped the vehicle in which Hensley was a passenger because the tags on the plates were expired. [Supp. Tr., p.7, Ls.11-24.] The vehicle was a blue Ford Taurus, which was being driven by a Michael Randall. [Id., p.7, L.21 – p.8, L.5.] Besides Randall, and Hensley, Beach (a female) was the only other passenger in the vehicle. [Id., p.11, Ls.3-6.] Beach was seated in the front passenger seat, and Hensley was seated in one of the rear passenger seats. [Id.]

After making initial contact with the driver, McClure returned to his police cruiser and ran Randall's name, at which point he discovered that a warrant had been issued for Randall's arrest. [Supp. Tr., p.9, Ls.5-17.] McClure also observed, to his concern, that the passengers in the vehicle were moving around quite a bit. [Id., p.9, L.25 – p.10, L.8.] McClure contacted dispatch to ask that additional officers be sent to his location. [Id., p.10, Ls.10-12.]

After additional officers arrived on scene, McClure asked Randall to step out of the vehicle, and took him into custody. [Supp. Tr., p.10, Ls.10-17.] He was placed in the back of the patrol vehicle and was subjected to additional questioning by officers from the Chubbuck Police Department. [Id., p.10, Ls.16-23.] Officer McClure then attempted to establish ownership of the vehicle. [Id., p.12, L.24 – p.13, L.1.] At some point, it is not clear when, McClure placed a phone call to Melissa Cannidy,^[2] the registered owner of the vehicle. [Id., p.12, L.24 – p.13, L.4.]

¹ The incident occurred on September 14, 2017. (Supp. Tr., p.7, Ls.11-24.)

² The transcript spells the owner's last name "Kanady." (Supp. Tr., p.13, Ls.3-15.)

She advised McClure that the car was being used by a girl named Mariah. [Id., p.13, Ls.4-5.] McClure also spoke with Mariah's father. [Id., p.13, Ls.13-14.] Although Randall stated that Mariah was his girlfriend, he was unable to recall her address, or even her last name. [Id., p.13, L.19 – p.14, L.4.] Because of the problems with the vehicle's registration and Randall's inability to identify Mariah, McClure was concerned that the vehicle may have been stolen. [Id., p.13, Ls.17-23.]

At some point during Randall's questioning by Chubbuck Police officers, Officer Bloxham of the Pocatello Police Department questioned Hensley and Beach regarding the ownership of the vehicle. [Supp. Tr., p.16, L.20 – p.17, L.25.] Like Randall, neither were able to identify Mariah's last name. [Id.] Bloxham was certified as a drug recognition expert at the time the questioning occurred, and at the time she testified in this matter. [Id., p.18, L.14 – p.19, L.3.] Bloxham testified that Hensley "exhibited several signs and indicators and symptoms of being under the influence of a central nervous system stimulant." [Id., p.19, Ls.21-25.] Bloxham then contacted Corporal Lacey. [Id., p.20, Ls.7-8.]

Lacey arrived on scene, and ran an open air sniff around the exterior of the Ford Taurus with Bart, his detection canine. [Supp. Tr., p.20, Ls.5-11.] The canine alerted at the driver side headlight of the vehicle. [Id., p.29, L.15 – p.30, L.2.] According to testimony offered by Lacey, Bart, his detection dog, typically alerts passively by sitting when he detects the presence of illegal narcotics. [Id., p.29, Ls.5-9.] In this case, Bart pressed his nose into the front grill of the vehicle, then ran his nose to the driver side headlight, and then sat, refusing to move. [Id., p.29, Ls.21-23.] According to Officer Lacey, this was "a final indication of a presence of illegal narcotics in the vehicle." [Id., p.30, Ls.3-6.]

The vehicle was then searched. [Supp. Tr., p.20, Ls.16-17; p.30, Ls.9-18.] In the glove compartment of the vehicle, a hypodermic syringe was recovered. [Id., p.20, Ls.20-22.] It was "loaded" with a liquid that tested presumptively positive for methamphetamine. [Id., p.20, L.21 – p.21, L.9.] Used syringes were also recovered in a backpack that, although it contained mostly women's clothing, was located in the backseat next to Hensley. [Id., p.20, Ls.22-23; p.24, L.4 – p.25, L.5.] Upon further questioning, none of the passengers admitted to possessing the drugs and paraphernalia, so both Hensley and Beach were searched. [Id., p.23, Ls.16-20.] Upon searching Hensley, officers discovered a black neoprene cell phone armband. [Id., p.33, Ls.2-15.] The armband contained a small vial with a substance that tested positive for methamphetamine. [Id., p.21, L.15 – p.22, L.25.] Hensley was arrested at the scene. [Id., p.14, Ls.16-18; p.25, Ls.6-23.]

(R., pp.93-94.)

The state charged Rosales-Hensley with possession of a controlled substance (methamphetamine). (R., pp.38-39.) Rosales-Hensley filed a motion to suppress “all evidence obtained as a result of the illegal detention.” (R., pp.68-69.) Rosales-Hensley argued suppression was proper because he was “detained and his person searched without reasonable suspicion or probable cause to support the detention or search.” (R., p.68.) After a hearing, the district court entered a written decision denying Rosales-Hensley’s suppression motion. (R., pp.92-102.)

Pursuant to a binding plea agreement, Rosales-Hensley entered a conditional guilty plea to guilty of the charged offense. (R., pp.114-129.) The district court ordered that judgment be withheld for three years, and placed Rosales-Hensley on probation for that same term. (R., pp.138-141.) Rosales-Hensley timely appealed from the judgment. (R., pp.152-154.)

ISSUE

Rosales-Hensley states the issue on appeal as:

Did the district court err when it denied Mr. Rosales-Hensley's motion to suppress?

(Appellant's Brief, p.9.)

The state rephrases the issue as:

Has Rosales-Hensley failed to show error in the denial of his motion to suppress methamphetamine found on him after his arrest because there was probable cause to arrest him for possessing drug paraphernalia found in the backpack near him?

ARGUMENT

Rosales-Hensley Has Failed To Show Error In The Denial Of His Motion To Suppress Methamphetamine Found On Him After His Arrest Because There Was Probable Cause To Arrest Him For Possessing Drug Paraphernalia Found In The Backpack Near Him

A. Introduction

Rosales-Hensley challenges the denial of his motion to suppress, arguing that “the officers did not have probable cause to believe Mr. Rosales-Hensley had constructive possession of the syringes in the backpack. Thus, the search of Mr. Rosales-Hensley’s person was not a valid search incident to arrest.” (Appellant’s Brief, p.10.)

Rosales-Hensley’s argument fails because the evidence presented at the suppression hearing supports the conclusion that the search of Rosales-Hensley’s person was conducted incident to his arrest for constructive possession of the used syringes (i.e., drug paraphernalia) found in the backpack next to him in the backseat of the vehicle. The district court correctly found that Rosales-Hensley’s arrest for possession of drug paraphernalia was supported by probable cause and correctly denied his motion to suppress the methamphetamine discovered as a result of that arrest.

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 [the court] freely reviews the application of constitutional principles to the facts as found.” State v. Faith, 141 Idaho 728, 730, 117 P.3d 142, 144 (Ct. App. 2005).

C. Rosales-Hensley Was Not Entitled To Suppression Because There Was Probable Cause To Arrest Him At The Time Of His Detention

1. Legal Standards Applicable To Searches Incident To Lawful Arrest

Generally, any seizure of a person, whether by arrest or detention, must be supported by probable cause. Michigan v. Summers, 452 U.S. 692, 700 (1981); Dunaway v. New York, 442 U.S. 200, 208 (1979). “Reasonable or probable cause for an arrest exists where the officer possesses information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty.” State v. Buti, 131 Idaho 793, 798, 964 P.2d 660, 665 (Ct. App. 1998) (citation omitted). The evaluation of probable cause “must take into account the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” Id. “In determining whether there is probable cause for an arrest, an officer is entitled to draw reasonable inferences from the available information in light of the knowledge that he has gained from his previous experience and training.” Id. Probable cause does not require an actual showing of criminal activity, but only the “probability or substantial chance” of such activity. Illinois v. Gates, 462 U.S. 213, 244-245 n.13 (1983). The probable cause standard necessary for an arrest “must be distinguished from the burden of proof that is borne by the State at trial” because “[t]he adequacy of probable cause is not measured against the high standard of proof beyond a reasonable doubt that is required for conviction.” State v. Zentner, 134 Idaho 508, 510, 5 P.3d 488, 490 (Ct. App. 2000).

“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. Moreover, if there is probable cause to arrest a suspect, a search, even in the absence of an arrest that precedes the search, will be considered a valid search incident to arrest. Rawlings v. Kentucky, 448 U.S. 98, 111 (1980).

2. The District Court Correctly Denied Rosales-Hensley's Suppression Motion

Application of the law to the facts established at the suppression hearing supports the district court's conclusion that law enforcement officers had probable cause to arrest Rosales-Hensley when they found used hypodermic syringes in the backpack that was in close proximity to him in the back seat of the vehicle. The state adopts and incorporates the district court's Memorandum Decision and Order Denying Defendant's Motion to Suppress (R., pp.92-102), attached as Appendix A, as if fully set forth herein, for its response to this issue. In addition to the district court's well-reasoned Memorandum Decision and Order, the state makes the following comments.

The district court's conclusion that Rosales-Hensley "possessed both knowledge and control over the contents of the backpack," which included used hypodermic syringes, was based on five main factors: (1) the drug detection canine ("Bart") alerted to the presence of illegal narcotics in the vehicle, (2) illegal drugs were, in fact, recovered in the vehicle's glove compartment (a syringe "loaded" with a substance that tested presumptively positive for methamphetamine), (3) Officer McClure "viewed a significant amount of movement by the passengers in the car after he had initiated the stop," (4) the backpack with used syringes was in close proximity to Rosales-Hensley in the back seat of

the vehicle, and (5) Officer Bloxham, a drug recognition expert, testified that Rosales-Hensley exhibited “signs and symptoms indicating that Hensley was under the influence of a central nervous stimulant[.]” (See R., p.101.)

In Maryland v. Pringle, 540 U.S. 366 (2003), police stopped a car with three people in it. Id. at 368. The police searched the car after obtaining consent from the driver and found a large amount of cash in a roll in the glove compartment and baggies of cocaine tucked behind the folded-up armrest in the back seat. Id. After all three men in the car denied knowledge of the drugs and cash, officers arrested them all. Id. at 368-369. Pringle, the front-seat passenger, later admitted that the drugs and cash were his. Id. After being convicted, Pringle appealed the denial of his motion to suppress evidence, asserting officers lacked probable cause to arrest him. Id. at 369. The Maryland Court of Appeals agreed and held that, “absent specific facts tending to show Pringle’s knowledge and dominion or control over the drugs, the mere finding of cocaine in the back armrest when Pringle was a front seat passenger in a car being driven by its owner is insufficient to establish probable cause for an arrest for possession.” Id. at 369 (internal quotes and brackets omitted). However, this analysis was unanimously rejected by the Supreme Court of the United States. Id. at 370-74.

The Supreme Court reiterated that probable cause deals with “probabilities and depends on the totality of the circumstances” and consists of a “reasonable ground for belief of guilt” that is “particularized with respect to the person to be searched or seized.” Id. at 371 (internal quotes omitted). “Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the probable-cause decision.” Id. (internal quotes and brackets omitted). It

reasoned that the presence of cocaine and a significant amount of cash in the car where it was accessible to all three occupants, in combination with the three occupants having provided no information as to ownership of the cash or cocaine, created “an entirely reasonable inference ... that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine.” Id. at 373.

Here, although there was no “significant amount of cash” in the vehicle as in Pringle, there were other factors which indicated a group effort to hide drugs and drug paraphernalia in the vehicle as it was being stopped by Officer McClure. Perhaps most significantly, Officer McClure observed all three occupants in the vehicle moving around “quite a bit” as he sat in his patrol car checking on the driver’s driving status and waiting for additional officers to arrive. (Supp. Tr., p.9, L.20 – p.10, L.2.) According to Officer McClure, “the driver [Randall] was reaching over to the passenger side of the vehicle, which was causing concern, not knowing if he was looking for registration or what exactly was going on. But there was movement in the vehicle that was starting to concern me.” (Supp. Tr., p.10, Ls.4-8.) Officer McClure further testified that after additional officers arrived and Randall was placed into custody on an outstanding warrant, “[t]he front seat passenger identified as Kelsey Beach, and the rear passenger that’s in the backseat identified as Mr. Hensley, [*were*] *still moving around quite a bit.*” (Supp. Tr., p.10, L.10 – p.11, L.6 (emphasis added).) Rosales-Hensley’s continued movement inside the vehicle, while seated next to the backpack,³ provided Officer McClure with probable cause to

³ In Pringle, the defendant was in the front passenger seat and the baggies of contraband (cocaine) were “tucked behind the folded-up armrest in the back seat.” Pringle, 540 U.S. at 368-369. Here, in contrast, the contraband (i.e., used syringes) were in a backpack in the back seat “where Mr. Rosales[-Hensley] was sitting initially.” (Supp. Tr., p.24, Ls.7-14) (explanation added.)

believe Rosales-Hensley had knowledge of, and dominion and control over, the used syringes found in the backpack. The suspicious movements by Rosales-Hensley and the other two occupants of the vehicle – indicative of hiding illegal drugs and/or paraphernalia – coupled with Rosales-Hensley’s close proximity with the used syringes in the backpack, make this an even stronger case for finding probable cause than Pringle.

As the district court concluded, State v. Zentner, 134 Idaho 508, 5 P.3d 488 (Ct. App. 2000), is also instructive. (See Appendix A.) In addition to the other factors cited by the court (i.e., the drug detection by Bart, the “loaded” syringe in the glove compartment, and the signs of drug use by Rosales-Hensley), similar to Zentner, Rosales-Hensley’s presence in the back seat of the vehicle in close proximity to the backpack which contained contraband (used syringes), combined with the furtive movements of all three occupants of the vehicle, was sufficient to establish probable cause to believe Rosales-Hensley had knowledge of, and dominion and control over, the syringes. Because officers had probable cause to arrest Rosales-Hensley for possession of the used syringes found in the backpack, the court correctly denied his motion to suppress the vial of methamphetamine found on his person during the search incident to that lawful arrest.

CONCLUSION

The state respectfully requests that this Court affirm the judgment and the denial of Rosales-Hensley’s motion to suppress.

DATED this 14th day of June, 2019.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of June, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT on the attorney listed below by means of iCourt File and Serve:

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/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

APPENDIX A

BACKGROUND

On September 14, 2018, Officer McClure of the Pocatello Police Department stopped the vehicle in which Hensley was a passenger because the tags on the plates were expired. The vehicle was a blue Ford Taurus, which was being driven by a Michael Randall. Besides Randall, and Hensley, Beach (a female) was the only other passenger in the vehicle. Beach was seated in the front passenger seat, and Hensley was seated in one of the rear passenger seats.

After making initial contact with the driver, McClure returned to his police cruiser and ran Randall's name, at which point he discovered that a warrant had been issued for Randall's arrest. McClure also observed, to his concern, that the passengers in the vehicle were moving around quite a bit. McClure contacted dispatch to ask that additional officers be sent to his location.

After additional officers arrived on scene, McClure asked Randall to step out of the vehicle, and took him into custody. He was placed in the back of the patrol vehicle and was subjected to additional questioning by officers from the Chubbuck Police Department. Officer McClure then attempted to establish ownership of the vehicle. At some point, it is not clear when, McClure placed a phone call to Melissa Cannidy, the registered owner of the vehicle. She advised McClure that the car was being used by a girl named Mariah. McClure also spoke with Mariah's father. Although Randall stated that Mariah was his girlfriend, he was unable to recall her address, or even her last name. Because of the problems with the vehicle's registration and Randall's inability to identify Mariah, McClure was concerned that the vehicle may have been stolen.

At some point during Randall's questioning by Chubbuck Police officers, Officer Bloxham of the Pocatello Police Department questioned Hensley and Beach regarding the

ownership of the vehicle. Like Randall, neither were able to identify Mariah's last name.

Bloxham was certified as a drug recognition expert at the time the questioning occurred, and at the time she testified in this matter. Bloxham testified that Hensley "exhibited several signs and indicators and symptoms of being under the influence of a central nervous system stimulant."

Bloxham then contacted Corporal Lacey.

Lacey arrived on scene, and ran an open air sniff around the exterior of the Ford Taurus with Bart, his detection canine. The canine alerted at the driver side headlight of the vehicle. According to testimony offered by Lacey, Bart, his detection dog, typically alerts passively by sitting when he detects the presence of illegal narcotics. In this case, Bart pressed his nose into the front grill of the vehicle, then ran his nose to the driver side headlight, and then sat, refusing to move. According to Officer Lacey, this was "a final indication of a presence of illegal narcotics in the vehicle."

The vehicle was then searched. In the glove compartment of the vehicle, a hypodermic syringe was recovered. It was "loaded" with a liquid that tested presumptively positive for methamphetamine. Used syringes were also recovered in a backpack that, although it contained mostly women's clothing, was located in the backseat next to Hensley. Upon further questioning, none of the passengers admitted to possessing the drugs and paraphernalia, so both Hensley and Beach were searched. Upon searching Hensley, officers discovered a black neoprene cell phone armband. The armband contained a small vial with a substance that tested positive for methamphetamine. Hensley was arrested at the scene.

ANALYSIS

Hensley argues primarily that the search of his person was not legal because it was not incident to a lawful arrest.¹ Specifically, Hensley argues that he was not properly found to be in constructive possession of the contraband recovered from the vehicle, nor under arrest at the time he was searched.² Hensley argues that such deficiencies render the search of his person illegal as a search incident to arrest, and also that the search was not a permissible *Terry* frisk.³ In either case, Hensley argues that the exclusionary rule requires the suppression at trial of any evidence obtained as a result of that search.⁴ Because the Court finds that the search of Hensley's person was a search incident to a lawful arrest, the Court need not consider whether the search of Hensley's person was valid as a *Terry* frisk.

On appeal, a trial court's denial of a motion to suppress is subjected to a bifurcated review.⁵ A reviewing court will accept the trial court's findings of fact so long as they are not clearly erroneous, but freely reviews the application of constitutional principles to the facts found.⁶

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures."⁷ Searches conducted without a warrant are per se unreasonable and evidence obtained as a result of such a search may only be admitted at trial if the search falls into one of the specifically established and well-delineated exceptions to the warrant requirement.⁸

¹ Brief in Support of Motion to Suppress at 2

² *Id.* at 5, 6.

³ *Id.* at 3, 4.

⁴ *Id.* at 2.

⁵ *State v. Zentner*, 134 Idaho 508, 510, 5 P.3d 488, 490 (Ct. App. 2000).

⁶ *Id.*

⁷ U.S. Cons. Amend. IV.

⁸ *Schneekloth v. Bustamonte*, 412, U.S. 218, 219, 93 S. Ct. 2041 (1973).

One such exception is a search incident to arrest.⁹ Under this exception, an officer may search a suspect if the search is incident to a lawful arrest.¹⁰ A search incident to arrest is authorized because “it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or affect his escape.”¹¹ It is also reasonable because the arresting officer may need to search for, and seize “any evidence on the arrestee’s person in order to prevent its concealment or destruction.”¹² The timing of a search incident to arrest is not necessarily a dispositive issue.¹³ Where an officer conducts a search after probable cause has arisen, but before the defendant is formally placed under arrest, the fact that the search precedes the formal arrest even by several minutes does not necessarily render the search illegal. All that is required in such cases is that “the search and arrest are substantially contemporaneous, and [that] the fruits of the search are not required to establish probable cause for the arrest.”¹⁴

The legality of an arrest is a matter of state law.¹⁵ Idaho’s arrest statute allows for arrest of a suspect based upon probable cause.¹⁶ Probable cause is primarily concerned with probabilities, and is defined as the possession of information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong presumption that the suspect is guilty of committing a crime.¹⁷ The scrutiny of a probable cause determination is an objective

⁹ *United States v. Robinson*, 414 U.S. 218, 235, 4 S. Ct. 467, 476 (1973).

¹⁰ *Id.*

¹¹ *State v. Pederson*, 157 Idaho 790, 792, 339 P.3d 1194, 1196 (Ct. App. 2014) citing *Chimel v. California*, 395 U.S. 752, 763 (1969).

¹² *Id.*

¹³ *State v. Cook*, 106 Idaho 209, 215, 677 P.2d 522, 528 (Ct. App. 1984).

¹⁴ *State v. Chapman*, 146 Idaho 346, 351, 194 P.3d 550, 555 (Ct. App. 2008).

¹⁵ *State v. Julian*, 129 Idaho 133, 135, 922 P.2d 1059, 1062 (1996).

¹⁶ *Id.*

¹⁷ *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L.Ed. 1879 (1949); *Julian*, 129 Idaho at 135, 922 P.2d at 1062.

assessment of the facts known to the officer at the time of arrest.¹⁸ Further, such scrutiny deals with “the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.”¹⁹ Therefore, review of a probable cause determination does not focus on the subjective understanding of the arresting officer, but rather, on an objective view of the facts presented to the officer at the time of arrest.²⁰ This is true even if the officer subjectively believes that probable cause to arrest is lacking under the circumstances.²¹ The relevant inquiry is upon the totality of the circumstances and the assessment of probabilities within the particular factual context.²² The expertise and experience of the officers must be taken into account.²³

The present case is very similar to *State v. Zentner*,²⁴ which discusses the search of a defendant based upon constructive possession that was only valid if the underlying arrest was also valid.²⁵ In *Zentner*, the defendant was arrested after the car in which he was a passenger was pulled over, and after another passenger in that vehicle had confessed to possessing illicit drugs, and had been arrested.²⁶ The vehicle was initially stopped because it had broken taillights.²⁷ Before the vehicle pulled over, but after the arresting officer had activated her overhead lights, the arresting officer noted that the passengers in the vehicle were moving around excessively.²⁸ Upon running the plates on the vehicle, the officer discovered that the plates did

¹⁸ *Id.*

¹⁹ *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, (1949); *Julian*, 129 Idaho at 136, 922 P.2d at 1062.

²⁰ *Chapman*, 146 Idaho at 351, 194 P.3d at 555.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ 134 Idaho 508, 5 P.3d 488 (Ct. App. 2000).

²⁵ *Id.* (stating that “[t]he search of Zentner at the police station was permissible only if his arrest was lawful”).

²⁶ *Id.* at 509, 489.

²⁷ *Id.*

²⁸ *Id.*

not match the vehicle's make and model.²⁹ Because the front seat passenger claimed to have just purchased the vehicle, and produced a hand written bill of sale, that passenger was removed and subjected to a *Terry* frisk.³⁰ During this frisk, the passenger admitted to possession of illicit narcotics and was placed under arrest.³¹ The officer then saw a baggy filled with a white substance in a hole in the dashboard of the vehicle.³² At this point, another officer arrived on scene and conducted a search of the vehicle.³³ The baggy recovered from the dashboard contained methamphetamine, the glove compartment contained a rolled up dollar bill in the shape of a tube, and a backpack in the back seat contained scales, and nine baggies filled with methamphetamine.³⁴ The defendant was initially frisked for weapons, but was not searched incident to arrest until after he arrived at the police station. Pursuant to the search of the defendant's person at the police station, officers discovered methamphetamine hidden in the defendant's sock.³⁵

As is the case with Hensley's arrest pursuant to the paraphernalia recovered from the backpack, the defendant's arrest in *Zentner* was "predicated on the drugs contained in [the] backpack that was lying next to him in the back seat."³⁶ What is more, *Zentner* discusses whether the arresting officer in that case "had probable cause to believe that [the defendant] had constructive possession of the drugs recovered from the backpack in the seat next to him."³⁷ Also, as is the case here, the defendant in *Zentner* argued that "probable cause [for arrest] was lacking because he was not the sole occupant of the vehicle and there was nothing in the

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

backpack indicating that the backpack or the drugs belonged to him as distinguished from the driver or other passenger.”³⁸

In discussing the issue, the Court of Appeals distinguished between constructive possession in the realm of probable cause necessary to authorize lawful arrest, as opposed to “the quantum of evidence required necessary to prove guilt beyond a reasonable doubt at trial.”³⁹ The Court of Appeals noted that “[t]he facts known to the officer at the time of [the defendant’s] arrest include not only the proximity of the backpack to [the defendant] as he was situated in the backseat of the vehicle, but also [the officer’s] observation, while attempting to stop the vehicle, that all three occupants were moving excessively about the interior of the car for a period of time.”⁴⁰ “From this excessive activity, followed by the discovery of drugs in the automobile,” the Court of Appeals reasoned, “an officer could reasonably infer that *all* the occupants had been taking steps to conceal the contraband in the car.”⁴¹ These findings were found to be sufficient to lead a prudent person to entertain an honest and strong suspicion that the suspect had “knowledge and control of the contraband in the backpack.”⁴² Such objective observations, therefore, meet the standard of probable cause necessary for an officer to execute a valid arrest pursuant to constructive possession.

Here, although there was no admission to possession of illegal drugs before the blue Ford Taurus was searched, the vehicle had been detained in a necessarily prolonged stop because there were issues with the vehicle’s registration and ownership. Answers given by Randall regarding the vehicle’s ownership were clearly suspicious, and patently unsatisfactory. One would expect the driver of his girlfriend’s car to know the last name of his girlfriend, and at least a proximate

³⁸ *Id.* at 510, 490.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 491, 511.

address. Randall could supply neither. At this point, there was likely probable cause to search the vehicle because there was a reasonable probability that the car had been stolen.

But the officers here engaged in thorough police work, they did not search the vehicle until after Lacey's drug detection canine had given an alert to the presence of illegal narcotics within the vehicle. At this point there was certainly probable cause to search the vehicle.⁴³

Hensley argues that "[i]n order to prove constructive possession, knowledge and control of the controlled substance must each be independently proven beyond a reasonable doubt by either circumstantial or direct evidence."⁴⁴ He argues further that "[w]hen multiple people occupy a vehicle, constructive possession cannot be inferred from the mere fact that a defendant at some point occupied the vehicle in which contraband was found."⁴⁵ The problem with the cases presented by Hensley is that they discuss constructive possession within the realm of the sufficiency of evidence necessary to sustain a conviction at trial, and not an analysis of constructive possession sufficient to give rise to probable cause to arrest.⁴⁶ It is axiomatic that although an array of facts may be insufficient to sustain a conviction at trial, they may nevertheless be sufficient to give rise to probable cause to justify an arrest.⁴⁷ To wit, the Court

⁴³ The Court notes that Hensley has not challenged the execution of the sniff by Officer Lacey. Even if Hensley did challenge the sniff, such a challenge would likely have no impact on the Court's analysis. The vehicle had been stopped on a legitimate traffic violation, and its driver arrested on a valid warrant. The ownership of the vehicle was not clear. The stop of the vehicle was justifiably prolonged so that officers could execute Randall's arrest and determine ownership of the vehicle. It is highly unlikely, therefore, that the sniff unjustifiably prolonged the detention of the vehicle, and probable cause to suspect other crime arose during the officers' proper investigation of the circumstances.

⁴⁴ Brief in Support at 5.

⁴⁵ *Id.*

⁴⁶ *State v. Seitter*, 127 Idaho 356, 359, 900 P.2d 1367, 1370 (1995) ("Seitter was tried on a constructive possession theory, which required that the state prove that Seitter had knowledge of methamphetamine, and control over the bedroom"); *State v. Burnside*, 115 Idaho 882, 885, 771 P.2d 546, 549 (Ct. App. 1989) ("the jury could not infer constructive possession from the mere fact that Burnside occupied, with a passenger, the automobile in which the drugs were seized"); *State v. Garza*, 112 Idaho 778, 784, 735 P.2d 1089, 1095 (Ct. App. 1987) ("where joint occupancy is involved, substantial evidence must exist establishing the guilt of each defendant, not merely the collective guilt of both);

⁴⁷ *Draper v. United States*, 358 U.S. 307, 311, 79 S. Ct. 329 (1959); *Zentner*, 134 Idaho at 510, 5 P.3d at 490.

notes that the evidence Hensley is seeking to suppress for the purposes of trial was not constructively possessed by him, but was recovered from his ankle, and was rather actually possessed by him. Constructive possession is therefore only relevant in this case as it relates to probable cause to arrest.

Before searching Hensley, officers that responded to the scene made significant observations. First, as already mentioned, Lacey's drug detection canine alerted to the presence of illegal narcotics within the vehicle. Second, drugs and paraphernalia were actually recovered within that vehicle. Third, as was the case in *Zentner*, McClure viewed a significant amount of movement by the passengers in the car after he had initiated the stop. Fourth, the backpack that was found close to Hensley's position in the rear seat of the vehicle produced used needles. Objectively viewed, these facts makes it likely that Hensley was engaged in hiding evidence of drug use in the backpack, and render the other contents of that backpack irrelevant. Further, as mandated by *Zentner*, the preceding facts give rise to a reasonable probability that Hensley possessed both knowledge and control over the contents of the backpack. And finally, Bloxham observed signs and symptoms indicating that Hensley was under the influence of a central nervous stimulant, another important and relevant fact that was not present in *Zentner*. All of these events occurred before Hensley was searched.

These facts taken together are more than adequate to give rise to a finding of probable cause on the part of law enforcement personnel sufficient to sustain a lawful arrest. Although it appears clear that the search of Hensley occurred before Hensley was placed under arrest at the scene, the arrest was "substantially contemporaneous" with the search, and the search was validly executed as a search incident to Hensley's arrest.

