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State v. Melling Appellant's Reply Brief Dckt. 42666

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO, Plaintiff-Appellant, vs. JEFFREY B. MELLING, Defendant-Respondent.	)	No. 42666 Canyon Co. Case No. CR-2014-16078

REPLY 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

HONORABLE GEORGE A. SOUTHWORTH
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

RUSSELL J. SPENCER
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-APPELLANT

JENNY C. SWINFORD
Deputy State Appellate
Public Defender
P.O. Box 2816
Boise, Idaho 83701
(208) 334-2712

ATTORNEY FOR
DEFENDANT-RESPONDENT

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ARGUMENT IN REPLY

By Denying Ownership Of The Lockbox And Its Contents Prior To The Search, Melling Abandoned Any Privacy Interest He May Have Had In Those Items And Therefore Lacks Standing To Challenge Their Search

After Melling denied ownership of a lockbox and its contents multiple times, Officer Harward opened the unlocked lockbox and discovered "a black scale, a pipe with white crystal substance and some matches, as well as two fake identification cards." (R., p.52.) After placing Melling under arrest, Officer Harward asked Melling to separate his feet to facilitate a search for weapons and contraband, whereupon a glass pipe fell out of Melling's shorts and shattered on the ground. (R., pp.52-53.) Residue on the shattered pipe tested positive for methamphetamine, and additional methamphetamine was located on Melling's person at the jail. (R., p.53.)

The state charged Melling with possession of methamphetamine. (R., pp.15-16.) Melling filed a motion to suppress the evidence, arguing that it was obtained through an unlawful search and seizure. (R., pp.21-31.) The district court granted Melling's suppression motion on the theory that, because Melling denied owning the lockbox in an apparent effort to avoid criminal liability for contraband contained within the lockbox, his abandonment did not divest him of his privacy interest related to that property. (R., pp.51-59).

The state appealed, arguing that by denying ownership of the lockbox and its contents prior to the search,[1] Melling disavowed any privacy interest he may have had in the lockbox and its contents. (Appellant's brief, pp.4-7.) Because "[a] person challenging a search has the burden of showing he or she had a legitimate expectation

[1] In fact, Melling denied ownership of the lockbox and its contents prior to any *inquiry* by police regarding the lockbox or its contents. (See R., p.52.)

of privacy in the item or place to be searched," State v. Pruss, 145 Idaho 623, 626, 181 P.3d 1231, 1234 (2008), and because there is no reasonable expectation of privacy in voluntarily abandoned property, State v. Harwood, 133 Idaho 50, 52, 981 P.2d 1160, 1162 (Ct. App. 1999) (citation omitted), the district court erred by granting Melling's suppression motion.

The only issue before this Court is whether Melling's denial of ownership of the lockbox and its contents prior to any search of those items constitutes abandonment. That issue is controlled by precedent. In State v. Zaitseva, 135 Idaho 11, 13, 13 P.3d 338, 340 (2000), the Idaho Supreme Court held that, "by denying ownership of the bag in response to the officer's inquiry prior to the search, Zaitseva essentially relinquished or abandoned any privacy interest in the contents of the bag." Likewise, by denying ownership of the lockbox and its contents prior to the search, Melling abandoned any privacy interest in those items.

Idaho jurisprudence requires respect for its own precedents. The rule of *stare decisis* dictates that controlling precedent be followed "unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." State v. Dana, 137 Idaho 6, 9, 43 P.3d 765, 768 (2002). But Melling does not argue in his Respondent's brief that Zaitseva should be overruled. Instead he asserts that its holding should be ignored, claiming that Zaitseva "does not provide a bright-line rule for abandonment." (Respondent's brief, pp.10-11.) To support this contention, Melling advances two arguments: (1) that the Court's holding in Zaitseva is merely *dicta*; and (2) that "any rule from Zaitseva is not binding on this case because abandonment is a fact-

specific inquiry" and, he asserts, Zaitseva is factually distinguishable. (Id.) Both arguments fail.

First, Melling asserts that Zaitseva's "abandonment of the bag was not the essential or primary reason to uphold the search of the container" because "the focus of the Court's discussion was on consent." (Respondent's brief, p.10.) Melling also characterizes the Court's conclusions regarding abandonment as an "alternative, supplemental means to uphold the search." (Id.) But an alternate holding is still a holding—not *dicta*—and is binding.

Moreover, this supposed alternate holding was likely necessary to support the ultimate search of the bag under the facts of that case. Zaitseva was a passenger in a vehicle that was pulled-over for speeding. Zaitseva, 135 Idaho at 12, 13 P.3d at 339. Both the driver and Zaitseva consented to a search of the car. Id. While exiting the vehicle the driver attempted to remove a bag from the car, but was ordered to return the bag to the car by the officers when "[b]oth Zaitseva and the driver denied ownership of the bag." Id. Officers then searched the bag, finding evidence which led to Zaitseva's charges. Id.

Generally, consent to search a vehicle will include consent to search containers in that vehicle. Florida v. Jimeno, 500 U.S. 248 (1991). However, consent may be limited and, "when the basis for a search is consent, the government must conform to the limitations placed upon the right granted to search." State v. Thorpe, 141 Idaho 151, 154, 106 P.3d 477, 480 (Ct. App. 2004) (citations omitted). Moreover, even under the search incident to arrest exception, a police officer cannot create a right to search by forcing the occupant of a vehicle to leave a purse in the vehicle. State v. Newsom,

132 Idaho 698, 979 P.2d 100 (1998). Thus in Zaitseva, because the driver attempted to limit the scope of her consent by removing the bag from the vehicle, her and Zaitseva's abandonment of any reasonable expectation of privacy in the bag or its contents, based on their denials of ownership, would have been necessary for officers to lawfully search the bag.

Melling also argues that Zaitseva is factually distinguishable from this case and so not binding. (Respondent's brief, pp.10-11.) First Melling notes that police in Zaitseva searched a container in a vehicle whereas the officer in this case searched a container on the front lawn of Melling's residence and, he argues, there is a greater expectation of privacy in objects in front lawns than in objects in cars. (Respondent's brief, p.11.) But this distinction is irrelevant to the issue of abandonment. Whatever expectation of privacy Melling may have had in his front lawn is not at issue in this case; there is no argument that Officer Harward was not lawfully present on Melling's front lawn when Melling's girlfriend threw the lockbox at the officer's feet. Where the suspect has denied ownership of the container and its contents, he has disavowed any reasonable expectation of privacy in that container or its contents. The question is what reasonable expectation of privacy Melling had in the lockbox, not in his front lawn. And any reasonable expectation of privacy he may have had in the lockbox was disavowed when he abandoned it.

Second, Melling asserts that in Zaitseva "both the driver of the vehicle and the defendant denied ownership of the bag," whereas in this case "there is no evidence that more than one individual denied ownership of the lockbox." (Respondent's brief, p.11.) It should be noted that by repeatedly claiming that the lockbox belonged to Melling (R.,

p.52), Melling's girlfriend necessarily denied that the lockbox was hers, so this distinction does not exist. More importantly, any such distinction would again be irrelevant to the issue before this Court. If one person denies owning a container prior to its search, then that individual has relinquished any reasonable expectation of privacy he or she may have had in the container or its items. Likewise, if 100 people deny owning a container prior to its search, then those individuals have each relinquished whatever reasonable expectation of privacy each may have had in the container or its items. Whether the defendant is the one individual who disavowed having a reasonable expectation of privacy or one of 100 individuals who disavowed having a reasonable expectation of privacy, that defendant still cannot demonstrate that he *now* has a reasonable expectation of privacy to bring a Fourth Amendment challenge against the search of the abandoned property.

Finally, Melling argues that, unlike in Zaitseva, there were reasonable *indicia* that Melling owned the lockbox and the officer in this case "in fact believed" that Melling was the true owner of the lockbox. (Respondent's brief, p.11.) Again, this is irrelevant to the question of abandonment. Officers conducting trash pulls have "reasonable *indicia*" that the garbage they are sifting through belongs to the suspects, but the discarded property is still abandoned. Officers in pursuit likely believe that the contraband suspects attempt to discard along roadways or under bushes is in fact the suspects' property, but those suspects have still essentially relinquished any reasonable expectation of privacy which may have attached to that abandoned property. Likewise, when a suspect denies ownership of property prior to its search, he has "essentially relinquished or abandoned

any privacy interest in the contents" of that property. Zaitseva, 135 Idaho at 13, 13 P.3d at 340.

On appeal, Melling invites this Court to disregard its precedent and instead adopt the theory espoused in one legal treatise that "a mere disclaimer of ownership in an effort to avoid making an incriminating statement in response to police questioning" is insufficient to show abandonment. 6 Wayne R. LaFave, Search & Seizure § 11.3(f) (5th ed.). Contrary to Melling's assertion (see Respondent's brief, p.12), this is not the "prevailing view." Rather it seems most jurisdictions, like Idaho, have held that denying ownership of an item abandons any reasonable expectation of privacy in that object, and therefore defendants lack standing to later challenge searches of the abandoned item. Professor LaFave offers numerous examples of jurisdictions which employ this rule, including United States v. Torres, 949 F.2d 606, 608 (2nd Cir. 1991) (defendant lacked standing where she claimed a shoulder bag she was carrying belonged to her mother and that she lacked knowledge of its contents); United States v. Williams, 538 F.2d 549, 550-51 (4th Cir. 1976) (defendant's disclaimer of ownership of his briefcase was analogous to abandonment); United States v. Powell, 732 F.3d 361, 374-75 (5th Cir. 2013) (defendant "abandoned the cell phone" when "she disclaimed personal connection to the phone" and so "lack[ed] standing to challenge the admissibility of the phone and the records contained therein"); United States v. Peters, 194 F.3d 692, 695-96 (6th Cir. 1999) (defendant lacked standing to challenge the search of a bag *police saw him carry onto the bus*, because he disclaimed ownership); United States v. Alexander, 573 F.3d 465, 473 (7th Cir. 2009) (defendant's "disclaim[ing] that the vehicle was his" was sufficient "to establish abandonment *despite the officers' belief* that the

[car] was his" (emphasis added)); United States v. Decoud, 456 F.3d 996, 1007-08 (9th Cir. 2006) (where defendant claimed a briefcase found in his car did not belong to him, he lacked standing); United States v. Tubens, 765 F.3d 1251, 1256-57 (10th Cir. 2014) (defendant lacked standing to challenge search of carry-on bag found in bus after he "asserted unequivocally that the bag was not his"); United States v. McBean, 861 F.2d 1570, 1573 (11th Cir. 1988) (defendant lacked standing to challenge search of suitcases in the trunk of his car where he abandoned that property by claiming the luggage was not his); see also United States v. Lewis, 921 F.2d 1294, 1302-03 (D.C. Cir. 1990) (when defendant denied owning bag, she abandoned it for purposes of the Fourth Amendment). Professor LaFave also offers several additional examples from various state courts. In contrast, he offers only one example of a court which has adopted Melling's proposed exception: State v. Isom, 641 P.2d 417 (Mont. 1982). See 6 Search & Seizure § 11.3(e) n.358. The state has already addressed that case in its Appellant's brief. (See id., pp.6-7.)

In his Respondent's brief, Melling also suggests that State v. Evans, 150 P.3d 105 (Wash. 2007), and State v. Johnson, 193 A.2d 1185 (N.J. 2008), support his proposed avoiding self-incrimination exception to abandonment.[2] Review, however, shows that neither case is applicable. First, Washington has an automatic standing rule. Evans, 150 P.3d at 108. Idaho, however, has no automatic standing rule; rather, as noted above, "[a] person challenging a search has the burden of showing he or she had a legitimate expectation of privacy in the item or place to be searched." Pruss, 145

[2] Melling also cites to State v. Cook, 34 P.3d 156 (Or. 2001), a case which was decided specifically under the Oregon Constitution, see 34 P.3d at 161, not the Fourth Amendment and certainly not the Idaho Constitution.

Idaho at 626, 181 P.3d at 1234. Relying on the automatic standing rule and the state's constitutional privacy protections exceeding those of the federal constitution, the Evans court concluded that denial of ownership would not "divest [the defendant] of a privacy interest in that property, provided the search takes place in an area where the defendant had a privacy interest." Evans, 150 P.3d at 110-11. The court also noted that the property, a briefcase found during a consent-based search of a vehicle, was locked and the defendant objected to its seizure. Id. at 111. Neither of these facts is present in Melling's case. (See R., p.52.)

New Jersey's unique standing rules were also a key factor in the Johnson decision. In that case, police entered an apartment occupied by five people with an arrest warrant for the defendant. Johnson, 193 A.2d at 1197. The police seized and searched a duffle bag after both the defendant and another occupant denied owning the duffle bag. Id. The court noted that "New Jersey's broad rule of standing protects the privacy rights of not just the accused, but also others in a home who might not have a ready forum in which to make their voices heard." Id. at 1197-98. Therefore, despite the defendant's denial, the property still was not "abandoned" because that denial "did not forfeit the rights of the other occupants of the apartment ... to have their 'effects' subjected to an unreasonable search," and "the police might still have easily determined [the bag's] owner." Id. at 1197.

Whatever the merits of these cases, this Court should reject Melling's proposed "attempting to avoid incrimination" exception to abandonment. Contrary to his argument, there is no right against self-incrimination; rather, the Fifth Amendment provides a right against *compelled* self-incrimination. See U.S. Const. Am. V ("No

person shall ... be compelled in any criminal case to be a witness against himself...."). While, to protect that constitutional right, the Supreme Court announced in Miranda v. Arizona, 384 U.S. 436 (1966), the prophylactic right to remain silent during custodial interrogations, even that right must be affirmatively invoked. Berghuis v. Thompkins, 560 U.S. 370, 381-82 (2010). Suspects may invoke the right simply by stating that they are exercising the right not to incriminate themselves. Id. at 382. Lying to the police "to avoid incrimination" is not the equivalent of invoking the right against compelled self-incrimination. See, e.g., Mills v. United States, 708 A.2d 1003, 1008 (D.C. App. 1997) (contention that defendant "was entitled not to incriminate himself by volunteering his connection to the incriminating evidence in the car" rejected as "nothing in the record manifests any intention" to "assert his privilege against self-incrimination").

Melling, again citing to Professor LaFave's treatise, also contends that "a mere denial of ownership cannot constitute abandonment when the police are on notice that a person has a reasonable expectation of privacy in property based on something other than ownership." (Respondent's brief, p.12.) An example of this rule is found in the case of Robles v. Indiana, 510 N.E.2d 660, 663 (Ind. 1987), where a passenger denied *owning* luggage, but still had a legitimate expectation of privacy because he was the bailee and "admitted he was transporting the bag." But that rule is inapplicable to the instant case. Far from admitting any connection to the lockbox or its contents, Melling "stated he had never seen the box before and had no idea who it belonged to," and he claimed "that nothing in the box was his." (R., p.52.)

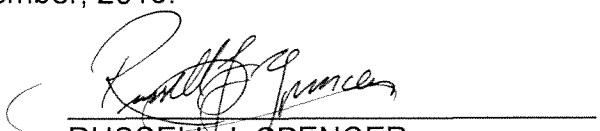
A suspect may not simultaneously disavow and assert a reasonable expectation of privacy in items of property. By repeatedly denying, prior to a search, his ownership

of the lockbox and its contents, Melling abandoned any reasonable expectation of privacy he may have had in those items. Zaitseva, 135 Idaho at 13, 13 P.3d at 340. Having disavowed his reasonable expectation of privacy, he cannot meet his burden of showing that he had a legitimate expectation of privacy in the abandoned container. Harwood, 133 Idaho at 52, 981 P.2d at 1162. The district court erred in concluding otherwise. The district court's suppression order should therefore be reversed and this case remanded for further proceedings.

CONCLUSION

The state respectfully requests that this Court reverse the district court's order granting Melling's suppression motion and remand this case for further proceedings.

DATED this 15th day of December, 2015.



RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th day of December, 2015, served a true and correct copy of the attached REPLY BRIEF OF APPELLANT by causing a copy addressed to:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

RUSSELL J. SPENCER
Deputy Attorney General

RJS/dd