4-21-2016

State v. Harrison Appellant's Reply Brief Dckt. 43299

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 43299**
	)	
v.	)	**KOOTENAI COUNTY NO. CR 2014-20195**
	)	
MICHAEL SEAN HARRISON,	)	
	)	**REPLY BRIEF**
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

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

In his appellant's brief, Michael Sean Harrison argued that the district court erred by denying his motion to suppress because Officer Harrison unlawfully detained and then frisked him, Mr. Harrison's consent to empty his pockets was invalid because it was inextricably bound to the unlawful detention and frisk, and Mr. Harrison's consent to empty his pockets was not voluntary. In response, the State asserts that Officer Harrison had reasonable suspicion to detain Mr. Harrison, it is irrelevant whether the frisk was irrevocably intertwined with Mr. Harrison's consent to empty his pockets because he consented to the initial frisk, and Mr. Harrison voluntarily consented to Officer Harrison's request to empty his pockets.

This reply brief addresses the State's second argument. The State acknowledges that *State v. Kerley*, 134 Idaho 870 (Ct. App. 2000), controls, and does not dispute that Officer Harrison had no reason to believe Mr. Harrison was armed and presently dangerous. (Resp. Br., p.15.) Yet the State claims suppression is not required because Officer Harrison asked Mr. Harrison if he could check him for weapons, and Mr. Harrison consented. (*Id*.) The State's argument is legally flawed and factually baseless. The State has not and cannot meet its burden of proving that Mr. Harrison voluntarily consented to the frisk, and so Mr. Harrison's later consent to empty his pockets was invalid. Regardless of this Court's decision on Mr. Harrison's other grounds for relief, this issue requires reversal. The Court should suppress the evidence, and the fruits of the evidence, seized as a result of the unlawful frisk and search.

ISSUE

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

ARGUMENT

The District Court Erred When It Denied Mr. Harrison's Motion To Suppress

In his appellant's brief, Mr. Harrison argued that the district court erroneously concluded that it did not need to decide whether the pat search was justified because, according to *State v. Kerley*, 134 Idaho 870, 874–75 (Ct. App. 2000), consent which is irrevocably intertwined with an unlawful frisk cannot "purge the taint of the unlawful frisk." (*See* App. Br., pp.11–12.) Further, the frisk was unlawful because Officer Harrison did not believe that Mr. Harrison was armed and presently dangerous. (App. Br., pp.10–13.) Therefore, the district court should have suppressed the evidence seized as a result.

In response, the State acknowledges that *Kerley* controls and thus asserts that "whether the evidence discovered as a result of that search is 'tainted' depends on whether the frisk itself was lawful." (Resp. Br., p.15.) It goes on to argue that, even assuming Officer Harrison had no reason to believe Mr. Harrison was armed and presently dangerous,[1] suppression is not required because "Officer Harrison *asked* Harrison if he could check him for weapons" and Mr. Harrison consented. (Resp. Br., p.16 (emphasis added).) The State also asserts that the district court did not make any findings on that issue, but suggests that this Court apply the district court's findings regarding Mr. Harrison's consent to empty his pockets to the State's claim that Mr. Harrison consented to the frisk, arguing the "situation surrounding both are similar if not the same." (Resp. Br., p.16 n.2.)

The State's arguments are legally flawed and factually baseless. Because the State has not and cannot meet its burden of proving that Mr. Harrison voluntarily consented to the frisk,

[1] By failing to argue to the contrary, the State has conceded this issue.

the Court should suppress the evidence seized as a result. *See Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *State v. Koivu*, 152 Idaho 511, 519 (2012).

A. The State Failed To Prove That Mr. Harrison Consented To The Frisk

Consent to search may be in the form of words, gestures, or conduct, *State v. Staatz*, 132 Idaho 693, 695 (Ct. App. 1999) (citing *State v. Knapp*, 120 Idaho 343, 348 (Ct. App. 1991)), but must be "unequivocal and specific," *United States v. Shaibu*, 920 F.2d 1423, 1426 (9th Cir. 1990) (internal quotation marks omitted); *see also United States v. Canipe*, 569 F.3d 597, 602 (6th Cir. 2009); *United States v. Lyons*, 510 F.3d 1225, 1239 (10th Cir. 2007). The State has the burden of proving that the defendant gave consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *State v. Garcia*, 143 Idaho 774, 778 (Ct. App. 2006).

The State has not and cannot meet its burden of proving that Mr. Harrison clearly and unequivocally consented to the frisk. First, the State's characterization of the exchange between Officer Harrison and Mr. Harrison is both self-serving and incorrect. The State claims that "Officer Harrison *asked* Harrison if he could check him for weapons," and then Mr. Harrison consented. (*See* Resp. Br., p.16 (emphasis added).) To the contrary, Officer Harrison did not "ask" Mr. Harrison anything—he simply *told* Mr. Harrison what he was going to do. (*See* Ex. 1, 5:16:50–5:16:55.) This is especially clear in-context:

Officer Harrison:	Excuse me, sir? Step right over here for me. Set your stuff down for me right there.
Mr. Harrison:	What's going on?
Officer Harrison:	Somebody called you in, you and your girlfriend or whoever is in the car as a shoplifter. Set your stuff down for me.
Mr. Harrison:	I didn't ta—I didn't—I didn't—I didn't steal nothing, man.
Officer Harrison:	Set your stuff down. K. Step right over here for me. K. Turn around for me.
Mr. Harrison:	[Unintelligible]
Officer Harrison:	Pat you down make sure you don't have any weapons, ok?

Mr. Harrison: Alright, [unintelligible]. [2]
Officer Harrison: Spread your feet out for me.
Mr. Harrison: Yeah.

(Ex. 1, 5:16:35–5:17:00.) As the video makes clear, Officer Harrison first instructed Mr. Harrison to step over to him and turn around, then gave the explanation for why—he was going to pat Mr. Harrison down. (*See* Ex. 1, 5:16:30–5:16:55.) If Officer Harrison were going to ask Mr. Harrison if he could frisk him, it would seem rather odd to begin by directing Mr. Harrison to face the other way; one generally asks a question face-to-face, while one conducts a frisk from behind. By saying "ok" at the end of the statement, Officer Harrison did not convert the entire phrase into a question—he simply asked for acknowledgement. (*See* Ex. 1, 5:16:50–5:16:52.) Mr. Harrison did just that by saying "alright" to Officer Harrison's directives—he acknowledged what Officer Harrison had said and communicated that he was not going to fight the frisk. (*See* Ex. 1, 5:16:50–5:16:55.)

What's more, the State has overlooked Officer Harrison's own testimony on this issue. Officer Harrison did not testify that he asked for and was given Mr. Harrison's consent. (*See* 1/26/15 Tr., p.13, L.24 – p.15, L.15 (direct examination), p.30, L.1 – p.31, L.17 (cross examination).) Instead, he testified that he frisked Mr. Harrison because he had general concerns about his safety. (1/26/15 Tr., p.14, Ls.6–10 ("At that point in time I was still there alone. I

[2] Counsel has attempted to transcribe this portion of the audio as accurately as possible, but it is at times difficult to understand what Mr. Harrison said. For example, Mr. Harrison said something after "alright." (*See* Ex. 1, 5:16:50–5:16:55.) The State believes he said "Alright. Fine." (*See* Resp. Br., p.16.) Counsel does not believe Mr. Harrison said "fine," but is unable to make out exactly what he said. It sounds as though he said "alright, mine," which does not make sense in context. Even if he said "alright, fine," that phrase only acknowledged what Officer Harrison had said and communicated that Mr. Harrison was not going to fight the frisk. But if the Court agrees it is unclear what Mr. Harrison said, that ambiguity cuts against the State because it is the State's burden to prove Mr. Harrison clearly and unequivocally consented to the frisk. *See Schneckloth*, 412 U.S. at 222; *Shaibu*, 920 F.2d at 1426.

couldn't tell what the female was doing. I couldn't see, you know, at all what she was doing in the vehicle and I had limited information. And my cover officer wasn't on scene with me yet."), p.15, Ls.10–15 (Officer Harrison explaining that he pat searched Mr. Harrison because he "was wearing a hooded sweatshirt, which fit loosely. It was hard to see what was in the center pouch of the sweatshirt or along his waistline" and "[t]here were several things bulging. I couldn't make out what they were.").) This is presumably why the prosecutor abandoned her claim that Mr. Harrison consented to the frisk. (*Compare* R., p.71 (the State's objection to Mr. Harrison's motion to suppress, stating: "The Defendant consented to a pat down search for weapons."), *with* 1/26/15 Tr., p.38, L.23 – p.39, L.19 (the prosecutor arguing only that the frisk was justified because Officer Harrison "was unsure really what was going on" and "in regards to safety concerns it was certainly appropriate to ask him to come toward him and to conduct that pat-down search.").) In short, Mr. Harrison did not consent to the frisk, let alone clearly and unequivocally consent. The State has not and cannot meet its burden of proving as much.

B. The State Failed To Prove That Any Purported Consent Was Voluntary

"Where there is coercion there cannot be consent." *Bumper v. N. Carolina*, 391 U.S. 543, 550 (1968). "For no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a mere pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth*, 412 U.S. at 228. Mere acquiescence does not constitute knowing, intelligent, and voluntary consent. *Bumper*, 391 U.S. at 548–49; *State v. Jaborra*, 143 Idaho 94, 98 (Ct. App. 2006). "The state has a heavy burden to prove that consent was given freely and voluntarily." *State v. Zavala*, 134 Idaho 532, 536 (Ct. App. 2000).

Whether consent was the product of coercion is a factual determination. *Schneckloth*, 412 U.S. at 229. The court must assess "the totality of all the surrounding circumstances—both

the characteristics of the accused and the details of the interrogation." *Id.* at 226; *see also Garcia*, 143 Idaho at 778. Relevant factors include, but are not limited to, whether the defendant knew he could deny consent; the location, conditions, and time at which the consent was given; whether the defendant was free to leave; the number of officers involved; and the lack of any advice to the defendant regarding his constitutional rights. *Garcia*, 143 Idaho at 778; *see also Schneckloth*, 412 U.S. at 226 (considering "(1) whether Miranda warnings were given; (2) the youth of the accused; (3) the accused's level of education or low intelligence; (4) the length of the detention; (5) the repeated and prolonged nature of the questioning; and (6) deprivation of food or sleep."). "Because each factual situation surrounding consent to a search is unique, [the Court] may also take into account any other factors that [it] deem[s] relevant." *Liberal v. Estrada*, 632 F.3d 1064, 1082 (9th Cir. 2011).

Even if this Court concludes that Mr. Harrison consented, the State has not shown that his consent was voluntary. The circumstances of the interaction were such that a reasonable person would not feel free to refuse consent. As the dash camera video shows, Mr. Harrison said "alright" only after Officer Harrison said "excuse me, sir, step right over here for me," ordered him three times to "set your stuff down for me," then said "step right over here for me," "turn around for me" and "pat you down make sure you don't have any weapons, ok?"[3] (Ex. 1, 5:16:32–5:16:52; *see also* 1/26/15 Tr., p.30, Ls.1–19.) A reasonable person in those circumstances would not have felt free to refuse consent. Officer Harrison had been ordering Mr. Harrison around, Mr. Harrison was not free to leave, and Officer Harrison did not inform

[3] In the appellant's brief, counsel transcribed this phrase as "I'm going to make sure you don't have any weapons." (App. Br., p.16.) On further review, it sounds more like Officer Harrison said "pat you down make sure you don't have any weapons." (*See* Ex. 1, 5:16:50–5:16:55.) It is difficult to hear whether Officer Harrison said "I'm going to" at the beginning of that phrase because Mr. Harrison is also talking at that time.

Mr. Harrison that he could refuse to consent. Therefore, even if this Court finds Mr. Harrison consented, that consent was not voluntary.

C. The State's Suggestion That This Court Apply The District Court's Findings Regarding Mr. Harrison's Consent To Empty His Pockets To Mr. Harrison's Alleged Consent To The Frisk Is Meritless

The State's suggestion that "[t]he district court's factual findings and legal conclusions regarding Harrison's consent to search his pockets could also be applied to Harrison's consent to the initial pat search because the factual situation surrounding both are similar if not the same" is meritless. (Resp. Br., p.16 n.2.) First, the State has overlooked the district court's findings on this issue. Specifically, the court found: "Officer Harrison *indicated clearly* that he was going to make sure that Mr. Harrison had no weapons on him and engaged in a pat search." (1/26/15 Tr., p.49, Ls.19–21.) Although the court did not explicitly find that Mr. Harrison did not consent, its finding that Officer Harrison "indicated clearly" that he was going to search Mr. Harrison, and then did so, implies as much. Second, the "factual situation" is not similar, much less "the same." (Resp. Br., p.16 n.2.) Officer Harrison *told* Mr. Harrison that he was going to frisk him, but *asked* Mr. Harrison for consent to empty his pockets. (*Compare* Ex. 1, 5:16:50–5:16:55 ("Pat you down make sure you don't have any weapons, ok."), *with* Ex. 1, 5:17:55–5:18:10 ("What's in your pocket here? . . . You mind if I check?").) The State cannot meet its burden of proving that Mr. Harrison voluntarily consented to the frisk by pointing to the court's finding on a wholly separate issue.

In sum, the State has not and cannot meet its burden of proving that Mr. Harrison voluntarily consented to the frisk. Because the State acknowledges that *Kerley* controls, and does not dispute that Officer Harrison had no reason to believe Mr. Harrison was armed and presently dangerous, the frisk was unlawful. Mr. Harrison's later consent to empty his pockets

was therefore invalid. The Court should suppress the evidence seized as a result of the unlawful frisk and search, as well as the fruits of the evidence.

CONCLUSION

Mr. Harrison respectfully requests that this Court vacate his conviction, reverse the order denying his motion to suppress, and remand to the district court for further proceedings.

DATED this 21st day of April, 2016.

_____/s/_____
MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of April, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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