4-29-2020

State v. Weliever Appellant's Brief Dckt. 47332

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4/29/2020 2:18 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 47332-2019**
Plaintiff-Respondent,	)	
	)	**MINIDOKA COUNTY**
	)	**NO. CR34-18-3711**
v.	)	
	)	
ROBERT HENRY WELIEVER,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

HONORABLE ERIC WILDMAN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Robert Henry Weliever appeals the district court's order denying his motion to suppress evidence found after police officers impounded and conducted a warrantless search of his car, and the court's order denying his motion for reconsideration. He asserts the district court erred in upholding the search under the inventory-search exception to the Fourth Amendment's warrant requirement because, contrary to the district court's findings, the officers did not conduct the inventory search in compliance with the established police procedures.

Statement of the Facts and Course of Proceedings

On July 23, 2018, a Mini-Cassia Sherriff's Deputy, Detective Shane Murphy, observed Mr. Weliever driving a Mercury Topaz. (R., p.63.) The detective knew Mr. Weliever had an outstanding warrant for his arrest, and decided to stop and arrest him. (Tr., p.45, L.18 – p.46, L.9.) Upon making contact, Detective Murphy informed Mr. Weliever he was under arrest pursuant to the warrant and took him into custody. (R. p.63.) Mr. Weliever had his friend's two dogs in the car with him, and he called the friend to come and get them. (Tr., p.125, Ls.1-4.) Mr. Weliever's vehicle was uninsured and it had license plates that did not match the car and were "fictitious." (R., p.63; Tr., p.47, Ls.7-15, p.135, Ls.6-10.) A second officer, Detective Matt Love, arrived at the scene to assist Detective Murphy. (Tr., p.56, Ls.14-17.) A transport officer also arrived and took Mr. Weliever to the county jail. (Tr., p.60, Ls.7-8.)

The detectives decided to impound Mr. Weliever's vehicle and called for a tow truck. (R., p.65; Tr., p.53, L.20 – p.54, L.6.) In the meantime, Mr. Weliever's friend arrived at the scene and collected her dogs, and the officers also let her take several bags of clothing she claimed belonged to her. (Tr., p.46, L.10 – p.63, Ls.8-15.) After the friend had left, and before

the tow truck arrived, the officers searched through Mr. Weliever's vehicle. (Tr., p.49, L.7 – p.50, L.16.) During the search, Officer Love found a brown Carhartt-style coat, searched inside the coat's pocket, and seized a syringe containing a liquid substance. (Tr., p.29, Ls.5-12, p.53, Ls.19-24.)

The officers also completed an impound vehicle inventory log sheet listing some, but not all, of the items found inside the vehicle. (Tr., p.61, Ls.16-22.) According to the officers, they were "looking for items of value … just anything that we feel like needs to be listed." (Tr., p.61, L.16 – p.62, L.9.) The items listed on the inventory log sheet are as follows:

> FISHING POLES, DOGS, MISC. TRASH, LEATHERMAN, I.D.S, SOCIAL SECURITY CARD, 3 PHONES, MULTIPLE CELL PHONES, Misc. Tools.

(Ex., p.8.) The officers specially listed the "syringe" as a "retained" item. (Ex., p.8.) No other items – not even the Carhartt-style coat – were listed on the inventory sheet. (*See* Ex., p.8.)

The liquid substance in the syringe was later tested and determined to be methamphetamine. (Tr., p.19, Ls.21-24.) A few months after the original stop and vehicle search, Mr. Weliever was charged with possession of methamphetamine, and another warrant was issued. (*See* R., p.63; Tr., p.9, L.21 – p.13, L.9.) On September 19, 2018, Officer Love arrested Mr. Weliever pursuant to that warrant, and during the search incident thereto, discovered a baggie of methamphetamine on Mr. Weliever's person. (*See* Tr., p.9, L.21 – p.13, L.9.) The State filed a three-count Information, charging Mr. Weliever with possessing methamphetamine and drug paraphernalia on July 23, 2018 (the original stop and vehicle search); and with possessing methamphetamine on September 19, 2018 (the subsequent arrest on the warrant). (R., p.20.)

Mr. Weliever filed a motion to suppress,[1] claiming the warrantless search of his vehicle on July 23, 2018, violated his constitutional rights against unreasonable searches and seizures. (R., pp.45-48.) He argued the "inventory exception" did not apply in this case because: (1) the officers had unreasonably impounded his car; and (2) the officers did not comply with the established police policy. (R., pp.45-48; Tr., p.43, L.12 – p.154, L.18.) He argued that the exclusionary rule required suppression of all direct and indirect evidence as the tainted fruit of the officers' unlawful conduct, including the evidence discovered as the result of his arrest on September 19, 2018. (R., pp.45-48; Tr., p.9, L.21 – p.13, L.9.)

Following an evidentiary hearing, the district court issued a written order denying Mr. Weliever's motion. (R. pp.63-68.) The district concluded that: (a) the officers' decision to impound the vehicle was reasonable under the circumstances; and (b) the officers listed the valuable items in the car on the inventory sheet, and that in so doing, conducted the search consistently with standardized inventory-search police procedures. (R., pp.67-68.) Mr. Weliever filed a motion for reconsideration, asking the district court to re-examine its order concerning the inventory search, in light of the transcript of the preliminary hearing and additional argument. (R. pp.99-102.) The district court denied the motion to reconsider, ruling that the evidence in the preliminary transcript was merely cumulative. (R., pp.104-05.)

Mr. Weliever, entered a conditional plea of guilty to one count of possessing methamphetamine, reserving his right to appeal the district court's orders denying his motion to suppress and motion to reconsider. (R., p.110; Tr., p.173, L.24 – p.182, L.7.) The district court entered a judgment of conviction sentencing him to seven years, with two years fixed. (R., p.130.) Mr. Weliever timely filed a Notice of Appeal. (Tr., p.138.)

[1] References to the Motion to Suppress refer to the Amended Motion to Suppress filed January 18, 2019. (*See* R., pp.45-48.)

ISSUE

Did the district court err in failing to suppress the evidence gathered in violation of Mr. Weliever's Fourth Amendment rights?

ARGUMENT

The District Court Erred In Failing To Suppress The Evidence Gathered In Violation Of Mr. Weliever's Fourth Amendment Rights

A. Introduction

The police officers violated Mr. Weliever's Fourth Amendment rights when they conducted a warrantless search of his vehicle. The district erred when it ruled that the search was valid under the inventory-search exception, because, contrary to the district court's findings, the officers did *not* conduct the search in compliance with the standard and established police procedures.[2] Suppression should have been granted.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When this Court reviews an order granting or denying a motion to suppress, it accepts the trial court's factual findings unless they are clearly erroneous. *State v. Frederick*, 149 Idaho 509, 512 (2010). However, this Court freely reviews the trial court's application of constitutional principles in light of those facts. *State v. Eversole*, 160 Idaho 239, 242 (2016).

C. The Officers' Warrantless Vehicle Search Violated Mr. Weliever's Fourth Amendment Rights

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. A warrantless search is presumptively unreasonable unless it falls within an exception to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443,

[2] Mr. Weliever does not challenge the district court's ruling that the impound of the vehicle was reasonable under the circumstances.

454-55 (1971). "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. 373, 382 (2014).

In this case, the search of Mr. Weliever's car was a warrantless search, and the burden was on the State to establish that an exception to the warrant requirement applied. *State v. LaMay*, 140 Idaho 835, 839 (2004). As demonstrated below, the State failed to carry its burden.

1. The Inventory-Search Exception Does Not Apply In This Case Because The Officers Did Not Comply With The Established Police Policy

The authorization for warrantless inventory searches "is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory." *Florida v. Wells*, 495 U.S. 1, 4 (1990). As described by the Court of Appeals:

> Inventory searches are a well-recognized exception to the warrant requirement of the Fourth Amendment. The legitimate purposes of inventory searches are: (1) protect the owner's property while it remains in police custody; (2) protect the State against false claims of lost or stolen property; and (3) protect police from potential danger. However, an inventory search must not be a ruse for general rummaging in order to locate incriminating evidence. "Inventory searches, *when conducted in compliance with standard and established police procedures* and not as a pretext for criminal investigation, do not offend Fourth Amendment strictures against unreasonable searches and seizures.

State v. Stewart, 152 Idaho 868, 870 (Ct. App. 2012) (emphasis added) (citations omitted).

For the inventory-search exception to apply, the State must show the search was conducted in compliance with standard and established police procedures *and* was not used as a pretext, that is, not used in bad faith. *See Colorado v. Bertine*, 479 U.S. 387, 373 n.6 (1987) ("Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.").

In this case, as found by the district court, the Minidoka County Sheriff's Office has a standardized written policy governing vehicle inventory searches, which is the policy contained

in the Idaho Policing Policy, updated July 1, 2017. (R., p. 66; Ex.5; Tr., 51, L.11 – p.52, L.23.)

That written standardized policy provides, in relevant part:

> **Vehicle inventory searches**
> Whenever you impound a vehicle, you should conduct a vehicle inventory search in accordance with this policy. The purpose of this type of search is [1] to protect the owner's property from damage or loss while the vehicle is in law enforcement custody, [2] to protect you and our agency against claims of lost, damaged or stolen property, and [3] to protect our agency from potential dangers of property stored in the vehicle.
>
> . . .
>
> *Failure to complete the inventory search may render the search invalid.* [emphasis original.]
>
> Special Procedure: Fill out a vehicle search inventory log that includes the date and time of the search *and a detailed inventory of the vehicle's contents.* You should search any location in the vehicle where you could reasonably expect to discover valuables or other items for safekeeping.
>
> . . .
>
> Remove any hazardous or potentially dangerous item, or any valuable item that could potentially be lost or damaged, and store in a safe manner. . . .

(Ex.pp.6-7 (emphasis added).)

This standardized written policy was not complied with in this case. Although the officers filled out an inventory log, they failed to include a "detailed inventory of the vehicle's contents," and they failed to do so despite the emphatic written warning that "*Failure to complete the inventory search may render the search invalid.*"

Instead, on the inventory log, the officers listed the following items:

> FISHING POLES, DOGS, MISC. TRASH, LEATHERMAN, I.D.S, SOCIAL SECURITY CARD, 3 PHONES, MULTIPLE CELL PHONES, Misc. Tools.

(Ex., p.8.) Also included was the syringe, noted as a "retained" item. (Ex., p.8.) The officers included no other items on the inventory log – not even the Carhartt coat in which the syringe had been found. (*See* Ex., p.8.)

This inventory demonstrates that the officers failed to comply with the written policy's standards. As testified to by the officers and found by the district court, the officers did not include a complete list of all items. (Tr., p.61, Ls.16-22.) Although both of the officers were vague and non-committal in their respective assessments of the quantity of items in the vehicle (*see* Tr., p.41, Ls.19- p.43, L.9), the district court accepted as fact that the officers had left items out of the inventory. (R., p.67.)

The district court found that the officers had nonetheless complied with the policy since "they listed those items which *they believed* to *have value*." (R., p.67 (emphasis added).) This finding was erroneous. First, the finding is, factually, clearly erroneous, and not supported by the evidence,[3] since the officers also included "MISC. TRASH." (Ex., p.8.) Moreover, a finding that the officers included items of value does not mean that all items of value were listed. Critically, the officers did *not* testify they had in fact conducted thorough search of the vehicle, or looked through all its containers, in search of items of value, as required by the policy. (*See generally* Tr., p.5, L.2 – p.66, L.23.) On the contrary, the officers testified they spent little time – five or ten minutes – inventorying the contents of the vehicle. (Tr., p.76, Ls.8-10.)

Additionally, the written policy does not state that *only* items of value need to be included in the inventory; rather, the policy plainly instructs officers to include a "detailed description of the contents." (Ex., p.8.) Thus, while inventorying valuable items may be consistent with the *second* of the policy's three stated purposes, *i.e.*, "to protect you and our agency against claims

[3] Factual findings that are not supported by the record are clearly erroneous and cannot be used to support a trial court's decision. *See e.g., Stuart v. State*, 127 Idaho 806, 814 (1994).

of lost, damaged or stolen property," it does not fulfill the first purpose, which is "to protect the owner's property from damage or loss while the vehicle is in law enforcement custody." (Ex., p.8.) Mr. Weliever had been living out of his car, and kept clothing and other numerous items of personal property with him, which certainly had value to him even if not apparent to the officers. (Tr., p.107, Ls.2-10.)

Not only did the officers fail to list all of the items found in the vehicle, they falsely listed items that were *not* in the vehicle, specifically "DOGS." (Ex., p.8.) Listing items removed from the vehicle prior to towing would contravene the second supposed purpose of inventory searches. (*See* Ex., p.7.)

Finally, the district court erred in ruling that Mr. Weliever was required to show bad faith by the police (R., pp.67), and its reliance on the Court of Appeals' opinion in *State v. Bray*, 122 Idaho 375 (Ct. App. 1992), was misplaced. For the inventory-search exception to apply, the search must: (1) be conducted in compliance with standard and established police procedures *and* (2) not be used as a pretext, that is, not be used in bad faith. *See Colorado v. Bertine*, 479 U.S. 387, 373 n.6 (1987) ("Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria."). Thus, because the inventory search must satisfy *both* requirements, in order for suppression to succeed, the defendant need only show that *either* the search was not consistent with established procedures, *or* it was pretextual.

In *Bray*, the defendant complained the officer's inventory "was not complete, in that [the officer] did not list all of the items found." 122 Idaho at 379. However, and in contrast to the facts of Mr. Weliever's case, in *Bray* there was no written police policy or other established police standard that instructed officers to include a complete listing of all items in the inventory.

Id. On the contrary, the officer in *Bray* testified as to the purpose of the policy, and that he had conducted the inventory in accordance with that purpose. *Id.* Moreover, as noted in the *Bray* Court's decision, the defendant failed to introduce the inventory log produced by the officer, and also failed to show that the officer's list did not comply with the policy's purpose. *Id.* Thus, in *Bray*, the State showed that the officer in fact complied with the established policy, and the inventory search was therefore proper in the absence of a showing of officer bad faith. *Id.*

While an officer's noncompliance with the provisions of an inventory policy can demonstrate improper motives, an officer's noncompliance with the policy is not equivalent to bad faith; likewise, bad faith can exist even where the policy has been strictly followed. *See United States v. Johnson*, 889 F.3d 1120 (9th Cir. 2018).

In short, to justify the search, the State bore the burden to show the inventory search was conducted both in compliance with standard and established police procedures *and* not as a pretext for criminal investigation. *Stewart*, 152 Idaho at 868. Because the State failed to show that the inventory search complied with the established written procedure, the district court clearly erred in concluding the procedure was followed. The district court's order denying suppression should be reversed.

2. Mr. Weliever Is Entitled To Suppression Of Both The Direct And Indirect Fruit Of The Officers' Unlawful Conduct

Evidence obtained in violation of the Fourth Amendment is subject to the exclusionary rule, which requires unlawfully seized evidence to be excluded from trial. *See, e.g.*, *State v. Cohagen*, 162 Idaho 717, 720 (2017); *State v. Page*, 140 Idaho 841, 843 (2004). The exclusionary rule requires the suppression of both "primary evidence obtained as a direct result of an illegal search or seizure," and "evidence *later discovered* and found to be derivative of an illegality," the proverbial "'fruit of the poisonous tree.'" *Cohagan*, 162 Idaho at 721 (quoting

Segura v. United States, 468 U.S. 796, 804 (1984)) (emphasis added). The rule "extends as well to the indirect as the direct products of unconstitutional conduct." *Segura*, 468 U.S. at 804.

There are, of course, exceptions to the application of the exclusionary rule. *Cohagan*, 162 Idaho at 721 (citing *Utah v. Strieff*, _ U.S._, 136 S.Ct. 2056 (2016)). However, the burden rests with the State to argue and establish there was "sufficient attenuation" to break the causal connection between the officer's illegal conduct and the discovery of the evidence. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

In this case, the methamphetamine and the syringe found on July, 23, 2018, during the search of Mr. Weliever's vehicle, was discovered as the direct result of the officers' unlawful conduct. However, that unlawfully-seized evidence was then used by Officer Love to supply the probable cause to obtain the warrant on which the officer later, on September 19, 2018, arrested and searched Mr. Weliever, discovering the additional drugs on his person. (R., pp.45-48; Tr., p.9, L.21 – p.13, L.9.)

Additionally, because in the district court, the State failed even to argue the application of any exception to the exclusionary rule, the State has waived the issue. *State v. Hoskins*, 165 Idaho 217, __, 443 P.3d 231, 240 (2019) (rejecting the State's request for a remand to determine the application of exceptions to exclusionary rule, where the State had failed to argue any exception in the district court).

CONCLUSION

Mr. Weliever respectfully requests that this Court reverse the district court's denial of his motion to suppress, vacate his judgment of conviction, and remand the case to the district court to allow him to withdraw his conditionally-entered guilty plea, in accordance with the plea agreement.

DATED this 29th day of April, 2020.

/s/ Kimberly A. Coster
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April, 2020, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
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KAC/eas