9-7-2016

State v. Mann Appellant's Reply Brief Dckt. 43745

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 43745**
	)	
v.	)	**KOOTENAI COUNTY NO. CR 2015-1903**
	)	
JESSE EUGENE MANN,	)	
	)	**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

_____

HONORABLE JOHN T. MITCHELL
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

Following a jury trial, Jesse Eugene Mann was convicted of trafficking in marijuana and two misdemeanor offenses for driving without privileges and possession of drug paraphernalia. Mr. Mann appealed. He argued that the district court erred by denying his motion to suppress based on its determination he lacked standing to challenge the search of the rental car. He also argued that the district court improperly instructed the jury on the misdemeanor charge of possession of drug paraphernalia. This Reply Brief is necessary to respond to the State's arguments regarding the appropriate test to determine an unauthorized driver's privacy interest in a rental car and the elements of possession of drug paraphernalia, a specific intent crime.

Statement of Facts and Course of Proceedings

The statement of facts and course of proceedings were previously articulated in Mr. Mann's Appellant's Brief. (*See* App. Br., pp.1–6.) They are not repeated in this Reply Brief, but are incorporated herein by reference.

ISSUES

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

II. Did the district court err when it failed to instruct the jury that the State had to prove Mr. Mann possessed the paraphernalia with the intent to use in Idaho?

ARGUMENT

I.

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

The district court applied the totality of the circumstances test from *State v. Cutler*, 144 Idaho 272 (Ct. App. 2007), to determine Mr. Mann lacked standing to challenge the police's search of a rental car. (Tr., p.29, L.6–p.32, L.10.) On appeal, Mr. Mann challenged the district court's ruling that he had no privacy interest in the car. (App. Br., pp.8–16.) Among other arguments, Mr. Mann contended that this Court should reconsider or reject the totality of the circumstances test from *Cutler* and instead adopt the test from Judge Lansing's concurring opinion in that case. (App. Br., pp.9–13.) The State asserts that the Court should decline Mr. Mann's request to reconsider or reject *Cutler*. (Resp. Br., p.6.)

Unlike the majority test, Judge Lansing's test allows an unauthorized driver to establish a reasonable expectation of privacy in a rental car with permission from the lessee. *Cutler*, 144 Idaho at 976 (Lansing, J., concurring). The Eighth and Ninth Circuits have adopted similar tests. *See State v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006); *United States v. Best,* 135 F.3d 1223, 1225 (8th Cir. 1998). The State claims that the Eighth and Ninth Circuits' approach is the minority view, but the same can be said of the test adopted by the majority in *Cutler.* In *Cutler*, the Court of Appeals considered the "three disparate approaches" in the federal circuit courts to the question of standing for an unauthorized driver of a rental car. 144 Idaho at 274. Ultimately, the majority adopted the totality of the circumstances test from the Sixth Circuit in *United States v. Smith*, 263 F.3d 571, 586 (6th Cir. 2001). *Cutler*, 144 Idaho at 275. The *Smith* approach is also an

outlier, however. Only the Third Circuit has adopted a similar test. *See United States v. Kennedy*, 638 F.3d 159, 165 (7th Cir. 2011) (adopting a rule that an unauthorized driver has no standing unless "extraordinary circumstances" suggest an expectation of privacy). Thus, while the Fourth, Fifth, and Tenth Circuits have held that an unauthorized driver never has standing, the Eighth and Ninth Circuits have held otherwise if the driver has permission, the Seventh Circuit has yet to "take sides," and the Third and Sixth Circuits require extraordinary or unique circumstances to establish standing. *United States v. Sanford*, 806 F.3d 954, 958 (7th Cir. 2015) (summarizing the circuit split); *see Thomas*, 447 F.3d at 1196–97 (same). This unresolved split makes evident there is no prevailing view on the privacy interest held by unauthorized drivers of rental cars. The Eighth and Ninth Circuits' approach is as viable as all others on this contested issue.

But, unlike the other approaches, the Eighth and Ninth Circuits' test is most consistent with Fourth Amendment jurisprudence. As explained by the Ninth Circuit:

> [W]e must reject the government's contention that a defendant not listed on a lease agreement lacks standing to challenge a search. Based on *Portillo*, *Jones*, *Dorais*, and *Henderson*,[1] we cannot base constitutional

[1] In *United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980), the Ninth Circuit held a "non-owner has standing to challenge a search where he has 'permission to use his friend's automobile and the keys to the ignition and the trunk, with which he could exclude all others, save his friend, the owner.'" *Thomas*, 447 F.3d at 1197. "In *Jones v. United States*, 362 U.S. 257, 259 (1960), the defendant had standing to challenge a search of a friend's apartment when he had permission to use the apartment, had a key to the apartment, stored his belongings there, and had the right and ability to exclude others, except the owner, from the apartment." *Thomas*, 447 F.3d at 1198. In *United States v. Dorais*, 241 F.3d 1124, 1129 (9th Cir. 2001), the Ninth Circuit "noted that 'the mere expiration of the rental period, in the absence of affirmative acts of repossession by the lessor, does not automatically end a lessee's expectations of privacy' in a motel room." *Thomas*, 447 F.3d at 1198. Finally, in *United States v. Henderson*, 241 F.3d 638, 647 (9th Cir. 2001), the Ninth Circuit "held that the lessee of a rental car has a

> standing entirely on a rental agreement to which the unauthorized driver was not a party and may not capture the nature of the unauthorized driver's use of the car. *See Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (stating that "arcane distinctions developed in property and tort law . . . ought not . . . control" the reasonableness of an expectation of privacy (citing *Jones v. United States*, 362 U.S. 257, 266 (1960)). Rather, an unauthorized driver who received permission to use a rental car and has joint authority over the car may challenge the search to the same extent as the authorized renter. This approach is in accord with precedent holding that indicia of ownership—including the right to exclude others—coupled with possession and the permission of the rightful owner, are sufficient grounds upon which to find standing. *Jones*, 362 U.S. at 266; *Portillo*, 633 F.2d at 1317.

Thomas, 447 F.3d at 1198–99; *see also* Justin E. Simmons, Comment, *Hertz and The Fourth Amendment: A Post*-Rakas *Examination of an Unauthorized Driver's Standing to Challenge the Legality of a Rental Car Search*, 15 GEO. MASON L. REV. 149 (2008) (arguing the federal courts should adopt the Eighth and Ninth Circuits' test). This approach is also in accord with the Court of Appeals' decision in *State v. Hanson*, which held that a non-owner driver can establish a privacy interest in a vehicle with possession plus authorization from the owner or a person believed to have authority. 142 Idaho 711, 719 (Ct. App. 2006). In the Fourth Amendment context, the privacy interest of an unauthorized driver should be evaluated the same as a non-owner driver. For these reasons, as well as those stated in Mr. Mann's Appellant's Brief, the Court should reconsider or reject the *Cutler* holding and adopt Judge Lansing's proposed test from her concurring opinion in *Cutler*. (*See* App. Br., pp.10–13.)

Here, it is undisputed that Mr. Mann had permission from the lessee to drive the rental car. (*See* Tr., p.10, L.22–p.12, L.14, p.26, Ls.20–21.) Thus, if the Court adopts

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reasonable expectation of privacy in it, even after the lease period expires, as long as the lessee retains possession and control over the car." *Thomas*, 447 F.3d at 1198.

Judge Lansing's approach, Mr. Mann asserts that he has met his burden to establish a reasonable expectation of privacy in the rental vehicle. Alternatively, Mr. Mann maintains that he established a reasonable expectation of privacy in the rental car using the majority test from *Cutler*. (*See* App. Br., pp.13–16.) Because Mr. Mann has established a privacy interest in the car, he requests that this Court vacate the district court's order denying his motion to suppress and remand this case to resolve the other issues raised in his suppression motion, namely, the constitutionality of the warrantless search of the vehicle. (*See* App. Br., pp.15–16.)

II.

The District Court Erred When It Failed To Instruct The Jury That The State Had To Prove Mr. Mann Possessed The Paraphernalia With The Intent To Use In Idaho

During deliberations, the jury asked the district court if "intending to use" meant "use in Idaho" or "elsewhere." (Aug. R., p.1.) The district court responded: "You are instructed that any possession of paraphernalia must occur in Idaho. If you find defendant possessed paraphernalia in Idaho, you must consider whether the defendant intended to use the paraphernalia. It does not matter in which state the defendant formed the intent to use the paraphernalia." (R., p.202 (Instruction No. 21).) Mr. Mann maintains that Instruction No. 21 was improper as a matter of law. It confused and misled the jury on the specific intent element of possession of drug paraphernalia. (*See* App. Br., pp.17–21.)

In response, the State argues that neither the plain language of I.C. § 37-2734A nor the pattern jury instruction I.C.J.I 408 explicitly requires intent to use while in Idaho. (Respt. Br., pp.12–14.) Mr. Mann agrees. The State does not have to prove the

defendant was going to or had used the paraphernalia while in Idaho. But that issue is beside the point. The location in which the defendant intends to use the paraphernalia is irrelevant. The relevant inquiry is whether the defendant possessed the paraphernalia for that purpose while in Idaho. Possession of drug paraphernalia is a specific intent crime. *State v. Williams*, 134 Idaho 590, 592 (Ct. App. 2000). As such, the State must prove that, when the defendant possessed the paraphernalia in Idaho, he had the intent to use it to introduce a controlled substance into the body. *See* I.C. § 18-114 (requiring a union of act and intent for all crimes). Otherwise, the mere possession of any item that was once used or could be used to introduce a substance into the body would violate the statute. Instruction No. 21 endorsed this flawed interpretation, however. By informing the jury it did not matter where Mr. Mann formed the intent to use the paraphernalia, any intent to use—past, present, or future—with no connection to the act of possession would suffice to prove the elements of the offense. Thus, the jury could find Mr. Mann guilty even if he presently did not (but once had) intended to use the paraphernalia to introduce a substance into the body. Such an interpretation is contrary to the requirement of specific intent for possession of drug paraphernalia. Instruction No. 21 thus relieved the State of its burden to prove an essential element of the offense and was in error.

CONCLUSION

Mr. Mann respectfully requests that the Court vacate the district court's order denying his motion to suppress and remand the case for further proceedings on his motion to suppress, including a determination of whether the search of the rental car was lawful. Alternatively, he respectfully requests that the Court vacate his judgment of conviction for possession of drug paraphernalia and remand the case for a new trial.

DATED this 7th day of September, 2016.

_____/s/_____
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of September, 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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