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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 47822-2020**
Plaintiff-Appellant,	)	
	)	**Latah County Case No.**
v.	)	**CR29-19-2799**
	)	
LONNIE EUGENE COX,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

HONORABLE JOHN JUDGE
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

The state appeals from the district court's order partially granting Lonnie Eugene Cox's motion to suppress evidence. The state challenges the district court's determination that a hotel employee was acting as a state's agent when she opened the door to Cox's hotel room to show an officer the syringe loaded with heroin that hotel employees had discovered earlier.

Statement Of The Facts And Course Of The Proceedings

Police applied for a warrant to search a hotel room for evidence of heroin. (R., pp. 7-9.) The evidence submitted in support of the warrant application included that a hotel housekeeping employee entered a room, saw a syringe on the floor, and called police. (R., p. 10.) When an officer responded the employee took the officer to the room and opened the door. (R., p. 10.) The syringe contained a brown liquid the officer suspected was heroin. (R., p. 10.) The officer seized the syringe and police secured the room while seeking a search warrant. (R., p. 10.) The hotel employee identified Lonnie Cox as the occupant of the room. (R., p. 10.) The syringe field tested positive for heroin. (R., p. 10.)

The state charged Cox with possession of heroin, possession of methamphetamine, and possession of paraphernalia. (R., pp. 62-63.) Cox moved to suppress evidence, arguing that the officer had conducted an initial warrantless search of his room. (R., pp. 69-71.) The district court found that a hotel housekeeping employee entered Cox's hotel room to clean, "saw a syringe laying on the floor and immediately left the room." (R., p. 140.) The employee told her supervisor, who then went into the room and saw the syringe and that it contained a colored liquid. (R., p. 140.) The hotel supervisor recognized the

syringe as drug paraphernalia that likely contained heroin and called the police. (R., pp. 140-41.) When an officer responded the supervisor "took him" to the room and "opened the door while [the officer] stood in front of it." (R., p. 141.) It was "undisputed that [the officer] did not expressly ask or direct [the hotel supervisor] to open the door." (R., p. 141.)

Once the hotel supervisor opened Cox's hotel room door, the officer could see the syringe from the hallway and "immediately recognized the syringe as 'loaded' with a brownish fluid he recognized as probably heroin." (R., p. 141.) The officer entered the room and secured the syringe for safety reasons.[1] (R., p. 141.) He then contacted another officer to secure the room while he applied for a search warrant. (R., p. 141.) Officers ultimately found heroin, methamphetamine, and paraphernalia in the hotel room and heroin on Cox's person.[2] (R., p. 143.)

The district court granted suppression of the evidence found in Cox's room pursuant to the search warrant. (R., pp. 144-56.) The district court concluded that the entrances into the room by hotel employees were not governmental actions, and therefore Cox's Fourth Amendment rights were not implicated by those entrances. (R., pp. 150-51.) However, the district court determined the hotel employee was an agent of the state when she opened the door of the hotel room to show the officer what she had seen. (R., pp. 151-52.) Because the hotel employee was acting as a state agent, according to the district court,

[1] The state conceded below that the entry into the hotel room by the officer before obtaining the warrant was improper. (Tr., p. 9, L. 24 – p. 11, L. 8.)
[2] The district court denied suppression of the heroin on Cox's person because it was found incident to his arrest on a valid arrest warrant. (R., pp. 157-58.)

the officer did not see the syringe in plain view but instead saw the syringe as the result of the employee's governmental search. (R., pp. 152-53.)

The state filed a timely notice of appeal from the order granting suppression of the evidence found in the hotel room by execution of the search warrant. (R., pp. 161-63.)

ISSUE

Did the district court erroneously conclude that the hotel employee's act of opening Cox's hotel room door constituted a governmental search implicating the Fourth Amendment?

ARGUMENT

The District Court Erroneously Concluded That The Hotel Employee's Act Of Opening Cox's Hotel Room Door Constituted A Governmental Search

A. Introduction

The district court reasoned that the hotel employee's and officer's joint purpose of showing the officer the syringe that the employee had previously seen in the hotel room converted the hotel employee into a state agent, and therefore her act of opening the door constituted a governmental search. (R., pp. 144-56.) That the employee wished the officer to see the syringe she had seen in Cox's room, and that the officer wished to see the syringe the hotel employee had seen in Cox's room, did not convert the hotel employee into a governmental agent.

B. Standard Of Review

In reviewing a district court's order granting a motion to suppress the appellate court "will accept the trial court's findings of fact unless they are clearly erroneous" but will "freely review the trial court's application of constitutional principles in light of the facts found." State v. Gonzales, 165 Idaho 667, 671, 450 P.3d 315, 319 (2019) (internal quotation marks omitted).

C. The Hotel Employee Was Not A State Agent When She Opened Cox's Hotel Room Door

The Fourth Amendment "was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies." Burdeau v. McDowell, 256 U.S. 465, 475 (1921). Thus, the Fourth Amendment has been consistently construed "as proscribing only governmental action" and is "wholly

inapplicable to a search or seizure, even an unreasonable one, effected by a private individual." United States v. Jacobsen, 466 U.S. 109, 113 (1984) (internal quotation marks omitted). See also State v. Johnson, 110 Idaho 516, 519, 716 P.2d 1288, 1291 (1986) (a private search "implicates no interests of the Fourth Amendment or art. 1, § 17 of the Idaho Constitution because those provisions only prohibit illegal *governmental* searches and seizures" (emphasis original)). "It is firmly established that evidence obtained through a private search, even though wrongfully conducted, is not excludable under the fourth amendment unless government officials instigated the search or otherwise participated in a wrongful search." State v. Kopsa, 126 Idaho 512, 517, 887 P.2d 57, 62 (Ct. App. 1994).

The applicable test is whether the private citizen, "in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state." Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971) (plurality opinion). "Thus, when analyzing whether the person conducting the search is acting as an instrument or agent of the government, we consider two critical factors—whether the government knew of and acquiesced in the intrusive conduct and whether the party performing the search intended to assist law enforcement efforts or further his or her own ends." State v. Breese, 160 Idaho 841, 844, 379 P.3d 1111, 1114 (Ct. App. 2016). "The burden of proving governmental involvement in a search conducted by a private citizen rests on the party objecting to the evidence." Id. at 843, 379 P.3d at 1113. Review of the record shows Cox failed to prove either element of his claim that the hotel employee was acting as a governmental instrument or agent when she opened the hotel room door.

As to the first prong of the test, more is required than officer passivity. The "involvement of government officials does not necessarily transform private conduct into

a government search or seizure." Wechsler v. Wechsler, 162 Idaho 900, 913, 407 P.3d 214, 227 (2017) (internal quotation marks omitted). Rather, the "knowledge and acquiescence" prong of the test "encompass[es] the requirement that the government agent must also affirmatively encourage, initiate or instigate the private action." United States v. Smythe, 84 F.3d 1240, 1243 (10th Cir. 1996). "It is clear that if a government agent is involved 'merely as a witness,' the requisite government action implicating Fourth Amendment concerns is absent." Id. (quoting United States v. Leffall, 82 F.3d 343, 347-48 (10th Cir. 1996)). "While government agents may not circumvent the Fourth Amendment by acting through private citizens, they need not discourage private citizens from doing that which is not unlawful." Id.

In this case Cox presented no evidence that the officer was anything other than a passive witness. The district court found that it was "undisputed" that the officer "did not expressly ask or direct" the hotel employee "to open the door." (R., p. 141.) The officer testified he did not ask, suggest, or command the hotel employee to open the room door. (Prelim Tr., p. 11, Ls. 2-5; p. 44, Ls. 16-17; Tr., p. 58, L. 18 – p. 59, L. 5.) The hotel employee testified she called the police as required by policy, then took the responding officer to the room where she opened the door. (Tr., p. 32, L. 12 – p. 34, L. 7; p. 42, Ls. 2-11.) She showed the officer the loaded heroin syringe in the room because it was "an unsafe situation." (Tr., p. 34, L. 8 – p. 35, L. 5; see also p. 20, Ls. 8-23; p. 21, Ls. 14-20; p. 23, L. 19 – p. 24, L. 4; p. 27, L. 13 – p. 28, L. 9; p. 37, L. 24 – p. 38, L. 4; p. 43, Ls. 7-15; p. 47, L. 15 – p. 48, L. 8.) Because the officer was nothing other than a passive witness who did not affirmatively encourage, initiate or instigate the private action, Cox failed to

prove the first element of his claim that the hotel employee was acting as an agent of the state.

In concluding otherwise, the district court determined that the first element of the claim was proven because the officer "follow[ed] [the hotel employee] to the room knowing she wished to show him the syringe and standing in the hallway positioned to view the inside of Cox's room once [the hotel employee] opened the door." (R., p. 151.) However, as shown above, merely going to the scene of the private search to see the evidence thus exposed does not meet the first prong of the test. "In order to bring a private citizen's actions within the purview of the Fourth Amendment, the government must be involved either directly as a participant or indirectly as an encourager." Breese, 160 Idaho at 844, 379 P.3d at 1114. There is no factual finding, and no evidence, that the officer was either a direct participant to opening the door or that he encouraged the hotel employee to open the door. This prong is unproved because the officer did not "affirmatively encourage, initiate or instigate the private action" and was "involved merely as a witness." Smythe, 84 F.3d at 1243 (internal quotation marks omitted). The district court's conclusion that mere foreknowledge of the impending private search combined with traveling to where it would take place confers the imprimatur of agency on the non-governmental searching party is legally erroneous.

The second element Cox had to prove was that "the party performing the search intended to assist law enforcement efforts" rather than "further his or her own ends." Breese, 160 Idaho at 844, 379 P.3d at 1114. Here there was no evidence that the hotel employee considered herself to be acting on behalf of the police, as opposed to in her capacity as a hotel employee, when she opened the door. To the contrary, the evidence

conclusively establishes that the hotel employee called the police and showed the responding officer the syringe because she considered having a loaded heroin syringe on the floor of a room where her staff worked to be a safety hazard. (Tr., p. 34, L. 8 – p. 35, L. 5; see also p. 20, Ls. 8-23; p. 21, Ls. 14-20; p. 23, L. 19 – p. 24, L. 4; p. 27, L. 13 – p. 28, L. 9; p. 37, L. 24 – p. 38, L. 4; p. 43, Ls. 7-15; p. 47, L. 15 – p. 48, L. 8.) She was "further[ing] her own ends." Breese, 160 Idaho at 844, 379 P.3d at 1114. Nothing in the record suggests the employee who opened the hotel door considered herself in any way to be a state agent.

In concluding otherwise the district court found that although the employee initially went to the room and looked in it for safety reasons, her only motive in opening the door with the officer present was "to assist law enforcement efforts." (R., p. 152.) Had she not been so motivated, she would have "instructed her staff not to enter the room until law enforcement was able to engage Cox directly." (R., p. 152.) This finding is clearly erroneous. As noted above, the only evidence presented at the hearing was that the hotel employee showed the officer the syringe because she was concerned about her own safety and the safety of her staff. (Tr., p. 20, Ls. 8-23; p. 21, Ls. 14-20; p. 23, L. 19 – p. 24, L. 4; p. 27, L. 13 – p. 28, L. 9; p. 34, L. 8 – p. 35, L. 5; p. 37, L. 24 – p. 38, L. 4; p. 43, Ls. 7-15; p. 47, L. 15 – p. 48, L. 8.) It was entirely reasonable to address the safety concern by showing the police the syringe she had just seen so that they would remove the safety hazard from the hotel. Although the district judge would have handled the safety issue by merely keeping hotel staff out of the room, that does not mean the hotel employee considered herself an agent of law enforcement. There is no evidence that the hotel employee considered herself to be acting with law enforcement purpose rather than within

her duties as a hotel staff manager trying to keep her cleaning staff safe. Therefore Cox did not meet his burden of proof as to this second element of his claim and the district court's conclusion he did is clearly erroneous.

In order to prove government action where, as here, the search was conducted by a private party, the defendant must prove two things: that the government created an agency relationship by its actions and the private person was trying to achieve a law enforcement, as opposed to private, purpose. The facts of this case show the exact opposite of what Cox had the burden of proving. The officer did nothing to create an agency relationship and the hotel employee did not consider herself an agent of the government when she opened the door and exposed the interior of Cox's room. The district court erred in finding that the opening of the door was a government search.

D. The District Court's Error Requires Reversal

A search warrant is still valid despite the inclusion of illegally obtained evidence in the underlying application if, "after the tainted evidence is excluded," the application "contains adequate facts from which the magistrate could have concluded that probable cause existed for the issuance of the search warrant." State v. Revenaugh, 133 Idaho 774, 779, 992 P.2d 769, 774 (1999).[3] Here, the state below conceded that the officer improperly entered the hotel room, and therefore evidence of his seizure of the syringe and the field testing that it contained heroin should be stricken from the warrant application, but that probable cause was established by the remaining evidence in the application. (Tr., p. 9, L.

[3] The state does not challenge the district court's determination that if the officer's observations from outside the hotel room are excised from the warrant application it does not establish probable cause for issuance of the search warrant.

24 – p. 11, L. 8.) Absent evidence obtained by seizure of the syringe, the application sets forth that the officer saw from outside the hotel room a syringe loaded with what he believed in his training and experience was heroin. (R., p. 10.) Seeing the syringe, which the officer believed contained heroin, established probable cause for issuance of the search warrant. State v. Josephson, 123 Idaho 790, 794, 852 P.2d 1387, 1391 (1993) ("It is well-established law that in order to support a finding of probable cause an affidavit must provide facts sufficient to create probable cause for belief that the forbidden articles are within the place to be searched at the time the search warrant is requested." (internal quotation marks omitted)). Therefore, the district court erroneously suppressed evidence found pursuant to the search warrant.

CONCLUSION

The state respectfully requests this Court to reverse the district court's order suppressing evidence found in Cox's hotel room as a result of execution of the search warrant.

DATED this 9th day of June, 2020.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9th day of June, 2020, served a true and correct copy of the foregoing BRIEF OF APPELLANT to the attorney listed below by means of iCourt File and Serve:

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/s/ Kenneth K. Jorgensen
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KKJ/dd