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State v. Dunn Appellant's Brief Dckt. 47677

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

STATE OF IDAHO,	)	
	)	**NO. 47677-2019**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-19-12418**
v.	)	
	)	
ANDREW ROBERT DUNN,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

Nature of the Case 1

Statement of the Facts and Course of Proceedings 1

ISSUE PRESENTED ON APPEAL 7

ARGUMENT 8

The District Court Erred By Denying Mr. Dunn's Motion To Suppress Evidence Obtained From His Warrantless Arrest For A Completed Misdemeanor 8

A. Introduction 8

B. Standard Of Review 8

C. Mr. Dunn's Warrantless Arrest For A Completed Misdemeanor Violated His Idaho Constitutional Protection Against Unreasonable Seizures 8

CONCLUSION 14

CERTIFICATE OF MAILING 14

TABLE OF AUTHORITIES

Cases

Nix v. Williams, 467 U.S. 431 (1984) 11, 12

State v. Bishop, 146 Idaho 804 (2009) 11

State v. Clarke, 165 Idaho 393 (2019) ..... *passim*

State v. Cohagan, 162 Idaho 717 (2017) 11

State v. Conner, 59 Idaho 695 (1939) 13

State v. Cook, 106 Idaho 209 (Ct. App. 1984) 12

State v. Donato, 135 Idaho 469 (2001) 9, 13

State v. Downing, 163 Idaho 26 (2017) 11

State v. Green, 158 Idaho 884 (2015) 9

State v. Guzman, 122 Idaho 981 (1992) 9

State v. Holman, 109 Idaho 382 (Ct. App. 1985) 12

State v. Koivu, 152 Idaho 511 (2012) 9, 11, 13

State v. Lee, 162 Idaho 642 (2017) 8

State v. Purdum, 147 Idaho 206 (2009) 8

State v. Rauch, 99 Idaho 586 (1978) 13

Stuart v. State, 136 Idaho 490 (2001) 11

Statutes

I.C. § 16-606 3

I.C. § 18-901 10

I.C. § 18-903 10

I.C. § 18-918 10

I.C. § 18-920 10

I.C. § 18-3302I 10

I.C. § 18-7905 10

I.C. § 18-7906 10

I.C. § 19-603 ..... 9, 10

I.C. § 39-6312 10

Constitutional Provisions

IDAHO CONST. art. I, § 17 9

STATEMENT OF THE CASE

Nature of the Case

Andrew Dunn challenges the district court's denial of his motion to suppress evidence following his warrantless arrest for a misdemeanor committed outside the police officer's presence. Due to the unconstitutional arrest, Mr. Dunn submits the district court should have granted his motion and suppressed the evidence found after the dog alerted on his car which resulted in officers finding methamphetamine. Mindful that the evidence he seeks to suppress may have inevitably been discovered had the arrest not occurred, Mr. Dunn respectfully requests this Court reverse the district court's order denying suppression and vacate his judgment of conviction.

Statement of Facts and Course of Proceedings

On March 27, 2019, Officer Ben Kettering responded to a report of a battery. (Tr. 10/1/19, p.9, L.1 – p.10, L.12.) Upon arriving at the location, Officer Kettering saw two vehicles pulled to the side of the road, both with bumper damage. (Tr. 10/1/19, p.11, L.4 – p.12, L.1.) Officer Kettering spoke to Andrew Dunn, whose white BMW had sustained rear bumper damage from a grey pickup truck. (Tr. 10/1/19, p.11, Ls.4-23; p.12, Ls.23-25; p.17, Ls.14-16; Defendant's Exhibit A, 9:26-10:10.) Mr. Dunn, who was sitting on the curb, told the officer that he slapped the reporting party after the man had engaged in aggressive driving, which caused the accident. (Tr. 10/1/19, p.20, Ls.1-8; Defendant's Exhibit A, 9:26-11:25.) Mr. Dunn also told Officer Kettering that his driver's license was suspended. (Tr. 10/1/19, p.20, Ls.1-5; p.21, L.24 – p.22, L.1; p.35, Ls.23-25.) After interviewing the reporting party and Mr. Dunn, Officer Kettering arrested Mr. Dunn for misdemeanor battery. (Tr. 10/1/19, p.22, Ls.7-8; p.34, Ls.16-

24.) He handcuffed Mr. Dunn and placed him in the back of his patrol car. (Tr. 10/1/19, p.22, Ls.7-21; p.35, Ls.12-20.)

A short time later, Officer Kettering told Mr. Dunn he was under arrest for two misdemeanors, battery and driving without privileges. (Tr. 10/1/19, p.35, Ls.12-20.) Officer Kettering did not see either the alleged battery or Mr. Dunn driving the car. (Tr. 10/1/19, p.25, Ls.7-9; p.35, Ls.9-25.) Mr. Dunn's car was parked partially in the road. (Tr. 10/1/19, p.33, Ls.3-8.) Mr. Dunn initially asked the officer to have his car towed, but later attempted to make arrangements for a friend to come get the car. (Tr. 10/1/19, p.22, Ls.12-17; p.44, Ls.14-17.) However, Officer Kettering did not cancel the tow truck. (Tr. 10/1/19, p.44, Ls.14-23.) A canine drug detection dog was requested after the officer learned that Mr. Dunn had previously been charged with a drug-related offense. (Tr. 10/1/19, p.27, Ls.8-11p.36, Ls.13-21.) Officer Kettering was writing the misdemeanor citations when the drug dog arrived and alerted on Mr. Dunn's car. (Tr. 10/1/19, p.28, Ls.11-21; p.31, Ls.6-9.) After the canine sniff, a tow truck arrived at the scene. (Tr. 10/1/19, p.28, L.22 – p.29, L.2.)

Based on these facts, the State filed an Information alleging Mr. Dunn committed the crime of felony possession of a controlled substance, misdemeanor battery, and misdemeanor inattentive driving. (R., pp.54-55.)

Mr. Dunn filed a motion to suppress. (R., pp.63-64.) He argued the evidence must be suppressed because of his warrantless arrest. (R., p.63.) In a memorandum in support, Mr. Dunn, relying on *State v. Clarke*, 165 Idaho 393 (2019), asserted Officer Kettering arrested him in violation of Article 1, Section 17 of the Idaho Constitution because Officer Kettering arrested him for a misdemeanor battery committed outside the officer's presence (also known as

a completed misdemeanor[1]). (Aug., pp.1-4.) Due to the unconstitutional arrest, Mr. Dunn maintained all evidence obtained after his arrest must be suppressed. (Aug., pp.1-4.)

The State filed a memorandum in opposition. (Aug., pp.5-10.) The State argued *Clarke* was inapplicable because Mr. Dunn's arrest was a citizen's arrest pursuant to I.C. § 16-606. (Aug. pp.6-7.) The State also asserted that the evidence obtained after the dog alerted on Mr. Dunn's car would have inevitably discovered such that the evidence was not a fruit of the poisonous tree. (Aug., pp.7-9.) The State claimed that because Mr. Dunn's driver's license was suspended, he was unable to drive his vehicle from the scene, and a drug detection dog could have been deployed around the vehicle at any time while it was parked. (Aug., pp.7-8.)

The district court held a hearing on Mr. Dunn's motion. (*See generally* Tr. 10/1/19, p.6, L.4 – p.75, L.10.) Officer Kettering testified, and the district court admitted the officer's body cam as an exhibit. (Tr. 10/1/19, p.6, L.16 – p.57, L.3.) Mr. Dunn also challenged the duration of the stop, asserting that the stop was unlawfully extended. (Tr. 10/1/19, p. 40, L.16 – p.42, L.2.) After argument by the parties, the district court took the matter under advisement following the submission of supplemental briefing by the parties. (Tr. 10/1/19, p.68, L.11 – p.75, L.3.)

The district court pronounced its ruling at a hearing the next week. (*See generally* Tr. 10/9/19.)

The district made the following factual findings:

> The officer was responding to an alleged battery. When the officer arrived at the scene on March 27th, 2019, the alleged victim indicated that he wanted to pursue charges, battery charges against the defendant, and that [the] alleged victim signed the citation at approximately eight minutes into the video.
>
> During the investigation of the alleged battery, the defendant admitted to the officer that his driver's license was suspended and indicated that he was on his

[1] A completed misdemeanor has also been described as "one which is no longer in progress when the officer arrives on the scene." *Clarke*, 165 Idaho at 398 n.6.

way to the DMV to take care of that matter, and that he had been the person driving the vehicle that was involved in the altercation with the alleged victim.

So there was the defendant's car and there was also the truck of the alleged victim in the video.

But the defendant admitted to the officer that he knew his driver's license was suspended and that he was driving. Therefore, there's evidence that the Court can find that the defendant was driving without privileges and could have been arrested on that charge. And that he was not able to drive the vehicle away because he did not have a valid license to drive the vehicle. On the video there is no other person that the Court could observe in the white car that was capable of driving the vehicle.

Additionally, based on the testimony on the video, the Court finds that the vehicle was clearly parked in the roadway. There was cars going both directions on the road. There was a solid white line that appeared to be some type of bike lane is what the officer thought it was on the video. It is clearly a lane that you are not allowed to park in. So it was not a possibility to leave the defendant's vehicle off to the side of the roadway without creating a potential hazard to other drivers as the officer testified to.

The officer testified that the defendant informed him that he wanted his vehicle towed. The officer testified that that was going to be a courtesy tow, that he did not intend to impound or have the police department take custody over the vehicle, but just to have the vehicle towed to get it off the roadway as requested by the defendant.

But the officer never testified that he was going to allow the defendant to drive off based on the fact that it was support – that the – there was evidence that the defendant's driver's license was suspended at the time the officer called in to dispatch and verified the status of the defendant's license.

The officer, Kettering, also testified he was not the officer who requested the K9 be called to the scene. He was not sure exactly who requested the K9. And the video clearly indicates that this officer was properly and efficiently investigating the alleged battery as well as the driving without privileges that was discovered as part of his investigation of the battery.

(Tr. 10/9/19, p.7, L.8 – p.9, L.19.) The district court rejected Mr. Dunn's argument that Officer Kettering's arrest for a completed misdemeanor was unconstitutional. (Tr. 10/9/19, p.11, L.7 – p.12, L.24.) The court reasoned that although the defendant was arrested on the battery charge initially, and then the officer later clarified that he was also being arrested for driving without

privileges (DWP), the defendant would still have been detained for the DWP. (Tr. 10/9/19, p.11 Ls.7-12.)

The district court reasoned:

> And even the writing up of the citation on the battery, even if the officer really didn't have constitutional power to arrest the defendant on the battery since he had not seen, observed or been present when the alleged battery took place, and that such an arrest may be in violation of State v. Clark, 165 Idaho 393, 2019, the Court really doesn't find that this is a Clark case.
>
> Because while the defendant was arrested, the officer could have detained the defendant while he was investigating both the battery and the DWP. And it wasn't the unlawful – alleged unlawful arrest that led to the search of the vehicle, it was an independent dog alert, the drug dog alert that led to the probable cause that allowed the search of the vehicle.
>
> So the alleged unlawful, unconstitutional arrest, if this is deemed a Clark situation, simply is not linked to the probable cause from the dog sniff which would have allowed the car to have been searched without a warrant. And the Court doesn't feel it is even necessary to determine whether or not the facts of this case are by analogy a citizen's arrest because there is clear evidence that the defendant admitted to driving without privileges, and that gave the officer probable cause to arrest the defendant.

(Tr. 10/9/19, p.11, L.13 – p.12, L.15.) The district court determined Officer Kettering did not unlawfully delay the stop to allow the drug dog to arrive. (Tr. 10/9/19, p.10, L.22 – p.11, L.6.) In short, the district court held the additional time the officer took to write the citation for battery, in addition to the citation for DWP, was not unnecessary time and did not unlawfully extend the stop. (Tr. 10/9/19, p.12, L.16 – p.13, L.5.)

Alternatively, the district court concluded that the drugs would have inevitably been discovered because the K9 alerted before the officer was done writing the citations. (Tr. 10/9/19 Tr., p.13, L.6 – p.14, L.25.) The free dog sniff occurred while the officer was waiting for the tow truck—during proper and predictable investigatory procedures. (Tr. 10/9/19, p.14, Ls.10-25.) "The evidence in the vehicle was inevitably discovered independent of any taint related to the

arrest on the battery charge," and the evidence was "not causally linked to the arrest on the battery charge." (Tr. 10/9/19, p.16, Ls.11-15.) For these reasons, the district court denied Mr. Dunn's motion. (Tr. 10/9/19, p.17, Ls.1-6l R., pp.94-95.)

Pursuant to a plea agreement, Mr. Dunn pled guilty to felony possession of a controlled substance and misdemeanor battery. (Tr. 10/16/19, p.5, Ls.9–11, p.17, L.21 – p.18, L.1; R., pp.80-90.) The State agreed to dismiss the misdemeanor inattentive driving charge. (Tr. 10/16/19, p.7, Ls.5-8.) Mr. Dunn reserved his right to appeal the district court's denial of his motion to suppress. (Tr. 10/16/19, p.6, Ls.19–25; R., pp.83, 89.) The district court imposed a sentence of five years, with one year fixed, for the felony offense, but retained jurisdiction. (Tr. 12/18/19, p.90, Ls.20-25; R., pp.102-107.) Mr. Dunn was sentenced to one-hundred eighty days, with credit for time served, for the misdemeanor offense. (Tr. 12/18/19, p.91, Ls.12-16; R., pp.102-103.) After a period of retained jurisdiction, Mr. Dunn's sentence was suspended and he was placed on probation for four years. (Aug. 2, pp.1-10.)

Mr. Dunn timely appealed from the district court's judgment of conviction. (R., pp.108-10.)

ISSUE

Did the district court err by denying Mr. Dunn's motion to suppress evidence obtained from his warrantless arrest for a completed misdemeanor?

ARGUMENT

The District Court Erred By Denying Mr. Dunn's Motion To Suppress Evidence Obtained From His Warrantless Arrest For A Completed Misdemeanor

A. Introduction

Article I, Section 17 of the Idaho Constitution prohibits warrantless arrests for completed misdemeanors. *Clarke*, 165 Idaho at 399. Here, Officer Kettering arrested Mr. Dunn in violation of Article 1, Section 17 because Officer Kettering arrested Mr. Dunn for a completed misdemeanor. All evidence obtained by Officer Kettering after Mr. Dunn's arrest was subject to suppression as the fruit of the unconstitutional arrest. Mindful that the evidence he seeks to suppress may have been discovered regardless of the arrest, Mr. Dunn respectfully requests this Court reverse the district court's order denying suppression and vacate his judgment of conviction.

B. Standard Of Review

> In reviewing an order denying a motion to suppress evidence, this Court applies a bifurcated standard of review. *State v. Purdum*, 147 Idaho 206, 207 (2009). This 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 to the facts found. *Id.*

State v. Lee, 162 Idaho 642, 646–47 (2017).

C. Mr. Dunn's Warrantless Arrest For A Completed Misdemeanor Violated His Idaho Constitutional Protection Against Unreasonable Seizures

Article I, Section 17 of the Idaho Constitution states:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.

IDAHO CONST. art. I, § 17. "In some instances," this Court has "construed Article I, section 17, to provide greater protection than is provided by the United States Supreme Court's construction of the Fourth Amendment." *State v. Koivu*, 152 Idaho 511, 519 (2012). The Court provides "greater protection to Idaho citizens based on the uniqueness of our state, our Constitution, and our long-standing jurisprudence." *Id.* (quoting *State v. Donato*, 135 Idaho 469, 472 (2001)); *see also State v. Guzman*, 122 Idaho 981, 987–88 (1992) (discussing the Court's power to interpret the Idaho Constitution independently and grant Idaho citizens more protection).

In *Clarke*, the Court interpreted the protections provided to Idaho citizens in Article I, Section 17 for warrantless arrests. First, the Court recognized Article I, Section 17 had "long been interpreted in conjunction with Idaho Code section 19-603 and its predecessor statutes, which were in place at the time of the adoption of the Idaho Constitution." *Clarke*, 446 P.3d at 454 (citing *State v. Green*, 158 Idaho 884, 888 (2015)). Idaho Code § 19-603 and its predecessors outlined the statutory guidelines for a warrantless arrest:

> Until 1979, the interpretation of the Constitution and the statutes that preceded Idaho Code section 19-603 largely echoed the general rule of federal cases—that a warrantless arrest was lawful if the arresting officer had probable cause to believe a felony had been committed or if the offender had committed a misdemeanor in the presence of the officer.

Clarke, 165 Idaho at 396 (citations omitted). Then, in 1979, the legislature added subsection 6 to I.C. § 19-603. *Id.* This subsection allowed warrantless arrests for certain misdemeanors committed outside the officer's presence, provided the officer had probable cause to believe the arrestee committed the misdemeanor and the arrest was in "immediate response to a report of a commission of a crime." I.C. § 19-603(6). Thus, "the constitutional standard and the statutory standard" for warrantless arrests "diverged." *Clarke*, 165 Idaho at 396. Article I, Section 17

prohibited warrantless arrests for completed misdemeanors, but I.C. § 19-603(6) allowed them for certain enumerated misdemeanors, including assault.[2]

The *Clarke* Court's review of the common law showed a police officer could not make a warrantless arrest for a misdemeanor committed outside the officer's presence. *Id.* at 397-99. The Court concluded, "based upon the state of the common law in 1889, we conclude that the framers of the Idaho Constitution understood that Article I, section 17 prohibited warrantless arrests for completed misdemeanors." *Id.* at 399. While the *Clarke* Court was "fully mindful of the significance of this conclusion," it determined the "extremely powerful policy considerations" to support upholding I.C. § 19-603(6) "must yield to the requirements of the Idaho Constitution." *Id.* at 399-400.

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[2] I.C. § 19-603 currently states in full:

> A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:
>
> 1. For a public offense committed or attempted in his presence.
> 2. When a person arrested has committed a felony, although not in his presence.
> 3. When a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it.
> 4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.
> 5. At night, when there is reasonable cause to believe that he has committed a felony.
> 6. When upon immediate response to a report of a commission of a crime there is probable cause to believe that the person has committed a violation of section 18-901 (assault), 18-903 (battery), 18-918 (domestic violence), 18-7905 (first-degree stalking), 18-7906 (second-degree stalking), 39-6312 (violation of a protection order), 18-920 (violation of a no contact order), or 18-3302I (threatening violence upon school grounds--firearms and other deadly or dangerous weapons), Idaho Code.
> 7. When there is reasonable cause to believe, based upon physical evidence observed by the officer or statements made in the presence of the officer upon immediate response to a report of a commission of a crime aboard an aircraft, that the person arrested has committed such a crime.

Mr. Dunn asserts that the evidence obtained following his arrests for battery and driving without privileges should be suppressed. The district court found Officer Kettering arrested Mr. Dunn for the completed misdemeanor of battery. (Tr. 10/1/19, p.12, Ls.16-17.) However, the court concluded, "And even the writing up of the citation on the battery, even if the officer really didn't have constitutional power to arrest the defendant on the battery since he had not seen, observed or been present when the alleged battery took place," the case was not impacted by *Clarke*, "Because while the defendant was arrested, the officer could have detained the defendant while he was investigating both the battery and the DWP." (Tr. 10/1/19, p.11, Ls.13-23.) The district court concluded that the duration of the stop was not unlawfully extended, and that the State's inevitable discovery doctrine applied to the facts of Mr. Dunn's case. (Tr. 10/1/19, p.12, L.24 – p.14, L.25.)

Evidence obtained in violation of the United States and Idaho constitutional protections against unreasonable searches generally may not be used as evidence against the victim of the illegal government action. *State v. Koivu*, 152 Idaho 511, 515-19 (2012); *State v. Bishop*, 146 Idaho 804, 810-11 (2009). This exclusionary rule "applies to evidence obtained directly from the illegal government action and to evidence discovered through the exploitation of the original illegality, or the fruit of the poisonous tree." *Bishop*, 146 Idaho at 811. However, there are various exceptions to the exclusionary rule, including the inevitable discovery doctrine. *See State v. Cohagan*, 162 Idaho 717, 721 (2017).

"[T]he inevitable discovery doctrine asks courts to engage in a hypothetical finding into the lawful actions law enforcement *would have inevitably taken* in the absence of the unlawful avenue that led to the evidence." *State v. Downing*, 163 Idaho 26, 31 (2017) (citing *Nix v. Williams*, 467 U.S. 431, 459 (1984) (Brennan, J., dissenting); and *Stuart v. State*, 136 Idaho 490,

497 (2001)) (emphasis in original). "The premise is that law enforcement should be 'in the same, not a worse, position that they would have been' absent the misconduct." *Id.* (quoting *Nix*, 467 U.S. at 443 (majority opinion)). However, "[t]he doctrine must presuppose inevitable hypotheticals running in parallel to the illegal actions, not in series flowing directly from the officers' unlawful conduct." *Id.* at 32. Thus, the inevitable discovery doctrine "'is not intended to swallow the exclusionary rule whole by substituting what the police should have done for what they really did.'" *Id.* (quoting *State v. Holman*, 109 Idaho 382, 392 (Ct. App. 1985)). The inevitable discovery doctrine requires the State to show: (1) that "certain proper and predictable investigatory procedures would have been utilized;" and (2) the State must demonstrate that "those procedures would have inevitably resulted in the discovery of the evidence in question." *State v. Cook*, 106 Idaho 209, 216-17 (Ct. App. 1984).

Here, the State asserted that, because Mr. Dunn's driving privileges were suspended and he could not drive his car away from the scene, it was necessary to tow his car. (Aug., p.11.) The State claimed that because the parked car could have been sniffed by a K-9 at any time, the discovery of the methamphetamine was inevitable. (Aug., p.12.)

The district court considered the State's inevitable discovery argument and concluded that the drugs would have inevitably been discovered because the dog sniff occurred while the officer was waiting for the tow truck—during proper and predictable investigatory procedures. (Tr. 10/9/19, p.14, Ls.10-25.)

> [T]he K9 had already been ordered by another officer or requested by another officer, and that the free dog sniff around the vehicle that was not going to be moved, that the officer was waiting for the tow truck to arrive for the courtesy tow was not a violation of the defendant's right. And it was a proper and predictable investigatory procedure to have the dog sniff the car.

(Tr.10/9/19, p.14, L.13-20.) The district court concluded, "both requirements of the inevitable discovery doctrine apply in this case." (Tr.10/9/19, p.14, Ls.24-25.) "The evidence in the vehicle was inevitably discovered independent of any taint related to the arrest on the battery charge," and the evidence was "not causally linked to the arrest on the battery charge." (Tr. 10/9/19, p.16, Ls.11-15.)

However, Mr. Dunn asserts that, in light of *Clarke*, Officer Kettering's warrantless arrest of Mr. Dunn for a completed misdemeanor violated his state constitutional right to be free from unreasonable seizures. Therefore, the district court erred by denying Mr. Dunn's motion to suppress. Due to the unconstitutional arrest, the exclusionary rule requires suppression of the evidence obtained by Officer Kettering. "The value of the exclusionary rule was recognized by this Court long before the United States Supreme Court required it for fourth amendment violations." *State v. Rauch*, 99 Idaho 586, 592 (1978). "Idaho had clearly developed an exclusionary rule as a constitutionally mandated remedy for illegal searches and seizures in addition to other purposes behind the rule such as recognizing the exclusionary rule as a deterrent for police misconduct." *Donato*, 135 Idaho at 472. "The rule is well settled in this state that evidence, procured in violation of defendant's constitutional immunity from search and seizure, is inadmissible and will be excluded if request for its suppression be timely made." *Koivu*, 152 Idaho at 516 (quoting *State v. Conner*, 59 Idaho 695, 703 (1939)). Accordingly, Idaho's exclusionary rule requires suppression of the evidence procured in violation of Mr. Dunn's state constitutional rights.

Mindful that the evidence Mr. Dunn seeks to suppress may have inevitably been discovered, Mr. Dunn asserts that Officer Kettering obtained the evidence from Mr. Dunn's car by exploitation of the unconstitutional arrest. Thus, all evidence obtained by Officer Kettering

should have been suppressed as "fruit of the poisonous tree." *Clarke*, 165 Idaho at 395 n.2. Therefore, the district court erred by denying Mr. Dunn's motion to suppress.

CONCLUSION

Mr. Dunn respectfully requests that this Court vacate the district court's order of judgment and commitment and reverse the order denying his motion to suppress.

DATED this 24th day of September, 2020.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September, 2020, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

SJC/eas