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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|------------------------|---|-------------------------|
| STATE OF IDAHO, |) | |
| |) | NO. 47751-2020 |
| Plaintiff-Respondent, |) | |
| |) | KOOTENAI COUNTY |
| v. |) | NO. CR28-19-5889 |
| |) | |
| JUSTIN BRIAN PITTELKO, |) | |
| |) | |
| Defendant-Appellant. |) | |

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 SCOTT WAYMAN
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

Justin Pittelko appeals from his conviction for possession of a controlled substance, challenging the district court's denial of his motion to suppress. The district court erred in denying Mr. Pittelko's motion to suppress because Officer Pierson's lengthy search of Mr. Pittelko's pants pockets, which preceded his arrest for possession of methamphetamine by more than ten minutes, was not a lawful search incident to his arrest, and was instead a warrantless search that violated his rights under the Fourth Amendment of the United States Constitution. This Court should vacate Mr. Pittelko's conviction, reverse the district court's order denying his motion to suppress, and remand this case to the district court for further proceedings.

Statement of Facts and Course of Proceedings

Officer Pierson responded to a residence in Post Falls, Idaho, on April 11, 2019, following a report from an anonymous neighbor of a verbal domestic dispute. (Tr., p.72, Ls.2-7, p.73, Ls.2-7; R., p.25.) When Officer Pierson arrived on-scene, she observed Mr. Pittelko standing by an SUV near his house. (Tr., p.82, Ls.10-16.) She ordered Mr. Pittelko to show his hands, and he put his hands in the air. (Tr., p.82, Ls.20-25; Def. Ex. A at 1:03-06.) Officer Pierson then ordered Mr. Pittelko to come over, but he remained standing in place, with his hands in the air. (Def. Ex. A at 1:06-21.)

Officer Pierson told Mr. Pittelko she was going to pat him down for weapons, and he said he had a weapon. (Tr., p.85, Ls.5-14; Def. Ex. A at 1:22-25.) Officer Pierson yelled, "Don't reach for it!" and he responded, "I'm sorry, I'm sorry." (Def. Ex. A at 1:25-28.) Officer Pierson yelled, "What part of that don't you understand?" (Def. Ex. A at 1:28-32.) Mr. Pittelko "put his

hands back up in the air,” and Officer Pierson “immediately handcuffed him.” (Tr., p.10, L.11 – p.11, L.8, p.86, L.23 – p.87, L.4; Def. Ex. A at 1:50-55.)

Officer Pierson punched Mr. Pittelko in the face either just before or just after she handcuffed him. (Tr., p.112, Ls.12-16.) She testified at the suppression hearing that she punched him to get him to follow her directions. (Tr., p.112, Ls.12-16.) She wrote in her report that she punched him because the situation “was tense, uncertain, rapidly evolving and I still was unable to locate [the] weapons [Mr. Pittelko] had claimed were in his possession.” (R., p.26.)

After handcuffing Mr. Pittelko and punching him in the face, Officer Pierson told Mr. Pittelko, “You’re not in trouble and I wouldn’t even have detained you had you followed my directions and not reached for a freaking knife.” (Def. Ex. A at 2:25-35, 3:27-30.) Officer Pierson continued to shout at Mr. Pittelko to stop reaching for his knife. (Def. Ex. A at 2:36-52.) Officer Pierson retrieved a knife, which was tucked into Mr. Pittelko’s jeans. (Tr., p.88, L.21 – p.89, L.4.; Def. Ex. A at 3:55-4:00.)

After retrieving the knife, Officer Pierson questioned Mr. Pittelko about the argument he had with his wife. (Def. Ex. A at 6:00-54.) She said, “I’m going to get your information, and then I’m going to be letting you go depending on what she says.” (Def. Ex. A at 6:54-58.) Officer Pierson told Mr. Pittelko she smelled marijuana on him when she was removing the knife. (Def. Ex. A at 7:45-49.) She testified she recognized the smell as fresh marijuana. (Tr., p.91, Ls.13-19.) Officer Pierson told Mr. Pittelko, “Marijuana is not a big deal. It’s not a big deal. If I even charge you with it, it’s like a misdemeanor.” (Def. Ex. A at 8:32-45.) Officer Pierson searched Mr. Pittelko’s pockets, and eventually found a plastic bag containing a substance that appeared to be marijuana. (Def. Ex. A at 8:45-10:40.)

Officer Pierson did not take any action indicating she intended to arrest Mr. Pittelko at that time; instead, she continued to search Mr. Pittelko's pockets. (Def. Ex. A at 10:40-11:55.) She testified she could feel "multiple large items . . . inside [Mr. Pittelko's] left pocket." (Tr., p.90, Ls.1-7.) At some point, she found a portion of a glass pipe that she believed had been used for smoking methamphetamine. (Tr., p.94, L.19 – p.95, L.10.) She asked Mr. Pittelko, "Where is the rest of that broken pipe?" and said, "If I cut myself on it, I'm going to charge you." (Def. Ex. A at 12:20-26.) Again, she did not take any action indicating she intended to arrest Mr. Pittelko at that time. (*See id.*)

Officer Pierson continued to search Mr. Pittelko's pockets. (Def. Ex. A at 10:50-15:50.) She found a small container that she believed contained methamphetamine. (Def. Ex. A at 11:55-12:00; Tr., p.99, L.23 – p.100, L.6.) At some point, she searched the container. (Tr., p.111, L.20 – p.112, L.1.) Approximately ten minutes after finding the container, she advised Mr. Pittelko of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), but told him, "You're not under arrest now, you're just detained." (Def. Ex. A at 23:18-40.) She then asked him, "What is in this little yellow container?" (Def. Ex. A at 23:40-24:00.) Mr. Pittelko said it was methamphetamine, and Officer Pierson had a discussion with him about whether he was willing to work as an informant. (Def. Ex. A at 24:00-26:45.) Mr. Pittelko did not agree to work as an informant, and Officer Pierson then arrested him for felony possession of a controlled substance. (Def. Ex. A. at 26:45-27:00; Tr., p.115, Ls.10-19, p.116, Ls.4-8.)

The State charged Mr. Pittelko by Information with felony possession of a controlled substance, possession of drug paraphernalia, misdemeanor possession of a controlled substance, and misdemeanor obstructing an officer. (R., pp.55-57.) The State alleged Mr. Pittelko was subject to an habitual offender enhancement. (*Id.*) Mr. Pittelko filed a motion to suppress.

(R., pp.71-72, 88-98.) The State filed an objection to Mr. Pittelko's motion. (R., pp.79-87.) The district court held a hearing, at which it heard testimony from Officer Pierson and reviewed the officer's on-body video recording of the incident. (R., pp.106-07, 113-20; Def. Ex. A.)

Counsel for Mr. Pittelko argued it "is very clear from the video and also clear from the officer's testimony . . . that Mr. Pittelko was not under arrest at the time that she got into his pockets" (Tr., p.125, Ls.4-9.) Counsel argued the search of Mr. Pittelko's pockets was not a permissible search incident to arrest under *State v. Lee*, 162 Idaho 642 (2017), because Mr. Pittelko was not under arrest, and the officer did not indicate an intent to arrest him, until *after* the discovery of the methamphetamine. (Tr., p.125, L.9 – p.126, L.23.) Counsel pointed out that "[p]robable cause isn't an exception to the warrant requirement . . . and this wasn't an arrest." (Tr., p.127, Ls.1-4.) The prosecutor argued the search of Mr. Pittelko's pockets was a permissible search incident to arrest "whether we call that incident to arrest for the obstructing or contemporaneous search prior to decision on arrest." (Tr., p.132, Ls.11-13.)

The district court denied Mr. Pittelko's motion to suppress. (R., pp.117-19, 121-22.) The district court explained, "When a person is searched before they are arrested, that is not determinative of whether or not it is a lawful search incident to an arrest." (Tr., p.146, Ls.6-9.) The district court acknowledged *Lee*, but concluded this case was distinguishable from *Lee*. (Tr., p.147, Ls.2-4.) The court explained:

So the officer at that point after ceasing these items certainly could have arrested Mr. Pittelko for the marijuana charge. She certainly could have arrested Mr. Pittelko for the paraphernalia charge. She could have certainly arrested Mr. Pittelko for the resisting and obstructing charge. But she exercised her discretion and did not arrest the defendant for those particular offenses even though she had probable cause to do so. She exercised her discretion and arrested Mr. Pittelko for the felony charge and simply issued citations for those offenses that were otherwise arrestable.

(Tr., p.147, L.17 – p.148, L.3.)

Following the district court's decision, Mr. Pittelko entered into an agreement with the State pursuant to which he pled guilty to all four charges. (R., pp.128. 131.) The district court sentenced Mr. Pittelko to a unified term of 3 years, with 18 months fixed, and then suspended the sentence and placed Mr. Pittelko on probation. (R., p.138.) The judgment was entered on December 16, 2019. (R., pp.142-50.) Mr. Pittelko filed a timely notice of appeal on January 24, 2020.¹ (R., pp.160-74.)

¹ On February 6, 2020, the State filed a motion for probation violation, alleging Mr. Pittelko violated his probation by possessing a pellet gun that resembled a handgun, using methamphetamine on multiple occasions, and being terminated from the Good Samaritan Program after failing to attend required classes. (R., pp.180-92.) Mr. Pittelko admitted to violating his probation as alleged, and the district court accepted his admissions. (5/6/20 Tr., p.6, L.5 – p.7, L.15.) The district court executed Mr. Pittelko's sentence, and retained jurisdiction. (5/6/20 Tr., p.14, Ls.17-21.) The judgment was entered on March 12, 2020. (R., pp.205-07.)

ISSUE

Did the district court err in denying Mr. Pittelko's motion to suppress?

ARGUMENT

The District Court Erred In Denying Mr. Pittelko's Motion To Suppress

A. Introduction

The Idaho Supreme Court recognized in *State v. Blythe*, 166 Idaho 713, ___, 462 P.3d 1177, 1182 (2020), that “cases where the search precedes the arrest require careful scrutiny.” This case requires careful scrutiny, as the search of Mr. Pittelko’s pockets that led to the discovery of a container of methamphetamine preceded his arrest by over ten minutes. The district court erred in concluding the search was a lawful search incident to arrest, as it is clear from the totality of the circumstances that Mr. Pittelko would not have been arrested but for the discovery of the methamphetamine.

B. Standard Of Review

“In reviewing a district court order granting or denying a motion to suppress evidence, the standard of review is bifurcated.” *State v. Purdum*, 147 Idaho 206, 207 (2009) (citation omitted). “This Court will accept the trial court’s findings of fact unless they are clearly erroneous. However, this Court may freely review the trial court’s application of constitutional principles in light of the facts found.” *Id.* (citations omitted). “At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court.” *State v. Aguirre*, 141 Idaho 560, 562 (Ct. App. 2005) (citations omitted).

C. The District Court Erred In Concluding The Lengthy Search Of Mr. Pittelko's Pockets Was A Lawful Search Incident To His Arrest For Possession Of The Methamphetamine Found In His Pockets

The Fourth Amendment to the United States Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” U.S. Const. amend IV. Evidence obtained in violation of the Fourth Amendment is subject to the exclusionary rule, which requires unlawfully seized evidence to be excluded. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963); *State v. Page*, 140 Idaho 841, 846 (2004). “Searches conducted without a warrant are considered *per se* unreasonable unless they fall into one of the specifically established and well-delineated exceptions to this general rule.” *State v. Bishop*, 146 Idaho 804, 815 (2009) (quotation marks and citation omitted). “[T]he State has the burden of proving the facts necessary to establish an exception to the warrant requirement.” *State v. Islas*, 442 P.3d 274, 282 (2019) (citation omitted).

“Searches incident to arrest are one of the well-established exceptions to the warrant requirement.” *State v. LaMay*, 140 Idaho 835, 838 (2004) (citations omitted). “Pursuant to the search incident to arrest exception, law enforcement officers may search an arrestee incident to a lawful custodial arrest.” *State v. Lee*, 162 Idaho 642, 649 (2017) (citations omitted). Here, the district court concluded the lengthy search of Mr. Pittelko’s pockets was a lawful search incident to his arrest, because the officer “could have arrested Mr. Pittelko for the marijuana charge . . . the paraphernalia charge . . . [or] the resisting and obstructing charge” before discovering the methamphetamine, and the fact that she exercised her discretion and did not arrest him for those offenses did not invalidate the subsequent search. (Tr., p.147, L.17 – p.148, L.3.) The district court erred because the totality of the circumstances indicate Mr. Pittelko would not have been arrested but for the discovery of the methamphetamine.

Our Supreme Court explained in *Lee* that a search that precedes an arrest can constitute a lawful search incident to arrest only if the totality of the circumstances, including the objective facts and the subjective intent of the officer, indicate an arrest is going to occur notwithstanding the fruits of the search. 162 Idaho at 652. The critical question is not whether there was probable cause for an arrest, but whether an arrest would have in fact occurred. *Id.* at 651-52. Here, the totality of the circumstances indicate Mr. Pittelko would not have been arrested but for the discovery of the small container of methamphetamine. There are no objective facts that indicate Officer Pierson intended to arrest Mr. Pittelko for resisting or obstructing, possession of marijuana, or possession of drug paraphernalia. Thus, the fact that the district court concluded “there was probable cause to arrest the defendant on those three misdemeanor offenses” is irrelevant. (Tr., p.148, Ls.4-10.)

There are no objective facts that indicate Officer Pierson intended to arrest Mr. Pittelko for resisting or obstructing. The objective facts indicate Officer Pierson addressed Mr. Pittelko’s conduct of (arguably) resisting or obstructing by punching him and handcuffing him. (Tr., p.10, L.11 – p.11, L.8, p.86, L.23 – p.87, L.4, p.112, Ls.12-16.) Officer Pierson told Mr. Pittelko, after he arguably resisted and obstructed, “I’m going to get your information, and then I’m going to be letting you go depending on what [your wife] says.” (Def. Ex. A at 6:54-58.)

There are no objective facts that indicate Officer Pierson intended to arrest Mr. Pittelko for possession of marijuana. Officer Pierson testified she recognized the smell of fresh marijuana early on in the encounter. (Tr., p.91, Ls.13-19.) But she told Mr. Pittelko, “Marijuana is not a big deal. It’s not a big deal. If I even charge you with it, it’s like a misdemeanor.” (Def. Ex. A at 8:32-45.) Officer Pierson testified at the preliminary hearing that “[a]t that time, based off if it

was just marijuana and just a verbal domestic, I typically would not arrest on those two things.” (Tr., p.45, Ls.3-5.)

There are no objective facts that indicate Officer Pierson intended to arrest Mr. Pittelko for possession of drug paraphernalia. At some point, she found in Mr. Pittelko’s pocket a portion of a glass pipe that she believed had been used for smoking methamphetamine. (Tr., p.94, L.19 – p.95, L.10.) She asked Mr. Pittelko, “Where is the rest of that broken pipe?” and said, “If I cut myself on it, I’m going to charge you.” (Def. Ex. A at 12:20-26.) She did not take any action indicating she intended to arrest Mr. Pittelko for possession of drug paraphernalia, and instead continued to search his pockets. (*See* Def. Ex. A at 10:50-15:50.)

Looking at the totality of the circumstances, it is clear that Officer Pierson did not arrest Mr. Pittelko prior to discovering a small container of methamphetamine in his pocket, and would not have arrested him but for the discovery of that methamphetamine. The prosecutor all but acknowledged as much in the district court, arguing the search of Mr. Pittelko’s pockets was a permissible search incident to arrest “whether we call that incident to arrest for the obstructing or contemporaneous search prior to decision on arrest.” (Tr., p.132, Ls.11-13.) The decision to arrest is the key, and that decision was not made by Officer Pierson until after the discovery of the methamphetamine.

Our Supreme Court recognized in *Blythe* that “[w]hile probable cause is certainly a necessary prerequisite to a custodial arrest, it does not, by itself, justify a search.” 462 P.3d at 1182. Here, the district court erred in concluding the search of Mr. Pittelko’s pockets that led to the discovery of the methamphetamine was lawful because the officer had probable cause to arrest him on three misdemeanor offenses prior to that search. “Bootstrapping evidence found in a search ‘incident to arrest’—based on probable cause for only a minor violation that would

otherwise not result in an arrest—so that the fruits of a search incident to arrest themselves provide the justification for the arrest, is not permissible.” *United States v. Davis*, 111 F. Supp. 3d 323, 334 n.7 (E.D.N.Y. 2015).

CONCLUSION

Mr. Pittelko respectfully requests that this Court vacate his judgment of conviction, reverse the district court’s order denying his motion to suppress, and remand this case to the district court for further proceedings.

DATED this 17th day of September, 2020.

/s/ Andrea W. Reynolds
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th 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

AWR/eas