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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,
Plaintiff/Respondent,

v.

JASON SCOTT DOWNING,
Defendant/Appellant.

Supreme Court No. 44382

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District
Of the State of Idaho, in and for the County of Ada
The Honorable Gerald Schroeder, Presiding.

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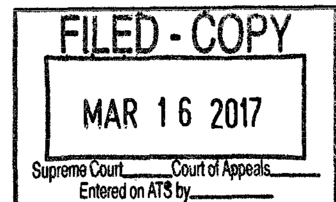

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STATEMENT OF THE CASE

I. NATURE OF THE CASE:

This is an appeal from the District Court's denial of Mr. Downing's Motion to Suppress filed March 8, 2016 and heard on March 31, 2016. The District Court erred in substantially denying Mr. Downing's suppression motion. Specifically, the District Court first erred in ruling that the probation officers could detain Mr. Downing because Idaho law has not recognized the authority of probation officers to detain any and all persons on the premises when conducting a warrantless probation search. The District Court also erred in ruling that the frisk of Mr. Downing was justified because there existed no articulable suspicion of officer danger justifying the frisk. Lastly, the District Court erred in ruling that Mr. Downing consented to the removal from his pocket of an object containing a controlled substance because Mr. Downing consented only as the officer was already reaching into his pocket to remove the object. Each one of these errors constitutes an ever-growing poisonous tree of illegal searches and seizures, culminating in the finding of a controlled substance in Mr. Downing's pocket.

II. COURSE OF PROCEEDINGS:

On October 7, 2015 Mr. Downing was charged with a single felony count of possession of a controlled substance. Mr. Downing filed a suppression motion which was denied in substantial part by the District Court after a hearing on March 31, 2016. On June 23, 2016 Mr. Downing was sentenced to five years' incarceration, with one year fixed. The District Court suspended Mr. Downing's term of incarceration and placed Mr. Downing on five years' felony probation, including 100 hours of community service, 90 days' discretionary jail time, outpatient substance abuse treatment and participation in alcoholics anonymous.

III. STATEMENT OF FACTS:

On the night of October 6, 2015 Ada County Probation and Parole Officers Hurst and Severson went to the address of James Cook, a probationer, to conduct a residence verification. (Tr., p. 59, L. 13-p. 60, L. 4.) Mr. Cook had waived his Fourth Amendment rights regarding searches of his person and premises as a condition of his probation. (Tr., p. 59, L. 21-23.) Mr. Downing opened the door to the uniformed Probation and Parole Officers and allowed them to enter. (Tr., p. 59, L. 23-p. 60, L. 4.) The Officers spotted Mr. Cook behind a couch and asked Mr. Cook and Mr. Downing to sit on a couch in the premises' living room where their hands could be seen. (Tr., p. 60, L. 5-8; p. 8, L. 19-p. 9, L. 3.)

One Probation and Parole Officer stood at the front door with his hand on his firearm while the other searched the premises. (Tr., p. 9, L. 8-23; p. 13, L. 7-17.) While the search was being conducted Mr. Downing got up from the couch and moved towards the front door of the premises, but complied when asked by the probation officers to return to the couch and sit where his hands "could be seen". (Tr., p. 63, L. 13-19; p. 11, L. 1-7.) The Probation and Parole Officers found a third person and controlled substance paraphernalia in the garage, restrained Mr. Cook, and called the Boise Police Department for backup. (Tr., p. 60, L. 15-20.) The Probation and Parole Officers described Mr. Cook as visibly under the influence of a controlled substance and resistant to being placed in restraints. (Tr., p. 61, L. 8-13.)

While awaiting backup, Officers Hurst and Severson, without advising Mr. Downing of his *Miranda* rights or restraining him, asked Mr. Downing if he had been smoking in the garage. (Tr., p. 63, L. 1-12; p. 12, L. 4-p. 13, L. 1.) Mr. Downing admitted to Officers Hurst and Severson that he had been smoking in the garage. (Tr., p. 63, L. 6-7; p. 12, L. 4-12.)

Officer Holtry of the Boise Police Department arrived and observed Mr. Cook in handcuffs and behaving erratically. (Tr., p. 61, L. 15-19.) Officers Hurst and Severson informed

Officer Holtry of the situation. (Tr., p. 34, L. 18-22; .) Officer Holtry escorted Mr. Downing outside the premises with his hand on Mr. Downing's shoulder. (Tr., p. 14, L. 7-17.) Officer Holtry read Mr. Downing his *Miranda* rights, and Mr. Downing agreed to speak with Officer Holtry. (Tr., p. 62, L. 5-12.)

Officer Holtry then performed a pat down search of Mr. Downing and felt a small object in Mr. Downing's pocket. (Tr., p. 62, L. 1-4, 12-15; p. 14, L. 25-p. 16, L. 6..) Mr. Downing testified that Officer Holtry contemporaneously began to remove the object from Mr. Downing's pocket as he asked Mr. Downing's permission to do so. (Tr., p. 16, L. 17-p. 17, L. 1.) Mr. Downing consented to Officer Holtry's removal of the object because Officer Holtry was already in the process of removing it. (Tr., p. 16, L. 22-p. 17, L. 1.) Officer Holtry then asked Mr. Downing the nature of the object, and Mr. Downing informed Officer Holtry that it was methamphetamine. (Tr., p. 62, L. 12-15; p. 17, L. 10-16.)

ISSUES ON APPEAL

A. Did the District Court err in substantially denying Mr. Downing's suppression motion?

ARGUMENT

A. *Standard of Appellate Review*

The standard of review for a motion to suppress evidence on constitutional grounds is one of "deference to factual findings unless they are clearly erroneous." *State v. Weber*, 116 Idaho 449, 452, 776 P.2d 458, 461 (1989) (*quoting State v. Heinen*, 114 Idaho 656, 658, 759 P.2d 947, 949 (Ct. App. 1988)). The appellate court then engages in free review of whether the "constitutional requirements have been satisfied in light of facts found." *Id.*

B. *The District Court Erred in Substantially Denying Mr. Downing's Suppression Motion.*

The District Court denied Mr. Downing's suppression motion except as to the statements made by Mr. Downing to Officers Hurst and Severson, before Officer Holtry read Mr. Downing

his *Miranda* rights. The District Court's ultimate error lies in failing to suppress the evidence found by Officer Holtry in Mr. Downing's pocket. There are several distinct factual nexus which will be analyzed separately, each contributing to a large, gnarled, poisonous tree of illegal searches and seizures of Mr. Downing.

1. <u>The District Court Erred in Ruling that the Probation and Parole Officers Could Detain Mr. Downing.</u>

The District Court's first error concerns the detention of Mr. Downing by Officers Hurst and Severson. The Idaho Supreme Court has held that a seizure occurs when an officer, by means of physical force or show of authority, in some way restrains the liberty of a citizen. *State v. Page*, 140 Idaho 841, 843, 103 P.3d 454, 456 (2004). A warrantless seizure, like the one in this case, is presumptively unreasonable unless it falls within the bounds of certain special and well-delineated exceptions to the warrant requirement. *Id.* It is undisputed that Officers Severson and Hurst detained Mr. Downing, as they directed him on at least two occasions to sit in a specific place where his hands could be seen, and Mr. Downing was directed to return to his seat when he got up and moved towards the door. Mr. Downing was thus seized without a warrant, and such seizure was lawful only if an exception to the warrant requirement applied.

Regarding an exception to the warrant requirement, the District Court ruled that "the probation officers had the ability to detain for investigation anyone found on the premises who were not readily ascertainable residents or occupants." (Tr., p. 65, L. 6-9.) In support, the District Court cited *Michigan v. Summers*, 452 U.S. 692 (1982). In that case officers were executing a search warrant of the defendant's residence, and upon arrival the defendant was exiting the house. *Id.* at 693. The officers forced the defendant to re-enter the premises and detained him while they executed the search warrant. *Id.* The Supreme Court ruled such detention constitutional as part of the execution of a search warrant. *Id.* at 705. Of "prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's

house for contraband." *Id.* at 701. The Supreme Court also placed great emphasis on the fact that the detention was "was surely less intrusive than the search itself." *Id.*

Summers, however, involved a search warrant and the owner of the house subject to such warrant; it did not involve a third party at the residence of a probationer. The District Court nonetheless ruled that the same interests cited in *Summers* are protected by extending *Summers* to apply to the detention of a third party during a probation search: "I think the same interests are certainly displayed here . . . the preventing flight of the occupants, minimizing potential harm for law officers . . . and facilitating completion of the search." (Tr., p. 64, L. 23.)

Idaho courts, however, have already declined to extend *Summers* as the District Court did in this case. In *State v. Reynolds*, 143 Idaho 911, 155 P.3d 712 (2007), the State sought extension of "the reasoning of *Summers* to hold that an officer acted reasonably in detaining individuals leaving the premises of a residence subject to a warrantless probation search." *Id.* at 915, 155 P.3d at 716. The State cited a California case, *People v. Matelski*, 82 Cal. App. 4th 837, 98 Cal. Rptr. 2d 543 (2000). *Id.* The *Reynolds* court expressly declined to apply *Summers* in the manner in which the District Court did in this case: "We therefore need not decide whether the police can constitutionally detain individuals found on the premises of a lawful probation search." *Id.* at 916, 155 P.3d at 717.

Other jurisdictions have found that the extension of *Summers'* rationale to justify detention of third parties during otherwise valid probation searches to be an overreach. For example, "in the Eastern District of New York, probation officers are not authorized to detain or restrain third parties. . . .Officers are not authorized to restrain third parties during a search." *Tchirkova v. Kelly*, 1998 WL 125542, at *8 (E.D.N.Y. Mar. 16, 1998). Such result is logical, because a warrantless probation search is random, not tied to a particularized suspicion of criminal activity, and a third party has not waived their rights under the Fourth Amendment. By

contrast, when a warrant is obtained, there has been established such a nexus between an individual, his premises, and criminal conduct. The *Summers* court noted this key distinction: "A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there." 452 U.S. at 701.

The District Court appeared to give a second justification for Mr. Downing's detention as an afterthought, stating that after Officers Severson and Hurst searched the house and found drug paraphernalia, they possessed reasonable suspicion of the commission of a crime such that they were justified in detaining Mr. Downing for "further investigation." (Tr., p. 65, L. 16-24.) This rationale ignores the fact that Mr. Downing had twice been directed to sit down on the couch and keep his hands visible, the second time after he stood up and moved towards the door, before the Probation and Parole Officers located the drug paraphernalia in the garage. The justification for detaining Mr. Downing cannot arise subsequent to his detention; rather, it must be present at the outset of the detention. *See, e.g., State v. Landreth*, 139 Idaho 986, 88 P.3d 1226 (Ct. App. 2004) (determining whether there existed "reasonable suspicion that would have justified a detention at the outset of the encounter."). At the outset of Mr. Downing's detention, the sole basis therefore was Mr. Downing's presence at the home the probationer Mr. Cook.

Absent the prophylaxis of *Summers*, Mr. Downing was unreasonably detained by Officers Severson and Hurst. As such, all evidence and statements obtained subsequent to Mr. Downing's unlawful detention constitutes fruit of the poisonous tree and is appropriately suppressed. *See State v. Luna*, 126 Idaho 235, 239, 880 P.2d 265, 269 (Ct. App. 1994) ("Statements made by the defendant as a result of being confronted by the police with the fruits of an illegal search constitute the fruit of the poisonous tree and are inadmissible in evidence in a criminal prosecution."); *State v. Van Dorne*, 139 Idaho 961, 963, 88 P.3d 780, 782 (Ct. App.

2004) ("If evidence is not seized pursuant to a recognized exception to the warrant requirement, the evidence discovered as a result of the warrantless search must be excluded as the fruit of the poisonous tree."); *State v. Kerley*, 134 Idaho 870, 874, 11 P.3d 489, 493 (Ct. App. 2000) ("Consent to search does not expunge the taint of unlawful police activity where the events are irrevocably intertwined.").

2. **The District Court Erred in Ruling that Officer Holtry's Frisk of Mr. Downing was Justified on Officer Safety Grounds.**

After suppressing Mr. Downing's statements to Officers Severson and Hurst due to their failure to provide Mr. Downing *Miranda* warnings prior to questioning him (Tr., p. 66, L. 2-11), the District Court then ruled that Officer Holtry nonetheless possessed reasonable suspicion justifying his frisk of Mr. Downing pursuant to *Terry v. Ohio*, 392 U. S. 1 (1968). Under *Terry*, "an investigative detention is permissible if it is based upon specific articulable facts which justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity." *Id.* at 26. The quantity and quality of information necessary to create reasonable suspicion for such a "*Terry* stop" is less than that necessary to establish probable cause, *Alabama v. White*, 496 U.S. 325, 330 (1990); *State v. Bishop*, 146 Idaho 804, 811, 203 P.3d 1203, 1210 (2009), but must be more than a mere hunch or unparticularized suspicion. *Terry*, 392 U.S. at 27. Reasonable suspicion must be based on specific, articulable facts considered with objective and reasonable inferences that form a basis for particularized suspicion. *State v. Sheldon*, 139 Idaho 980, 983-84, 88 P.3d 1220, 1223-24 (Ct. App. 2003). Particularized suspicion consists of two elements: (1) the assessment must be based on a totality of the circumstances, and (2) the assessment must yield a particularized suspicion that the particular individual being stopped is engaged in wrongdoing. *See id.* at 983, 88 P.3d at 1223. An officer may draw reasonable inferences from the facts in his or her possession, and those inferences may be drawn from the

officer's experience and law enforcement training. *State v. Montague*, 114 Idaho 319, 321, 756 P.2d 1083, 1085 (Ct. App. 1988).

Significantly, a more invasive frisk search "is only justified when, at the moment of the frisk, the officer has reason to believe that the individual he or she is investigating is armed and presently dangerous to the officer or to others and nothing in the initial stages of the encounter dispels the officer's belief. *Bishop*, 146 Idaho at 818, 203 P.3d at 1217.

The District Court ruled that Officer Holtry's reasonable suspicion justifying the frisk of Mr. Downing was predicated upon "paraphernalia in the garage which is in plain view of the probation officers." (Tr., p. 67, L. 17-18.) The District Court delineated this basis from Mr. Downing's smoking admission: "I do not find that the reasonable suspicion at that point was based on Mr. Downing's admissions to the probation officers." (Tr., p. 67, L. 19-21.) Even if Officer Holtry had reasonable suspicion that Mr. Downing was engaged in criminal activity, reasonable suspicion alone does not justify a frisk for weapons; Officer Holty required reason to believe Mr. Downing was armed and dangerous. Recognizing this, the District Court ruled that Officer Holtry reasonably frisked Mr. Downing on officer safety grounds, citing "bizarre behavior going on" and the potential that Mr. Downing could have had "in his possession a weapon that could harm officers under this particular circumstance." (Tr., p. 68, L. 2-p. 69, L. 9.)

It should be noted that analysis of this ruling should be irrelevant because it flows from the poisonous tree of Mr. Downing's initial, illegal detention at the hands of Officers Severson and Hurst. Assuming *arguendo* that Mr. Downing's detention was legal, The District Court's rationale with regards to Officer Holty's reasonable suspicion fails because without the properly suppressed admission of Mr. Downing, Officer Holtry possessed no reasonable suspicion that Mr. Downing had engaged in any criminal activity. It is undisputed that the drug paraphernalia found by Officers Severson and Hurst was located in the garage, an area of the premises away

from Mr. Downing when he opened the door for the probation officers. The only manner in which Officer Holtry could have linked Mr. Downing to criminal activity is by learning from Officers Hurst and Severson of Mr. Downing's admission to smoking, given without the benefit of *Miranda* warnings. Without the benefit of Mr. Downing's properly suppressed admission, there existed no basis upon which Officer Holtry could reasonably suspect Mr. Downing engaged in criminal activity.

Regarding reasonable, articulable suspicion for a frisk for weapons, the District Court's rationale yet again fails because Mr. Downing was supremely cooperative. The undisputed facts demonstrate that any bizarre behavior was solely the conduct of Mr. Cook, who was handcuffed. Mr. Downing admitted Officers Severson and Hurst to the residence, sat where Officers Severson and Hurst told him to sit with his hands visible as directed, and complied when Officers Severson and Hurst directed him to sit back down when Mr. Downing moved towards the door. The record is wholly and entirely devoid of a shred of evidence that Mr. Downing was non-compliant in any manner, let alone armed and dangerous.

Mr. Downing's conduct is not dissimilar to that of the defendant in *U. S. v. Mitchell*, 2003 WL 1690320, March 31, 2003 (10th Cir. 2003). In that case the officer frisked the defendant based on the fact that the encounter occurred in a high crime area, and the defendant could have been involved in shoplifting. *Id.* at *1. The Tenth Circuit ruled the frisk unjustified because the defendant, like Mr. Downing in this case, was "polite, cooperative, and non-threatening." *Id.* at *2.

Similarly, in *State v. Thirty Thousand Six Hundred Sixty Dollars & no/100*, 136 S.W.3d 392 (Tex. App. 2004), an officer pulled over a speeding driver at night who had bloodshot eyes and a history of marijuana convictions. *Id.* at 396. The officer made the driver exit the vehicle, at which time the officer frisked the driver. *Id.* The Texas Court of Appeals ruled that the frisk was

unjustified, noting that the driver "was entirely cooperative during the traffic stop. Before the frisk, he was not nervous or agitated. He had made no sudden movements or furtive gestures. He did not try to flee. Although Hullum reasonably suspected that Tobin had used an intoxicant of some kind, that alone does not raise a reasonable suspicion that Tobin was armed." *Id.* at 402. In this case there is no evidence whatsoever that Mr. Downing was nervous or agitated, made sudden moves, or tried to flee. Mr. Downing was nothing but cooperative. Perhaps most significantly, the Texas Court of Appeals noted that suspicion of intoxication does not alone raise suspicion that a suspect is armed and dangerous, so even if Officer Holtry suspected Mr. Downing was intoxicated, such suspicion did not justify frisking Mr. Downing. *See also People v. Francis*, 17 Misc. 3d 870, 875, 847 N.Y.S.2d 398, 403 (N. Y. Sup. Ct. 2007) (no justification for frisk for weapons where "Defendant never made any furtive movements or threatening gestures during the confrontation. He never tried to reach for the knife or conceal it. On the contrary, defendant never exhibited any suspicious behavior and was completely cooperative with Officer Castro during the encounter.")

Any person encountered by law enforcement could potentially be armed, but more particularized suspicion regarding officer danger and the armed and dangerous nature of a suspect is both required and completely absent in this case. There existed no officer safety concerns justifying Officer Holtry's frisk of Mr. Downing.

3. **The District Court Erred in Ruling that Mr. Downing Consented to Officer Holtry's Removal of the Object from his Pocket.**

Lastly, the District Court ruled that Mr. Downing consented to Officer Holtry's removal of the object from his pocket that turned out to contain a controlled substance: "Mr. Downing has been Mirandized and after consenting to talk with the officers, Mr. Downing says yes, its methamphetamine. It's in my pocket, and yes, you can take it." (Tr., p. 71, L. 10-13.)

Again, analysis of this ruling should be irrelevant because it flows from the poisonous tree of Mr. Downing's initial, illegal detention at the hands of Officers Severson and Hurst and Officer Holtry's lack of justification to conduct a frisk of Mr. Downing.

Assuming *arguendo* that Mr. Downing's detention and frisk were legal, the District Court erred because Mr. Downing, testified that Officer Holtry had already reached in his pocket when he consented to the removal of the object: "[Officer Holtry] asked, 'Do you mind if I pull this out of your pocket,' but he was reaching in at the same time." (Tr., p. 16, L. 18-20.) Mr. Downing also testified that Officer Holtry did not ask him the nature of the substance until after Officer Holtry "pulled it out." (Tr., p. 17, L. 10-16.)

The Idaho Supreme Court has repeatedly reiterated that under *Terry*, 392 U. S. 1, a protective frisk is generally limited to a pat-down of the outer clothing. *State v. Crooks*, 150 Idaho 117, 119, 244 P.3d 261, 263 (Ct. App. 2010) ("Under *Terry*, an officer may conduct a limited pat-down search, or frisk, of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons."); *Bishop*, 146 Idaho at 818, 203 P.3d at 1217 (same); *State v. Faith*, 141 Idaho 728, 730, 117 P.3d 142, 144 (Ct. App. 2005) ("The stop and frisk procedure ... is defined as 'a carefully limited search of the outer clothing' "); *State v. Greene*, 140 Idaho 605, 607, 97 P.3d 472, 474 (Ct. App. 2004) (holding a *Terry* frisk is initially limited to "a frisk of the outer clothing").

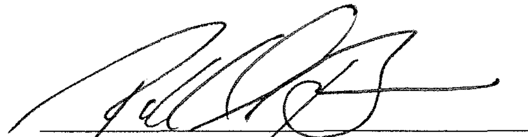
Officer Holtry's act of reaching into Mr. Downing's pocket without gaining Mr. Downing's prior permission expanded the scope of the *Terry* frisk beyond its permissible bounds of a search for weapons limited to outer clothing. Accordingly, the controlled substance removed from Mr. Downing's pocket is appropriately suppressed.

CONCLUSION

For the reasons set forth herein, the District Court erred in substantially denying Mr. Downing's suppression motion, and this matter is appropriately remanded for further proceedings.

Dated this 15 day of March, 2017.

BARNUM HOWELL & GUNN PLLC.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of March, 2017, I served a true and correct copy of the foregoing *Appellant's Brief* in the manner indicated below:

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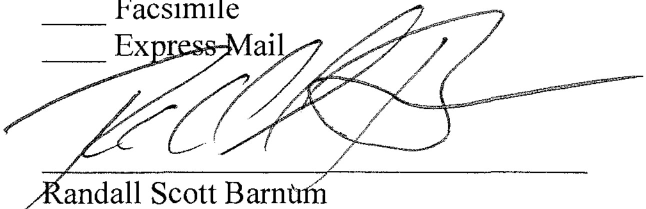

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