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<u>IN THE SUPREME COURT OF THE STATE OF IDAHO</u>

STATE OF IDAHO,	)	
	)	No. 44382
Plaintiff-Respondent,	)	
	)	Ada Co. Case No.
vs.	)	CR-FE-2015-14295
	)	
JASON SCOTT DOWNING,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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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STATEMENT OF THE CASE

Nature Of The Case

Jason Scott Downing appeals from the district court's partial denial of his motion to suppress.

Statement Of The Facts And Course Of The Proceedings

On the evening of October 6th, 2015, Idaho Department of Correction Probation and Parole officers were performing a home verification on one of their probationers. (Tr., p. 42, Ls. 8-15; p. 42, L. 25 – p. 43, L. 21.) Downing, a friend of a friend, answered the door and let the officers in. (Tr., p. 5, L. 25 – p. 8, L. 1.)

The officers, who had a Fourth Amendment waiver to search the probationer's home, saw the probationer behind a couch in the front room. (Tr., p. 44, Ls. 11-15; p. 46, 12-14.) The probationer was behaving bizarrely—he was "acting very psychotic and got on the floor underneath the table and was hysterical" and making nonsensical statements. (Tr., p. 10, Ls. 10-22.) A third individual was also inside the house, and had to be located and brought into the living room. (Tr., p. 11, Ls. 14-22; p. 45, Ls. 17-21.) The officers eventually restrained the probationer, who was sobbing, rocking back and forth, and who ultimately "curled up in a ball on the floor." (Tr., p. 27, L. 9; p. 49, Ls. 16-20.)

At one point, in an attempt to leave, Downing stood up from the couch. (Tr., p. 11, Ls. 1-11.) The officer by the door asked Downing to sit, which he did. (Tr., p. 11, Ls. 5-11; p. 50, Ls. 17-18.)

While one probation officer stayed in the living room a second officer searched the home. (Tr., p. 46, Ls. 3-8.) After three to four minutes the officer found drug paraphernalia in the garage. (Tr., p. 46, L. 9 – p. 47, L. 3.) The probation officers then made an assist call to the Boise Police Department. (Tr., p. 47, Ls. 11-17.) Without reading Downing his Miranda rights, the officers asked Downing if he had been smoking in the garage, which Downing admitted. (Tr., p. 12, L. 5 – p. 13, L. 1.)

Boise Police officer Holtry arrived some 17 minutes later. (Tr., p. 33, Ls. 5-22; p. 61, Ls. 6-7.) Officer Holtry went outside with Downing and read him his Miranda rights. (Tr., p. 14, Ls. 7-22; p. 30, L. 11 – L. 31, L. 2.) Downing agreed to talk to the officer and admitted he had been using drugs in the house that day. (Tr., p. 31, Ls. 3-18.) Officer Holtry, citing safety concerns, frisked Downing for weapons. (Tr., p. 14, Ls. 23-25; p. 27, Ls. 11-25; p. 29, Ls. 2-14.) The officer testified that the frisk led to the following exchange:

> Q. When you were searching Mr. Downing, did you find anything that warranted further attention?
>
> A. Just briefly, on his front pocket. I felt something in [his] right pants pocket.
>
> Q. What did you believe it to be when you felt it?
>
> A. I'm relatively familiar with. I had an idea. I don't know what it was, but I just asked him, "What is this? What's in your pocket?" He said, "You can take it out." I asked him again, I said, "What is it?" And he said, "It's Meth." So I removed it and put it in my pocket. It was a little nylon bag with a silver key chain screw top.

(Tr., p. 29, L. 18 – p. 30, L. 4.) Downing was arrested for frequenting a place where drugs are used or sold, and possession of methamphetamine. (Tr., p. 31, Ls. 19-23; p. 32, Ls. 11-19.)

Downing moved to suppress evidence of the statements he made and the evidence that was found. (R., pp. 46-47, 49-59.) His motion was partially granted, as the district court suppressed the pre-Miranda statements that he made to the probation officers. (Tr., p. 72, Ls. 3-4.)

But the district court denied the rest of Downing's motion to suppress. (Tr., p. 72, Ls. 5-9.) The court found that his initial detention was proper per Michigan v. Summers, 452 U.S. 692 (1981), even though, unlike Summers, the detention here was pursuant to a probation search and not a search warrant. (Tr., p. 64, L. 14 – p. 65, L. 13.) The district court also found that the frisk of Downing was justified on officer safety grounds, and that Downing consented to the search of his pocket. (Tr., p. 67, L. 24 – p. 69, L. 15; p. 71, L. 5 – p. 72, L. 2.) Lastly, the court found that the post-Miranda admissions Downing made to Officer Holtry would not be suppressed. (Tr., p. 72, Ls. 5-7.)

Downing entered a conditional guilty plea, reserving his right to appeal the district court's ruling on his motion to suppress. (Tr., p. 75, L. 21- p. 76, L.4; p. 86, Ls. 6-12; R., pp. 74-81.) He timely appealed from the district court's judgment of conviction. (R., pp. 85-89; 97-99.)

ISSUE

Downing states the issue on appeal as:

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

(Appellant's brief, p. 3)

The state rephrases the issue as:

Has Downing failed to show the district court erred by partially denying his motion to suppress?

ARGUMENT

Downing Has Failed To Show Any Error In The Partial Denial Of His Suppression Motion

A. Introduction

Downing argues that the district court erred by partially denying his motion to suppress. He contends that his initial detention was illegal, because the Summers rule justifying third-party detentions would not apply to warrantless probation searches. (Appellant's brief, pp. 4-7.) Downing also argues that the court erred in determining the ensuing frisk was proper based on officer safety grounds. (Appellant's brief, pp. 7-10.) Finally, Downing claims the court erred in determining that he consented to the search of his pocket, because Downing "testified that Officer Holtry had already reached in his pocket when he consented to the removal of the object…." (Appellant's brief, p. 11.)

These arguments fail. This court should apply the Summers rule here, because the detention here prevented flight, ensured officer safety, and hastened the orderly completion of the stop. The frisk was also proper, as the officer had reasonable safety grounds necessitating a pat search for weapons. Moreover, Downing has failed to meaningfully address, let alone show clearly erroneous, the court's factual finding that Downing consented to the search of his pocket *before* the officer reached in his pocket. Lastly, Downing was arrested for frequenting a residence where drugs were present; accordingly, the methamphetamine in his pocket would have been inevitably discovered regardless of the propriety of the frisk, or his consent to the search. The district court therefore correctly ruled on Downing's motion.

B. Standard Of Review

On review of a ruling on a motion to suppress, the appellate court defers to the trial court's findings of fact unless clearly erroneous, but exercises free review of the trial court's determination as to whether constitutional standards have been satisfied in light of the facts. State v. Willoughby, 147 Idaho 482, 485-86, 211 P.3d 91, 94-95 (2009); State v. Fees, 140 Idaho 81, 84, 90 P.3d 306, 309 (2004). If findings are supported by substantial evidence in the record, those "[f]indings will not be deemed clearly erroneous." State v. Stewart, 145 Idaho 641, 648, 181 P.3d 1249, 1256 (Ct. App. 2008) (quoting State v. Jaborra, 143 Idaho 94, 98, 137 P.3d 481, 485 (Ct. App. 2006)).

C. The District Court Correctly Applied *Michigan v. Summers* To Determine The Initial Detention Of Downing Was Justified

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons … against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause … particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Generally, "Fourth Amendment seizures are 'reasonable' only if based on probable cause" to believe that a crime was committed. Bailey v. United States, 568 U.S. 186, __, 133 S. Ct. 1031, 1037 (2013) (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979)). Nevertheless, there are some exceptions to this general rule, and "some latitude for police to detain" when "the intrusion on the citizen's privacy 'was so much less severe' than that involved in a traditional arrest that 'the opposing interests

in crime prevention and detection and in the police officer's safety' could support the seizure as reasonable." Bailey, 133 S. Ct. at 1037 (quoting Summers, 452 U.S. at 697-98); see also Terry v. Ohio, 392 U.S. 1, 27 (1968); Dunaway, 442 U.S. at 209.

In Michigan v. Summers, the United States Supreme Court considered such an exception: whether law enforcement executing a warrant to search a home could detain individuals found there. 452 U.S. 692 (1981). The police officers there were "about to execute a warrant to search a house for narcotics" when they ran into Summers outside the house, attempting to leave. Id. at 693. Summers was asked to help law enforcement enter the house and was "detained … while they searched" it. Id. Summers, who owned the house, was searched, drugs were found, and he was charged with possession of a controlled substance. Id. at 693-94. Summers moved to suppress that evidence as the product of an illegal detention, raising the issue of "whether the initial detention of [Summers] violated his constitutional right to be secure against an unreasonable seizure of his person." Id. at 694.

The Summers Court concluded such a detention would be reasonable under the Fourth Amendment. Id. 694-706. The Court's decision was based on several factors: first of all, it considered "the fact that the police had obtained a warrant to search respondent's house for contraband." Id. at 701. The Court noted that the detention was "surely less intrusive" than the search that had been authorized. Id. at 701. Moreover, the Court found that most citizens "would elect to remain in order to observe the search of their possessions"; that a detention

accommodating a search was unlikely to be "unduly prolonged" because the information sought "normally will be obtained through the search and not through the detention"; and that a detention inside the home would not embarrass the defendant with either "the inconvenience [or] the indignity associated with a compelled visit to the police station." Id. at 701-02.

Three key factors also justified the detention in Summers: preventing flight, officer safety, and the orderly completion of the search. See id. at 702-03. As the Summers Court explained:

> In assessing the justification for the detention of an occupant of premises being searched for contraband pursuant to a valid warrant, both the law enforcement interest and the nature of the "articulable facts" supporting the detention are relevant. Most obvious is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found. Less obvious, but sometimes of greater importance, is the interest in minimizing the risk of harm to the officers. Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation. Finally, the orderly completion of the search may be facilitated if the occupants of the premises are present. Their self-interest may induce them to open locked doors or locked containers to avoid the use of force that is not only damaging to property but may also delay the completion of the task at hand.

Id. (internal citations omitted). The Summers Court thus held "that a warrant to search for contraband found on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Id. at 705.

Since Summers, other courts have asked whether its logic would extend to detentions accompanying a lawful but warrantless search—for example, a probation or parole search pursuant to a Fourth Amendment waiver. In People v. Matelski, a California Court of Appeals concluded that Summers would apply in the case of a probation search. 82 Cal. App. 4th 837 (2000). There, probation officers were conducting a warrantless search of a home, pursuant to a Fourth Amendment waiver, after their probationer failed a drug test. Id. at 841, 851. "As the officers arrived at the home" they encountered the exiting defendants and detained them. Id. at 841. The officers learned the defendants had active arrest warrants, searched them, and found drugs. Id. at 841-42. The Matelski defendants moved to suppress the evidence, and the state argued, among things, that Summers justified the seizure. Id. at 842-43.

The Matelski Court agreed that Summers would apply to probation searches, noting first that the presence of a search warrant was just a "significant factor" in the analysis, to be considered among other significant factors such as "the legitimate law enforcement interest in preventing flight if contraband is found, and officer safety considerations." Id. at 847. The court, favorably quoting prior precedent, explained why the existence of a search warrant was not dispositive:

> With regard to the crucial distinguishing factor, the lack of a search warrant, the [People v. Hannah] court said: "Defendant correctly points out that *Summers, supra*, and the other cases discussed, involved detention of an individual during the execution of a search warrant for contraband. By the same token, none of these cases require the existence of a search warrant for contraband as a prerequisite to finding the detention of an individual to be reasonable. **The existence of a warrant is but one factor the**

> **courts consider when determining the governmental interest involved.**"

Id. at 849 (emphasis added) (quoting People v. Hannah, 51 Cal. App. 4th 1335, 1343 (1996)). The Matelski Court also pointed out that the extent of the intrusion was "minimal": the detention lasted 15 minutes, was shielded from public view, and was justified by "the need to determine what connection defendant, who appeared to be more than a stranger or visitor, had to the premises, and by the related need to ensure officer safety and security at the site of a search for narcotics." 82 Cal. App. at 849-50.

Additionally, the Matelski Court found that "there were also officer safety concerns" justifying the search, and observed that "[s]ecurity demands that the persons in the home at the time of the officers' arrival remain there until the officers have completed their investigation." Id. at 850. Finally, the court pointed out that:

> Here, the officers had neither an arrest nor a search warrant. However, they were not acting randomly. The officers were conducting a valid search of the home of a probationer who had failed a drug test. In order to obtain probation on general terms and conditions, a criminal defendant must waive his Fourth Amendment rights: "A probationer, unlike a parolee, consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term. Probation is not a right, but a privilege." Since the probationer waived his Fourth Amendment rights, the officers were properly able to enter the premises to search it without a warrant.

Id. at 851 (internal citations omitted). The court therefore concluded that "the intrusion on defendants' privacy was minimal, the governmental interests stated above outweighed the brief intrusion on defendants' privacy, and that the lack of a search or arrest warrant was not dispositive." Id.

Idaho courts have not expressly held whether the Summers rule applies to warrantless probation searches, but the district court here correctly concluded that it would. Because, as the court noted, the factors identified by Summers and Matelski—preventing flight, officer safety, and the orderly completion of the search—all apply here:

> Now Michigan versus Summers differs a little in—and that's the case involving the execution of a search warrant—but I think the same interests are certainly displayed here; that there's three important interests, which includes the preventing flight of the occupants[,] minimizing the potential for harm for law or peace enforcement officers and facilitating the completion of the search, and so even though a [probation] search is a warrantless search, it's not an execution of a search warrant, those same overriding concerns were certainly present in what the officer saw given that Mr. Cook, apparently, was fleeing or trying to hide from the officers. Someone else was present in the residence, and the officers had concerns for their safety.
>
> So, in this particular case, the probation officers had the ability to detain for investigation anyone found on the premises who were not readily ascertainable residents or occupants and to determine who was in the residence and to assure it was a secure residence….

(Tr., p. 64, L. 16 – p. 65, L. 11.)

The district court's conclusion that Summers would apply here was correct. The probation officers' entered a chaotic home containing unidentified individuals, and detaining them on the couch was necessary to prevent flight; Downing himself attempted to leave before being asked to sit down. (Tr., p. 11, Ls. 3-11; p. 44, Ls. 6-10.) Because the officer was armed and standing by the door, Downing's attempt to leave also created a self-evident safety risk—which was on top of the additional safety risks posed by the probationer, who was sobbing, hiding behind the couch, and in Downing's own words, who "started

acting very psychotic and got on the floor underneath the table and was hysterical." (Tr., p. 10, Ls. 18-19.) Moreover the officers could not initially locate everyone inside the house—a third individual had to be found inside the house and brought in to the living room. (Tr., p. 11, Ls. 14-18; p. 45, Ls. 17-21.) Downing's detention took place inside the home, shielded from public scrutiny and potential embarrassment, and was brief, with Officer Holtry arriving within 17 minutes of being called. (Tr., p. 33, Ls. 5-22; Tr., p. 61, Ls. 2-7.) All these factors justified detaining Downing by asking him to sit on the couch while the probation officers secured the disordered, potentially dangerous scene and effected the lawful search. Regardless of the existence of a warrant to search the home, the important interests identified by the Summers all existed here; this court, like the Matelski Court, should find that the Summers rule applies here, which would justify Downing's brief detention as the officers secured the scene.

Downing argues that Summers would not apply here, because Summers "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." (Appellant's brief, p. 5.) Downing cites to extra-jurisdictional authority in support of this proposition, and contends that the Idaho Court of Appeals has "expressly declined to apply *Summers* in the manner in which the District Court did in this case." (Appellant's brief, p. 5.)

These arguments fail. All other factors being equal, if a third-party detention would be allowed in light of a valid search warrant, then it would also be allowed pursuant to a lawful probation search, where the home owner has

waived his Fourth Amendment rights. Moreover, while the Summers Court admittedly considered the existence a warrant of "prime importance," it did not specifically address the question of a probation search, nor did it hold that the existence of a warrant was a dispositive question. See 452 U.S. at 701-06. Indeed, if the existence of a warrant *was* dispositive, then there would be no need for the Summers Court to engage in a balancing test as it did: ruminating over factors such as suspect flight, defendant embarrassment, officer safety, and the orderly completion of the search, among other things. Id. at 701-04; but cf. State v. Williams, 2016 WL 4492579 (Ct. App. 2016) (appearing to require a search or arrest warrant, but proceeding to apply the Summers multi-factor test). In any event, the Summers Court's application of a multi-factor test shows that the existence of a warrant is just another factor, and further implies that in other cases where the rest of the factors are plainly evident—such as here—detention would be proper.

The remaining authority Downing relies on is inapplicable to the issues at hand. The Tchirkova Court did not interpret Summers, or even cite to Summers in its opinion, much less find the application of its rationale to "valid probation searches to be an overreach." (See Appellant's brief, p. 5); Tchirokva v. Kelly, 1998 WL 125542 (E.D.N.Y. 1998). Rather, the court there expressly analyzed the authority of Eastern District of New York probation officers to detain third parties under the "EDNY Search and Seizure Policy Statement" the United States Code, and a "United States Parole Commission Memo to U.S. District Judges and Magistrates, and Chief Probation Officers," which per the court

provided that "officers are not authorized to restrain third parties during a search." Id. at *8. Given the inapplicability of federal statutes, New York policy statements, and federal parole commission memoranda to Idaho state probation officers, Tchirkova, placed in context, is unilluminating.

Likewise, State v. Reynolds, 143 Idaho 911, 155 P.3d 712 (Ct. App. 2007), does not support Downing's position. Downing interprets the Reynolds holding as the Court of Appeals "expressly declin[ing] to apply *Summers*" to a probation search. (Appellant's brief, p. 5.) But the Reynolds Court only "expressly declined" to apply Summers insofar it never reached the issue: it stated that "[w]e therefore **need not decide** whether the police can constitutionally detain individuals found *on the premises* of a lawful probation search." Reynolds, 143 Idaho at 916, 155 P.3d at 717 (italic emphasis in original, boldface emphasis added). Because Reynolds was resolved on a different issue, the Reynolds Court never decided *whether* Summers would apply—let alone expressly ruled that it would not. See id. In sum, Downing has failed to show that the Summers rule should not apply here.

This Court, however, should find that Summers would control here. Per Summers, the district court correctly concluded that Downing's brief detention was permissible given the facts.

D. The District Court Correctly Found That The Ensuing Frisk Of Downing Was Reasonable Because It Was Justified By Officer-Safety Concerns

Under the Fourth Amendment an officer may "conduct a limited self-protective pat down search of a detainee in order to remove any weapons."

State v. Henage, 143 Idaho 655, 660, 152 P.3d 16, 21 (2007) (citing State v. Wright, 134 Idaho 79, 82, 996 P.2d 298, 301 (2000)). Such searches are "evaluated in light of the facts known to the officers on the scene and the inference of the risk of danger reasonably drawn from the totality of the circumstances." Henage, 143 Idaho at 660, 152 P.3d at 21 (quotations and citations omitted). The ultimate inquiry is an objective one, requiring the court consider whether the facts available to the officer would "warrant a man of reasonable caution in the belief that the action taken was appropriate." Id. (quoting Terry, 392 U.S. at 22).

The Idaho Supreme Court has further held that "[a] person can be armed without posing a risk of danger," such that the mere knowledge that an individual has a weapon is insufficient to justify a frisk; there must also be a basis for concluding the armed individual is dangerous. Henage, 143 Idaho at 660, 152 P.3d at 21. "Several factors influence whether a reasonable person in the officer's position would conclude that a particular person was armed and dangerous." State v. Bishop, 146 Idaho 804, 819, 203 P.3d 1203, 1218 (2009). The factors include whether: (1) "there were any bulges in the suspect's clothing that resembled a weapon"; (2) "the encounter took place at night or in a high crime area"; (3) "the individual made threatening or furtive movements"; (4) "the individual indicated that he or she possessed a weapon"; (5) "the individual appeared to be under the influence of alcohol or illegal drugs"; (6) the individual "was unwilling to cooperate"; and (7) the individual "had a reputation for dangerousness." Id. (citations omitted). "Whether any of these circumstances,

taken together or by themselves, are enough to justify a [pat] frisk depends on an analysis of the totality of the circumstances." Id.

Here, the district court correctly found the frisk of Downing was justified by officer safety concerns based on the totality of the circumstances. The scene here was chaotic: Downing himself testified that the probationer was "acting very psychotic" and "hysterical" (Tr., p. 10, Ls. 17-19), and when Officer Holtry arrived the probationer was "curled up into a little fetal position," sobbing, trying to conceal himself "under a lamp." (Tr., p. 27, Ls. 6-10.) The encounter took place at night, and Officer Holtry noted Downing's height, and given the scene, the officer was "looking for weapons"—he didn't "want anybody with a gun or a knife," and "[i]f they're going to maintain a position of being unsecured," as Downing was, "I just want to make sure they don't have anything that can harm me or anybody else." (Tr., p. 25, Ls. 6-7; p. 29, Ls. 4-14.) On direct examination, Officer Holtry gave the following inventory of concerns:

> Well, my main concern is being by myself. I didn't know who was who, who was there, who was doing what. The fact that I was advised that when they initially knocked on the door, the one offender had tried to conceal himself behind a couch. He was trying to hide. I didn't know who anybody was on the scene or what their involvement was, so just initially is to sort of secure things and assign safety assessment, and make sure everybody's contained in one area and nobody has any weapons or anything like that on them.

(Tr., p. 27, Ls. 13-22.) And the cross-examination of Officer Holtry only reaffirmed the objective propriety of the frisk:

> Q. Now you testified that your primary concern upon arriving in the situation, particularly given Mr. Cook and his kind of odd behavior—

> A. Yes.
>
> Q. —was to secure the scene and make sure everybody was safe?
>
> A. Yes.
>
> Q. You had also been told nobody had been searched for weapons; right?
>
> A. Correct.
>
> Q. So as a result, one of the first things you do with Mr. Downing after reading him his rights, is to make sure that he doesn't have any weapons on him; right?
>
> A. Correct.

(Tr., p. 36, Ls. 11-25.)

The safety concerns and other facts before Officer Holtry would plainly "warrant a man of reasonable caution in the belief" that frisking Downing for weapons "was appropriate." Downing's own trial counsel apparently agreed, seemingly abandoning his specific challenge to the propriety of the frisk (R., pp. 55-56) in light of what he called the "fairly detrimental" testimony of Holtry and Downing. (See Tr., p. 53, L. 25 – p. 54, L. 2.) Following a challenge only to the *detention* of Downing (Tr., p. 54, L. 6 – p. 57, L. 18), and the *consent* to the search (Tr., p. 57, L. 19 – p. 59, L. 10), Downing's counsel made the following concession in his closing argument:

> But that little tangent[[1]] aside, **everything that police Officer Holtry did on his version, on the police officer's version of events, seems to be according to the constitution.** Our argument was that the damage was already done.

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[1] The "little tangent" was Downing's testimony that the officer began his search of the pocket before asking permission. (Tr., p. 58, Ls. 13-19.)

(Tr., p. 58, Ls. 20-24 (emphasis added).) The State agrees with defense counsel's candid assessment of Officer Holtry's frisk. Based on the facts known to the officer the frisk was reasonable, and the district court correctly concluded the same.

E. Downing Has Failed To Show That The District Court Clearly Erred When It Found That Downing Consented To The Search Of His Pocket

A consented-to warrantless search does not violate the Fourth Amendment. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (citations omitted); State v. Hansen, 138 Idaho 791, 796, 69 P.3d 1052, 1057 (2003); State v. Varie, 135 Idaho 848, 852, 26 P.3d 31, 35 (2001). Consent is valid if it is free and voluntary. Bustamonte, 412 U.S. at 225-26. The voluntariness of an individual's consent is a question of fact to be determined based upon the totality of the circumstances. Varie, 135 Idaho at 852, 26 P.3d at 35 (citing Bustamonte, 412 U.S. at 248-49).

The court correctly concluded that Downing consented to the search of his pocket, from which the methamphetamine was retrieved. This factual finding was based on the officer's unmistakable testimony:

> Q. When you were searching Mr. Downing, did you find anything that warranted further attention?
>
> A. Just briefly, on his front pocket. I felt something in [his] right pants pocket.
>
> Q. What did you believe it to be when you felt it?
>
> A. I'm relatively familiar with. I had an idea. I don't know what it was, **but I just asked him, "What is this? What's in your pocket?" He said, "You can take it out." I asked him again, I said, "What is it?" And he said, "It's Meth." So I removed it and**

> **put it in my pocket. It was a little nylon bag with a silver key chain screw top.**

(Tr., p. 29, L. 18 – p. 30, L. 4 (emphasis added.) Later in his testimony the officer reiterated that the request for permission occurred *before* he reached into Downing's pocket:

> Q. And at that point, did you then begin to go into his pocket for that object?
>
> A. No.
>
> Q. **Your testimony is you asked for permission first?**
>
> A. **It was – what it says, he said, you can take it out, and I asked him again what it was.**
>
> Q. **After you took it out?**
>
> A. **No.**
>
> Q. **Both questions were before you took it out?**
>
> A. **Yes.**

(Tr., p. 38, L. 24 – p. 39, L. 9 (emphasis added).)

Based on this testimony the district court made a factual finding that Downing consented to the search: "Officer Holtry asked if he could remove the item from Mr. Downing's pocket. Mr. Downing agreed by saying you can take it out." (Tr., p. 62, Ls. 16-18.) Furthermore, the court noted that it was "after Mr. Downing has been Mirandized and after consenting to talk with the officers, Mr. Downing, says, yes; it's methamphetamine. It's in my pocket, and, yes; you can take it." (Tr., p. 71, Ls. 10-13.) In other words, the court found, "in this particular case, this was a consensual search." (Tr., p. 71, Ls. 17-18.)

Downing attacks this conclusion on appeal, arguing that the district court erred by finding that the consent preceded the search. (Appellant's brief, pp. 10-12.) He does so only by pointing to Downing's contrary testimony that Officer Holtry began pulling the object out before Downing assented to the search:

> Assuming *argueno* 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….

(Appellant's brief, p. 11.)

This argument fails to show clear error. Factual "[f]indings will not be deemed clearly erroneous if they are supported by substantial evidence in the record." State v. Lutton, No. 43257, 2017 WL 192846, at *4 (Ct. App. Jan. 18, 2017) (citing State v. Jaborra, 143 Idaho 94, 98, 137 P.3d 481, 485 (Ct. App 2006)). And the district court's finding—that the consent *preceded* the search—was based on substantial evidence in the record: Officer Holtry's repeated testimony the consent happened before the search. (Tr., p. 29, L. 18 – p. 30, L. 4; p. 38, L. 24 – p. 39, L. 9.) Downing testified to alternative facts below, but simply pointing out evidentiary contradictions on appeal falls far short of his burden: showing that substantial evidence supporting the court's findings did *not* exist. Because the district court's finding was clearly based on substantial evidence, it was clearly not an error. Downing has failed to show the district court erred by concluding that Downing consented to the search.

F. Alternatively, Regardless Of The Propriety Of The Frisk Or The Search, Because Downing Was Ultimately Arrested For Frequenting A Residence Where Drugs Were Present, The Methamphetamine In His Possession Would Have Inevitably Been Discovered And Therefore Should Not Be Excluded

In the alternative, even if this Court concludes that the frisk or search of Downing was illegal, excluding the evidence of the methamphetamine would be improper under the inevitable discovery doctrine. See State v. Buterbaugh, 138 Idaho 96, 101-102, 57 P.3d 807, 812-813 (Ct. App. 2002) (inevitable discovery doctrine is an exception to the exclusionary rule). Where the prosecution establishes by a preponderance of proof that the evidence at issue inevitably would have been found by lawful means, then exclusion of the evidence is improper even if it was actually obtained by constitutionally improper means. Nix v. Williams, 467 U.S. 431, 444 (1984); Stuart v. State, 136 Idaho 490, 497-98, 36 P.3d 1278, 1285-86 (2001). The underlying rationale of this rule is that suppression should leave the prosecution in the same position it would have been absent the police misconduct, not a worse one. Nix, 467 U.S. at 442-44; Buterbaugh, 138 Idaho at 102, 57 P.3d at 813.

Here, the methamphetamine would inevitably have been discovered. Regardless of the propriety of the frisk and the search, Downing was present in a house in which drugs were found, and admitted to Officer Holtry that he had used drugs in the house that day. (Tr., p. 31, Ls. 3-16.) The officer accordingly had probable cause to suspect Downing of frequenting a place where drugs were being used, and arrested Downing for the same. See Idaho Code § 37-2732(d); (Tr., p. 31, Ls. 19-23.) While the district court granted Downing's

motion insofar as it suppressed the earlier statements he made to probation officers, the court expressly noted that "the only statements that I will suppress are his admissions to the probation officers. I will not suppress the statements that were made to Officer Holtry." (Tr., p. 72, Ls. 3-6.) Downing has not specifically challenged the suppression of the latter statements on appeal. (See generally, Appellant's brief.) Consequently, regardless of whether the frisk or search of Downing was proper, Downing's methamphetamine would inevitably been discovered as a search incident to his arrest for frequenting. Because the methamphetamine would have been inevitably discovered, it should therefore not be excluded.

CONCLUSION

The state respectfully requests this Court affirm the order of the district court.

DATED this 6th day of June, 2017.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 6th day of June, 2017, served two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General