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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 Case No.**
v.	)	**CR01-19-12418**
	)	
ANDREW ROBERT DUNN,	)	
	)	
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

HONORABLE NANCY A. BASKIN
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Andrew Robert Dunn appeals from his convictions for felony possession of methamphetamine and misdemeanor battery, arguing that the district court erred by denying his motion to suppress.

Statement Of The Facts And Course Of The Proceedings

Officer Kettering, with the Boise Police Department, responded to a call of a battery on the side of a road. (10/1/19 Tr., p. 8, L. 3 – p. 10, L. 12.[1]) When he arrived, there were two vehicles, a truck parked behind a car, with damage to the front of the truck and the rear of the car. (10/1/19 Tr., p. 11, Ls. 4-23.) The vehicles were parked illegally, partially in a bike lane and partially in the lane of traffic, in a manner presenting a hazard. (10/1/19 Tr., p. 12, Ls. 2-22; p. 33, Ls. 3-8.) One of the drivers, Mr. Shaffer, stated that Dunn slapped him in a "road rage" incident. (10/1/19 Tr., p. 12, L. 23 – p. 13, L. 3; p. 14, L. 21 – p. 15, L. 6; p. 16, L. 21 – p. 17, L. 16; Ex. A, 3:15 – 4:45.[2]) Dunn admitted that he slapped Mr. Shaffer, and that he was driving with a suspended license. (10/1/19 Tr., p. 19, L. 23 – p. 20, L. 9; p. 21, L. 24 – p. 22, L. 1; Ex. A, 00:45 – 1:30, 10:45 – 12:20.) Officer Kettering confirmed the suspended license by running Dunn's information. (10/1/19 Tr., p. 27, Ls. 8-11.)

Mr. Shaffer stated that he wanted to sign a citation and "be a victim of battery" so that Dunn "could go to jail," and signed the citation (10/1/19 Tr., p. 17, L. 22 – p. 19,. L. 22; Ex. A,

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[1] The transcript of the hearing on Dunn's motion to suppress, held on October 1, 2019, is found on pages 17 – 34 of the document titled "Trans.-Dunn.pdf."

[2] Officer Kettering's body-cam video was introduced as Exhibit A in the hearing on the motion to suppress (Tr., p. 37, Ls. 4-20) and is in the record in an MP4 file titled "Kettering – BATTJ . . ."

8:00 – 8:25, 9:30 – 10:24) Officer Kettering placed Dunn in handcuffs and in the back of his patrol car, telling Dunn he was arrested for battery (10/1/19 Tr., p. 34, Ls. 16-24; Ex. A, 12:25 – 17:00), and later telling him that he was arrested for battery and driving without privileges (10/1/19 Tr., p. 35, Ls. 12-20; p. 39, Ls. 13-24; Ex. A, 29:38 – 29:51). Dunn asked Officer Kettering to have his vehicle towed and a tow truck was called. (10/1/19 Tr., p. 22, Ls. 12-17; Ex. A, 15:00 – 15:30.) With Dunn in the back of the patrol car, Officer Kettering began processing the citations for battery and driving without privileges. (10/1/19 Tr., p. 22, Ls. 18-24.) While still processing the citations and before the tow truck arrived, Dunn asked if he could have a friend pick up his car, and Officer Kettering responded that the tow truck had already been called, was on the way, and they could not wait around for his friend. (10/1/19 Tr., p. 44, Ls. 14-22; Ex. A, 31:32 – 32:10.) Very shortly thereafter and, again, while still processing the citations and before the tow truck arrived, a K9 unit called by another officer arrived and the dog alerted on Dunn's vehicle. (10/1/19 Tr., p. 28, L. 11 – p. 29, L. 5; p. 31, Ls. 6-22; p. 36, Ls. 6-12; Ex. A, 33:00 – 36:00 (Dunn reacting from the back seat of the patrol car to the arrival of the K9 unit and the dog's alert on the car).) A search of the car based on probable cause provided by the dog's alert recovered syringes filled with a brown substance in the glove box. (10/1/19 Tr., p. 47, Ls. 16-20; p. 56, Ls. 12-20; Ex. A, 38:50 – 43:11.) The tow truck is first visible on the body-cam very shortly thereafter. (Ex. A, 44:00.)

Dunn was charged with possession of methamphetamine, battery, and inattentive driving. (R., pp. 54-55.) He filed a motion to suppress methamphetamine, syringes, and paraphernalia found in his vehicle. (R., p. 63.) He argued that the evidence should be suppressed because he was arrested for a misdemeanor not committed in the officer's presence and the Idaho Supreme Court had recently held in State v. Clarke, 165 Idaho 393, 446 P.3d 451 (2019), that an arrest by

an officer for a misdemeanor committed outside the officer's presence violates Article I, Section 17 of the Idaho Constitution. (Aug., pp. 1-3.) For the first time during the hearing on the motion, when the state objected as to the relevance of a question during cross-examination, Dunn also suggested that the stop was unlawfully extended. (10/1/19 Tr., p. 40, L. 7 – p. 42, L. 2.) The state responded that Clarke was inapplicable because Dunn was subject to a citizen's arrest, not addressed by Clarke, and because the evidence Dunn was seeking to suppress would inevitably have been discovered even if Dunn had not been arrested. (Aug., pp. 6-9.) With respect to the duration of the stop, the state argued that Dunn had not properly raised that issue in briefing. (10/1/19 Tr., p. 57, Ls. 12-20.) The state additionally argued that "the search, the K9 alert and the subsequent search, has no relation or bearing and is simply not a fruit of the arrest in this case regardless of whether it was a proper arrest or not." (10/1/19 Tr., p. 63, Ls. 2-6.)

The district court denied the motion in a separate hearing on October 9, 2019.[3] After making factual findings (10/9/19 Tr., p. 7, L. 6 – p. 9, L. 19), the court concluded, first, that Officer Kettering acted diligently to investigate and complete citations before the narcotics dog alerted, and so the stop was not improperly extended (10/9/19 Tr., p. 9, L. 20 – p. 11, L. 6). Next, the court held that it did not need to determine whether Officer Kettering could lawfully arrest Dunn under Clarke because Dunn was properly detained while Officer Kettering was processing citations and investigating, and the vehicle was going to remain where it was until the tow truck arrived, whether or not Dunn could be arrested. (10/9/19 Tr., p. 11, L. 21 – p. 13, L. 5.) According to the court, it was not the "alleged unlawful arrest" that led to the discovery of the narcotics, but an independent dog sniff, which would have occurred exactly as it did if Dunn

[3] The transcript from that hearing is in a file titled "Reporters Supplemental Transcript Filed – 10-9-19.pdf."

had not been arrested because, even then, neither Dunn nor the vehicle would have left the scene before Officer Kettering completed citations and the tow truck arrived. (Tr., p. 11, L. 21 – p. 12, L. 9.) For similar reasons, the court held that the inevitably discovery doctrine applied. (10/9/19 Tr., p. 13, L. 6 – p. 16, L. 2.) The court therefore denied the motion. (10/9/19 Tr., p. 17, Ls. 1-6; R., p. 94.)

Dunn pled guilty to possession of methamphetamine and battery, while the inattentive driving charge was dismissed, and reserved his right to appeal the denial of his motion to suppress. (R., pp. 79, 102-03.) The district court sentenced him to 180 days in jail on the battery conviction, with credit for time served, and to five years with one year fixed, retaining jurisdiction, on the felony possession charge. (R., pp. 102-06.) Dunn timely appealed. (R., pp. 108-10.)

ISSUE

Dunn states the issue on appeal as:

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

(Appellant's brief, p. 7.)

The state rephrases the issue as:

Has Dunn failed to show that the district court erred by denying his motion to suppress?

ARGUMENT

Dunn Has Failed To Show The District Court Erred By Denying His Motion To Suppress

A. Introduction

Mindful of and without challenging the district court's conclusion that the evidence he sought to suppress was recovered independently of his allegedly unlawful arrest, and would inevitably have been discovered had he not been arrested, Dunn nevertheless asks this Court to conclude that the evidence should have been suppressed because the arrest was unlawful. (Appellant's brief, pp. 8-14.) The argument fails because Dunn has not challenged the district court's rationale for denying the motion, the district court was correct, and because the allegedly unlawful arrest was not unlawful.

B. Standard Of Review

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

C. This Court Should Affirm Because Dunn Has Not Shown—Or Even Argued—That The District Court Erred By Denying His Motion For The Reason It Did

"[E]vidence will not be excluded as fruit unless the illegality is at least the but for cause of the discovery of the evidence. Suppression is not justified unless the challenged evidence is in some sense the product of illegal governmental activity." Segura v. United States, 468 U.S. 796, 815 (1984) (internal quotations marks omitted). "Where a defendant has moved to suppress evidence allegedly gained through unconstitutional police conduct, the State bears the ultimate

burden of persuasion to prove that the challenged evidence is untainted, but the defendant bears an initial burden of showing a factual nexus between the illegality and the State's acquisition of the evidence." State v. Dahl, 162 Idaho 541, 546, 400 P.3d 629, 634 (Ct. App. 2017). "This requires a prima facie showing that the evidence sought to be suppressed would not have come to light but for the government's unconstitutional conduct." Id. The defendant must "show that, on the events that did take place, the discovery of the evidence was a product or result of the unlawful police conduct." Id. Further, the inevitable discovery doctrine makes suppression of evidence improper where, even if the evidence was actually obtained by constitutionally improper means, the prosecution establishes by a preponderance of proof that the evidence inevitably would have been found by lawful 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; State v. Buterbaugh, 138 Idaho 96, 102, 57 P.3d 807, 813 (Ct. App. 2002).

Below, Dunn argued that the evidence recovered from his vehicle should be suppressed both because his detention was unlawfully extended and because he was unlawfully arrested. The district court rejected the argument that Dunn's detention was unlawfully extended before a narcotics dog alerted on his vehicle. (10/9/19 Tr., p. 9, L. 20 – p. 11, L. 6.[4]) It then concluded that, whether or not Dunn was lawfully arrested, "the evidence was discovered unrelated" to any unlawful arrest, and would inevitably have been discovered had Dunn not been arrested, because

[4] Dunn does not address, and has therefore waived, this issue on appeal. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (issues not supported by authority and argument are waived on appeal).

it was recovered after a dog alerted on the vehicle while the officer was still processing citations and waiting for a tow truck, which would have occurred whether or not Dunn was arrested. (Tr., p. 13, L. 6 – p. 14, L. 25; p. 15, L. 20 – p. 16, L. 2.) Dunn has not challenged either of those conclusions on appeal, focusing instead entirely on the issue the district court determined it did not need to address—whether the arrest was lawful. (Appellant's brief, pp. 8-14.) Then, "[m]indful that the evidence Mr. Dunn seeks to suppress may have inevitably been discovered," Dunn merely asserts—without any argument or authority to support it—that "Officer Kettering obtained the evidence from Mr. Dunn's car by exploitation of the unconstitutional arrest." (Appellant's brief, pp. 13-14.) Dunn has not properly challenged the district court's rationale for denying his motion, and has certainly not shown that the court erred.

This Court "will not consider an issue not supported by argument and authority in the opening brief." Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) (quotation marks omitted). Dunn cites cases stating that the exclusionary rule applies only to evidence "'obtained directly from the illegal government activity and to evidence discovered through exploitation of the original illegality'" (Appellant's brief, p. 11 (quoting State v. Bishop, 146 Idaho 804, 811 (2009)), and cases stating that it does not apply to evidence that would inevitably have been discovered had the allegedly illegal conduct not occurred (Appellant's brief, pp. 11-12). But he cites no cases, no facts, and makes no argument to support the bare assertion that, notwithstanding that authority, the district court erred by concluding that the exclusionary rule does not apply here. (See generally Appellant's brief, pp. 8-14.) Citing cases supporting the district court, only to assert in a conclusory fashion that the district court erred, does not adequately raise the issue on appeal and this Court should affirm because the basis of the district court's denial of his motion is unchallenged. See State v. Goodwin, 131 Idaho 364, 366, 956

P.2d 1311, 1313 (Ct. App. 1998) (appellate court will affirm where one of the district court's grounds for taking the relevant action is unchallenged on appeal).

Even if properly raised on appeal, the district court was correct that, whether or not Dunn was unlawfully arrested, the evidence found in his vehicle should not have been suppressed. The district court correctly determined that the evidence recovered from Dunn's vehicle was "unrelated" to his arrest, and would inevitably have been discovered had the arrest not occurred. (Tr., p. 13, L. 6 – p. 14, L. 25; p. 15, L. 20 – p. 16, L. 2.) The court found, and Dunn does not dispute, that the search was justified by probable cause after a narcotics dog alerted. (10/9/19 Tr., p. 11, L. 21 – p. 12, L. 4.) State v. Anderson, 154 Idaho 703, 706, 302 P.3d 328, 331 (2012) ("A reliable drug dog's alert on the exterior of a vehicle is sufficient, in and of itself, to establish probable cause for a warrantless search of the interior."). The court found, and Dunn does not dispute, that Dunn would not have been permitted to drive away in his vehicle because he had a suspended license; that the vehicle was being towed pursuant to Dunn's own request and because it was a hazard where it was parked; and that Officer Kettering was still processing the citations for battery and driving without privileges, as well as waiting for the tow truck, when the narcotics dog alerted on the vehicle. (10/9/19 Tr., p. 7, L. 25 – p. 9, L. 11; p. 13, Ls. 15-17; p. 14, Ls. 10-25.) It follows, as the district court found, that the discovery of the evidence in his vehicle was unrelated to his arrest, as opposed to his detention while the officer processed citations and while his vehicle sat waiting for a tow truck he requested. The evidence was therefore not the product of his arrest. Likewise, it follows, as the district court found, that the evidence would inevitably

have been discovered had Dunn merely been detained until the citations were processed, as opposed to arrested, or even if he had been permitted to walk away but his car remained.[5]

Dunn has not properly raised the propriety of the district court's ruling on appeal and, even if had, cannot show error.

D. Dunn's Arrest Was Not Unlawful

Though the district court correctly determined that Dunn's motion to suppress should be denied whether or not his arrest was lawful, that state argued below that the arrest was lawful (Aug., pp. 6-7) and this Court can also affirm on that alternative basis, State v. Garcia-Rodriguez, 162 Idaho 271, 275-76, 396 P.3d 700, 704-05 (2017) (appellate court may affirm the correct result on an alternative theory raised to the lower court).

"'In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable [and lawful] under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed.'" State v. Lee, 162 Idaho 642, 649, 402 P.3d 1095, 1102 (2017) (brackets original) (quoting Devenpeck v. Alford, 543 U.S. 146, 152 (2004)). There is no question here that there was probable cause to believe Dunn had battered Mr. Shaffer—both of them stated as much and, of course, both were in an excellent position to know whether the former slapped the latter. (Ex. A, 00:45 – 1:30, 3:15 – 4:45, 10:45 – 12:20.) In Clarke, though, the Idaho Supreme Court held that, even with probable cause, Article I, Section 17 of the Idaho Constitution prohibits a police officer from making a warrantless arrest

[5] Dunn does not argue on appeal, and did not really argue below, that Officer Kettering was required to cancel the tow truck and permit a friend to come take the car, and has not argued that the result would be any different if Officer Kettering had been required to do so.

for a misdemeanor offense committed outside the officer's presence. Clarke, 165 Idaho at 399, 446 P.3d at 457.

But as the state argued below, Clarke does not imply that this arrest was unlawful. Dunn's arrest complied with Clarke's "in the presence" requirement because the battery for which he was arrested occurred in the presence of the other driver, Mr. Shaffer, who was battered, and it was Mr. Shaffer who made the arrest and signed the citation. That the physical arrest was accomplished by an officer did not transform this citizen's arrest into an unconstitutional arrest by an officer. Under Idaho law, a private citizen may arrest "[f]or a public offense committed or attempted in his presence." I.C. § 19-604. See also State v. Moore, 129 Idaho 776, 779-80, 932 P.2d 899, 902-03 (Ct. App. 1996) ("The term 'in his presence' is satisfied if the citizen detected the commission of the offense through the use of his senses."). The citizen "may orally summon as many persons as he deems necessary to aid him therein." I.C. § 19-606. When a citizen summons police to assist with a citizen's arrest the responding officers "must be regarded as an agent of the person making the arrest." State v. Sutherland, 130 Idaho 472, 474-75, 943 P.2d 62, 64-65 (Ct. App. 1997) (internal quotations omitted).

The facts of this case show the arrest was accomplished upon the specific authority of a citizen with the assistance of an officer who had been summoned by the citizen to assist and who was therefore the agent of the citizen. As the court found, Mr. Shaffer indicated that he wanted to bring charges, wanted Dunn arrested, and signed the citation. (10/9/19 Tr., p. 7, Ls. 6-14.) The body-cam video shows that Officer Kettering explained to Mr. Shaffer that he had to decide whether Dunn would be charged and whether Dunn would go to jail, and that he would need to sign a citation to do so because Officer Kettering was not present when the battery occurred. (Ex. A, 3:15 – 4:45, 8:00 – 8:25, 9:30 – 10:24.) Mr. Shaffer then affirmed that he wanted to be a

"victim of battery," that he wanted Dunn to go to jail, and signed the citation. Dunn was arrested by Mr. Shaffer, though it was Officer Kettering who assisted him and placed Dunn in handcuffs.

Because Dunn's arrest was by a citizen in whose presence the crime was committed—assisted by an officer acting as an agent of the citizen—it was a valid and constitutional arrest. The arrest was constitutionally reasonable under both the Fourth Amendment and Article I, Section 17 of the Idaho Constitution. There was therefore no illegality based on which to suppress the evidence recovered from Dunn's vehicle.

CONCLUSION

The state respectfully requests this Court to affirm the denial of Dunn's motion to suppress and to affirm his judgment of conviction.

DATED this 8th day of January, 2021.

/s/ Andrew V. Wake
ANDREW V. WAKE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 8th day of January, 2021, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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/s/ Andrew V. Wake
ANDREW V. WAKE
Deputy Attorney General

AVW/dd