5-1-2017

State v. Fairchild Respondent's Brief Dckt. 44617

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Appellant,	)	**NO. 44617**
	)	
v.	)	**CANYON CO. NO. CR 2016-12011**
	)	
TAYLOR JAMES FAIRCHILD,	)	**RESPONDENT'S BRIEF**
	)	
Defendant-Respondent.	)	
_____	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE GEORGE A. SOUTHWORTH
District Judge

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STATEMENT OF THE CASE

Nature of the Case

After receiving a call from a citizen stating that there might be a "transaction going down" behind his house, or that that it "could be nothing," the Sheriff's office dispatched Caldwell Police Officer Phillips to the area. When he arrived, Officer Phillips observed Mr. Fairchild's car driving down the street, pulled him over, and searched him. The district court granted Mr. Fairchild's motion to suppress the evidence against him because there was no reasonable suspicion to make the stop. Although the State argued that the attenuation doctrine applied because, after searching and arresting Mr. Fairchild for possession of methamphetamine, Officer Phillips was informed that there was a valid arrest warrant for Mr. Fairchild, the district court held that the attenuation doctrine did not apply. The State appeals from the district court's order granting the motion to suppress and argues that the district court erred because the stop was lawful. Alternatively, it argues that, even if the stop was unlawful, the district court erred when it held that the attenuation doctrine did not apply.

Statement of the Facts and Course of Proceedings

At 8:30 in the morning on July 8, 2016, Layne Stark called the sheriff's office. (R., p.79.) He said, "I was wondering if I could have somebody sent out. I'm a little concerned about a transaction or something going down behind my house." (State's Exhibit 2 at 0:00 – 0:10.)[1] When asked what was occurring, Mr. Stark said, "two cars just come up really fast and pull around and meet up and they get out and they're both

[1] State's Exhibit 2 is the audio recording of Mr. Stark's call to the sheriff's office. (*See* Tr., p.17, L.3 – p.19, L.2.)

just sitting in the truck together. It could be nothing but too often things happen back there and the way they pulled up so fast it looks like they're trying to [unintelligible]." (State's Exhibit 2 at 0:45 – 1:00.)

Mr. Stark gave dispatch the make, model, and license plate numbers for the vehicles and said they had been there about 10 minutes. (State's Exhibit 2 at 1:10 – 2:15.) He said the two men were sitting in was a Red Dodge Ram pickup, and the other vehicle was a dark-colored Hyundai. (R., p.79.) Mr. Stark also gave dispatch his phone number and address. (State's Exhibit 2 at 0:10 – 45.)

Officer Phillips responded. (R., p.79.) As he drove to the area, he ran the license plates of the vehicles and noted that the pickup was registered to someone that he "knew from previous experience to be a drug user." (R., p.79.) When Officer Phillips was near the scene, he said he saw both vehicles drive away. (R., p.79.) However, he could not see the identity of the person driving the truck before it left. (Tr., p.44, Ls.7-12.) He said the truck drove through an adjacent field towards Indiana Avenue, and the Hyundai drove down the street towards him. (R., p.79; Tr., p.24, Ls.8-16.) At that point, Officer Phillips stopped the Hyundai, which Mr. Fairchild was driving. (R., pp.79-80.) The district court noted that Officer Phillips's body camera video[2] showed that Mr. Fairchild was stopped in a "well-kept subdivision full of newer looking homes on one side, and a field of farmland on the other." (R., p.80.) The district court also observed that it was a sunny day. (R., p.80.)

After stopping Mr. Fairchild, Officer Phillips asked for his identification and contacted dispatch with Mr. Fairchild's information. (R., p.80.) Dispatch informed him

[2] The video was admitted as State's Exhibit 3. (Tr., p.32, L.12 – p.33, L.9.)

that the computer showed that Mr. Fairchild had a warrant, but it still had to be confirmed to make sure it was "still valid and not just in their database." (Tr., p.34, L.8 – p.35, L.2.) While he was waiting to hear whether the warrant was valid, Officer Phillips questioned Mr. Fairchild about what he was doing there. (R., p.80.) Mr. Fairchild said he did not have any contact with the driver of the Red pickup. (R., p.80.) Shortly thereafter, while still waiting to hear whether the warrant was valid, Officer Phillips told Mr. Fairchild to turn off his car. (R., p.80.)

Officer Phillips then ordered Mr. Fairchild to get out of his car, patted him down, and searched his pockets. (R., p.80; State's Exhibit 3 at 3:25 – 4:05.) At that point, he discovered a "small baggie of white powdered substance." (R., pp.80-81.) Officer Phillips then arrested Mr. Fairchild. (R., p.81.) After getting some gloves out of his patrol car, Officer Phillips returned to Mr. Fairchild and said, "Ok, so you do have a warrant . . . out of Pocatello . . . so you are under arrest for that." (R., p.81; State's Exhibit 3 at 5:15 – 6:15.)

After Officer Phillips's testimony, the State moved to reopen testimony so that Officer Phillips could clarify exactly when he received confirmation that the warrant was valid. (Tr., p.53, L.17 – p.54, L.11.) The district court said it would allow Officer Phillips to submit an affidavit with that information, and Mr. Fairchild's counsel agreed to that. (Tr., p.54, Ls.12-25.) Based on that affidavit, the district court found that "the warrant was not confirmed until after [Officer Phillips] conducted the initial search, found the [first baggie of] methamphetamine, and arrested Defendant." (R., p.81.) It wrote, "After returning from his trunk with the gloves, Officer Phillips asked Defendant what else he had 'in there' *before* telling him about the warrant. This sequence of events indicates

that the warrant was confirmed either after Officer Phillips had asked Defendant what else he had 'in there,' or while Officer Phillips was asking the question." (R., pp.81-82 (emphasis in original).)

After Officer Phillips told Mr. Fairchild he had a warrant, and he was actually under arrest for that reason, he continued searching Mr. Fairchild. (R., p.82.) At that point, he found a second baggie of methamphetamine. Mr. Fairchild was charged with one count of possession of a controlled substance. (R., pp.14-15.) He filed a motion to suppress, and a hearing was held on October 7, 2016. (R., p.78.) After the hearing, the parties submitted additional briefing. (R., pp.60-76.) Mr. Fairchild argued that the police did not have reasonable suspicion to stop the car he was driving, and the attenuation doctrine did not apply. (R., pp.66-76.) The district court granted the motion to suppress. (R., pp.78-94.) It held that the first baggie of methamphetamine would be suppressed as fruit of the poisonous tree because there was no reasonable suspicion to stop Mr. Fairchild.[3] (R., pp.85-86.) It also held that the second baggie of methamphetamine did not fall under the attenuation doctrine and would be suppressed. (R., pp.88-93.) The State timely appealed. (R., pp.98-100.)

[3] The district court also held that, even if the stop had been lawful, a *Terry* frisk of Mr. Fairchild was unlawful at that point. (R., pp.86-87.) It also held that, even if a *Terry* frisk had been justified, Officer Phillips exceeded the proper scope of a such a frisk when he searched Mr. Fairchild's pockets. (R., pp.87-88.) The State did not challenge these holdings on appeal.

ISSUES

1. Has the State failed to show that the district court erred in concluding there was no articulable, reasonable suspicion for the traffic stop?

2. Has the State failed to show that, even if the stop was unlawful, the district court erred when it held that the attenuation doctrine did not apply?

ARGUMENT

I.

The State Has Failed To Show That The District Court Erred In Concluding There Was No Articulable, Reasonable Suspicion For The Traffic Stop

A. Introduction

The district court correctly granted Mr. Fairchild's motion to suppress all evidence seized in this case because the initial stop was not supported by reasonable suspicion. The State's argument to the contrary mischaracterizes the facts. This leads to specious arguments, which rely on facts not found by the district court.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. This Court accepts the trial court's findings of fact if they are supported by substantial evidence, but freely reviews the application of constitutional principles to the facts. *State v. Page*, 140 Idaho 841, 843 (2004) (citing *State v. Holland*, 135 Idaho 159, 161 (2000)).

C. Officer Phillips Stopped Mr. Fairchild Without Reasonable Suspicion

The district court correctly held that Officer Phillips did not have reasonable suspicion to justify the stop in this case, and therefore the first baggie of methamphetamine was inadmissible. (R., pp.82-86.) The United States and Idaho Constitutions prohibit unreasonable searches and seizures. U.S. CONST. amend. IV; IDAHO CONST. art. I, § 17. Warrantless searches and seizures are presumptively unreasonable. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Halen v. State*, 136 Idaho 829, 833 (2002). To overcome that presumption, the State has the burden of

proving that the search or seizure falls within a well-recognized exception to the warrant requirement and was reasonable in light of the surrounding circumstances. *Schneckloth*, 412 U.S. at 219; *Schmerber v. California*, 384 U.S. 757, 767 (1966) (overruled on other grounds in *Missouri v. McNeely*, 133 S. Ct. 1552, 1555 (2013)); *Halen*, 136 Idaho at 833. If the government fails to meet its burden, the evidence acquired as a result of the illegal search or seizure, including later-discovered evidence derived from the original illegality, is inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963); *State v. Koivu*, 152 Idaho 511, 518–19 (2012).

"Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts. Reasonable suspicion requires more than a mere hunch or inchoate and unparticularized suspicion. The test for reasonable suspicion is based on the totality of the circumstances known to the officer at or before the time of the stop." *State v. Morgan*, 154 Idaho 109, 112 (2013) (internal citations and quotations omitted). Because warrantless seizures must generally be based on probable cause, *Florida v. Royer*, 460 U.S. 491, 499–500 (1983); *State v. Bishop*, 146 Idaho 804, 811 (2009), limited investigatory detentions such as traffic stops are impermissible unless "justified by an officer's reasonable articulable suspicion that a person has committed, or is about to commit, a crime." *Morgan*, 154 Idaho at 112.

In addressing the State's argument that the call from Mr. Stark provided reasonable suspicion to make the stop, the district court agreed that the call was reliable because Mr. Stark provided his name and address as well as several details. (R., p.84.) Depending on the "substance, source and reliability of the information provided," an informant's tip can sometimes amount to reasonable suspicion. *State v.*

Bishop, 146 Idaho 804, 811 (2009). However, the district court noted that, while reasonable suspicion can arise from a citizen's report of suspicious activity, "*both* content and reliability are required" to create reasonable suspicion. (R., p.84 (emphasis in original).) Addressing that content, it wrote, "In this case, the caller simply stated that two cars were parked alongside the road, and that two people had been sitting in one of the cars for ten minutes. The caller even stated it could be 'nothing'." (R., p.84.)

The district court also reviewed the facts known by Officer Phillips when he stopped Mr. Fairchild. (R., p.85.) It wrote,

> The facts known to Officer Phillips at the time he detained the Defendant were that on a bright, sunny morning, in a subdivision full of newer looking homes, a concerned resident reported that a car and a truck pulled up and parked on the street, and that the two men sat in one of the vehicles for about ten minutes. The caller speculated that the men could be engaging in an unspecified 'transaction,' but also speculated that it could be 'nothing.' The caller did not report seeing the men doing drugs or otherwise breaking the law. The only other information that Officer Phillips had upon arriving at the scene was that the Dodge pickup (not the vehicle driven by the Defendant) had been registered to an individual (also not the Defendant) who had been involved with drugs in the past.

(R., p.85.)

Based on these facts, the district court held that, "No matter how reliable the *source* of the tip was in this case, the content of the tip and the facts available to Officer Phillips upon his arrival at the scene were simply not enough to create reasonable, articulable suspicion that Defendant had committed or was about to commit a crime." (R., p.85 (emphasis in original).) The district court went on to state, "While it is true that Defendant may have spent ten minutes sitting in a truck that was registered to an individual who had used drugs in the past, it is unclear whether that was even the same individual driving the truck that day. The caller did not state that he saw either man

consume drugs, or that he saw money change hands." (R., p.85.) The district court also noted that there was no indication the neighborhood was a "high-crime or high-drug neighborhood." (R., p.85.) Therefore, it wrote, "At best, Defendant's presence in the truck could give rise to a hunch or a generalized sense of suspicion. In the absence of any articulable facts indicating crime was afoot, this Court has concluded that the initial stop was unlawful." (R., pp.85-86.)

The State relies on a different version of the facts to argue that the district court erred. First, it asserts that Mr. Stark actually witnessed a transaction and then relies on this mischaracterization throughout its argument. It states that Mr. Stark called to "report a suspicious 'transaction' occurring behind his house . . . ." (Resp. Br., p.1.) This is not accurate. Mr. Stark called to report that he was "a little concerned about a transaction *or something* going down behind my house." (State's Exhibit 2 at 0:00 – 0:10; R., p.79 (emphasis added).) Mr. Stark did not know it was a transaction because, as the district court found, he did not see a transaction occur.

Similarly, when describing the "totality of the circumstances," the State writes, "this was a place where [Mr. Stark] had seen suspicious transactions before." (Resp. Br., p.5.) This is also not accurate. Mr. Stark said, "It could be nothing but too often things happen back there . . . ." (State's Exhibit 2 at 0:45 – 1:00; R., p.79.) This statement certainly did not indicate that he had seen "suspicious transactions" there before. Indeed, the statement was so broad that it could have meant he had seen events ranging from car accidents to lovers' trysts behind his house. He also never used the word "suspicious." But the State goes on to argue that Mr. Stark witnessed one of the drivers get into the other vehicle "where the two men engaged in some sort of

transaction" and "the citizen believed the transaction was suspicious." (Resp. Br., p.5.) This is not true. The district court did not find, and the record does not indicate, that Mr. Stark ever witnessed a transaction of any sort or that he believed such an alleged transaction was suspicious. In fact, as the district court noted, Mr. Stark said that "it could be nothing." (R., p.79.) Indeed, the district court correctly found that Mr. Stark merely "*speculated* that the men *could be* engaging in an unspecified transaction." (R., p.85 (emphasis added).)

The State also argues that "when the officer approached, the two vehicles took off, one of them driving through a field." (Resp. Br., p.5.) This is also not part of the facts found by the district court. The State attempts to make this sound suspicious, but the reality is there is no indication that the vehicles "took off" *because* they saw Officer Phillips approach. He stated that, when he arrived in the neighborhood, he wanted to wait until a backup officer arrived, so he got into a position where he could see the vehicles and stopped. (Tr., p.23, L.1 – p.24, L.6.) When asked what he saw, he said he saw both vehicles start to drive away, so he then began driving again to intercept the Hyundai. (Tr., p.24, Ls.7-18, p.28, L.23 – p.29, L.23.) The State argues that these circumstances were enough to make it "reasonable to *suspect* that Fairchild's transaction in the truck may have involved drugs." (Resp. Br., p.5.) Again, as the district court found, there was no proof, let alone a material allegation, that a transaction ever occurred.

And the State implicitly acknowledges that its version of the facts is not supported by the actual facts. It writes, "In concluding that the citizen's[4] and officer's

[4] Whether the citizen's suspicions were reasonable is not the issue.

suspicions that Fairchild's *transaction* in the truck may have involved drugs were not reasonable, the court emphasized that . . . *neither the citizen nor the officer saw drugs or money change hands* . . . ." (Resp. Br., pp.5-6 (emphasis added).) Thus, no transaction was ever witnessed.

Nevertheless, the State argues that "the facts articulated by the district court are consistent with reasonable suspicion," suggesting that reasonable suspicion can exist even though there is a possibility that the conduct witnessed could be innocent in nature. (Resp. Br., pp.6-7.) However, the cases the State relies on are easily distinguishable from this one. Most notably, the State cites to *Terry v. Ohio,* 392 U.S. 1 (1968) and argues, "even assuming that drug transactions often happen at night or in high-crime areas, absence of these factors does not render the suspicion unreasonable." (Resp. Br., p.6.) The State then recounts the facts from *Terry* as well as the Court's later comments that the conduct of the suspects in *Terry* "was by itself lawful, but it also suggested that the individuals were casing the store for a planned robbery." (Resp. Br., p.6.)

The glaring problem with this argument is that the conduct witnessed here was not suspicious. In *Terry*, as the State recognizes, the men repeatedly took turns walking up to a store window, looking inside before they returned to a street corner to confer briefly. *Id.* at 6. The Court wrote, "The two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips." *Id.* The Court called this "unusual conduct." *Id.* at 30. By contrast, here, Mr. Stark saw two people meet and talk in a pickup truck for ten minutes. If indeed he had seen them do this repetitively, or he saw some shred of evidence indicating that crime was afoot, the district court's

analysis may have been different. But Mr. Stark did not see a drug transaction; he did not see a crime, and he did not see "unusual conduct" or anything overtly suspicious.

The State also cites to *Navarette v. California*, 134 S. Ct. 1683 (2014) where the Court quoted *United States v. Arvizu,* 534 U.S. 266, 277 (2002), and wrote that it had "consistently recognized that reasonable suspicion 'need not rule out the possibility of innocent conduct'." (Resp. Br. p.7.) The facts of *Arvizu*, however, are dramatically different than this case. *Arvizu* concerned a border patrol agent's stop of a vehicle in which marijuana was discovered. *Id.* at 267. In evaluating the totality of the circumstances, the Court held that the agent had reasonable suspicion to believe that Mr. Arvizu "was engaged in illegal activity." *Id.* at 277. It wrote,

> It was reasonable for Stoddard to infer from his observations, his registration check, and his experience as a border patrol agent that respondent had set out from Douglas along a little-traveled route used by smugglers to avoid the 191 checkpoint. Stoddard's knowledge further supported a commonsense inference that respondent intended to pass through the area at a time when officers would be leaving their backroads patrols to change shifts. The likelihood that respondent and his family were on a picnic outing was diminished by the fact that the minivan had turned away from the known recreational areas accessible to the east on Rucker Canyon Road. Corroborating this inference was the fact that recreational areas farther to the north would have been easier to reach by taking 191, as opposed to the 40–to–50–mile trip on unpaved and primitive roads. The children's elevated knees suggested the existence of concealed cargo in the passenger compartment. Finally, for the reasons we have given, Stoddard's assessment of respondent's reactions upon seeing him and the children's mechanical-like waving, which continued for a full four to five minutes, were entitled to some weight.

Id. The Court explained, "Undoubtedly, each of these factors alone is susceptible of innocent explanation, and some factors are more probative than others. Taken together, we believe they sufficed to form a particularized and objective basis for Stoddard's stopping the vehicle, making the stop reasonable within the meaning of the

Fourth Amendment." *Id.* at 277-78. In this case, the district court properly found that there was no similar plethora of facts that allowed Officer Phillips to make inferences that Mr. Fairchild was involved in illegal activity. Therefore, *Navarette* is also inapposite.

Finally, the State argues that the district court "failed to address several of the circumstances in the totality." (Resp. Br., p.7.) And yet again it asserts that "Fairchild conducted some sort of transaction that a nearby resident found suspicious, spending about ten minutes in a truck registered to a man with known drug affinity, in a place where other suspicious transactions had been observed and both men left in different directions when the officer approached . . . ." (Resp. Br., p.7.) The State asserts that a rational inference from "these facts" is that "the transaction Fairchild participated in involved controlled substances." There was no transaction witnessed. (Resp. Br., p.7.)

The district court did indeed address all the circumstances in their totality. It repudiated the claim that there was a transaction witnessed. It wrote that Mr. Stark "*speculated that the men could be engaging in an unspecified* '*transaction*' but also speculated that *it could be 'nothing'*." (R., p.85 (emphasis added).) The district court also recognized that Mr. Fairchild was in a truck that was registered to someone who had used drugs in the past. However, the district court delved deeper into this circumstance to find that it was not suspicious. It stated, "While it is true that Defendant may have spent ten minutes sitting in a truck that was registered to an individual who had used drugs in the past, *it is unclear whether that was even the same individual driving the truck that day*." (R., p.85 (emphasis added).)

The district court properly held that Officer Phillips did not have reasonable, articulable suspicion to stop Mr. Fairchild. It carefully considered the facts, applied the

appropriate law, and reached the correct decision that—because there was an absence of facts indicating a crime had occurred—the traffic stop was unlawful.

II.

The State Has Failed To Show That The District Court Erred When It Held That The Attenuation Doctrine Did Not Apply

A. Introduction

The State's argument oversimplifies this issue and does not actually track the district court's decision because it fails to address the district court's separate analysis of the two baggies discovered by Officer Phillips. Therefore, Mr. Fairchild asserts that the State has waived the issue of whether the district court erred when it held that the attenuation doctrine did not apply to the second baggie. If this Court considers the issue, Mr. Fairchild argues that the district court correctly held that the attenuation doctrine did not apply; the evidence seized was not sufficiently attenuated from Officer Phillips's illegal stop of Mr. Fairchild.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. This Court accepts the trial court's findings of fact if they are supported by substantial evidence, but freely reviews the application of constitutional principles to the facts. *State v. Page*, 140 Idaho 841, 843 (2004) (citing *State v. Holland*, 135 Idaho 159, 161 (2000)).

C. The State's Argument Fails To Prove That The District Court Erred When It Held That the Attenuation Doctrine Did Not Apply

1. The State Ignores The District Court's Distinction Between The Two Discoveries Of Contraband And How That Affected Its Analysis And Thus Waives The Issue Of Whether The Attenuation Doctrine Applied To The Second Baggie Of Methamphetamine

In its statement of facts, the State acknowledges that when Officer Phillips called dispatch with Mr. Fairchild's information, he was informed that the dispatch computer showed a warrant, but that the warrant had to be confirmed to make sure it was valid. (Resp. Br., p.2.) However, the State does not acknowledge that the warrant was not confirmed as valid until *after* Mr. Fairchild was arrested and searched. (R., p.81.) Therefore, it bases its entire argument on the initial indication that there was a warrant showing in the computer, arguing that the attenuation doctrine should apply before an officer knows whether a warrant is valid. (Resp. Br., pp.8-14.) The relevant precedent does not support such a holding.

The State ignores the fact that the district court held that the first baggie was fruit of the poisonous tree because it was the result of the unlawful stop, and the only evidence to which attenuation may have applied was the "second baggie" of methamphetamine. (R., pp.86-88.) The State makes no reference to the fact that two baggies were discovered at *different times* during the stop: one *before the warrant was confirmed as valid* and one after it was confirmed. (R., pp.80-82.) It argues that the only important fact was that a warrant, valid or not, initially showed up on dispatch's computer, and its argument focuses on the first baggie. (Resp. Br., pp.13-14.)

This analysis does not track the district court's decision. Indeed, the district court even stated, "The meat of the parties dispute lies with the second baggie of

methamphetamine." (R., p.88.) It then proceeded to analyze whether the attenuation doctrine applied to that evidence. (R., pp.88-93.) The State makes no argument regarding the second baggie. As such, Mr. Fairchild asserts that the State has waived the issue of whether the attenuation doctrine applied to that piece of evidence. A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking. *State v. Zichko*, 129 Idaho 259, 263 (1996).

2. The Attenuation Doctrine Clearly Did Not Apply To The First Baggie Because Officer Phillips Was Not Informed That The Warrant Was Valid Until After He Arrested And Searched Mr. Fairchild And Discovered The First Baggie

The Fourth Amendment protects the people's right to be free from unreasonable searches and seizures. U.S. CONST., amend. IV; *see also* ID. CONST., art. I, § 17; *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (the Fourth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment). Evidence that the State obtains in violation of the Fourth Amendment is generally excluded from a prosecution of the victim of the violation. *State v. Page*, 140 Idaho 841, 846 (2004); *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963). This rule applies to evidence obtained directly from the illegal government action and evidence discovered through the exploitation of the original illegality. *Page*, 140 Idaho at 846; *Wong Sun*, 371 U.S. at 484–85. Once a defendant makes a showing that the evidence to be suppressed was causally connected to the illegal state action, the burden shifts to the State to show that the unlawful conduct did not taint the evidence. *State v. Cardenas*, 143 Idaho 903, 908–09 (Ct. App. 2006).

"[T]he ultimate question is whether the police acquired the evidence from

'exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *State v. Bigham*, 141 Idaho 732, 734 (Ct. App. 2005) (quoting *United States v. Green*, 111 F.3d 515, 520 (7th Cir. 1997), and *Wong Sun*, 371 U.S. at 488). For example, the attenuation doctrine "permits use of evidence that would normally be suppressed as fruit of police misconduct if the causal chain between the misconduct and the discovery of the evidence has been sufficiently attenuated." *Bigham*, 141 Idaho at 734. The Idaho Supreme Court in *Page* stated that courts consider the following three factors to determine whether the attenuation doctrine applied: "(1) the elapsed time between the misconduct and the acquisition of the evidence, (2) the occurrence of intervening circumstances, and (3) the flagrancy and purpose of the improper law enforcement action." 140 Idaho at 846 (citing *Green*, 111 F.3d at 521 and *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)). Recently, the United States Supreme Court confirmed that this is the proper analysis. *See Utah v. Strieff*, 136 S. Ct. 2056, 2062-63 (2016).

In *Strieff*, a detective was investigating an anonymous tip regarding "narcotics activity" at a residence. *Id.* at 2059. He saw Mr. Strieff leave the house and walk towards a store and then detained him in the parking lot. *Id.* at 2060. After requesting Mr. Strieff's identification, the detective called dispatch and discovered that Mr. Strieff had a valid outstanding warrant. *Id.* The detective arrested Mr. Strieff and then found methamphetamine in the search incident to the arrest. *Id.*

Mr. Strieff filed a motion to suppress and argued that he was unlawfully detained. *Id.* The prosecutor conceded that the stop was not based on reasonable suspicion "but argued that the evidence should not be suppressed because the existence of a *valid*

arrest warrant attenuated the connection between the unlawful stop and the discovery of contraband." (*Id.* (emphasis added).) The trial court agreed and denied the motion to suppress. *Id.* Mr. Strieff entered a conditional guilty plea and reserved his right to appeal the trial court's decision on the motion to suppress. *Id.* The Utah Court of Appeals affirmed, but the Utah Supreme Court reversed. *Id*. It held that only a voluntary act, such as a confession, could attenuate the connection between the illegal stop and the discovery of contraband. *Id.* The United States Supreme Court granted certiorari "to resolve disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant." *Id.*

Regarding the attenuation doctrine, the Court wrote, "Evidence is admissible when the connection between the unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance. . . ." *Id.* at 2061. The Court held that the attenuation doctrine was not limited to situations in which there were "independent acts by the defendant." *Id.* It also noted that that the three factor test from *Brown v. Illinois* was the proper analysis. *Id.* at 2061-62. It found that the "temporal proximity between the initially unlawful stop and the search" favored suppression because the officer discovered the contraband "only minutes after the illegal stop." *Id.* at 2062. With respect to the second factor, the Court noted that the discovery of the existence of a valid warrant supported application of the attenuation doctrine. *Id.* And it found that the third factor favored the State because the officer was "at most negligent." *Id.* at 2063. Therefore, it held that the evidence was admissible because the officer's discovery of the valid arrest warrant "attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest." *Id*. at

2064.

The State asserts that this case is "indistinguishable" from *Strieff*. (Resp. Br., p.13.) But the State ignores one of the Court's most crucial considerations in *Strieff*. Regarding the second factor—the intervening circumstance—the Court wrote, "In this case, the warrant was valid." *Id.* at 2062. Here, as the district court noted, Officer Phillips did not learn that the warrant was valid until *after he had arrested and searched Mr. Fairchild*. (R., p.81.) The district court wrote, "At the time the warrant was confirmed in this case, Defendant had already been improperly arrested . . . ." (R., p.91.) And in discussing the intervening circumstance, it wrote, "In this case, the warrant was discovered *after* the Defendant had been unlawfully arrested . . . ." (R., p.92 (emphasis in original).) The State argues that this finding was clearly erroneous by claiming that, "[t]he evidence in the record, however, clearly shows that the officer handcuffed and searched Fairchild only after dispatch informed him of the arrest warrant." (Resp. Br., pp.13-14.) The district court's ruling, however, clearly relies on the confirmation of the warrant's validity.

As such, the district court properly considered the attenuation doctrine only as it applied to the second baggie, which was discovered after the warrant was confirmed. (R., pp.88-93.) Officer Phillips did not learn of a valid arrest warrant until after he had arrested and searched Mr. Fairchild. Therefore, not only was there "virtually no time between" Officer Phillips's unlawful stop and the search of Mr. Fairchild, but Officer Phillips had not been informed that there was a valid warrant when he searched Mr. Fairchild. (R., p.92.) The district court also found that the "flagrancy factor" favored Mr. Fairchild because of the "multiple procedural missteps that led to Defendant being

improperly arrested prior to confirmation of a valid warrant." (R., p.93.) Thus, the attenuation doctrine certainly does not apply to the first baggie of methamphetamine.

3. The District Court Correctly Held That The Attenuation Doctrine Did Not Apply To The Second Baggie

As argued above, Mr. Fairchild asserts that the State has waived this issue. However, if this Court considers this issue, Mr. Fairchild argues that the district court properly held that the attenuation doctrine did not apply, and thus the second baggie was properly suppressed also.

Regarding the first factor, the district court wrote, "Because the misconduct at issue was ongoing up to the moment when the warrant was confirmed, there was virtually no time between the misconduct and the acquisition of evidence." (R., p.92.) With respect to the second factor, it acknowledged that, "Idaho appellate courts have held that the discovery of a valid arrest warrant satisfies the second prong of the attenuation test." (R., p.92.) However, it explained that, "a critical fact distinguishes this case from other cases where Idaho courts of appeal have applied the attenuation doctrine. In this case, the warrant was discovered *after* the Defendant had been unlawfully arrested, and officers were already preparing to search Defendant's vehicle." (R., p.92 (emphasis in original).) It went on to write, "And, because Defendant had already been arrested, officers would have almost certainly performed a more thorough search of Defendant's person incident to that arrest." (R., p.92.) Therefore, it stated,

> It appears to this Court that confirmation of the warrant did not alter the likely course of the officers' conduct at all. Looking at the stream of events set forth in the record, it seems as though the officers would have almost certainly discovered the second baggie of methamphetamine with or without confirmation of the warrant from dispatch. Conversely, in the cases discussed above, the existence of a valid warrant created an

> attenuating circumstance that required officers to alter their course of conduct, thereby altering the causal chain.

(R., p.92.)

Finally, the district court held that the third factor also favored Mr. Fairchild because law enforcement "took the unlawful interaction much further than officers in other cases applying the attenuation exception, going so far as to unlawfully search Defendant's person, reach into his pockets, and ultimately effectuate an unlawful arrest of Defendant." (R., p.93.)

The district court's thorough analysis demonstrates that it applied the correct test, and it properly held that the attenuation doctrine did not apply in this case. Therefore, it did not err when it granted Mr. Fairchild's motion to suppress.

CONCLUSION

The district court properly suppressed the evidence seized as a result of the unlawful stop. Therefore, Mr. Fairchild respectfully requests that this Court affirm the order suppressing the evidence.

DATED this 1st day of May, 2017.

_____/s/_____
REED P. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of May, 2017, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

TAYLOR JAMES FAIRCHILD
C/O BINGHAM COUNTY SHERIFF'S OFFICE
501 N MAPLE
BLACKFOOT ID 83221

GEORGE A SOUTHWORTH
DISTRICT COURT JUDGE
E-MAILED BRIEF

RYAN DOWELL
CANYON COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

RPA/eas