

Uldaho Law

Digital Commons @ Uldaho Law

Idaho Supreme Court Records & Briefs, All

Idaho Supreme Court Records & Briefs

7-30-2018

State v. Hensley Respondent's Brief Dckt. 45470

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"State v. Hensley Respondent's Brief Dckt. 45470" (2018). *Idaho Supreme Court Records & Briefs, All*. 7245.

https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/7245

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs, All by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 45470
 Plaintiff-Respondent,)
) Bonneville County Case No.
 v.) CR-2016-7593
)
 SCOTT ROBERT HENSLEY,)
)
 Defendant-Appellant.)
)
)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE**

**HONORABLE BRUCE L. PICKETT
District Judge**

**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division**

**TED S. TOLLEFSON
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov**

**ATTORNEYS FOR
PLAINTIFF-RESPONDENT**

**JENNY C. SWINFORD
Deputy State Appellate Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712
E-mail: documents@sapd.state.id.us**

**ATTORNEY FOR
DEFENDANT-APPELLANT**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE.....	1
Nature of the Case.....	1
Statement of Facts and Course of Proceedings	1
ISSUE	3
ARGUMENT	4
The District Court Did Not Err When It Denied Hensley’s Motion To Suppress.....	4
A. Introduction.....	4
B. Standard Of Review	4
C. Hensley Has Failed To Show The District Court Erred When It Denied His Motion To Suppress.....	5
D. Even If The District Court Erred, The Affidavit Provided Probable Cause To Search And A Procedural Violation Of Idaho Criminal Rule 41(c) Does Not Require Suppression	11
CONCLUSION	12
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>State v. Bicknell</u> , 140 Idaho 201, 91 P.3d 1105 (2004)	11
<u>State v. Branigh</u> , 155 Idaho 404, 313 P.3d 732 (Ct. App. 2013)	11
<u>State v. Dallas</u> , 126 Idaho 273, 882 P.2d 440 (Ct. App. 1994).....	5
<u>State v. Hansen</u> , 151 Idaho 342, 256 P.3d 750 (2011).....	5
<u>State v. Larios</u> , 129 Idaho 631, 931 P.2d 625 (1997).....	5
<u>State v. Moore</u> , 129 Idaho 776, 932 P.2d 899 (Ct. App. 1996)	5
<u>State v. Purdum</u> , 147 Idaho 206, 207 P.3d 182 (2009)	4
<u>State v. Slater</u> , 133 Idaho 882, 994 P.2d 625 (Ct. App. 1999).....	passim
<u>State v. Smith</u> , 144 Idaho 482, 163 P.3d 1194 (2007)	5
<u>State v. Watts</u> , 142 Idaho 230, 127 P.3d 133 (2005)	4
<u>State v. Zielinski</u> , 119 Idaho 316, 805 P.2d 1240 (1991)	10
 <u>STATUTES</u>	
I.C. § 19-4403	10
I.C. § 19-4404	4, 7
 <u>RULES</u>	
I.C.R. 41(c).....	passim
I.C.R. 41(c) (2016).....	4, 6, 7

STATEMENT OF THE CASE

Nature of the Case

Scott Robert Hensley appeals from the judgment of the district court entered upon his guilty plea to possession of methamphetamine. On appeal, Hensley argues the district court erred when it denied his motion to suppress.

Statement of Facts and Course of Proceedings

Detective Fielding submitted a written affidavit to a magistrate judge in support of a request for a warrant to search Hensley's residence. (R., pp. 16-17,¹ 111-112.) The magistrate judge placed Detective Fielding under oath and Detective Fielding signed the affidavit in front of the magistrate. (R., pp. 111-112.) The magistrate issued the search warrant. (Id.)

Detective Fielding searched Hensley's residence and found 23.4 grams of a white crystal substance that later tested presumptive positive for the presence of methamphetamine. (R., pp. 16-17.) Detective Fielding also found a syringe and spoon. (Id.) The state charged Hensley with possession of methamphetamine and possession of paraphernalia, with a persistent violator enhancement. (R., pp. 60-62, 238-241.)

Hensley filed a motion to suppress, claiming the search warrant "failed to comply with the requirements of Idaho Criminal Rule 41 and was, therefore, invalid." (R., pp. 105-106.) The district court held a hearing on the motion to suppress. (R. pp. 109-110.)

¹ Because the testimony and stipulation focused on the legal question whether Idaho Criminal Rule 41(c) requires an audio recording for a search warrant when a written affidavit is submitted, there was necessarily limited contextual information provided during the suppression hearing. (See 12/28/16 Tr., generally.) Therefore, in order to put the case in context, the respondent will include citations to the Affidavit of Probable Cause for Warrantless Arrest. (See R., pp. 16-17.)

Hensley clarified that he was not contesting probable cause for the search warrant; he was just challenging the procedure by which the search warrant was issued. (12/28/16 Tr., p. 6, Ls. 4-21.) Specifically, Hensley argued that Idaho Criminal Rule 41(c) requires an audio recording of the interaction between the affiant and the magistrate. (Id.) The parties stipulated that Detective Fielding submitted a written affidavit to the magistrate, that the affidavit was signed in the presence of the magistrate, and that the magistrate signed the affidavit of probable cause. (12/28/16 Tr., p. 7, L. 19 – p. 8, L. 8, p. 15, Ls. 2-23.) The parties further stipulated that the signing of the affidavit and search warrant was not audio recorded. (See id.)

The district court denied the motion to suppress. (R., pp. 111-116.) The district court found that Idaho Criminal Rule 41(c) does not require an audio recording of the interaction between law enforcement and a magistrate if probable cause is submitted via written affidavit. (Id.) Finding “[t]he State properly followed the law and the Rule in this case and properly submitted evidence by written affidavit properly subscribed and sworn before a magistrate,” the district court denied Hensley’s motion to suppress. (R., p. 115.)

Hensley and the state entered into a written plea agreement. (R., pp. 263-266.) Hensley reserved the right to appeal the district court’s order denying his motion to suppress. (Id.) Hensley pled guilty to possession of methamphetamine and the state dismissed the remaining charges. (R., pp. 267-268.) The district court entered judgment and sentenced Hensley to seven years with one year fixed. (R., pp. 296-298.) The district court retained jurisdiction. (Id.) Hensley timely appealed. (R., pp. 303-306.)

ISSUE

Hensley states the issue on appeal as:

Did the district court err when it denied Mr. Hensley's motion to suppress?

(Appellant's brief, p. 4.)

The state rephrases the issue as:

Has Hensley failed to show the district court erred when it denied Hensley's motion to suppress?

ARGUMENT

The District Court Did Not Err When It Denied Hensley's Motion To Suppress

A. Introduction

The district court found that Idaho Criminal Rule 41(c) does not require an audio recording when probable cause for a search warrant is submitted via written affidavit. (See R., pp. 111-116.) On appeal Hensley argues that the plain language of Idaho Criminal Rule 41(c) requires an audio recording even when probable cause is established via written affidavit. (See Appellant's brief, pp. 5-13.) Further, he argues that this procedural violation amounts to a constitutional violation requiring suppression of the contraband found as a result of the search warrant. (See id.) Both of Hensley's arguments are without support in the law and in the record.

The plain language of Idaho Criminal Rule 41(c) does not impose an audio recording requirement when probable cause is established via written affidavit. See I.C.R. 41(c) (2016). Both Idaho Code § 19-4404 and Idaho case law support this interpretation of the rule. Further, suppression is not warranted because there was no constitutional violation as Detective Fielding's affidavit established probable cause for the search warrant. (See R., pp. 111-112; see also 12/28/16 Tr., p. 6, Ls. 15-21.) Hensley has failed to show the district court erred when it denied his motion to suppress.

B. Standard Of Review

In reviewing an order granting or denying a motion to suppress evidence, the appellate court applies a bifurcated standard of review. State v. Purdum, 147 Idaho 206, 207, 207 P.3d 182, 183 (2009) (citing State v. Watts, 142 Idaho 230, 232, 127 P.3d 133, 135 (2005)). The appellate court defers to the trial court's factual findings unless they are clearly erroneous;

however, the appellate court freely reviews the determination as to whether constitutional requirements have been satisfied in light of the facts found. State v. Hansen, 151 Idaho 342, 345, 256 P.3d 750, 753 (2011) (citing State v. Smith, 144 Idaho 482, 485, 163 P.3d 1194, 1197 (2007)).

Where the district court's decision turns upon the interpretation of an Idaho statute or rule, the appellate court exercises free review. State v. Slater, 133 Idaho 882, 888, 994 P.2d 625, 631 (Ct. App. 1999) (citing State v. Larios, 129 Idaho 631, 633, 931 P.2d 625, 627 (1997); State v. Moore, 129 Idaho 776, 783, 932 P.2d 899, 906 (Ct. App. 1996); State v. Dallas, 126 Idaho 273, 274, 882 P.2d 440, 441 (Ct. App. 1994)).

C. Hensley Has Failed To Show The District Court Erred When It Denied His Motion To Suppress

Detective Fielding submitted a sworn written affidavit to the magistrate and the magistrate issued a search warrant based upon that written affidavit. (R., pp. 111-112.) The written affidavit established probable cause. (See R., pp. 111-116; 12/28/16 Tr., p. 6, Ls. 15-21.) Hensley does not challenge the sufficiency of the probable cause, but instead argues that evidence found pursuant to the search warrant should be suppressed because Idaho Criminal Rule 41(c) required that the interaction between Detective Fielding and the magistrate be audio recorded. (See Appellant's brief, pp. 5-13.) Hensley's argument on appeal fails.

The version of Idaho Criminal Rule 41(c)² that was in effect at the time stated, in relevant part:

² Idaho Criminal Rule 41(c) was amended effective July 1, 2017. The current version of Idaho Criminal Rule 41(c) also only requires an audio recording when the warrant is based upon oral testimony. See I.C.R. 41(c).

(c) Issuance and Content. A warrant shall issue only on an affidavit or affidavits, which include written certifications or declarations under penalty of perjury, or by testimony under oath and recorded and establishing the grounds for issuing a warrant. If the district judge or magistrate is satisfied that there is probable cause to believe that the grounds for the application exist, the judge or magistrate shall issue a warrant identifying the property or person and naming or describing the person or place to be searched. The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis, considering the totality of the circumstances, to believe probable cause exists. Before ruling on a request for a warrant the district judge or magistrate may require the affiant to appear personally and may examine under oath the affiant and any witnesses affiant may produce, provided that such proceeding shall be taken down by recording equipment and shall be considered a part of the affidavit.

I.C.R. 41(c) (2016).

The district court determined that the language of this rule does not require an audio recording when the proof of probable cause is submitted by written affidavit. (See R., pp. 114-115.)

The Court finds that as a matter of law under the United States Constitution, the Idaho Constitution, the Idaho Code and Idaho Criminal Rule 41 that there does not need to be a recording of the interaction between law enforcement and a magistrate if there is probable cause submitted by a properly sworn written affidavit. In this case there was no evidence submitted that the oath was improper or that there was any irregularity as to the swearing in of the deputy. The rule requires a recording if there is oral testimony of facts that the court used in considering probable cause. If there is no oral testimony of facts that the court considered the law does not require there to be a recording of the interaction.

(R., pp. 114-115.)

On appeal Hensley argues the plain language of Idaho Criminal Rule 41(c) requires that the interaction be audio recorded even when the proof is submitted via written affidavit. (See Appellant's brief, pp. 7-8.) The plain language of Idaho Criminal Rule 41(c) does not support Hensley's interpretation. Rule 41(c) provides that "A warrant shall issue only on an affidavit or affidavits, which include written certifications or declarations under penalty of perjury, *or* by

testimony under oath and *recorded* and establishing the grounds for issuing a warrant.” I.C.R. 41(c) (2016) (emphasis added). This opening clause of Idaho Criminal Rule 41(c) differentiates between a written affidavit and live testimony under oath. See *id.* This clause only requires a recording if testimony is given under oath.

Further, the rule states, “[b]efore ruling on a request for a warrant” the judge “may require the affiant to appear personally and may examine under oath the affiant and any witnesses affiant may produce, provided that such proceeding shall be taken down by recording equipment and shall be considered a part of the affidavit.” See *id.* Thus if the judge requires additional information from the affiant or other witnesses, the judge can require them to give live testimony provided the testimony is recorded. See *id.* There is no requirement in Idaho Criminal Rule 41(c) that when the probable cause is established solely by written affidavit any interactions between the person seeking the warrant and the judge be recorded.

This interpretation is supported by Idaho law. Idaho Code § 19-4404 only requires a recording when there is an oral statement under oath:

In lieu of a written affidavit, the magistrate may take an oral statement under oath which shall be recorded and transcribed. The judge is authorized to administer an oath or affirmation by telephone, and to take testimony by telephone. All testimony given over the telephone that is intended to support an application for a search warrant must be given on oath or affirmation and must identify the person testifying. The affidavit or oral testimony as recorded must be filed with the clerk of the court.

I.C. § 19-4404.

Idaho case law is in accord. In State v. Slater, supra, Officer Gunderson applied for a search warrant by submitting a written affidavit to the magistrate. 133 Idaho at 885, 994 P.2d at 628. The magistrate requested that Officer Gunderson write an additional statement explaining why a nighttime warrant was necessary and attach that statement to his affidavit. Id. “[Officer]

Gunderson swore under oath before the magistrate that the signatures on the affidavit and attachment were his and the statements therein were true.” Id. The officers executed the search warrant and found marijuana, methamphetamine and paraphernalia. Id. On appeal, Slater argued that the search warrant was invalid, in part, because “no record was made of [Officer] Gunderson’s testimony in support of the search warrant as required by I.C.R. 41(c).” Id. at 888, 994 P.2d at 631. Officer Gunderson spoke with the magistrate on the phone and in person regarding the search warrant and he was sworn in before the magistrate. Id. The Idaho Court of Appeals held that the procedure utilized by Officer Gunderson, which did not include audio recording, complied with Idaho Criminal Rule 41(c). See id. at 889, 994 P.2d at 632.

Rule 41(c) states in pertinent part that: “[a] warrant shall issue only on an affidavit or affidavits sworn to before a district judge or magistrate or by testimony under oath and recorded and establishing the grounds for issuing a warrant.” The stipulated facts establish that [Officer] Gunderson was sworn in before the magistrate, he stated that all the facts in his affidavit were true and correct, and that the signature on the first page was his own. The affidavit was signed by Gunderson in three places and acknowledged by the magistrate. By the letter of Rule 41(c), the affidavit was sufficient. Idaho Code §§ 19-4401 – 4420 provides no further requirements.

Id. Here, the district court properly found Slater to be controlling. (See R., p. 115.)

Hensley’s attempt to distinguish Slater fails. (See Appellant’s brief, pp. 9-10.) Hensley argues that Slater is distinguishable because Hensley did not stipulate to “all facts concerning the execution of the affidavit and the search warrant application” and because “Mr. Hensley does not argue Detective Fielding’s written affidavit failed to comply with I.C.R. 41(c). Instead, he argues the failure to record the ex parte proceeding constitutes the I.C.R. 41(c) violation.” (Appellant’s brief, p. 10.) As an initial matter it does not appear that the stipulated facts in Slater are meaningfully different from the stipulated facts here. (See 12/28/16 Tr., p. 7, L. 19 – p. 8, L. 8, p. 15, Ls. 2-23.) In Slater the stipulated facts were:

The facts stipulated to by the parties establish that, under oath, [Officer] Gunderson swore that the signatures were his and that the information contained in the paperwork were true and accurate to the best of his knowledge.

Slater, 133 Idaho at 888, 994 P.2d at 631. Here, the stipulated facts were essentially the same:

[DEFENSE COUNSEL]: If I could just clarify, so I understand the stipulated facts that we'll present to the Court.

The stipulation would be that the affidavit – the written affidavit that the Court has was submitted to the magistrate; that Detective Kyle Fielding is the affiant; that the detective appeared in chambers with the magistrate; that the affidavit was executed in the presence of the magistrate; that the magistrate signed the affidavit of probable cause; and that there's no audio of the interaction between the detective and the magistrate in chambers.

THE COURT: That's what I have written down. Are those going to be the stipulated facts?

[PROSECUTOR]: Yes, Your Honor.

(12/28/16 Tr., p. 7, L. 19 – p. 8, L. 8.)

Even if the stipulations were somehow meaningfully different, Slater still controls. Contrary to Hensley's argument, Slater addressed whether a recording of the interaction between the affiant and the judge is necessary when there is a written affidavit. As cited above, when the Idaho Court of Appeals laid out the requirements of Idaho Criminal Rule 41(c) it did not require that the swearing in had to be recorded. See id. at 889, 994 P.2d at 632. While the parties in Slater had stipulated that Officer Gunderson had been sworn, the parties had not stipulated about any recording requirement. Whether there was a recording was an issue on appeal. Slater argued that "no record was made of [Officer] Gunderson's testimony in support of the search warrant as required by I.C.R. 41(c)." Id. at 888, 994 P.2d at 631. The Court of Appeals rejected Slater's argument and held that the rules and statutes "provide[] no further requirements." Id. at 889, 994 P.2d at 632. No recording was required. Slater controls the outcome of this case.

Hensley also relies upon State v. Zielinski, 119 Idaho 316, 319, 805 P.2d 1240, 1243 (1991). (See Appellant’s brief, pp. 8-9.) Hensley’s reliance is misplaced because Zielinski supports the district court’s determination that an audio recording is only required for an oral affidavit. In Zielinski an officer provided oral testimony to a magistrate in support of the search warrant. Zielinski, 119 Idaho at 317, 805 P.2d at 1241. The magistrate attempted to record the oral testimony but apparently failed to do so. Id. At the preliminary hearing Zielinski moved to dismiss the charges, arguing the evidence seized as a result of the search would be suppressed because there was a lack of a record to support the issuance of the search warrant. Id. The magistrate dismissed the case, but the district court reversed to allow the state the opportunity to reconstruct the testimony establishing probable cause which supported the search warrant. Id. On appeal, the Idaho Supreme Court examined Idaho Criminal Rule 41(c) and Idaho Code § 19-4403 and held, “[t]he statute and the rule, together, establish that there must be a record made of any *oral* affidavit that is presented in support of a search warrant.” Id. at 318, 805 P.2d at 1242 (emphasis added). The Idaho Supreme Court held that because the officer gave his oral testimony *ex parte*, and there was no record of that testimony, that there was no way for the defendant to contest the officer’s testimony. See id. at 318-319, 805 P.2d at 1242-1243.

Here, in contrast, Hensley was absolutely able to challenge whether the officer’s testimony established probable cause, because the testimony was memorialized in the written affidavit. There was no oral testimony submitted in support of the search warrant. Detective Fielding submitted a written affidavit in support of the search warrant. Zielinski stands for the proposition that the statute and rule require a recording of an *oral affidavit* because that is the only way a defendant can challenge the basis for the search warrant. Here, the district court

properly determined that Slater was “more similar” and properly denied Hensley’s motion to suppress.

D. Even If The District Court Erred, The Affidavit Provided Probable Cause To Search And A Procedural Violation Of Idaho Criminal Rule 41(c) Does Not Require Suppression

The district court did not err when it denied Hensley’s motion to suppress. Even if it did err, suppression is not required for a procedural violation of Idaho Criminal Rule 41(c). See State v. Bicknell, 140 Idaho 201, 204-05, 91 P.3d 1105, 1108-09 (2004). Hensley argues that Bicknell does not apply because the failure to record the interactions between Detective Fielding is a procedural error that “rises to the level of a constitutional violation and mandates suppression.” (Appellant’s brief, p. 12.) Hensley’s argument is without merit because the lack of a recording did not violate Hensley’s constitutional rights.

The Fourth Amendment to the United States Constitution states that no “warrants shall issue, but upon probable cause, supported by oath or affirmation.” Bicknell, 140 Idaho at 203, 91 P.3d at 1107. Suppression is available as a remedy only where a constitutional right was infringed. State v. Branigh, 155 Idaho 404, 415, 313 P.3d 732, 743 (Ct. App. 2013). A search warrant issued upon a justified finding of probable cause by a neutral, detached magistrate satisfies the constitution. See Id. Here, Hensley conceded below that the written affidavit established probable cause to issue the search warrant. (See 12/28/16 Tr., p. 6, Ls. 15-21; see also R., pp. 111-112.)

THE COURT: So you’re not, from what I understand, based upon this conversation and the conversation we held in chambers just for a second, you’re not contesting the probable cause for the search warrant, just the procedure in which the search warrant was handled; is that correct?

[DEFENSE COUNSEL]: That’s correct, Your Honor.

(12/28/16 Tr., p. 6, Ls. 15-21.)

Therefore, because the search warrant was supported by probable cause and issued by a magistrate, there is no constitutional violation, and suppression is not available as a remedy. Hensley has failed to show the district court erred when it denied his motion to suppress.

CONCLUSION

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

DATED this 30th day of July, 2018.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of July, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd