4-12-2018

State v. Clarke Appellant's Reply Brief Dckt. 45062

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 45062**
	)	
v.	)	**KOOTENAI COUNTY NO. CR 2016-14857**
	)	
PETER O'DONALD CLARKE,	)	
	)	**REPLY BRIEF**
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN T. MITCHELL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Mr. Clarke appeals from his judgment of conviction for three drug-related offenses. He raised two issues on appeal. First, he challenged the district court's denial of his motion to suppress because his warrantless arrest for a misdemeanor committed outside the police officer's presence (a "completed misdemeanor") violated the Idaho and United States Constitutions. Due to the constitutional violations, the district court should have suppressed all evidence obtained after his arrest. Second, Mr. Clarke argued the prosecutor committed misconduct in her closing argument by misrepresenting the evidence to the jury. This prosecutorial misconduct clearly violated Mr. Clarke's unwaived constitutional rights to due process and a fair trial and was not harmless. This Reply Brief responds to some, but not all, of the State's arguments. For those arguments not addressed here, Mr. Clarke respectfully refers this Court to his Appellant's Brief.

Statement of Facts and Course of Proceedings

The statement of the facts and course of proceedings were articulated in Mr. Clarke's Appellant's Brief. (App. Br., pp.1–6.) They are not repeated here, but are incorporated by reference.

ISSUES

I. Did the district court err by denying Mr. Clarke's motion to suppress evidence obtained following his warrantless arrest for an alleged misdemeanor committed outside the police officer's presence?

II. Did the State violate Mr. Clarke's constitutional right to a fair trial when the prosecutor committed misconduct by misstating the evidence in her closing argument?

ARGUMENT

I.

The District Court Erred By Denying Mr. Clarke's Motion To Suppress Evidence Obtained Following His Warrantless Arrest For An Alleged Misdemeanor Committed Outside The Police Officer's Presence

Mr. Clarke challenged the district court's denial of his motion to suppress on two separate legal grounds. First, he argued his warrantless arrest for a completed misdemeanor violated the protections of Article I, Section 17 of the Idaho Constitution. (App Br., pp.7–16.) Second, he contended his arrest was also in violation of the Fourth Amendment's prohibition against unreasonable seizures. (App. Br., pp.16–25.) Due to either the state or federal constitutional violation, Mr. Clarke asserted the district court erred by denying his motion to suppress the evidence found after his warrantless arrest. (*See generally* App. Br., pp.7–25.)

Examining the Idaho Constitution first, Mr. Clarke disputes the State's claim that the prohibition on warrantless arrests for completed misdemeanors is purely statutory. *Green* plainly holds otherwise. In *State v. Green*, 158 Idaho 884 (2015), this Court examined Article I, Section 17 to determine whether an arrest "that does not comply with an Idaho statute governing arrest,[1] is 'lawful' in the context of Article I, Section 17 of the Idaho Constitution." *Id.* at 887. This Court held that it was. *Id.* at 887–92. This Court reasoned a statutory violation of the traffic law did not amount to an Idaho constitutional violation. *Id.* In reaching this conclusion, the *Green* Court set forth the *constitutional* standards for an arrest in Idaho. *Id.* at 888. This Court stated:

> Because the constitutional guarantee against unreasonable seizure of the person includes an arrest, the Idaho Constitution incorporated the principles regarding arrest in the Idaho statutory and common law in 1890 when the constitution was adopted. At that time, the law governing warrantless arrests by peace officers in

[1] The statute at issue, I.C. § 49-1407, provided that the police officer could only give the defendant a citation for driving without a license, but the police officer arrested her instead. *Green*, 158 Idaho at 887.

> Idaho was found in Title III, Chapter V, Section 7540 of the Idaho Revised Statutes [(*hereinafter*, R.S. § 7540)], which provided:
>
> > A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:
> >
> > 1. For a public offense committed or attempted in his presence.
> >
> > 2. When a person arrested has committed a felony, although not in his presence. . . .

Id. The *Green* Court concluded, "Therefore, arrests made under the circumstances specified in this statute should be accepted as constitutionally reasonable under the Idaho Constitution." *Id.* It follows that arrests *not* made under these circumstances are *not* constitutionally reasonable. In fact, this Court reached this conclusion in *Green* as well. This Court held the subsequently enacted sections of R.S. § 7540 were not "made through the same rigorous standard as an amendment to the Idaho Constitution," and thus "cannot be considered part of the constitutional standard for what constitutes a reasonable seizure of the person." *Id.* at 888–89. Only the sections of R.S. § 7540 in effect at the time of the adoption of the Idaho Constitution establish the parameters for constitutionally reasonable arrests. By the same token, arrests that do not comply with R.S. § 7540 are constitutionally unreasonable. Therefore, contrary to the State's assertion, the Idaho Constitution incorporated R.S. § 7540 as the standard for reasonable and thus lawful arrests.

The incorporation of certain statutory protections into Article I, Section 17 of the Idaho Constitution was repeatedly emphasized in *Green* (but apparently overlooked by the State on appeal). (*See* Resp. Br., p.15.) In determining whether a statutory violation was subject to the exclusionary rule, the *Green* Court distinguished between pure statutory violations and statutory violations that were actually "violating rights guaranteed by the Idaho Constitution." 158 Idaho at 890. For example, the Court discussed a violation of statutory knock-and-announce rules,

which required suppression because "the officers' failure to knock and announce violated principles incorporated into the Constitution at the time it was adopted. It is this direct violation of principles inherent in the Constitution that resulted in the constitutional remedy of suppression." *Id.* Idaho's knock-and-announce rules were "deeply rooted in our heritage" and "codifying a tradition embedded in Anglo-American law." *Id.* at 889 (quoting *State v. Rauch*, 99 Idaho 586, 593–94 (1978)). "Therefore, whether phrased as a statutory violation or a constitutional violation, when the police . . . failed to knock and announce their presence, *they were violating more than simply a statutory requirement. They were violating rights guaranteed by the Idaho Constitution*." *Id.* at 890 (emphasis added). The Court even analogized the knock-and-announce rules to the very protections at issue here—"*Like the warrantless arrest standards in Idaho Code section 19-603(1)–(5),* the requirement that police knock and announce their presence *was incorporated into the Idaho Constitution at the time it was adopted*." *Id.* (emphasis added). As shown by this example, the *Green* Court could not have been more clear that the Idaho Constitution incorporated certain statutory protections, including I.C. § 19-603(1)–(5) (formerly codified at R.S. § 7540).

The *Green* Court went on to give another example of a statutory-turned-constitutional violation—an unsigned search warrant, which again required suppression. The Court reasoned, "[T]he principles found in the code sections requiring a warrant to be signed were part of Idaho law prior to the adoption of the Idaho Constitution" and thus "create a substantive right," which existed "prior to the adoption of this State's Constitution." 158 Idaho at 890 (quoting *State v. Mathews*, 129 Idaho 865, 869 (1997)). Again referencing the Idaho Constitution's incorporation of certain statutory protections, the Court explained:

> [T]his rule is limited to statutory principles incorporated into Article I, Section 17 because they were present at the time of the Constitution's adoption. It is, therefore, not the violation of the statute that offends the Constitution; the offense comes from violating principles incorporated into Article I, Section 17. The fact that those principles also continue to be codified in the Idaho Code and there is also a violation of that code does not mean the violation is not constitutional in nature. This limitation of the *Mathews* holding [requiring suppression of evidence from an unsigned warrant] to violations of principles in effect at the time the Constitution was adopted is consistent with the statutory violations discussed above, such as knock-and-announce statutes and *pre-existing arrest statutes.*

Green, 158 Idaho at 890–91 (emphasis added). Once again, this Court referenced the "pre-existing arrest statutes" as incorporated in the Idaho Constitution. This is yet another example of this Court identifying the substantive protections in R.S. § 7540 (now I.C. § 19-603(1)–(5)) as incorporated into Article 1, Section 17 of the Idaho Constitution.

Accordingly, Mr. Clarke has not "flipped" *Green* on its head, as argued by the State. (Resp. Br., p.15.) Mr. Clark is simply holding the State, and law enforcement, to its constitutional limitations. *Green* explicitly held the Idaho Constitution adopted certain statutory protections as constitutional ones. Violations of those constitutional protections require suppression. 158 Idaho at 892. In *Green*, there was "no historical counterpart" to the traffic law at issue "that was present at the time the Idaho Constitution was adopted." *Id.* "Therefore, it cannot be said that the principles in that section limiting certain warrantless misdemeanor arrests to specific circumstances[2] are constitutional in nature." *Id.* Here, there is a "historical counterpart" and "principles" that "are constitutional in nature." The prohibition on warrantless arrests for completed misdemeanors has "a historical, pre-constitution source of the currently codified principles"—R.S. § 7540, which has been in effect since 1887. *Green*, 158 Idaho at 892.

[2] Again, the statute restricted when an officer could arrest an individual for driving without a license. I.C. § 49-1407.

(App. Br., pp.11–12.) Accordingly, the remedy of "suppression" is "justified by a direct violation of principles inherent in the Idaho Constitution." *Green*, 158 Idaho at 892.

The State also seems to argue the legislature has the authority to alter the Idaho Constitution by enacting a statute. (Resp. Br., pp.15–16.) *Green* (not to mention basic separation of powers principles) explicitly rejected this proposition:

> To hold otherwise would essentially allow the Legislature to amend the Idaho Constitution by the process of a statutory enactment or amendment. Because these subsequently enacted arrest standards are merely statutory, constitutional remedies are inappropriate when those statutes have been violated by police. Although the Legislature could certainly specify suppression as the remedy for police violation of one of these statutes, because such a statutory violation is not a constitutional violation, suppression is not warranted absent such a legislative directive.

158 Idaho at 889. Thus, this Court unequivocally stated the legislature cannot work around the Idaho Constitution by amending the statutes incorporated at the Constitution's adoption. If the legislature wants to change the constitutional standards for a warrantless arrest, it must amend the Idaho Constitution.

Moreover, requiring a constitutional amendment to change the Idaho Constitution does not mean the legislature cannot change the statutory standards for a warrantless arrest. The legislature certainly has the power to amend statutes and did so with I.C. § 19-603. I.C. § 19-603 therefore is not "some sort of super-statute" "immune to legislative amendment." (Resp. Br., p.16.) The legislature can freely amend I.C. § 19-603 to grant law enforcement various statutory authority to conduct warrantless arrests. The legislature could even create a statutory remedy of suppression for the statutory violations. Yet, the legislature's amendments to I.C. § 19-603 cannot diminish the long-standing constitutional protections of Idaho citizens. *See State v. Mathews*, 129 Idaho 865, 869 (1997) (Article XXI, Section 2 affirms substantive rights existing prior to the Constitution's adoption). This division of statutory and constitutional protections is

entirely consistent with *Green*'s application of the exclusionary rule. If a police officer arrests an individual in violation of the statute only, the subsequently discovered evidence is not subject to suppression. 158 Idaho at 889–892. But, if the police officer arrests an individual in violation of the Idaho Constitution, the exclusionary rule applies. *Id.* at 892. The legislature cannot circumvent the constitutional protections of Idaho citizens and avoid the exclusionary rule by adding more and more statutory authorizations for law enforcement to conduct warrantless arrests.

Ultimately, there is "clear precedent" and "circumstances unique" to Idaho and its Constitution for "the Idaho Constitution's interpretation to deviate from the interpretation of the U.S. Constitution." *Id.* R.S. § 7540 has been in effect before, during, and after the adoption of the Idaho Constitution. *See* Revised Statutes of the Territory of Idaho, Pt. 4 (Penal), Pt. 2 (Of Criminal Procedure), Title III, Ch. V, § 7540 (1887); I.C. § 19-603. These statutory protections were incorporated by Article I, Section 17 of the Idaho Constitution when the Constitution was adopted. *See* Green, 158 Idaho at 887–92. Idaho's appellate courts have consistently recognized these statutory-turned-constitutional protections.[3] (*See* App. Br., pp.12–14.) Therefore, the warrantless arrest of Mr. Clark for a misdemeanor committed hours earlier and outside the police officer's presence violated Article I, Section 17 of the Idaho Constitution. The district court should have suppressed the evidence from Mr. Clarke's warrantless arrest. (*See* App. Br., pp.15–16.)

Turning to the U.S. Constitution, Mr. Clarke respectfully refers this Court to his Appellant's Brief, except to emphasize the U.S. Supreme Court has not decided whether

[3] To this end, Mr. Clarke submits the Washington Supreme Court's decision on its state constitution has little to no persuasive value on this Court's interpretation of its Constitution. (*See* Resp. Br., pp.11–12.)

warrantless arrests for completed misdemeanors are constitutionally reasonable. *Virginia v. Moore*, 553 U.S. 164 (2008)—which has no bearing on the protections given to Idaho citizens by the Idaho Constitution—identified an in-the-presence requirement for warrantless arrests more than once. (*See* Resp. Br., p.8.) First, the U.S. Supreme Court stated, "In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime *in his presence*, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable." *Moore*, 553 U.S. at 171 (emphasis added). Second, the U.S. Supreme Court stated that it "declined to limit" "the Fourth Amendment rule allowing arrest based on probable cause to believe a law has been broken *in the presence of the arresting officer*" to felonies and disturbing the peace only. *Id.* at 175 (emphasis added). Third, the U.S. Supreme Court stated, "We conclude that warrantless arrests for crimes committed *in the presence of an arresting officer* are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections." *Id.* at 176 (emphasis added). Finally, the U.S. Supreme Court stated, "When officers have probable cause to believe that a person has committed a crime *in their presence*, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety." *Id.* at 178 (emphasis added). Regardless of the decisions of other federal circuit courts or state courts, the U.S. Supreme Court has expressly declined to rule on whether the Fourth Amendment has an "in the presence" requirement for warrantless misdemeanor arrests. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 341 n.11 (2001). (App. Br., p.17 & n.10.) As argued in his Appellant's Brief, U.S. Supreme Court dicta, Framing-era history, and traditional standards of reasonableness support this Fourth Amendment protection. (App. Br., pp.16–25.)

For the reasons stated herein and in Mr. Clarke's Appellant's Brief, he submits the district court erred by denying his motion to suppress. He respectfully requests this Court reverse the district court's order denying his suppression motion.

II.

The Prosecutor Committed Misconduct And Thereby Violated Mr. Clarke's Right To A Fair Trial By Misstating The Evidence In Her Closing Argument

Mr. Clarke also challenged the prosecutor's misrepresentation of evidence in closing argument. (App. Br., pp.25–32.) The prosecutor misrepresented the evidence on the sole contested element in the case: Mr. Clarke's knowledge of a trace amount of methamphetamine inside a syringe in his shoe. Specifically, the prosecutor told the jury that, at the jail, Officer Hanson told Mr. Clarke that he "can't bring drug in here," at which point Mr. Clarke admitted to possessing drugs. (Tr., p.183, Ls.10–18.) The prosecutor also told the jury that Officer Hanson asked Mr. Clarke about "controlled substances," "drugs specifically," and "[t]hat is when Mr. Clarke decided to say there's something in there, I remember now, there's a syringe in my shoe." (Tr., p.189, L.14–p.190, L.18.) These statements by the prosecutor are misrepresentations of the evidence because Officer Hanson did not ask Mr. Clarke about drugs or controlled substances; he asked Mr. Clarke about "anything illegal." (Tr., p.138, Ls.7–15, p.138, L.23–p.139, L.3.)

The State contends the prosecutor did not misrepresent the evidence, but rather made "reasonable inferences" from the evidence. (Resp. Br., pp.24, 26.) Mr. Clarke disagrees with the State's characterization of the prosecutor's statements. The prosecutor certainly is permitted to make inferences from the evidence, but the prosecutor cannot misrepresent the evidence to make those inferences. If the prosecutor had accurately recited Officer Hanson's testimony, and then

told the jury to infer Mr. Clarke's knowledge from that testimony, there would be no error in this case. But that is not what the prosecutor did. The prosecutor misstated the evidence in the first place, and then told the jury to make inferences from her false representations. It is improper for the prosecutor to misrepresent or mischaracterize the evidence. *State v. Lankford*, 162 Idaho 477, 399 P.3d 804, 829 (2017).

As for the first, unobjected-to misstatement ("can't bring drugs in here"), the State argues this error is not clear from the record. (Resp. Br., pp.24–25.) The State references its argument from above—that the error is unclear because the prosecutor was providing a reasonable interpretation of the evidence. (Resp. Br., pp.24–25.) This is not the test for whether an error is obvious or plain from the record. The test is whether the error "plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision)." *State v. Perry*, 150 Idaho 209, 228 (2010). Mr. Clarke has met this burden. The error plainly exists because it is clear from the face of the record and no additional information is needed. It cannot be said that defense counsel's failure to object was a tactical decision when defense counsel objected to a similar misrepresentation later on in closing arguments. Mere "speculation" that defense counsel's failure to object was tactical or strategic is insufficient to defeat this prong of the *Perry* test. *See State v. Sutton*, 151 Idaho 161, 166–67 (Ct. App. 2011). Defense counsel gained no advantage by failing to object to the prosecutor's misstatement on the key, contested element at trial.

For both misstatements, the State relies on the stock jury instructions to prove these errors were harmless. (Resp. Br., pp.25, 26–27.) The district court instructed the jury that closing arguments are not evidence. (*See* R., pp.132, 144, 156.) These pattern instructions, however, are given in all cases. These instructions should not be relied on as a cure-all for prosecutorial

misconduct. Otherwise, these pattern instructions are a blanket invitation for prosecutors "to exert their skill and ingenuity to see how far they can trespass upon the verge of error" without fear of being held accountable for misconduct. *State v. Parker*, 157 Idaho 132, 144 (2014) (quoting *State v. Christiansen*, 144 Idaho 463, 469 (2007)). Moreover, these instructions do not remedy the specific error in this case. These instructions are intended to inform the jury (1) argument itself is not evidence and (2) to make its own inferences from the evidence. The error here is that the prosecutor misstated the evidence itself. These instructions do not necessarily cover this type of misconduct. And, although the jury is instructed to "follow your memory" "[i]f the facts as you remember them differ from the way the lawyers have stated them," (R., p.144), this does not cure the error if a juror did not remember or was unsure of Officer Hanson's testimony and, as such, relied on the prosecutor's misrepresentation. Further, even if a juror accurately remembered Officer Hanson's testimony, that juror could easily question his memory and set aside his belief when informed otherwise by the prosecutor:

> Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused.

State v. Irwin, 9 Idaho 35, 71 P. 608, 611 (1903). These stock jury instructions do not show the error was harmless.

Also for both misstatements, the State argues the errors were harmless because only one syringe had the trace amount of methamphetamine (the one in Mr. Clarke's shoe) and Mr. Clarke's defense was not "based upon a distinction between 'anything illegal' and 'drugs.'" (Resp. Br., pp.25, 26–27.) To the contrary, Mr. Clarke's defense was based upon this distinction. His counsel argued in closing:

> I think if you go back there and look at the pictures that the State has presented to you, the pictures showing what that needle actually looked like on August 1, if you look at that picture, it looks like an old used empty needle, and if Mr. Clarke looked at that needle and thought, there's nothing in there, it's an old empty needle, well, *then he's guilty of the paraphernalia, but he's not guilty of knowingly possessing methamphetamine*.

(Tr., p.186, Ls.9–17 (emphasis added).) Later on, counsel argued: "This wasn't a baggie of methamphetamine. *This was a piece of paraphernalia.* Now, I think you all know, okay, paraphernalia is used to ingest drugs, but after that's done, don't you think that it just goes back to being paraphernalia again?" (Tr., p.186, Ls.21–25 (emphasis added).) Hence, Mr. Clarke's defense was that he knew about something "illegal" in his shoe—drug paraphernalia in the form of the syringe. But he disputed his knowledge of the trace amount of methamphetamine inside. The prosecutor's misrepresentation that there was direct evidence on Mr. Clarke's knowledge of "controlled substances" and "drugs specifically" in the syringe was not harmless.

Lastly, Mr. Clarke seeks to clarify the State's argument as to a third statement by the prosecutor: "That is when Mr. Clarke decided to say there's something in there, I remember now, there's a syringe in my shoe." (*See* Resp. Br., pp.27–29.) Mr. Clarke does not assert fundamental error for prosecutorial misconduct in stating Mr. Clarke admitted to a syringe in his shoe.[4] But, Mr. Clarke maintains the second, objected-to misstatement ("asks about controlled substances, asks him about drugs specifically") is error. The prosecutor misrepresented to the jury that Officer Hanson asked Mr. Clarke about controlled substance and drugs and this specific question prompted Mr. Clarke to respond and admit his possession. The error is not Mr. Clarke's response to Officer Hanson's question, but the prosecutor's misrepresentation of the question itself.

[4] This clarification does not waive Mr. Clarke's argument as to the errors addressed on appeal.

In sum, the prosecutor violated Mr. Clarke's constitutional rights to due process and a fair trial by misrepresenting the evidence on the only contested element in order to tip the scales in favor of the State. For the first, unobjected-to misstatement ("can't bring drugs in here"), Mr. Clarke has met his burden to show fundamental error. (*See* App. Br., pp.26–32.) For the second, preserved misstatement ("asks about controlled substances, asks him about drugs specifically"), Mr. Clarke has shown prosecutorial misconduct, and the State had not met its burden to prove, beyond a reasonable doubt, the error was harmless. (*See* App. Br., pp.26–30, 31–32.)

CONCLUSION

On the motion to suppress issue, Mr. Clarke respectfully requests this Court reverse or vacate the district court's order denying his motion to suppress, vacate the judgment of conviction, and remand this case for further proceedings. Alternatively, on the prosecutorial misconduct issue, Mr. Clarke respectfully requests this Court vacate the judgment of conviction and remand this case for a new trial.

DATED this 12th day of April, 2018.

_____/s/_____
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of April, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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_____/s/_____
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