2-21-2018

State v. Garnett Appellant's Brief Dckt. 45282

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45282**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY NO. CR 2016-21824**
v.	)	
	)	
MARK TRAVIS GARNETT,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

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

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Probation officers searched the residence of a probationer they suspected had relapsed on heroin and absconded. Mark Garnett was in the residence at the time of the search, having stayed the prior night as a guest of the probationer's boyfriend. An officer found Mr. Garnett's closed and locked backpack in a storage area, bypassed the lock by severing an attached elastic strap, opened the backpack, and discovered a handgun. Mr. Garnett was subsequently charged with being a felon in possession of a firearm and he filed a motion to suppress. The district court denied Mr. Garnett's motion, finding the probation officer had a reasonable suspicion the backpack belonged to the probationer, and that the search was therefore authorized by the probationer's Fourth Amendment waiver, or alternatively upon a reasonable suspicion that the probationer violated the terms of her probation. Mr. Garnett asserts the district court erred in denying his motion to suppress.

Statement of the Facts and Course of Proceedings

The State charged Mark Garnett by information with unlawful possession of a firearm and with grand theft of a firearm,[1] based upon a stolen gun being discovered in his closed and locked backpack. (R., pp.11-23, 29-33.) Mr. Garnett filed a motion to suppress and a brief in support, arguing in relevant part that he had a reasonable expectation of privacy in his closed and locked backpack and that the warrantless search violated his Fourth Amendment right to be free

[1] The district court granted the State's request to amend the grand theft of a firearm charge to grand theft by possession of a stolen firearm. (R., pp.132-134, 147-155, 165-169.) The State dismissed that charge after the jury could not reach a verdict on it, in exchange for Mr. Garnett seeking no lower than a 3-year fixed term for the felon in possession of a firearm charge for which he was convicted. (R, pp.215, 263; Tr. 6/22/17, p.59, Ls.9-16.) Mr. Garnett does not raise any issues related to the grand theft charge in this appeal.

from unreasonable searches. (R., pp.37-45.) The State filed a response asserting the backpack search was justified because it was found in Tamara Brunko's residence, Ms. Brunko was on probation at the time and had agreed to submit to searches of her residence and belongings, and Ms. Brunko's probation officer had a reasonable suspicion that she had violated the terms of her probation. (R., pp.46-59.)

During a hearing on Mr. Garnett's motion to suppress, Andrew Soy testified that probation officers searched the trailer he shared with his girlfriend, Ms. Brunko, who he knew to be on probation, without a warrant and without his permission, in November of 2016. (Tr. 3/21/17, p.6, L.6 – p.7, L.18; p.8, L.1 – p.9, L.17.)[2] Mr. Soy and Mr. Garnett both testified that Mr. Garnett had stayed over the previous night and was in the residence at the time of the warrantless search.[3] (Tr. 3/21/17, p.7, Ls.19-25; p.13, L.2 – p.14, L.6.) Mr. Garnett testified that he had suitcase and a backpack in the residence, that the backpack was closed and secured with a padlock attached to cords which were in turn attached to the zippers, and that he placed the backpack in the storage area of the trailer. (Tr. 3/21/17, p.14, L.7 – p.15, L.1; p.16, L.14 – p.17,

[2] In its written order denying Mr. Garnett's motion to suppress, the district court referred to the suppression hearing as having occurred on March 22, 2017. (R., pp.98-116). However, both the Court Minutes and the transcript of the hearing indicate that the suppression hearing occurred on March 21, 2017. (R., pp.74-79; Tr. 3/21/17, p.3, L.13.) Noting this discrepancy and for the sake of consistency, Mr. Garnett will cite the transcripts of the suppression hearing as "Tr. 3/21/17" in this Brief.

[3] The parties litigated whether Mr. Garnett had standing to challenge the search of the residence based upon his status as an overnight guest. (R., pp.37-59.) The district court ultimately determined that Mr. Garnett was an overnight guest and therefore had standing to challenge the search of the residence. (R., pp.104-105.) As Mr. Garnett's standing to challenge the search of his closed and locked backpack found inside the residence, is not dependent upon whether this Court determines he has standing to challenge to search of the residence, he will not address the district court's finding in this regard in this Brief. *See State v. Westlake*, 158 Idaho 817, 823 (Ct. App. 2015).

L.4.) Mr. Garnett further testified that he did not give officers permission to search his backpack. (Tr. 3/21/17, p.15, Ls.18-20.)[4]

Probation officer Jason Haines was assigned to supervise Ms. Brunko and he suspected she had relapsed on heroin after she failed to complete a treatment program and provided an altered urine sample. (Tr. 3/21/17, p.21, L.2 – p.24, L.25; p.26, L.24 – p.28, L.3.) Officer Haines, along with three other probation officers and two Post Falls police officers, went to Ms. Brunko and Mr. Soy's residence, a single-wide trailer, after one of Ms. Brunko's children had been absent from school for several days. (Tr. 3/21/17, p.7, L.4 – p.8, L.5; p.28, L.4 – p.30, L.9; p.34, Ls.22-25.) Officer Haines knocked on the door, Mr. Soy answered, and after verifying with Mr. Soy that Ms. Brunko still lived at the residence, the officers entered the trailer without asking permission.[5] (Tr. 3/21/17, p.31, L.7 – p.32, L.18.) Mr. Garnett was laying down on a chaise lounge when the officers entered. (Tr. 3/21/17, p.32, Ls.5-11.) After "clearing" the residence, and although nothing appeared amiss, officers searched for drug-related items and evidence of Ms. Brunko's whereabouts, without asking permission. (Tr. 3/21/17, p.32, L.5 – p.37, L.4.)

[4] During the prosecutor's cross-examination, both Mr. Soy and Mr. Garnett testified that they did not verbally object when the officers conducted a search of the residence, and Mr. Garnett testified that he did not verbally object to Officer Haines searching his backpack. (Tr. 3/21/17, p.11, L.9 – p.12, L.7; p.17, L.17 – p.19, L.14.) Their failure to object, however, is not relevant as mere acquiescence to an assertion of lawful authority does not meet the constitutional definition of voluntary consent. *See Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

[5] During the suppression hearing, Mr. Soy testified that Officer Haines ordered him to take two steps back prior to entering the trailer, and told him to sit down. (Tr. 3/21/17, p.8, Ls.6-14.) Officer Haines and Officer Travis Johnson both testified that Mr. Soy voluntarily backed up and allowed them to enter without being ordered to. (Tr. 3/21/17, p.31, L.12 – p.32, L.18; p.49, Ls.2-13.) The district court found the officers' testimony to be credible and determined that Mr. Soy voluntarily let the officers in the residence. (R., pp.99-100.) Mr. Garnett does not challenge the district court's finding in this regard.

In a storage room that appeared to be shared by multiple people, Officer Haines found a backpack and removed it. (Tr. 3/21/17, p.37, L.16 – p.39, L.20.) The backpack was closed and had a lock attached to two cords, which were in turn were attached to the zippers. (Tr. 3/21/17, p.40, Ls.5-15.) Not seeing any identifying tags or markings on the backpack, and without asking either Mr. Soy or Mr. Garnett to whom the backpack belonged,[6] Officer Haines searched the backpack believing he had authority to do so because he "felt that it was very likely that it could" belong to Ms. Brunko. (Tr. 3/21/17, p.39, L.21 – p.40, L.23; p.46, Ls.13-15.) Officer Haines pulled one of the cords, snapping it off of the zipper, unzipped the backpack, looked inside and found a handgun, ammunition, and a piece of mail addressed to Mr. Garnett. (Tr. 3/21/17, p.41, L.14 – p.43, L.15.)

On cross-examination, when asked, "[w]hat made you think that that backpack was Tamara Brunko's?" Officer Haines responded, "It's in her residence. It's quite possible that it could be her backpack. I didn't know for sure, but it was quite possible it was hers. It's not uncommon for women to have camouflage backpacks and clothing in northern Idaho. It's always a possibility." (Tr. 3/21/17, p.45, L.23 – p.46, L.4.) Officer Haines agreed with defense counsel's suggestions that the fact the backpack was in the residence was the only reason he thought it may have belonged to Ms. Brunko, and that he held "only the belief that it was possible it was hers" before he opened it. (Tr. 3/21/17, p.46, Ls.5-12.)

The State also submitted a copy of Ms. Brunko's 2001 judgment placing her on probation, and a 2014 supervision agreement between Ms. Brunko and the Idaho Department of

[6] Mr. Garnett testified that the backpack either had his name or his initials on it (Tr. 3/21/17, p.17, L.23 – p.19, L.24), while Officer Haines testified that he did not see any identifying information on the backpack (Tr. 3/21/17, p.39, Ls.21-24). The district court found Officer Haines to be more credible on this issue (R., pp.100-101), and Mr. Garnett does not challenge the district court's finding that the backpack did not have any identifying information on its exterior.

Correction. (Tr. 3/21/17, p.26, Ls.9-23; p.47, Ls.3-15; Exs., pp.7-14.) At the conclusion of the hearing, the district court allowed the parties to provide additional briefing. (Tr. 3/21/17, p.53. L.7 – p.54, L.4.)

Mr. Garnett filed an addendum to his brief in support of his motion to suppress in which he argued that he had reasonable expectation of privacy in the contents of his closed and locked backpack; that the waiver provision in Ms. Brunko's 2011 judgment did not provide the officers authority to search because the probation officers did not request her consent prior to searching; and, because the State lacked a search warrant or consent from either Mr. Garnett or Mr. Soy, the search violated his Fourth Amendment rights. (R., pp.82-89.) The State responded by conceding that language in the Fourth Amendment waiver provision in the 2011 judgment placing Ms. Brunko on probation was not sufficient to justify the search,[7] but argued that the search was nevertheless reasonable because Officer Haines had a reasonable suspicion that Ms. Brunko had violated the terms of her probation; that Mr. Soy consented to the search by

[7] The State presented two separate documents purporting to contain Ms. Brunko's Fourth Amendment waiver as a condition of her probation. (Exs., pp.7-14.) Mr. Garnett argued to the district court that the "at the request of" language in the 2011 judgment required probation officers to first seek consent from Ms. Brunko prior to searching her premises, and the State acknowledged this argument was meritorious. (R., pp.87-88, 91-92). Mr. Garnett's argument is supported by this Court's recent decision in *State v. Jaskowski*, 2018 Opinion No. 44772 (Jan. 18, 2018) (opinion not yet final). However, the 2014 supervision agreement submitted by the State and presumably considered by the district court contains a different waiver clause which states, "The defendant waives his/her Fourth Amendment Rights concerning searches." (Exs., p.13.) Because Mr. Garnett did not challenge whether the 2014 supervision agreement was operative at the time of the search, and in light of this Court's holding in *State v. Gawron*, 112 Idaho 841 (1987), Mr. Garnett does not challenge the authority of the officers to search the premises based upon Ms. Brunko's purported Fourth Amendment waiver. In reality, it is likely that neither of those documents were operative. Ms. Brunko violated the terms of her probation in 2016 and an Amended Judgment on Probation Violation was entered on June 14, 2016, likely containing a new probation supervision agreement and rendering the documents provided to the district court in this case null. *See* Register of Actions for *State v. Brunko* (Kootenai County district court case number CR-2011-10494) (available via Idaho Supreme Court Data Repository).

inviting the probation officers in when he stepped back from the door after verifying that Ms. Brunko still resided at the trailer; and, that Officer Haines had an objectively reasonable suspicion that the backpack belonged to Ms. Brunko. (R., pp.90-97.)

The district court entered a written order denying Mr. Garnett's motion to suppress. (R., pp.98-116.) Noting that the State did not assert otherwise, the court found that Mr. Garnett has standing to challenge the search of his backpack as he had a legitimate expectation of privacy in the contents of its interior. (R., pp.105-106.) However, the court held that the search of Mr. Garnett's backpack was reasonable because Officer Haines held an objectively "reasonable suspicion the Ms. Brunko owned, possessed, or controlled the backpack," such that her probationary agreement to waive her Fourth Amendment rights authorized the search. (R., pp.109-111.) The court held that "there was no obligation on the probation officers and/or law enforcement to ask [Mr.] Garnett for permission to search anything found within the single-wide trailer." (R., p.112.) Instead, the court found that Mr. Garnett "had the duty to inform the officers … where they would find his backpack and that they did not have his permission to search his backpack." (R., p.113.)[8] Finally, the court held that, because probation officers had a reasonable suspicion that Ms. Brunko had violated the terms of her probation, they were not required to seek Ms. Brunko's consent prior to searching her residence. (R., pp.114-115.)

A jury found Mr. Garnett guilty of being a felon in possession of a firearm, and the district court sentenced him to the maximum, five-year fixed term. (R., pp.215, 265-266.) Mr. Garnett filed a timely Notice of Appeal. (R., pp.267-270.)

[8] This holding was not supported by citation to any legal authority.

ISSUE

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

ARGUMENT

The District Court Erred When It Denied Mr. Garnett's Motion To Suppress

A. Introduction

The district court held the warrantless search of Mr. Garnett's backpack was constitutional based upon two separate, but related, justifications offered by the State. First, the court found the search was justified pursuant to Ms. Brunko's written consent to waive her Fourth Amendment rights as a condition of her probation. Alternatively, the court found the search was justified because Officer Haines had a reasonable suspicion that Ms. Brunko had violated the terms of her probation. The district court erred in both of these rulings.

B. The District Court Erred When It Denied Mr. Garnett's Motion To Suppress

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact, which were supported by substantial evidence, but freely reviews the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561 (Ct. App. 1996).

The Fourth Amendment to the United States Constitution guarantees citizens the right to be free from unreasonable searches and seizures. U.S. CONST. amend. IV. Its purpose is "to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order to 'safeguard the privacy and security of individuals against arbitrary invasions.'" *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)). If evidence is not seized either pursuant to a valid warrant or pursuant to a recognized exception to the warrant requirement, the evidence

discovered as a result of the illegal search or seizure must be excluded as the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471 (1963).

1. The Search Was Not Justified By Ms. Brunko's Fourth Amendment Waiver Because Officer Haines Did Not Have An Objectively Reasonable Belief Ms. Brunko Had The Authority To Consent To A Search Of Mr. Garnett's Backpack

Mr. Garnett does not challenge the officers' authority to search Mr. Soy and Ms. Brunko's residence based upon Ms. Brunko's purported Fourth Amendment waiver. (*See* Exs., pp.10, 13.) However, Ms. Brunko's Fourth Amendment waiver did not provide authority for the officers to search Mr. Garnett's backpack.

A warrantless search is valid under the Fourth Amendment if it was conducted pursuant to voluntary consent of a person having the authority to consent. *Schneckloth v. Bustamonte*, 412 US. 218 (1973). "[T]he consent of one who possesses common authority over premises or effects is valid against the absent, nonconsenting person with whom that authority is shared." *United States v. Matlock*, 415 U.S. 164, 170 (1974). Alternatively, a warrantless search conducted pursuant to consent granted by a person who does actually have authority to consent, may nevertheless be reasonable if the State proves the officer had an objectively reasonable belief that the consenting person had the authority to consent. *Illinois v. Rodriguez*, 497 U.S. 177 (1990). "Like homes, personal effects are expressly protected from unreasonable search and seizure by the Fourth Amendment, and an individual's expectation of privacy in an effect is not automatically forfeited whenever that item is temporarily located within an area over which a third party has authority." *State v. Westlake*, 158 Idaho 817, 823 (Ct. App. 2015).

It is undisputed that Ms. Brunko did not actually have individual or common authority over Mr. Garnett's backpack. Thus, in order to justify the search based upon Ms. Brunko's

Fourth Amendment waiver, the State was required to prove Ms. Brunko had apparent authority over the backpack; that is, the State had to show Officer Haines had an objectively reasonable belief that Ms. Brunko did have common authority over the backpack. The State failed to meet this standard and the district court erred in denying Mr. Garnett's motion to suppress on this basis.

a. The District Court Applied An Erroneous "Reasonable Suspicion" Standard For Determining Apparent Authority

The district court applied an erroneous standard for determining apparent authority. Relying, in part, upon the Idaho Supreme Court's decision in *State v. Barker*, 136 Idaho 728, 731-32 (2002), the district court applied a "reasonable suspicion" test to Officer Haines' actions. (R., pp.109-111.) Specifically, the court stated "officers could search any item in the storage room if they had reasonable suspicion that Brunko owned, possessed or controlled the item," and the court found the State met this standard in regard to the backpack. (R., pp.111.) The reasonable suspicion standard adopted by the *Barker* Court, however, is inconsistent with the standards governing apparent authority established by the United States Supreme Court. Rather than a mere "reasonable suspicion," the Supreme Court requires a "reasonable belief" that the person consenting to a search had authority over the premises or effect searched.

The United States Supreme Court first recognized that a search is reasonable if conducted based upon consent given by a person whom officers reasonably, but erroneously, believe had the authority to consent, in *Rodriguez*. After discussing its precedent analyzing the "reasonableness" requirement of the Fourth Amendment, the *Rodriguez* Court held,

> We see no reason to depart from this general rule with respect to facts bearing upon the authority to consent to a search. Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires

> is that they answer it reasonably. The Constitution is no more violated when officers enter without a warrant because they *reasonably* (though erroneously) *believe* that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they *reasonably* (though erroneously) *believe* they are in pursuit of a violent felon who is about to escape.

Rodriguez, 497 U.S. at 183-86 (emphasis added). The Court went on to state,

> what we hold today does not suggest that law enforcement officers may always accept a person's invitation to enter premises. Even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry. As with other factual determinations bearing upon search and seizure, determination of consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment ... 'warrant a man of *reasonable caution* in the belief' " *that the consenting party had authority over the premises*? *Terry v. Ohio,* 392 U.S. 1, 21–22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid.

Id. at 188-89 (emphasis added). The Supreme Court has also recognized that, "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (citing *Rodriguez*, 497 U.S. at 183-89) (further citations omitted). In *Georgia v. Randolph*, 547 U.S. 103 (2006), the Court again applied the "reasonable belief" standard: "The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained." *Id.* at 106 (citing *Rodriguez*; *Matlock*.) In short, the United States Supreme Court has made it abundantly clear that in order to justify a search based upon apparent authority to consent to

search, the State must demonstrate that the officer "reasonably believed" the consenting party had the authority to do so.

In *Barker*, the Idaho Supreme Court analyzed whether the search of the defendant's fanny pack could be justified by a Fourth Amendment waiver executed by her boyfriend when he was placed on felony parole. *Barker*, 136 Idaho at 729-31. Without noting the reasonable belief standard articulated in *Rodriguez*, and instead relying upon a Ninth Circuit Court of Appeals decision in *United States v. Davis*, 932 F.2d 752 (9th Cir. 1991), the *Barker* Court stated, "When searching that room pursuant to [boyfriend's] consent, the officers could search any item in the bedroom if they had reasonable suspicion that [boyfriend] owned, possessed, or controlled the item." *Barker*, 136 Idaho at 731-32. The *Barker* Court's reliance upon *Davis*, rather than *Rodriguez*, was misplaced.

In *Davis*, the Ninth Circuit Court of Appeals upheld the search of a safe conducted pursuant to a third-party's probationary search condition. *Davis*, 932 F.2d at 754-58. Relying upon precedent establishing that a probationer may be searched if the probation officer has reasonable suspicion to believe that the probationer violated the terms of probation, the *Davis* Court held, "police must have reasonable suspicion, that an item to be searched is owned, controlled, or possessed by probationer, in order for the item to fall within the permissible bounds of a probation search." *Id.* 932 F.2d at 758 (citing *Griffith v. Wisconsin*, 483 U.S. 868, 872-73 (1987); *United States v. Duff*, 831 F.2d 176, 179 (9th Cir. 1987); *United States v. Johnson*, 722 F.2d 525, 527 (9th Cir. 1983); *United States v. Giannetta*, 909 F.2d 571, 577 (1st Cir. 1990) (further citations omitted).) A person's status as a probationer comes with a diminished expectation of privacy. *See United States v. Knights*, 534 U.S. 112, 118-20 (2001). The *Davis* Court was concerned with the scope of a search justified by the probationer's

diminished expectation of privacy, not the standard for determining whether a probationer (or anyone else for that matter) had apparent authority to authorize a particular search. Probationary status, however, does not alter a person's common authority over places and effects. The *Barker* Court failed to recognize this distinction.

In any event, neither the Idaho Supreme Court nor the Ninth Circuit Court of Appeals are the ultimate arbiter of the protections guaranteed by the Fourth Amendment. *See e.g. Marbury v. Madison*, 5 U.S. 137 (1803); *James v. City of Boise*, 136 S.Ct. 685, 686 (2016) (recognizing "[t]he Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law"). The United States Supreme Court has repeatedly held that if the State wishes to justify a search based upon consent, the State must demonstrate that consent was actually and voluntarily given by one who either has the authority to consent, or by one who officers reasonably believe has the authority to consent. *See Schneckloth*; *Matlock*; *Rodriguez*; *Jimeno*; *Randolph*, *supra*.

A standard requiring the State to show merely that an officer reasonably suspects that an effect belongs to an individual who has granted consent to search is no different than a standard requiring the State to show merely that an officer has a reasonable suspicion that a person actually and voluntarily consented to the search at all. Such a standard is inconsistent with United States Supreme Court precedent.

b. Officer Haines Did Not Have An Objectively Reasonable Belief That Ms. Brunko Had Common Authority Over Mr. Garnett's Backpack Such That The Search Could Be Justified By Ms. Brunko's Waiver

Officer Haines testified that the only reasons he "felt that it was quite possible" the backpack "could be" Ms. Brunko's, was because it was found in her residence, and its "not uncommon for women to have camouflage backpacks and clothing in northern Idaho. Its's

always a possibility." (Tr. 3/21/17, p.39, L.21 – p.40, L.23; p.45, L.23 – p.46, L.12.) Without more, the mere fact that a backpack (or any other container that is typically used to conceal a person's private effects), is found in a shared residence, is not enough to support a reasonable belief that each resident has common authority over the backpack. Officer Haines himself recognized as much when he acknowledged that it was only "possible" that the backpack belonged to Ms. Brunko. Under the totality of the circumstances, it was not reasonable for Officer Haines to believe Ms. Brunko had common authority over Mr. Garnett's backpack.

The date of the search was not Officer Haines' first visit to the residence. The month prior, Officer Haines conducted an inspection of the Soy/Brunko residence to determine its suitability for Ms. Brunko's probation, while Ms. Brunko was at a residential treatment program. (Tr. 3/21/17, p.29, L.15 – p.30, L.6.) Mr. Soy was at home at the time and consented to Officer Haines' search. (3/21/17, p.30, Ls.7-9.) Other individuals were in the residence at the time, including another probationer and a person who had an active warrant. (3/21/17, p.33, Ls.10-22.)[9] During that initial inspection, Officer Haines looked in the storage room at Mr. Soy's invitation. (Tr. 3/21/17, p.37, L.16 – p.38, L.5.) Through his two visits, Officer Haines became aware that at least 6 people had access to the storage room: Mr. Garnett, Mr. Soy, the two people present during the initial home inspection; Ms. Brunko; and Ms. Brunko's child. (*See generally* Tr.3/21/17.) He testified that the storage area looked like it was being used by multiple people. (Tr. 3/21/17, p.38, L.21 – p.39, L.5.)

The totality of the circumstances known to Officer Haines at the time he searched Mr. Garnett's backpack would not lead a person of reasonable caution to believe Ms. Brunko had

[9] It is unclear whether the probationer was the same person who had the active warrant, but the use of the plural "individuals" suggests that there were at least two people in addition to Mr. Soy who were present during the home inspection. (Tr. 3/21/17, p.33, Ls.10-22.)

authority to consent to its search, regardless of Officer Haines' observation of the fashion sensibilities of northern Idaho women. Although the search was not unconstitutional merely because Officer Haines did not take the simple step of asking Mr. Soy and Mr. Garnett who owned the backpack, a search justified by voluntary consent requires the State to show more than willful ignorance on the part of the officer. *See generally Rodriguez*. The State, therefore, failed to prove the search of Mr. Garnett's backpack was justified by Ms. Brunko's Fourth Amendment waiver, and the district court erred in denying Mr. Garnett's motion to suppress on that basis.

2. The Search Was Not Justified By A Reasonable Suspicion That Ms. Brunko Violated The Terms Of Her Probation Because The State Failed To Demonstrate There Was Probable Cause To Believe Evidence Of Ms. Brunko's Probation Violation Would Be Found In The Backpack

Although Officer Haines reasonably suspected Ms. Brunko violated the terms of her probation, that reasonable suspicion did not justify the search of Mr. Garnett's backpack. A probationer has a diminished expectation of privacy. *Knights*, 534 U.S. at 118-20. Therefore, "[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." *Id.* at 121. Mr. Garnett, however, was not on probation and therefore did not have a diminished expectation of privacy in the contents of his backpack. In order to justify the search of Mr. Garnett's backpack, the State was required to show there was probable cause to believe evidence of Ms. Brunko's probation violation would be found in the backpack.

In *State v. Ruck*, 155 Idaho 475 (2013), the Idaho Supreme Court used its plenary power to hear the appeal of a probationer's employer who filed a motion pursuant to I.C.R. 41 for the return of its laptop, which was seized during a probation search of its employee. *Id.* at 477-79.

Probation offers conducted a home visit to inquire about the probationer, Ruck, attempting to purchase a firearm in violation of Idaho law (and presumably the terms of his probation). *Id.* at 478. A probation officer found a backpack and, after verifying the backpack belonged to the probationer, opened it and found a laptop computer along with evidence that Ruck had violated his probation by traveling out of state. *Id.* Ruck told the officer that the computer belonged to his employer, but the probation officer seized it anyway with the intent of searching it later. *Id.* The employer filed a motion pursuant to I.C.R. 41 seeking return of the laptop, and a restraining order preventing law enforcement from searching its contents. *Id.*

The *Ruck* Court noted that the legality of the laptop's seizure was not based upon the consent to search provisions Ruck agreed to when he was placed on probation. *Id.* at 483. Instead, the Court examined the application of the plain-view doctrine. "If, during a lawful search of a private area, an officer sees an object in plain view, the incriminating character of the object is immediately apparent, and the officer has a lawful right to access the object, the officer may seize it." *Id.* at 482 (citing *Horton v. California*, 496 U.S. 128, 136–37 (1990)). "The officer must have probable cause to believe that the object is evidence of a crime or contraband." *Id.* (citing *Arizona v. Hicks*, 480 U.S. 321, 326–27 (1987)). "The Supreme Court has stated that 'in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.'" *Id.* (quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967)). The *Ruck* Court noted that the United States Supreme Court had yet to determine whether the plain-view doctrine permits the seizure of evidence of a probation violation, but found the Sixth Circuit's reasoning in *United States v. Herndon*, 501 F.3d 683 (6th Cir. 2007), to be compelling, and held "the plain-view doctrine applies to evidence of a probation violation." *Id.*

The *Ruck* Court declined to address whether a probationer's diminished expectation of privacy means that an officer need only have a reasonable suspicion that an item seen in plain-view contains evidence of a crime or contraband, rather than the normally required probable cause, in order to justify its seizure. *Id.* at 483. The district court held that it was reasonable for the officers to believe the laptop contained evidence that Ruck violated the terms of his probation, and the employer did not challenge that finding. *Id.* Nevertheless, the Court recognized "[t]he interest protected by the Fourth Amendment injunction against unreasonable seizures is quite different from the interest protected against unreasonable searches." *Id.* at 484 (citing *Arizona v. Hicks*, 480 U.S. at 328). The Court held that, absent consent from the employer, "the State cannot search the laptop without a warrant issued based upon a judicial determination that there is probable cause to believe that evidence of Employee's probation violation is contained in the laptop." *Id.*

The district court found that Officer Haines had reasonable grounds to believe that Ms. Brunko had violated the terms of her probation, which was an independent justification for the residential search. (R., pp.113-115.) However, the court did not specifically address the application of the plain-view doctrine to the seizure of Mr. Garnett's backpack, and did not address whether there was probable cause to believe evidence of Ms. Brunko's probation violation would be found in the backpack. (R., pp.98-116.) The court appears to have assumed that, as long as Officer Haines had a reasonable suspicion that Ms. Brunko owned, possessed, or controlled the backpack, the officer had the authority to seize it and search its contents. (R., pp.109-115.) Nevertheless, a review of the evidence presented demonstrated that the State failed to prove Officer Haines had probable cause to search the backpack.

Assuming, but not conceding, that the lesser "reasonable suspicion" standard applied to the seizure of his backpack based upon it being found in plain-view during the probationary search,[10] Mr. Garnett asserts that there was no probable cause to believe evidence of Ms. Brunko's probation violations would be found in the backpack.[11] Officer Haines testified that it is not uncommon for probationers to place items in locked containers in an attempt to dissuade officers from searching those containers. (Tr. 3/21/17, p.37, Ls.5-15.) Keeping the contents of a closed and locked container from the view of others is, of course, the very purpose of containers that can be closed and locked, and this fact does not establish probable cause. Additionally, Officer Haines knew only that the backpack may have belonged to Ms. Brunko, not that it did belong to her. (Tr. 3/21/17, p.39, L.21 – p.40, L.23; p.45, L.23 – p.46, L.12.) The State cannot meet its burden of showing Officer Haines had probable cause to believe evidence of Ms. Brunko's probation violation(s) would be found in Mr. Garnett's backpack, when it could not even establish that he had a reasonable belief that it was Ms. Brunko's backpack to begin with. In short, the State failed to establish probable cause to search Mr. Garnett's backpack based upon reasonable suspicion that Ms. Brunko violated the terms of her probation.

[10] The Fourth Amendment guarantees individuals the right to be secure in their persons, houses, papers, and effects – it does not protect houses, papers, or effects, independently from an individual's reasonable expectation of privacy therein. *See Katz v. United States*, 389 U.S. 347, 351-52 (1967). Probationers have a diminished expectation of privacy. *See Knights*, 534 U.S. at 118-20. A probationer's family, friends, and neighbors do not suffer their own diminished expectation of privacy merely due to their relationship to the probationer. It seems unlikely that applying a "reasonable suspicion" standard to the plain-view doctrine would meet the standards set by the United States Supreme Court, unless it was first established that the probationer had authority to control the item in question.

[11] The State's failure to seek a warrant should, in and of itself, be fatal to its claim that the search was justified by suspicion Ms. Brunko violated the terms of her probation. *See Ruck*, 155 Idaho at 484. Nevertheless, because the district court found the search could be justified on this basis, Mr. Garnett will address the probable cause issue in this Brief.

CONCLUSION

Mr. Garnett respectfully requests that this Court vacate his conviction for felon in possession of a firearm, and reverse the district court's order which denying his motion to suppress.

DATED this 21st day of February, 2018.

_____/s/_____
JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of February, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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