5-29-2018

State v. Garnett Respondent's Brief Dckt. 45282

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45282**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
vs.	)	**CR-2016-21824**
	)	
MARK TRAVIS GARNETT,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

Mark Travis Garnett appeals from the judgment of conviction entered upon the trial verdict finding him guilty of unlawful possession of a firearm. On appeal, Garnett challenges the district court's denial of his motion to suppress.

Statement of Facts and Course of Proceedings

In 2016, Tamara Brunko was on felony probation. (R., pp.98-99.) Pursuant to the terms of her probation agreement, Brunko "waive[d]…her Fourth Amendment Rights concerning searches," and was required to consent to searches of her residence. (3/21/17 Tr., p.25, L.1 – p.26, L.1; Exhibits, p.13.[1]) During this time, Brunko lived in a single-wide trailer with her boyfriend, Andrew Soy, and her son. (R., pp.98-99; 3/21/17 Tr., p.8, Ls.1-5.)

In November 2016, Brunko became non-compliant with the terms and conditions of her probation. (R., p.99.) She failed to complete required inpatient substance abuse treatment and submitted a diluted urine sample. (Id.; 3/21/17 Tr., p.27, L.2 – p.28, L.23.) Additionally, Brunko's son had missed several days of school. (R., p.99.) Officer Jason Haines, Brunko's supervising probation officer, went with several other officers to Brunko's residence to attempt to make contact with her. (R., pp.98-99; 3/21/17 Tr., p.22, Ls.13 – p.23, L.5.)

Upon arrival, officers made contact with Soy, who confirmed that Brunko still lived at the residence. (R., p.99.) Soy took several steps back from the door and the

[1] Exhibits in the appellate record are contained within the electronic file, "CR 16-21824 GARNETT #45282 EXHIBITS.pdf." Citations to page numbers of the "Exhibits" refer to the page numbers of this file. (Exhibits, pp.7-14; 3/21/17 Tr., p.26, Ls.9-15.)

officers entered the residence. (R., pp.99-100.) The officers observed Garnett, who had stayed at the residence as a guest the previous evening, lying on a sofa. (R., p.99; 3/21/17 Tr., p.13, L.23 – p.14, L.6.) Brunko was not present. (R., p.100.)

The officers proceeded to search the residence for contraband. (Id.) Officer Haines searched a storage room that had been built on to the back door of the trailer. (Id.) The room contained a "hodge-podge" of items including clothes, household supplies, pulled-out drawers containing paperwork, and a purse. (3/21/17 Tr., p.38, L.9 – p.39, L.5.) In this storage room, Officer Haines located a backpack with a lock on it behind a large moving box. (R., p.100; 3/21/17 Tr., p.39, Ls.6-18.) The backpack had no identifying marks or other exterior indicators of ownership. (R., p.100.) Officer Haines removed the lock and searched the backpack. (R., p.101; 3/21/17 Tr., p.41, L.14 – p.42, L.5.) The backpack contained a handgun, ammo, gun cleaning supplies, and a piece of mail addressed to Garnett. (R., p.101.) Officers subsequently determined that the handgun had been stolen. (Id.) The state charged Garnett with unlawful possession of a firearm and grand theft. (R., pp.32-33.)

Garnett filed a motion to suppress evidence obtained from the backpack on the ground that the residence and backpack were unlawfully searched. (R., pp.37-45.) After a hearing (3/21/17 Tr.), the district court denied the motion (R., pp.98-116). The court concluded that while Garnett, as an overnight guest, had a legitimate expectation of privacy in the backpack and thus standing to challenge the warrantless search, Officer Haines' search did not violate the Fourth Amendment. (Id.) Specifically, the court concluded that because Officer Haines possessed reasonable suspicion that Brunko

owned, possessed, or controlled the backpack, the search was within the lawful scope of the search consented to by Brunko through her Fourth Amendment waiver. (Id.)

After a trial, the jury found Garnett guilty of unlawful possession of a firearm. (R., p.215; Trial Tr., p.349, Ls.5-17.) The district court declared a mistrial on the grand theft charge after the jury was unable to reach a verdict. (Trial Tr., p.346, L.22 – p.348, L.8.) At the sentencing hearing, the state agreed to dismiss the grand theft charge in exchange for Garnett recommending a sentence of at least three years fixed on the unlawful possession of a firearm charge. (6/22/17 Tr., p.59, Ls.9-16.) The district court imposed a fixed five-year sentence on that charge. (R., pp.265-266; 6/22/17 Tr., p.83, L.16 – p.86, L.15.) Garnett timely appealed. (R., pp.267-270.)

ISSUE

Has Garnett failed to show that the district court erred by denying his motion to suppress evidence obtained from Officer Haines' search of the backpack?

ARGUMENT

Garnett Has Failed To Show That The District Court Erred By Denying His Motion To Suppress Evidence Obtained From Officer Haines' Search Of The Backpack

A. Introduction

Garnett contends that the district court erred by denying his motion to suppress evidence obtained from Officer Haines' search of his backpack. (Appellant's brief, pp.8-18.) Specifically, Garnett contends that the officers' authority to search Brunko's residence pursuant to the terms of her probation agreement did not extend to the backpack recovered from a storage room in the trailer, and that State v. Barker, 136 Idaho 728, 40 P.3d 86 (2001), the authority relied upon by the district court, is inconsistent with applicable United States Supreme Court precedent. (Id.) This Court should decline to consider this issue because Garnett has failed to preserve it for appeal. In any event, Garnett's contention fails because a review of the totality of the circumstances reveals that Officer Haines had reasonable suspicion that Brunko owned, possessed, or controlled the backpack. Therefore, the search was lawful pursuant to Barker, and Garnett has failed to demonstrate that the district court erred.

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)).

C. Garnett Failed To Preserve The Ground For Suppression He Raises On Appeal

It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal. State v. Vondenkamp, 141 Idaho 878, 885, 119 P.3d 653, 660 (Ct. App. 2005) (citing State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000)). Further, when a defendant pursues a suppression motion, only the specific grounds raised in the district court are preserved for appeal. See e.g., State v. Anderson, 154 Idaho 703, 705-706, 302 P.3d 328, 330-331 (2012) (holding that the defendant preserved only two of the three grounds for suppression that he attempted to raise on appeal).

In this case, Garnett argues that Barker was wrongly decided and that the district court erred by applying the standard set forth in that case to analyze whether the lawful scope of the officers' consent search of Brunko's residence included the backpack recovered from the storage room. (Appellant's brief, pp.8-19.) Garnett did not raise this argument below. Instead, Garnett argued only that: (1) Garnett had a reasonable expectation of privacy in the backpack; and (2) Brunko's probation agreement did not constitute valid consent to search the residence in the first place. (R., pp.40-45, 82-89.) Despite the state's reliance on Barker and related cases in its briefs filed in the district court (R., pp.54-57, 95-97), Garnett did not argue that Barker was wrongly decided or inapplicable in this case, or that some other standard informed a proper analysis of the scope of a consent search. (See id.) The district court therefore did not have the

opportunity to rule on the argument Garnett now raises on appeal. This argument is therefore waived, and should not be considered by this Court.

D. In The Alternative, The District Court Correctly Determined That Brunko's Consent Justified Officer Haines' Search Of Garnett's Backpack

The Fourth Amendment to the United States Constitution prohibits unreasonable searches.[2] Warrantless searches are unconstitutional, unless they are authorized by a recognized exception to the warrant requirement. Barker, 136 Idaho at 730, 40 P.3d at 88 (citing State v. Johnson, 110 Idaho 516, 716 P.2d 1288 (1986)).

Properly given consent is a recognized exception to the warrant requirement. Id. "When the state seeks to justify a warrantless search based upon consent, it is not limited to proof that the consent was given by the defendant." Id. The state may show that consent came from a third party who "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." Id. at 730-31, 40 P.3d at 88-89 (citing United States v. Matlock, 415 U.S. 164 (1974)). "The common authority of the third party does not rest upon the law of property." Id. The state is not required to show the third party actually had a property interest in the effects searched. Id. "Rather, the common authority rests upon the joint access or control of the property searched." Id. The standard for measuring the scope of a consent to search is that of objective reasonableness. Florida v. Jimeno, 500 U.S. 248 (1991).

In Barker, the Idaho Supreme Court analyzed the lawful scope of a warrantless search justified by a parolee's waiver of his Fourth Amendment rights. Barker, 136

[2] Garnett did not argue, to the district court or on appeal, that the Idaho Constitution provides more protection than the Fourth Amendment with respect to the relevant issues in this case. (See R., pp.40-45; Appellant's brief, pp.8-18.)

Idaho at 730-732, 40 P.3d at 88-90. Tate, Barker's boyfriend, violated his parole by failing to report to his parole officer. Id. at 729, 40 P.3d at 87. The parole officer went to Barker's apartment after learning that Tate had been seen there. Id. at 729-730, 40 P.3d at 87-88. The officer located Tate outside of the apartment and arrested him. Id. at 730, 40 P.3d at 88. Tate told the officer that he had been living at Barker's apartment for the previous few weeks. Id.

Officers then contacted Barker at the apartment. Id. Despite Barker's denials that Tate had been living there, the officers searched the apartment pursuant to Tate's Fourth Amendment waiver. Id. The officers also located a fanny pack on a counter in the master bedroom. Id. A drug dog alerted on the fanny pack. Id. After Barker then admitted ownership of the fanny pack, officers searched it and located methamphetamine and a vehicle title with both Tate's and Barker's names on it. Id. The state charged Barker with possession of methamphetamine. Id.

The Idaho Supreme Court affirmed the district court's denial of Barker's motion to suppress evidence recovered from the fanny pack. Id. at 730-732, 40 P.3d at 88-90. The Court first held that Tate's parole agreement constituted valid consent to search Tate's and Barker's residence, including the master bedroom which was occupied by both Tate and Barker. Id. at 731, 40 P.3d at 89.

The Court then held that the scope of this search extended to the fanny pack. Id. at 731-732, 40 P.3d at 89-90. The Court concluded that the officers could lawfully search any item in the shared bedroom if they possessed reasonable suspicion that Tate owned, possessed, or controlled the item. Id. (citing United States v. Davis, 932 F.2d 752 (9th Cir. 1991).) The Court further recognized that the "circumstances need not indicate that

the item was obviously and undeniably owned, possessed, or controlled by Tate," and that the officers were not required to inquire into the ownership, possession, or control of the fanny pack. Id. at 732, 40 P.3d at 90. Finally, after reviewing the totality of the circumstances of the case (including that: (1) a drug dog alerted on the fanny pack; (2) Tate was on parole for possession of a controlled substance; (3) before absconding from supervision, Tate submitted a urine sample to his parole officer that tested positive for a controlled substance; (4) the fanny pack was located in the bedroom that was occupied jointly by Tate and Barker; and (5) there was nothing about the fanny pack's location or appearance that indicated it was owned, possessed, and controlled exclusively by Barker), the Idaho Supreme Court concluded that the officer had reasonable suspicion that Tate had at least joint possession or control of the fanny pack, and that the search was therefore lawful under the Fourth Amendment. Id.

In the present case, Garnett does not dispute any of the factual findings of the district court (see generally Appellant's brief), and concedes that the officers had the authority, pursuant to Brunko's Fourth Amendment waiver, to search the residence (Appellant's brief, p.9). Instead, Garnett contends that Officer Haines' search of the

backpack exceeded the lawful scope of this search.[3] (Appellant's brief, pp.8-18.) A review of the record reveals that the district court properly applied Barker and concluded that Officer Haines possessed reasonable suspicion that Garnett had at least joint possession or control of the backpack.

First, and perhaps most significantly, Officer Haines located the backpack not near Garnett or the sofa that Garnett was lying on, but in a storage room behind a large moving box. (R., p.100; 3/21/17 Tr., p.39, Ls.9-18.) This storage room contained numerous household items including clothes, paperwork, and sink faucets. (3/21/17 Tr., p.38, L.9 – p.39, L.5.) Thus, it was apparent that the room was not utilized exclusively for guest belongings, but was likely accessed and controlled by the permanent residents of the household. Officer Garnett thus possessed reasonable suspicion that Brunko, as one of the two known permanent residents of the trailer, had at least joint possession or control of the backpack found in storage room containing domestic household items. This is particularly true in light of the backpack's positioning *behind* a large moving box – not an area where one would expect to find the luggage of an overnight guest.

[3] On appeal, Garnett also construes the district court's order denying his motion to suppress as concluding that the search of the backpack was additionally justified by Officer Haines' reasonable suspicion that Brunko was in violation of her probation. (Appellant's brief, pp.8, 15-18.) However, the district court arrived at this conclusion only in response to Garnett's argument that the officers were required, pursuant to State v. Turek, 150 Idaho 745, 250 P.3d 796 (Ct. App. 2001), to obtain Brunko's consent to enter and search her apartment (R., pp.114-115). The district court rejected Garnett's argument on the grounds that: (1) probation searches may be conducted without consent when the officers are investigating their reasonable suspicion of violation of probation terms; and (2) the officers possessed such reasonable suspicion in this case. (R., pp.114-115 (citing Turek, 150 Idaho 745, 250 P.3d 796; State v. Pinson, 104 Idaho 227, 657 P.2d 1095 (Ct. App. 1983).) Because Garnett does not dispute this conclusion on appeal, and because he concedes that the officers had lawful authority to search Brunko's residence (Appellant's brief, p.9), the state does not otherwise address the district court's analysis with respect to this point in its Respondent's brief.

Further, despite Officer Haines' specific attempts to locate such, there was no physical indications, such as a name tag or other identifying characteristic on the exterior of the backpack indicating that the backpack was owned, possessed, or exclusively controlled by some individual other than Brunko. (R., p.100; 3/21/17 Tr., p.39, L.21 – p.40, L.4.) Also, Officer Haines testified at the suppression hearing that, from his experience, it is not uncommon for individuals such as Brunko who are on probation or parole to place items in locked containers in an attempt to dissuade probation searches. (3/21/17 Tr., p.37, Ls.5-15; p.41, Ls.2-13.) Therefore, it was reasonable for Officer Haines to suspect that the backpack was simply one of many other household items in the storage room controlled, at least in part, by Brunko.

Additionally, Garnett did not object to the search of the residence, or of the backpack specifically. (R., p.100; 3/21/17 Tr., p.17, L.17 – p.19, L.14.) Nor did Garnett inform the officers that there were specific items that exclusively belonged to him in the residence. (3/21/17 Tr., p.52, Ls.17-20.) While not determinative, an active objection is important to the reasonableness of the officer's belief in the apparent authority that justifies a search. See State v. Benson, 133 Idaho 152, 159, 983 P.2d 225, 232 (Ct. App. 1999); State v. Frizzel, 132 Idaho 522, 975 P.2d 1187 (Ct. App. 1999). An officer may not be able to rely upon a third party's apparent authority to a search when another party with a superior possessory interest in the property is present and objects or denies consent. Benson, 133 Idaho at 159, 983 P.2d at 232. "When an individual who has a possessory interest in an item remains silent while a third party with apparent authority gives consent to search an item, it is objectively reasonable for a police officer to

conclude that he 'had all the consent that was constitutionally required.'" Id. (citing Frizzel, 132 Idaho at 525, 975 P.2d at 1190.)

On appeal, Garnett contends that the district court applied an erroneous standard in determining whether the backpack was within the lawful scope of Officer Haines' search of the residence. (Appellant's brief, pp.10-13.) Specifically, Garnett argues that the standard set forth in Barker, which permits officers performing a lawful consent search of an area to search the contents of any container in that area if they possess reasonable suspicion that the individual whose consent the search is based upon owned, possessed, or controlled the item, is contrary to United States Supreme Court precedent as set forth in Illinois v. Rodriguez, 497 U.S. 177 (1990). (Id.) However, a review of the applicable caselaw reveals that Garnett's contention fails, and the district court properly relied upon Barker in denying Garnett's motion to suppress. Further, Idaho jurisprudence requires respect for its precedents. The rule of *stare decisis* dictates that controlling precedent be followed "unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." State v. Dana, 137 Idaho 6, 9, 43 P.3d 765, 768 (2002). Garnett has failed to show either that Rodriguez is applicable to this case, or that Barker should be overruled.

In Rodriguez, officers gained warrantless entry to a suspect's apartment after obtaining consent from a third party who described the residence as "our" apartment, and who told police that she had clothes and furniture there. Rodriguez, 497 U.S. at 179. Officers arrested Rodriguez at the apartment and recovered drugs and drug paraphernalia in plain view. Id. at 180. The United States Supreme Court held that a warrantless entry

into a residence is valid when based upon the consent of a third party whom the police, *at the time of entry*, "reasonably believed" to possess common authority over the premises, regardless of whether the third party actually possessed such authority. Id. at 179-189. In other words, the Court held that an officer's consent-based *initial entry into a residence* must be based upon a "reasonable belief" that the individual granting the consent actually had sufficient authority over the residence to provide such consent. Id.

This "reasonable belief" standard has no application to the present case, in which the issue is not whether the officers had the authority to enter and search the residence in the first place, but whether Officer Haines' search of the backpack was within the lawful scope of the search for which the officers already possessed consent to effectuate. The officers' initial entry and search of Garnett's apartment, as conceded by Garnett on appeal (Appellant's brief, p.3 n.5, p.9), was justified by both Soy permitting the officers to enter, and by Brunko's probation status and Fourth Amendment waiver. Once the officers were lawfully inside the residence, and once they had lawful authority to search the residence, they were not required to develop a new, subjective, "reasonable belief" with respect to Brunko's possession or control of every individual container they came across. Instead, as held in Barker and Davis, the officers could search any container at the residence for which a totality of the circumstances demonstrated an objective reasonable suspicion that the container was owned, possessed, or controlled, at least in part, by Brunko. Barker, 136 Idaho at 730-732, 40 P.3d at 88-90; Davis, 932 F.2d at 757-760; see also United States v. Bolivar, 670 F.3d 1091, 1093-1096 (9th Cir. 2012) (rejecting Bolivar's challenge to the Davis "reasonable suspicion" standard and reaffirming that "[*o*]*nce police officers properly enter a residence pursuant to*

a probation search, they need only a 'reasonable suspicion' to conclude that the probationer owns, controls, or possesses a particular item within the probationer's residence in order to search that item." (emphasis added).[4] Contrary to Garnett's assertion on appeal, this standard, as applied to determine the lawful *scope* of a warrantless consent search of a probationer's residence, is not contrary to Rodriguez or any other United States Supreme Court precedent.

Officer Haines possessed reasonable suspicion that the backpack located in the storage room was owned, possessed, or controlled, at least in part, by Brunko. Therefore, Officer Haines was permitted to search the backpack, and Garnett has failed to demonstrate that the district court erred by denying his motion to suppress.

CONCLUSION

The state respectfully requests that this Court affirm the judgment of conviction and the district court's denial of Garnett's motion to suppress.

DATED this 29th day of May, 2018.

/s/ Mark W. Olson
Deputy Attorney General
MARK W. OLSON

[4] In the alternative, the state submits that, for all the reasons set forth by the district court and in this brief, Officer Haines' search of the backpack was justified even pursuant to the standard set forth by Garnett.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of May, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

JASON C. PINTLER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

_____/s/ Mark W. Olson_____
MARK W. OLSON
Deputy Attorney General

MWO/vr