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State v. Garnett Appellant's Reply Brief Dckt. 45282

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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 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

Probation officers searched the residence of Tamara Brunko, 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 Ms. Brunko'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 argues on appeal that the district court erred in denying his motion to suppress, because the officer did not have an objectively reasonable belief that Mr. Garnett's backpack belonged to Ms. Brunko, and its search was therefore not authorized by Ms. Brunko's Fourth Amendment waiver.[1]

In its Respondent's Brief, the State argues, *inter alia*, that Mr. Garnett did not preserve his argument that the "reasonable belief" standard articulated by the United States Supreme Court's decision in *Illinois v. Rodriguez*, 497 U.S. 177 (1990), is the proper standard of review, and further argues that the "reasonable suspicion" standard articulated by the Idaho Supreme Court in *State v. Barker*, 136 Idaho 728 (2002), is the proper standard of review. The State's arguments are without merit.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Garnett's Appellant's Brief, and are repeated in this Reply Brief only where necessary to address the State's appellate argument.

[1] Mr. Garnett also argued that the search could not be justified based upon a reasonable suspicion that Ms. Brunko violated the terms of her probation. (Appellant's Brief, pp.15-18.) The State has chosen not to address this issue in its Respondent's Brief. (Respondent's Brief, p.10, fn.3.)

ISSUE

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

As such, Mr. Garnett relies upon the arguments he made in his Appellant's Brief as it relates to this issue.

ARGUMENT

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

Mr. Garnett argued in his Appellant's Brief that the district court erred in denying his motion to suppress because 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 consent to search in the form of her probationary Fourth Amendment waiver. (Appellant's Brief, pp.9-15.) In making that argument, Mr. Garnett pointed out that the district court used an incorrect standard of review; namely, a "reasonable suspicion" standard. (Appellant's Brief, pp.10-13.) Mr. Garnett acknowledged that the district court relied upon the Idaho Supreme Court's Opinion in *Barker*, but argued that standard was inconsistent with the standard articulated by the United States Supreme Court in *Rodriguez*, which controls questions of apparent authority to consent searches. *Id.*

The State mischaracterizes Mr. Garnett's legal argument as a "ground for suppression" and asserts it is not preserved for appeal. (Respondent's Brief, pp.6-7.) The State's argument is without merit, as Mr. Garnett did not raise a new ground for suppression in his Appellant's Brief. On the contrary, Mr. Garnett has maintained throughout that his "ground for suppression" is that he had a reasonable expectation of privacy in the contents of his closed and locked backpack, and that the State failed to show there was a valid exception to the warrant requirement, authorizing the search.

In his motion to suppress, Mr. Garnett asserted, "[t]he evidence must be suppressed because Mr. Garnett had a reasonable expectation of privacy in his personal belongings, the search was not pursuant to a lawful search warrant, and the search did not occur pursuant to a lawful exception to the warrant requirement." (R., p.38.) Mr. Garnett argued in his brief in

support that the, "[t]he warrantless search of … Mr. Garnett's backpack did not occur pursuant to an exception to the warrant requirement," and that he had a reasonable expectation of privacy in the contents of his backpack, even though it was found at Ms. Brunko's residence. (R., pp.40., 43-45.)

Having the burden of providing a valid exception to the warrant requirement (*see Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971)), the State asserted the search was justified by Ms. Brunko's Fourth Amendment waiver, noting that "a third party may consent to a search, thereby relieving the government of the warrant requirement, as long as such person possessed authority – either actual or apparent – to consent." (R., pp.50-51 (citations omitted).) The State relied upon the Ninth Circuit's decision in *United States v. Davis*, 932 F.2d 752, 758 (9th Cir. 1991), for the proposition that officers must have a "reasonable suspicion" that an item to be searched is owned, controlled, or possessed by the probationer, in order for the item to fall within the permissible bounds of a "probation search." (R., pp.54-55.) Although recognizing that the *Davis* Opinion was based upon reasonable suspicion that a probationer violated the terms of his probation ("a reasonable suspicion search"), and not based upon a probationer's Fourth Amendment waiver, the State claimed the *Barker* Court extended the exception to "include consent to search a home," and argued, "[i]t appears the same reasonable suspicion test applies to both." (R., pp.55-56.)

After the hearing on his motion to suppress, Mr. Garnett filed an addendum to his brief in support, concluding as follows:

> Based on Mr. Garnett's reasonable expectation of privacy in his zipped, locked backpack, the State's lack of authorization under Ms. Brunko's Terms and Conditions of Probation, lack of warrant, and lack of consent from Mr. Garnett, the evidence seized as a result of the search of Mr. Garnett's backpack should be suppressed.

(R., p.89.) In its response brief, the State argued it met its claimed burden of showing the Officer Haines had a "reasonable suspicion" that Mr. Brunko owned, possessed, or controlled the backpack, based upon the evidence presented during the suppression hearing. (R., pp.95-97.) The district court recognized that the State argued "Officer Haines had a reasonable suspicion to believe Brunko owned, possessed, or controlled the backpack, meaning that Brunko had the apparent authority to consent to that search," applied *Barker*, and found the State met the burden articulated in that case. (R., pp.109-111.)

In sum, Mr. Garnett has consistently claimed that he had a reasonable expectation of privacy in the contents of his closed and locked backpack, and that the State failed to prove the search was justified by an exception to the warrant requirement. The district court held the search was lawful, finding Ms. Brunko had *apparent authority* to consent to the search based upon a "reasonable suspicion" that she owned, possessed, or controlled Mr. Garnett's backpack, and that she did consent through her probationary Fourth Amendment waiver.

In his Appellant's Brief, Mr. Garnett argued that under the "reasonable belief" standard articulated by the United States Supreme Court in *Rodriguez*, the State failed to show Mr. Brunko had the apparent authority to consent to the search, and the district court's ruling is erroneous. (Appellant's Brief, pp.9-15.) Mr. Garnett noted the district court based its decision upon the *Barker* standard, and argued both why *Barker* was wrongly decided (Appellant's Brief, pp.12-13 (it was based upon a misunderstanding of *Davis*)), and why the *Rodriguez* standard applies (Appellant's Brief, p.13 (United States Supreme Court is the ultimate arbiter of the protections guaranteed by the Fourth Amendment)). Admittedly, Mr. Garnett's trial counsel did not point out the flaw in the *Barker* decision to the district court, but this is simply not relevant to any issue before this Court.

Parties on appeal are not limited to reciting verbatim the arguments they made in the district court. Although new substantive issues cannot be raised for the first time on appeal, the specific arguments the parties make in support of their legal theories may "evolve" between the lower court and the appellate court. *Ada County Highway District v. Brooke View, Inc.*, 162 Idaho 138, 142 n.2 (2017). Appellate counsel, like trial counsel, have a duty to zealously represent their respective clients, and a duty of candor to the Appellate Court. *See* I.R.P.C. Preamble (2); I.R.P.C. 1.1; I.R.P.C. 3.1; I.R.P.C. 3.3. Appellate counsel, whether they represent the State, a criminal defendant, or a party in a civil dispute, can neither be allowed to nor required to ignore controlling precedent. *Id.* This Court must determine legal issues presented on this appeal, based upon the applicable legal standards.

Contrary to the State's assertion, Mr. Garnett did not raise a new "ground for suppression" on appeal.

The State also argues that *Rodriguez* does not control, attempting to limit its applicability to questions of apparent authority to consent to an "initial entry" into a residence. (Respondent's Brief, pp.12-14.) The State claims,

> This 'reasonable belief' standard has no applicability 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.

(Respondent's Brief, p.13.) The State does not support this assertion with citation to authority, presumably because there is no such authority, and the State's claim is without merit.

In *United States v. Matlock*, 415 U.S. 164 (1974), the United States Supreme Court held, "when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to

search was obtained from a third party who possessed common authority over or other sufficient relationship to the *premises or effects* sought to be inspected." *Id.* at 171 (emphasis added). The focus in *Matlock* was the nature of who could consent to a search, and the Court did not distinguish between real and personal property. *See generally, Matlock.*

In *Rodriguez*, the United States Supreme Court addressed whether a search conducted pursuant to consent given by a third party who the officers reasonably, but erroneously, believed had authority to consent to the search was nevertheless valid. 497 U.S. at 179. The Court started its analysis by noting, "[t]he Fourth Amendment generally prohibits the warrantless entry of a person's home, *whether to make an arrest or to search for specific objects.* *Id.* at 181 (citing *Payton v. New York*, 445 U.S. 573 (1980); *Johnson v. United States*, 333 U.S. 10 (1948) (emphasis added)). The Court continued, "[t]he prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, *see Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), or from a third party who possesses common authority over the premises, *see United States v. Matlock, supra*, 415 U.S., at 171, 94 S.Ct., at 993." *Id.*

The *Rodriguez* Court found that the person who gave the officers consent to enter the premises in question did not have actual authority to grant consent. *Id.* at 181-82. The Court then considered the State's argument that the officer's entry was nevertheless valid because the officers "reasonably believed" the person who gave the consent had the authority to do so. *Id.* at 182. The Court held,

> 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 186 (emphasis added). The Court went on to state,

> 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).

While the State accurately points out that the specific question before the *Rodriguez* Court was whether such apparent authority justified the initial entry of the residence, there is simply nothing in the opinion that indicates the Court intended to limit the "reasonable belief" standard adopted in *Rodriguez* to the initial entry into a residence. *Id.* at 179-89. The Court did not distinguish or limit the holding in *Matlock*, recognizing third party consent to the search of "premises or effects" as valid against the defendant, to the facts in that case, nor did it express that its holding was limited to the initial entry of the premises. *Id.* The *Rodriguez* Court did not need to explicitly state its "reasonable belief" standard for determining apparent authority applies to effects, because no effects were searched in that case under the guise of apparent authority. *Id.* Consent to search granted by a person having the lawful authority to provide such consent is an exception to the warrant requirement – the "reasonable belief" standard articulated in *Rodriguez*, is the standard the Supreme Court adopted for lower courts to measure whether the person who granted consent had the apparent authority to do so.

The State provides no logical basis for why *Rodriguez* should be limited to the entry and search of residences, but should not apply to the search of personal property, and it cites to no cases in support of its assertion. The Idaho Court of Appeals, on the other hand, has addressed this issue and found that the "reasonable belief" standard applies when the State seeks to justify

the search of an effect based upon apparent authority. In *State v. Westlake*, 158 Idaho 817 (Ct. App. 2015), the Court of Appeals was presented with the question of whether officers could search a backpack found within a motel room occupied by multiple people, when the person who rented the room gave permission to search. *Id.* at 819-20. The Court recognized that "The issue presented … [was] not Gallagher's apparent authority to consent to a search of the motel suite but her apparent authority to consent to a search of one particular container in the suite." *Id.* at 823. Noting the standard articulated in *Rodriquez* controlled, the *Westlake* Court held "the facts known to the officers did not warrant a reasonable belief that Gallagher had authority to consent to the search of the backpack." *Id.* at 823-27.

The State's argument that *Rodriguez* does not apply is without merit.

CONCLUSION

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

DATED this 1st day of August, 2018.

/s/ Jason C. Pintler
JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, electronically as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
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JCP/eas