Electronically Filed
3/7/2019 3:34 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45950**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-2017-41727**
	)	
ANDREW CHARLES MAXIM,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE PETER G. BARTON
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

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

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

ATTORNEYS FOR PLAINTIFF-RESPONDENT

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

ATTORNEY FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

Nature Of The Case

Andrew Charles Maxim appeals from the judgment of conviction issued after Maxim entered a conditional guilty plea to felony possession of a controlled substance. Maxim argues that the district court erred when it denied his motion to suppress.

Statement Of The Facts And Course Of The Proceedings

In July 2017, Andrew Charles Maxim was placed on probation. (State's Ex. 1, p.2.) In connection with his probation, he signed an Idaho Department of Correction Agreement of Supervision. (State's Ex. 2; see Tr., p.6, Ls.13-24.) The document Maxim signed states:

> **Search:** I consent to the search of my person, residence, vehicle, personal property, and other real property or structures owned or leased by me, or for which I am the controlling authority conducted by any agent of IDOC or a law enforcement officer. I hereby waive my rights under the Fourth Amendment and the Idaho constitution concerning searches.

(State's Ex. 2, p.1.) Above Maxim's signature, the agreement reads: "I understand and accept these conditions of supervision." (State's Ex. 2, p.2.) The agreement was incorporated by reference into the terms of probation in the district court's probation order. (State's Ex. 1, p.2.)

In early September 2017, Maxim moved in to his girlfriend's apartment—apartment 101 in the Foothills Apartments. (Tr., p.7, Ls.11-23.) On September 27, 2017, the Meridian Police Department received a narcotics complaint regarding apartment 101 in the Foothills Apartments. (Tr., p.31, L.13 – p.32, L.9.) The individual who made the complaint stated "that there w[ere] drugs being used and/or stolen from the residence and that there were three small children that resided at that location as well." (Id.) Officers

Ludwig and Haustveit "responded to make contact with the homeowner and ask about the welfare of the children." (Id.)

When the officers pulled into the parking lot, a woman near the apartment complex office waved them down. (Tr., p.32, L.13 – p.33, L.2.) She explained to the officers that she had called in the complaint. (Id.) She had seen "some strange people hanging out at the apartment that morning" and had heard from another tenant in the last day or two that the female resident of the apartment "was in possession of a large quantity of heroin." (Tr., p.33, Ls.11-25.) The woman was concerned because the female resident had three young daughters who lived at the apartment, and she "just didn't think it was a fit environment for children." (Tr., p.32, L.13 – p.33, L.2.)

The officers approached the apartment and Officer Ludwig knocked on the door. (Tr., p.34, Ls.11-21.) No one responded. (Tr., p.34, Ls.15-21.) When Officer Ludwig knocked louder, the door opened. (Id.) He could see "signs of children inside" such as "toys and movies and things of that nature right in the living room." (Tr., p.34, L.22 – p.35, L.5.) Officer Ludwig announced "Meridian Police." (Tr., p.35, L.10 – p.36, L.2.) He then "heard what sounded like someone walking in a hurried pace away from the front door." (Id.) Officer Ludwig stepped inside of the apartment. (Id.)

Once inside the apartment, Officer Ludwig saw a woman walking toward the back of the apartment. (Id.) "She turned towards [Officer Ludwig] when [he] stepped in and voluntarily came out of the apartment." (Id.) She told Officer Ludwig that it was not her apartment. (Tr., p.36, Ls.5-15.) Officer Ludwig then went to "check the back bedroom." (Tr., p.36, Ls.16-24.) One of the doors in the hallway was locked. (Tr., p.37, Ls.14-22.)

Officer Ludwig walked back to the front door to ask the woman whose room had the locked door. (Tr., p.37, L.25 – p.38, L.14.) She responded that she did not know. (Id.)

"[A]t that point, [Officer Ludwig] could hear the latch of the door being triggered." (Id.) He turned around and saw an individual coming out of the previously-locked door. (Id.) Officer Ludwig instructed the individual, subsequently identified as Andrew Charles Maxim, to show his hands. (Tr., p.39, L.3 – p.42, L.18.) Officer Ludwig testified at the suppression hearing that Maxim said, "'This isn't my house. It's my girlfriend's house.'" (Tr., p.58, Ls.13-17.) Officer Ludwig asked Maxim if he had any needles, knives, guns, or drugs. (Tr., p.40, L.5 – p.42, L.18.) Maxim said that he had a knife and started reaching towards his pocket. (Id.) Officer Ludwig instructed Maxim to stop. (Id.) Officer Ludwig stopped Maxim from grabbing his knife and "put [Maxim's] hands on top of his head so [Officer Ludwig] could control his movements more." (Id.) Maxim tried to "pull[] away from the officer and began walking towards the front door." (R., p.66; see Defense Ex. A at 02:15-02:32.)

Officer Ludwig "didn't want to stick [his] hand in [Maxim's pocket] out of fear that the knife was in the open position," so he "turned the inside pocket fabric inside out." (Tr., p.40, L.5 – p.42, L.18.) Inside Maxim's pocket were a knife and "a small multi colored silicon container." (Id.) Officer Ludwig opened the container and found heroin inside. (Defense Ex. A at 03:35 – 03:41; see R., p.66.)

"The officers contacted the owner of the apartment by telephone." (R., p.67.) "[T]he owner stated she was not aware of Mr. Maxim being in the home." (R., p.70.) She also "agreed to let the police search her apartment and unlock her bathroom door." (R., p.67.) "They unlocked the bathroom door and found a third person in the bathroom." (Id.)

Officer Ludwig testified at the suppression hearing that, "[f]or virtually all the individuals [he] encounter[s], [he] will conduct a name and date of birth inquiry . . . that will check . . . warrants." (Tr., p.47, L.17 – p.48, L.9.) Consistent with Officer Ludwig's testimony, the officers ran a warrant check on Maxim and the other two individuals found in the apartment. (Tr., p.48, Ls.10-16.) All three individuals in the apartment had—and were arrested for—outstanding warrants. (Tr., p.48, Ls.17-21; Defense Ex. A at 1:30:30-1:31:32, 1:33:48-1:34:05, 1:37:18-1:37:40, 2:00:45-2:02:45.) Officer Ludwig testified that he did not know that Maxim was on felony probation or that Maxim had signed an agreement that included a search waiver. (Tr., p.39, Ls.12-17.)

The state charged Maxim with possession of a controlled substance. (R., p.23.) Maxim moved to suppress the evidence obtained from the search of the apartment. (R., pp.32-39.) In response, the state argued that (1) Maxim did not have standing to contest the search in light of his Fourth Amendment waiver, (2) the officers conducted a reasonable search as part of their community caretaking function, and (3) any violation of the Fourth Amendment did not require suppression under the doctrine of inevitable discovery. (R., pp.43-50.) At the hearing, the district court found the standing issue in light of Maxim's waiver an "interesting one" but ultimately held that Maxim had standing because the purpose of the exclusionary rule is "to change police officer behavior" and the officer did not know that Maxim had signed the waiver. (Tr., p.26, L.5 – p.28, L.1.) At the end of the hearing, the district court took the matter under advisement. (Tr., p.85, Ls.11-12.)

The district court subsequently issued a written decision on Maxim's motion to suppress. (R., pp.65-71.) The decision stated that "[i]t [was] not necessary to determine whether the actual entry and pat down of Mr. Maxim were lawful" or "to analyze the

effectiveness of Mr. Maxim's waiver unknown to the officers at the time." (R., p.70.) Instead, the district court denied Maxim's motion to suppress based on the doctrine of inevitable discovery because the officers would have found the heroin even absent any unlawful conduct. (R., p.70.)

Maxim pled guilty to possession of a controlled substance on the condition that he could appeal the district court's denial of his motion to suppress. (R., p.73.) The district court sentenced Maxim to an aggregate term of five years with two years fixed. (R., p.83.) Maxim timely appealed. (R., pp.89-92.)

ISSUE

Maxim states the issue on appeal as:

> Whether the district court's speculative analysis under the inevitable discovery doctrine is directly contrary to clear Idaho Supreme Court precedent.

(Appellant's brief, p.9.)

The state rephrases the issue as:

Has Maxim failed to show that the district court erred by denying his motion to suppress?

ARGUMENT

The District Court Did Not Err By Denying Maxim's Motion To Suppress

A. Introduction

Neither the search of the apartment nor the pat-down search of Maxim required suppression of the drug evidence recovered from Maxim in the apartment. The search of the apartment did not require suppression because Maxim did not have Fourth Amendment standing to challenge the search. To challenge the search of the apartment, Maxim had to show he had a reasonable expectation of privacy in the apartment. Maxim could not have had a *reasonable* expectation of privacy from law enforcement officers searching his apartment because, as part of his probation, he signed a supervision agreement in which he "consent[ed] to the search of [his] . . . residence" and expressly "waive[d] [his] rights under the Fourth Amendment . . . concerning searches." (State's Ex. No. 2, p.1.)

The pat-down search of Maxim did not require suppression for three reasons: First, Maxim did not have standing to challenge the search because Maxim could not have had a *reasonable* expectation of privacy from pat-down searches by law enforcement officers given that he also "consent[ed] to the search of [his] person" in his supervision agreement. (Id.) Second, the pat-down search was reasonable under the Fourth Amendment because Officer Ludwig had reason to believe Maxim was armed and dangerous: Maxim admitted that he had a knife, reached for his knife, and continually tried to pull away from Officer Ludwig after Officer Ludwig stopped Maxim from grabbing his knife. Third, the exclusionary rule does not apply to the pat-down search because Maxim had an outstanding arrest warrant and the officers inevitably would have found the heroin in a search incident to his arrest. The officers ran a warrant check on each of the three individuals in the

apartment, including the other two individuals who did not have heroin. This proves that, even if Officer Ludwig had not found heroin on Maxim via a pat-down search, the officers still would have run a warrant check, learned of his outstanding arrest warrant, arrested Maxim, and found the heroin in a search incident to Maxim's arrest. Thus, the exclusionary rule does not apply.

B. Standard Of Review

"When this Court reviews a district court's order granting or denying a motion to suppress evidence, the standard of review is bifurcated." State v. Skurlock, 150 Idaho 404, 405, 247 P.3d 631, 632 (2011). "The Court will accept the trial court's findings of fact unless they are clearly erroneous, but may freely review the trial court's application of constitutional principles in light of the facts found." Id.

C. The District Court Properly Denied Maxim's Motion To Suppress Because The Fourth Amendment Did Not Require Suppression Of The Heroin

On appeal, Maxim challenges the same two searches conducted by Officer Ludwig that he challenged in the district court: the search of his girlfriend's apartment and the pat-down inside of the apartment.[1] (R., p.32 (moving to suppress "evidence obtained as the result of an illegal, warrantless entry into the defendant's residence and/or an illegal pat-down"); Appellant's brief, p.13 (arguing "the officers unlawfully entered and searched the

[1] Maxim has not challenged the scope of the pat-down search or the search of the container retrieved from Maxim and has thus waived those issues. See State v. Garcia-Rodriguez, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) ("Issues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court.") (internal quotations and citation omitted); Gallagher v. State, 141 Idaho 665, 669, 115 P.3d 756, 760 (2005) (explaining that issues not raised in the opening brief are waived). Nor has Maxim asserted a violation of the Idaho Constitution (R., pp.32-38), which means his challenge is limited to the Fourth Amendment, see State v. Frederick, 149 Idaho 509, 513, 236 P.3d 1269, 1273 (2010).

apartment and . . . unlawfully searched Mr. Maxim's person").) Neither search required the suppression of the heroin retrieved from Maxim's person.

1. The Search Of The Apartment Did Not Require Suppression Because Maxim Did Not Have Standing To Challenge The Search

Maxim did not have Fourth Amendment standing to challenge the search of the apartment.[2] The Fourth Amendment protects individuals against unreasonable searches. U.S. Const. amend. IV. "However, even if a search is unreasonable, a defendant must have a privacy interest that was invaded by the search in order to suppress evidence discovered in the search." State v. Mann, 162 Idaho 36, 41, 394 P.3d 79, 84 (2017). "When a search is challenged, the defendant bears the burden of showing that he or she had a reasonable expectation of privacy in the place searched." Id.; see State v. Bottelson, 102 Idaho 90, 92, 625 P.2d 1093, 1095 (1981) ("[T]o claim the protection of the fourth amendment, a person must show that he had a legitimate expectation of privacy in the invaded place."). This concept is often referred to as Fourth Amendment standing. See Byrd v. United States, 138 S. Ct. 1518, 1530 (2018).

A defendant can satisfy his burden and claim Fourth Amendment standing only by showing that he held a "subjective expectation of privacy . . . 'that society is prepared to recognize as reasonable.'" Minnesota v. Olson, 495 U.S. 91, 95-96 (1990) (quoting Rakas v. Illinois, 439 U.S. 128, 143-44 n.12 (1978)); see State v. Mubita, 145 Idaho 925, 932-33, 188 P.3d 867, 874-75 (2008). The second part of that test focuses on whether "the

[2] Although the district court resolved Maxim's motion to suppress using the doctrine of inevitable discovery (R., p.70), the state made a Fourth Amendment standing argument in the district court (R., pp.45-46), and "this Court will affirm upon the correct theory," Garcia-Rodriguez, 162 Idaho at 275-76, 396 P.3d 704-05. In any event, the state can raise Fourth Amendment standing for the first time on appeal. See State v. Hanson, 142 Idaho 711, 717-18, 132 P.3d 468, 474-75 (Ct. App. 2006).

individual's expectation, viewed objectively, is 'justifiable' under the circumstances." United States v. Knotts, 460 U.S. 276, 281 (1983) (quoting Katz v. United States, 389 U.S. 347, 353 (1967)).

The "circumstances" here included Maxim's status as a probationer. "Inherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled.'" United States v. Knights, 534 U.S. 112, 119 (2001) (quoting Griffin v. Wisconsin, 483 U.S. 868, 874 (1987)). "Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." Id.

The "circumstances" here also included Maxim's signed Fourth Amendment waiver in his supervision agreement for felony probation. "While the United States Supreme Court has not yet addressed whether a probationer may waive his Fourth Amendment rights through acceptance of probationary search conditions, this Court has determined that a probationer's consent to searches constitutes a waiver of Fourth Amendment rights." State v. Purdum, 147 Idaho 206, 208, 207 P.3d 182, 184 (2009) (footnote omitted); cf. Samson v. California, 547 U.S. 843, 847 (2006) ("[A] condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment."). "[T]he scope of [a] waiver is defined by the terms employed in the condition of probation." State v. Jaskowski, 163 Idaho 257, 261, 409 P.3d 837, 841 (2018); see State v. Gawron, 112 Idaho 841, 843, 736 P.2d 1295, 1297 (1987).

For example, in Gawron, the Idaho Supreme Court held that Gawron could not claim a violation of his Fourth Amendment rights from a warrantless search of his house because his probation agreement "expressly waived his constitutional right to be free from warrantless searches." 112 Idaho at 843, 736 P.2d at 1297. Gawron's term of probation read: "That probationer does hereby agree and consent to the search of his person, automobile, real property, and any other property at any time and at any place by any law enforcement officer, peace officer, or probation officer, and does waive his constitutional right to be free from such searches." Id. at 842, 736 P.2d at 1296. Given the language of Gawron's probation term, the court found no need to apply the traditional reasonableness analysis for probation searches. Id. at 843, 736 P.2d at 1297; see Purdum, 147 Idaho at 209, 207 P.3d at 185 (explaining that, in Gawron, the "reasonableness test . . . did not apply because the probationer had 'expressly waived his constitutional right to be free from warrantless searches'"). Instead, the court affirmed the denial of Gawron's motion to suppress because "Gawron simply waived all Fourth Amendment rights relating to searches of his person or property." Jaskowski, 163 Idaho at 261, 409 P.3d at 841.

Similarly, in State v. Spencer, 139 Idaho 736, 85 P.3d 1135 (Ct. App. 2004), the court held that an individual cannot have a reasonable expectation of privacy in a location the individual knows the police can freely search at any time pursuant to a condition of probation. Id. at 739, 85 P.3d at 1138. Spencer moved in to his sister's house knowing that she had signed a consent to search her home upon being placed on probation. Id. The court held "that Spencer's expectation of privacy was neither legitimate nor reasonable" because he was "fully aware that the house was subject to a search at any time." Id.

Under Gawron and Spencer, Maxim could not have had a reasonable expectation of privacy in the apartment. Not only was Maxim, like Spencer, fully aware that his residence was "subject to a search at any time," id., it was *his* consent and waiver that opened his residence to the police.[3] Just like Gawron, Maxim "expressly waived his constitutional right to be free from warrantless searches." 112 Idaho at 843, 736 P.2d at 1297. His signed agreement of supervision stated: "I hereby waive my rights under the Fourth Amendment . . . concerning searches." (State's Ex. 2, p.1.) He also expressly "consent[ed] to the search of . . . [his] residence . . . conducted by any agent of IDOC or a law enforcement officer." (Id.)

Given these circumstances, any subjective expectation of privacy Maxim had in the apartment was not "justifiable" when "viewed objectively." Knotts, 460 U.S. at 281. Assuming Maxim subjectively maintained an expectation of privacy in his residence even after signing his supervision agreement, society is not prepared to recognize such an unrealistic privacy expectation as reasonable. See Samson, 547 U.S. at 852 (finding parolee with a parole search condition "did not have an expectation of privacy that society would recognize as legitimate"); see Spencer, 139 Idaho at 739, 85 P.3d at 1138. Maxim cannot sign an agreement "waiv[ing] [his] rights under the Fourth Amendment . . . concerning searches" and expressly "consent[ing] to the search of [his] . . . residence" and still *reasonably* expect privacy from law enforcement officers searching his residence. See Gawron, 112 Idaho at 843, 736 P.2d at 1297; Spencer, 139 Idaho at 739, 85 P.3d at 1138.

[3] As a co-resident with his girlfriend, Maxim could, at the very least, consent to a search of the common areas within the apartment, see Fernandez v. California, 571 U.S. 292, 298-307 (2014), which is where Officer Ludwig found Maxim (Defense Ex. A at 1:55-2:00).

Because Maxim did not have a reasonable expectation of privacy in the apartment, he did not have Fourth Amendment standing to challenge the search.

Maxim did not argue to the district court, and has not argued on appeal, that the search of the apartment fell outside the scope of his signed waiver—and with good reason. Both Officers Ludwig and Haustveit qualify as "law enforcement officer[s]" under any plain meaning of the phrase, and Maxim testified at the suppression hearing that the apartment was his "residence" at the time of the search. (State's Ex. 2, p.1; see Tr., p.13, L.10 – p.14, L.16.) The search thus fell within the scope of the signed supervision agreement. See Jaskowski, 163 Idaho at 261, 409 P.3d at 841 (treating a probation agreement like a contract and observing that "the court will give force and effect to the words of the contract"). Moreover, like the defendant in Gawron, Maxim "has made no allegation that his signature and acceptance of the . . . conditions of probation were involuntary or done unintelligently." 112 Idaho at 843, 736 P.2d at 1297.

The district court found "the officer's lack of knowledge" of the supervision agreement meant Maxim's Fourth Amendment waiver could not affect the Fourth Amendment standing analysis. (Tr., p.26, L.5 – p.28, L.1.) The district court cited no authority for limiting the standing analysis to the facts within the officer's knowledge, and its novel limitation contradicts decisions from the U.S. Supreme Court and Idaho's appellate courts. See, e.g., O'Connor v. Ortega, 480 U.S. 709, 718-19 (1987); State v. Vasquez, 129 Idaho 129, 132, 922 P.2d 426, 429 (Ct. App. 1996).

For example, in O'Connor, the U.S. Supreme Court relied on the fact that "the only items found by the investigators were apparently personal items" to hold that a state employee had "a reasonable expectation of privacy in his desk and file cabinets" 480 U.S.

at 718-19. Such evidence would have been out of bounds under the district court's novel approach because the investigators could not have known at the time of the search that the fruits of that search would consist of "only . . . personal items." Id.

Similarly, in Vasquez, the Idaho Court of Appeals found that the defendant did not have a reasonable expectation of privacy in a house searched by police because he was "a casual visitor." 129 Idaho at 132, 922 P.2d at 429. The officers who conducted the search could not have known the defendant's status as a casual house guest at the time of the search, however, because the defendant "entered the apartment about five minutes before the police arrived." Id. at 130, 922 P.2d at 427.

Third and fourth examples come from the line of cases addressing whether a defendant has a reasonable expectation of privacy in a rental car. In Mann, the Idaho Supreme Court held the defendant did not have a reasonable expectation in the rental car he was driving because he was not listed as an authorized driver on the rental agreement—a fact the searching officer, who never saw the rental agreement, could not have known. 162 Idaho at 42, 394 P.3d at 85. Subsequently, in a different case, the U.S. Supreme Court rejected the test adopted by the Idaho Supreme Court but not on the basis that a reasonable expectation of privacy analysis is limited to facts within the officer's knowledge. Byrd, 138 S. Ct. at 1529. On the contrary, the Court remanded the case for "further factual development" to determine whether the defendant effectively stole the car by "intentionally us[ing] a third party strawman in a calculated plan to mislead the rental company from the very outset"—a scheme that the officer who pulled the defendant over for "a possible traffic infraction" would not have known about but that could have dealt a fatal blow to the defendant's reasonable expectation of privacy in the rental car. Id. at 1529-30; see also

United States v. Wong, 334 F.3d 831, 835, 839 (9th Cir. 2003) (holding that defendant did not have Fourth Amendment standing to challenge the search of a laptop computer because, "*[a]fter the execution of the . . . warrant*, Sergeant Carmichael discovered that the laptop . . . [was] stolen property") (emphasis added).

The district court's novel limitation to information within the officer's knowledge at the time of the search not only contradicts decisions from the U.S. Supreme Court and Idaho's appellate courts, it actually contradicts its own analysis in this case. The district court found Maxim had standing to challenge the search of the apartment because of "his duration of living there." (Tr., p.26, Ls.13-18.) But the only evidence showing Maxim's "duration of living there" was Maxim's own testimony that he had lived in the apartment, "[g]ive or take, three and a half weeks." (Tr., p.7, Ls.21-23.) Nothing in the record suggests Officer Ludwig knew that Maxim had been living in the apartment for three and a half weeks at the time of the search. In fact, Officer Ludwig testified that he did not even know who Maxim was prior to the search (Tr., p.39, Ls.10-14), and Maxim testified that he failed to inform his probation officer that he lived at the apartment even though his supervision agreement required such disclosures (Tr., p.14, Ls.10-16; see State's Ex. 2, p.1). Because the U.S. Supreme Court and Idaho's appellate courts have made clear that Fourth Amendment standing is *not* conditioned on the officer's knowledge at the time of the search, the district court should have considered Maxim's Fourth Amendment waiver as part of its Fourth Amendment standing analysis.[4]

[4] The issue of whether a searching officer must know about a Fourth Amendment waiver in order for the waiver to affect the Fourth Amendment analysis is currently pending before the Idaho Supreme Court in State v. Saldivar, No. 46098, which is scheduled for oral argument on April 12, 2019.

The district court also claimed the purpose of the exclusionary rule "to curb officers' behavior" somehow supported its finding that Maxim had standing. (Tr., p.26, L.5 – p.28, L.1.) That is backwards: the exclusionary rule only enters the picture if the defendant has standing and successfully challenges the search; it does not put a thumb on the scale throughout the standing analysis. See United States v. Salvucci, 448 U.S. 83, 85 (1980) ("[D]efendants . . . may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated.").

The U.S. Supreme Court has repeatedly held that, regardless of the exclusionary rule and its purpose, a defendant must have Fourth Amendment standing to challenge an allegedly illegal search. See Rakas v. Illinois, 439 U.S. 128, 138 & n.6 (1978) (refusing to expand exclusionary rule's protection to those who do not actually have Fourth Amendment standing and citing two cases in which it had already rejected the same argument). As the Court explained in rejecting an argument similar to the district court's, "[e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights." Id. at 137. "Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." Id. Thus, "it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the [exclusionary] rule's protections." Id. at 134.

In sum, Maxim signed an agreement stating that he waived his Fourth Amendment rights concerning searches and consented to law enforcement officers searching his residence. (State's Ex. 2, p.1.) Having done so, he could not have had a *reasonable* expectation of privacy from law enforcement officers searching his residence and thus lacked Fourth Amendment standing to challenge the search of the apartment.

2. The Pat-down Search Did Not Require Suppression Because Maxim Did Not Have Standing To Challenge The Search, The Search Was Reasonable, And The Inevitable Discovery Doctrine Applied

The district court properly rejected Maxim's challenge to Officer Ludwig's pat-down search inside of the apartment. The pat-down search did not require suppression for at least three reasons:

First, Maxim did not have Fourth Amendment standing to challenge the pat-down search for the same reasons he did not have standing to challenge the search of the apartment. See Part C.1. By signing the supervision agreement, Maxim "waive[d] [his] rights under the Fourth Amendment . . . concerning searches" and expressly "consent[ed] to the search of [his] person." (State's Ex. 2, p.1.) The pat-down search was indisputably a "search of [his] person." (Id.) Having signed an agreement in which he gave up his Fourth Amendment rights and consented to a search of his person, Maxim could not have *reasonably* expected privacy from pat-down searches conducted by law enforcement officers. See Samson, 547 U.S. at 852 (finding parolee with a parole search condition "did not have an expectation of privacy that society would recognize as legitimate").

Second, the pat-down search was reasonable under the Fourth Amendment.[5] An officer can conduct a pat-down search "when, at the moment of the frisk, the officer has reason to believe that the individual he or she is investigating is 'armed and presently dangerous to the officer or others.'" State v. Bishop, 146 Idaho 804, 818, 203 P.3d 1203, 1217 (2009) (quoting Terry v. Ohio, 392 U.S. 1, 24 (1968)). Factors that "influence whether a reasonable person in the officer's position would conclude that a particular person was armed and dangerous" include "whether there were any bulges in the suspect's

[5] The state asserted this argument in the district court. (R., p.48; Tr., p.76, L.13 – p.78, L.14.)

clothing that resembled a weapon; whether the encounter took place late at night or in a high crime area; and whether the individual made threatening or furtive movements, indicated that he or she possessed a weapon, appeared nervous or agitated, appeared to be under the influence of alcohol or illegal drugs, was unwilling to cooperate, or had a reputation for being dangerous." Id. at 819, 203 P.3d at 1218. "Whether any of these considerations, taken together or by themselves, are enough to justify a *Terry* frisk depends on an analysis of the totality of the circumstances." Id.

For example, in State v. Fleenor, 133 Idaho 552, 989 P.2d 784 (Ct. App. 1999), an officer entered a residence and observed a large knife on boxes near the door and a knife sheath on the defendant's belt. Id. at 556, 989 P.2d at 788. The officer identified himself and explained to the defendant that he had to take the knife from the sheath for officer safety. Id. The defendant "became very uncooperative." Id. Given those circumstances, the Idaho Court of Appeals held a pat-down search was reasonable because the officer "possessed articulable facts that justified him in suspecting that [the defendant] was armed and presently dangerous." Id.

Here, Officer Ludwig possessed even more articulable facts that justified him suspecting that Maxim was armed and presently dangerous than the officer in Fleenor. The officer in Fleenor had reason to believe the defendant had a knife because he saw a knife sheath on the defendant's belt. Id. Officer Ludwig had reason to believe Maxim had a knife because Maxim told Officer Ludwig "that he had a knife." (Tr., p.41, Ls.3-11.) The only other fact the officer in Fleenor had justifying his pat-down search was that the defendant "became very uncooperative" and "attempted to walk away." Id. at 554, 556, 989 P.2d at 786, 788. Maxim, too, "did not cooperate" but in a manner that posed a much

greater risk to Officer Ludwig. (R., p.66.) Immediately after telling Officer Ludwig that he had a knife in his pocket, Maxim reached for his pocket, and according to Officer Ludwig's testimony, "it was clear that [Maxim] was trying to access that knife." (Tr., p.41, Ls.7-11, p.43, L.5 – p.44, L.7.) Maxim "also pulled away from the officer and began walking towards the front door." (R., p.66.) Officer Ludwig stopped Maxim from grabbing his knife and "put his hands on top of his head so [Officer Ludwig] could control his movements more." (Tr., p.41, Ls.12-18.) As Officer Ludwig and Maxim relocated down the hall "where there was a little bit more space," Maxim "continued to try to pull away from [Officer Ludwig]." (Tr., p.41, L.12 – p.42, L.1; see Defense Ex. A at 2:08-2:33.) It was at that moment, after Maxim had told Officer Ludwig that he had a knife, after Maxim had reached for his knife, and after Maxim had repeatedly tried to pull away from Officer Ludwig, that Officer Ludwig conducted a pat-down search. Even more so than the officer in Fleenor, Officer Ludwig "possessed articulable facts that justified him in suspecting that [Maxim] was armed and presently dangerous." 133 Idaho at 556, 989 P.2d at 788.

In the district court, Maxim argued that this case is indistinguishable from State v. Henage, 143 Idaho 655, 152 P.3d 16 (2007). (R., pp.36-37.) He was mistaken. In Henage, an officer conducted a pat-down search of a defendant who admitted he had a knife. 143 Idaho at 661, 152 P.3d at 22. The defendant "was not in any way acting threatening or dangerous, but indeed, according to [the officer's] testimony, was 'cooperative' and 'polite.'" Id. The officer had known the defendant for several years and testified the defendant "had 'always been cooperative and polite' with him and that he had 'never had

a problem with him.'" Id. Based on those circumstances, the Idaho Supreme Court found the officer's pat-down search violated the Fourth Amendment. Id. at 662, 152 P.3d at 23.

The only similarity between the circumstances here and the circumstance in Henage is that the Henage defendant and Maxim both admitted to having a knife. Aside from that, the cases are polar opposites: The defendant in Henage "was 'cooperative' and 'polite.'" 143 Idaho at 661, 152 P.3d at 22. Maxim "continued to try to pull away from [Officer Ludwig]." (Tr., p.42, L.1; see Defense Ex. A at 2:08-2:33.) The defendant in Henage "made no suspicious movements for his pockets or other area from which a weapon might be readily retrieved." 143 Idaho at 662, 152 P.3d at 23. Maxim "put[] his hands down towards his pants where the knife was" in a manner that made it "clear that he was trying to access that knife." (Tr., p.43, L.5 – p.44, L.7.) The officer in Henage testified that "[h]e had known [the defendant] for several years and never had a combative experience with him" and that the defendant "had 'always been cooperative and polite' with him and that he had 'never had a problem with him.'" 143 Idaho at 661, 152 P.3d at 22. Officer Ludwig had no history with Maxim to work from. (Tr., p.39, Ls.3-11.) Moreover, Officer Ludwig testified that Maxim's behavior was suspect from the beginning—specifically, Maxim hid in the locked bathroom even after the police announced themselves and then, after coming out of the bathroom, tried to "walk right past [Officer Ludwig] after closing the door." (Tr., p.43, L.5 – p.44, L.7.) In short, the very facts that the Idaho Supreme Court said were missing in Henage for the officer to conduct a permissible pat-down search were present here.

Third, as the district court found, the exclusionary rule does not apply to the pat-down search because the officers would have inevitably discovered the heroin. (R., pp.69-

70.) Under the doctrine of inevitable discovery, the exclusionary rule does not apply to evidence initially discovered unlawfully if it inevitably would have been discovered by lawful means. Stuart v. State, 136 Idaho 490, 495-97, 36 P.3d 1278, 1283-85 (2001). "[T]he inquiry should concentrate upon the *inevitability* of the discovery rather than the independence of the investigation." State v. Buterbaugh, 138 Idaho 96, 102, 57 P.3d 807, 813 (Ct. App. 2002) (emphasis in original). Thus, "a wholly independent investigation, while certainly relevant to whether discovery was inevitable, is not a prerequisite to application of the inevitable discovery exception." Id.

The doctrine of inevitable discovery applies to the pat-down search because Officer Ludwig inevitably would have arrested Maxim based on his outstanding warrant and found the heroin in a search incident to that arrest. Maxim does not dispute that he had a warrant out for his arrest at the time of the pat-down search. (Tr., p.15, L.25 – p.16, L.2.) And Officer Ludwig testified that "as part of [his] normal law enforcement duties in a situation like this" he "conduct[s] a name and date of birth inquiry" for "virtually all the individuals [he] encounter[s]" to "check to see if they have any wants, warrants, or alerts." (Tr., p.47, L.17 – p.48, L.9.) In fact, he ran warrant checks on all of the individuals found in the apartment even though he did not find heroin on any of them except Maxim. (Tr., p.48, Ls.10-16.) Thus, even without the pat-down search, Officer Ludwig would have run a warrant check on Maxim, and that warrant check indisputably would have indicated that Maxim "was currently wanted on an outstanding failure to appear warrant." (Tr., p.48, Ls.17-21.) At that point, Officer Ludwig would have been "compelled to arrest [Maxim] and bring [him] before the nearest magistrate." (Tr., p.48, Ls.22-25); see Utah v. Strieff, 136 S. Ct. 2056, 2062 (2016) ("[O]nce [the officer] discovered the warrant, he had an

obligation to arrest [the defendant].”). And Officer Ludwig inevitably would have conducted a search incident to that arrest because “[t]here is *always* a search of the person incident to their arrest.” (Tr., p.49, Ls.1-8 (emphasis added)); see Strieff, 136 S. Ct. at 2062 (“And once [the officer] was authorized to arrest [the defendant], it was undisputedly lawful to search [the defendant] as an incident of his arrest to protect [the officer]’s safety.”). Because that inevitable search incident to Maxim’s arrest would have produced the heroin, see State v. Heinen, 114 Idaho 656, 658, 759 P.2d 947, 949 (Ct. App. 1988) (“A search incident to arrest includes containers within the arrestee’s immediate control.”), the exclusionary rule does not apply to the pat-down search.

Maxim argues “there is no assurance that the officers would have actually run Mr. Maxim’s information.” (Appellant’s brief, p.16.) That is wrong. In addition to running a warrant check on Maxim, the officers ran warrant checks on the only other two individuals found in the house with Maxim—even though neither of them had heroin. (Tr., p.48, Ls.10-16.) Both of the other individuals had warrants, and both of the other individuals were arrested.[6] Put differently, this is not an alternate timeline in which the district court “substitute[ed] what the police *should* have done for what they really did or were doing.” State v. Rowland, 158 Idaho 784, 787, 352 P.3d 506, 509 (Ct. App. 2015) (emphasis in original). Running warrant checks on the individuals in the apartment was precisely “what they . . . *were* doing.” Id. (emphasis added).

[6] The officers arrested the female individual for outstanding warrants and giving false information to a police officer based on information the officers gathered from the warrant check. (Defense Ex. A at 2:00:45-2:02:45.) The officers arrested the male individual because a warrant check showed outstanding warrants. (Defense Ex. A at 1:30:30-1:31:32, 1:33:48-1:34:05, 1:37:18-1:37:40.)

And, even setting aside Officer Ludwig's routine practice of running warrant checks, the officers had good reason to run warrant checks on the individuals in the apartment, including Maxim. The first individual they encountered in the apartment admitted that it was not her apartment. (Tr., p.36, Ls.5-15.) Although there was an unresolved factual dispute over whether Maxim told Officer Ludwig that it "was" or "wasn't" his apartment (see R., p.66), "[w]hen the owner was finally contacted, the owner stated she was not aware of Mr. Maxim being in the home" (R., p.70). Because Officer Ludwig has a practice of running warrant checks on individuals he encounters and because the apartment owner told him she did not know people were in her home (see Defense Ex. A at 33:15-33:22 ("How many people should be in your house right now? Zero.")), he inevitably would have run a warrant check on Maxim even if he had not first found heroin in Maxim's possession. That check would have led Officer Ludwig to the heroin on Maxim, and the exclusionary rule thus does not apply to the pat-down search.

CONCLUSION

The state respectfully requests this Court affirm the judgment of conviction issued after Maxim entered a conditional guilty plea to felony possession of a controlled substance.

DATED this 7th day of March, 2019.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of March, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

JN/ah