12-20-2018

State v. Maxim Appellant's Brief Dckt. 45950

Electronically Filed
12/20/2018 9:30 AM
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 NO. CR01-17-41727**
v.	)	
	)	
ANDREW CHARLES MAXIM,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE PETER BARTON
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE CASE

Nature of the Case

Andrew Maxim contends the district court erroneously denied his motion to suppress when it improperly speculated about what the officers might have otherwise done in this case had they not unlawfully entered the apartment without a warrant and unlawfully searched Mr. Maxim's pocket. By engaging in that sort of speculative analysis, the district court did precisely what the Idaho Supreme Court held to be improper in *State v. Downing*, 163 Idaho 26, ___, 407 P.3d 1285, 1290-91 (2017), which was issued mere weeks before the district court's decision in this case. As such, this Court should reverse the district court's decision to deny Mr. Maxim's motion to suppress under the inevitable discovery doctrine.

Statement of the Facts and Course of Proceedings

Officer Ludwig and Officer Haustveit decided to conduct what they described as a "welfare" check on the three children who lived with Brina Harris when the manager of Ms. Harris' apartment complex reported that, a day or two before, some other tenants had told her Ms. Harris had heroin in her apartment,. (Tr., p.32, Ls.1-25 (Officer Ludwig testifying at a hearing on Mr. Maxim's motion to suppress); R., p.65 (the district court's findings of fact on the motion).) They decided to conduct that check in the middle of the day even though they knew it was a school day and that at least one of the children was of school age. (Tr., p.53, L.21 - p.54, L.2; *see generally* Defense Exhibit A.)[1] The officers did not get a warrant to authorize their

[1] Defense Exhibit A was admitted at the hearing on Mr. Maxim's motion, and it contains the relevant portion of Officer Ludwig's body camera (the portion showing the entry into the apartment and the search of Mr. Maxim's person). Mr. Maxim also attached the complete two and one-half hour video to his memorandum in support of his motion as "Exhibit 1." (R., p.35 n.1; *see* R., p.67 (the district court indicating it had viewed the full video).) A motion to augment the record with "Defense Exhibit 1" has been filed contemporaneously with this brief.

intended search of the apartment. (R., p.65.)

Mr. Maxim testified that Ms. Harris was his girlfriend, and he was living with her at that time. (Tr., p.7, Ls.11-23; *accord* Defense Exhibit 1, ~1:17:45 (Ms. Harris telling Officer Ludwig she was in a relationship with Mr. Maxim at the time).) He explained that, on the day in question, some of his and Ms. Harris' mutual friends were with him at the apartment. (Tr., p.8, Ls.20-24; *accord* Defense Exhibit 1, ~1:18:35 (Ms. Harris telling officers that Mr. Maxim and two others had been at the apartment when she had left that day).) Officer Ludwig testified that, when the officers arrived at the apartment complex, the manager met them and told them that there were some people at Ms. Harris' apartment, but she was not sure who they were. (Tr., p.54, Ls.12-14.)

When Officer Ludwig knocked on the apartment's door, it swung open, and he announced his presence. (Tr., p.34, Ls.18-21, p.35, Ls.14-15.) He testified he could hear footsteps hurrying away from the door. (Tr., p.35, Ls.14-17; *but see* Defense Exhibit A, ~0:30.) Officer Ludwig decided to enter the apartment "just enough to get a look down that hallway." (Tr., p.35, Ls.22-23.) As he did so, he met a woman who said her name was Kayla Rogers, and she told Officer Ludwig that the apartment belonged to a friend of hers. (Tr., p.35, Ls.23-25; Defense Exhibit A, ~0:45.) At Officer Ludwig's request, Ms. Rogers stepped outside with Officer Haustveit. (Tr., p.36, Ls.1-2; Defense Exhibit A, ~0:50.)

Officer Ludwig continued deeper into the apartment, walking down the hallway, past a closed door, and casually inspecting a bedroom. (Tr., p.36, Ls.19-21; *see* Defense Exhibit A, ~0:55.) He testified he did so only so he could find out "who the responsible party was and kind of what was going on." (Tr., p.36, Ls.6-8.) As he came back out of the bedroom, he tried to open the closed door, but it was locked. (Defense Exhibit A ~1:35; Tr., p.36, Ls.22-24.) He

knocked and received no answer. (Defense Exhibit A, ~1:35.) The officer thought that door led to another bedroom, and he went back to the front door and asked Ms. Rogers whose room it was. (Tr., p.38, Ls.3-6; Defense Exhibit A, ~1:50.) That room was ultimately revealed to be a bathroom. (*See* Tr., p.40, L.9.)

As Officer Ludwig was talking with Ms. Rogers, Mr. Maxim came out of the bathroom and closed the door behind him. (Tr., p.38, Ls.7-8.) Officer Ludwig told Mr. Maxim to keep his hands up. (Defense Exhibit A, ~1:55; Tr., p.40, L.24 - p.41, L.2.) Mr. Maxim then said something to the officer, though there was some debate as to what, exactly, he said. (R., p.66 (the district court noting the dispute on this point).) Defense counsel argued he thought the video showed Mr. Maxim saying, "This *is* my house." (Tr., p.64, Ls.10-12 (emphasis added).) Officer Ludwig testified he thought Mr. Maxim had said: "This *isn't* my house. It's my girlfriend's house." (Tr., p.58, Ls.16-17 (emphasis added).) Mr. Maxim testified he did not think the officer's recollection was correct, but did not remember what, exactly, he had said.[2] (Tr., p.12, L.16 - p.13, L.5.) Unfortunately, the audio at that point on the video is not particularly clear. (*See* Defense Exhibit A, ~2:00.) The district court acknowledged the dispute on this point, but it did not make a finding one way or the other. (*See* R., p.66.)

At any rate, Officer Ludwig then asked Mr. Maxim if he had any weapons or illegal items on his person. (Tr., p.41, Ls.3-6.) Mr. Maxim began feeling his pockets and told the officer he had a pocket knife. (Defense Exhibit A, ~2:05; Tr., p.41, Ls.7-8.) Officer Ludwig ordered Mr. Maxim to not to reach into his pockets and to put his hands on his head instead. (Defense

[2] Mr. Maxim testified that he recalled also telling the officer he could not search the house without a warrant. (Tr., p.12, L.22 - p.13, L.2.) Officer Ludwig agreed that Mr. Maxim had told him that, though that statement came after the search of Mr. Maxim. (Tr., p.58, Ls.18-24; *see* Defense Exhibit 1, ~6:00.)

Exhibit A, ~2:10; Tr., p.41, Ls.12-13.) The officer then put one of his hands on Mr. Maxim's so he could control Mr. Maxim's movements. (Tr., p.41, Ls.13-14; *see* Defense Exhibit A; ~2:15.) As that was happening, Mr. Maxim said he wanted to go outside and started moving toward the front door. (Defense Exhibit A, ~2:15; *see* Tr., p.57, Ls.5-9.) Though he did not mention it to Mr. Maxim, Officer Ludwig testified he actually wanted "to get him to an area outside where there was a little bit more space." (Tr., p.41, Ls.14-18.)

Officer Ludwig testified he did not want to put his hands inside Mr. Maxim's pockets because he was afraid the knife might be open. (Tr., p.42, Ls.5-7.) As such, as walked down the hallway, Officer Ludwig "began to manipulate – I could feel objects in his right front pocket," and he "manipulate[d] the pockets so that I could kind of pour its contents out without reaching my hands in." (Tr., p.42, Ls.3-9.)

Once they reached the front room, Mr. Maxim turned toward the front door, where Officer Haustveit and Ms. Rogers were still waiting, but Officer Ludwig pulled him up short and told him he had to stand still while he got the knife out of Mr. Maxim's pocket. (Defense Exhibit A, ~2:25; Tr., p.41, Ls.19-25.) The district court concluded that Mr. Maxim was not cooperative with the officer during that time. (R., p.66.)

The officer ultimately got the knife out of Mr. Maxim's pocket and tossed it on a nearby table. (Defense Exhibit A, ~2:35; Tr., p.42, Ls.12-13, 21-23.) The officer also got a small, closed container out of Mr. Maxim's pocket. (Defense Exhibit A, ~2:45; Tr., p.42, Ls.13-14.) The officer testified that, in his experience, people sometimes store drugs in such containers. (Tr., p.42, Ls.14-18.) As such, he asked Mr. Maxim how much heroin was inside the container.[3]

[3] Officer Ludwig did not read Mr. Maxim his rights until nearly half an hour later. (Defense Exhibit 1, ~36:20.)

(Defense Exhibit A, ~2:45; Tr., p.42, Ls.17-18.) Mr. Maxim replied that it was not his. (Defense Exhibit A, ~2:50.) The officer then put Mr. Maxim in handcuffs and moved him out onto the porch. (Defense Exhibit A, ~3:00; Tr., p.42, Ls.21-24.) Officer Ludwig went back down the hall to check the bathroom door again, and then he opened the container and searched its contents. (Defense Exhibit A, ~3:25.) Inside, he found items ultimately identified as heroin. (*See* Defense Exhibit A, ~3:30; R., p.66.)

After searching the closed container, the officer asked Mr. Maxim for his identification and ran that information through dispatch. (Tr., p.47, L.21 - p.48, L.16.) The return revealed there was a warrant out for Mr. Maxim's arrest. (Tr., p.48, Ls.19-21.) Mr. Maxim also subsequently told Officer Ludwig that he was on probation. (Defense Exhibit 1, ~25:50.) The State provided a copy of his probation agreement, which included a Fourth Amendment waiver. (R., pp.51-59.) Officer Ludwig testified that the searches of the apartment and Mr. Maxim's pocket were not conducted based on the probation waiver because he did not know Mr. Maxim was on probation at the time. (Tr., p.39, Ls.12-17, p.49, Ls.9-13.)

Officer Ludwig was subsequently able to use Mr. Maxim's cell phone to talk to Ms. Harris, who had been trying to call Mr. Maxim to ask him to pick up one of her children. (Defense Exhibit 1, ~31:15.) Officer Ludwig explained what was happening and asked her to return to the apartment. (Defense Exhibit 1, ~31:50.) When Ms. Harris ultimately arrived home, Officer Ludwig "advised her of the situation and what had transpired, and then voiced to her some of our potential concerns" that something else was being hidden in her apartment. (Tr., p.46, Ls.14-16, p.47, Ls.9-13; Defense Exhibit 1, ~1:11:45.) While Officer Ludwig was talking with Ms. Harris, another officer ran his dog around her car and subsequently found needles in her purse. (Defense Exhibit 1, ~1:13:30; 1:20:00.) After she heard the about officers'

concerns and was confronted with the needles in her purse, Ms. Harris consented to a search of her apartment. (Defense Exhibit 1, ~1:20:00; Tr., p.46, Ls.16-18.) The officers searched the apartment, and found the third person hiding in the shower. (Tr., p.46, Ls.21-24.)

At the hearing on his motion to suppress, the prosecutor argued that, because Mr. Maxim had said he did not live at the apartment, he had no standing[4] to challenge the search of the apartment. (Tr., p.22, Ls.8-14.) She also argued that, if Mr. Maxim did live at the apartment, he was categorically barred from objecting to the search of the apartment, as well as to the search of his person, because of his probation waiver. (Tr., p.22, L.15 - p.23, L.4.) The district court rejected the State's arguments, concluding instead that Mr. Maxim had made a sufficient showing of standing, and so, the burden was on the State to justify the warrantless searches. (Tr., p.26, L.5 - p.27, L.25.)

To try to meet that burden, the prosecutor argued that the warrantless entry into the apartment was justified under the officers' "community caretaking" function. (Tr., p.25, Ls.4-10, R., pp.47-48.) Defense counsel responded by noting that the community caretaker doctrine existed as a result of officers' interactions with automobiles, and so, explained it does not apply to residences. (Tr., p.62, Ls.2-23 (citing *State v. Reynolds*, 146 Idaho 466 (Ct. App. 2008)); R., pp.35-36.) Rather, defense counsel argued, the State would have to show exigent circumstances in order to justify the officer's warrantless entry into the apartment, and that the evidence in this case revealed no such circumstances. (Tr., p.62, L.21 - p.66, L.22.)

[4] The term "standing" is a shorthand term of art which is used to refer to whether the defendant had a sufficient privacy interest in the property seized or searched, such that he is entitled to suppression of the evidence found there. *State v. Hanson*, 142 Idaho 711, 716 n.2 (Ct. App. 2006).

The prosecutor also argued the search of Mr. Maxim's pocket was justified as a weapons frisk based on the fact that Mr. Maxim had admitted he had a knife, he had not immediately come out of the bathroom, and he had not been cooperative with the officer's instructions. (Tr., p.77, L.1 - p.78, L.14.) Defense counsel responded that those facts did not show that Mr. Maxim presented a present danger to the officers, and so, those facts did not justify the search of Mr. Maxim's pocket. (Tr., p.67, L.18 - p.68, L.7; Tr., p.70, Ls.2-21; R., pp.36-37.) To that point, he provided the district court and prosecutor with copies of the opinion in *Downing*, which had been issued the week before the hearing, and defense counsel explained, in that case, the Supreme Court had held there was no justification for a weapons frisk under similar circumstances. (Tr., p.68, L.8 - p.69, L.18.)

Finally, the prosecutor argued that, even if those two searches were unlawful, the evidence on Mr. Maxim's would have been inevitably discovered. (Tr., p.79, Ls.11-12.) The prosecutor asserted that, had the officers not entered the apartment, they still would have stayed on scene because they had not completed their welfare check. (Tr., p.79, Ls.12-16.) As such, she contended the officers would have been there when Ms. Harris returned home, and the prosecutor speculated Ms. Harris would still have given her consent for the officers to search the apartment. (Tr., p.79, Ls.16-17.) Thereafter, the prosecutor speculated, the officers would have found Mr. Maxim in the bathroom, gotten his identification, learned about the warrant, and thus, lawfully found the heroin still in his pocket as part of a search incident to an arrest on that warrant. (Tr., p.79, L.18 - p.80, L.13.) Defense counsel responded that the inevitable discovery exception did not apply because there was no separate, untainted line of investigation actually undertaken by the officers in this case. (Tr., p.71, L.13 - p.72, L.14.)

The district court decided that the inevitable discovery argument resolved the motion to suppress, and so, only discussed that justification. (R., p.70.) The district court concluded that, "[a]s shown by their later actions, the officers were in the process of locating and contacting the owner [Ms. Harris] by telephone." (R., p.69.) It speculated that, "[i]f she had been contacted before Mr. Maxim had been found and arrested, it is likely she still would have permitted the police to enter and search the apartment before permitting her child to enter." (R., p.70.) It surmised that, during that search, the officers would not have "ignored a locked bathroom," and upon finding Mr. Maxim inside, "the police would have run his name through their system and found the warrant for his arrest. He would have been arrested and searched. And the heroin discovered." (R., p.70.) As a result, it denied Mr. Maxim's motion to suppress the heroin. (R., p.70.)

Mr. Maxim subsequently entered a conditional guilty plea, whereby he pled guilty to possession of a controlled substance and reserved his right to appeal the district court's decision on his motion to suppress. (Tr., p.86, L.13 - p.88, L.15.) The district court ultimately imposed and executed a unified sentence of five years, with two years fixed. (R., pp.82-84.) Mr. Maxim filed a notice of appeal timely from the judgment of conviction. (R., pp.88-89.)

ISSUE

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

ARGUMENT

The District Court's Speculative Analysis Under The Inevitable Discovery Doctrine Is Directly Contrary To Clear Idaho Supreme Court Precedent

A. Standard Of Review

When the appellate courts review a decision to deny a motion to suppress, the standard of review is usually bifurcated, with the appellate court will defer to the district court's factual findings, if those findings are not clearly erroneous, but it will freely review the district court's application of the law to those facts. *Downing*, 407 P.3d at 1288. There is, however, a limited exception in that regard – where the appellate court has exactly the same evidence that the district court considered, the appellate court freely reviews and weighs the evidence. *State v. Andersen*, ___ P.3d ___, 2018 WL 5316979, *3 (Oct. 29, 2018) (quoting *State v. Lankford*, 162 Idaho 477, 492 (2017)).

B. The District Court's Speculative Analysis Is The Same Sort Of Analysis The Idaho Supreme Court And The Idaho Court Of Appeals Have Repeatedly Rejected Because Using It Would Allow The Inevitable Discovery Exception To Swallow The Exclusionary Rule

Five weeks before the district court ruled on Mr. Maxim's motion to suppress, the Idaho Supreme Court issued an opinion addressing the inevitable discovery doctrine in a case which arose out of the same judicial district as Mr. Maxim's case, and which involved a very similar fact pattern. *Downing*, 407 P.3d at 1287. Defense counsel actually provided the district court with a copy of that opinion in advance of the evidentiary hearing. (Tr., p.68, Ls.8-9.) And yet, the district court did not mention *Downing* at all in its decision. (*See generally* R., pp.65-70.) More troubling, it used the very analysis the *Downing* Court reaffirmed is improper to deny Mr. Maxim's motion.

In that case, Mr. Downing (like Mr. Maxim) was at a friend's house when officers arrived. *Id*. at 1287. Those officers intended to perform a probation check on the friend. *Id*. Mr. Downing (like Mr. Maxim) tried to hide when the probation officers initially entered the house. *Id*. One officer instructed Mr. Downing and the friend to sit on a couch and (like Officer Ludwig) told them to keep their hands visible. *Id*. Mr. Downing or his friend told the officers there was a third person in the house, and the second officer went to find that person. *Id*. During his search for that other person, the second officer saw drug paraphernalia in the garage. *Id*.

Meanwhile, Mr. Downing was mostly cooperative with the first officer, though his behavior did begin to become erratic. *Id*. For example, as he stood up and (like Mr. Maxim) began walking in the direction of the door. *Id*. The first officer (like Officer Ludwig) repeated his instructions for Mr. Downing to sit down and keep his hands visible. *Id*. After the second officer finished his search, the probation officers called for back up from the city police department. *Id*. While waiting for the city officer to arrive, the first officer (like Officer Ludwig) asked Mr. Downing, without providing a *Miranda* warning,[5] whether he had been smoking methamphetamine in the garage, and Mr. Downing admitted he had. *Id.*

When the city officer arrived, he (like Officer Ludwig) explained he felt uneasy because he did not know "who was who" in the apartment. *Id.* In order to assuage those general concerns, the city officer read Mr. Downing his rights and (like Officer Ludwig) frisked Mr. Downing for weapons. *Id*. at 1288. During that frisk, the city officer (like Officer Ludwig) found an object in Mr. Downing's pocket which he admitted contained methamphetamine. *Id*. at 1288.

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The Idaho Supreme Court noted that the district court had determined Mr. Downing's pre-*Miranda* statements were inadmissible. *Id*. at 1288, 1291. The Supreme Court then held that the frisk of Mr. Downing's person was unlawful because the city officer's general unease regarding the confusion in the apartment was not a sufficient basis to conclude Mr. Downing was presently dangerous. *Id.* at 1289. It also held the post-*Miranda* statements were unlawfully obtained because the questioning was not sufficiently attenuated from the unlawful search. *Id*. at 1289-90. As such, the Idaho Supreme Court concluded all the evidence, except the paraphernalia found in the garage, was subject to the exclusionary rule. *See id*. at 1291.

The *Downing* Court then considered whether the inevitable discovery exception should prevent the exclusion of that evidence. *Id*. It expressly held that "[t]he inevitable discovery doctrine does not permit us to speculate on the course of the action the investigation could have taken in the absence of pre-*Miranda* statements, an unlawful pat-search and subsequently tainted admissions—even if the alternate course likely would have yielded the evidence." *Downing*, 407 P.3d at 1291. In other words, the *Downing* Court reaffirmed, the inevitable discovery doctrine does not allow the courts to "'substitut[e] what the police should have done for what they really did,'" because doing so would allow the inevitable discovery expectation to swallow the exclusionary rule. *Id*. (quoting *State v. Holman*, 109 Idaho 382, 392 (Ct. App. 1985) (in turn quoting *State v. Cook*, 106 Idaho 209, 225-26 (Ct. App. 1984))).

As a result, the *Downing* Court's analysis under the inevitable discovery exception focused on what else the officers had actually done during the encounter – searched the garage – to see if that other, untainted line of investigation furnished a lawful basis for the search of Mr. Downing's person. *Id*. at 1290-91; *accord State v. Liechty*, 152 Idaho 163, 170 (Ct. App. 2011) ("the issue before us is whether an additional line of investigation would have revealed the

methamphetamine, not whether the evidence would have been discovered had the encounter between the officer and Liechty not occurred while the officer was [unlawfully] standing in the open passenger doorway. Indeed, we decline to predict how such a conversation would have unfolded."). However, the *Downing* Court ultimately concluded that the mere presence of paraphernalia in the garage did not provide a sufficient alternate basis to arrest, and thus, search, Mr. Downing. *Downing*, 407 P.3d at 1291. Therefore, the Supreme Court held, "[t]he inevitable discovery doctrine does not save the drug evidence from exclusion." *Id*. at 1290.

In Mr. Maxim's case, the officers unlawfully entered and searched the apartment and, like the city officer in *Downing*, unlawfully searched Mr. Maxim's person.[6] The only potential alternative line of investigation in this case was the officers contacting Ms. Harris and getting her consent to search the apartment. (*See* R., p.69.) However, Defense Exhibit 1 shows that Officer Ludwig did not begin that part of the investigation until after unlawfully searching the apartment and Mr. Maxim's person. In fact, Defense Exhibit 1 clearly shows that Officer Ludwig used Mr. Maxim's cell phone to contact Ms. Harris. (Defense Exhibit 1, ~31:15.) As such, the district court's determination that the officers were "in the process of locating and contacting the owner [Ms. Harris] by telephone" (R., p.69) was clearly erroneous – the record is clear that the attempt to contact Ms. Harris did not begin until after the unlawful searches and was part of the same, tainted line of investigation. Since there was no *alternative* line of investigation, the inevitable discovery doctrine does not apply in this case. *Liechty*, 152 Idaho at 170 ("The record

[6] Since the inevitable discovery doctrine is an exception to the exclusionary rule, and since the exclusionary rule is a judicial remedy that is applied when there has been an unlawful search, *State v. Rowland*, 158 Idaho 784, 786-87 (Ct. App. 2015), the fact that the district court resolved Mr. Maxim's motion to suppress by using the inevitable discovery doctrine means, even though it did not specifically address the legality of the searches, it necessarily presumed those searches were unlawful.

does not disclose any additional line of investigation and, as a result, the inevitable discovery doctrine does not apply.").

And even if that were a sufficiently-alternative line of investigation, Officer Ludwig actually brought the taint into that alternative line of investigation, as he expressly testified that it was only after he had told Ms. Harris what he had (unlawfully) found in the apartment that she consented to a search of her home. (Tr., p.46, Ls.14-16, p.47, Ls.9-13; *see* Defense Exhibit 1, ~1:11:45.) Thus, unlike *Downing*, there were no untainted actions actually undertaken by the officers which would have justified either the entry into the apartment or the search of Mr. Maxim's person. That means the inevitable discovery doctrine was even less applicable in this case than it was in *Downing*.

In reaching the contrary conclusion and applying the inevitable discovery exception, the district court conducted the very sort of speculative analysis the *Downing* Court expressly reaffirmed to be improper. Specifically, the district court hypothesized an alternate timeline in which the officers would not have unlawfully entered the apartment or unlawfully searched Mr. Maxim, but instead, would have engaged in a series of lawful actions, through which, they could have, potentially, found the drugs on Mr. Maxim's person. (R., pp.68-70.) Besides being contrary to Idaho Supreme Court precedent, that speculative analysis is fatally flawed because, at each step of that hypothetical timeline, there are numerous other ways the encounter could have unfolded, and in many of those alternatives, the evidence likely would not have been discovered. Because such alternatives are possible in the hypothetical alternate timeline, it is impossible to say the evidence in this case actually would have *inevitably* been discovered in that alternate timeline.

For example, the district court speculated that, had the officers not actually entered the apartment, they would have waited outside the apartment until Ms. Harris returned, at which point, they would have gotten her consent to search the apartment. (R., pp.69-70.) However, the district court did not mention the fact that the officers only got Ms. Harris' consent *after* they told her what they had already (unlawfully) found, told her what they were concerned could still be concealed inside the apartment, and confronted her with the needles they had found in her purse. (*Compare* R., pp.69-70; *with* Tr., p.46, Ls.14-18, p.47, Ls.9-13 *and* Defense Exhibit 1, ~1:20:00.) The officers would not have had any of that information in the alternative timeline. There is no guarantee that Ms. Harris would have actually consented to the officers searching her home without being confronted with that information. She could just as easily have stood on her rights at that point. *Liechty*, 152 Idaho at 170 (refusing "to predict how such a conversation would have unfolded" because that was improper analysis under the inevitable discovery exception). If she did not consent to their search, the officers could not have entered the apartment, and so, would not have found Mr. Maxim, and thus, would not have found the drugs.

The district court's next speculation – that, upon searching the apartment, the officers would have found Mr. Maxim still locked inside the bathroom (R., p.70) – is problematic because it assumes that Mr. Maxim would have stayed in the bathroom for however long it took Ms. Harris to return home and the officers to enter the apartment. Since, in the district court's alternate timeline, the officers would not have entered the apartment during that interim, Mr. Maxim could have just as easily come out of the bathroom and been found in one of the bedrooms or the kitchen when the officers ultimately entered the apartment. Thus, one of the purported justifications for the weapons frisk would not have existed. (*See* Tr., p.77, L.1 - p.78,

L.14.) As such, that reduces the possibility that the officers would have actually searched Mr. Maxim in the alternate timeline.

To that point, the district court presumed that, upon finding Mr. Maxim, the officers would have probably obtained Mr. Maxim's identification, run that information through dispatch, and found the arrest warrant. (R., p.70.) However, as noted above, the officers in the alternate timeline could just have easily encountered Mr. Maxim in less suspicious circumstances, and that means there is no assurance that the officers would have actually run Mr. Maxim's information. After all, Officer Ludwig implicitly admitted he does not run *every* person's information during an encounter. (Tr., p.47, Ls.21-22 ("For *virtually* all the individuals I encounter, I will conduct a name and date of birth inquiry . . .") (emphasis added); *see* Defense Exhibit 1, ~1:24:25 (Officer Ludwig encountering several of Ms. Harris' neighbors and not running their information).) Besides, likely as that particular assumption might be, *Downing* made it clear that the inevitable discovery exception does not turn on the likelihood that the officers would actually engage in proper steps in the hypothetical alternative timeline. *Downing*, 407 P.3d at 1291.

Finally, the district court speculated that, upon arresting Mr. Maxim, the officers would have found the drugs in his pocket during a search incident to his arrest. (R., p.69.) That, of course, assumes that, during the interim, Mr. Maxim would not have taken the container out of his pocket or given it to one of the other people in the apartment. As such, just because the officers might have been able to search Mr. Maxim's person in the district court's alternate timeline, that does not mean they would have necessarily found the drugs during such a search.

The fact that that numerous such possibilities could unfold in a hypothetical alternate timeline actually proves that the Idaho Supreme Court's concern that such rampant speculation

would cause the exception to swallow the rule is legitimate. *See Downing*, 407 P.3d at 1290-91. As the Court of Appeals has long since explained:

> In any case where an illegal search had been conducted, the state would be invited to show that if the police had not searched illegally, but instead, had done whatever was necessary to make the search legal (e.g., obtain a warrant or secure additional information to establish reasonable cause), the evidence in question would have been obtained. As noted in *Griffin*,[7] these types of showings would as a practical matter be beyond judicial review and would tend in practice to emasculate the search warrant requirement of the Fourth Amendment.

Cook, 106 Idaho at 225-26 (Burnet, J., with whom Walters, C.J., joined, specially concurring) (internal quotation omitted, capitalization altered).

The Court of Appeals' decision in *Rowland*, upon which the district court relied (R., pp.68-70), actually reinforces that understanding of the inevitable discovery doctrine. In *Rowland*, the officers executed a lawful search warrant for a home and found various incriminating items on the premises. *State v. Rowland*, 158 Idaho 784, 785 (Ct. App. 2015). Mr. Rowland did not object to the search of the premises; rather, he objected to the contemporaneous search of his person, which the Court of Appeals agreed was unlawful. *Id*. However, specifically because the officers had actually, already engaged in a lawful search of the premises, and specifically because the evidence found during the legal search established probable cause to arrest Mr. Rowland, the Court of Appeals held the drugs on Mr. Rowland's person would have been discovered in a search incident to the arrest that was already, actually going to happen because of the untainted portion of the investigation that actually took place. *Id*. In reaching that conclusion, *Rowland* reiterated that, while assessing the inevitable discovery doctrine, the courts are not allowed to speculate about an alternative line of investigation that did not actually occur. *Id*. (reaffirming that "the inevitable discovery doctrine was never intended to

[7] *United States v. Griffin*, 502 F.2d 959 (6th Cir. 1974), *cert. denied*.

swallow the exclusionary rule by substituting what the police *should* have done for what they really did or were doing") (emphasis from original)). As such, the district court's speculative analysis in this case is not appropriate under *Rowland* either.

In this case, unlike *Rowland*, there was no untainted, alternative line of investigation. All the other aspects of the investigation the officers actually conducted in this case either began after, or were impacted by, Officer Ludwig's unlawful actions. As such, the inevitable discovery doctrine should not have saved the unlawfully-discovered evidence in this case. *Downing*, 407 P.3d at 1290-91. Since the district court's decision to the contrary was based on the sort of speculative analysis the Idaho Supreme Court had reaffirmed was improper mere weeks before, the district court's decision in that regard should be reversed.

CONCLUSION

Mr. Maxim respectfully requests this Court reverse the district court's order denying his motion to suppress under the inevitable discovery doctrine.

DATED this 20th day of December, 2018.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of December, 2018, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BRD/eas