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12/28/2018 3:24 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 46098**
Plaintiff-Appellant,	)	
	)	**Ada County Case No.**
v.	)	**CR01-2017-49307**
	)	
ISAAC LYLE SALDIVAR,	)	
	)	
Defendant-Respondent.	)	
	)	

REPLY 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 MELISSA MOODY
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

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

KENNETH K. JORGENSEN
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-APPELLANT

BEN P. McGREEVY
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-RESPONDENT

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I.
The District Court Erred By Concluding That Saldivar Retained A Privacy Right Despite His Parole Status And Waiver Of His Rights Against Police Searches

A. Introduction

On appeal the state contends Saldivar failed to show that the search in question infringed upon his reduced expectation of privacy as a parolee. (Appellant's brief, pp. 4-10.) Saldivar responds that he did have a privacy right despite his reduced expectation, that this issue is therefore about the reasonableness of the search, and that the search is rendered unreasonable by the officer's lack of knowledge that Saldivar had waived his Fourth Amendment rights against suspicionless, warrantless searches. (Respondent's brief, pp. 11-19.) Saldivar's argument, and the district court's decision, fail because a search within the scope of Saldivar's parole Fourth Amendment waiver did not violate Saldivar's Fourth Amendment rights.

B. Because Of His Parole Waiver, Saldivar Did Not Have A Subjective Privacy Interest Society Was Willing To Recognize As Reasonable

Although "no single rubric definitively resolves which expectations of privacy are entitled to protection," some intrusion on a property right or privacy interest is required before the Fourth Amendment has application. Carpenter v. United States, ___ U.S. ___, 138 S. Ct. 2206, 2213-14 (2018) (determining there is an expectation of privacy "in the whole" of one's "physical movements"). In Samson v. California, 547 U.S. 843, 852 (2006), the Supreme Court of the United States examined "the totality of the circumstances pertaining to petitioner's status as a parolee, an established variation on imprisonment, including the plain terms of the parole search condition," and concluded Samson "did not

have an expectation of privacy that society would recognize as legitimate." Although the Court clearly did not hold that all parole searches are necessarily reasonable, it did hold that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Id. at 857. "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." Grady v. North Carolina, ___ U.S. ___, 135 S. Ct. 1368, 1371 (2015) (citing Samson, 547 U.S. 843).

Saldivar consented to searches of his person and waived his "rights under the Fourth Amendment and the Idaho constitution concerning searches" as part of his parole agreement. (State's Exhibit 1.) The district court held that parole conditions regarding searches are "only valid if … law enforcement officers [know] about [them] before conducting the search." (R., p. 120.) The district court erred because the officers' ignorance of the parole condition did not re-confer upon Saldivar the waived Fourth Amendment rights; the officers' actions, knowingly or otherwise, did not intrude upon Saldivar's rights because he waived those rights. (Appellant's brief, pp. 4-10.)

On appeal Saldivar first argues the state misunderstands the cases it relies on, and that those cases "largely do not address standing." (Respondent's brief, pp. 13-16 (capitalization altered, underlining omitted).) The Court can read the cases (and the state's brief) for itself and determine what those cases say about reduced privacy interests and the significance of a specific waiver of search and seizure rights. Under any standard a search that did not intrude upon privacy rights, because those privacy rights were waived as a condition of parole, is not a Fourth Amendment violation.

Saldivar next argues he "had the requisite legitimate expectation of privacy to challenge the search, because he had a subjective expectation of privacy that society was willing to recognize as reasonable." (Respondent's brief, pp. 17-19.) Review of the applicable law shows that this argument is likewise without merit.

A parolee's "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." Riley v. California, ___ U.S. ___, 134 S. Ct. 2473, 2488 (2014) (discussing the diminished privacy of an arrestee). Therefore, not every search of a person with a reduced expectation of privacy is acceptable. Id. Thus, "when privacy-related concerns are weighty enough a search may require a warrant, notwithstanding the diminished expectations of privacy of the [parolee]." Id. (internal quotations omitted). For example, although an arrestee has a reduced expectation of privacy, such would not justify a "top-to-bottom search of [an arrestee's] house." Id.

Here there are no privacy concerns weighty enough to require a warrant or any exception thereto. Saldivar, in his parole agreement, "consent[ed] to the search of [his] person" by "any agent of IDOC or a law enforcement officer." (State's Exhibit 1.) He further "[waived his] rights under the Fourth Amendment and the Idaho constitution concerning searches." (Id.) A search of Saldivar by a parole officer or law enforcement officer aware of this parole condition under the circumstances of this case (parolee found at the scene of a recent shooting) would be the epitome of a proper search. That the officers who in fact conducted the search were not aware of the parole condition did not make any privacy or other reasonableness concerns "weighty enough" to require a warrant or a warrant exception.

Saldivar argues "there is no question that Mr. Saldivar had a subjective expectation of privacy in his own person." (Appellant's brief, p. 17.) This statement, however, merely begs the question of whether the search in this case invaded any such expectation of privacy. Prisoners may be subjected to strip and body cavity searches if such are pursuant to "reasonable search policies to detect and deter the possession of contraband in their facilities." Florence v. Bd. of Chosen Freeholders of Cty. of Burlington, 566 U.S. 318, 328 (2012). See also Hudson v. Palmer, 468 U.S. 517, 526 (1984) ("society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell"). "'[P]arole is an established variation on imprisonment of convicted criminals.'" Samson, 547 U.S. at 850 (quoting Morrissey v. Brewer, 408 U.S. 471, 477 (1972)). Saldivar had a *reduced* expectation of privacy. The question under the facts of this case is whether the officers' frisk for a gun invaded those reduced privacy rights. Because Saldivar consented to and waived rights against far more intrusive searches than a mere pat-down for weapons, the frisk did not intrude upon Saldivar's reduced expectation of privacy.

Saldivar also relies upon Moreno v. Baca, 431 F.3d 633 (9th Cir. 2005), and State v. Donaldson, 108 A.3d 500, 506 (Md. App. 2015), for the proposition that whether a search invades a person's privacy depends on the officer's knowledge of the person's parole status, reasoning that a search generally may not be justified by knowledge gained after the search. (Respondent's brief, pp., 17-18.) This gets the analysis exactly backwards. (Appellant's brief, pp. 6-10.) An officer conducting a search generally will not know who would have a privacy interest that could be later asserted in court. See Rakas v. Illinois, 439 U.S. 128, 152 n.1 (1978) ("A police officer observing an automobile

carrying several passengers will not know the circumstances surrounding each occupant's presence in the automobile, and certainly will not know whether an occupant will be able to establish that he had a reasonable expectation of privacy.").

Requiring a showing of a reasonable expectation of privacy does not "retroactively justify" a search, Moreno, 431 F.3d at 641—rather, it means that Saldivar failed to show that the Fourth Amendment was even implicated. State v. Fancher, 145 Idaho 832, 837, 186 P.3d 688, 693 (Ct. App. 2008) ("Application of the constitutional safeguards from unreasonable search and seizure depends on whether the person invoking protection had a justifiable, reasonable, or legitimate expectation of privacy which was invaded by some governmental action."). Constitutional protections against unreasonable searches and seizures "apply only to a person's reasonable expectation of privacy," the existence of which the defendant must prove. State v. Ashworth, 148 Idaho 700, 702, 228 P.3d 381, 383 (Ct. App. 2010). When the defendant fails to meet this burden of proof it is "unnecessary to reach [the defendant's] challenges to the conduct of the police." State v. Johnson, 126 Idaho 859, 862, 893 P.2d 806, 809 (Ct. App. 1995). Simply stated, without an invasion of a reasonable expectation of privacy, even unreasonable conduct by the police does not infringe upon the defendant's search and seizure rights. E.g., State v. Bordeaux, 148 Idaho 1, 9, 217 P.3d 1, 9 (Ct. App. 2009) ("The rule is well established that in order to assert standing to suppress evidence, the individual seeking suppression must demonstrate some proprietary interest in the premises searched or some other interest giving a reasonable expectation of privacy.").

Saldivar consented to searches of his person by "a law enforcement officer." (State's Exhibit 1.) He did not consent to searches by "a law enforcement officer [aware

of his parole status]." Saldivar waived his "rights under the Fourth Amendment and the Idaho constitution concerning searches." (State's Exhibit 1.) He did not waive his "rights under the Fourth Amendment and the Idaho constitution concerning searches [unless an officer is unaware of Saldivar's parole status]." In short, Saldivar failed to show that, given the search waiver he entered as a condition of parole, he reasonably expected to be free of the frisk under the facts of this case.

Applying the rule from Moreno and Donaldson under the facts of this case would also have an additional perverse effect. Another requirement of Saldivar's parole was that if "detained by law enforcement" he was required to "tell the officer(s) that [he was] on felony supervision, and the name of [his] probation/parole officer." (State's Exhibit 1.) That officers were unaware of Saldivar's parole status is because Saldivar violated this term of his parole. Limiting law enforcement searches to only those with knowledge of a parolee's status would create a perverse incentive to violate parole.

Saldivar did not have a subjective expectation of privacy because he knowingly consented to searches by law enforcement officers as a condition of his parole. The scope of his consent was not limited to law enforcement officers aware of his waiver. Nor is society willing to recognize as reasonable an expectation of privacy in the face of such a waiver. Because a search that invades no reasonable expectation of privacy (or some other articulated right) is not a Fourth Amendment violation, the district court erred by granting the motion to suppress.

II.
The Frisk Was Constitutionally Reasonable

Because officers had reasonable suspicion that Saldivar was leaving the scene of a recent shooting, stopping and frisking him for the involved gun were reasonable. (Appellant's brief, pp. 11-16.) Saldivar argues reasonable suspicion was lacking because he cooperated and the officers' suspicions were not about him in particular. (Respondent's brief, pp. 19-27.) The district court erred by concluding that frisking a person reasonably believed to be coming from the scene of a shooting was unreasonable under the facts of this case.

Saldivar's cooperation does not show the frisk unreasonable. A suspect's "unwilling[ness] to cooperate" is a factor weighing in favor of a frisk. State v. Bishop, 146 Idaho 804, 819, 203 P.3d 1203, 1218 (2009); State v. Smith, 159 Idaho 15, 22, 355 P.3d 644, 651 (Ct. App. 2015) ("Smith exhibited threatening acts, including lunging toward the officer, and showed agitation and an unwillingness to cooperate"). Although cooperation certainly mitigates this factor, it does not follow that cooperation itself weighs against a frisk. See State v. Cox, 136 Idaho 858, 862, 41 P.3d 744, 748 (Ct. App. 2002) (frisk proper even though defendant "was cooperative throughout their encounter").

In this case the officers immediately ordered Saldivar to stop, show his hands, turn around and get on his knees. (R., p. 115.) Saldivar complied with these commands. That Saldivar complied with the officers' commands does not in any way reduce the reasonable suspicion that, because he was apparently leaving the scene of a shooting, he might be armed and dangerous. Unlike cases where no weapon was believed to be involved or the weapon was a pocket knife, this case involves the presence of a handgun. The possible

presence of a gun on a man who may have used it to commit a crime created reasonable suspicion Saldivar was armed and dangerous.

III.
The District Court Erred By Requiring An "Additional Line Of Inquiry" Before The Inevitable Discovery Doctrine Would Apply

In addressing the inevitable discovery doctrine, the district court stated: "For the inevitable discovery doctrine to apply, the state must prove by a preponderance of the evidence that some additional line of investigation would have inevitably resulted in the evidence being discovered. *State v. Liechty,* 152 Idaho 163, 170, 267 P.3d 1278, 1285 (Ct. App. 2011)." (R., p. 122.) This is an incorrect legal standard. (Appellant's brief, pp. 16-20.)

Saldivar argues the standard is correct and was correctly applied. (Respondent's brief, pp. 27-32.) This argument does not withstand analysis. The district court applied an incorrect legal theory and thereby reached an erroneous result.

First, the district court applied an incorrect standard. The district court relied on State v. Liechty, 152 Idaho 163, 170, 267 P.3d 1278, 1285 (Ct. App. 2011), and State v. Holman, 109 Idaho 382, 392, 707 P.2d 493, 503 (Ct. App. 1985), both of which apply the incorrect "additional line of investigation" standard. (R., p. 123.) Saldivar's argument the district court applied a correct theory is not supported.

Second, Saldivar's argument that "the officer's discovery of the warrant here flowed directly from their unlawful conduct" (Respondent's brief, p. 30) is meritless. It is in fact Saldivar's argument, that but for the weapons frisk the officers would not have run a dispatch check for warrants, that is speculative. Saldivar argues that the state is seeking to "improperly substitute what the police should have done for what they really did"

(Appellant's brief, p. 31), but does not identify anything the police did not do that the state is requesting this Court to speculate they would have done but for the frisk. They in fact ran a warrants check and in fact confirmed an arrest warrant and in fact arrested Saldivar on that warrant. That a search incident to arrest would have led to the discovery of the gun previously found in the pat-down is hardly speculative.

The district court applied an incorrect standard. Applying the correct standard leads to the conclusion the gun would have inevitably been found. The district court erred.

CONCLUSION

The state respectfully requests this Court to reverse the district court's order suppressing evidence.

DATED this 28th day of December, 2018.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of December, 2018, served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to the attorney listed below by means of iCourt File and Serve:

BEN P. McGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd