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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. 46992-2019**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY**
v.	)	**NO. CR-2018-3931**
	)	
NICHOLAS KEITH BLYTHE,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE LANSING L. HAYNES
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Nicholas Blythe appeals from his judgment of conviction for possession of a controlled substance, challenging the district court's denial of his motion to suppress. The district court erred in denying Mr. Blythe's motion to suppress because the warrantless search of his shoes was not a lawful search incident to arrest under *State v. Lee*, 162 Idaho 642 (2017).

Statement of Facts and Course of Proceedings

At approximately 3:00 a.m. on March 12, 2018, Officers Boardman and Fancuillo stopped a vehicle for speeding and rolling through a stop sign. (7/10/18 Tr., p.19, Ls.20-24; Tr., p.11, Ls.16-22.) Gabriel Parent was the driver and the owner of the vehicle, and Mr. Blythe was the passenger. (7/10/18 Tr., p.25, Ls.21-22, p.26, Ls.6-7; Tr., p.11, Ls.16-22.) Mr. Parent admitted to Officer Fancuillo that he had seven grams of marijuana. (Ex. B at 2:25-45; 7/10/18 Tr., p.17, Ls.12-16.) Officer Fancuillo ordered Mr. Parent out of the vehicle, searched his pockets, and handcuffed him. (Ex. B at 2:45-4:25; 7/10/18 Tr., p.22, Ls.11-25.) Officer Fancuillo found a pill in Mr. Parent's shoe. (Ex. B at 3:55-4:15; Ex. A at 5:40-6:00.)

Officer Boardman observed "a rolled-up dollar bill on [Mr. Blythe's] lap, and also some tin foil on the floor that [he] believed to be drug paraphernalia." (7/10/18 Tr., p.10, Ls.4-8.) Officer Boardman ordered Mr. Blythe out of the car and searched his pockets, finding nothing of evidentiary value. (7/10/18 Tr., p.11, L.21 – p.13, L.20; p.21, Ls.13-16; Ex. A at 0:40-1:00.) Officer Boardman told Mr. Blythe, "Like I said, you're not under arrest—nothing like that, right?" (Ex. A at 1:00-05.)

The officers then began searching Mr. Parent's vehicle, with Officer Fancuillo searching the driver's side, and Officer Boardman searching the passenger's side. (7/10/18 Tr., p.13, Ls.21-

22; Ex. B at 5:10-10:00.) While the officers were searching the vehicle, Mr. Blythe stood near the front of the patrol car, not in handcuffs. (7/10/18 Tr., p.14, Ls.2-8.) Officer Fancuillo asked Officer Boardman, "You got anything felony?" and Officer Boardman said, "No." (7/10/18 Tr., p.24, Ls.21-25; Ex. A at 3:05-09; Ex. B at 5:35-41.) At some point, Officer Fancuillo found marijuana in the driver's side of the vehicle, and Officer Boardman found "several . . . used rolled-up pieces of tin foil with burn marks consistent with drug use," and one piece of tin foil that he believed contained "a usable amount of heroin," though he never tested it. (7/10/18 Tr., p.15, Ls.3-11, 17-19; p.16, Ls.4-5, p.17, Ls.17-21, p.23, Ls.20-23.) With respect to at least one piece of foil, Officer Boardman told Officer Fancuillo, "It was in the back." (Ex. A at 9:25-32.)

While Officer Boardman was still searching the vehicle, Officer Fancuillo asked him, "What do you think?" and Officer Boardman answered, "In that one, there's . . . at least a point. He told me he smokes pills off tinfoil. I say we Mirandize them . . . . It's up to you." (Ex. A at 14:00-30.) The following exchange took place awhile later:

> [Officer Fancuillo] How well did you check your guy?
> [Officer Boardman] Not. I did not. Just—
> [Officer Fancuillo] You've got good reason to check him now.
> [Officer Boardman] Oh, yeah.
> [Officer Fancuillo] Take his shoes off.
> [Officer Boardman] Yes.

(Ex. A at 15:40-55.) Officer Boardman did not immediately check Mr. Blythe, but continued searching the vehicle. (Ex. A at 15:55-16:35.)

After he completed searching the vehicle, Officer Boardman walked back to where Mr. Blythe was standing, and said, "Do me a favor, can you kick your shoes off for me?" (Ex. A at 16:45-48; Tr., p.12, Ls.14-17.) Mr. Blythe kicked his shoes off, and Officer Boardman saw two baggies that appeared to contain heroin. (7/10/18 Tr., p.18, Ls.14-18; Tr., p.12, Ls.17-18.)

He said, "Dude, really?" (Ex. A at 17:00.) Officer Boardman then handcuffed Mr. Blythe, advised him of his *Miranda* rights, and told him he was under arrest. (7/10/18 Tr., p.18, L.21 – p.19, L.10; Tr., p.12, Ls.18-19; Ex. A at 17:10-20:05.)

Mr. Blythe was charged by Information with possession of a controlled substance and possession of paraphernalia. (R., pp.45-46.) Mr. Blythe filed a motion to suppress, arguing the heroin found in his shoe should be suppressed under the Fourth Amendment of the United States Constitution, and Article I, section 17 of the Idaho Constitution, because the automobile exception to the warrant requirement did not permit the officers to search his shoes. (R., pp.47-52.) The prosecution filed a memorandum in opposition to Mr. Blythe's motion, arguing Officer Boardman did not violate Mr. Blythe's rights by searching his shoes because Mr. Blythe consented to a search of his shoes by removing them in response to the officer's request, and the search of Mr. Blythe's shoes was a lawful search incident to arrest. (R., pp.56-59.)

The district court held a hearing on Mr. Blythe's motion to suppress, at which it heard testimony from Officer Boardman, and admitted the recordings of the incident from Officer Boardman's and Officer Fancuillo's on-body video cameras. (7/10/18 Tr., p.29, L.8 – p.31, L.11; Exs. A, B.) The parties argued the motion to suppress at a subsequent hearing, and the district court denied the motion. (R., pp.85-86.) The district court first concluded Mr. Blythe did not consent to a search of his shoes, but took his shoes off in response to a police directive. (Tr., p.12, L.21 – p.14, L.24.) The district court next concluded the search was a lawful search incident to arrest, distinguishing this case from *State v. Lee*, 162 Idaho 642 (2017). (Tr., p.15, L.6 – p.17, L.5.)

Following the district court's ruling, Mr. Blythe entered a conditional guilty plea to possession of a controlled substance, reserving his right to appeal from the denial of his motion

to suppress. (Tr., p.18, L.14 – p.19, L.25, p.27, L.4; R., pp.77-81.) The district court accepted Mr. Blythe's guilty plea. (Tr., p.28, Ls.20-24.) The district court sentenced Mr. Blythe to a unified term of four years, with two years fixed, then suspended the sentence and placed Mr. Blythe on probation for two years. (Tr., p.44, Ls.11-16.) The judgment of conviction was entered on March 14, 2019, and Mr. Blythe filed a timely notice of appeal on April 23, 2019. (R., pp.100-11.)

ISSUE

Did the district court err in denying Mr. Blythe's motion to suppress?

ARGUMENT

The District Court Erred In Denying Mr. Blythe's Motion To Suppress

A. Introduction

The district court correctly concluded Mr. Blythe did not consent to Officer Boardman's warrantless search of his shoes, but erred in concluding the search of his shoes was a lawful search incident to his arrest. An objective review of the totality of the circumstances shows that, prior to the search of Mr. Blythe's shoes, an arrest was not going to occur. That is, Mr. Blythe would not have been arrested but for the discovery of heroin in his shoe. This was not a lawful search incident to arrest under *State v. Lee*, 162 Idaho 642 (2017).

B. Standard Of Review

"In reviewing a district court order granting or denying a motion to suppress evidence, the standard of review is bifurcated." *State v. Purdum*, 147 Idaho 206, 207 (2009) (citation omitted). "This Court will accept the trial court's findings of fact unless they are clearly erroneous. However, this Court may freely review the trial court's application of constitutional principles in light of the facts found." *Id.* (citations omitted). "At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court." *State v. Aguirre*, 141 Idaho 560, 562 (Ct. App. 2005) (citations omitted).

C. The Warrantless Search Of Mr. Blythe's Shoes Violated His Rights Under The Fourth Amendment Because Neither Of The Two Exceptions To The Warrant Requirement Proffered By The Prosecution Applies

1. Introduction

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. Evidence obtained in violation of the Fourth Amendment is subject to the exclusionary rule, which requires unlawfully seized evidence to be excluded. *See, e.g.*, *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963); *State v. Page*, 140 Idaho 841, 846 (2004). "Searches conducted without a warrant are considered *per se* unreasonable unless they fall into one of the specifically established and well-delineated exceptions to this general rule." *State v. Bishop*, 146 Idaho 804, 815 (2009) (quotation marks and citation omitted). "[T]he State has the burden of proving the facts necessary to establish an exception to the warrant requirement." *State v. Islas*, 442 P.3d 274, 282 (2019) (citation omitted).

2. The District Court Correctly Concluded Mr. Blythe Did Not Consent To A Search Of His Shoes

Consent is a well-recognized exception to the warrant requirement. *See State v. Wulff*, 157 Idaho 416, 419 (2014). "Where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given." *Florida v. Royer*, 460 U.S. 491, 497(1983). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). Here, the district court correctly concluded Mr. Blythe did not consent to a search of his shoes.

After searching Mr. Parent's vehicle, Officer Boardman walked back to where Mr. Blythe was standing, and said, "Do me a favor, can you kick your shoes off for me?" (Ex. A at 16:45-48; Tr., p.12, Ls.14-17.) Mr. Blythe kicked his shoes off, and Officer Boardman saw two baggies that appeared to contain heroin. (7/10/18 Tr., p.18, Ls.14-18; Tr., p.12, Ls.17-18.) He said, "Dude, really?" (Ex. A at 17:00.) Officer Boardman then handcuffed Mr. Blythe, advised him of his *Miranda* rights, and told him he was under arrest. (7/10/18 Tr., p.18, L.21 – p.19, L.10; Tr., p.12, Ls.18-19; Ex. A at 17:10-20:05.)

The district court concluded Officer Boardman's statement to Mr. Blythe to "kick your shoes off" was a directive, as it "was not a situation where . . . [the officer] was really giving Mr. Blythe the option of kicking off his shoe or not kicking off his shoe." (Tr., p.12, L.21 – p.13, L.3.) The district court explained, "It's not optional. It's just a polite way of directing that person to do something about which they have no option but to comply, really." (Tr., p.13, Ls.8-11.) The district court rejected the prosecutor's argument that Mr. Blythe voluntarily consented to the search. (Tr., p.14, Ls.2-20.) The district court noted that, at the time of the directive, Mr. Blythe's identification had been taken; Mr. Blythe had twice asked for permission to smoke a cigarette; the patrol car's red and blue lights were flashing at all times; and the driver was handcuffed in the back of the patrol car. (Tr., p.13, L.19 – p.14, L.1.)

The district court correctly concluded that the State did not meet its burden of proving the search of Mr. Blythe's shoes was consensual. *See Islas*, 442 Pd.3d at 282 (stating "the State has the burden of proving the facts necessary to establish an exception to the warrant requirement") (citation omitted). Thus, the district court correctly concluded the warrantless search of Mr. Blythe's shoes did not fall within the consent exception to the warrant requirement.

3. The District Court Erred In Concluding The Search Of Mr. Blythe's Shoes Was A Lawful Search Incident To His Arrest

"Searches incident to arrest are one of the well-established exceptions to the warrant requirement." *State v. LaMay*, 140 Idaho 835, 838 (2004) (citations omitted). "Pursuant to the search incident to arrest exception, law enforcement officers may search an arrestee incident to a lawful custodial arrest." *Lee*, 162 Idaho at 649 (citations omitted). Here, the district court concluded the search of Mr. Blythe's shoes was a lawful search incident to arrest, because "there was probable cause for him to be arrested even leading up to the point where he kicked off his shoes . . . ." (Tr., p.16, Ls.22-24.) A search incident to probable cause is not an exception to the warrant requirement. The district court's reasoning is contrary to our Supreme Court's holding in *Lee* that "[t]he reasonableness of a search is determined by the totality of the circumstances, and a search incident to arrest is not reasonable when an arrest is not going to occur." *Lee*, 162 Idaho at 652.

There was little suspicion directed at Mr. Blythe prior to the discovery of the heroin in his shoe. Mr. Parent, the driver and owner of the vehicle, admitted early on that he had seven grams of marijuana, and he was handcuffed immediately. (Ex. B at 2:25-45; 7/10/18 Tr., p.17, Ls.12-16, p.22, Ls.11-25.) Officer Boardman observed what he believed to be drug paraphernalia on Mr. Blythe's lap while he was still in the car, but did not handcuff Mr. Blythe, and specifically told him he was "not under arrest." (7/10/18 Tr., p.10, Ls.4-8; Ex. A at 1:00-05.) Officer Boardman found what he believed to be "a usable amount of heroin" in a piece of tin foil under the passenger seat while he was searching the vehicle, but it is clear from the totality of the circumstances that he was not going to arrest Mr. Blythe on that basis. (7/10/18 Tr., p.15, Ls.3-11; p.16, Ls.4-5, p.17, Ls.17-21.)

Officer Fancuillo asked Officer Boardman, "What do you think?" and Officer Boardman answered, "I say we Mirandize them . . . . It's up to you." (Ex. A at 14:00-30.) Officer Boardman did not take any actions that would objectively indicate an intent to arrest Mr. Blythe. He did not place Mr. Blythe in handcuffs; he did not tell him he was under arrest; he did not call for backup; he did not secure Mr. Blythe in the patrol car; he did not draw his weapon. *See* Joshua Deahl, *Debunking Pre-Arrest Incident Searches*, 106 Cal. L. Rev. 1061, 1118 (2018) (discussing the pre-search indicia of arrest).

While he was still searching the car, Officer Boardman had the following conversation with Officer Fancuillo:

> [Officer Fancuillo] How well did you check your guy?
> [Officer Boardman] Not. I did not. Just—
> [Officer Fancuillo] You've got good reason to check him now.
> [Officer Boardman] Oh, yeah.
> [Officer Fancuillo] Take his shoes off.
> [Officer Boardman] Yes.

(Ex. A at 15:40-55.) After searching the vehicle for another minute, Officer Boardman walked back to where Mr. Blythe was standing, and directed him to take off his shoes. (Ex. A at 16:45-48; Tr., p.12, Ls.14-17.) After observing the heroin, Officer Boardman handcuffed Mr. Blythe, advised him of his *Miranda* rights, and told him he was under arrest. (7/10/18 Tr., p.18, L.21 – p.19, L.10; Tr., p.12, Ls.18-19; Ex. A at 17:10-20:05.)

Counsel for Mr. Blythe argued in the district court that Mr. Blythe "wouldn't have been arrested" absent the discovery of the drugs in his shoe. (Tr., p.7, Ls.19-21.) He pointed out that until Officer Boardman found heroin in Mr. Blythe's shoe, "[the driver] is the one that admitted that there was marijuana in the vehicle," was "the one that handed the marijuana to [the officer]," and was "the one that was handcuffed and sitting in the back of the cop car." (Tr., p.9, L.21 – p.10, L.3.) "So I don't think it's reasonable to assume that Mr. Blythe would have been arrested

anyway because of some tinfoil that had been found in the passenger side area." (Tr., p.8, Ls.9-12.) The prosecutor candidly acknowledged he had not reviewed *Lee*, and argued simply that "[s]o long as that arrest happens a short time after that probable cause develops, a search incident to arrest can take place either before or after a formal arrest." (Tr., p.10, Ls.13-24.)

The district court read *Lee* to mean it could not "[speculate] about what may or may not have happened depending on the rest of the circumstances that might have developed at the scene of this case for Mr. Blythe as to whether he would or would not have been ultimately arrested." (Tr., p.16, Ls.1-7.) But this is not entirely correct. The *Lee* Court instructs that courts are to determine from the totality of the circumstances whether an arrest is going to occur prior to a search. 162 Idaho at 652. The *Lee* Court explained:

> We determine if an arrest is going to occur based on the totality of the circumstances, including the officer's statements. While the subjective intent of an officer is usually not relevant in Fourth Amendment analysis, statements made by the officer of his intentions along with other objective facts are relevant in the totality of circumstances as to whether an arrest is to occur. If an arrest does not occur, and objectively the totality of the circumstances show an arrest is not going to occur, an officer cannot justify a warrantless search based on the search incident to arrest exception.

Id.

Here, the district court did not consider whether an arrest was going to occur based on the totality of the circumstances. Instead, the district court found the search of Mr. Blythe's shoes was permissible because, prior to the search, the officers had probable cause to arrest Mr. Blythe "for frequenting a place where drugs were found, for possession of a controlled substance, [and] for possession of paraphernalia." (Tr., p.16, Ls.8-16.) The district court explained, "This Court finds that there was probable cause for him to be arrested even leading up to the point where he kicked off his shoes based on what the Court saw in this video and heard from the witness." (Tr., p.16, L.22 – p.17, L.1.)

The fact that there was probable cause to arrest Mr. Blythe prior to the search of his shoes does not resolve the question of whether the search of his shoes was a lawful search incident to arrest. As the Idaho Supreme Court explained in *Lee*, Officer Laurenson had probable cause to arrest Mr. Lee for driving without privileges prior to the search of the items found in his pocket. 162 Idaho at 651. The critical question is not whether there was probable cause for an arrest, but whether an arrest would have in fact occurred. *See id.* at 651-52. "Bootstrapping evidence found in a search 'incident to arrest'—based on probable cause for only a minor violation that would otherwise not result in an arrest—so that the fruits of a search incident to arrest themselves provide the justification for the arrest, is not permissible." *United States v. Davis*, 111 F. Supp. 3d 323, 334 n.7 (E.D.N.Y. 2015).

Here, the State did not meet its burden of proving the facts necessary to establish the search of Mr. Blythe's shoes was a lawful search incident to arrest. *See Islas*, 442 Pd.3d at 282 (stating "the State has the burden of proving the facts necessary to establish an exception to the warrant requirement") (citation omitted). Looking at the totality of the circumstances, which the district court declined to do, the objective facts indicate Mr. Blythe would not have been arrested but for the discovery of the drugs in his shoe. As such, the search of his shoes was not a lawful search incident to his arrest under *Lee*, and the district court erred in denying his motion to suppress.

CONCLUSION

Mr. Blythe respectfully requests that the Court vacate his conviction, reverse the district court's order denying his motion to suppress, and remand this case to the district court for further proceedings.

DATED this 29th day of July, 2019.

/s/ Andrea W. Reynolds
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of July, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

AWR/eas