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State v. Bonner Respondent's Brief Dckt. 46097

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Appellant,	)	**NO. 46097**
	)	
v.	)	**ADA COUNTY NO. CR01-17-51545**
	)	
MICHAEL AARON BONNER,	)	**RESPONDENT'S BRIEF**
	)	
Defendant-Respondent.	)	
	)	

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 BARTON
District Judge

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Nature of the Case

Michael Bonner asserts that the State has failed to demonstrate error in the district court's order granting his motion to suppress. The district court suppressed evidence obtained after Mr. Bonner was seized absent reasonable, articulable suspicion of criminal wrongdoing.

The issue presented in this case is whether the State can, *post hoc*, justify a warrantless seizure absent reasonable, articulable suspicion of wrongdoing because the individual is a parolee? This appears to be an issue of first impression. The Idaho Supreme Court, in its recent decision in *State v. Saldivar*, "decline[d] the State's invitation to further delineate the extent of Saldivar's Fourth Amendment rights as a parolee." *State v. Saldivar*, ___ Idaho ___, 446 P.3d 446 (2019) (holding the pat-search of the parolee was reasonable, thus the Court need not address whether parolee had a reasonable expectation of privacy due to Fourth Amendment waiver in parole agreement). Once again, this issue comes before the Court because Mr. Bonner was seized absent reasonable articulable suspicion of wrongdoing, but the officer later learned that Mr. Bonner was on parole. As it did in *Saldivar*, the State seeks to justify its unlawful seizure using the officer's *post hoc* knowledge of Mr. Bonner's Fourth Amendment parole waiver. This Court should affirm the decision of the district court, which held that that Mr. Bonner was unlawfully seized, the evidence obtained as a result of the seizure was inadmissible, and that Mr. Bonner's waiver was ineffective as to this seizure because the officer did not know of the waiver or reasonably believe that Mr. Bonner was on probation or parole at the time of the seizure. (R., pp.79, 81.)

Statement of the Facts and Course of Proceedings

On the evening of December 17, 2017, Officer Linn observed a vehicle being driven by Michael Bonner drive past him while he was stopped at a traffic light. (Defense Exhibit A; R., p.70; 4/10/18 Tr., p.40, L.19 – p.41, L.23.) Mr. Bonner was traveling quickly, although not so quickly that he would have been unable to stop at the light. (4/10/18 Tr., p.41, L.24 – p.42, L.5; R., p.71.) Officer Linn noticed the vehicle only had temporary registration tags in the back window. (4/10/18 Tr., p.42, Ls.16-22; R., p.71.) He followed the vehicle and noticed it quickly, but lawfully crossing several traffic lanes before turning into a hospital parking lot. (4/10/18 Tr., p.42, L.6 – p.43, L.21; R., p.70.) Officer Linn believed the driver was trying to avoid him, and so he followed the vehicle. (4/10/18 Tr., p.46, Ls.10-16; R., p.71.) He observed it parking in the area of the hospital closed for business, and he saw the driver exit the vehicle and walk toward the hospital. (4/10/18 Tr., p.46, L.17 – p.47, L.6; R., p.71.) The driver had parked the car far away from the closest entrance, in the nearly empty parking lot. (4/10/18 Tr., p.44, L.15 – p.45, L.16; R., p.71.) Officer Linn had a hunch the vehicle could possibly be stolen because the car had a temporary tag. (4/10/18 Tr., p.63, L.14 – p.64, L.7.) Officer Linn made contact with the driver after he unsuccessfully tried to open a locked door in the closed part of the hospital. (4/10/18 Tr., p.47, Ls.10-24; R., pp.71-72.)

Officer Linn asked Mr. Bonner what he was doing. (4/10/18 Tr., p.7, Ls.17-20; R., p.72.) Mr. Bonner told the officer that he was trying to get into the hospital building to find out where his girlfriend's grandparents were. (4/10/18 Tr., p.20, Ls.14-24; R., p.72.) He asked for Mr. Bonner's identification, and Mr. Bonner complied. (4/10/18 Tr., p.7, Ls.21-25; R., p.73.) Officer Linn asked Mr. Bonner if that was his "ride" to which Mr. Bonner did not seem to respond. (4/10/18 Tr., p.50, L.24 – p.51, L.3; Defense Exhibit A; R., p.73.) One minute and

twenty-four seconds into the stop, Officer Linn directed Mr. Bonner to "sit down" and followed up by directing him to take his hands out of his pockets and to "sit down, please." (Defense Exhibit A; R., p.73.)

A status checked revealed that Mr. Bonner had a suspended driver's license. (4/10/18 Tr., p.14, L.25 – p.15, L.1; R., p.73.) Officer Linn also learned that Mr. Bonner was on parole. (4/10/18 Tr., p.15, Ls.2-3; R., p.73.) Officer Linn learned that Mr. Bonner had two felony DUI convictions and had executed a waiver of his Fourth Amendment rights as a term of his parole. (4/10/18 Tr., p.15, L.2 – p.17, L.20; R., p.73.) During his contact with Mr. Bonner, Officer Linn noticed the smell of alcohol. (4/10/18 Tr., p.55, Ls.3-8.) Mr. Bonner was subsequently arrested for driving with a suspended driver's license and for felony DUI. (R., pp.10-12.) Mr. Bonner was charged by Information with felony DUI, and the State filed an Information Part II charging him with being a persistent violator of the law. (R., pp.44-46.)

Mr. Bonner moved to suppress the evidence, arguing, in part, that he was seized in violation of his rights under the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 17 of the Idaho Constitution, and the evidence gathered against him should be suppressed as fruits of the unlawful seizure. (R., pp.37-41.)

The district court held a hearing on the motion to suppress. (*See generally* 4/10/18 Tr.) At the hearing, the State stipulated that Mr. Bonner was seized and not free to end the encounter when Officer Linn told him to sit down on the curb. (4/10/18 Tr., p.33, Ls.17-23; p.84, Ls.16-21; R., p.77.) The State claimed, however, that Mr. Bonner did not have an expectation of privacy in his person that should be recognized, and that is where the inquiry should end. (4/10/18 Tr., p.81, Ls.6-12.) The district court pressed the State to come up with a crime Officer Linn suspected Mr. Bonner of committing, but the State could not identify a specific crime, other

than a suspicion that the vehicle was stolen because Mr. Bonner did not respond when the officer asked him if that was his "ride." (4/10/18 Tr., p.83, L.2 – p.90, L.22.)

After hearing argument from the parties, the district court granted the motion to suppress, holding: (1) Officer Linn's direction of Mr. Bonner to sit on the curb was a seizure unsupported by a reasonable articulable suspicion of criminal wrongdoing, and (2) the parole waiver was ineffective where the officer did not know the terms of the waiver at the time of the unlawful seizure. (R., pp.77-81.) The court analyzed whether, "at the time Officer Linn directed Mr. Bonner to sit on the curb, Officer Linn had a 'reasonable articulable suspicion that a person has committed, or is about to commit, a crime.' This Court finds . . . Officer Linn did not." (R., p.78 (internal citations omitted).) The district court found that Officer Linn admitted that he did not know whether Mr. Bonner was speeding, and he did not articulate that Mr. Bonner had driven recklessly. (R., p.78.) The district court found that Mr. Bonner was not running away or evading the officer, he complied with the officer's questions and explained his conduct. (R., p.78.) The court concluded that Mr. Bonner's actions did not support a reasonable suspicion that the vehicle he was driving was stolen. (R., p.79.) The district court "decline[d] to adopt a test whereby odd or unusual behavior justifies a search or seizure. Such a test would be contrary to the rulings in *Page, Bishop*, and *Pachosa*."[1] (R., p.79.) The district court held that the officer's curiosity or an unsubstantiated suspicion of criminal activity were insufficient to warrant the detention of a citizen. (R., p.79.)

The district court held that Mr. Bonner was unlawfully seized, the evidence obtained as a result of the seizure was inadmissible, and that Mr. Bonner's waiver was ineffective as to this seizure because the officer did not know of the waiver or reasonably believe that Mr. Bonner was

[1] *State v. Page*, 140 Idaho 841 (2004); *State v. Bishop*, 146 Idaho 804 (2009); *State v. Pachosa*, 160 Idaho 35 (2016).

on probation or parole at the time of the seizure. (R., pp.79, 81.) The district court relied on the Idaho Court of Appeals' decision in *Robinson*, which held that "absent such reasonable suspicion, a probation search conducted pursuant to a Fourth Amendment waiver contained in a probation agreement must still pass the test of the Fourth Amendment—reasonableness under all the circumstances." (R., p.81 (quoting *State v. Robinson*, 152 Idaho 961, 964-65 (Ct. App. 2012).)

The State appealed. (R., pp.84-87.)

ISSUE

Did the district court correctly grant Mr. Bonner's motion to suppress?

ARGUMENT

The District Court Correctly Granted Mr. Bonner's Motion To Suppress

A. Introduction

The district court suppressed evidence obtained after Mr. Bonner was subjected to a warrantless seizure absent reasonable, articulable suspicion that he was engaged in criminal wrongdoing. On appeal, the State argues that, in signing a parole agreement containing a provision consenting to searches and waiving his Fourth Amendment rights regarding searches, Mr. Bonner forfeited any expectation of privacy that society would recognize as reasonable. (*See* App. Br., pp.4-7.) The State contends: "Bonner's waiver of his Fourth Amendment rights extinguished his expectation of privacy." (App. Br., p.6.) And "Officer Linn's ignorance of Bonner's parole status did not, and cannot, confer upon Bonner an expectation of privacy he did not possess." (App. Br., p.6.)

However, the district court properly held that Mr. Bonner's parole waiver was ineffective as to this seizure because Officer Linn did not know of the waiver or have reason to believe Mr. Bonner was on parole or probation at the time of the seizure. This Court should affirm the order granting Mr. Bonner's motion to suppress.

B. Standard Of Review And Relevant Law

This Court uses a bifurcated standard to review a district court's order on a motion to suppress. *State v. Danney*, 153 Idaho 405, 408 (2012); *State v. Hunter*, 156 Idaho 568, 571 (Ct. App. 2014). This Court will accept the trial court's findings of fact "unless they are clearly erroneous." *State v. Wulff*, 157 Idaho 416, 418 (2014). "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. Ellis*, 155 Idaho 584, 587 (Ct. App. 2013). This Court exercises free review of "the trial court's application of constitutional principles to the facts found." *Danney*, 153 Idaho at 408.

The Fourth Amendment to the United States Constitution, and Article I, Section 17 of the Idaho Constitution, provide protection against unreasonable searches. U.S. Const. amend. IV; Idaho Const. art. I, § 17. "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 (2017) (citing *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978)). "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.* at 41. "That involves a two-part inquiry: (1) Did the person have a subjective expectation of privacy in the object of the challenged search? and (2) Is society willing to recognize that expectation as reasonable?" *State v. Pruss*, 145 Idaho 623, 626 (2008).

C. Mr. Bonner's Status As A Parolee Who Had Executed A Fourth Amendment Waiver Did Not Mean He Had No Expectation Of Privacy Whatsoever

The State introduced evidence that, pursuant to a term of his parole, Mr. Bonner had executed a waiver of his Fourth Amendment right to be free from unreasonable searches and seizures. (State's Exhibits 1, 2; 4/10/18 Tr., p.15, L. 11 – p.18, L.2.) Here, Mr. Bonner's Agreement of Supervision provided:

> 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 Exhibit 1.)

The district court found determinative that Officer Linn did not learn of the waiver until *after* he had unlawfully seized Mr. Bonner. (R., pp.80-81.) The court concluded that Mr. Bonner's Fourth Amendment waiver was ineffective as to this seizure because the officer did not know of the waiver or know or reasonably believe that Mr. Bonner was on probation or parole at the time of the seizure. (R., p.81.)

In finding that the terms of Mr. Bonner's parole agreement were an ineffective waiver when the officer did not know of them at the time of seizure, the district court relied on *State v. Guzman*, for its holding that "[e]xclusionary rules are intended in part to disincentivize certain police behavior and to provide a remedy to those improperly seized." (R., p.80 (citing *State v. Guzman*, 122 Idaho 981 (1992).) The court reasoned:

> If an officer does not know of the waiver or reasonably believe that a person is a parolee or probationer, the same norms should disincentivize any police behavior that would otherwise violate constitutional rights. *See* 122 Idaho 981, 842 P.2d 660. Otherwise, police may have less incentive to behave constitutionally, the key goal of the exclusionary rule, including in locations where a larger percentage of the public may be on probation or parole. A preexisting waiver, discovered after a warrantless seizure, should not cure otherwise constitutionally improper seizures where the waiver was unknown to police at the time of the seizure. As the Idaho Court of Appeals made clear in *Robinson*, "absent such reasonable suspicion, a probation search conducted pursuant to a Fourth Amendment waiver contained in a probation agreement must still pass the test of the Fourth Amendment—reasonableness under all the circumstances." *See State v. Robinson*, 152 Idaho 961, 964-65, 277 P.3d 408, 411-12 (Ct. App. 2012); *see also State v. Cruz*, 144 Idaho 906, 910, 174 P.3d 876, 880 (Ct. App. 2007).

(R., pp.80-81.) The district court was correct.

First, there is no question that Mr. Bonner had a subjective expectation of privacy in his own person. As the United States Supreme Court has long recognized, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting

Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)). Mr. Bonner had a subjective expectation of privacy in his own person. *See Pruss*, 145 Idaho at 626.

Second, Mr. Bonner had an expectation of privacy society was willing to recognize as reasonable. While a prisoner does not have Fourth Amendment rights, parolees and probationers do retain privacy rights which society would recognize as reasonable. Although the rights are diminished, they nonetheless exist. Arrestees also continue to maintain privacy rights, albeit reduced.

Here, Mr. Bonner's Agreement of Supervision provided that he consented to the search of his person and property "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 Exhibit 1.) By the plain language of this agreement, Mr. Bonner consented to searches and waived his constitutional rights regarding searches.[2] However, the State's claim that this provision negated any expectation of privacy is misguided. Consent can be limited in scope or revoked. *See State v. Turek*, 150 Idaho 745 (Ct. App. 2011) (finding unpersuasive the State's argument that acceptance of this probation condition constitutes an unfettered waiver of all Fourth Amendment rights—the State must conform its search to the scope of the consent); *Wulff*, 157 Idaho at 422-23 (holding that the consent implied by statute in not irrevocable, "a person could change his mind and revoke his consent"). The waiver of a constitutional right can likewise be revoked. *See United States v. Lorenzo*, 570 F.2d 294, 298 (9th Cir. 1978) (recognizing that a waiver of constitutional rights may be revoked, but holding that suspect's failure to respond to one question from the interrogating agent did not constitute either a total or a selective revocation of his earlier waiver of his Fifth Amendment rights).

[2] Although not argued below or on appeal, this waiver specifically addresses only searches. Mr. Bonner contended that he was unlawfully seized.

The State asserts that the district court erred by concluding that Mr. Bonner retained a privacy right after his waiver. (App. Br., p.6.) The State claims, based on cases such as *Samson v. California*, 547 U.S. 843 (2006), and *State v. Gawron*, 112 Idaho 841 (1987), that "Bonner's waiver of his Fourth Amendment rights extinguished his expectation of privacy." (App. Br., p.6.) However, the cases upon which the State relies do not hold that a parolee never has an expectation of privacy that society would recognize as reasonable. Both *Samson* and *Gawron* deal with whether a search was reasonable, after the burden shifted to the State to prove reasonableness. The United States Supreme Court in *Samson* concluded "that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." *Samson*, 547 U.S. at 856. The *Samson* Court framed the issue as "whether 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." *Id.* at 847. The Court addressed that issue "under our general Fourth Amendment approach," by examining "the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment." *Id.* at 848 (alterations and internal quotation marks omitted). "Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* (internal quotation marks omitted).

In *Samson*, the United States Supreme Court stated that, "Because we find that the search at issue here is reasonable under our general Fourth Amendment approach, we need not reach the issue whether acceptance of the search condition constituted consent in the . . . sense of a complete waiver of his Fourth Amendment rights." *Samson*, 547 U.S. at 852 n.3. The *Samson*

Court held that, on the continuum of state-imposed punishments, "parolees have fewer expectations of privacy that probationers, because parole is more akin to imprisonment than probation is to imprisonment." *Id.* at 850. The Court, "[e]xamining the totality of the circumstances pertaining to petitioner's status as a parolee . . . including the plain terms of the parole search condition," concluded "that petitioner did not have an expectation of privacy that society would recognize as legitimate." *Id.* at 852. The Court then held, "The State's interests, by contrast, are substantial." *Id.* at 853.

Thus, when the *Samson* Court concluded the petitioner did not have an expectation of privacy that society would recognize as legitimate, it reached that conclusion in the context of whether the search, balancing the petitioner's privacy interest and the governmental supervisory interests under the general Fourth Amendment approach, was reasonable. *See id.* at 848, 852-53. Further, the *Samson* Court emphasized it was not equating "parolees with prisoners for the purpose of concluding that parolees, like prisoners, have no Fourth Amendment rights." *Id.* at 850 n.2. According to the Court: "That view misperceives our holding. If that were the basis of our holding . . . there would have been no cause to resort to Fourth Amendment analysis." *Id.* Moreover, the *Samson* Court, in discussing how parolees have a "substantially diminished expectation of privacy," also noted that, under California law, "an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee." *Id.* at 855, 856 n.5 (citing *People v. Sanders*, 73 P.3d 496, 505-06 (Cal. 2003)).

In sum, the State's reliance on *Samson* is misplaced. Ultimately, *Samson* "left open . . . the possibility that a parolee subject to a search condition could challenge searches conducted by officers who lacked 'knowledge that the person stopped for the search is a parolee.'" *See United*

States v. Grandberry, 730 F.3d 968, 975 (9th Cir. 2013) (quoting *Samson*, 547 U.S. at 856 & n.5). Because *Samson* contemplated parolees could challenge a search under such circumstances, it follows that such parolees (like Mr. Bonner) would have an expectation of privacy society was willing to recognize as reasonable.

This conclusion has been implicitly approved by the Idaho Supreme Court, in its recent decision in *State v. Saldivar*, ___ Idaho ___, 446 P.3d 446 (2019). In *Saldivar*, the State sought to justify its search on the basis that the defendant was a parolee who had waived his right to object to searches as a condition of probation, thus, he did not have an expectation of privacy that society would recognize as reasonable. *Id.* 446 P.3d at 450. That is, the State argued that it did not matter whether the officers knew of Mr. Saldivar's status as a parolee before they searched him. *Id.* The Idaho Supreme Court reversed the district court's order granting Mr. Saldivar's motion on other grounds, namely that it was reasonable to pat-search him. *Id.* As for the State's argument regarding the expectation of privacy of a parolee, the Court wrote:

> While this Court would typically address the question of whether there was a reasonable expectation of privacy as the first step in its Fourth Amendment analysis, there is no need to do so here. While we generally agree that "parolees ... have severely diminished expectations of privacy by virtue of their status alone," *Samson v. California*, 547 U.S. 843, 852, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006), the State's argument is essentially a post hoc justification for the conduct of the police, based on information the police did not know at the time.

Id. In finding the officer's pat-search of Mr. Saldivar was justified, the Court recognized it was unnecessary to further delineate the extent of Saldivar's Fourth Amendment rights as a parolee; however, the Court still took the opportunity to point out the absurdity of the State's position on this point. *Id.*

The State also relies on *Gawron* in support of its argument that Mr. Bonner's waiver of his Fourth Amendment rights extinguished his expectation of privacy. (App. Br., p.6.) However, the Idaho Supreme Court's decision in *Gawron* is distinguishable. In *Gawron*, the

probationer waived his constitutional right to be free from warrantless searches as a condition of his probation and the search of his house was conducted by another probation officer while Mr. Gawron was not home. 112 Idaho at 842. The *Gawron* Court held that persons "conditionally released to societies have a reduced expectation of privacy, thereby rendering intrusions by governmental authorities 'reasonable' which otherwise would be unreasonable or invalid under traditional constitutional concepts." *Gawron*, 112 Idaho at 843. Although "[t]he scope of the search in the instant case well may have exceeded the permissible limits announced in *Chimel v. California*, [395 U.S. 752 (1969)]," the Court wrote that *Chimel* "acknowledged the existence of well recognized exceptions to the general rule requiring a warrant in order to conduct a house search. One of those exceptions set forth in *Katz v. United States*, [389 U.S. 347 (1967)], is a search to which an individual consents." *Gawron*, 112 Idaho at 843 (internal quotation marks omitted). The *Gawron* Court upheld the search at issue, based upon the probationer's "consent to warrantless searches." *Id.* In other words, the *Gawron* Court held the search pursuant to a probation officer's request was reasonable based on consent as an exception to the warrant requirement, but did not hold that the probationer had no expectation of privacy. *Id.*

Even *State v. Cruz*, 144 Idaho 906 (Ct. App. 2007), does not support the State's argument that Mr. Bonner had no expectation of privacy here. The Idaho Court of Appeals in *Cruz* held that the parole search of Mr. Cruz's girlfriend's apartment was based upon a reasonable suspicion or reasonable grounds that Cruz was violating the terms of his parole by living at the apartment and possessing or selling narcotics there. *Cruz*, 144 Idaho at 910.

As the Idaho Supreme Court recently pointed out, "The common guiding principle underlying our decisions in *Turek*,[3] *Gawron*, and *Purdum*[4] is that courts evaluating the scope of the Fourth Amendment waiver must look to the language used in the condition of probation in order to determine whether the search was objectively reasonable."[5] *State v. Jaskowski*, 163 Idaho 257, 261 (2018); *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). As is the case with other warrantless searches, the State must carry the burden of showing that the search is reasonable. The district court, citing *State v. Robinson*, 152 Idaho 961, 964-65 (Ct. App. 2012), properly analyzed whether the seizure at issue was reasonable and concluded that "[a] preexisting waiver, discovered after a warrantless seizure, should not cure otherwise constitutionally improper seizures when the waiver was unknown to police at the time of the seizure." (R., p.81; *Robinson*, 152 Idaho at 965 (holding that a probation search conducted pursuant to a Fourth Amendment waiver "must still pass the test of the Fourth Amendment—reasonableness under all the circumstances")).

The State's contention that a Fourth Amendment waiver automatically eliminates a parolee's ability to challenge any subsequent search or seizure is unsupported by legal authority. As the United States Supreme Court held in *Riley v. California*, "The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." 573 U.S. 373, 392 (2014) (holding an arrestee has reduced privacy interest upon being taken into custody, but government's interest in preventing destruction of evidence did not

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[3] *State v. Turek*, 150 Idaho 745 (Ct. App. 2011).
[4] *State v. Purdum*, 147 Idaho 206 (2009).
[5] The State has forfeited any argument on appeal that the warrantless search here was reasonable because Mr. Bonner consented to the search through the parole waiver. The State claims only that Mr. "Bonner's waiver of his Fourth Amendment rights extinguished his expectation of privacy." (App. Br., p.6.) *See State v. Raudebaugh*, 124 Idaho 758, 763 (1993) (declining to address an issue the appellant did not raise until the reply brief stage).

justify dispensing with warrant requirement for the contents of his cellular telephone); *see also Maryland v. King*, 569 U.S. 435, 463 (2013) (holding not every search of an arrestee "is acceptable solely because a person is in custody"). To the contrary, when "privacy-related concerns are weighty enough" a "search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." *Riley*, 573 U.S. at 392 (2014).

Although Mr. Bonner was a parolee, and not an arrestee as the defendant was in *Riley*, the fact that he had "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *See Riley*, 573 U.S. at 392. Mr. Bonner had the requisite legitimate expectation of privacy to challenge the seizure, because he had a subjective expectation of privacy that society was willing to recognize as reasonable. *See United States v. Lara*, 815 F.3d 605, 612 (9th Cir. 2016) ("Because of his status as a probationer, Lara's privacy interest was somewhat diminished, but that interest was nonetheless sufficiently substantial to protect him from the two cell phone searches at issue here."). Although the district court in Mr. Bonner's case did not have the benefit of *Saldivar* to aid in its decision, the court correctly determined that the officer's subsequent discovery of the parole waiver did not make lawful or cure his initial unlawful seizure of Mr. Bonner. (R., pp.80-81.)

D. The District Court Correctly Granted Mr. Bonner's Motion To Suppress, Finding Officer Linn Did Not Have Reasonable Articulable Suspicion Of Criminal Wrongdoing

The State has not challenged any of the district court's factual findings in this appeal. As such, the question for this Court is whether, in light of the facts found by the district court, the district court erred in granting Mr. Bonner's motion to suppress. Mr. Bonner submits that the district court's ruling granting his motion to suppress was amply supported both by the evidence and by governing case law, and that this Court should therefore affirm the district court.

"When a defendant moves to exclude evidence on the grounds that it was obtained in violation of the Fourth Amendment, the government carries the burden of proving that the search or seizure in question was reasonable." *State v. Bishop*, 146 Idaho 804, 811 (2009). "A seizure under the meaning of the Fourth Amendment occurs only 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" *State v. Nickel*, 134 Idaho 610, 612 (2000) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). In addition, even brief detentions of individuals must meet the Fourth Amendment's requirement of reasonableness. *Bishop*, 146 Idaho at 811. When the discovery of the evidence to be used against a defendant was the product of his illegal seizure, it is rightfully suppressed as "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 478-88 (1963).

The touchstone of Fourth Amendment analysis is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry v. Ohio*, 392 U.S. 1, 19 (1968). Reasonableness hinges on "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

The United States Supreme Court has held that a seizure under the Fourth Amendment "must be based on specific, objective facts indicating that society's legitimate interests require the seizure *of the particular individual*, or that seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. 47, 51 (1979) (emphasis added). The *Brown* Court went on to note "we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Id.* Reasonable suspicion must be based on specific, articulable facts considered with objective and reasonable inferences that form a basis for particularized

suspicion. *State v. Sheldon*, 139 Idaho 980, 983-84 (Ct. App. 2003). Particularized suspicion consists of two elements: (1) the determination must be based on a totality of the circumstances, and (2) the determination must yield a particularized suspicion that the particular individual being stopped is engaged in wrongdoing. *United States v. Cortez*, 449 U.S. 411, 418 (1981). "An officer may draw reasonable inferences from the facts in his or her possession, and those inferences may be drawn from the officer's experience and law enforcement training." *State v. Swindle*, 148 Idaho 61, 64 (Ct. App. 2009). However, the officer "must be able to articulate more than an 'inchoate and unparticularized suspicion' or 'hunch' of criminal activity." *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

The State conceded below that Mr. Bonner was seized when Officer Linn told him to sit on the curb (4/10/18 Tr., p.33, Ls.15-23; R., p.78), but claims that Officer Linn was justified in conducting a limited investigative detention. (App. Br., pp.10-12.) "Although ambiguous, and perhaps innocent . . . Bonner's attempts to evade police contact under the totality of the circumstances of this case justified a limited detention to investigate a possible registration violation or the possibility of a stolen car." (App. Br., p.12.) The State's argument ignores the district court's finding that Mr. Bonner was not attempting to avoid or evade Officer Linn. (*See* R., p.78.)

In this case, the district court found:

> Officer Linn exited his patrol car without turning on any overhead lights and without using his spotlight. He approached Mr. Bonner and at the video's 37-second mark asked: "What are you doing?"
> . . .
>
> Mr. Bonner replied, somewhat unclearly as the microphone pick-up was far from Mr. Bonner, that he was trying to find the hospital. The hospital's working entrance is on the east side of the buildings and campus, some distance from the

closed outpatient building where the two men stood. Mr. Bonner explained that he was attempting to find and visit his girlfriend and her grandparents in the hospital. No evidence contradicted this explanation. However, from the recording Officer Linn did not appear to understand what Mr. Bonner said in response.

Officer Linn responded: "I'm sorry, what?"

At the 51-second mark, Officer Linn asked more pointedly: "What are you doing here?"

As Officer Linn had been walking toward Mr. Bonner, the distance was now closer and Mr. Bonner held up his phone and told Officer Linn he was trying to talk to someone on the phone about which way to go.

At the 53-second mark, Officer Linn asked: "Do you have ID on you?" Mr. Bonner responded in the affirmative and reached towards his rear pocket. Officer Linn followed up by asking "Can I see it?" Mr. Bonner pulled out his wallet and began opening it.

At the 1:19 mark, Mr. Bonner handed the officer his license.

At 1:23, Officer Linn asked, "Is that your ride?" Mr. Bonner did not seem to answer.

At 1:24, Officer Linn directed Mr. Bonner: "Sit down." As Mr. Bonner fumbled with his wallet and pockets, Officer Linn followed up by directing him: "Take your hands out of your pockets" and "Sit down, please." Mr. Bonner did so. Officer Linn repeated his instruction for Mr. Bonner to keep his hands out of his pockets.

At 1:44, Officer Linn called for assistance. At about the 2:00 mark, Officer Linn called in the details of Mr. Bonner's license.

A few short minutes later, Officer Linn was informed by dispatch that Mr. Bonner's license was suspended. He also learned that Mr. Bonner was on parole. When asked, Mr. Bonner admitted he was on parole. Mr. Bonner was on parole for two felony DUI convictions and had previously waived in writing his Fourth Amendment rights as a condition of parole. Officer Linn arrested Mr. Bonner, who was later tested and found positive for driving while intoxicated.

(R., pp.72-73.)

The district court analyzed the officer's request for Mr. Bonner to sit on the curb. (R., pp.77-78.) After noting that the parties stipulated that Officer Lim seized Mr. Bonner when he asked Mr. Bonner to sit on the curb, the court found:

> At the time of the contract, Officer Linn knew that Mr. Bonner had been driving. However, Officer Linn also knew that *Mr. Bonner was not running away from him*. Indeed, if Mr. Bonner had driven to the correct hospital entrance and entered the emergency room, it is not clear that any conversation would have occurred that night between Mr. Bonner and Officer Linn. After leaving the locked building entrance, *Mr. Bonner did not act in a way that indicated a crime had occurred or was about to occur. He was standing in a well-lit area talking on his phone*, when the officer approached. In response to the officer's appearance, *Mr. Bonner did not run or evade. When Mr. Bonner was asked questions and was asked for his identification, he complied and explained himself.*

(R., pp.77-78 (emphasis added).) The Court added that the officer conceded that he did not know whether Mr. Bonner was speeding, he did not articulate that Mr. Bonner was driving recklessly in violation of the law, and that he was not making a traffic stop when he approached Mr. Bonner. (R., p.78.) Nor did the officer have a reasonable suspicion that Mr. Bonner was driving a stolen vehicle. (R., p.79.) At the time Officer Linn directed Mr. Bonner to sit on the curb, Officer Linn did not have a "reasonable articulable suspicion that a person has committed, or is about to commit, a crime." (R., pp.77-78.) Mr. Bonner's actions up to that point did not give rise to reasonable and articulable suspicion of criminal conduct. At most, Officer Linn had an unsubstantiated hunch that Mr. Bonner may have been driving an unregistered or stolen car.

The State contends that Officer Linn had a reasonable articulable suspicion to investigate Mr. Bonner because the officer believed he was trying to avoid him. (App. Br., pp.7-12.) However, the district court found that Mr. Bonner was not running away or evading the officer, he complied with the officer's questions and explained his conduct (R., p.78), and the State has not challenged this finding on appeal. (App. Br., *generally*.)

The State claims that the district court ignored or excused Mr. Bonner's behavior, finding it merely "unusual," instead of suspicious. (App. Br., p.11.) The State asserts that "[t]he district court employed an incorrect legal standard whereby Bonner's unusual conduct had to be more than 'ambiguous' as to its suggestion of criminal activity." (App. Br., p.12.) At most, Officer Linn had an unsubstantiated hunch. This is evident where the State, both below and on appeal, uses words like "perhaps" and phrases describing "Officer Linn's suspicion that 'more was going on.'" (*See* App. Br. pp.9, 12.) The State claims that the evidence suggests that Mr. Bonner was attempting to evade Officer Linn, "*perhaps* to avoid detection of an expired registration or association with a stolen car." (App. Br., p.12) (emphasis added.) The State claims that Officer Linn has reasonable suspicion to detain Mr. Bonner "to ascertain whether Bonner was trying to avoid detection of a crime involving Bonner or his car." (App. Br., p.10.) Once again, the State is describing a hunch.

Further, the case cited by the State does not support the proposition that an officer obtains reasonable articulable suspicion of criminal wrongdoing when an officer develops a suspicion that a driver may not want to have contact with that officer. An officer does not have reasonable articulable suspicion of criminal wrongdoing when an officer develops a suspicion that a driver may not want to have contact with that officer. The State cites to *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000), in support of its conclusion that "[a]ttempting to evade police contact is not merely unusual, it is suspicious." (App. Br., p.11.) However, *Wardlow* held no such thing.

In *Wardlow*, the United States Supreme Court held that "it was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police." *Id.* 528 U.S. at 124. While the Court has "recognized that nervous, evasive behavior is a pertinent factor in determining reasonable

suspicion," Mr. Wardlow saw the officers and ran—he engaged in "headlong flight." *Id.* The Court noted that even headlong flight "is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Id.* "[U]unprovoked flight is simply not a mere refusal to cooperate." *Id.* at 124-25 (2000). Thus, the *Wardlow* Court did not hold that evasion can, alone, provide reasonable articulable suspicion of criminal wrongdoing. Further, "[t]he review must be based on the totality of the circumstances rather than examining each of the officer's observations in isolation." *State v. Morgan*, 154 Idaho 109, 111 (2013); *United States v. Arvizu*, 534 U.S. 266, 274 (2002)). In this case, Mr. Bonner clearly did not engage in "headlong flight," nor was he evading or avoiding the officer, thus, *Wardlow* is inapplicable to the facts of this case.

Here, the officer could articulate no specific law Mr. Bonner was suspected to have actually broken, nor could he say why he suspected Mr. Bonner was driving a stolen car, other than Mr. Bonner's failure to respond to a question about whether that was "his ride." (App. Br., p.10; Defense Exhibit A.) Further, the question itself was ambiguous—someone's "ride" simply means the car he was driving; Officer Linn did not unequivocally ask Mr. Bonner if he owned the car. (*See* Defense Exhibit A.) Additionally, under *Royer* and *Bostick*, Mr. Bonner was not required to respond to Officer Linn's question because, at this point, he had no obligation to talk to the police. *See Florida v. Royer*, 460 U.S. 491, 498 (1983), (holding that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business); *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (holding any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure").

As the Idaho Supreme Court recently summarized:

> The "whole picture" must yield a particularized and objective basis for suspecting a violation of the law. "The test for reasonable suspicion is based on the totality of

> the circumstances known to the officer at or before the time of the stop." Moreover, "[t]he suspicion for the stop must be based upon objective information available to the officer when he decided to make the stop, and cannot be bolstered by evidence gathered following the stop."

State v. Fuller, 163 Idaho 585, 588 (2018) (internal citations omitted). Officer's Linn's suspicion was an inchoate hunch, and the State's argument that the conduct was "perhaps innocent (although subsequent events proved otherwise, albeit Bonner was attempting to avoid detection for DUI)" (App. Br., p.12), cannot be used to bolster the totality of the circumstances known at or before the time of the stop. *See Fuller*, 163 Idaho at 588.

The district court correctly suppressed the evidence obtained as a result of the seizure of Mr. Bonner where Officer Linn did not have reasonable, articulable suspicion that he was engaged in or about to engage in criminal wrongdoing. Mr. Bonner respectfully requests that this Court affirm the district court's order suppressing the evidence.

CONCLUSION

Mr. Bonner respectfully requests that this Court affirm the district court's Memorandum and Order Re: Motion to Suppress.

DATED this 24th day of September, 2019.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September, 2019, I caused a true and correct copy of the foregoing RESPONDENT'S BRIEF, to be served as follows:

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

SJC/eas