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11/20/2019 3:16 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 46097-2018**
Plaintiff-Appellant,	)	
	)	**Ada County Case No.**
v.	)	**CR01-2017-51545**
	)	
MICHAEL AARON BONNER,	)	
	)	
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 PETER G. BARTON
District Judge

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I.
Bonner Showed No Privacy Right Infringed Upon By His Detention

A. Introduction

In exchange for his parole release from prison, Bonner waived his "rights under the Fourth Amendment and the Idaho constitution concerning searches" and "consent[ed] to the search of [his] person … by … a law enforcement officer." (State's Exhibit 1, ¶ 5; see also State's Exhibit 2, ¶ 11.) Despite this clear language reducing Bonner's expectation of privacy, the district court concluded that the waiver and consent applied only to law enforcement officers with knowledge of Bonner's parole status, and as to officers without that knowledge Bonner enjoyed the same expectation of privacy as enjoyed by any citizen without such a waiver and consent. (R., pp. 80-81.) The district court erred because the scope of a citizen's expectation of privacy is measured based on the *citizen's* expectation and what *society* would recognize as reasonable and therefore the officer's knowledge or ignorance of what privacy interests were at stake was irrelevant. (Appellant's brief, pp. 4-7.)

On appeal Bonner argues that the district court was correct because (1) his subjective expectation of privacy in his person was unaffected by the parole waiver and consent (Respondent's brief, pp. 9-10) and (2) that, despite the waiver, he retained some privacy rights intruded upon by the officer in this case (Respondent's brief, pp. 11-16). Neither argument withstands scrutiny.

B. Bonner Did Not Demonstrate Any Subjective Expectation Of Privacy

"'[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.'" United States v. Jones, 565 U.S. 400, 414 (2012) (quoting Kyllo v. United States, 533 U.S. 27, 33 (2001)). Thus, the initial inquiry into a claimed Fourth Amendment violation is: "Did the person have a subjective expectation of privacy in the object of the challenged search?" State v. Pruss, 145 Idaho 623, 626, 181 P.3d 1231, 1234 (2008). See also State v. Ashworth, 148 Idaho 700, 702, 228 P.3d 381, 383 (Ct. App. 2010) (Fourth Amendment analysis starts with "a determination of whether the defendant had an actual, subjective expectation of privacy"); State v. Fancher, 145 Idaho 832, 837, 186 P.3d 688, 693 (Ct. App. 2008) ("a Fourth Amendment analysis involves a determination of whether the defendant has an actual, subjective expectation of privacy"); State v. Morris, 131 Idaho 562, 565, 961 P.2d 653, 656 (Ct. App. 1998) (Court engaged in Fourth Amendment analysis should "begin by asking whether the complainant exhibited an actual, subjective expectation of privacy"). The person challenging the search has the burden of showing such an expectation of privacy as a matter of fact. Pruss, 145 Idaho at 626, 181 P.3d at 1234.

Here the district court did not find that Bonner had a subjective expectation that he would be free of searches of his person. (R., pp. 80-81.) The only evidence presented was that Bonner had waived that expectation in order to secure his release on parole. (State's Exhibit 1, ¶ 5; see also State's Exhibit 2, ¶ 11.) The district court disregarded the evidence, reasoning that the waiver was "ineffective" because the officer "did not know of the waiver or know or reasonably believe that Mr. Bonner was a parolee or probationer at the time of the seizure." (R., p. 81.) There is, however, nothing in the waiver or in the record that so limits the scope of Bonner's waiver and consent. Indeed, Bonner had an affirmative duty

to notify the officer of his parole status. (State's Exhibit 1, ¶ 1; see also State's Exhibit 2, ¶ 2.) Bonner neither had nor created through his parole violation a subjective expectation that the Fourth Amendment protected his person against a search by the officer.

Bonner argues "there is no question" that he "had a subjective expectation of privacy in his own person." (Respondent's brief, pp. 9-10.) He presents no argument how that expectation survived his waiver and consent, and points to no evidence on this factual question. While Bonner clearly had an expectation of privacy prior to the waiver and consent, he waived that expectation as a condition of parole. Because Bonner expressly stipulated to law enforcement searches of his person as a condition of his release from prison, he did not subjectively expect to be free of law enforcement searches of his person. The district court erred, and Bonner has failed to show otherwise.

C. Bonner Did Not Demonstrate Any Expectation Of Privacy Society Would Recognize As Reasonable

The Fourth Amendment "does not protect the merely subjective expectation of privacy, but only those expectations that society is prepared to recognize as reasonable." Oliver v. United States, 466 U.S. 170, 177 (1984). Even if Bonner had a subjective expectation that he would not be subject to searches of his person by police officers despite his parole agreement that he would be, society would not recognize such a subjective expectation to be reasonable in the face of a signed parole agreement specifically waiving his Fourth Amendment rights, agreeing to searches of his person by law enforcement officers, and mandating that in any encounter with a law enforcement officer he notify that officer of his status as a parolee. (Appellant's brief, pp. 6-7.) Simply stated, any subjective

expectation that he would be free of searches by officers was unreasonable in the face of the agreement Bonner made to secure his parole from custody.

The district court's conclusion that the search violated Bonner's reasonable expectation of privacy is flawed for two reasons. In Samson v. California, 547 U.S. 843 (2006), the Supreme Court of the United States applied the "general Fourth Amendment approach" of examining the totality of the circumstances to determine if the search was reasonable. Id. at 848-49 (internal quotations omitted). The totality of the circumstances included the parolee's reduced expectation of privacy and the state's interests in administering a parole system to conclude that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Id. at 849-56. Because the officer's lack of knowledge that Bonner was on parole did not change Bonner's parole status or the terms of his waiver and consent, it could not have increased his expectation of privacy. Likewise, the officer's lack of awareness that Bonner was a parolee did not change the state's interests in administering its parole system. Indeed, the requirement that Bonner alert any officer of his parole status exemplifies the state's interest in monitoring its parolees' encounters with police. Thus, the officer's lack of knowledge of Bonner's parole status does not change the balancing under Samson, and the search was constitutionally reasonable.

Even if, however, adding the officer's ignorance to the totality of the circumstances rendered the search otherwise unreasonable, Bonner could only obtain suppression if the search violated his subjective expectation of privacy that society is willing to recognize as reasonable. Oliver, 466 U.S. at 177. The Court in Samson specifically stated it was not reaching whether the conditions of parole constituted a consent or a "complete waiver" of

Fourth Amendment rights. Samson, 547 U.S. at 852 n.3 ("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." (internal quotations omitted)). Because the officer's search was not outside the scope of the waiver and consent, as shown by the plain language of the parole agreements, Bonner could not, and did not, show that he had a reasonable expectation of privacy in fact infringed by the search.

Bonner first argues that although his rights of privacy were "diminished" because of his status as a parolee, they "nonetheless exist." (Respondent's brief, pp. 10-16.) He does not, however, demonstrate how the search in this case was outside the scope of his parole waiver and consent. There is no exception in the parole agreement's waiver and consent for officers unaware of Bonner's parole status, and in fact the parole agreement required Bonner to affirmatively cure the officer's lack of knowledge. Nor does Bonner show how a search within the scope of his waiver and consent infringed upon a reasonably held expectation of privacy. Because the search in this case was squarely within the scope of the consent and waiver ("I consent to the search of my person … by any … law enforcement officer" (Exhibit 1, ¶ 5)) Bonner did not have any reasonable expectation infringed by the search of his person by a law enforcement officer.

II.
Officer Linn Had Reasonable Suspicion To Detain Bonner

The district court, in direct contravention of controlling authority, held that ambiguous circumstances cannot justify an investigative detention. (Appellant's brief, pp. 7-12.) Bonner does not contest this central point of the state's argument. (Respondent's

brief, pp. 16-23.) Rather, he argues that applying the correct legal standards shows that Officer Linn's suspicion was not reasonable, but was instead based on a "hunch." (Id.) Bonner's "right result wrong reason" analysis does not show the district court's error to be irreversible.

As set forth in the state's brief, Bonner drove past Officer Linn in an unusually fast and dangerous manner. When the officer started following him Linn cut across a lane of traffic to make an abrupt exit from the road into a parking lot. Once in the parking lot Bonner parked his car away from any buildings and approached a closed business. He then walked away from buildings in the parking lot and his car. Finally, Bonner ignored a question about his car. (Appellant's brief, pp. 1-2, 9-10; Tr., p. 40, L. 19 – p. 49, L. 23; R., pp. 71-73.) Under these circumstances the officer reasonably suspected that Bonner was trying to evade any contact with the officer that involved his car.

On appeal Bonner argues there was no reasonable suspicion because when Officer Linn contacted him he was standing in a well-lit area talking on his phone and not engaging in any evasive behaviors. (Respondent's brief, p. 20.) This ignores Bonner's obvious and suspicious efforts to avoid any association with the car or his driving. Although fleeing on foot would undoubtedly have added to the suspicion, Bonner's evasion of the officer while on the road, his parking the car away from any legitimate destination, his distancing himself from the car prior to the encounter, and then his simply ignoring any reference to the car in the initial (and voluntary) stages of the encounter are suspicious, and reasonably so. Even if Bonner had a reasonable expectation of privacy, an investigative detention to learn why Bonner was so assiduously trying to avoid having the officer associate him with his car and driving was reasonable.

CONCLUSION

The state respectfully requests that this Court reverse the district court's order suppressing evidence and remand for further proceedings.

DATED this 20th day of November, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of November, 2019, 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:

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