IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

NO. 78230

vs.

KIMBERLY MARIE NYE,

Respondent.

STATEMENT OF GOOD CAUSE IN SUPPORT OF APPEAL BY THE STATE OF NEVADA, PURSUANT TO THE PROVISIONS OF NRS 177.015(2), OF RULING GRANTING MOTION TO SUPPRESS

COMES NOW APPELLANT, STATE OF NEVADA, and informs the Court that there is good cause for this appeal in that it involves matters of public concern, as well as issues arising under the United States Constitution. Specifically, the State submits that the District Court in granting the motion to suppress relied upon a prior Nevada Supreme Court ruling that was not properly briefed or addressed at the time it was decided in light of other contradicting case law in the area of searches incident to arrest. In granting the motion to suppress the District Court stated that it was "constrained" to follow the reasoning from Rice v. State, 113 Nev. 425 (1997), which found an officer's search of a backpack at the scene of the arrest, which had been carried by the defendant at the time of the encounter, not a search incident to arrest. The State is appealing and requesting that the Supreme Court review Rice and reverse the reasoning therein. Furthermore, even if Nevada is choosing to specifically

grant greater protections under Rice, the drugs should not have been suppressed due to their inevitable discovery by the jail staff at booking.

Nye was arrested for trespassing by a casino employee. She had with her a backpack at the time she was arrested. She was disruptive, to put it mildly, at the time of arrest and in lieu of trying to search the backpack at the place of arrest, the casino floor, she was moved by officers to a police car, placed in the car and her bag was placed in the trunk. The arresting officer, Officer Ortiz, then drove her the scant .7 miles to the jail and handed the Defendant off to jail staff and the officer then performed the search of the backpack at the jail. These actions were reasonable by the officer, delaying the search of the backpack by a few minutes due to the unruly nature of the Defendant. At the jail, Officer Ortiz searched the backpack and therein found an eyeglass case with paraphernalia and approximately 3.2 grams of methamphetamine.

The Rice decision noted above was made without the issue being raised by the parties as noted by the concurring and dissenting opinion:

> "The parties to this appeal did not choose to litigate the issue of whether this search of the backpack was invalid as an improper inventory search or was an invalid search incident to arrest. The contentions of the parties were restricted to the reasonableness of the detention and the searches incident thereto. I would therefore not reach this issue on direct appeal." Id. at 431.

It appears that without argument from either party the Supreme Court in 1997 decided to rewrite search incident to arrest law. Read clearly, an officer, if Rice is to rule the day, must either, search the bag while it is on the person of the Defendant - clearly an officer safety issue, or have a second officer always on hand to search the bag while the person of the Defendant is searched by another officer simultaneously, an altogether onerous requirement not supported by the prevailing United States Supreme Court case law.

As it currently reads, without doing one of these two suggestions, an officer is then left with just putting a bag in his car when he has no idea what might be inside – another officer safety issue. Furthermore, he must take it to the jail without ever opening it and leave it with jail deputies in the institution, without ever checking it for anything – another officer safety

issue and in fact an institutional safety issue. This simply makes no sense for the police officers on the street or the jail deputies.

It is interesting to note that in the 22 years since Rice was decided, it has only been cited 3 times and only for the following two propositions: (1) "If probable cause matures, the detention can ripen into an arrest." State v. McKellips, 118 nev. 465, 471 fn. 14 (2002); and (2) "Findings of fact in a suppression hearing will not be disturbed on appeal if supported by substantial evidence." Peck v. Nev. 116 Nev. 840, 846 (2000); State v. Johnson, 116 Nev. 78, 80 (2000). It has never been cited as prevailing search incident to arrest authority.

State v. Greenwald, 109 Nev. 808, 810 (1993), cited by the District Court in granting the motion to suppress, which is cited and relied upon by Rice has to do with the inventory search of a vehicle. While giving lip service to the principles of a search incident to arrest, it is not a search incident to arrest case. Furthermore, Greenwald has to do with the search of a vehicle, much like Arizona v. Gant, 556 U.S. 332 (2009), and is distinguishable as they are searching the place where a person was arrested rather than the person or articles in possession of a person upon arrest. There is a distinction between the search of a place and the search of a person and the articles in their possession. The places to be searched are not taken to jail, obviously, and therefore a review of Rice in this limited area does not disturb the reasoning in Gant and Greenwald as they pertain to places searched upon arrest.

It is the State's contention that the officer should be able to perform a search incident to arrest of the person and any articles within their possession at the time of arrest without being required to produce an inventory and as long as it is roughly contemporaneous with the arrest, in other words reasonable, and not remote in time or place from the arrest. United States v. Chadwick, 433 U.S. 1, 14-15 (1977) (see also Chimel v. Cal., 395 U.S. 752, 763-764 (1969)). This is the reasoning of both the 9th Circuit and the 4th Circuit which have made rulings since Chadwick and Chimel explaining the scope of a searches incident to arrest in regards to items like backpacks, purses and the like that are in the "immediate control" of the Defendant at the time of the encounter with law enforcement. United States v. Camou, 773

F.3d 932, 937-938 (9th Cir. 2014); United States v. Nelson, 102 F.3d 1344, 1346-47 (4th Cir. 1996).

Under the above precedent Rice which was never fully briefed, apparently, needs to be revisited.

Furthermore, in this case the jail deputy did inventory the items of property from the Defendant, and while a written inventory was created, the District Court found it lacking. The State suggests that a search of the person or property brought to the jail and booked does not require an inventory in order for it to fulfill the inevitable discovery doctrine. The jail has a tremendous officer safety issue and if the purposes of searches incident to arrest are to protect the officers, then clearly that is the case for any search done at the jail. It is a twofold purpose and while they do inventory to prevent lost property claims, they also search to prevent and protect from items being introduced into the jail population. A strip search is not an inventory of the inmate's property, but a search incident to incarceration. A search of a backpack is not just for inventorying the property and safekeeping, but making sure that dangerous items, drugs and weapons, are not stored at a place where there are hundreds of criminals. Thus, if an inventory must be done, it should not be of the same standard as a car on the road since there is a dual purpose for the search.

Due to the Defendant's actions Ortiz's reaction by deferring his search incident to arrest of the backpack to the jail was reasonable and given the prevailing case law noted above and the fact that Rice has never been cited for that proposition his actions were reasonable still. The jail deputy's action in creating an inventory was sufficient and the high detail required by the District Court was not necessary in a jail intake protocol setting where there are dual purposes for the search, officer safety and keeping contraband out of the jail, and also safeguarding the property of the Defendant. With these reasonable actions suppression was not warranted. Herring v. United States, 555 U.S. 135 (2009).

///

///

///

The Appellant avers that there is good cause for this appeal.

RESPECTFULLY submitted: March 4, 2019.

TYLER J. INGRAM
Elko County District Attorney

By: _____
CHAD B. THOMPSON
Chief Criminal Deputy District Attorney
State Bar Number: 10248

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the provisions of NRCP 5(b), that I am an employee of the Elko County District Attorney's Office, and that on the 14th day of March, 2019, I served the foregoing Statement Of Good Cause In Support Of Appeal By The State Of Nevada, Pursuant To The Provisions Of NRS 177.015(2), Of Ruling Granting Motion To Suppress, by delivering, or causing to be delivered, a copy of said document to the following:

By mailing to:

DAVID D. LOREMAN
ATTORNEY AT LAW
445 5TH STREET, SUITE 210
ELKO, NV 89801

I hereby further certify that this document was filed electronically with the Nevada Supreme Court on the 14th day of March, 2019. Electronic Service of the Statement Of Good Cause In Support Of Appeal By The State Of Nevada, Pursuant To The Provisions Of NRS 177.015(2), Of Ruling Granting Motion To Suppress shall be made in accordance with the Master Service List as follows:

Honorable Aaron Ford
Nevada Attorney General

Erika Weber
Caseworker
eweber@elkocountynv.net

DA# F-18-00921