IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA

Appellant,

vs. CASE NO.78230

KIMBERLY MARIE NYE,

Respondent.

Appeal From The Fourth Judicial District Court
Of The State of Nevada
In And For The County Of Elko

POINTS AND AUTHORITIES SETTING FORTH THE BASIS FOR APPEAL

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FACTUAL AND PROCEDURAL BACKGROUND

Nye was arrested for trespassing by a casino employee at the Stockmen's Casino in Elko, NV on March 29, 2018. She had with her a backpack at the time she was arrested. She was intoxicated, argumentative and uncooperative with hotel employees and officers prior to and at the time of arrest and throughout the arresting officer's interaction with her. In lieu of trying to search the backpack at the place of arrest, which would have been the casino floor and the arresting Officer's normal practice, Officer Ortiz chose, due to Nye's uncooperative behavior, to move Nye to a police car, place her in the car and her backpack was placed in the trunk and drive her the short distance to the jail and perform the search of the backpack there.

Prior to being moved from the casino floor, Nye requested that she be allowed to leave her backpack with her friend, although there was no one else around at the time of arrest. The arresting officer, Officer Ortiz, then drove her the scant .7 miles to the jail and during the ride there Nye continued her verbal assault of Ortiz. Upon arriving at the jail, Ortiz handed Nye off to jail staff and then Officer Ortiz searched the backpack within approximately 5-6 feet of Nye while jail deputies searched her person in the booking area. During the search of the backpack Officer Ortiz found therein

an eyeglasses case with paraphernalia and approximately 3.2 grams of methamphetamine. Nye was arrested for possession of a controlled substance, possession of drug paraphernalia and trespassing. Nye was booked by jail deputy Edgmond who searched and inventoried the personal items of Nye pursuant to jail policy. The inventory sheet was admitted into evidence at the hearing as was the policy manual.

The State filed a Criminal Complaint on April 24, 2018 charging Nye with Possession of a Controlled Substance. A preliminary hearing was held on June 26, 2018 after which Nye was bound over on the charge. A jury trial was set for March 12, 2019. Prior to trial, Nye filed a motion to suppress on December 13, 2018, which the State opposed. An evidentiary hearing was held on February 14, 2019, at which Deputy Edgmond and Officer Ortiz testified. The District Court filed its order granting the motion to suppress on February 25, 2019, which excluded all the evidence found in the backpack during Ortiz's search. This appeal was then taken by the State and the parties stipulated to stay the proceedings pending the outcome of the appeal. Nye is not incarcerated. The District Court relied upon the Preliminary Hearing Transcript, the testimony at the evidentiary hearing and the evidence admitted at both hearings in arriving at its decision, all of which will be included in the State's appendix if the State is permitted to

proceed with the appeal.

ARGUMENT

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 because the Defendant had been handcuffed and placed in the police vehicle prior to the search of the backpack. Id. at 430. The State is appealing Nye's case and requests that the Supreme Court review Rice and reverse the reasoning therein. Alternatively, even if Nevada is choosing to specifically grant greater protections under Rice, the drugs in Nye's case should not have been suppressed due to their inevitable discovery by the jail staff during booking. Finally, because Officer Ortiz's actions were reasonable, based upon and due to Nye's actions during the arrest, suppression is not warranted.

The Rice decision noted above and relied upon by the District Court here in suppressing the drugs attributed to Nye, 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 briefing from either party the Nevada 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 and before the defendant is in handcuffs - 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 again prior to restraining the defendant, which is again an officer safety issue and 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. Is there a search

incident to arrest exception or isn't there in Nevada? Officers are routinely encountering incidents that they do not expect and by forcing them to focus on the person and completely disregard the possessions of the defendant has the potential to put them and others in great harm.

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)); Camacho v. State, 119 Nev. 395, 399-400 (2003). 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). The Nevada Supreme Court adopted this reasoning in 1965 when it cited other United States Supreme Court precedent: "A search can

be incident to arrest 'only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.'" Thurlow v. State, 81 Nev. 510, 512 (1965) (quoting Stoner v. California, 376 U.S. 483 (1964). Given these above cases the State and law enforcement officers are flummoxed that the search of the backpack in Rice was deemed not a search incident to arrest as it occurred at the scene and immediately after the Defendant was placed in custody and the backpack was on his person at the outset of the encounter. This appeal should be entertained to give officers the guidance they need out on the street.

The United States Supreme Court has recently, 2014, addressed searches incident to arrest again in Riley v. California and gave an excellent overview of search incident to arrest case law citing the cases above as well as United States v. Robinson, 414 U.S. 218 (1973) and United States v. Chadwick noted above dealing with personal property. Riley v. California, 573 U.S. 373, 381-393 (2014). The Court in Riley, while about whether the data contained in a cell phone may be searched incident to arrest, noted that while Robinson allowed for the search of a cigarette package which was a container on the person of the arrestee, Chadwick dealt with a 200 lb. locked footlocker and Chimel dealt with the search of an entire house. While the latter two were rejected as unreasonable searches, the search of the cigarette

package was not. Riley then went on to further explain approvingly those cases decided by lower courts interpreting the above reasoning, that have allowed searches of the contents of items found on an arrestee's person under Chimel and the like: the search of a zipper bag, a billfold and address book, a wallet and most importantly as it applies in Nye's case, a purse. Riley at 392-393 (citing, Draper v. United States, 358 U.S. 307, 310-311 (1959); United States v. Carrion, 809 F.2d 1120, 1123, 1128 (CA5 1987); United States v. Watson, 669 F.2d 1374, 1383-1384 (CA11 1982); United States v. Lee, 501 F.2d 890, 892 (CADC 1974). All of these items are containers on a person and ought to be searched at the time of the arrest. A backpack as in Rice should have also fallen under this same rationale as an unlocked item carried on the arrestee's person the same as a purse, bag or other container. With the recent Supreme Court decision approvingly citing the searches of bags/purses upon an arrested person during a search incident to arrest, it appears that Rice which was never fully briefed, needs to be revisited.

Furthermore, as it applies to Nye, the "substantially" or "roughly" contemporaneous search of the backpack in this case, having occurred at the jail instead of the place of actual arrest due to Nye's uncooperative behavior, was still a reasonable search within a short period of time. Furthermore, it

was done while she was being simultaneously searched by jail deputies, still incident to the arrest.

Alternatively, the drugs should not have been suppressed due to the inevitable finding of the drugs by the jail deputies. 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 to prevent a defendant from introducing contraband into the jail. 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. The State relies upon

Illinois v. Lafayette, 462 U.S. 640, 644-647 (1983) in support of the above arguments.

Due to the Defendant's actions at the casino and towards officers, 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, namely officer safety and keeping contraband out of the jail, and also safeguarding the property of the Defendant. With these reasonable actions in mind suppression was not warranted. Herring v. United States, 555 U.S. 135 (2009).

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CONCLUSION

The order granting the motion to suppress will prevent the State from introducing at trial the 3.2 grams of methamphetamine and the drug paraphernalia found in the backpack that Nye had with her when she was arrested. The reasoning of the District Court to support the suppression of the evidence was founded in Rice. The District Court's finding that once the Defendant was handcuffed and placed in the car, then Rice did not permit the search of the backpack is only founded upon Rice which is contradicted by prevailing United States Supreme Court case law. It also contradicted existing Nevada case law which Rice did not address or expressly overrule or note that it was granting greater protections to the citizenry of Nevada in light of these opposing views. Specifically, the Thurlow case above cited approvingly a "substantially" contemporaneous search incident to arrest. The State's officers on the street need greater guidance than the reasoning Rice provides as it will put them and defendants at a greater risk of harm if Rice really stands for the proposition that a search of a container on the person of a defendant may only be searched prior to any restraint of the defendant.

Finally, the State would note that it is also appealing another case, Supreme Court Case #78280, wherein the Rice case is again central to the issue demonstrating the need for this court to address Rice.

RESPECTFULLY SUBMITTED this 12 day of March, 2019.

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CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 12th day of March, 2019. Electronic Service of the POINTS AND AUTHORITIES SETTING FORTH THE BASIS FOR APPEAL shall be made in accordance with the Master Service List as follows:

Honorable Aaron Ford
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