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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 50707-2023**
	)	
v.	)	**ADA COUNTY NO. CR01-22-22589**
	)	
AMANDA JOAN FLETCHER,	)	**APPELLANT'S REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

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 RONALD J. WILPER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Amanda Fletcher appealed from the district court's judgment of conviction after her conditional guilty plea to two drug-related offenses. She argued the district court erred by denying her motion to suppress. First, she asserted the officers unlawfully searched her vehicle because they had no knowledge of her Fourth Amendment waiver, as required by *State v. Maxim*, 165 Idaho 901, 454 P.3d 543 (2019). Second, she asserted the officers unlawfully searched her vehicle because the Idaho Constitution prohibits dog sniffs without reasonable suspicion and warrantless searches of secured vehicles without exigent circumstances.

In response, the State contends the district court did not err by denying Ms. Fletcher's motion. The State argues *Maxim* should be overruled or distinguished, and the Idaho Constitution should not be interpreted to grant greater protections for dog sniffs or warrantless vehicle searches.

Ms. Fletcher replies to the State's *Maxim* arguments. She respectfully refers the Court to her Appellant's Brief on her state constitutional claims.

Statement of Facts and Course of Proceedings

Ms. Fletcher set out the relevant facts and proceedings in her Appellant's Brief. They are not repeated here but are incorporated by reference. (App. Br., pp.1–7.)

ISSUE

Did the district court err when it denied Ms. Fletcher's motion to suppress evidence obtained from a warrantless search of her vehicle?

ARGUMENT

The District Court Erred When It Denied Ms. Fletcher's Motion To Suppress Evidence Obtained From A Warrantless Search Of Her Vehicle

In her Appellant's Brief, Ms. Fletcher argued the district court erred by denying her motion to suppress in two ways. (App. Br., pp.9–33.) First, she argued the district court erred because, under *Maxim*, the Fourth Amendment waiver in her probation agreement could not justify the search of her vehicle when the officer had no knowledge of her waiver. (App. Br., pp.10–13.) Second, she argued the district court erred because, although not ruled on below, Article 1, Section 17 of the Idaho Constitution grants greater protections for dog sniffs and warrantless searches under the automobile exception. (App. Br., pp.14–32.) Under either argument, Ms. Fletcher contended the officers unlawfully searched her vehicle, and the district court should have granted her motion. (App. Br., pp.13, 32–33.)

In response, the State addresses Ms. Fletcher's state constitutional arguments first. (Resp. Br., pp.6–22.) Ms. Fletcher does not reply[1] and respectfully refers the Court to her Appellant's Brief. (App. Br., pp.14–32.)

[1] In a footnote, the State suggests that the Minnesota Supreme Court's holding that requires reasonable suspicion for dog sniffs has minimal persuasive value because the case was decided before *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding a dog sniff is not a search under the Fourth Amendment). (Resp. Br., p.15 n.2.) *See State v. Wiegand*, 645 N.W.2d 125, 137 (Minn. 2002) ("Thus, in order to lawfully conduct a narcotics-detection dog sniff around the exterior of a motor vehicle stopped for a routine equipment violation, a law enforcement officer must have a reasonable, articulable suspicion of drug-related criminal activity. We believe this is the appropriate application of the search and seizure limitations in the federal and state constitutions to the facts of the case before us."). Ms. Fletcher notes the Minnesota Supreme Court has not changed its holding post-*Caballes*. *See*, *e.g.*, *State v. Lugo*, 887 N.W.2d 476, 486 (Minn. 2016)

On the *Maxim* issue, the State first argues the Court should overrule *Maxim* and hold Ms. Fletcher lacked "standing" to challenge the warrantless search of her vehicle. (Resp. Br., pp.23–29.) The State contends Ms. Fletcher's Fourth Amendment waiver in her probation agreement deprived her of any expectation of privacy in her vehicle. (Resp. Br., pp.22, 29.) The State asserts this is a matter of waiver, not consent. (*See* Resp. Br., pp.25–27.) The State's argument on standing is not only unpreserved but also directly contrary to its position below.

In the district court, the State took no issue with the Court's decision in *Maxim*. In the State's written objection to Ms. Fletcher's motion, the State argued in full on the *Maxim* issue:

> I. Defendant waived her rights regarding searches by law enforcement under the U.S. and Idaho Constitutions, thereby rendering her constitutional arguments inapplicable
>
> Defendant was convicted of the felony offense of Possession of a Controlled Substance in Ada County Case No. CR01-18-34469 on or about December 7, 2018. The standard IDOC Agreement of Supervision, which was signed by Defendant as a part of her probation condition in that case, contains within it a consent to searches by IDOC agents or law enforcement officers. *See Judgment of Conviction and Order of Probation* at 7, item #5. [(*See* R., p.123.)]
>
> Defendant was on felony probation with an active consent to searches by all law enforcement officers at the time of this offense. According to Officer Biagi's police report, he was aware of Fletcher's probation status (which would include a consent to search) prior to requesting the assistance of a K9 officer. He had already seen Fletcher inside the car and knew her to be in control of it. Her prior consent to searches and waiver of her applicable search rights as a part of her felony probation renders the subsequent search of her vehicle reasonable when law enforcement was already aware of it. *See generally State v. Maxim*, 165 Idaho 901 (2019). While Fletcher did make clear to Officer Biagi that she did not "consent" to a search of her car, she cannot revoke consent previously given as a condition of probation while in the field. In order to legally revoke such consent, she would have to go

(reciting *Wiegand* holding); *State v. Davis*, 732 N.W.2d 173, 176–82 (Minn. 2007) (discussing *Wiegand* post-*Caballes*).

> back to the court that placed her on probation and make the request. *State v. Hansen*, 167 Idaho 831 (2020). Fletcher has made no such request, and absent a court order from Judge Baskin removing that probation condition it remains valid.

(R., p.156 (bolded emphasis omitted).) In essence, the State argued the arresting officer's awareness of Ms. Fletcher's felony probation status satisfied *Maxim*'s knowledge requirement and that, under *Hansen*, Ms. Fletcher could not revoke her consent at the time of the search.

Later, at the hearing on Ms. Fletcher's motion, the arresting officer testified:

> Q. And then you mentioned she was on felony probation. How did you come to find that out?
>
> A. Yes. I ran her name through the IDOC website, and she showed to be on probation for possession of a controlled substance.

(Tr., p.52, Ls.9–13.) On cross-examination, the arresting officer continued:

> Q. Officer Biagi, when did you run Ms. Fletcher's name through the IDOC website?
>
> A. I believe I did it before I made contact with her.
>
> Q. And did you take any other steps related to her probation with IDOC?
>
> A. No.
>
> Q. Did you reach out to a PO?
>
> A. I did not.
>
> Q. Did you read any documents?
>
> A. No.
>
> Q. Are you aware of what her probation status was?
>
> A. As far as the terms?
>
> Q. Yes.

A. No, I was not.

(Tr., p.53, L.16–p.54, L.1.) Notwithstanding this testimony, the State did not revise its position and argue *Maxim* was distinguishable or that Ms. Fletcher otherwise lacked standing. Instead, the State argued Ms. Fletcher consented to the search via her Fourth Amendment waiver. (Tr., p.90, L.21–p.91, L.12.) In response to the district court's inquiry as to whether "in your view this [(the probation agreement)] is simply a waiver and so she can't complain about unreasonable searches at all, or this is evidence [sic] this search was reasonable because she consented," the State confirmed it was an issue of consent. (Tr., p.91, L.24–p.92, L.18.) The State explained that *Hansen*, 167 Idaho 831, 477 P.3d 885, "dealt with this exact circumstance where there is a search done pursuant to conditions of probation," and Ms. Fletcher attempt to revoke her consent at the time of the search was, therefore, ineffectual. (Tr., p.92, Ls.3–12.)

Now on appeal, the State argues *Maxim* is wrong. The State cannot take such a contrary position on appeal. "To properly preserve an issue for appeal, 'both the issue and the party's position on the issue must be raised before the trial court[.]'" *State v. Plata*, 171 Idaho 833, 840, 526 P.3d 1003, 1010 (2023) (quoting *State v. Gonzalez*, 165 Idaho 95, 99, 439 P.3d 1267, 1271 (2019)). "Issues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court." *State v. Foeller*, 168 Idaho 884, 891, 489 P.3d 795, 802 (2021) (quoting *State v. Garcia-Rodriguez*, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017)). The State has not maintained the same legal theory throughout this case. In the district court, the State argued the arresting officer's awareness of Ms. Fletcher's probation status satisfied *Maxim* and she could not revoke her consent at the time of the search.

The State never argued *Maxim* was inapplicable or that Ms. Fletcher waived her expectation of privacy in her vehicle. In short, the State never challenged standing. The State is not riding on a "groomed and reshod" horse on appeal but an "entirely new" one. *Gonzalez*, 165 Idaho at 99, 439 P.3d at 1271. This new horse is simply "forbidden." *Id.*

But, even if the State could change horses, it cannot in this circumstance. The Court has unequivocally held that standing cannot be raised for the first time on appeal. In *State v. Howard*, 169 Idaho 379, 496 P.3d 865 (2021), the State argued, for the first time on appeal, that the defendant did not have a reasonable expectation of privacy in a borrowed car. *Id.* at 384, 496 P.3d at 870. The Court held that "the State cannot challenge a defendant's Fourth Amendment standing for the first time on appeal." *Id.* at 385, 496 P.3d at 871. In so holding, the Court explained:

> "Our adversarial system of justice demands active and agile counsel at all levels." [*State v. Hoskins*, 165 Idaho 217, 226, 443 P.3d 231, 240 (2019)]. Indeed, the quality of our review depends on it. Whether the decision not to litigate the issue of standing below was the product of a strategy, of an oversight, or—as seems to be the case from the record—of an assumption by all parties that [the defendant] had standing, we will not venture into the thicket to decide the issue for the first time on appeal. The initial resolution of fact-intensive questions is the province of our capable trial judges.

Id. at 386, 496 P.3d at 872. The Court should not "venture into the thicket" here. *Id.* Despite the arresting officer's testimony that he had no knowledge of Ms. Fletcher's Fourth Amendment waiver, the State did not adjust its position and try to distinguish *Maxim*. Nor did defense counsel have the opportunity to respond to that new argument. The preservation of the parties' arguments below and "wisdom of the trial counsel in deciding the matter in the first instance . . . . are not mere courtesies to the Court, but vital aspects of the appellate process." *Howard*, 169 Idaho at 385,

496 P.3d at 871. The State should not get "a legal mulligan" to devise a new theory on appeal upon its realization that the evidence supports Ms. Fletcher's *Maxim* argument. *Hoskins*, 165 Idaho at 226, 443 P.3d at 240. The State's standing argument is not preserved for appeal.

Setting aside the State's preservation pitfalls, the State has not offered any compelling reason for the Court to overrule *Maxim*—beside the fact that it does not like the outcome it dictates in this case. The State argues the defendant cannot leapfrog over "the second *Hoskins* step" of standing to reach "the third *Hoskins* step" of the legality of the search. (Resp. Br., pp.23–29.) Interestingly, the Court decided *Hoskins* before *Maxim*, and the same Justice authored both cases. *Hoskins*, 165 Idaho 217, 443 P.3d 231 (June 13, 2019) (Burdick, C.J.); *Maxim*, 165 Idaho 901, 454 P.3d 543 (Dec. 4, 2019) (Burdick, C.J.) Had the Court wished to outline a baseline standing requirement (or a lack of standing) for probation searches in light of *Hoskins*' three steps, it certainly could have done so. But the Court did not. *Maxim*, 165 Idaho at 905, 454 P.3d at 547 (reciting *Hoskins*). In fact, the State simply rehashes its standing argument from *Maxim*. In *Maxim*, the State also argued the defendant lacked standing to challenge the search due to his Fourth Amendment waiver. *Respondent's Brief*, *State v. Maxim*, No. 45950, 2019 WL 1228323, at *9–16 (March 7, 2019). There, the State had at least preserved the argument in the district court that the defendant did not have a reasonable expectation of privacy due to the Fourth Amendment waiver. *Maxim*, 165 Idaho at 903–04, 454 P.3d at 545–46. Nonetheless, the Court rejected the State's argument. *Id.* at 905–08, 454 P.3d at 547–50. The State's attempt to get a second bite at the "standing" apple, with the same arguments, does not provide a convincing justification to overrule *Maxim*.

On the merits, *Maxim* controls. The State argues *Maxim*'s knowledge requirement is distinguishable because "[c]ommon sense dictates that the officer would have been aware that Fletcher was most likely subject to terms of probation regarding consent and waiver." (Resp. Br., p.30.) Basically, according to the State, if the officer learns the defendant is on felony probation, the officer should be allowed to assume the defendant has a Fourth Amendment waiver and act accordingly (*i.e.*, conduct warrantless searches at will). A "common sense" assumption is not actual knowledge. This Court has repeatedly expounded that an officer's illegal action cannot be remedied by an after-the-fact solution. *State v. Ramos*, 172 Idaho 764, ___, 536 P.3d 876, 885 (2023) ("determining whether an officer's primary purpose in deciding to impound a car is an impermissible pretext will require the district court to consider evidence regarding the officer's *subjective* intent"); *State v. Downing*, 163 Idaho 26, 32, 407 P.3d 1285, 1291 (2017) ("The inevitable discovery exception does not permit us to speculate on the course of action the investigation *could* have taken in the absence of pre-*Miranda* statements, an unlawful pat-search, and subsequently tainted admissions—even if that alternate course likely would have yielded the evidence."); *State v. Lee*, 162 Idaho 642, 652, 402 P.3d 1095, 1105 (2017) ("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."). *Maxim* is no exception:

> [T]he only question presented by these facts is whether the existence of a Fourth Amendment waiver can transform the officer's otherwise illegal actions into reasonable ones despite being unaware of the waiver at the time he acted.

> We hold that a Fourth Amendment waiver cannot salvage an otherwise unreasonable entry into a home under the Fourth Amendment if the police officers were unaware of the waiver at the time of the unconstitutional search. We are not alone in this common-sense approach. *See Samson v. California*, 547 U.S. 843, 856 n.5 (2006) ("Under California precedent . . . an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee."); *United States v. Job*, 871 F.3d 852, 859 (9th Cir. 2017) ("Police officers must know about a probationer's Fourth Amendment search waiver before they conduct a search in order for the waiver to serve as a justification for the search."). The discovery of a Fourth Amendment waiver after the fact should not serve as a *deus ex machina* allowing the State to rewrite the story in the courtroom when the police's actions were unconstitutional outside of it.

Maxim, 165 Idaho at 908, 454 P.3d at 550. Without an officer's actual knowledge of the Fourth Amendment waiver, an officer cannot conduct an illegal search in the hopes that, later, the State will find the waiver and validate their illegal actions. This "*deus ex machina*" approach to "rewrite" Fourth Amendment violations is untenable. *Id. Maxim* should not be "distinguished" simply because, as the State claims, the officer should have been able to assume Ms. Fletcher had a Fourth Amendment waiver when he conducted the warrantless search.

Finally, even if "common sense" could be enough in a hypothetical case, there was none here. The arresting officer explicitly testified that he was not aware of the terms of Ms. Fletcher's probation. (Tr., p.53, L.23–p.54, L.1.) Thus, there is no evidence to permit a "common sense" assumption that the officer was "aware" of Ms. Fletcher's "likely" probation terms. (Resp. Br., p.30.) He was indisputably unaware. In sum, *Maxim* is indistinguishable from this case, and Ms. Fletcher respectfully requests the Court reject the State's arguments in opposition.

For the reasons stated here and in the Appellant's Brief, Ms. Fletcher maintains the district court erred by declining to apply *Maxim* and, as a result, denying her motion to suppress.

CONCLUSION

Ms. Fletcher respectfully requests this Court vacate the district court's judgment of conviction, reverse its order denying her motion to suppress, and remand this case for further proceedings.

DATED September 12, 2024.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 12, 2024, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to be served as follows:

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