IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JANESSA CHONTAE RAEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81012-COA

FILED

NOV 25 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Janessa Chontae Rael appeals from a judgment of conviction, pursuant to a guilty plea, of possession of a controlled substance. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

In January 2019, the West Wendover Police Department responded to a call from Ashley Velarde who wanted her sister, appellant Janessa Rael, removed from her home, asserting that Rael was high on drugs.[1] Officer Miguel Pantelakis, a certified drug recognition expert, was dispatched to the Velarde residence. Once he arrived, Velarde told Officer Pantelakis that she had seen Rael "snorting something" and that Rael also had drugs in her purse. In addition to these statements, Officer Pantelakis observed several physical indicators that Rael was under the influence of a controlled substance. These indicators included skin lesions, red coloring around the nose, dry and cracked lips, excitable behavior, and difficulty responding to basic questions and maintaining speech within the normal scope of conversation. Officer Pantelakis then performed two searches. The first was a search of Rael's mouth,[2] which occurred approximately six and a

[1]We do not recount the facts except as necessary to our disposition.

[2]For purposes of this appeal, we refer to this act as a search, but we do not decide if the law requires a search warrant to look inside a person's

half minutes after he arrived. Based on his suspicion that Rael was using an illegal substance, Officer Pantelakis asked Rael to open her mouth and, after several requests, Rael complied, displaying a white film coating the inside of her mouth.[3]

The second was a search of Rael's purse, which occurred approximately 11 and a half minutes after Officer Pantelakis's arrival. He asked Rael several times to show him the inside of her purse, but she refused. After asking once again without success, Officer Pantelakis attempted to take hold of the purse. "[A]fter a short tug-of-war," Rael exclaimed that she would show him the contents of her purse, but that she wanted to be the one to do it. Rael removed the contents of her purse in front of the officer.

Officer Pantelakis noticed some semi-transparent plastic bags with what, in his experience, looked like methamphetamine, heroin, and a singular prescription pill. While he was looking through the now visible contents of the purse, Rael started striking the ground and the area around her, yelling, and crying. When she would not stop, Officer Pantelakis attempted to handcuff Rael and place her under arrest. At first Rael resisted, but after several seconds Officer Pantelakis was able to place Rael under arrest, handcuff her, search her person, and put her in the back of his patrol car.

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mouth. Further, we note that only the search of Rael's purse yielded evidence relevant to the possession charge of methamphetamine, which is the charge Rael is appealing.

[3]According to both the record and the district court's factual findings, Officer Pantelakis first noticed the white substance in Rael's mouth before he used a flashlight to look inside her mouth.

In his arrest report, Officer Pantelakis recommended charging Rael with one count of unlawful use of a controlled substance, three counts of possession of a controlled substance, and one count of resisting arrest. However, the Elko County District Attorney's Office only charged Rael with three counts of possession of a controlled substance via a criminal information.[4]

Before trial, Rael filed a motion to suppress evidence asserting that the searches of her mouth and purse were unlawful pursuant to the Fourth Amendment. The State opposed the motion, arguing that the searches were lawful searches incident to arrest. After the hearing on the motion, but before the motion was decided, Rael pleaded guilty to one count of unlawful possession of methamphetamine, preserving her right to appeal from the denial of her motion to suppress, as set forth in the terms of the plea agreement. *See* NRS 174.035(3). The district court denied the motion to suppress, finding that there was probable cause to arrest Rael before the searches occurred, and also finding that the searches were lawful as searches incident to arrest. This appeal followed.

On appeal, Rael argues that the district court erred in denying her motion to suppress. Specifically, she contends that any evidence recovered from the searches of her mouth and purse should have been excluded because probable cause to arrest did not exist before the searches were conducted, thereby rendering them unconstitutional. Additionally, Rael alternatively argues that the district court committed reversible error

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[4]The first count was for the unlawful possession of methamphetamine, the second for the unlawful possession of heroin, and the third for the unlawful possession of an amphetamine pill. Rael, pursuant to a plea agreement, pleaded guilty to one count of unlawful possession of methamphetamine. The State dismissed the other two counts.

by not identifying the precise time of her arrest in order to determine whether the searches were lawful searches incident to arrest, or in violation of the Fourth Amendment. Without knowing the precise time of arrest, Rael argues that the district court, and subsequently this court, cannot determine if the "arrest followed quickly on the heels of the" preceding searches under *Rawlings v. Kentucky*.[5] We disagree, and therefore affirm the judgment of conviction.

A district court's resolution of a motion to suppress evidence presents a mixed question of law and fact. *State v. Beckman*, 129 Nev. 481, 485, 305 P.3d 912, 916 (2013). The district court's findings of fact are reviewed for clear error, but the legal consequences of those factual findings are reviewed de novo. *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008). "A district court's legal conclusion regarding the constitutionality of a challenged search receives de novo review." *State v. Lloyd*, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013).

Generally, a search incident to arrest occurs after the arrest. *Sibron v. New York*, 392 U.S. 40, 63 (1968) ("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification."). However, "[w]here the formal arrest follow[s] quickly on the heels of the challenged search of [the] person," a search can precede the arrest so long as the fruits of the search were "not necessary to support probable cause to arrest." *Rawlings*, 448 U.S. at 111 & n.6; *cf. Schmitt v. State*, 88 Nev. 320, 326, 497 P.2d 891, 894 (1972) (concluding that where officers do not have probable cause to arrest prior to a search, the search is not valid because the arrest may not be justified by what is found in the search).

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[5]448 U.S. 98, 111 (1980).

Whether probable cause existed for the searches

In order to conclude if a search is lawfully incident to arrest, we must first determine whether the officer had probable cause to make the arrest *before* the search occurred, without using any resulting evidence from the search as its basis. Probable cause to arrest exists where an officer, at the time of arrest, has reasonably trustworthy information that the person to be arrested has committed an offense. *Doleman v. State*, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991). "The presence or absence of probable cause is determined in light of all the circumstances and can include conduct of the defendant in the presence of the police officers." *Deutscher v. State*, 95 Nev. 669, 681, 601 P.2d 407, 415 (1979). "Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). Additionally, "[b]ecause probable cause is an objective standard, an arrest is lawful if the officer had probable cause to arrest for any offense, not just the offense cited at the time of arrest or booking." *District of Columbia v. Wesby*, ___ U.S. ___, ___ n.2, 138 S. Ct. 577, 584 n.2 (2018).

Here, we conclude that Officer Pantelakis had probable cause to arrest Rael prior to searching her mouth and purse. Before Rael's arrest, Officer Pantelakis heard statements from an on-scene informant, Velarde, Rael's sister. Velarde told Officer Pantelakis that she had seen Rael snorting a substance and started "going crazy." Velarde also told Officer Pantelakis that Rael had multiple "baggies" in her purse, specifically saying, "[l]ook in her purse. She has drugs."

In addition to Velarde's statements, Officer Pantelakis conducted his own observations of Rael. Officer Pantelakis, a certified drug

recognition expert, noticed that even before he undertook the searches of Rael's mouth or purse, Rael was exhibiting signs consistent with someone under the influence of a "central nervous system stimulant" such as methamphetamine. These signs included skin lesions, facial discolorations, dry mouth and lips, and red nasal cavities. Additionally, before Officer Pantelakis searched Rael's mouth, he noticed a white coating around her mouth and tongue, which is indicative of methamphetamine use. Officer Pantelakis testified that Rael was restless, moving back and forth, and could not maintain a conversation, responding to simple questions with topics outside the normal range of conversation. Further, after being asked by Velarde to show Officer Pantelakis the drugs in her purse, Rael, in response, told Officer Pantelakis, "I will, and I'm gonna get it out myself, sir! I'm going to show you, okay!"

Thus, in light of the on-scene informant's statements, Rael's statements and conduct, and Officer Pantelakis's observations of Rael, we conclude that such observations establish probable cause for Rael's arrest before either of the two searches occurred.[6]

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[6]To the extent that Rael argues that "vague notion of 'drugs'" and a "central nervous system stimulant" as cited in the district order does not establish probable cause for arrest, we need not address this argument, as it is not cogently argued or supported by relevant authority. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Rael fails to cite to any legal authority to support her argument that vague references to drugs and a central nervous system stimulant are insufficient for probable cause. Additionally, the references by Velarde were specific.

Whether the arrest was made "quickly on the heels" of the preceding searches

Since we conclude probable cause existed to arrest Rael in advance of the searches, we next decide whether the arrest turned "quickly on the heels" of the searches in order to constitute lawful searches incident to arrest.

Although Nevada has not yet addressed the "quickly on the heels" standard established in *Rawlings*, decisions from the United States Court of Appeals for the Ninth and Tenth Circuits are instructive. In *United States v. Smith*, the Ninth Circuit held that when there is no significant delay in the series of events from the moment probable cause arose, to the initial search, and then arrest, the arrest is sufficiently on the heels of the search. 389 F.3d 944, 951-52 (9th Cir. 2004); *see also United States v. Johnson*, 913 F.3d 793, 799 (9th Cir. 2019) ("[P]robable cause to arrest must exist at the time of the search, and the arrest must follow during a continuous sequence of events." (internal quotation marks omitted)), *cert. granted, judgment vacated on other grounds*, ___ U.S. ___, 140 S. Ct. 440 (2019). Similarly, in *United States v. Torres-Castro*, the Tenth Circuit noted, "courts have found that a search may be incident to an arrest in cases where the search and arrest were separated by times ranging from five to sixty minutes." 470 F.3d 992, 998 (10th Cir. 2006).

Here, according to a review of the body cam video, the entire sequence of events, from the time Officer Pantelakis arrived on the scene until the time Rael was placed in the back of the patrol car, lasted 23 minutes. The search of Rael's mouth occurred 6 and a half minutes after Officer Pantelakis's arrival at the residence, and the search of Rael's purse occurred 11 and a half minutes after his arrival. Officer Pantelakis attempted to arrest Rael, who initially resisted, approximately 18 minutes

after he arrived. Approximately one minute later, Officer Pantelakis was able to place Rael in handcuffs and under arrest. Within the next five minutes, Officer Pantelakis called over the radio stating that he had a "female in custody," searched her person, and placed her in the back of the patrol car.

Rael concedes that the arrest occurred when Officer Pantelakis placed her in handcuffs. A review of the body cam footage supports that 12 minutes passed between the time of Officer Pantelakis's first search of Rael's mouth and the time of her arrest. Further, only seven minutes passed from the time Officer Pantelakis searched Rael's purse to her arrest.

We conclude that Rael's arrest was preceded by a very short sequence of events from the time the officer had probable cause for the searches to the time of her arrest, and therefore, the searches were sufficiently "quick[ ] on the heels" of the arrest and permissible in accordance with *Rawlings*.[7]

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[7]Rael additionally argues that the rationales to support a search incident to arrest—officer safety and preservation of evidence from being concealed or destroyed—were not present in this case. We disagree. From a review of the record, including the body cam video, it is clear that officer safety was implicated when Rael started striking the floor and yelling. She had also previously possessed a knife. Further, based on the record, preservation of evidence was also implicated, as allegedly Rael had multiple semi-transparent bags that contained illicit drugs in her purse. Rael was protective of the contents of her purse, which raised the concern that the evidence contained therein would need to be preserved. Accordingly, we conclude that the rationales for conducting a search incident to arrest were present under the facts and circumstances of this case. *See State v. Greenwald*, 109 Nev. 808, 810, 858 P.2d 36, 37 (1993); *see also Riley v. California*, 573 U.S. 373, 386 (2014) ("*Robinson* concluded that the two risks identified in *Chimel*—harm to officers and destruction of evidence—are present in all custodial arrests."); *see cf., State v. Nye*, 136 Nev., Adv. Op.

Thus, we conclude the searches of Rael's mouth and purse were lawful searches incident to arrest. Because the searches were lawful, the district court did not err in refusing to suppress the evidence obtained from the searches. *See Mapp v. Ohio,* 367 U.S. 643 (1961); *see also* NRS 48.025(1)(b) (providing that all relevant evidence is admissible, except "[a]s limited by the Constitution of the United States or of the State of Nevada"). *Whether the district court erred in failing to identify the precise time of the arrest*

Finally, we address Rael's argument that the district court committed reversible error because the court did not precisely identify the time of the arrest. In support of this argument, Rael cites to *State v. Ruscetta*, where the Nevada Supreme Court "advised district courts to issue express factual findings when ruling on suppression motions so that this court [does] not have to speculate as to what findings were made below."[8] 123 Nev. 299, 304, 136 P.3d 451, 455 (2007) (alteration in original) (internal quotation marks omitted).

48, 468 P.3d 369, 371 (2020), wherein the supreme court found that no rationale existed for upholding a search of the defendant's backpack incident to his arrest because the defendant and his backpack were immediately separated after the arrest, with the backpack having been secured in the trunk of the patrol car and the defendant confined in the backseat; thus, the search was not a lawful search incident to arrest as the rationales for the search, preserving evidence or officer safety, were not present.

[8]In addition to *Ruscetta*, Rael also cites to *State v. Rincon*, 122 Nev. 1170, 147 P.3d 233 (2006), and *Rosky v. State*, 121 Nev. 184, 111 P.3d 690 (2005), in support of her position. As more fully explained herein, these cases are not persuasive and inapposite to the case at hand.

Here, unlike *Ruscetta*, *Rincon*, and *Rosky*, the district court conducted an evidentiary hearing that included arguments from both parties and testimony from the arresting officer. The court also considered the preliminary hearing transcript, affidavits, the body cam footage, and the arrest report. Importantly, the district court issued a written order that made specific factual findings related to the officer's conduct during the subject searches and his credibility. Moreover, none of the cases cited by Rael stand for the proposition that a judge must determine the precise moment of arrest in determining whether a search is incidental to an arrest, nor are we aware of any authority that demands such a conclusion. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Accordingly, we conclude that the district court made sufficient factual findings to support that Rael's "arrest followed quickly on the heels of the challenged search[es]." *Rawlings*, 448 U.S. at 111. Therefore, we conclude that the searches were lawful and incident to Rael's arrest, and the district court did not err in denying her motion to suppress.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Alvin R. Kacin, District Judge
Elko County Public Defender
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk