

STATE V. CLARKE: DOWN THE ROAD*

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I. INTRODUCTION

The 2019 decision of *State v. Clarke*¹ sent shockwaves through the Idaho legal community.² That summer, the Idaho Supreme Court held that Idaho law enforcement officers may not make warrantless arrests for any misdemeanor occurring outside their presence — even if they have probable cause to believe the crime was committed.³

II. FACTS

On August 1, 2016, Taylor Dan reported to a Kootenai County Deputy Sheriff that she had been harassed and groped by a man later identified as Peter Clarke.⁴ Dan alleged that earlier that day, Clarke made unwanted passes at her.⁵ According to Dan, Clarke not only vocally harassed her, but also grabbed her butt.⁶ After this encounter, Dan alerted authorities, provided a description of Clarke, and advised the sheriff’s deputy that she wanted to pursue charges.⁷ Shortly thereafter, the deputy apprehended Clarke.⁸

* This article was originally written in early 2020. The *Idaho Law Review* published the article in its online Spotlight Edition in May 2021 and is republishing now in November 2021. Since the time of writing, other significant cases under the umbrella of *Clarke* have been litigated. See, e.g., *Reagan v. Idaho Transp. Dep’t*, No. 47865, at *1, 2021 WL 1096672 (Idaho Mar. 23, 2021); *State v. Sutterfield*, 484 P.3d 839, 168 Idaho 558 (2021); *State v. Amstutz*, 492 P.3d 1103, 169 Idaho 144 (2021).

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1. *State v. Clarke*, 446 P.3d 451, 165 Idaho 393 (2019).

2. Look no further than the plethora of articles analyzing the Idaho Supreme Court’s decision. See, e.g., Sean Coletti, *State v. Clarke Didn’t Have to End This Way*, POST REGISTER (July 7, 2019), https://www.postregister.com/opinion/guest_column/state-v-clarke-didn-t-have-to-end-this-way/article_c88281c2-bbdc-5a64-b192-4f2307c6306a.html; Tommy Simmons & Emily Lowe, *How the Supreme Court’s Misdemeanor Arrest Ruling Is Playing out in the Treasure Valley*, IDAHO PRESS (Aug. 24, 2019), https://www.idahopress.com/news/local/how-the-supreme-court-s-misdemeanor-arrest-ruling-is-playing/article_bc73b5e9-44f8-5281-88cc-23eafb0aac19.html; Chuck Peterson, *Arresting Development – That Warrantless Misdemeanor Arrest May Violate the Protections of the Constitution*, PETERSON L. OFFS.: IDAHO CRIM. DEF. BLOG (Sept. 30, 2019), <https://www.idahocriminaldefenselaw.com/2019/09/search-and-seizure/arresting-development-that-warrantless-misdemeanor-arrest-may-violate-the-protections-of-the-constitution/>.

3. *Clarke*, 446 P.3d at 457, 165 Idaho at 399.

4. *Id.* at 452, 165 Idaho at 394.

5. *Id.*

6. *Id.* at 453, 165 Idaho at 395.

7. *Id.*

8. *Id.*

Although Clarke admitted to interacting with Dan and grabbing her in the way she described, Clarke insisted the touching was consensual.⁹ However, because the deputy determined probable cause existed — based on Dan’s complaint and Clarke’s admission — the deputy arrested Clarke for misdemeanor battery.¹⁰ He then searched Clarke,¹¹ discovering drug paraphernalia, marijuana, and methamphetamine.¹²

III. PROCEDURAL HISTORY

The events of August 1, 2016 prompted Clarke to seek suppression of the evidence obtained during the search incident to his warrantless arrest based on two theories: there was neither (1) a constitutional basis nor (2) any statutory ground to justify the police conduct.¹³ The district court conducted a hearing and then denied the motion.¹⁴ The state dismissed the battery charge due to lack of evidence, but a jury convicted Clarke on the drug charges.¹⁵ Clarke appealed, arguing in part¹⁶ that, because the misdemeanor was committed outside the presence of law enforcement,¹⁷ arresting him without a warrant was a violation of the constitutions of the United States and Idaho.¹⁸

IV. THE IDAHO SUPREME COURT’S DECISION

On appeal, Clarke focused on the proposition that at the time the Idaho Constitution was adopted, all existing law prohibited warrantless arrests for misdemeanors committed outside the presence of a police officer.¹⁹ The Idaho

9. *Clarke*, 446 P.3d at 453, 165 Idaho at 395.

10. *Id.*

11. *Id.* at 454, 165 Idaho at 396. For a deeper discussion of the search incident to arrest doctrine — an exception to the Fourth Amendment’s prohibition against warrantless arrests, see *Terry v. Ohio*, 392 U.S. 1 (1968). See also *State v. Green*, 354 P.3d 446, 448–49, 158 Idaho 884, 886–87 (2015), *abrogated by* *State v. Clarke*, 446 P.3d 451, 165 Idaho 393 (2019) (highlighting that officers are allowed to search the suspect’s person and the area within the suspect’s wingspan); Peterson, *supra* note 2 (opining that the real issue in this case might have been the search: “I don’t think [this case] will likely change many outcomes.”).

12. *Clarke*, 446 P.3d at 453, 165 Idaho at 395.

13. *Id.*

14. *Id.*

15. *Id.*

16. Clarke advanced two claims on appeal: (1) unconstitutional arrest and (2) prosecutorial misconduct. *Id.* The Idaho Supreme Court found Clarke’s first claim to be dispositive and thus did not reach the second claim. *Id.* at 458, 165 Idaho at 400.

17. *Clarke*, 446 P.3d at 454, 165 Idaho at 396 (recognizing that until 1979, in Idaho, warrantless arrests were permitted in only two circumstances: (1) if there was probable cause to believe a felony had been committed or (2) if a misdemeanor was committed in the presence of an officer); see also, e.g., *State v. Polson*, 339 P.2d 510, 513, 81 Idaho 147, 152 (1959); *State v. Conant*, 153 P.3d 477, 479–80, 143 Idaho 797, 799–800 (2007).

18. *Clarke*, 446 P.3d at 454, 165 Idaho at 396 (highlighting that Clarke couches his claim under both of the applicable constitutional provisions, U.S. CONST. amend. IV and IDAHO CONST. art. I, § 17, Idaho case law, and the predecessor to IDAHO CODE § 19-603(6) (2021)).

19. Clarke proposed that *State v. Green* stood for the idea that Title III was incorporated into the Constitution and should be viewed in unison. *Clarke*, 446 P.3d at 454, 165 Idaho at 396 (citing *Green*, 354 P.3d at 450, 158 Idaho at 888).

Supreme Court ultimately sided with Clarke.²⁰ The Court, however, dialed back a statement it made in a 2015 case that Idaho’s constitution incorporated the principles of the common and statutory law existing at the time.²¹ Rather, according to the Court, when analyzing the question of whether the law that existed at the Constitution’s creation was incorporated into the constitution, the foundational inquiry is to analyze the framers’ intent.²²

The Court reasoned that the framers were silent on Article I, section 17, which establishes Idaho’s arrest warrant requirement.²³ Accordingly, the Court turned to Idaho case law.²⁴ It then reviewed centuries of common law criminal practices and cases decided around 1890.²⁵ Ultimately, the Court supported its decision by citing multiple cases that ruled against officers performing warrantless arrests for crimes that were not felonies.²⁶

The Court held, in agreement with common law, that “the framers of the Idaho Constitution understood that Article I, section 17 prohibited warrantless arrests for . . . misdemeanors” committed outside the presence of law enforcement.²⁷ Thus, Clarke’s arrest was unconstitutional, and his conviction was vacated.²⁸

20. *Id.* at 458, 165 Idaho at 400 (vacating Clarke’s judgment of conviction).

21. *Id.* at 455, 165 Idaho at 397.

22. *Id.* (reasoning that “[t]o hold otherwise would elevate statutes and the common law that predate the Constitution’s adoption to constitutional status”).

23. *Id.* at 455, 165 Idaho at 397.

24. *See id.* (citing *State v. Creech*, 670 P.2d 463, 493, 105 Idaho 362, 392 (1983); *Toncray v. Budge*, 95 P. 26, 34–35, 14 Idaho 621 (1908) (reasoning that, in absence of record, the court must examine the language of the constitution “in the light of conditions as they existed”).

25. *Clarke*, 446 P.3d at 455–57, 165 Idaho at 397–99.

26. *Id.* at 456, 165 Idaho at 398.

27. *Id.* at 457, 165 Idaho at 399 (highlighting the seriousness of domestic violence but nevertheless deeming section 19-603 unconstitutional as the statute’s policy goals are outweighed by the Idaho Constitution).

28. *Id.* at 458, 165 Idaho at 400.