STATE OF IDAHO )
County of KOOTENAI )ss

FILED 10/16/19

AT 5:30 O'clock P M
CLERK, DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**STATE OF IDAHO,**
*Plaintiff,*

vs.

**SUMMER DAWN DURAND,**
*Defendant.*

Case No. **CR28-19-10526**

**MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS**

## I. FACTUAL BACKGROUND.

Defendant Summer Dawn Durand (Durand) filed her Motion to Suppress on August 28, 2019. Durand filed her Memorandum in Support of Motion to Suppress on September 4, 2019. The next day, on September 5, 2019, Durand filed a Notice of Hearing scheduling the motion for October 8, 2019. On September 27, 2019, due to the unavailability of a witness on the date of the hearing, the parties stipulated to continue the hearing. This Court granted that request and rescheduled the hearing for October 16, 2019. On October 4, 2019, the plaintiff filed its Memorandum in Opposition to Motion to Suppress. On October 16, 2019, a hearing was held on Durand's Motion to Suppress. Durand appeared, represented by counsel. Counsel for plaintiff appeared. Post Falls Police Officer Nathan Schrag testified at length, much of that testimony concerned what was shown on his body camera video, which was marked and admitted as Exhibit 1. The Court then heard argument from both attorneys. At the conclusion of the hearing, the Court denied Durand's

Motion to Suppress. However, due to the fact that the hearing had gone more than a half hour over the one hour set aside for the hearing, and the fact that the hearing in a different matter was now late by over one half hour, the Court told Durand and counsel that it would issue a written decision setting forth the Court's analysis denying Durand's motion.

On June 26, 2019, at 1:50 a.m., Officer Nathan Schrag responded to a possible drunk driver (DUI) call from dispatch concerning a 2008 white (according to the police report, Schrag testified it was silver) Chrysler Sebring driving erratically between Interstate 90 and mile post 1. Officer Schrag testified he was given a license plate number by dispatch, and proceeded to look for the vehicle. Officer Schrag located the vehicle bearing that license plate number near the intersection of North Pleasant View and West Expo Parkway. Officer Schrag testified he then witnessed the vehicle make two left hand turns without timely signaling, in violation of Idaho Code § 49-808(2). Officer Schrag testified that on both occasions, Durand came to a complete stop and then signaled her intention to turn left, and then turned left. This violates Idaho Code § 49-808(2), and no party disputes that fact.

Officer Schrag followed the vehicle into a gas station parking lot without activating his patrol lights and parked his vehicle at a gas pump on the opposite side of the pump at which the Durand's vehicle was parked. In other words, Durand's vehicle was parked next to a pump and pump island as if she were going to get gas, and Officer Schrag's patrol car was on the other side of that island, separated by the gas pumps and parked even further away, that is, not next to the pump. The body cam video shows the passenger of Durand's vehicle had just exited the vehicle as Schrag arrived and was walking to the gas station. Officer Schrag exited his vehicle and asked the passenger to return to the vehicle. At this time, the driver, who was later identified as the defendant Summer Durand (Durand), had opened the driver side door to her vehicle. Officer Schrag then approached the car and

explained that he had contacted her because the vehicle had been reported as a possible DUI. Durand responded by saying, "[Y]ou can check me, I'm, fine." Mem. in Opp. to Mot. to Suppress 2. The body cam video bears that out. Durand then exited her vehicle, and Schrag performed a field sobriety test. Prior to the administration of the field sobriety tests, the uniformed reporting party, a Spokane County Sherriff's deputy, arrived on the scene. The body cam video shows the reporting party parked his patrol car at least 15-20 feet behind Durand's car. The body cam video shows that while Officer Schrag was conducting the horizontal gaze nystagmus test upon Durand, the reporting party spoke with the passenger through the open driver's side door of Durand's car. Given the direction Durand was facing during the field sobriety tests, Durand would not have seen that officer looking into her car. Officer Schrag testified he did not detect any signs of impairment from Durand. Durand then returned to her car and Officer Schrag then spoke with Durand, learning her name, phone number and address, but he did not ask for the vehicle's registration and insurance information at that time. Officer Schrag then returned to his patrol car in order to request verification of the defendant's driving status from dispatch. He obtained that verification. On his way back to the patrol car, Officer Schrag spoke with the reporting party. The reporting party advised Officer Schrag of what he had seen regarding the defendants driving as well as the conversation the reporting party had with the passenger. The body cam video then shows Officer Schrag contact dispatch from his patrol car and obtain Durand's license status.

Officer Schrag left his patrol vehicle and contacted Durand in her car in order to obtain proof of insurance and registration from Durand. At this point, Officer Schrag informed Durand that she had violated Idaho Code §49-808(2). Durand provided proof of insurance, registration, as well as her driver's license, and she exited the vehicle one last time at Officer Schrag's request. Officer Schrag immediately asked Durand if there was

any marijuana in the vehicle, to which Durand denied. The body cam video shows Officer Schrag then requested Durand's consent by asking, "Mind if I check inside your car?", to which Duran immediately replied "No" (as in she did not mind). Having obtained consent from Durand to search her vehicle, inside the vehicle Officer Schrag in short order found two plastic baggies containing crystal methamphetamine and a smoking pipe with burn residue inside, that residue being consistent with methamphetamine residue. At some point in time after consent was obtained, another Post Falls Police officer arrived. The body cam video shows from the time Officer Schrag arrived until he asked for and obtained Durand's consent, less than eight minutes had transpired. The body cam video shows the area of Loves truck stop was extremely brightly lit and that neither Officer Schrag's vehicle nor the reporting party's vehicle had their overhead lights activated at any time. The body cam video shows the reporting party had no contact with Durand until after Officer Schrag had searched the car. The body cam video shows that prior to and after Officer Schrag finding the methamphetamine in Durand's car, there was no conversation between Officer Schrag and the reporting party as to what the reporting party may have learned from that conversation with Durand.

## II. STANDARD OF REVIEW.

In an appeal from an order granting or denying a motion to suppress, the reviewing court will not disturb findings of fact supported by substantial evidence. *State v. Whiteley*, 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct. App. 1993); *State v. Donato*, 135 Idaho 469, 470, 20 P.3d 5, 6 (2001). However, it freely reviews "the trial court's determination as to whether constitutional requirements [were] satisfied in light of the facts." *Whiteley*, 124 Idaho at 264, 858 P.2d at 803; *Donato*, 135 Idaho at 470, 20 P.3d at 6. "[T]he power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw

factual inferences is vested in the trial court." *State v. Dreier*, 139 Idaho 246, 250, 76 P.3d 990, 994 (Ct. App. 2003) (citing *State v. Valdez–Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999)).

## III. ANALYSIS.

### A. Extension of the Traffic Stop

The Idaho Supreme Court in *State v. Linze* laid out the Fourth Amendment analysis regarding the stop of a vehicle by law enforcement for a traffic violation:

> The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. The stop of a vehicle by law enforcement constitutes a seizure of its occupants to which the Fourth Amendment applies. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1395–96, 59 L.Ed.2d 660, 667 (1979). The seizure of a vehicle's occupants in order to investigate a traffic violation is a "reasonable seizure" under the Fourth Amendment so long as the seizing officer had reasonable suspicion that a violation had occurred. *See Rodriguez v. U.S.*, 135 S.Ct. 1609, 1614, 191 L.Ed.2d 492, 498–99 (2015) ("A seizure for a traffic violation justifies a police investigation of that violation."). However, "[b]ecause addressing the infraction is the purpose of the stop, it may 'last no longer than is necessary to effectuate that purpose.' " Id. (*quoting Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834, 836–37, 160 L.Ed.2d 842, 846 (2005)). "Authority for the seizure thus ends when tasks tied to the traffic infraction are... or reasonably should have been...completed." *Id.*

*State v. Linze*, 161 Idaho 605, 607–08, 389 P.3d 150, 152–53 (2016). The Court in *Linze* goes on to outline what happens once an officer abandons his original purpose for a traffic stop to investigate other criminality.

> The stop remains a reasonable seizure while the officer diligently pursues the purpose of the stop, to which that reasonable suspicion is related. However, should the officer abandon the purpose of the stop, the officer no longer has that original reasonable suspicion supporting his actions. Indeed, when an officer abandons his or her original purpose, the officer has for all intents and purposes initiated a new seizure with a new purpose; one which requires its own reasonableness under the Fourth

> Amendment. This new seizure cannot piggy-back on the reasonableness of the original seizure. In other words, unless some new reasonable suspicion or probable cause arises to justify the seizure's new purpose, a seized party's Fourth Amendment rights are violated when the original purpose of the stop is abandoned (unless that abandonment falls within some established exception).

61 Idaho at 609, 389 P.3d at 154.

*State v. Stewart* provides the analysis for evaluating the Fourth Amendment constitutionality of investigating additional criminality during the course of a stop for a traffic violation.

> ...[U]nder current United States Supreme Court interpretation, when a suspect is otherwise being reasonably detained, the Fourth Amendment is not infringed by the officer's interrogating the suspect about possible criminal activity unrelated to the justification for the detention. This is consistent with our prior decisions holding that general questioning on topics unrelated to the purpose of the stop is permissible so long as it does not expand the duration of the stop.

*State v. Stewart*, 145 Idaho 641, 647, 181 P.3d 1249, 1255 (Ct. App. 2008) (Citing *Parkinson,* 135 Idaho [357] at 362, 17 P.3d [301] at 306; *State v. Silva,* 134 Idaho 848, 853, 11 P.3d 44, 49 (Ct. App. 2000)).

In the case at hand, Officer Schrag had reasonable suspicion to affect a stop of Durand based on the reporting party witnessing erratic driving and the violation of Idaho Code § 49-808(2). Additionally, requests by radio for dispatch to run a check on the driving status of a driver is a routine and reasonable part of a traffic stop. The stop remained a reasonable seizure while Officer Schrag pursued the purpose of investigating the possible DUI. Once Officer Schrag decided Durand was not driving while intoxicated, Officer Schrag was left with the violation of Idaho Code §49-808(2). In order to effectuate the purpose of writing a ticket for Durand regarding this traffic violation, Officer Schrag informed Durand of the violation and requested proof of registration and insurance information for the vehicle. Finally, Officer Schrag asked Durand if there was marijuana in the car, which Durand

denied. Then, Officer Schrag requested and obtained consent to search Durand's vehicle. This Court finds that the inquiry into the presence of marijuana, and the request for consent to search the car are not a violation of Fourth Amendment protections because such brief questioning about possible criminality unrelated to the reason for detention is allowed under the current interpretation of the Fourth Amendment by the Supreme Court. *State v. Stewart*, 145 Idaho 641, 647, 181 P.3d 1249, 1255 (Ct. App. 2008) (*citing Parkinson*, 135 Idaho at 362, 17 P.3d at 306; *State v. Silva*, 134 Idaho 848, 853, 11 P.3d 44, 49 (Ct. App. 2000)).

For these reasons, the original purpose of investigating and writing a ticket for violation of Idaho Code § 49-808(2) was not abandoned by Officer Schrag by asking questions regarding additional criminality. Instead, the purpose was abandoned, if it was abandoned at all, no sooner than when Officer Schrag received Durand's consent and then immediately began his search of Durand's vehicle. All of that occurred after Officer Schrag asked all questions about additional criminality. Once the original purpose of a traffic stop is abandoned, "the officer has for all intents and purposes initiated a new seizure with a new purpose; one which requires its own reasonableness under the Fourth Amendment...(unless that abandonment falls within some established exception)." *Linze*, 161 Idaho at 609, 389 P.3d at 154. This Court finds that Officer Schrag abandoned the purpose of the traffic stop no sooner than when he began the search of Durand's car. At that moment the search was lawful because it falls under the consent exception to the warrant requirement.

**B. Consent to the Search**

The analysis for evaluating the voluntariness of consent is stated by the Idaho Court of Appeals in *State v. Stewart*:

> When consent is used to justify a warrantless search, the state must prove by a preponderance of the evidence that the consent was voluntary and not the result of duress or coercion, direct or implied...A voluntary decision is one that is "the product of an essentially free and unconstrained choice by its maker." *Schneckloth*, 412 U.S. at 225, 93 S.Ct. at 2046, 36 L.Ed.2d at 861. *See also Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S.Ct. 1860, 1879, 6 L.Ed.2d 1037, (1961). An individual's consent is involuntary, on the other hand, "if his will has been overborne and his capacity for self-determination critically impaired." *Id.* In determining whether a subject's will was overborne in a particular case, the court must assess "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth*, 412 U.S. at 226, 93 S.Ct. at 2047, 36 L.Ed.2d at 862. Thus, whether consent was granted voluntarily, or was a product of coercion, is a factual determination to be based upon the surrounding circumstances, accounting for subtly coercive police questions and the possibly vulnerable subjective state of the party granting the consent to a search. *Id.* at 229, 93 S.Ct. at 2048, 36 L.Ed.2d at 863; Hansen, 138 Idaho at 796, 69 P.3d at 1057; *Dominguez*, 137 Idaho at 683, 52 P.3d at 327.

*State v. Stewart*, 145 Idaho 641, 647–48, 181 P.3d 1249, 1255–56 (Ct. App. 2008) (*citing* *State v. Jaborra*, 143 Idaho 94, 137 P.3d 481 (Ct. App. 2006)).

> A determination of voluntariness does not turn "on the presence or the absence of a single controlling criterion." *Schneckloth*, 412 U.S. at 226, 93 S.Ct. at 2047, 36 L.Ed.2d at 862. Factors to be considered include whether there were numerous officers involved in the confrontation, *Castellon v. United States*, 864 A.2d 141, 155 (D.C.2004); *United States v. Jones*, 846 F.2d 358, 361 (6th Cir.1988); the location and conditions of the consent, including whether it was at night, *United States v. Mapp*, 476 F.2d 67, 77–78 (2d Cir.1973); whether the police retained the individual's identification, *United States v. Chemaly*, 741 F.2d 1346, 1353 (11th Cir.1984); whether the individual was free to leave, *Ohio v. Robinette*, 519 U.S. 33, 39–40, 117 S.Ct. 417, 421–22, 136 L.Ed.2d 347, 354–55 (1996); Chemaly, 741 F.2d at 1353; *State v. Gutierrez*, 137 Idaho 647, 651, 51 P.3d 461, 465 (Ct.App.2002); and whether the individual knew of his right to refuse consent, *Schneckloth*, 412 U.S. at 248–49, 93 S.Ct. at 2058–59, 36 L.Ed.2d at 875; *Chemaly*, 741 F.2d at 1353; *State v. Jones*, 126 Idaho 791, 793, 890 P.2d 1214, 1216 (Ct.App.1995). Although the presence of multiple police officers does not, standing alone, establish coercion, and there is no requirement that police inform the individual that he is free to leave or that he has a right to refuse consent, these factors are nevertheless relevant when viewing the totality of the circumstances. *See Robinette*, 519 U.S. at 39–40, 117 S.Ct. at 421–22, 136 L.Ed.2d at 354–55; Schneckloth, 412 U.S. at 248, 93 S.Ct. at 2058, 36 L.Ed.2d at 875;

> *Jones*, 846 F.2d at 361; *Chemaly*, 741 F.2d at 1353; *Castellon*, 864 A.2d at 155; *Gutierrez*, 137 Idaho at 651, 51 P.3d at 465; *Jones*, 126 Idaho at 793, 890 P.2d at 1216.

*State v. Stewart*, 145 Idaho 641, 647–48, 181 P.3d 1249, 1255–56 (Ct. App. 2008) (citing *State v. Jaborra*, 143 Idaho 94, 137 P.3d 481 (Ct. App. 2006)).

The State argues that "[c]onsent may be voluntary even if given during a lawful investigatory detention or by an individual in custody." Mem. In Opp. to Mot. to Suppress 10-11 (*citing State v. Hansen*, 138 Idaho 791, 796 [69 P.3d 1052, 1057] (2003); *See also State v. Johnson*, 137 Idaho 656 [51 P.3d 1112] (Ct. App. 2002); *State v. Salato*, 137 Idaho 260 [47 P.3d 763] (Ct. App. 2001); *State v. Holcomb*, 128 Idaho 296 [912 P.2d 664] (Ct. App. 1995); *State v. Moran-Soto*, 150 Idaho 175 [244 P.3d 1261] (Ct. App.2010). In their argument, the State cites *State v. Linenberger*, 151 Idaho 680 [263 P.3d 145] (Ct. App. 2011), as an example of a case where consent given to three law enforcement officers still resulted in a finding for voluntary consent. *Id.* at 11. To this end, the State also points out that Durand had a passenger which further evened the ratio between officers and civilians involved. *Id.* The State also argues that "Schrag was lawfully permitted to retain possession of the Defendant's identification during the traffic stop[,]"... and... the court in Silva upheld the voluntariness of consent granted during a traffic stop under similar circumstances. *Id.* (citing *State v. Silva*, 134 Idaho 848 (Ct. App. 2000)). Finally, the state argues that Officer Schrag asking Durand to step out of the vehicle and then asking questions unrelated to the traffic stop were the same facts considered by the Court in *State v. Ramirez*, 145 Idaho 886 [187 P.3d 1261] (Ct. App. 2008), where voluntariness was upheld. *Id.* at 11.

Considering the totality of circumstances, this Court finds that the State has met its burden of proof to show Durand's consent for the search of her car to be voluntary.

Despite the added duress of a traffic seizure, the police presence of two officers at the time consent was given (and one of those was an off duty officer from another jurisdiction) in relation to two involved civilians (Durand and her passenger) was not an oppressive showing of force. No guns were displayed, no overhead lights had ever flashed, no law enforcement vehicle was obstructing Durand from leaving and Officer Schrag's vehicle was not near Durand's vehicle. Officer Schrag was incredibly calm and professional, and Durand's consent was incredibly rapidly given. The total time from stop (if there was a stop, but the State concedes such) to consent was less than nine minutes. The retention of Durand's documentation is a normal occurrence in routine traffic stops, and even that had occurred only a second or two before consent was asked and was given. Finally, the simple inquiry into the presence of marijuana, and the asking for permission to search Durand's vehicle was not in the vein of an overly distressing line of questioning likely to impose a coercive or distressing effect upon Durand. For these reasons, this Court finds Durand's consent to be voluntary.

**IV. CONCLUSION AND ORDER.**

This Court finds the search of Durand's car not to be an unlawful extension of the traffic stop and Durand's consent for the search to be voluntary. For these reasons, the Motion to Suppress is denied.

IT IS HEREBY ORDERED that SUMMER DAWN DURAND's Motion to Suppress is **DENIED**.

DATED this 16th day of October, 2019

JOHN T. MITCHELL District Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the 17th day of October, 2019 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Adrien Fox pdfax@kcgov.us
Prosecuting Attorney – Stan Mortensen kcpacourtse@kcgov.us

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

By: _____
Deputy