STATE OF IDAHO)
County of KOOTENAI)ss

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AT 1:55 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.

KYLER REED BENGTSON,

Defendant.

Case No. **CR28-18-20770**

MEMORANDUM DECISION AND ORDER ON APPEAL AFFIRMING DECISION OF MAGISTRATE DENYING DEFENDANT'S MOTION TO SUPPRESS

I. INTRODUCTION, FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This matter comes before the Court as an appeal by defendant Kyler Reed Bengtson (Bengtson) of the March 19, 2019, decision by the Honorable James Stow, Magistrate Judge (Judge Stow), denying the Motion to Suppress filed by Bengtson regarding the misdemeanor charge of Weapon-Carry Concealed Weapon Without a License, a violation of Idaho Code Section 18-3302. The evidentiary hearing was held on March 13, 2019, before Judge Stow. At the end of that hearing, Judge Stow orally announced his findings and his decision denying the Motion to Suppress. A transcript of that hearing was made for this appeal and included in the record.

On March 18, 2019, Bengtson pled guilty to the misdemeanor, reserving his right to appeal Judge Stow's decision. At that hearing, Judge Stow imposed a $300.00 financial penalty, including court costs, imposed absolutely no jail time and did not place Bengtson

on any probation. Nevertheless, Bengtson filed his Notice of Appeal on April 15, 2019. On March 19, 2019, Judge Stow signed an Order Denying Defendant's Motion to Suppress.

The transcript of the March 13, 2019, hearing was filed before this Court on May 20, 2019. On June 12, 2019, Bengtson filed his Appellant's Brief. The record is unclear why the plaintiff/respondent, State of Idaho, did not file its Respondent's State's [sic] Brief until August 14, 2019. Bengtson did not file a reply brief. Oral argument on this appeal was held November 26, 2019. At the conclusion of that hearing, the Court took the matter on appeal under advisement as the Court had at that time not had the opportunity to review the exhibits presented before Judge Stow.

A brief version of this case is in order: On December 20, 2018, Officer Mauri conducted a traffic stop on a vehicle in the area of Anton and Government Way in Coeur d'Alene, Idaho, for having an obstructed windshield. Appellant's Brief, 5 citing Motion to Suppress Transcript, p. 8, ¶¶ 21-25; 10, ¶¶ 17-25. (The Court notes that throughout Bengtson's brief, he cites to specific portions of the transcript as "¶", when he obviously means to refer to the "line" within the page). This Court notes that the officer's body camera footage shows the windshield was nearly entirely fractured, and that the ability of the driver to see out of that windshield would be significantly impaired. Exhibit 1. When Officer Mauri approached the car, he noticed that two of the passengers did not have their seat belts buckled, an infraction under Idaho Code § 49-672. Tr. 11:4-7. Defendant Bengtson was seated in the front passenger seat. Tr. 11:13-16, Respondent's State's [sic] Brief, 6. Officer Mauri gathered verbal information on the driver and Bengtson and received an identification card from Ms. Hakalo (Hakalo), the rear right passenger. *Id.* at 12:6-14. The driver's name was Nevin Graham. *Id.* at 11:17-19. On the body camera recording, Officer Mauri can be clearly heard to ask Bengtson for his name and date of

birth. Equally clearly, Bengtson stated his date of birth to be July 2, 2000, making him eighteen years of age at the time of the stop. Officer Mauri then returned to his patrol vehicle, and ran checks through his computer on the driver, the passengers of the vehicle, and the vehicle itself. *Id.* During this timeframe, Officer Johns appeared on the scene and parked behind Officer Mauri. *Id.* Officer Mauri and Officer Johns turned off the forward-facing blue emergency lights but kept the rearward facing lights on. *Id.* at 13: 1-2; 33:17-24. Officer Mauri returned to the vehicle and gave Ms. Hakalo her identification back. *Id.* 13:18-21. Speaking with the driver, Graham, through the driver's side window, Officer Mauri told Graham that he was letting her off with a warning for the obstructed window and not having insurance. *Id.* Officer Mauri told Graham she was free to leave and the traffic stop was over. *Id.* 13:21-21. The Court notes Officer Mauri stated this clearly and loud enough for anyone in the car to hear. Exhibit 1. Officer Mauri testified, "I said it [that you are free to leave and my traffic stop is over] in a fashion that everyone in the car would have understood that." Tr. 13:20-14:3. No citations were issued at that point. *Id.* at 14:4-5.

Officer Mauri then asked to speak with Graham outside of the car to ask her more questions. Tr. 13:21-23. Officer Mauri asked Graham questions about her drug history and the occupant's drug history, and asked if she would let him search the car. Exhibit 1. Graham immediately consented to a search of her vehicle. *Id.* This Court finds that at all times the conversation between Officer Mauri and Graham was incredibly amicable and cordial. Officer Mauri initially approached Graham and said, "Hi how are you guys?", and "Any clue why I'm pulling you over?" to which Graham, Officer Mauri, and the occupants of the car briefly chuckled, presumably because of the extent of the damage to the windshield of Graham's car. Exhibit 1. Then, Officer Mauri said, "All right, I'm going to get you out of here", as if to apologize for their inconvenience in being stopped.

After obtaining Graham's consent to search the vehicle, Officer Mauri then spoke to the rear seat passenger, Hakalo. Officer Mauri asked Hakalo if she would get out of the car. Exhibit 1. Hakalo told Officer Mauri that she had a meth pipe in her purse which was in the car. Tr. 17-24. Again, this Court notes that Officer Mauri's very brief conversation with Hakalo was very cordial, really supportive of her. Officer Mauri asked, "You have a pretty lengthy drug history, what's up with that?", "Are you struggling to stay clean?", "Just be honest with me, I just let a guy go who had meth." Exhibit 1. That is when Hakalo admitted she was taking suboxone treatment, admitted having something in her purse, and admitted using yesterday. Exhibit 1. The body camera recording shows Officer Mauri briefly searched Hakalo's person, and before he did so he asked her to put her hands behind her back. *Id.* Officer Mauri testified he makes this request to have their hands behind at the small of their back "so they can't make any quick movements possibly to injure me while I'm doing the search." Tr. 19:1-9.

Next, Officer Mauri then asked Bengtson to exit the car. Tr. 14:25-15:5. Specifically, Officer Mauri calmly and politely stated, "Hey man, I'm going to have you step out of the car." Exhibit 1. Bengtson got out of the car, and Officer Mauri asked Bengtson about his drug use, and then asked and received permission to search him, and Bengtson consented to the search. Tr. 15:9-13; Exhibit 1. Officer Mauri did not tell Bengtson to stand in any specific place. Tr. 15: 14-16. The Court notes that the time that had elapsed from when Officer Mauri initially got out of his car to the point when he first spoke directly with Bengtson was just under twelve minutes. Exhibit 1. Only three minutes had transpired from when Officer Mauri told them they were all free to leave until Officer Mauri began his direct conversation with Bengtson outside the vehicle. *Id.* Officer Mauri mentioned to Bengtson that, "All three of you have significant drug histories," and he asked

Bengtson if he had been using. Exhibit 1. Bengtson responded, "I used like 24 hours ago", to which Officer Mauri asked, "Meth?", and Bengtson said, "Yeah." *Id.* Officer Mauri asked Bengtson if he had anything in the car. *Id.* Only Officer Mauri was with Bengtson; Officer Johns was with the other two occupants "pretty far away." Tr. 17:21-25. Just as with Hakalo, Officer Mauri asked Bengtson to put his hands behind his back while he searched Bengtson. Exhibit 1. Immediately, Officer Mauri stated "What is this?", to which Bengtson stated, "A nine millimeter", and then Bengtson asked, "Am I under arrest", to which Officer Mauri stated, "No, its just for my protection." *Id.* Officer Mauri testified that once he discovered the handgun in the waistband in Bengtson's abdomen area, he handcuffed Bengtson for officer safety. Tr. 19:10-23. Officer Mauri handcuffed Bengtson and made safe the weapon. Officer Mauri asked Bengtson how old he was, to which Bengtson clearly replied he was 18. Exhibit 1. Officer Mauri informed him that he was under arrest for carrying a concealed firearm under the age of 21. Exhibit 1. The entire encounter with Bengtson, from the time Officer Mauri asked him to get out of the car until Officer Mauri informed him he was being arrested, took two minutes.

II. STANDARD OF REVIEW

Idaho Criminal Rule 54(f)(1) states that "the district court must hear appeals from the magistrate court as an appellate proceeding... " The rule further states that "[t]he district court must review the case on the record and determine the appeal in the same manner and on the same standards of review as an appeal from the district court to the Supreme Court under the statutes of law of this state, and the Idaho Appellate Rules." I.C.R. 54(f). When a district court makes an appellate review of a magistrate judge's decision, the district court "should perform that task in the same manner as [the Supreme Court of Idaho] performs its appellate review of the trial

decision of a district court." *Hawkins v. Hawkins,* 99 Idaho 785, 788-89, 589 P.2d 532, 535-36 (1978). Therefore, in reviewing a magistrate judge's findings, "the district courts should adhere to the well recognized rule that [factual] findings based on substantial and competent, though conflicting, evidence will not be set aside on appeal." *Id.* (citing *Prescott v. Prescott,* 97 Idaho 257, 542 P.2d 1176 (1975)). "Substantial, competent evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Doe,* 143 Idaho 383, 386, 146 P.3d 649, 652 (2006) (quoting *Folks v. Moscow School District No. 281,* 129 Idaho 833, 836, 933 P.2d 642, 645 (1997)). "[T]he magistrate's factual findings will be liberally construed in favor of the judgment, and will not be set aside unless clearly erroneous." *State v. Johnson,* 131 Idaho 808, 809, 964 P.2d 675, 676 (Ct. App. 1998) (citation omitted).

"This Court exercises free review over questions of statutory construction, 'which includes whether a statute provides for judicial review, and the standard of review to be applied if judicial review is available.'" *Ravenscroft v. Boise Cty.,* 154 Idaho 613,614, 301 P.3d 271,272 (2013) (citing *Gibson* at 751, 133 P.3d at 1216).

When review of a trial court's decision involves entwined questions of law and fact, we exercise free review over questions of law, and uphold factual findings supported by substantial and competent evidence. *Ada* Co. *Hwy. Dist. V. Total Success Investments, LLC,* 145 Idaho 360, 365, 179 P.3d 323, 328 (2008), citing *Marshall v. Blair,* 130 Idaho 675, 679, 946 P.2d 975, 979 (1997).

Because mixed questions of law and fact are primarily questions of law, this Court exercises free review. *Id.* 145 Idaho 807, 812, 186 P.3d 663, 668 (2008). *Allen*

v. Reynolds, 145 Idaho 807, 812,186 P.3d 663, 668 (2008) citing *The Highlands, Inc. v. Hosac, 130 Idaho 67, 69,936 P.2d 1309, 1311 (1997).*

In articulating the proper standard of review for mixed questions of law and fact, this Court will differentiate among the fact-finding, law-stating, and law-applying functions of the trial courts. *Staggie v. Idaho Falls Consol. Hosps.*, 110 Idaho 349, 351, 715 P.2d 1019, 1021 (Ct. App.1986). Appellate judges defer to findings of fact based upon substantial evidence, but they review freely the conclusions of law reached by stating legal rules or principles and applying them to the facts found. *Id.* Where there is conflicting evidence, it is the trial court's task to evaluate the credibility of the witnesses and to weigh the evidence presented. *Desfosses v. Desfosses*, 120 Idaho 354, 357, 815 P.2d 1094, 1097 (Ct. App. 1991). Over questions of law, we exercise free review. *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610,613,826 P.2d 1322, 1325 (1992); *Cole v. Kunzler*, 115 Idaho 552,555,768 P.2d 815,818 (Ct. App. 1982).

III. ANALYSIS

Bengtson presents three issues on appeal: (1) did the magistrate judge err in finding that Bengtson was not seized by Officer Mauri prior to the discovery of the firearm; (2) if Bengtson was seized, was this seizure unlawful and did it vitiate any consent to search given by Bengtson; and (3) did the magistrate judge err in finding that Officer Mauri had legal justification to seize Bengtson immediately upon discovering the firearm. See Appellant's Br. 7.

1. **This Court Affirms the lower court's finding that Bengtson was not seized by officer Mauri prior to the discovery of the firearm.**

   Bengtson argues that:

   > Given the totality of the circumstances, no reasonable citizen in Mr. Bengtson's position would have felt free to leave. He was never told that he was free to leave or what the officer would be doing with his seatbelt infraction. The Officers' red and

> blue lights remained on and visible to Mr. Bengtson throughout this encounter. Mr. Bengtson was given orders by the officer to exit the vehicle, where to stand, and what to do. These commands included commanding Mr. Bengtson to perform a field sobriety test (commonly known as the Modified Romberg Balance Test). Mr. Bengtson was implicitly told [that the] officer was conducting a drug investigation, and specifically questioned Mr. Bengtson in this regard. These facts would communicate to a reasonable person that he was being temporarily detained while the officer conducted his investigation. No reasonable person in Mr. Bengtson's position would have felt at liberty to ignore the officer's commands, or simply leave the scene.

Id. at 9.

The State argues that:

> Based on Neven Graham's consent the officer had the authority to ask all passengers to step from the car so that he could conduct the vehicle search. Secondly, in speaking with Hakalo, the rear passenger, the officer learned there was methamphetamine paraphernalia in the car. Tr. P 14, L. 11-24. While Officer Mauri did not have specific articulable facts on which to detain Bengtson for suspicion of drug possession or drug paraphernalia possession or frequenting where drugs are located, the officer did have the authority to ask Bengtson to step from the car and to ask consensual questions in light of the information gained from Hakalo. Therefore there were two distinct lawful justifications for the officer to have Bengtson to step from the vehicle, neither of which constitutes a seizure of Bengtson.

Resp't State's Br. 8. The State goes on to argue that:

> The trial Court, based on the totality of the circumstances correctly assessed the credibility of witnesses and objective facts from the evidence. These facts support the court's findings that the traffic stop had concluded for all the persons in the vehicle, and the consent to search the vehicle was valid, the request to have passengers step out of the vehicle was reasonable and did not create an unlawful detention.

Id. Again, no reply brief was filed on behalf of Bengtson.

Judge Stow found that even though the flashing lights were only the rearward flashing lights, generally and without more information, a driver would feel as though they are detained and could not leave. Tr. 67:14-68:9. However, Judge Stow also found that in this instance, additional information overrode the effect of the flashing lights and had the effect of turning the traffic seizure into a consensual encounter. *Id.* Judge Stow reasoned that the officer had a conversation with the driver in which the officer stated that he was

letting the driver off with a warning and that they were free to go. Tr. 68:10-23. Judge Stow found this information was heard by the passengers, and a reasonable driver and passenger would have concluded that the traffic detention had ended and they were free to leave, and they were now speaking to the officer consensually. *Id.* at 68:24-70:12. Judge Stow found the officer then obtained permission to search the vehicle, and Judge Stow found that asking to speak with the passengers and asking them to step out of the car did not create a detention. *Id.* at 70:13-72:12. Judge Stow stated that good manners and customs of society might cause someone to feel it to be rude or inappropriate to decline speaking to a police officer. *Id.* at 72:13-19. But under the circumstances presented in this case, and when viewed from the reasonable person standard, Judge Stow did not find that to be enough to convert this to a detention. *Id.* at 72:20-24.

Additionally, Judge Stow found that Bengtson's consent was not overborn by the circumstances. *Id.* at 73:5-9. "There was a description of two officers being present on the scene. There was not any indication that the officers displayed their weapons." *Id.* at 73:10-12. "This was on a public street in the late-night hours. The whole encounter by all appearances and by all parties involved was polite, calm, cordial, simply a matter of – really of having some discussions, and certainly the driver providing certain documents or information." *Id.* at 73:13-17. Judge Stow found, "The defendant was able to hear the tone and general nature of those other conversations, at least in part, and certainly, the direct conversations up by the driver's window, was able to hear those." *Id.* at 73:18-21. For all these reasons, Judge Stow found that the defendant's consent was voluntary: So under those circumstances, nothing that would have converted that to an involuntary consent from the defendant. And so I do make the finding that it was a voluntary and clear consent." *Id.* at 73:24-74:2.

This Court affirms Judge Stow's finding that Bengtson was not seized by Officer Mauri prior to the discovery of the firearm, and Bengtson's consent to be searched was voluntarily given. This Court finds Judge Stow's findings of fact are based on substantial competent evidence, and this Court agrees that the facts examined in the totality of the circumstances show that the initial traffic stop had concluded and nothing that happened during the rest of the encounter, up until the discovery of Bengtson's firearm, had converted Bengtson's interaction with Officer Mauri into a detention.

This Court agrees with Judge Stow's finding that subsequent actions by police can override the presence of the flashing light on the patrol vehicle and keep the traffic stop a consensual encounter resulting in no detention. The Idaho Court of Appeals has held, "It is not practical nor necessary that an officer turn off his emergency lights before he may effectively instruct an individual who has been stopped that he may leave." *State v. Roark*, 140 Idaho 868, 871, 103 P.3d 481, 484 (Ct. App. 2004).

This Court affirms Judge Stow's holding that once Officer Mauri handed back the rear seat passenger's identification card and told the driver that she was free to go and that he was letting her off with a warning, the traffic detention had concluded. Judge Stow's finding is supported by substantial and competent evidence. Judge Stow determined that Bengtson heard the interaction between the driver and Officer Mauri, and the context of the Officer Mauri's conversation was directed at everyone in the vehicle. Bengtson did not testify at the suppression hearing before Judge Stow; thus, Judge Stow's finding is based not only upon substantial and competent evidence, but on uncontradicted evidence. At the point all were told they were free to leave, the traffic stop changed to a consensual encounter, and all involved gave uncoerced consent. A traffic stop can change to a consensual encounter if the officer returns the driver's license, registration and insurance

documents and engages in any subsequent questioning without further show of authority which would convey a message that the individual is not free to leave. *State v. Martinez*, 136 Idaho 436, 441, 24 P.3d 1119, 1124 (Ct. App. 2001); *State v. Gutierrez*, 137 Idaho 647, 651, 51 P.3d 461, 465 (Ct. App. 2002).

The driver then agreed to step out of the car and answer questions. This was consensual. The driver than gave consent to search the car.

This Court agrees with Judge Stow and finds that Judge Stow's findings that, taken in the totality of the circumstances, these facts would override the presence of flashing lights and Bengtson would have understood that they were no longer detained. Being told that you are free to go, and having all documentation returned, is a clear indication to a reasonable person that the detention had ended, and this would override the restraining nature of the flashing lights. All these findings are supported by substantial competent evidence.

Bengtson seems to argue that Officer Mauri's request of Graham for permission to search her car, was improper. Bengtson argues:

> in *Gutierrez*, an officer stopped a vehicle the defendant was a passenger in. *Gutierrez*, 137 Idaho 647, 51 P.3d 461. The officer had the driver step out and gave him a warning for the traffic infraction. The officer then asked the driver questions about drugs in the vehicle, and asked for consent to search the vehicle. The driver granted consent, and the officer asked the defendant to step out of the vehicle. Our Court of Appeals found the seizure of the defendant passenger was prolonged by 60-90 seconds for questioning; and this constituted an unlawful seizure. *Gutierrez*, at 652, 51 P.3d at 466. "Further detention was not lawful after the point at which the purpose of the stop was resolved." *Id.*, at 652, 51 P.3d at 466 (quoting *United States v. Valadez*, 267 F.3d 395 (5th Cir. 2001)). Additionally, the Court found that even though consent to search had been given, "consent to search given during an illegal detention is tainted by the illegality and is therefore ineffective." *Id.*

Appellant's Br. 12-13. Bengtson's reliance on *Gutierrez* is misplaced. Bengtson's reliance on *Gutierrez* in making his argument is also disingenuous. Counsel for Bengtson certainly

is aware that in the present case, Graham, and all occupants in her car, were told by Officer Mauri that they were free to leave. Counsel for Bengtson must certainly know that such are not the facts of *Gutierrez*. In *Gutierrez*, the Idaho Court of Appeals specifically found that, "Without telling Cheek that he was free to leave, Bunderson asked Cheek about alcohol, controlled substances and weapons." 137 Idaho at 651, 51 P.3d at 465. Additionally, the Idaho Court of Appeals relied on *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988), and the Idaho Court of Appeals noted that in *Guzman*, "The officer eventually gave the driver a written warning for the seatbelt violation and returned the rental agreement and driver's license, but without advising the driver that he was free to go, the officer began asking whether the vehicle occupants were carrying weapons or contraband." 137 Idaho at 652, 51 P.3d at 466.

Once Graham, the driver, has given uncoerced consent to search her car; Officer Mauri had every legal authority to request the occupants exit the car while he performed such search. Officer Mauri did so, one occupant at a time. First he asked Hakalo to exit the car, which she did, voluntarily. Then, he asked Bengtson to exit the vehicle, which he did voluntarily. Because the driver has given consent to search the vehicle, just because Bengtson was asked (or told) to exit the vehicle, does not mean Bengtson was not free to leave or that he objectively would have felt he was being detained. Up to this point, Officer Mauri has not given Bengtson any reason to believe that he, Bengtson, has done anything wrong or that he in any way is being investigated for any criminal action. It is only after the questioning of Bengtson begins that Officer Mauri gives any indication that he knows that all involved have prior drug records, and at that point in time, Bengtson has voluntarily exited the vehicle and Officer Mauri has the ability to frisk Bengtson for his own protection. *State v. Downing*, 163 Idaho 26, 29, 407 P.3d 1285, 1288 (2017). This Court affirms

Judge Stow's finding that the officers' actions during the consensual stop did not trigger a detention, and Bengtson's consent to the search of his person was voluntarily given. Judge Stow based these findings on substantial and competent evidence.

Bengtson argues that the interaction he had with Officer Mauri amounted to a detention and his consent was therefore not given voluntarily. That argument is without merit. There was no detention of Bengtson as Bengtson sat in the car. Officer Mauri made that quite clear to all occupants and the driver that they were free to leave and that there would be no citations given. When Officer Mauri asked Hakalo to get out of the car and as he questioned her, Bengtson was free to leave.

At any time, Bengtson was free to leave. Bengtson was then asked to get out of the car; he was not ordered. While in his testimony, Officer Mauri characterized such as an "order", (Tr. 25:3-5), the Court does not find such to be an "order." Specifically, Officer Mauri calmly and politely stated, "Hey man, I'm going to have you step out of the car." Exhibit 1. Bengtson then got out of the car voluntarily. Bengtson answered Officer Mauri's questions voluntarily. Bengtson either consented to the search of his person, or Officer Mauri had all legal authority to search Bengtson's person for officer safety.

Bengtson argues *State v. Zapp*, 108 Idaho 723, 701 P.2d 671 (Ct. App. 1985) and *State v. Jaborra*, 143 Idaho 94, 137 P.3d 481 (Ct. App. 2006), support his claim that, "It was during his unlawful seizure that Mr. Bengtson gave his consent to search his person. Because the consent was given during an unlawful seizure, the consent was not given freely and voluntarily and thus was invalid." Appellant's Brief 13-14. This argument is misplaced for two reasons. First, the facts of the present case are nothing like those discussed in *Zapp* and *Jaborra*. In Zapp, John Zapp was going to a friend's house. His friend had been arrested earlier and the police were still present when Zapp knocked on

his friend's door. The police answered and Zapp was holding a can of beer in one hand and a paper sack in the other. 108 Idaho at 725, 701 P.2d at 673. The Idaho Court of Appeals noted:

> The police officers began to question him. When asked for identification, Zapp stated he had none. When asked his name and address, he gave fictitious information. The officers, finding the street address unfamiliar, pressed him with further questions about where he lived. Zapp became increasingly nervous and was unable to respond. One of the officers approached Zapp and directed the beam of a flashlight toward a coat pocket where the outline of a wallet was visible. When again asked for identification, Zapp put the beer can in the hand holding the paper sack, reached into his pocket with the free hand and removed the wallet. He then revealed his true name. The police made a telephone call to determine whether there were any outstanding warrants on Mr. Zapp. There were none.
>
> But that was not the end of the encounter. An officer asked what was in the sack. "Oh, nothing of interest," Zapp replied. The officer retorted, "Well, that sparks my interest." Zapp shrugged his shoulders, looked down and hesitantly held out the sack. The officer looked inside and observed what appeared to be marijuana in plastic bags. He removed one of the plastic bags, smelled the substance, impounded it and arrested Zapp. In response to more questions on how he had travelled to the house, Zapp said that he had driven a car. A warrant was obtained to search the automobile and it yielded more marijuana.

Id. Not surprisingly, the trial court found the search not consensual. 108 Idaho at 725-26, 701 P.2d at 673-74. Equally without surprise, the Idaho Court of Appeals agreed with the district judge. 108 Idaho at 726, 701 P.2d 674. However, nothing about the facts of *Zapp* are analogous in any way to the present case, nor does counsel for Bengtson really argue in any detail why *Zapp* is on point. *Zapp* is not on point. The Court of Appeals adopted the facts of *Jaborra* as found by the district judge were as follows:

> A citizen is surrounded by three policemen who have come to the scene in three different police cars. It is late at night (or more precisely in the wee hours of the morning). One or two of the cars have their overhead lights flashing. The officers are in uniform and armed. The citizen is grabbed by the arm, knocked off-balance and told to put his hands on his head. His driver's license, which he gave to one of the deputies, has

never been returned. He is not free to leave.... He has not been afforded a Miranda warning.

143 Idaho at 98, 137 P.3d at 485. Again, not surprisingly, the Idaho Court of Appeals agreed with the district judge that Jaborra's consent was not voluntary. Again, nothing about the facts of *Jaborra* are analogous to the facts in the present case. As the Court of Appeals noted in *Jaborra*, "The trial court is the proper forum for the "careful sifting of the unique facts and circumstances of each case" necessary in determining voluntariness. *Schneckloth,* 412 U.S. at 233, 93 S.Ct. 2041." 143 Idaho at 97, 137 P.3d at 484. Counsel for Bengtson has chosen cases that are simply not helpful to analysis of the voluntariness of Bengtson's consent. Second, ignoring for the moment the issue of the voluntariness of Bengtson's consent to search his person, Officer Mauri did not need Bengtson's consent to search his person under *Downing*, 163 Idaho at 29, 407 P.3d at 1288. Officer Mauri can search Bengtson's person at that point for his own protection.

This Court agrees with Judge Stow's finding that the overall interaction was congenial and not overborne by coercive officers' presence. This can be seen and heard in Exhibits 1, 2 and 3, the various body camera and dash-board camera recordings of the stop and detention.

Upon receiving valid permission from the driver to search the car, Officer Mauri lawfully directed the other occupants, one at a time, to leave the car. Both Hakalo and subsequently Bengtson were asked a few brief questions. Questioning Hakalo took three minutes. Even though she admitted possessing paraphernalia, she was not immediately arrested. Questioning Bengtson took less than 90 seconds before Officer Mauri found Bengtson's concealed 9mm pistol. Officer Mauri's quick and simple questioning of Bengtson is not enough to trigger a detention.

For the reasons stated above, this Court finds that Bengtson was not seized by Officer Mauri prior to the discovery of the firearm, and Bengtson's consent to be searched was given voluntarily. Even without consent, Officer Mauri had the legal ability to search Bentson after he exited the vehicle. *Downing*, 163 Idaho at 29, 407 P.3d at 1288.

2. **This Court finds that since Bengtson was not seized prior to the discovery of the firearm, the consent to search given by Bengtson was voluntarily given.**

Bengtson next argues, "If Mr. Bengtson was seized prior to the discovery of the firearm, his seizure was unlawful. If Mr. Bengtson was being unlawfully seized at the time he gave consent to the search, the consent is invalid." Appellant's Br. 10-14. For the reasons discussed above, this Court affirms Judge Stowe's finding that the consensual stop did not convert to a seizure prior to the discovery of the firearm, and taken in the totality of the circumstances, Bengtson's consent to the search of his person was voluntarily given.

3. **This Court finds that the lower court did not err in finding that Officer Mauri had legal justification to seize Bengtson immediately upon discovering the firearm.**

Bengtson argues that Judge Stow's finding that once Officer Mauri learned Bengtson had a gun on his person, the officer had probable cause to arrest Bengtson for a violation of I.C. §18-3302, was in error, "because the officer still did not have reasonable suspicion to believe Mr. Bengtson had violated any law. *Transcript*, at 32, ¶¶ 18-23." Appellant's Br. 15. Bengtson goes on to argue that, "Even if this Court finds there was no seizure prior to the discovery of the gun, a seizure clearly occurred immediately after officer Mauri discovered the gun." *Id.* Bengtson reasons that, "Because a seizure requires an officer to possess at least reasonable suspicion of criminal activity, and because officer Mauri concedes that he lacked reasonable suspicion to believe Mr. Bengtson was violating I.C. § 18-3302 **prior to officer Johns asking Mr. Bengtson his age**, the seizure of Mr.

Bengtson immediately following the discovery of the gun was unlawful." *Id.* (bold added). Bengtson's argument is that Officer Mauri did not know Bengtson's age when he seized Bengtson's pistol. Bengtson argues, "Officer Mauri testified that he did not possess cause to believe Mr. Bengtson was violating I.C. §18-3302 *until a minute or so after this seizure* **when officer Johns asks Mr. Bengtson his age**. *Id.*

This argument by Bengtson is really a slight of hand by counsel for Bengtson. Idaho Code §18-3302 pertains to "concealed weapons", and a person cannot have a concealed weapons license if they are under the age of 21, except under certain circumstances, and only with a permit. I.C. §18-3302(11)(a) and (20). It is the bold portion of Bengtson's argument which ignores the uncontradicted facts of this case, and accordingly is an attempt to mislead this Court on appeal. It is the italicized portion which mischaracterizes Officer Mauri's testimony on probable cause and mischaracterizes the fact that it was essentially instantaneously after Bengtson stated he was 18, that the statement is made by one of the officers, "Well now you are under arrest." Exhibit 1. First, this Court finds the statement was most likely made by Officer Mauri, and not by Officer Johns. This is because Officer Mauri is the one asking Bengtson questions and the one who handcuffed Bengtson, and Officer Johns was apparently some distance away keeping Graham and Hakalo company. Second, nowhere in the transcript does Officer Mauri state he "did not possess cause to believe Mr. Bengtson was violating I.C. §18-3302" [by not being aware Bengtson was under the age of 21 the instant he seized Bengtson's gun]. Officer Mauri testified at page 32:

> Q. Okay. When you located the firearm, Mr. Bengtson asked if it was illegal to have the firearm. Do you recall your response?
> A. I told him no.
> Q. At what point did you change that response?
> A. When I knew his age.
> Q. Okay. If you ran his identification, didn't you know his age already?

A. I -- at that time I don't remember everyone's age when I walked back up to the car. When he refreshed my memory is when it stood out to me.

Tr. 32:18-33:3.

As mentioned above, within seconds of stopping Graham's car, Bengtson told Officer Mauri quite clearly that his birthdate was July 2, 2000. Exhibit 1. That made Bengtson 18 at the time. Also, as mentioned above, when Officer Mauri was questioning Bengtson outside the car and immediately after finding the 9mm pistol on Bengtson's person under his clothes, Officer Mauri asked Bengtson how old he was, to which Bengtson clearly replied he was 18. Exhibit 1. Officer Mauri then informed him that he was under arrest for carrying a concealed firearm under the age of 21. Exhibit 1. But it is what happened immediately *before* that which is most important. Officer Mauri stated "What is this?", to which Bengtson stated, "A nine millimeter", and then Bengtson asked, "Am I under arrest", to which Officer Mauri stated "No, its just for my protection." *Id.* Officer Mauri testified that once he discovered the handgun in the waistband in Bengtson's abdomen area, he handcuffed Bengtson for officer safety. Tr. 19:10-23. Officer Mauri handcuffed Bengtson and made safe the weapon. It was after that discussion that Officer Mauri then asked Bengtson how old he was. Given that context, it was obvious Officer Mauri was arresting Bengtson for a concealed weapon because Bengtson was under the age of 21 and did not have a license.

The State argues that probable cause existed to arrest Bengtson upon discovery of the concealed semiautomatic pistol. Respt's Appellate Br. 17. The State argues that once the firearm was discovered, the officer had a lawful basis to make the weapon safe and had knowledge of the defendant's age and lack of a concealed carry permeant based on the information gained by the officer during the wants and warrants search. *Id.* at 18. Alternatively, the State argues that Officer Mauri lawfully detained Bengtson in order to

make the weapon safe, and upon learning that the defendant was under the age of 21, by asking him his age, Officer Mauri possessed probable cause to arrest Bengtson. *Id.* at 22.

Judge Stow found the officer had knowledge that the defendant did not have a concealed carry license when the officer returned to the vehicle and ran his name. Judge Stow stated that, "I would find it reasonable for the officer to rely on that in believing that he (Bengtson) did not have a concealed weapon permit at that time." Tr. 74:3-13. Judge Stow goes on to find that, "And so I would find that, in fact, the officer did have probable cause to arrest for the crime that is ultimately now charged. Even if the charge was wrongly stated at the immediate time of arrest, the probable cause existed for, in fact, what amounted to a crime being committed in the officer's presence." *Id.* 74:17-20.

This Court affirms Judge Stow's finding that upon discovering the firearm, Officer Mauri's detention and subsequent arrest of Bengtson was lawful. Even if Officer Mauri did not have probable cause to arrest Bengtson immediately upon discovering the firearm, he had reasonable suspicion to detain Bengtson, make the weapon safe, and make certain of Bengtson's age.

Judge Stow's finding is supported by substantial and competent evidence. While Officer Mauri testified that he was uncertain of Bengtson's age upon discovery of the firearm, he had ran Bengtson's information and would have seen that Bengtson was 18 years old on the readout he received. He also testified that he knew from the readout that Bengtson did not have a concealed carry license. Officer Mauri testified that he was not certain of Bengtson's age in the moment that he discovered the firearm and detained Bengtson in order to make the weapon safe. Reasonable suspicion does not require certainty. Officer Mauri had reasonable suspicion to believe that Bengtson was in violation of I.C. § 16718-3302. This reasonable suspicion is articulable from the fact that he had

recently ran a check on Bengtson which showed he was 18 and did not have a concealed carry license. Officer Mauri then discovered a firearm on Bengtson during a voluntary search after learning that drugs were present in the car that Bengtson was a passenger in. Even if Officer Mauri was not certain that Bengtson was under the age of 21, based on officer-safety grounds, it was lawful to detain Bengtson in order to make the weapon safe and ask Bengtson how old he was. Once Bengtson replied that he was 18, Officer Mauri had probable cause to place him under arrest.

For reasons stated above, this Court affirms Judge Stow's finding that, upon discovery of the firearm, Bengtson's detention and arrest was lawful.

IV. CONCLUSION AND ORDER.

For reasons stated above, Judge Stow's decision denying defendant Bengtson's motion to suppress is affirmed in all aspects.

IT IS HEREBY ORDERED that the Order Denying Defendant's Motion to Suppress entered and filed in this case on March 19, 2019 is AFFIRMED.

DATED this 2nd day of December, 2019.

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of December, 2019 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Benjamin Onosko pdfax@kcgov.us
Honorable James Stow I.O.
Prosecuting Attorney - Wesley Somerton
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CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY
BY: Deputy