STATE OF IDAHO)
County of KOOTENAI)ss
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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/Appellant,

vs.

ADAM DAVID CONNERY,

Defendant/Respondent.

Case No. **CR28-20-17365**

MEMORANDUM DECISION ON APPEAL REVERSING MAGISTRATE'S DECISION GRANTING DEFENDANT'S MOTION TO SUPPRESS

I. INTRODUCTION

This matter comes before the Court on an appeal by the plaintiff/appellant State of Idaho (State) of the February 1, 2021, decision by the Honorable James Combo, Magistrate Judge (Judge Combo), granting the defendant/respondent Adam Connery's (Connery) Motion to Suppress regarding the misdemeanor charge of Driving Under the Influence as a Minor, a violation of Idaho Code Section 18-8004(1)(d). Oral arguments on this appeal were held on October 25, 2021.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On November 1, 2020, Idaho State Police Sergeant Justin Klitch (Sgt. Klitch) was patrolling the downtown area of Coeur d'Alene around 1:00 a.m. Mem. Decision and Order Re Mot. to Suppress 3. Sgt. Klitch noted that people were walking around as he observed a white pickup truck, driven by Connery, stopped at a stoplight in the left-hand lane. *Id.* Connery was in the left lane of Fourth Street (a one-way northbound street) at its intersection with Lakeside Avenue in Coeur d'Alene, Idaho. Sgt. Klitch observed pedestrians crossing the crosswalk in front of Connery. *Id.* Once the pedestrians finished

crossing the street, and the light turned green, Connery "suddenly accelerated rapidly emitting a large cloud of exhaust smoke and briefly and ever so slightly lost control of the vehicle for a split second." *Id.* Sgt. Klitch "immediately moved into the left lane behind the truck" and noticed that Connery's muffler "was the largest non-stock muffler he had experienced in his fifteen years of service that was not in accordance with the specifications of the original manufactured muffler" and that "the truck lacked the required mud flaps or fender covers." *Id.* Sgt. Klitch followed Connery for a half a block, then activated his overhead lights. *Id.* Connery then: "immediately slowed and signaled left to turn at the next intersection only a short distance away. After [Connery] completed the left hand turn he immediately signaled to move to the right and stopped his vehicle near the curb on the right hand side of the road and activated his warning flashers. *Id.* Sgt. Klitch stopped Connery for inattentive driving, insufficient muffler, and insufficient mud flaps in violation of I.C. 49-937 and 49-949. *Id.* at 3-4.

Sgt. Klitch parked his vehicle behind Connery's pickup truck and approached Connery's passenger door since the driver's window would not open. *Id.* at 5. Sgt. Klitch requested Connery's driver's license and registration and noted that Connery was nineteen years old. *Id.* Sgt. Klitch noticed that Connery's "eyes were glassy and bloodshot and that he had slightly slow movements in retrieving the documents but [he] denied any consumption of alcohol." *Id.* Sgt. Klitch did not detect any "odor of alcohol . . . nor did he notice anything that would suggest that [Connery] was confused, unable to follow commands, lacked coordination and fumbled with documents, or that he was slurring his words." *Id.* He also did not notice anything "unremarkable about his driving pattern other than that he had briefly, ever so slightly lost temporary control of his truck when he accelerated." *Id.* Nevertheless, Sgt. Klitch suspected Connery was impaired since it was late on a Saturday night in downtown Coeur d'Alene, "which has a large number of drinking

establishments" and because "between 10:00 pm and 3:00 am [] the majority of people driving around at that time more likely than not had probably been drinking." *Id.* at 6. Further, Sgt. Klitch observed that Connery, "had exercised bad judgment in accelerating from a stop with pedestrians around and had momentarily lost control of his vehicle" and that Connery had "glassy bloodshot eyes" and "slightly slow movements." *Id.* After about a 35-second conversation inside the vehicle, which was not recorded, Sgt. Klitch directed Connery to exit the vehicle "so that he could explain the equipment violations and for safety concerns." *Id.* Although Connery "walked to the back of the truck and there were no indications of loss of balance, swaying or unsteadiness or inability to follow directions," Sgt. Klitch conducted a modified horizontal gaze nystagmus (HGN) evaluation of Connery's eyes "by having [him] follow his finger from left to right and then back again" while "facing the front of the patrol car with its flashing light directly in front of his eyesight." *Id.* Sgt. Klitch "noted a lack of smooth pursuit which in itself accounts for two clues out of six for that test." *Id.* Sgt. Klitch returned to his vehicle then re-approached Connery. *Id.* Sgt. Klitch then questioned Connery about his lack of alcohol consumption, indicated the inconsistency with the "lack of smooth pursuit," to which Connery eventually acknowledged he had consumed "one or two Mike's Hard Lemonades" after Sgt. Klitch told him he believed he was lying to him. *Id.* Sgt. Klitch then had Connery perform the remainder of the Standard Field Sobriety Tests (SFSTs). *Id.* at 7. Connery "scored two more clues for HGN for distinct and sustained nystagmus at maximum deviation for a total of four clues." *Id.* Connery "performed the One Legged Stand and the Walk and Turn exceptionally well with no points at all. Subsequent BAC recorded a .050 reading, above the legal limit for minors of .020, otherwise commonly referred to as a Baby DUI." *Id.* Connery moved to suppress his admission to drinking, the results of his Field Sobriety Tests, and the subsequent BAC. *Id.* at 13. In his February 1, 2021, Memorandum Decision and Order

Regarding Motion to Suppress, Judge Combo granted Connery's motion. *Id.*

The State filed its Notice of Appeal from the Magistrate Court Pursuant to I.C.R. 54 on March 15, 2021. The transcript of the January 27, 2021, hearing on the motion to suppress was filed on March 29, 2021. Court reviewed the State's Appellant's Brief filed on May 27, 2021, Connery's Respondent's Brief filed on June 21, 2021, and the State's Appellant's Rebuttal Brief filed July 15, 2021. Prior to the October 25, 2021, hearing on appeal, this Court filed its Notice of Intent to Take Judicial Notice Pursuant to I.R.E. 201(c). At the conclusion of the October 25, 2021, hearing, this Court took the matter under advisement.

III. 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, and 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." 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).

The Idaho Supreme Court uses a bifurcated standard of review when reviewing a district court's order granting or denying a motion to suppress evidence. *State v. Hansen*, 167 Idaho 831, 834, 477 P.3d 885, 888 (2020) (citing *State v. Purdum*, 147 Idaho 206, 207, 207 P.3d 182, 183 (2009). First, the Court will "accept the trial court's findings of fact unless they are clearly erroneous." *Id.* This is because, at a suppression hearing, "the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and

draw factual inferences is vested in the trial court." *State v. Byrum*, 167 Idaho 735, 741, 476 P.3d 402, 408 (Ct. App. 2020); *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). Findings are not deemed clearly erroneous when supported by substantial evidence in the record. *State v. Benson*, 133 Idaho 152, 155, 983 P.2d 225, 228 (Ct. App. 1999). Then, the reviewing court "may freely review the trial court's application of constitutional principles in light of the facts [the lower court] found." 147 Idaho at 207, 207 P.3d at 183.

IV. ANALYSIS

The State appeals the magistrate court's grant of Connery's Motion to Suppress because: (1) law enforcement had reasonable suspicion and grounds to stop Connery, conduct field sobriety tests, and request a breathalyzer test; (2) the magistrate court did not properly apply the totality-of-the-circumstances test when determining the sufficiency of reasonable suspicion; and (3) the magistrate court erred in determining that typical indicia of a DUI was required to find reasonable suspicion for a DUI Under 21. Appellant's Br. i. (these are not the same issues set forth by the State in its Notice of Appeal). This Court on appeal will first address the validity of the initial stop, then it will address the validity of the DUI investigation, including the type of indicia of a DUI required to find reasonable suspicion for a DUI Under 21 and the application of the totality-of-the-circumstances test.

A. Law Enforcement Had Reasonable Suspicion to Stop Connery.

The Fourth Amendment of the United States Constitution and Article I, Section 17 of the Idaho Constitution prohibit unreasonable searches and seizures of persons or property. Searches or seizures performed without a warrant are deemed unreasonable absent an applicable exception. *State v. Ferreira*, 133 Idaho 474, 479, 988 P.2d 700, 705 (Ct. App. 1999); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032 (1971);

Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967). One such exception is when law enforcement "validly stop a person to investigate possible criminal behavior, even though there is no probable cause to make an arrest. Such an investigative stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *State v. Ferreira*, 133 Idaho at 705, 988 P.2d at 479 (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968)); *Simmons*, 120 Idaho at 676, 818 P.2d at 791 (citations omitted); *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 694 (1981)).

The State argues that Judge Combo, "stipulates in his ruling that the stop was justified in light of the circumstances, but goes on to bifurcate the Insufficient Mud Flaps and Muffler portion of the stop with the investigation of the Inattentive Driving." Appellant's Br. 5. The State argues that, "the inattentive driving alone was enough to warrant an investigatory stop and the magistrate acknowledged as much in his ruling when he cited *State v. Schmidt.*" *Id.* This Court is at a loss to understand what it is that the State is arguing on appeal regarding the stop. Judge Combo found that there was reasonable suspicion to stop Connery due to the violations of both I.C. § 49-937 (requiring a muffler in good working order and not modified) and I.C. § 49-949 (requiring fenders or covers over the rear wheels of all vehicles). Mem. Decision and Order Re Mot. to Suppress 4. Judge Combo held that "[i]t was clear from the findings made above that the officer did have a reasonable articulable suspicion that [Connery] had violated the traffic laws. . . . Therefore, the stop of [Connery's] truck was clearly justified inasmuch as [Connery] had violated both of these traffic laws." *Id.* The fact that Judge Combo did not consider the inattentive driving charge in his analysis of the reasonableness of the initial stop is inconsequential on appeal. Judge Combo found that there was sufficient evidence to warrant reasonable suspicion to stop the vehicle for insufficient muffler and insufficient

mud flaps, and whether or not he "bifurcated" the inattentive driving charge would not result in a different outcome on appeal. Connery states, "The magistrate found the officer had legal justification to pull over Mr. Connery, and defendant does not challenge this finding on appeal. *Memo*, at 4." Resp't Br. 1. Therefore, this Court will not address this issue any further. To the extent this remains an issue on appeal, this Court affirms Judge Combo's determination that Sgt. Klitch had reasonable suspicion for the initial stop.

B. Sgt. Klitch Had Reasonable Suspicion to Conduct Field Sobriety and Breathalyzer Tests on Connery; the Totality of the Circumstances Show Judge Combo Omitted Two Very Important Criteria in Finding There Was No Reasonable Suspicion, and He Did Not Consider the Reduced Level of Intoxication Required of the Crime of Underage DUI.

A seizure by a police officer on the street, or an investigative detention, is "justified under the Fourth Amendment if there is an articulable suspicion that the person has committed or is about to commit a crime." 133 Idaho at 480, 988 P.2d at 706. "Although an investigative detention must ordinarily last no longer than is necessary to effectuate the purpose of the stop, a detention initiated for one investigative purpose may disclose suspicious circumstances that justify expanding the investigation to other possible crimes." *State v. Brumfield*, 136 Idaho 913, 916, 42 P.3d 706, 709 (Ct. App. 2002).

The Idaho Court of Appeals has found that a field sobriety test following a traffic stop is an investigative detention, distinct from the initial traffic stop. *State v. Ferreira*, 133 Idaho 474, 480, 988 P.2d 700, 706 (Ct. App. 1999). The Idaho Court of Appeals held that in order for a field sobriety test to be justified under both the Fourth Amendment of the U.S. Constitution and Article I, Section 17 of the Idaho Constitution, law enforcement officers must have a "reasonable suspicion that a driver is driving while under the influence or is operating a vehicle in violation of I.C. § 18-8004." 133 Idaho at 482-83, 988 P.2d at 708-09. The Idaho Court of Appeals held "that field sobriety tests are the least intrusive means *reasonably* available to verify or dispel the officer's suspicion in a short period of time that a

driver is in violation of I.C. § 18-8004." 133 Idaho at 483, 988 P.2d at 709, *citing State v. Jones*, 115 Idaho 1029, 1033, 772 P.2d 236, 240 (Ct. App. 1989) (italics in original). Similarly, the Idaho Supreme Court has found that "[r]easonable suspicion of DUI is sufficient to conduct an investigative detention which may include a breathalyzer test." *Reagan v. Idaho Transp. Dep't*, No. 47865, 2021 WL 1096672, at *8 (Idaho Sup. Ct., March 23, 2021) (citing *State v. Haynes*, 159 Idaho 36, 45, 355 P.3d 1266, 1275 (2015). "Reasonable suspicion" that someone is committing the crime of driving under the influence is determined by the "totality of the circumstances." *Ferreira*, 134 Idaho at 680, 8 P.3d at 675.

The evidence shows the administration of the Horizontal Gaze Nystagmus test was the first Field Sobriety Test Sgt. Klitch administered to Connery. The case law above demonstrates, and this Court finds as a matter of law, that at the moment Sgt. Klitch began the HGN test, Sgt. Klitch had to have reasonable suspicion that Connery was committing the crime of underage DUI. If there was no reasonable suspicion at the moment the HGN began, the decision of Judge Combo must be affirmed. This Court finds the omission by Judge Combo of two important facts existing at that moment, resulted in clear error, and an abuse of his discretion when he found Sgt. Klitch lacked reasonable suspicion that Connery was committing the crime of underage DUI.

i. The Magistrate Judge Omitted Sgt. Klitch's Observations of Connery's Eye Movements and Connery's Admission to Consuming Alcohol, Both of Which Were Made *Before* Sgt. Klitch had Connery Perform the Horizontal Gaze Nystagmus Test; That Omission Alone Is Clear Error, an Abuse of Discretion, and Requires Reversal.

Based on Judge Combo's decision, we know that Judge Combo considered the following in his analysis of whether reasonable suspicion existed to administer field sobriety tests (FST) upon Connery: Connery's "eyes were glassy and bloodshot and that he had slightly slow movements in retrieving the documents **but the Defendant denied any**

consumption of alcohol" (Mem. Decision and Order Regarding Mot. to Suppress 5) (bold added); "there was nothing unremarkable about his driving pattern other than he had briefly, ever so slightly lost temporary control of his truck when he accelerated" (*Id.*); "he suspected [Connery] was an impaired driver given the time of night, 1:04 a.m. on a Sunday morning in downtown Coeur d'Alene which has a large number of drinking establishments and he asserted that between 10:00 pm and 3:00 am that the majority of people driving around at that time more likely than not had probably been drinking." *Id.* at 6. Judge Combo repeated, "that [Connery] had exercised bad judgement in accelerating from a stop with pedestrians around and had momentarily lost control of his vehicle; and because he had glassy bloodshot eyes and slightly slow movements." *Id.* These were reiterated later in Judge Combo's decision under the heading, "Additional Findings." *Id.* at 11-12. Judge Combo then held:

> Each of these factors taken separately does not give rise to a reasonable suspicion of driving under the influence but the question is whether taken collectively they constitute articulable facts to provide a reasonable suspicion that the Defendant was driving under the influence sufficient to allow the officer to conduct FST's.
>
> Clearly they do not. What is not present is sometimes as instructive of what is present. At the time the Defendant was required to perform the FST's, there was no indication of where the Defendant had been coming from or where he was going and no odor of alcohol on his breath, **no admission of drinking** or having taken any drugs or medications, no empty cans of alcohol located in the vehicle, no fumbling for documents, no inability to follow directions, no divided attention, no confusion, no swaying, staggering or inability to maintain balance, and no unsteadiness at all. This was simply a hunch formed by an officer with fifteen years of experience who believes that the majority of persons downtown driving at 1:00 am on a Saturday night have been drinking. That is not a reasonable inference that can be properly made.

Id. at 12 (bold added).

There are two clear errors committed here. First, omitted is the fact that Sgt. Klitch observed a lack of smooth pursuit in Connery's eyes *before* the HGN was administered. Second, the finding set out in bold above, that Connery did not admit to drinking, was true

at one time in the sequence. However, crucially important is the uncontroverted fact that shortly thereafter Connery then admitted to consuming alcohol, and did so *before* the HGN was administered.

The uncontroverted evidence comes from two sources. First, the video shows that the first thing Sgt. Klitch did in this encounter was to shine his flashlight in on Connery when Connery was seated in the driving position of his pickup. Second, Sgt. Klitch testified that he noticed a lack of smooth pursuit in movements of Connery's eyes and had an admission to drinking by Connery ***before*** Sgt. Klitch administered the HGN test.

This Court took judicial notice of the video of Sgt. Klitch's dashboard camera. Notice of Intent to Take Judicial Notice Pursuant to I.R.E. 201(c), Ex. A. The video of Sgt. Klitch's dashboard camera on his patrol vehicle captures Sgt. Klitch looking with a flashlight into Connery's pickup truck through the passenger door, looking at Connery seated in the driver's seat. After Sgt. Klitch had Connery exit his vehicle, he testified:

> ...we went over the traffic violations, the equipment violations. I questioned him about consuming alcohol, which initially he denied, which either—either he was being dishonest or he—his memory was failing, and then I briefly looked at his eyes. I noticed he had lack of smooth pursuit, which told me right away that he had either been consuming alcohol or had been using some other sort of CNS depressant. I re-questioned him about consuming alcohol, letting him know that, you know, I believed he was lying to me. At that point he admitted to consuming a Mike's alcoholic malt beverage.

Tr. 15:12-23. Then Klitch was asked:

> Q. And so I guess just so that I could clarify your clarification, what factors were you relying on when you—when this suspicion arose in you?
> A. Based on location, the driver's actions, behavior, the slow movements, the admission of alcohol. I think by this point he had already told me—I asked him on a scale of one to ten, ten being the drunkest he'd ever been, where he would rate himself, and he said he was a two or three. By that time he admitted to drinking the Mike's—the Mike's malt beverage, and then I confirmed that with the field sobriety tests.
> Q. All right. Thank you. And so you—let's talk about these field sobriety tests. How did he perform?
> A. He scored—there's six clues on the Horizontal Gaze Nystagumus, and

he scored four clues which meets the decision points for an arrest.

Tr. 18:17-19:9. This testimony by Sgt. Klitch that he observed lack of smooth eye pursuit and heard Connery's admission to drinking occurred *before* Sgt. Klitch began the HGN test is consistent with Sgt. Klitch's Probable Cause Affidavit in Support of Arrest and/or Refusal to Take Test, filed on November 6, 2020. In that affidavit, Sgt. Klitch writes under oath:

> I made contact with the male driver (sole occupant) at the front passenger window and informed him the reason for the stop. I identified the driver as Adam D. CONNERY (DOB: 12/04/2000) with his Idaho driver's license. CONNERY had glassy and bloodshot eyes and had slightly slow movements. I suspected CONNERY may be impaired. I had CONNERY, who was under the age of 21 exit the vehicle. I looked at CONNERY'S eyes and noticed he had lack of smooth pursuit in his eyes, indicating he was possibly under the influence of CNS Depressants. I questioned CONNERY about consuming alcohol and at first he denied, but then admitted to consuming Mike's alcoholic beverages.
>
> CONNERY failed field sobriety tests, specifically HGN.

Probable Cause Affid. In Supp. of Arrest and/or Refusal to Take Test 2.

The only time Judge Combo mentions a lack of smooth pursuit in Connery's eyes is in regard to Sgt. Klitch's testimony about his observations regarding the HGN test. Mem. Decision and Order Regarding Mot. to Suppress 5. This Court finds there is no doubt that Judge Combo did not take into account the fact that by the time Sgt. Klitch began the HGN, Sgt. Klitch had already noticed a lack of smooth eye pursuant, and Sgt. Klitch had already heard Connery's admission to consuming alcohol. It seems that Judge Combo simply misunderstood the evidence and the sequence of events. Perhaps he assumed that the lack of smooth eye pursuit was a finding made in the HGN test, which would certainly be an understandable assumption. But that assumption is not supported by the evidence. The uncontradicted testimony of Sgt. Klitch was that he noticed the lack of smooth eye movement *before* the HGN was administered. Perhaps he assumed that the admission to consuming alcohol occurred after the HGN. But that assumption is not supported by the

uncontroverted evidence either.

The omission of these two additional clues, the lack of smooth eye movement and especially the admission by Connery that he had consumed alcohol, both made before the HGN began, was clear error and abuse of discretion. That error alone requires reversal of the decision granting Connery's motion to suppress. This Court on appeal finds that Judge Combo's findings are clearly erroneous because they are not supported by substantial evidence in the record. *State v. Benson*, 133 Idaho 152, 155, 983 P.2d 225, 228 (Ct. App. 1999). The substantial evidence in the record is that in addition to glassy and bloodshot eyes, the poor decision-making in his driving, lack of awareness of surroundings, location downtown at bar closing time, Connery also had a lack of smooth eye pursuit prior to administration of the HGN, and, most importantly, Connery admitted to consuming alcohol prior to the administration of the HGN. These last two facts were clearly not considered by Judge Combo.

Even if an admission to drinking by the underage driver alone is not enough indicia, it certainly is one of the most powerful indicia to establish reasonable suspicion to conduct an investigative detention. In this case the admission to drinking was overlooked by Judge Combo in his analysis. As set forth above, this Court on appeal will "accept the trial court's findings of fact unless they are clearly erroneous." *Hansen*, 167 Idaho at 834, 477 P.3d at 888. This Court finds that Judge Combo's omission of the fact that Connery admitted to drinking alcohol makes his suppression finding "clearly erroneous." Also as set forth above, at a suppression hearing, "the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court." *Byrum*, 167 Idaho at 741, 476 P.3d at 408; *Valdez-Molina*, 127 Idaho at 106, 897 P.2d at 997; and *Schevers*, 132 Idaho at 789, 979 P.2d at 662. If a key fact is omitted by the trial court, then the inferences that follow are invalid. Findings are clearly erroneous when they

are not supported by substantial evidence in the record. *State v. Benson*, 133 Idaho 152, 155, 983 P.2d 225, 228 (Ct. App. 1999).

In addition to the omission of the key finding that Connery had consumed alcohol, there is no indication that the trial court gave any consideration to the fact that underage driving under the influence involves the consumption of very little alcohol. This is discussed in the next section.

This Court on appeal need not decide whether those two omitted clues are sufficient to provide Sgt. Klitch with reasonable suspicion that Connery had committed the crime of underage DUI such that he can administer the HGN, though it is hard to imagine why that would not be the result. If Sgt. Klitch had reasonable suspicion that Connery had committed the crime of underage DUI, Sgt. Klitch could then lawfully administer the FST's, which began with the HGN test.

ii. The Magistrate Judge Erred in Not Acknowledging the Elements of an Under-age DUI Are Different Than Those of a Regular DUI, and in Not Factoring that into His Reasonable Suspicion Analysis.

Although, ordinarily, the Court must accept the factual findings of the lower court unless clearly erroneous, the State argues that the Court should not do so in this instance because:

> In present instance, however, the Magistrate did not draw reasonable inferences from the facts presented to it. Instead, the Magistrate unreasonably claims that due to a lack of indicia commonly found in DUI cases, the indicia Sgt. Klitch did have did not rise to the level of reasonable suspicion for the purpose of performing a limited HGN.
>
> > [N]o odor of alcohol on his breath, no admission of drinking or having taken any drugs or medications, no empty cans of alcohol located in the vehicle, no fumbling for documents, no inability to follow directions, no divided attention, no confusion, no swaying, staggering or inability to maintain balance, and no unsteadiness at all.
>
> This logic ignores the specific circumstances associated with the DUI Under 21, namely, the requisite BAC being between 0.02 and 0.08 for

> an individual under the age of twenty-one. With such a low alcohol content being the nature of the charge, one would not expect to find normal DUI indicators. In fact, it is almost certain that a nineteen-year-old male wouldn't exhibit any of the indicia the Magistrate cited, due to such a low level of intoxication. The Magistrate wrongly and unreasonably conflates the indicia of two separate charges, and in so doing, creates a new standard for police officers investigating a DUI Under 21.
>
> The purpose of the DUI Under 21 statute is to prevent persons under the age of twenty-one from operating a vehicle after consuming alcohol. Unlike for persons of legal drinking age, it does not allow the slight level of 0.08 BAC, but rather sets a standard of at least 0.02 but less than 0.08. *See* I.C. § 18-8004(1)(d). Such a low level of alcohol consumption would not evince itself in the expected manner of a normal DUI such as swerving of the vehicle, slurred speech, swaying or unsteadiness of the driver, or heavy alcohol odors. However, as with all alcohol consumption, some of the same elements do exist (*e.g.*, glassy, bloodshot eyes; lethargic movements; poor decision-making faculties; and the inability for the eyes to track during a Horizontal Gaze Nystagmus test). The fact that these indicators of intoxication would manifest significantly less profoundly in a person under low levels of intoxication is precisely the context that the Magistrate unreasonably ignored in this instance. Mr. Connery exhibited multiple indications which would lead any reasonable officer to suspect intoxication. The fact that these indications were slight or minor in comparison to a traditional DUI investigation could mean that it would take a more experienced officer to detect them. Sgt. Klitch's fifteen years of experience allowed him to do so. An officer is not required to ignore their personal experience and training when evaluating a situation as long as they can articulate the facts from which their suspicion arises. If the Magistrate's unreasonably high standard for initiating a DUI Under 21 investigation were to be upheld, it would effectively limit an officer's ability to obtain the requisite reasonable suspicion required to administer a field sobriety test in such cases due to the mitigated characteristics of intoxicated behavior, to instances where the individual admits to the officer to having consumed alcohol.

Appellant's Br. 9-11. In response to the State's argument that someone under 21 would not show typical indicia of a DUI, Connery argues that:

> Nowhere in the transcript does the officer claim that a person under 21 who had been drinking would not exhibit any of these indicators; much less does he claim it is "almost certain" these indicators would not be present. The closest the officer comes to making such a statement is when he indicates that a person under 21 who has been drinking will still likely have some clues on the HGN test, and thus the officer relied heavily on the HGN test in his investigation. *Trans.* at 10.11. However, an officer must possessed [sic] reasonable suspicion prior to performing the HGN test, not after.

Resp't's Br. 11.

The State's argument that a 19-year-old male would exhibit far less obvious indicia typical of someone with a .08 or greater BAC has obvious logical merit. Certainly, one would not expect someone with a BAC of .05, much less .02, to have the same number of the various of indicia of a person above a BAC of .08, or the same level of that indicia. While there was not any testimony of exactly what signs or indicia could be expected of a .02 BAC compared to a .08 BAC, it seems without a doubt the former will present fewer indicia and that those fewer indicia will not be as obvious as the latter.

The error in this case was for Judge Combo not to include the fact that one of the elements of the crime of underage DUI is significantly different than that corollary element found in regular DUI, and consider that fact in his analysis. He clearly did not take that into account. While it seems that Judge Combo imposed the numerosity and strength of indicia expected for the regular DUI crime upon this under age DUI crime, that is not really the issue on appeal. The issue on appeal is, and the error is, that the trial court did not consider the fact that the elements of the two crimes are different. That fact, which is beyond dispute, has to be considered in the trial court's analysis of reasonable suspicion. It simply was not discussed in the present case, let alone analyzed.

Again, it is beyond doubt that the elements of the two crimes are different. It also seems beyond doubt that the analysis should be different. If an officer with proper training and experience were not allowed to conduct field sobriety tests of minors unless they had seen enough indicia to indicate a BAC of .08 or more, then it would be nearly impossible to enforce I.C. § 18-8004(d) and that statue would be eviscerated. An officer is permitted to draw inferences from their experience and law enforcement training, *State v. Rader,* 135 Idaho 273, 276, 16 P.3d 949, 952 (Ct. App. 2000).

Here, Sgt. Klitch has extensive experience and training. Tr. 7. He is not an average

police officer unfamiliar and untrained in subtle indicia of underage drinking. *See id.* In fact, Sgt. Klitch supervises the DUI team of the Idaho State Police in District 1 and has highly advanced DUI training. *Id.* at 6. He claims to be the most highly trained officer on DUIs in "the agency" and to have investigated thousands of DUIs and attended between twenty and thirty DUI trainings in his fifteen-year tenure. *Id.* at 7, 33. Given Sgt. Klitch's extensive experience and training, in this particular case, it would seem that Sgt. Klitch was justified in looking for more subtle indicia that would lead him to reasonably believe that Connery's BAC was between .02 and .08. Again, the Court need not decide whether that is so. It is sufficient for this Court to find that Judge Combo did not mention the distinction between a regular DUI and a "Baby DUI", nor was there mention of Sgt. Klitch's extensive training and experience, apart from mentioning, "[t]his was simply a hunch formed by an officer with fifteen years of experience who believes that the majority of persons downtown driving at 1:00 am on a Saturday night have been drinking." Mem. Decision and Order Regarding Motion to Suppress 11-12. Judge Combo erred in not distinguishing between the indicia of intoxication of an adult and a minor and in taking under consideration Sgt. Kitch's training in this particular instance.

In the previous section, this Court found the trial court erred in not recognizing the fact that Connery admitted to drinking alcohol before the HGN was administered. In the instant section, this Court finds that error is compounded. In this section, the Court finds the trial court did not address the fact that the instant crime is different than a regular DUI. Thus, in this case, the trial court 1) ignored the fact that Connery admitted to consuming alcohol, and 2) did not acknowledge the fact that under-age DUI has a lower threshold, a different element than regular DUI. Those two errors have a synergistic effect. When an under-age driver admits to consuming alcohol, that fact alone could, depending on the circumstances, be sufficient to establish "reasonable suspicion" to subject a detainee to

field sobriety tests. Usually there are other circumstances and indicia as well. Due to the low alcohol level involved with the crime of underage driving under the influence, it may well be that admission to drinking any amount of alcohol would be sufficient to establish reasonable suspicion. Again, this Court need not decide that. This Court does find that the low level of alcohol in that under-age DUI crime must at least be part of the "totality of the circumstances" analysis. It was not. That failure was error.

iii. This Court Finds Alternative Innocent Explanations Must Be Based On Some Evidence Found in the Record; and Even With an Evidentiary Basis, Innocent Explanations Cannot be Used to Negate Reasonable Suspicion.

"Reasonable suspicion requires less than probable cause but more than speculation or instinct on the part of the officer. *State v. McCarthy*, 133 Idaho 119, 124, 982 P.2d 954, 959 (Ct. App. 1999). In determining whether reasonable suspicion exists, a court "must look at the totality of the circumstances existing at the time of the stop." *Id.* When applying the totality-of-the-circumstances test, "the whole picture . . . must be taken into account." *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 695 (1981). "Due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, 329 U.S., 1, 27, 88 S.Ct. 1868, 1883 (1968).

The State argues that, although Judge Combo correctly identified the totality-of-the-circumstances standard, he did not apply the standard properly in his decision. Appellant's Rebuttal Br. 1. The State's main argument is that:

> Instead of mentioning the multiple reasons for law enforcement's suspicion of Respondent driving after having drunk alcohol while underage and determining whether or not all those suspicions taken as a whole were enough to support an investigation, the Magistrate looked at each reason independently attacking each reason alone and defeating reasonable suspicion that way. The magistrate improperly found that because an innocent explanation could have explained each of the indicia (most of which were not asserted by the Defense, but merely theoretical

scenarios conjured by the magistrate) the indicia did not reach the reasonable suspicion standard.

Id. The State argues that Judge Combo:

> acted outside the boundaries of his discretion and inconsistent with legal standards applicable to specific choices available to him by improperly applying the totality of the circumstances analysis to specific facts of this case. Furthermore, the Magistrate created facts that were not in evidence to suggest innocent explanations for the indicia of intoxication recognized by Sgt. Klitch. These innocent explanations were then used by the Court to dismiss the reasonable suspicion of Sgt. Klitch as merely speculation or a hunch.
>
> The Court properly cited to numerous authorities regarding the standard for reasonable suspicion under a totality of circumstances analysis. However, when the court applied all the various elements of the circumstances, it did not consider them to determine if, taken collectively, the circumstances amounted to reasonable suspicion. Instead, the court attacked each element individually with alternative explanations for which the officer possessed no evidence of and concluded that due to these innocent alternatives, Sgt. Klitch did not possess reasonable suspicion for the DUI investigation. The Magistrate theorized that any one of the elements for which Sgt. Klitch used to make his determination could be innocent in nature and therefore it was not reasonable for Sgt. Klitch to investigate further.
>
> . . .
>
> The Magistrate acknowledges that for every fact he lists and provides an erroneous, innocent explanation to, could be indicia for driving under the influence of alcohol and yet he arbitrarily concludes, with no explanation, that when taken collectively, they don't create reasonable suspicion permitting an investigation.
>
> By not properly applying the totality of the circumstances analysis to the facts which the Magistrate acknowledged, and by creating innocent explanations that were not in evidence, the Magistrate acted outside of his discretion and applicable legal standards.

Appellant's Br. 7-9.

Connery responds that Judge Combo:

> correctly identified the factors that Sgt. Klitch relied on to support his claim of reasonable suspicion that Mr. Connery was DUI. Those included the time, date, and location of the stop, Mr. Connery's "careless" action of accelerating quickly at the stop light, Mr. Connery's eyes, and the officer's unarticulable and non-specific assertion that Mr. Connery's movement to get his documents was slightly slow. Considering the totality of the

> circumstances, the magistrate found these facts were insufficient to establish reasonable suspicion that [Respondent] was DUI. This conclusion by the magistrate was a reasonable application of the law to the facts as found.

Resp't Br. 8.

This Court notes that it is well-established that, at a suppression hearing, the trial court has the power to weigh the evidence and draw factual inferences. *State v. Kirkwood*, 111 Idaho 623, 625, 726 P.2d 735, 737 (1986). As such, it was within Judge Combo's right to consider alternative innocent explanations for the indicia that Sgt. Klitch said gave him reasonable suspicion when weighing the totality of the circumstances. However, this Court finds it to be an abuse of discretion when the alternative innocent explanations have no basis in admissible evidence in the record, and when those alternative innocent explanations are used to negate the non-innocent explanation for the observed indicia of consumption of alcohol.

Case law also makes it clear that, while not determinative of a lack of reasonable suspicion, a court may consider alternative innocent explanations when determining whether reasonable suspicion existed. In *Nicolescu*, the Idaho Court of Appeals upheld a district court's reversal of a magistrate judge's decision to suppress evidence in a DUI case. *State v. Nicolescu*, 156 Idaho 287, 291, 323 P.3d 1248, 1252 (Ct. App. 2014). In that case, the defendant was struck by another driver who ran a red light. 156 Idaho at 288, 323 P.3d at 1249. The police officer who responded to the accident noticed the smell of alcohol and that the defendant had red, bloodshot, and watery eyes. *Id.* The defendant told the officer that he had consumed alcohol that evening. *Id.* The officer administered an HGN test and evidentiary breath test. *Id.* The defendant moved to suppress the results of the tests because the officer did not have reasonable suspicion that the defendant had been driving under the influence. *Id.* The magistrate judge granted the motion to

suppress; the district court overturned the order; and the appellate court upheld the district court's overturning of the decision. *Id.* The magistrate judge found the defendant's alternative explanation for his bloodshot eyes, namely, that the deployment of the airbag scratched his cornea, to be persuasive. 156 Idaho at 291, 323 P.3d at 1252. However, the Court of Appeals found that, although this could explain why the defendant's "eyes were red and bloodshot and why he failed the HGN test, . . . the existence of an alternative innocent explanation does not negate the fact that the officers had reasonable grounds to believe" a suspect may be intoxicated. *Id.*

This Court could find no Idaho appellate case law making it absolutely clear that there must be some factual basis for the alternative innocent explanation. However, there is at least an inference in *Nicolescu* and other cases that the alternative innocent explanation must have some factual basis in the record. In *Nicolescu,* the alternative innocent explanation for bloodshot eyes was the air bag. In that case, the air bag had actually deployed. *State v. Danney*, 153 Idaho 405, 283 P.3d 722 (2012), also seems to infer that the innocent explanation have some support in the record. In *State v. Bonner*, 167 Idaho 88, 467 P.3d 452 (2020), the Idaho Supreme Court held:

> Yet, if the mere possibility of an innocent explanation were all that is necessary to undermine an otherwise valid investigatory detention based on reasonable suspicion of criminal behavior, it would severely limit the ability of law enforcement officers to prevent crime and ensure public safety. For example, under such an approach the defendant in *Terry*—the seminal case for investigative stops of this nature—could have suppressed the results of the officer's stop on the grounds that his "elaborately casual and oft-repeated reconnaissance of the store window" might have merely been window shopping, rather than "casing" the premises in preparation for a burglary. *Terry*, 392 U.S. at 6, 88 S.Ct. 1868; *see also Wardlow*, 528 U.S. at 125, 120 S.Ct. 673 ("Even in *Terry,* the conduct justifying the stop was ambiguous and susceptible of an innocent explanation.") It would be naive to assume that most criminal defendants, even unsophisticated ones, do not attempt to avoid detection and mask their true intentions by acting in an ambiguous manner so that they may appear beyond suspicion. Again, this does not give an officer carte blanche authority to stop individuals for ambiguous behavior; the

> officer still "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21, 88 S.Ct. 1868.

167 Idaho at 95, 467 P.3d at 459.

In the present case, there was an alternative innocent explanation for the indicia of Connery's movements being slightly slow, a prior head injury. Apparently, Connery had informed Sgt. Klitch of such. That is an alternative innocent explanation to the indicia of intoxication of slow movements. Presumably Sgt. Klitch considered such alternative innocent explanation, and certainly Judge Combo did so in his decision, and there was a factual basis to support his doing so. Mem. Decision and Order Re Mot. to Suppress 12.

However, there is no factual basis in the record to support Judge Combo's "alternative innocent explanations" regarding Sgt. Klitch's observation of Connery having glassy bloodshot eyes. Judge Combo wrote, "The glassy, bloodshot eyes can be consistent with under the influence but are equally consistent with eye irritation from a campfire or having just finished a shift as a cook in a poorly ventilated greasy kitchen." *Id.* There is absolutely no evidence in the record of either of those two alternative innocent explanations. At no time did Connery mention that he was driving back from a campfire or that he had just gotten off work as a cook in a poorly ventilated kitchen. Since there is no evidence, it is purely conjecture to offer these as alternative innocent explanations.

This Court finds that allowing alternative innocent explanations to have no foundation in evidence would essentially change the burden of proof on the investigating officer (and on the State) from "reasonable suspicion" to "beyond a reasonable doubt." Stated another way, allowing alternative innocent explanations to have no foundation in evidence would essentially allow the trial court to invoke his or her "inchoate and unparticularized suspicion or 'hunch'", an action which the United State Supreme Court has forbidden of the investigating officer. *Terry*, 329 U.S., at 27, 88 S.Ct. at 1883. For these

reasons, this Court finds alternative innocent explanations must have some basis in the record.

Even if this Court could get past the fact that the alternative innocent explanations given by the trial court had no factual basis in the record, this Court cannot ignore that the trial court violated the mandate from our appellate courts that, "the existence of alternative innocent explanations does not necessarily negate reasonable suspicion." *Danney*, 153 Idaho at 411, 283 P.3d at 728. Citing *State v. Rader,* 135 Idaho 273, 275–76, 16 P.3d 949, 951–52 (Ct. App.2000); *U.S. v. Arvizu,* 534 U.S. 266, 273–76, 122 S.Ct. 744, 750–52, 151 L.Ed.2d 740, 749–52 (2002). "The existence of alternative innocent explanations of the circumstances does not negate the fact that the officer had a reasonable suspicion that a crime might have been committed. State v. Rader, 135 Idaho 273, 276, 16 P.3d 949, 952 (Ct. App. 2000). That is what Judge Combo did in setting forth not one but two alternative innocent explanations for Connery's glassy and bloodshot eyes. As mentioned immediately above, Judge Combo wrote, "The glassy, bloodshot eyes can be consistent with under the influence but are equally consistent with eye irritation from a campfire or having just finished a shift as a cook in a poorly ventilated greasy kitchen." Mem. Decision and Order Re Mot. to Suppress 12. The words "but equally consistent" make it clear that Judge Combo allowed the innocent explanation(s) to negate the reasonable suspicion provided by the indicia of glassy, bloodshot eyes. It is clear to this Court from the trial court's decision, that either one or both of these two alternative innocent explanations trumped, or negated, the non-innocent explanation that Connery had been consuming alcohol. This is an abuse of discretion and clear error.

V. CONCLUSION AND ORDER.

This Court finds for the reasons set forth above, the Order Granding Defendant's Motion to Suppress must be reversed. Reversing the magistrate's decision granting the

motion to suppress and remanding back to magistrate division is the appropriate remedy. *State v. Wilson*, No. 47275, 2020 WL 4876845 (Ct. App. Aug. 20, 2020) (unpublished opinion).

IT IS HERBY ORDERED that the Order Granting Defendant's Motion to Suppress entered and filed in this case on February 1, 2021, is REVERSED.

IT IS FURTHER ORDERED this matter is REMANDED back to the Magistrate Judge for all future proceedings.

Dated this 1st day of November, 2021.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 1st day of November, 2021, copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile, email or interoffice mail to:

Defense Attorney – Benjamin Onosko pdfax@kcgov.us.
Prosecuting Attorney – Nathan Adams kcpaicourt3@kcgov.us
Honorable James Combo I.O.

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY
BY: _____ Deputy