STATE OF IDAHO)
County of KOOTENAI)ss

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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. **CORY JON COOPER,** *Defendant.*	Case No. **CRF 2014 8720** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS**

Defendant Cory Jon Cooper's Motion to Suppress DENIED.
Dep. Prosecuting Attorney, Stanley Mortensen, lawyer for the Plaintiff.
Megan E. Marshall Coeur d'Alene, lawyer for Defendant Cooper.

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I. FACTUAL BACKGROUND.

According to the police report, on May 10, 2014, Deputy Zimmerman of the Kootenai County Sheriff's Office was traveling north on Highway 95 when he observed a stationary vehicle on the southbound shoulder near mile post 422. Report for KCSD Incident 14-10592, p. 1. Zimmerman could see there were three individuals inside the vehicle. *Id.* To see if he could provide assistance, he approached the vehicle without activating his overhead lights and parked directly behind the vehicle. *Id.* He identified the driver and owner of the vehicle as defendant, Cory J. Cooper, the front passenger as Amber L. Monti, and the rear right passenger as Jeremy R. Guffey. *Id.* Zimmerman was informed that the vehicle had run out of gas. *Id.* Deputy Zimmerman noted he believed he

recognized Cooper and Monti from "previous contacts and he knew they had a previous drug history." *Id.* Deputy Zimmerman took the identification and went back to his patrol vehicle and ran the three individuals through dispatch. *Id.* Dispatch confirmed none of the three individuals had outstanding warrants, but that passenger Guffey was on felony probation. *Id.* At the October 8, 2014, hearing on defendant's motion to suppress, Zimmerman testified consistently with his report.

The parties dispute what happened after Zimmerman returned to Cooper's vehicle. There is no audio or video recording of the encounter.

Zimmerman testified that when he returned to Cooper's car, he did not hand Cooper's identification back. Zimmerman testified he asked if there was anything he should be concerned about in the vehicle, and asked Cooper for consent to search the vehicle, to which Cooper said "yes." Cooper testified at the October 8, 2014, hearing, and stated that this initial consent was not asked for by Zimmerman, nor given by Cooper. Zimmerman testified that after Cooper gave consent, Zimmerman went back to his vehicle a second time and ran the occupants through dispatch. Zimmerman testified that when he returned back to Cooper's vehicle, he asked Cooper again if Zimmerman had consent to search the vehicle, and Cooper responded "yes." Zimmerman testified he then asked Guffey if he was on probation, and Guffey said "yes." Zimmerman testified that he then said, "I can search the vehicle". Zimmerman's report indicates Zimmerman told Cooper that due to Guffey being on felony probation, Zimmerman would be searching the areas of Cooper's car to which Guffey had access, even if he hadn't given consent. Memorandum in Opposition to Motion to Suppress. Zimmerman testified he then had Cooper exit the vehicle, patted him down, and then had Cooper stand in front of Zimmerman's patrol car while Zimmerman began searching the vehicle. Through the back hatch window

Zimmerman testified he could see a black case, which was within Guffey's reach as he sat in the right rear passenger seat. In the black case Zimmerman found five syringes, a vial of clear liquid, and a knife. The syringes appeared to have been used, and Zimmerman testified he observed a crystalline residue and traces of blood inside the syringes. Zimmerman testified he then detained Guffey.

Cooper testified he was not asked for consent to search his vehicle the first time Zimmerman approached his car to ask for identification. Cooper testified that when Zimmerman finished checking their identification, Zimmerman came back to Cooper's car, approaching on the passenger side, pulled Jeremy Guffey out of the back seat, that Zimmerman "told me (Cooper) Jeremy (Guthrie) was on felony probation and told me he had the right to search my car, and then asked me if it was alright (to search)." Cooper testified Zimmerman told Cooper that Zimmerman could search the area of the vehicle within Guffey's control, and Cooper testified he felt Zimmerman meant that pretty much meant he could search the whole car. Cooper testified that he gave consent at that time, but felt like he couldn't say "no" because Cooper felt Zimmerman was going to search anyway. After giving consent, Cooper testified that Zimmerman asked him again, "Are you sure, once again (that I have your consent)?", and Cooper again confirmed he gave Zimmerman consent.

Inside Cooper's car, on the front passenger floorboard under Monti's purse Zimmerman found two used syringes, a burnt spoon with white residue, and a plastic baggie containing a white crystalline substance. Inside Monti's purse were two used syringes, and inside Monti's wallet were two plastic baggies with a crystalline residue. In the side compartment of the front passenger door was a used syringe and several unused syringes. In the back seat, stuffed between the seats, was another black case; this one

contained additional syringes, a burnt spoon, and more plastic baggies containing a crystalline substance.

According to Zimmerman's report, he then told Cooper he was under arrest for possession of methamphetamine, he advised Cooper of his Miranda rights, and testified that Cooper was willing to speak with him. Cooper then advised Zimmerman "everything you found is mine", Cooper confirmed it was "Meth, it's mine, I forgot to clean my car out."

Cooper testified Zimmerman "did not offer to provide gas". Cooper argues this point a couple of times in his memorandum. Memorandum in Support of Motion to Suppress, p. 1 (actually, p. 2), p. 5 (6). Zimmerman testified he did not offer to go get gas for them or to take any of them back to the gas station. The Court finds no significance in that fact.

Cooper timely filed the instant Motion to Suppress on August 8, 2014. While the Memorandum in Support of Motion to Suppress was not filed until October 3, 2014, the plaintiff has not objected to the fact that Cooper's memorandum was not contemporaneously filed with his motion, as is required by the July 8, 2014, Order Holding defendant. The plaintiff filed its "Memorandum in Opposition to Motion to Suppress" on October 6, 2014. Hearing on the Motion to Suppress was scheduled for October 7, 2014, but the Court granted the plaintiff's motion to continue due to unavailability of Deputy Zimmerman on that date. Hearing on Cooper's Motion to Suppress was held October 8, 2014. Zimmerman and Cooper both testified.

In his Memorandum, Cooper makes two arguments: 1) "Mr. Cooper was unlawfully detained because Officer Zimmerman did not have reasonable suspicion that Mr. Cooper was engaged in criminal activity" (Memorandum in Support of Motion to Dismiss, pp. 3-6 (4-7)), and 2) "The warrantless search of Mr. Cooper's vehicle cannot be justified by any exception to the warrant requirement." *Id.,* pp. 6-9 (7-10).

II. STANDARD OF REVIEW.

In an appeal from an order denying a motion to suppress, the Court of Appeals will not disturb findings of fact supported by substantial evidence, but will freely review whether the trial court's determination as to whether constitutional requirements were satisfied in light of the facts. *State v. Whiteley,* 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct. App. 1993). When evaluating the trial court's determination of voluntariness of consent given, reviewing courts will not disturb such a decision on appeal if the trial court's finding is based on reasonable inferences to be drawn from the record. *State v. Post,* 98 Idaho 834, 837, 573 P.2d 153, 156 (1978). Whether consent to a search was voluntary is a question of fact and reviewing courts accept the factual findings of a trial court unless they are clearly erroneous. *State v. McCall,* 135 Idaho 885, 886, 26 P.3d 1222, 1223 (2001). 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).

III. ANALYSIS.

A. Introduction.

Again, Cooper argues; 1) he was unlawfully detained; and 2) the warrantless search is not justified by any exception to the warrant requirement.

Under the Fourth Amendment, all searches and seizures must be reasonable. *State v. Zavala*, 134 Idaho 532, 536, 5 P.3d 993, 997 (Ct. App. 2000). "Warrantless searches and seizures are considered unreasonable per se unless they come within one of the few specifically established and well-delineated exceptions to the warrant requirement." *Id.* (citing *California v. Acevedo,* 500 U.S. 565, 580, 111 S.Ct. 1982, 1991, 114 L.Ed.2d 619, 634 (1991); *State v. Murphy,* 129 Idaho 861, 863, 934 P.2d 34, 36 (Ct. App.1997)). One such exception is a search pursuant to voluntary consent. *State v. Garcia*, 143 Idaho 774,

778, 152 P.3d 645, 649 (Ct. App. 2006) (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854, 858 (1973); *State v. Dominguez,* 137 Idaho 681, 683, 52 P.3d 325, 327 (Ct. App. 2002)). The burden is on the state to prove, by a preponderance of the evidence, that the consent was voluntary, and not the result of coercion. *Id.* (citing *Schneckloth,* 412 U.S. at 221, 93 S.Ct. at 2044, 36 L.Ed.2d at 859; *State v. Hansen,* 138 Idaho 791, 796, 69 P.3d 1052, 1057 (2003); *State v. Jaborra,* 143 Idaho 94, 97, 137 P.3d 481, 484 (Ct. App. 2006); *Dominguez,* 137 Idaho at 683, 52 P.3d at 327; *State v. Fleenor,* 133 Idaho 552, 554, 989 P.2d 784, 786 (Ct. App.1999)). "[W]hether consent was granted voluntarily, or was the 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 from whom consent is elicited." *Id*. (citing *Schneckloth,* 412 U.S. at 229, 93 S.Ct. at 2048-49, 36 L.Ed.2d at 864; *Hansen,* 138 Idaho at 796, 69 P.3d at 1057; *Jaborra,* 143 Idaho at 97, 137 P.3d at 484; *Dominguez,* 137 Idaho at 683, 52 P.3d at 327). "Factors to be considered include whether there were numerous officers involved in the confrontation; the location and conditions of the consent, including whether it was at night; whether the police retained the individual's identification; whether the individual was free to leave; and whether the individual knew of his right to refuse consent." *Id.* (internal citations omitted). Moreover, there is no requirement that law enforcement inform the individual that he is free to leave, or that he has the right to refuse to consent to the search. *Id.* In making this determination as to whether an individual voluntarily consented, the trial court may draw reasonable inferences from the record. *Id.* at 778-79, 152 P.3d at 649-50. Findings supported by substantial evidence in the record will not be overturned unless they are clearly erroneous. *Id.*

"Generally, only the owner of a vehicle has standing to directly challenge an illegal search." *State v. Bordeaux*, 148 Idaho 1, 9, 217 P.3d 1, 9 (Ct. App. 2009) (citing *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)).

"It is well settled that a general, unlimited consent to search a car includes consent to search containers in the vehicle." *State v. Zaitseva*, 135 Idaho 11, 13, 13 P.3d 338, 340 (2000) (citing *Florida v. Jimeno,* 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991); *United States v. Snow,* 44 F.3d 133 (2nd Cir.1995); *United States v. Crain,* 33 F.3d 480 (5th Cir.1994); *United States v. Zapata,* 18 F.3d 971 (1st Cir.1994). See also, *State v. Frizzel,* 132 Idaho 522, 975 P.2d 1187 (Ct. App.1999)).

B. Cooper Was Not Unlawfully Detained.

Cooper first cites to cases discussing a vehicle stop. Memorandum in Support of Motion to Suppress, p. 4 (5), citing *State v. Grantham,* 146 Idaho 490, 496, 198 P.3d 128, 134 (Ct.App. 2008). In this case, Cooper's vehicle was already stopped. It was incapable of being moved. There is no evidence that Zimmerman's "motorist assist" reason for pulling in behind Cooper's stationary vehicle was in any way a pretext.

Cooper is correct that "the community caretaking exception" "does not allow an officer to seize individuals where no serious harm is threatened." *Id.,* p. 5 (6). While *Grantham* holds that for officer safety reasons an officer may search a vehicle for weapons under the community caretaking exception, that exception is not really applicable in the present case. The community caretaking exception is the reason Zimmerman stopped, and that exception certainly allowed Zimmerman to make inquiry of the occupants of Cooper's vehicle. However, Cooper argues:

> While he may call it a "motorist assist," based upon the facts of the case, Officer Zimmerman did not approach Mr. Cooper's vehicle to offer assistance under the community caretaking function. In fact, he didn't inquire as to why they were stopped on the side of the road or whether

> they needed assistance. Furthermore, he never once offered to help them get more fuel for the vehicle or to use a phone to call from assistance or anything remotely related to being helpful. Instead, Officer Zimmerman immediately asked for the occupants' identification to run a records check; effectively seizing the occupants. This seizure was beyond the scope of the caretaking function and thus, Officer Zimmerman needed reasonable articulable suspicion that Mr. Cooper had been or was engaged in criminal activity for which he did not have nor ever received throughout the initial detention.

Id. There is no evidence to support Cooper's unsubstantiated allegation that, "…Officer Zimmerman did not approach Mr. Cooper's vehicle to offer assistance under the community caretaking function." It is 5:13 a.m. when Zimmerman notices Cooper's stationary vehicle with three occupants on the side of the road. Cooper's claim, "In fact, he didn't inquire as to why they were stopped on the side of the road or whether they needed assistance" is belied by Cooper's own testimony that the first thing Zimmerman did was, "ask if everything was alright." Zimmerman testified, "They told me they had run out of gas." Cooper's complaint that, "he never once offered to help them get more fuel for the vehicle or to use a phone to call for assistance or anything remotely related to being helpful", is due to what Zimmerman later found upon searching the vehicle. As explained below, that search was performed with Cooper's voluntary consent. It is unreasonable to think Zimmerman would have fetched fuel for these out-of-gas motorists, after finding the extensive drug and paraphernalia located in Cooper's vehicle.

A pertinent issue is, whether on first encounter, Zimmerman could ask for identification. *State v. Godwin,* 121 Idaho 491, 826 P.2d 452 (1992), answers that question in the affirmative. In that case, the Idaho Supreme Court also discussed the ability to ask the driver for identification in the context of the community caretaking function. The Idaho Supreme Court held:

> Based on these cases, we agree with what appears to be the middle ground between the various views taken by each side and

conclude that a limited seizure occurred when Officer Barbieri took Godwin's license and told him to remain in his car. At this point, Godwin was arguably not free to leave. *Brignoni–Ponce; Terry v. Ohio; Clayton, supra.*

Having concluded that a limited seizure occurred when Officer Barbieri told Godwin to remain in his car, we must next determine whether, under the circumstances, the seizure was reasonable. We find that it was.

In *State v. Reed,* 107 Idaho 162, 686 P.2d 842 (Ct.App.1984), a somewhat similar case, the defendant claimed that a requirement that he show proof of insurance to a police officer upon request during a traffic stop was in violation of his fourth amendment protections against unreasonable searches and seizures. In *Reed,* the Court of Appeals concluded:

> [T]he fourth amendment is not offended by a requirement to produce the documents on request. Our view is consistent with a uniform body of court decisions upholding the constitutionality of statutes requiring drivers' licenses to be produced upon police request. *See* Annot., 6 A.L.R.3d 506 (1966); *cf. State v. Hobson,* 95 Idaho 920, 923, 523 P.2d 523, 526 (1974) (characterizing a policeman's request to see a driver's license as a "legitimate request" incident to a traffic stop.

107 Idaho at 165, 686 P.2d 842. The Court of Appeals then held that "[o]nce the stop had occurred, nothing in the fourth amendment would preclude the officer from routinely asking the motorist to exhibit his driver's license, the vehicle registration and an insurance certificate." 107 Idaho at 165, 686 P.2d 842.

Several other jurisdictions which have confronted this, or a similar issue, have held that a limited seizure, such as that which occurred in this case, to check a driver's license is reasonable. We find *State v. Ellenbecker,* 159 Wis.2d 91, 464 N.W.2d 427 (App.1990), particularly persuasive.

In *Ellenbecker,* a police officer stopped behind a disabled vehicle on the side of the road to see if the passengers needed his assistance. Although he ultimately determined that the driver and passenger did not need his help, he nevertheless asked the driver, Ellenbecker, for his driver's license. After running a check on the license, the officer learned that it had been revoked. Ellenbecker was subsequently arrested, and during a search of both Ellenbecker and his car, the officer discovered, among other things, packets of marijuana, vials of hash oil, and twenty-nine packets of LSD. Similar to the issue in this case, the issue in *Ellenbecker* was "whether an officer who learns that a motorist needs no assistance may still demand to see a driver's license and conduct a status check at the scene." *Ellenbecker,* 464 N.W.2d at 428.

Holding that the officer's actions were reasonable, the Wisconsin court stated that "the public interest in permitting an officer to request a driver's license and run a status check during a lawful police-driver contact

outweighs the minimal intrusion on the driver." 464 N.W.2d at 428. The *Ellenbecker* court reasoned:

> There are several reasons for permitting a police officer performing a motorist assist to ask for a driver's license. In many cases, police officers are required to make a written report of contacts with citizens. An officer needs to know whom he or she is assisting in the event a citizen later complains about improper behavior on the part of the officer or makes any kind of legal claim against the officer. Moreover, even seemingly innocent activity, such as refueling a disabled car, could later turn out to be theft of a car that was left on the shoulder of the highway.
>
> Section 343.18(1), Stats., implicitly recognizes this public interest by giving a law enforcement officer the authority to require a driver of a motor vehicle to display his or her license on demand. Police officers do not have unfettered discretion to stop drivers and request a display of a driver's license.... However, *this case does not concern an instance of unfettered discretion. Ellenbecker was not singled out for a spot check of his license. His car was already stopped when the inspector offered help. The request for Ellenbecker's license was reasonable in these circumstances.*
>
> *There is also a public interest in permitting a police officer to run a status check on a license. The statutory authority for police to demand a driver's license would mean little if the police could not check the validity of the license.* The reason for allowing police to request a driver's license on demand is to deter persons from driving without a valid license, since a license is a statement that the driver can be expected to comply with the state's requirements for safe driving. Where it is reasonable for a police officer to ask for a license, running a status check on the license is simply carrying out this deterrent function of the law.
>
> While there is a legitimate public interest in a police officer requesting a driver's license during a motorist assist and in running a status check on the license, these interests must outweigh any intrusion on the citizen in order for the police action to pass the fourth amendment test of reasonableness.... Requesting a license and conducting a status check after a lawful contact is but a momentary occurrence. The intrusion is minimal at best.

464 N.W.2d at 429–430 (emphasis added). *See also, State v. Tourtillott,* 618 P.2d 423, 434–35 (Or.1980) ("We are aware of no prohibition against an officer asking a driver for an operator's license when a driver is validly stopped, whatever be the reason for the stop. Oregon motorists are required to have a valid operator's license in their possession while operating a car and, upon demand, to show it to any peace officer.");

State v. Aguinaldo, 71 Haw. 57, 782 P.2d 1225, 1229 (1989) ("We ... hold that the police has the power and authority to demand from the driver of a vehicle the production of both [a driver's license and proof of insurance] whenever the vehicle is validly stopped.").

We are convinced that the views expressed in both *Reed* and *Ellenbecker* are correct. In *Brignoni–Ponce, supra,* the U.S. Supreme Court stated, "As with other categories of police action subject to Fourth Amendment constraints, the reasonableness of such seizures [brief detentions short of traditional arrest] depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." 422 U.S. at 878, 95 S.Ct. at 2579. Balancing the various public interests in this case, which we discuss below, against Godwin's "right to personal security from arbitrary interference by law officers," we conclude, as did the *Ellenbecker* court, that a police officer's brief detention of a driver to run a status check on the driver's license, after making a valid, lawful contact with the driver, is reasonable for purposes of the fourth amendment. The Court of Appeals very adequately explained why a subsequent check of Godwin's license, after Officer Barbieri made the initial, lawful contact, was both reasonable and appropriate under the circumstances:

Here, Deputy Barbieri testified that there were two reasons he contacted the driver of the vehicle. He believed he needed to determine if a motorist stopped on the highway required assistance, and he was somewhat concerned for the safety of Officer Yount because he believed the two vehicles may have been traveling together. There are several reasons for permitting a police officer to ask for a driver's license under these circumstances. *In making any stop, whether the stop is to enforce the traffic laws or to carry out the officer's community caretaker function, an officer should be allowed to identify, with certainty, the person with whom he is dealing. This is necessary to protect himself and other officers from danger, to accurately prepare any required reports concerning his contact with the motorist, and to allow the officer to adequately respond to allegations of illegal conduct or improper behavior.* Moreover, where it was determined that the person traveling with Godwin was operating her car without a driver's license, it was appropriate to determine whether Godwin had a driver's license and whether it was valid.

There is also a valid public interest in permitting a police officer to run a record check on a driver's license under these circumstances. The need to identify the person with whom a police officer is dealing would logically extend to making a correct identification and determining the validity and status of the driver's license upon which the identification is based.

Even if there is a legitimate public interest in requesting a driver's license and running a status check under the circumstances presented here, that interest must outweigh the nature of the intrusion in order to pass the Fourth Amendment test of reasonableness. We note, however, that the intrusion here was minimal. Godwin was already stopped at the roadside when Deputy Barbieri arrived. The officer's initial contact with

> Godwin was to determine whether he had Whitifield's driver's license. His further request for Godwin's license and his check on the status of that license constituted a very limited further encroachment upon any privacy interest protected by the Fourth Amendment. We therefore have little difficulty in concluding that such a limited intrusion was outweighed by the substantial public interest which supported Deputy Barbieri's conduct. This view is consistent with a uniform body of court decisions in other states that a police officer who has made an otherwise appropriate contact with a motorist, may request the motorist's license and run a check on that license without violating the driver's Fourth Amendment rights.
>
> Also, as in *Ellenbecker,* I.C. § 49–316 requires a driver to surrender a driver's license to a police officer upon demand. This statute "implicitly recognizes" the public interest in allowing a police officer to ask for and check and driver's license by "giving a law enforcement officer the authority to require a driver of a motor vehicle to display his or her license on demand." *Ellenbecker,* 464 N.W.2d at 430. While the statute does not specifically authorize the officer to run a status check on the driver's license, both the Court of Appeals and the *Ellenbecker* court correctly pointed out that "[t]he statutory authority for police to demand a driver's license would mean little if the police could not check the validity of the license." 464 N.W.2d at 430. Running a license check validly fulfills two functions: it allows the officer to correctly identify the person with whom he is dealing and to determine if the license is valid.

121 Idaho 491, 493-95, 826 P.2d 452, 454-57. Zimmerman's request of Cooper's license was entirely lawful. The question not discussed by either the plaintiff or defendant is whether Zimmerman could have additionally detained in order to ascertain the passengers' identification. In *State v. Roe,* 140 Idaho 176, 90 P.3d 926 (Ct.App. 2004), the Idaho Court of Appeals held:

> The identification of the driver and rear seat passenger occurred simultaneously and, thus, the driver and passengers were not detained any longer than if the officer had only identified the driver. The second officer's verbal request for the identity of the rear passenger did not extend the duration of the stop beyond the time necessary to effectuate the purpose of the stop. Applying the rationale of *Gutierrez* and *Godwin* to the facts presented here, the officers' conduct was not improper. Therefore, Roe was not unreasonably detained pursuant to a lawful traffic stop.

140 Idaho 176, 182, 90 P.3d 926, 932. Based on Cooper's testimony, Zimmerman's conduct is allowed under *Roe,* as Cooper testified Zimmerman gathered the identification

of all three occupants at the same time, ran them through dispatch, and then came back to Cooper's car disclosing that Guffey was on probation. Thus, under Cooper's testimony, the detention was not appreciably longer because Zimmerman also ran the identification of Guffey and Monti at the same time he ran Cooper's identification through dispatch.

However, based on Zimmerman's testimony, Zimmerman gathered identification from all three occupants at the same time, came back to Cooper's vehicle after running Cooper's identification, did not return that identification, but then went back to his patrol car to run the occupants' identifications, then came back to Cooper's car a second time. *Roe* does not precisely address this scenario. A police officer may also generally request identification from anyone legitimately stopped without implicating the Fourth Amendment. *See Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County,* 542 U.S. 177, 185–86 (2004). This rule applies equally to passengers. *United States v. DiazCastaneda,* 494 F.3d 1146, 1152–53 (9th Cir.2007), citing *Hiibel* and *INS v. Delgado,* 466 U.S. 210, 216, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984). If there were any appreciable additional detention created by this two-step process in Zimmerman returning to his patrol car a second time to process Guffey's identification, this Court finds any such additional detention to be minimal and justified for officer safety reasons. This Court is persuaded by two points, both stated with emphasis by the Idaho Supreme Court in *Godwin*. First, "*In making any stop, whether the stop is to enforce the traffic laws or to carry out the officer's community caretaker function, an officer should be allowed to identify, with certainty, the person with whom he is dealing.*" 121 Idaho 491, 495, 826 P.2d 452, 456. (italics in original). Second, "*The need to identify the person with whom a police officer is dealing would logically extend to making a correct identification and determining the validity and status of the driver's license upon which the identification is based.*" *Id.* (italics in original) If Zimmerman had chosen to give

one of the occupants a ride back to the gas station, it would be imperative for Zimmerman to know the status of whom he was giving a ride. If Zimmerman had chosen to give Cooper a ride back to the gas station, it would certainly be prudent for Zimmerman to ascertain Guffey's identity before leaving him alone with Monti in Cooper's car. The Court finds Cooper's detention was not unlawful. Zimmerman had the legal ability to ask Cooper for his identification as well as that of Guffey and Monti.

C. Cooper's Consent Was Voluntary.

In arguing that the search of Cooper's vehicle was not justified by any exception to the warrant requirement, Cooper again argues the community caretaking function does not apply. Memorandum in Support of Motion to Suppress, p. 7 (8). The Court has discussed this above, finding the community caretaking function justified the initial encounter, and also the ability to identify the driver and the occupants of the car.

Cooper then argues any consent Cooper gave was not voluntary:

> Notably, counsel for the defense is aware of no case law that allows a deputy to search a vehicle for which a probationer is present without some other exception to the warrant requirement or a search warrant. While a term and condition of someone's probation may be that an individual is subject to searches of their person, property, or residence at a request by law enforcement, the same terms and conditions to [sic] not apply to those individuals not on probation. * * * As applied here, Officer Zimmerman had no authority to search Mr. Cooper's vehicle without probable cause, a search warrant, or an exception to the warrant requirement. Instead, Officer Zimmerman lied to Mr. Cooper about this issue by telling him he had the authority to search even if Mr. Cooper didn't consent; effectively, giving Mr. Cooper no choice but to consent based upon Officer Zimmerman's skewed interpretation of the law.

Id., pp. 8-9 (9-10). Cooper is correct in that there is no Idaho case law cited to the Court by the parties, or that the Court could find, that supports a *police officer's* search of a *probationer* as a passenger of a *vehicle.* But Cooper is incorrect that Zimmerman's interpretation about searches of a probationer is a "skewed" interpretation of the law.

As discussed below, there is case law from California that would support Zimmerman's interpretation that he could search the area of Cooper's car which was accessible to Guffey. While this Court finds Zimmerman's testimony more credible than Cooper's as to what was asked for by Zimmerman regarding Cooper's consent, when it was asked, and what consent was given by Cooper, even Zimmerman admits he told Cooper he could search the vehicle because Guffey was on probation. Such is a misstatement of the law in Idaho. Thus, the basis for Zimmerman's statement is relevant, if for no other reason than to give such context.

Cooper's testimony was that when Zimmerman finished checking their identification, Zimmerman came back to Cooper's car, approaching on the passenger side, pulled Jeremy Guffey out of the back passenger side seat, that Zimmerman "told me (Cooper) Jeremy (Guthrie) was on felony probation and told me he had the right to search my car, and then asked me if it was alright (to search)."

Zimmerman's testimony was he asked Cooper twice for consent to search his vehicle, and both times Cooper gave consent. It was after the two consents that Zimmerman made the statement that he could search Cooper's vehicle anyway because Guffey was on probation.

Idaho appellate courts have discussed searches of probationers, due to written waivers, but not directly in the context of a passenger in someone else's vehicle. *State v. Peters,* 130 Idaho 960, 950 P.2d 1299 (Ct.App. 1997), concerned a parolee who had signed a written waiver of his Fourth Amendment right to be free from searches, who had his residence searched. 130 Idaho 960, 961, 950 P.2d 1299, 1300. The Idaho Court of Appeals confirmed such a written waiver was an exception to the warrant requirement, but held the State still needed to show the warrantless search was "reasonable", that "…a

parole officer may make a warrantless search of a *parolee* and his *residence* if the officer has reasonable grounds to believe that the parolee has violated some parole condition and the search is reasonably related to the disclosure or confirmation of that violation." 130 Idaho 960, 962, 950 P.2d 1299, 1301. (italics added).

In *State v. Cruz*, 144 Idaho 906, 174 P.3d 876 (Ct. App. 2007), the Idaho Court of Appeals discussed a parolee who had a written waiver of his right to be from warrantless searches, and held, "Like the parole condition in *Samson,* Cruz's parole condition significantly diminished his reasonable expectation of privacy because it subjected him to searches of person or property, including residence and vehicle, *at any time and place* and did not expressly require reasonable suspicion or reasonable grounds." 144 Idaho 906, 910,174 P.3d 876, 880 (underlining added, italics in original). The Idaho Court of Appeals also noted, "The search was conducted by a parole officer, acting with police officers, and therefore did not exceed the scope of the search condition, which expressly authorized searches by any agent of Field and Community Services." *Id.* The *Samson* case referenced above by the Idaho Court of Appeals is *Samson v. California,* 547 U.S. 843, 126 S.Ct. 2193, 2197, 165 L.Ed.2d 250, 256 (2006). The Idaho Court of Appeal noted:

> In *Samson,* the Supreme Court addressed the constitutionality of a search of a parolee on a public street conducted by an officer who possessed no individualized suspicion of the defendant, other than his knowledge that the defendant was a parolee. The parolee had agreed to a search condition, set forth by California law, whereby he was subject to search or seizure by a parole officer or other peace officer at any time, with or without a search warrant and with or without cause. *See* Cal.Penal Code Ann. § 3067(a).

144 Idaho 906, 909,174 P.3d 876, 879. (underlining added). The underlined portion demonstrates the difference between the California Penal Code § 3067 and Idaho Code § 20-227(1). California Penal Code § 3067 reads in pertinent part:

3067. (a) Any inmate who is eligible for release on parole pursuant

> to this chapter or postrelease community supervision pursuant to Title 2.05 (commencing with Section 3450) of Part 3 shall be given notice that he or she is subject to terms and conditions of his or her release from prison.
>
> (b) The notice shall include all of the following:
>
> * * *
>
> (3) An advisement that he or she is subject to search or seizure by a probation or parole officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause.

Idaho Code § 20-227, reads:

> 20-227. Arrest of parolee, probationer or person under drug court or mental health court supervision without warrant -- Agent's warrant -- Detention -- Report to commission or court.[effective until march 1, 2015] (1) Any parole or probation officer may arrest a parolee, probationer, or person under drug court or mental health court supervision without a warrant, or may deputize any other officer with power of arrest to do so, by giving such officer a written statement hereafter referred to as an agent's warrant, setting forth that the parolee, probationer, or person under drug court or mental health court supervision has, in the judgment of said parole or probation officer, violated the conditions of drug court or mental health court or conditions of his parole or probation.

A great difference exists between the two statutes. Without citing I.C. § 20-227, the Idaho Court of Appeals in *State v. Pinson,* 104 Idaho 227, 231, 657 P.2d 1095, 1099 (Ct.App. 1983), explains the reasons why the waiver pertains to only to probation officers.

This Court has found two California cases that are applicable to Cooper's situation having Guffey as a passenger who is on felony probation. The first is *People v. Denison,* 63 Cal.App.4th 550, 74 Cal.Rptr.2d 83 (Cal.App. 1998). In that case, the California Court of Appeal, First District, Division 2, held:

> Appellant's next contention is that officer Broom's seizure of the brown paper bag violated his constitutional right to be free from unreasonable searches and seizures.
>
> Magner's probation search condition included the right to search and seize "any .... property under his[ ] control at any time...." Thus, the critical question is whether Broom reasonably suspected the bag was controlled by Magner. If so, it was within the scope of the probation search. (See *People v. Boyd, supra,* 224 Cal.App.3d at p. 745, 274 Cal.Rptr. 100.) The evidence at the preliminary hearing showed the paper

bag was on the floor of the front passenger side of the car near Magner's feet. The trial court found that this alone was sufficient to support Broom's seizure of the bag pursuant to the probation search.

Appellant argues the evidence does not support a finding that the bag was possessed or controlled by Magner rather than appellant. Although there was nothing to show the bag belonged to Magner, the issue is whether he had control over the bag regardless of whether appellant also had control over it, or even owned it. As the Court of Appeal explained in *People v. Boyd, supra,* 224 Cal.App.3d at p. 749, 274 Cal.Rptr. 100: "Even if the nonparolee roommate's claim of ownership sounds reasonable, reasonable suspicion may be predicated on the parolee's possession or control of the object." (See also *People v. Palmquist* (1981) 123 Cal.App.3d 1, 12–13, 176 Cal.Rptr. 173.)

* * *

We agree with the *Boyd* court that the better rule is that "[t]he officer must reasonably suspect that the object is owned, controlled or possessed by the parolee [or probationer] for the search to be valid. Depending upon the facts involved, there may be instances where an officer's failure to inquire, coupled with all of the other relevant facts, would render the suspicion unreasonable and the search invalid." (*People v. Boyd, supra,* 224 Cal.App.3d at p. 749, 274 Cal.Rptr. 100, fn. omitted.)

In the present case, inquiry as to ownership of the bag was not required both because the evidence regarding the bag's location created a reasonable suspicion that the bag was under Magner's control, and also because of the unlikelihood that such an inquiry would have resulted in a truthful answer. (See *People v. Tidalgo* (1981) 123 Cal.App.3d 301, 306, 176 Cal.Rptr. 463 ["[W]here police officers do not know who owns or possesses a residence or item and such information *can be easily ascertained,* it is incumbent upon them to attempt to ascertain ownership in order to protect the privacy interest of both probationer and nonprobationer."], emphasis added.)

Because we conclude that, in the particular circumstances of this case, officer Broom reasonably suspected that Magner had control—whether joint or not—over the brown paper bag, appellant's claim must fail. (See *People v. Boyd, supra,* 224 Cal.App.3d at p. 745, 274 Cal.Rptr. 100.)

74 Cal.Rptr.2d 83, 89-90. (footnotes omitted). In *People v. Schmitz*, 55 Cal.4th 909, 288 P.3d 1259, 149 Cal.Rptr.3d 640 (Cal. 2012), the Supreme Court of California discussed the scope and basis for the scope of a probationer's search:

Balancing these factors, we reject the Court of Appeal's holding. Instead we hold that a vehicle search based on a passenger's parole status may extend beyond the parolee's person and the seat he or she occupies. Such a search is not without limits, however. The scope of the search is confined to those areas of the passenger compartment where

the officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity. Within these limits, the officer need not articulate specific facts indicating that the parolee has *actually* placed property or contraband in a particular location in the passenger compartment before searching that area. Such facts are not required because the parole search clause explicitly authorizes a search "without cause." (Pen.Code, § 3067, subd. (b)(3); see also *Reyes, supra,* 19 Cal.4th at pp. 753–754, 80 Cal.Rptr.2d 734, 968 P.2d 445.)

Applying this rule, we conclude that the officer's search of the backseat of defendant's car was reasonable. Defendant was driving an older model Oldsmobile or Buick. There was no evidence that the car was used for a commercial purpose or that it had any type of barrier (as might be found in a taxicab) dividing the front seats from the backseat. Nor would commonly held social conventions suggest to the officer that the passenger's movement was restricted only to the seat he occupied. (Cf. *Georgia v. Randolph, supra,* 547 U.S. at pp. 111–112, 126 S.Ct. 1515.) Considering the layout of a standard five-passenger car, it was objectively reasonable for the officer to expect that this parolee could have stowed his personal property in the backseat, tossed items behind him, or reached back to place them in accessible areas upon encountering the police. Accordingly, under these circumstances, the parolee status of the front seat passenger justified a warrantless search of the backseat area where the chips bag and shoes were located.

Defendant would state the rule more restrictively. He contends that a search of an automobile based on a passenger's parole status is limited to the areas *immediately* accessible to the parolee. Defendant seems to invoke a limiting principle applicable to a search incident to an arrest. Such a search is limited to the area within the arrestee's " 'immediate control,' " meaning "the area from within which he might gain possession of a weapon or destructible evidence." (*Chimel v. California* (1969) 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (*Chimel*).)

But that test undermines, rather than assists, defendant's position. In upholding a search of an automobile incident to arrest, the Supreme Court in *Belton, supra,* 453 U.S. 454, 101 S.Ct. 2860, observed that "the relatively narrow compass of the passenger compartment of an automobile" is in fact "generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].' " (*Id.* at p. 460, 101 S.Ct. 2860, quoting *Chimel, supra,* 395 U.S. at p. 763, 89 S.Ct. 2034.) Accordingly, the court adopted a bright-line rule that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." (*Belton, supra,* at p. 460, 101 S.Ct. 2860, fns. omitted.)

This search was not incident to arrest, and we do not adopt a bright-line rule here. Nonetheless, *Belton*'s analysis is instructive. The narrow and relatively nonprivate nature of the passenger compartment, and law enforcement's need for a workable rule to monitor parolees,

> justify our rejection of a rule that would require the officer to assess in each case the parolee's immediate grasping distance and limit the search to that area. Allowing a search of areas where, under the circumstances, the officer reasonably expects that the parolee could have placed or discarded items furthers the purposes of a warrantless parole search to facilitate close monitoring of the parolee's conduct and to deter the commission of crime. (See *Terry v. Ohio, supra,* 392 U.S. at p. 19, 88 S.Ct. 1868 [the scope of the search must be commensurate with the rationale authorizing it].)

55 Cal.4th 909, 926-28, 288 P.3d 1259, 1272-73, 149 Cal.Rptr.3d 640, 656-58. (footnotes omitted).

Unlike these two California cases, this Court can find no similar statutory "parole search clause" applicable to law enforcement in Idaho. Idaho Code § 20-227 allows a probation or parole officer to arrest a probationer or parolee without a warrant for violating probation or parole, and the probation officer can deputize a law enforcement officer by giving a written statement setting forth how probation was violated. I.C. § 20-227(1). Thus, this Court finds the legal assertion Zimmerman gave Cooper was just plain false. However, the Court also finds that the legal assertion Zimmerman admits he made, which the Court now finds to be false, was made after Cooper gave valid and voluntary consent.

Even if I.C. § 20-221(1) applied to police officers (it doesn't), the State in the present case put on no evidence that Guffey signed a written waiver of his Fourth Amendment rights, or, absent such an agreement, evidence that Zimmerman had "reasonable grounds" to believe Guffey was violating his probation. *State v. Devore,* 134 Idaho 334, 347, 2 P.2d 153, 156 (Ct.App. 2000). It is always the State's burden to prove an exception to the warrant requirement exists.

This Court finds it more probable than not that Zimmerman first asked Cooper for his consent, which was given by Cooper, before Zimmerman stated he would be searching the area around Guffey as a result of Guffey's probation status. While such a statement by

Zimmerman (that he could search the car anyway) is superfluous in light of one, and perhaps two prior consents given by Cooper, that scenario makes more sense than Zimmerman taking Guffey away from the car, then telling Cooper he was going to search the car due to Guffey's probation status, and then asking Cooper twice for his consent.

Cooper's own testimony supports this finding by the Court. First, Cooper was asked on cross-examination, "At some point did you confirm that you were giving him permission?", to which Cooper responded "yes". When asked how that occurred, Cooper testified that Zimmerman said to him, "Are you sure, once again?" Cooper testified this occurred just after Zimmerman told Cooper he had the ability to search anyway, but the question, "Are you sure, once again?", implies consent was asked for and obtained earlier. The question, "Are you sure, once again?" makes no sense following an alleged statement by Zimmerman that he had the ability to search and was going to search anyway. The question, "Are you sure, once again?" only makes sense if, on an earlier occasion, Zimmerman had asked for consent and Cooper had given such consent by Cooper. The Court finds Zimmerman more likely to be an accurate historian than Cooper. Zimmerman's police report was written close to the time of Cooper's arrest. Cooper is now testifying about events that occurred five months ago. At the time, Cooper was driving a vehicle in which, according to Zimmerman's report, Cooper after arrested took responsibility for ownership of all the illegal drugs, stating "everything you found is mine". And while Cooper was not asked if he had recently used any of those drugs, the state of the evidence shows there was extensive use, and, again according to the police report, Cooper stating "meth, it's mine, I forgot to clean my car out." It is not reasonable to infer that Cooper would drive around for days with two burnt spoons and several used needles. The more reasonable inference is that the use occurred at some point in time prior to and around the same time

as the arrest. Thus, there may be additional reasons Cooper is unable to recall exactly what happened at 5:13 a.m. on May 10, 2014.

The Court finds by a preponderance of the evidence that Zimmerman first asked Cooper for consent to search Cooper's vehicle. The Court also finds it is more likely than not that Zimmerman asked for Cooper's consent again, before Zimmerman made the statement that he could search the area under Guffey's control. Zimmerman admits making the statement that he could search the area under Guffey's control. While it is *possible* (but not probable) that Zimmerman stated he could search the area under Guffey's control after getting Cooper's initial consent, and before Zimmerman later confirmed Cooper's consent, in the interim, there is no evidence that Cooper ever revoked his consent. Thus, under either scenario, Cooper gave valid consent to Zimmerman. The only situation in which Cooper's consent would not be valid is if Zimmerman never asked for consent before stating he had the right to search the area under Guffey's control, because in that situation, Zimmerman would have gained such consent by falsely stating the law. But this Court finds such sequence did not occur, as pointed out by Cooper's own recollection of Zimmerman confirming earlier consent by asking, "Are you sure, once again?" Such is consistent with Zimmerman's testimony and his police report, that the statement by Zimmerman that he had the right to search the area under Guffey's control, was made *after* Zimmerman had twice asked Cooper for consent and Cooper had twice given it. Absent a revocation of consent before Zimmerman gave the incorrect legal advice, Cooper's earlier consent was valid and not affected by that incorrect legal advice.

Cooper's consent was voluntary and not invalidly obtained by Zimmerman.

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IV. ORDER.

IT IS HEREBY ORDERED THAT defendant Cory Jon Cooper's Motion to Suppress is **DENIED**.

DATED this 15th day of October, 2014

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of October, 2014 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Megan E. Marshall
Dep. Prosecuting Attorney – Stanley Mortensen

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy