STATE OF IDAHO)
County of KOOTENAI)ss

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AT_____ O'clock _____M
CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,)
Plaintiff,)
vs.)
DENEE KAY DYE,)
Defendant.)

Case No. **CRF 2011 7247**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

Defendant DENEE KAY DYE's Motion to Suppress is **DENIED**.
Bryant Bushling, Dep. Prosecuting Attorney, lawyer for the Plaintiff.
Sean Walsh Coeur d'Alene, lawyer for Defendant Dye.

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I. FACTUAL BACKGROUND.

Defendant Denee Dye (Dye) moves this Court to suppress any and all evidence gathered and seized, and statements made following an "arrest by law enforcement [which] was unlawful and without legal justification". Amended Motion to Suppress, p. 1.

On April 29, 2011, Dye was stopped by Post Falls Police Officer D. Harvey (Harvey) at the Interstate 90 eastbound Huetter rest area. Harvey noticed the 1997 Volkswagen Jetta Dye was operating had a "loud aftershock muffler attached, which is in violation of I.C. 49-937." Police Report, p. 1; Kootenai County Case CRF 2011 7247, October 27, 2011, Hearing, Defendant's Exhibit A. Harvey states he was also advised by a fellow officer via radio that it was Dye, "who I knew had a warrant for reckless driving", who was the driving the

Volkswagen Jetta with the loud muffler. *Id.* Upon stopping Dye's car, Harvey identified her and "advised her that she had a confirmed warrant for reckless driving." *Id.* Harvey handcuffed Dye and informed her she was under arrest. A search incident to the arrest uncovered a plastic baggie containing a substance later confirmed to be methamphetamine. Dye was charged with possession of methamphetamine and this case (CRF 2011 7247) was filed.

On July 21, 2011, in this case, Dye pled guilty to possession of a controlled substance, methamphetamine, before this Court, and on that date, Dye's case was scheduled for sentencing on September 27, 2011. A presentence report was ordered and prepared.

On September 7, 2011, Dye filed her initial Motion to Suppress along with her Motion to Withdraw Plea of Guilty. These motions were filed long after the deadline had expired for all pretrial motions established by the Order Holding filed on June 10, 2011. Dye's Motion to Suppress was filed without any supporting memorandum (which is also a violation of the June 10, 2011, Order Holding), and did not set forth the factual or legal basis for the motion. Dye's motion merely alleged the arrest was made without a warrant.

Dye's Motion to Withdraw Guilty Plea had more detail. Dye's Motion to Withdraw Guilty Plea was based upon Dye's attorney making the claim that Dye's attorney had failed to properly investigate her case and failed to advise Dye of her Fourth Amendment search and seizure issues. Motion to Withdraw Plea of Guilty, pp. 2-4. Due to that failure by Dye's attorney to investigate and inform Dye, Dye argued: "At the time Ms. Dye entered her plea, she had no way of knowing that her Fourth Amendment rights had been violated and that she could pursue a motion to suppress all of the relevant and admissible evidence in her case." *Id.* Dye noticed this Motion to Withdraw Plea of Guilty for hearing on

September 27, 2011, the same date which two months earlier had been set for Dye's sentencing. At her September 27, 2011, sentencing hearing and hearing on her Motion to Withdraw Plea of Guilty, the Court heard the Motion to Withdraw Plea of Guilty first. Counsel for Dye claimed that even though the presentence report had been prepared, Dye had not yet seen such report. If a defendant has seen a presentence report and then moves to withdraw a guilty plea, the standard for that motion to withdraw guilty plea is drastically more stringent. *State v. Carrasco,* 114 Idaho 348, 757 P.2d 211 (Ct.App. 1988). Prior to sentencing, the standard is the defendant must prove a "just reason" where, after sentence is imposed, the standard is allowing a defendant to withdraw their plea only to correct a "manifest injustice." Even though Dye's pre-sentence report had been prepared, even though Dye's Motion to Withdraw Guilty Plea was filed far beyond the deadline set forth in Dye's June 10, 2011, Order Holding, even though that Order Holding had been violated by failure to file a brief, and even though the motion to withdraw was heard the same day scheduled for sentencing Dye, this Court allowed Dye to withdraw her guilty plea and allowed Dye to schedule her Motion to Suppress for hearing on October 27, 2011. To do otherwise would have simply created an automatic post-conviction action by Dye based upon ineffective assistance of counsel.

On September 28, 2011, Dye filed her Amended Motion to Suppress. This amended motion provided no more factual basis than the initial Motion to Suppress, but added the cryptic clause that the arrest was "…in violation of the unique protections afforded by Article I, Section 17 of the Constitution of the State of Idaho." Amended Motion to Suppress. Such verbiage does little to prepare the Court for a hearing. No additional memorandum was filed by Dye contemporaneous with that Amended Motion to Suppress (yet another violation of the June 11, 2011, Order Holding).

Three days before the October 27, 2011, hearing on Dye's motion to suppress, the State filed a Response to Motion to Suppress. That Response to Motion to Suppress simply contained a lengthy block quote from *Idaho v. Guzman,* 122 Idaho 981 (1992), as that case discussed the "good faith" exception, which is more than any briefing submitted by Dye. The State's Response to Motion to Suppress began with the proposition that the Idaho Supreme Court in *Guzman* had "rejected the Leon [*United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 l.Ed.2d 677 (1984)] 'good faith' exception adopted by the U.S. Supreme Court." Response to Motion to Suppress, p. 1. The State's Response to Motion to Suppress concluded: "For the reasons stated above, the state respectfully requests defendant's Motion to Suppress be denied." Response to Motion to Suppress, p. 3. On October 25, 2011, two days before the hearing on her Motion to Suppress, Dye filed a Brief in Support of Amended Motion to Suppress. The parties also filed a Stipulation of Facts for Hearing on Motion to Suppress.

In Dye's Brief in Support of Amended Motion to Suppress, Dye devotes lengthy argument to the non-existence of a "good-faith exception" in Idaho. Brief in Support of Amended Motion To Suppress, pp. 4-11.

Oral argument was held on October 27, 2011. Dye's jury trial is scheduled in this matter for November 7, 2011.

At oral argument on October 27, 2011, the deputy prosecuting attorney stated that he had made a "typographical error", that his brief on behalf of the State of Idaho should have concluded: "For the reasons stated above, the state respectfully requests defendant's Motion to Suppress be *granted*." If this "typographical error" was known to the deputy prosecuting attorney on October 24, 2011, well before oral argument, it is unknown

why the State simply did not immediately move to dismiss this case under I.C.R. 48 and alleviate a hearing that was, at least from the State's standpoint, entirely unnecessary.

II. STANDARD OF REVIEW.

The standard of review of a suppression motion is bifurcated; the Court of Appeals accepts a trial court's findings of fact supported by substantial evidence and freely reviews the court's application of constitutional principles applied to the facts found. *State v. Atkinson,* 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct.App. 1996); *State v. Cruz,* 144 Idaho 906, 908, 174 P.3d 876, 878 (Ct. App. 2007). At a suppression hearing, the trial court has the power to assess the credibility of witnesses, resolve factual conflicts, and draw factual inferences. *State v, Valdez-Molina,* 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers,* 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct.App. 1999).

III. ANALYSIS.

As a preliminary matter, even though the motion to suppress in the instant case (involving Dye's alleged possession of methamphetamine) revolves around the reckless driving case (Kootenai County Case CR 2011 3872), neither the State nor Dye have requested this Court to take judicial notice of that court file. Idaho Rule of Evidence 201 governs judicial notice of adjudicative facts. This Court concludes that Dye's motion to suppress in the instant case cannot be analyzed without understanding exactly what transpired in the reckless driving case. This Court finds that the documents contained in the court file in CR 2011 3872, and the digital recording of the hearings which took place involving that case, contain facts "…not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." I.R.E. 201(b). "A court may take judicial notice, whether requested or not."

I.R.E. 201(c). "When a court takes judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the court shall identify the specific documents or items that were so noticed." *Id.*

In *State v. Reyna,* 142 Idaho 624, 130 P.3d 1162 (Ct.App. 2005), the Court of Appeals wrote:

> The issuance of an arrest warrant constitutes a judicial finding that probable cause exists to suspect a crime has been committed and that the individual named on the warrant committed it. I.C.R. 4(a); *see also State v. Elison,* 132 Idaho 546, 549, 21 P.3d 483, 486 (2001).

142 Idaho 624, 626, 130 P.3d 1162, 1164. Similarly, for a search warrant to be valid it must be supported by probable cause to believe evidence or fruits of a crime may be found in a particular place. *State v. Belden,* 148 Idaho 277, 279, 220 P.3d 1096, 1098 (Ct.App. 2009) (citing *State v. Josephson,* 123 Idaho 790, 792-93, 852 P.2d 1387, 1389-90 (1993)). In discussing its concern regarding law enforcement invasion into private homes to effect felony warrants, the United States Supreme Court noted the safeguards involved in the issuance of a warrant by a neutral, detached magistrate:

> It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law.

Payton v. New York, 445 U.S. 573, 603, 100 S.Ct 1371, 1388 (1980).

Here, Dye argues her arrest was unlawful because the search uncovering methamphetamine was pursuant to an arrest for a bench warrant issued in Kootenai County Case No. CR 2011 3872, a case in which Magistrate Judge Penny Friedlander had found no probable cause on March 11, 2011, *prior* to Dye's arrest on the bench warrant in the instant case. Motion to Withdraw Plea of Guilty, p. 2. Dye concedes that the traffic

stop for her loud muffler could have justified the traffic stop, but Dye argues the arrest was made "immediately and without any further investigation" and "the arrest and search were based solely on a bench warrant that court records show was not based on probable cause." *Id.*

On March 3, 2011, Dye was cited with an e-ticket for reckless driving by Idaho State Police Trooper Kagerice. Kootenai County Case No. CR 2011 3872, Citation (e-ticket). The filing of the e-ticket with the court clerk created Kootenai County Case No. CR 2011 3872. The e-ticket informed Dye that she had to appear in court between March 8, 2011, and March 24, 2011, and that if she failed to appear within the time allowed for her appearance, another charge of failure to appear may be filed and a warrant issued for her arrest. *Id.* On March 9, 2011, in Case No. CR 2011 3872, Dye was sent a "Notice of Pre-Trial Conference" scheduling her reckless driving charge for pre-trial conference/arraignment on March 28, 2011. Kootenai County Case No. CR 2011 3872, Notice of Pre-Trial Conference. On March 11, 2011, in Kootenai County Case No. CR 2011 3872, an "Affidavit in Support of a Warrantless Arrest" was filed by Trooper Kagerice. Kootenai County Case No. CR 2011 3872, Affidavit in Support of a Warrantless Arrest. In Kootenai County Case No. CR 2011 3872, on March 11, 2011, Judge Friedlander found "no p/c [probable cause] as submitted w/o sworn statement by complaining party." Kootenai County Case No. CR 2011 3872, March 11, 2011, Order, p. 1; October 27, 2011, Hearing in CRF 2011 7247, Exhibit D. Trooper Kagerice had submitted an affidavit, but the complaining party, Jordan Wright, who was the subject of Dye's alleged road rage, had not. Kootenai County Case No. CR 2011 3872, Affidavit in Support of Probable Cause, p. 1. Thus, Dye is correct on her factual claim, but Dye completely misses the boat on her warrant "status" on April 29, 2011, the date she was stopped by Harvey and arrested.

On March 28, 2011, in CR 2011 3872, the reckless driving case, Dye was present in court for her Pretrial Conference/Arraignment, before Magistrate Judge Robert Burton, at which hearing the State agreed to dismiss the case once Dye completed the Alive at 25 Class and filed proof of completion with the Court. At that March 28, 2011, hearing, Dye listened to her rights via recording. As her case was called by Judge Burton, it was confirmed that she had listened to her rights on the video and understood those rights. Judge Burton informed Dye of her charge (reckless driving), and the deputy prosecuting attorney Luke Malek, outlined the proposed resolution to Judge Burton: that since Dye was under the age of 25, if she completed the "Alive at 25" program and furnished proof of that completion by the time of the next hearing, the case would be dismissed. Judge Burton told Dye the hearing would be rescheduled for April 26, 2011, at 8:30 a.m., and told Dye that if you get that completed and file a certificate with the court, then you do not need to show up for that hearing, but that "If you do not file the certificate of completion and do not show up for court, a warrant will issue for your arrest." At the conclusion of that March 28, 2011, hearing, Dye was hand delivered *in court* a "Notice of Hearing/Trial", of a "Pretrial conference" scheduled for April 26, 2011, and the notice read: "**THE DEFENDANT MUST BE PRESENT**" at that hearing. (bold and capital letters in original).

However, Dye did not appear at the April 26, 2011, hearing. Due to Dye's failure to appear at that April 26, 2011, hearing, and because neither the State nor the Court received any indication that Dye had completed the Alive at 25 Class, the State requested a bench warrant. At that April 25, 2011, hearing, Magistrate Judge Patrick McFadden issued the requested bench warrant for Dye's arrest. Stipulation of Facts for Hearing on Motion to Suppress, p. 1, ¶ 1; Kootenai County Case CRF 2011 7247, October 27, 2011, Hearing, Exhibit C; Minutes of April 26, 2011, hearing in CRM 2011-3872; March 28, 2011,

Notice of Hearing/Trial in CRM 2011-3872. A review of the digital recording of that hearing shows Judge McFadden recited the offer by the State to Dye at the prior hearing on March 28, 2011. Judge McFadden noted Dye was not present and that there was no certificate of completion from "Alive at 25"; and deputy prosecuting attorney Luke Malek asked for a bench warrant. Judge McFadden found that Dye was provided with notice of the April 26, 2011, hearing. Judge McFadden found there was no proof of completion of the "Alive at 25" program in the file, found no good cause to excuse her presence at court and issued a bench warrant and stated he was setting bond at $500, a "relatively low bond warrant, but she does have an obligation to appear in court when she is ordered to appear." Judge McFadden's Bench Warrant reads "The Defendant in the above captioned case, having failed to appear for the following court hearing: Failure to Appear For Pretrial Conference Arraignment on April 26, 2011 at 8:30 a.m." Kootenai County Case No. CR 2011 3872, April 26, 2011, Bench Warrant.

This Court is faced with making a determination with regard to the propriety of Harvey's arrest of Dye on April 29, 2011, pursuant to a warrant for reckless driving which was on March 11, 2011, found to be not based on probable cause, but where before the April 29, 2011, arrest, a bench warrant for failure to appear had been issued three days before on April 26, 2011. In essence, Harvey mistakenly believed a non-existent warrant was in place, and arrested Dye based on the mistaken belief that a reckless driving warrant had been properly issued. What Harvey was unaware of is the uncontradicted fact that a completely valid bench warrant for Dye's arrest based on Dye's failure to appear (not a warrant for reckless driving) for her April 26, 2011, court hearing was in effect at the time of Harvey's stop and arrest of Dye.

The exclusionary rule is intended to effectuate Fourth Amendment rights by deterring law enforcement officials from violating constitutional protections. *Stone v. Powell,* 428 U.S. 465, 492, 96 S.Ct. 3037, 3051 (1976); *State v. Lusby,* 146 Idaho 506, 508, 198 P.3d 735, 737 (Ct.App. 2008). "Because the exclusionary rule imposes a price upon society that can enable the guilty to escape prosecution, the exclusionary rule is only applicable if there is a causal connection between the police misconduct and the acquisition of the challenged evidence." *Lusby,* 146 Idaho 506, 508, 198 P.3d 735, 737 (citing *Segura v. United States,* 468 U.S. 796, 805, 104 S.Ct. 3380, 3385-86 (1984)).

The Idaho Court of Appeals analyzed the "good-faith" exception to the exclusionary rule, as set forth in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405 (1984), in *State v. Jardine,* 118 Idaho 288, 291, 796 P.2d 165, 168 (Ct.App. 1990). The Court wrote:

> The application of the good-faith exception by the district court presents a mixed question of law and fact. We defer to factual findings made upon substantial evidence, but we freely review the application of law as stated in *Leon* to the facts as found in the instant case. Under *Leon,* evidence seized as a result of a police officer's objectively reasonable reliance on a magistrate's determination of probable cause will not be suppressed even if the warrant is later found to lack probable cause. However, the good-faith exception will not be applied where:
>
> > (1) the magistrate or judge issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his judicial role in such a manner or under such circumstances that no reasonably well-trained officer should rely on the warrant; (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the officer cannot reasonably presume the warrant to be valid. (Citations omitted).

118 Idaho 288, 291, 796 P.3d 165, 168. Two years after *Jardine,* the Idaho Supreme Court rejected the "good faith exception" on State Constitutional grounds. *State v. Guzman,* 122 Idaho 981, 992-93, 842 P.2d 660, 671-72 (1992).

There are some very good reasons why this is not a "good faith exception" case. First, Idaho no longer recognizes the "good-faith exception." Second, distinguishing the *Leon* analysis from the instant matter is the fact that, here, the reckless driving warrant was not *later* found to lack probable cause. The warrant pursuant to which Harvey believed he was arresting Dye was *previously* (i.e. before her arrest) found to be lacking probable cause. In other words, that warrant never existed. As such, the "good-faith exception" is simply not applicable to the instant facts. There can be no "good-faith exception" for a non-existent arrest warrant for reckless driving. The third and most important reason this is not a "good-faith exception" case is the existence of the **valid** warrant issued by Judge McFadden, due to Dye's failure to appear before him, three days prior to Dye's arrest in the present case.

Judge McFadden's bench warrant issued on April 26, 2011, was completely valid on the date Harvey arrested Dye on April 29, 2011. *Leon* holds that suppression of evidence under the exclusionary rule should have a deterrent effect, "…it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." 468 U.S. 897, 919, 104 S.Ct. 3405, 3418. Here, if Harvey had a *subjective* belief that a warrant for Dye's purported reckless driving existed, he was wrong in that subjective belief. But the Idaho Supreme Court has held that an officer's subjective belief as to a probable cause determination for a stop or a search is not material or determinative; the question is "would the facts *available* to the officer at the moment of the seizure or search 'warrant a [person] of reasonable caution in the belief' that the action taken was appropriate." *State v. Schwartz,* 133 Idaho 463, 468, 988 P.2d 689, 694 (1999) (quoting *State v. Julian,* 129 Idaho 133, 136-37, 922 P.2d 1059, 1062-63 (1996)). (emphasis added). Subjectively, Harvey's belief of an un-issued warrant on the charge of reckless driving was completely

wrong, and any arrest on that fact alone would be invalid. But the test in Idaho is *all facts* <u>*available*</u> to an *objectively reasonable person.* Objectively, the existence of a valid bench warrant at the time of the arrest is determinative. The existence of that valid warrant from Judge McFadden is an uncontradicted fact which was "available" to Harvey at the time of arrest. The purpose of the exclusionary rule would not be served by suppression of evidence given the instant facts because Harvey's action, although subjectively unreasonable based on a warrant of Judge Friedlander which Harvey thought existed but which in fact did not exist, was nonetheless objectively reasonable given the existence of Judge McFadden's April 26, 2011, bench warrant.

As mentioned above, in Dye's Brief in Support of Amended Motion to Suppress, Dye devotes much argument to the non-existence of a "good-faith exception" in Idaho. Brief in Support of Amended Motion To Suppress, pp. 4-11. The reason Dye feels there was no valid warrant is as follows:

> The warrant referred to by Officer Harvey was issued on April 26, 2011 in Kootenai County Case number CR-2011-0003872. However, the warrant was issued despite the fact that a magistrate in that case previously found that there was no probable cause on March 11, 2011. No additional sworn affidavits or testimony were presented to the Magistrate Court prior to the issuance of the bench warrant.

Brief in Support of Amended Motion to Suppress, p. 2. Dye continues:

> In this case, the magistrate below specifically found on March 11, 2011 that there was no probable cause "to believe that a crime or crimes has been committed." See Order, filed march 11, 2011 in Kootenai County Case Number CR 2011-0003872. Nonetheless, another magistrate issued a bench warrant on April 26, 2011 after Ms. Dye failed to appear at a pretrial conference arraignment. See Bench Warrant, filed April 26, 2011 in Kootenai County Case Number CR 2011-0003872. The magistrate issued the warrant without any further evidentiary showing from the State in support of a finding of probable cause. No sworn testimony or affidavits were offered to the magistrate in support of a finding of probable cause. In fact, the magistrate at the April 26, 2011 hearing never found probable cause, he simply issued a bench warrant upon the State's request.

> The April 26, 2011, bench warrant was issued in violation of Article I, Section 17 of the Idaho State Constitution, in violation of the Fourth Amendment to the Constitution of the United States, and also in violation of Idaho Criminal Rule 4(d). The Idaho Criminal Rules provide that "[i]f a defendant fails to appear in response to a summons a warrant shall issue *if probable cause has been shown*." (emphasis added). Thus, the April 26, 2011 warrant was issued without probable cause in violation of the Fourth Amendment of the United States Constitution, in violation of Article I, Section 17 of the Idaho State Constitution, and in violation of the Idaho Criminal Rules. Therefore, the warrant is invalid and the fruits of the warrant must be suppressed unless an exception to the exclusionary rule applies.

Id., pp. 3-4.

Idaho Criminal Rule 4 reads:

> **Rule 4. Warrant - Summons - Determination of probable cause.**
> **(a) Issuance of warrant.** After a complaint is laid before a magistrate, (which may be in the form of the Idaho Uniform Citation for a misdemeanor), the magistrate may issue a warrant for the arrest of the defendant only after making a determination that there is probable cause to believe that an offense has been committed and that the defendant committed it.
> **(b) Issuance of summons.** After a complaint is filed with a court, (which may be in the form of the Idaho Uniform Citation for a misdemeanor), the magistrate, or the clerk of the court, may issue a summons requiring the defendant to appear before the court at a time certain without first making a determination of whether there is such probable cause.
> **(c) Issuing warrant or summons, preference for summons.** If the magistrate finds such probable cause for a complaint, in determining whether a warrant or summons should issue, the magistrate shall give preference to the issuance of a summons. In making such determination as to whether a warrant or summons shall issue, the magistrate shall consider the following factors:
> (1) The residence of the defendant.
> (2) The employment of the defendant.
> (3) The family relationships of the defendant in the community.
> (4) The past history of response of the defendant to legal process.
> (5) The past criminal record of the defendant.
> (6) The nature of the offense charged.
> (7) Whether there is reasonable cause to believe that the defendant will flee prosecution or will fail to respond to a summons.
> **(d) Determination of probable cause after arrest without warrant, or upon appearance or failure to appear by a defendant pursuant to a summons.** If a defendant is arrested without a warrant or appears before the court pursuant to a summons, the magistrate before whom the

> defendant first appears shall not order the defendant retained or ordered into custody nor require the defendant to post bond unless the magistrate shall determine there is such probable cause as defined in subsection (a) of this Rule at or before the time of the first appearance of the defendant. The defendant must be released upon the defendant's own recognizance unless and until such determination of probable cause has been made by a magistrate or unless immediate disposition of the complaint has been made; but the complaint shall not be dismissed pending such determination or disposition. If a defendant fails to appear in response to a summons a warrant shall issue if probable cause has been shown.
>
> **(e) Hearing to determine probable cause.** The probable cause hearing is an informal nonadversary proceeding. The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing that there is a factual basis for the information furnished. It shall not be necessary for the defendant to be present at such hearing or to have the right to confrontation and cross-examination of witnesses, nor shall it be necessary to permit the defendant to have or to provide the defendant with counsel. Before making the determination of whether there is such probable cause, the magistrate may require any person, other than the defendant, who appears likely to have knowledge relevant to the offense charged to appear personally and give testimony under oath. The facts which the magistrate considers in determining probable cause shall be placed either in affidavit form and attached to the complaint or shall be testimony under oath placed upon the record. In making the determination of probable cause, the magistrate shall consider all facts as to whether an offense has been committed and whether the defendant has committed it.
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> **(f) Disposition on finding of no probable cause.** If the magistrate finds there is no such probable cause, the magistrate shall refuse to issue a warrant, and shall exonerate any bond posted, and shall order the release of the defendant if the defendant is in custody. A finding of a lack of probable cause shall not require the dismissal of the complaint.

Dye bases her argument for her motion to suppress on the last sentence of I.C.R. 4(d), which reads: "If a defendant fails to appear in response to a summons a warrant shall issue if probable cause had been shown." As mentioned above, Dye writes:

> The April 26, 2011, bench warrant was issued in violation of Article I, Section 17 of the Idaho State Constitution, in violation of the Fourth Amendment to the Constitution of the United States, and also in violation of Idaho Criminal Rule 4(d). The Idaho Criminal Rules provide that "[i]f a defendant fails to appear in response to a summons a warrant shall issue if probable cause has been shown." (emphasis added).

Brief in Support of Amended Motion to Suppress, p. 4. In this case, Dye was issued a uniform citation (an e-ticket), which is synonymous in Idaho with a Summons and Complaint, as shown by I.C.R. 3.1, which reads:

> **Rule 3.1. Idaho uniform citation.**
> Any misdemeanor may be charged and prosecuted by an Idaho Uniform Citation (Summons and Complaint) as provided in the Misdemeanor Criminal Rules (M.C.R.)

If Dye had not appeared before a magistrate at the time indicated on her e-ticket, there would need to have been a probable cause determination before an arrest warrant could legally issue. But those are not the facts of this case. In this case, Dye *did* appear in response to her Uniform Citation (the e-ticket), by appearing in Court on March 28, 2011. *Subsequently*, Dye failed to appear at the hearing on April 26, 2011, which was announced at the March 28, 2011, hearing. It was upon that failure to appear that Judge McFadden issued his bench warrant.

The fact that Judge Friedlander refused to find probable cause only resulted in no arrest warrant being issued for the underlying offense of reckless driving, when the matter was directed to Judge Friedlander's attention on March 11, 2011. Judge Friedlander found no probable cause because although Trooper Kagerice had submitted an affidavit, the complaining party, Jordan Wright, had not. Idaho Criminal Rule 4(f) makes it clear such a finding of no probable cause by Judge Friedlander does *not* result in dismissal of Dye's Complaint (the e-ticket Uniform Citation). Thus, when Dye appeared before Judge Burton on March 28, 2011, there was still a valid Complaint (the e-ticket Uniform Citation), to which Dye had voluntarily appeared and accepted an offer to complete the "Alive at 25" program in exchange for a later dismissal of this action, and promised to appear in court on April 26, 2011, and show proof of completing that program, or at least file proof of such completion prior to April 26, 2011. Dye did neither, and a bench warrant issued.

Dye's reliance on I.C.R. 4 is misplaced. Idaho Criminal Rule 4 concerns arrest warrants. Specifically, I.C.R. 4 governs warrants for arrest on the underlying offense. No part of I.C.R. 4 governs bench warrants.

United States v. Evans, 574 F.2d 352 (6th Cir. 1978) illustrates this distinction. In that case, Evans was convicted for felon in possession of a firearm. Evans appealed that the gun was illegally found by officers, who arrested Evans based on three outstanding traffic warrants. At issue was whether those warrants were arrest warrants based on the traffic citations, or bench warrants based upon a failure to appear.

> The Government argues that these warrants were not based on the violations contained in the complaint, but on the failure to appear in court, and that the judge had probable cause to believe that Evans had not appeared, based on his clerk's affidavit. It is true that normally, when an accused person or a subpoenaed witness fails to appear in court, the judge will issue a bench warrant ordering that person arrested and brought before the court. Such warrants are clearly valid and based on probable cause and our holding today does not affect them in the least. However, every indication in the record is that these warrants issued for Evans' arrest were not bench warrants based on his failure to appear, but arrest warrants, based on the complaint described in the ticket. The statute authorizing the warrants states:
>
> > If after the service of an appearance ticket and the filing of a complaint for the offense designated therein the defendant does not appear in the designated local criminal court at the time the appearance ticket is returnable, the court may issue a summons or warrant based upon the complaint filed. (Emphasis supplied.)
>
> Mich.Comp. Laws Ann. s 764.9e, Mich.Stat.Ann. s 28.868(5). The form signed by the judge ordering the issuance of warrants states that they are to be "based upon said complaint." The warrants themselves state that Evans was to be arrested for "the offense therein indicated," which is the traffic offense. [footnote]
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> > [footnote] The dissent argues that the judge who issued these warrants possessed the power to issue bench warrants based on nonappearance, but we do not question that. Nor do we doubt the validity and desirability of the citation system Michigan uses in traffic and local misdemeanor cases. However, the question is not what the judge could do, but what, in legal effect, he did do. We conclude that the judge did not exercise his power to issue bench warrants; he exercised his power to issue arrest warrants. Michigan law requires that all warrants contain the substance of the

> complaint and set forth and describe the alleged offense fully and correctly. *People v. Belcher,* 58 Mich. 325, 25 N.W. 303 (1885); *In re Reno,* 321 Mich. 497, 32 N.W.2d 723 (1948). Thus, assuming arguendo that the judge here intended to issue bench warrants for nonappearance (in spite of the fact that both the warrant order and the warrants themselves state that they are based on the complaints), the warrants would still be invalid because they do not state the grounds upon which they were issued.

574 F.2d 352, 355. In the present case, Judge McFadden's bench warrant states the grounds upon which it was issued. As the Sixth Circuit Court of Appeals in *Evans* noted:

> It is true that normally, when an accused person or a subpoenaed witness fails to appear in court, the judge will issue a bench warrant ordering that person arrested and brought before the court. Such warrants are clearly valid and based on probable cause and our holding today does not affect them in the least.

In the present case, the reason the bench warrant was based upon probable cause is Dye's non-appearance was committed in the presence of Judge McFadden. In *State v. Davidson,* 260 Neb. 417, 618 N.W.2d 418 (Neb. 2000), a case citing *Evans*, the arrest warrant was issued for Davidson's failure to pay court costs, but did not state what the amount of those costs were. The Supreme Court of Nebraska clarified the circumstances upon which a judge may issue an arrest warrant based upon personal knowledge:

> The Court of Appeals acknowledged, as do we, that other jurisdictions have recognized that the lack of an affidavit may be overcome by other competent evidence in the record upon which the validity of the warrant may be judged. For example, if the face of the warrant reflects the fact that it was issued based upon the personal knowledge of the issuing magistrate or judge or has a complaint attached which sets forth in sworn form the facts upon which the allegation of the defendant's failure to appear is based, the warrant's validity may be judged without an available affidavit. See, e.g., *McGrain v. Daugherty,* 273 U.S. 135, 157, 47 S.Ct. 319, 71 L.Ed. 580 (1927) (courts "may order commitments without other proof than their own knowledge of the occurrence"); *State v. Noble,* 314 Or. 624, 842 P.2d 780 (1992); *Kosanda v. State,* 727 S.W.2d 783 (Tex.App.1987) (affidavit not required if facts supporting probable cause occur in presence of court).
>
> The "personal knowledge" exception to the affidavit requirement recognizes the commonsense notion that there is no point in a judge executing an affidavit when that judge has personal knowledge of facts

establishing probable cause. See *State v. Pinela,* 113 N.M. 627, 830 P.2d 179 (N.M.App.1992). See, also, *United States v. Evans,* 574 F.2d 352, 355 (6th Cir.1978) (stating that "when an accused person or a subpoenaed witness fails to appear in court, the judge will issue a bench warrant ordering that person arrested and brought before the court" and that "[s]uch warrants are clearly valid and based on probable cause"). Accord, *U.S. v. Bigalk,* 175 F.R.D. 628 (W.D.Mo.1997); *People v. Allibalogun,* 312 Ill.App.3d 515, 727 N.E.2d 633, 245 Ill.Dec. 186 (2000).

We agree with the majority of courts that have established a personal knowledge exception to the affidavit requirement. It would be unreasonable to conclude that a court, acting under the solemn obligation of its oath of office, would nonetheless be required to affirm by separate affidavit events that took place in its presence. To require the production of a separate affidavit, where the evidence supporting a finding of probable cause is personally known to the court and can be set forth in the warrant itself, would accomplish nothing other than to elevate form over substance.

We furthermore conclude that the personal knowledge exception should encompass a situation in which the issuing judge personally reviews the records of the court.

> The number and type of records kept, and the virtually universal use of computers to record vast quantities of information in our society, make it unrealistic to require a witness to have personally observed each aspect of a transaction if he is familiar with the method the organization routinely uses to compile and record such data.

State v. Pinela, 113 N.M. at 629, 830 P.2d at 181. This logic is particularly pertinent where the court supervises the personnel who enter the data into the records of the court and, as here, the evidence establishing probable cause is contained entirely within the court records. The failure to pay a fine, for instance, is evidenced solely by the court records establishing that a fine was ordered and that the fine remains unpaid. Under such circumstances, the judge is as capable as any employee of the court of reviewing the court records and acting upon the personal knowledge obtained from that review.

We therefore hold that a court may issue an arrest warrant without a supporting affidavit where the facts supporting probable cause for the issuance of the warrant are within the personal knowledge of the court. The personal knowledge of the court, for these purposes, includes events that have taken place in the physical presence of the court and facts that are contained in the official records of the court. In order for such a warrant to be valid, however, the face of the warrant must (1) set forth the facts giving rise to probable cause for the issuance of the warrant and (2) affirmatively state that the issuing judge either (a) personally witnessed the events recited in the warrant or (b) personally reviewed the official records of the court, thus ensuring that the validity of the data in the court records is adequately scrutinized by the issuing judge or magistrate.

> Applying this holding to the facts, we conclude that the warrant in the instant case does not meet the requirements of the personal knowledge exception to the affidavit requirement. The warrant simply recites that Davidson failed to pay a fine or to appear in court to show good cause why he should not be jailed for failing to pay the fine. The warrant does not show on its face how the issuing judge became aware that Davidson had not paid the fine or appeared in court. Thus, the Court of Appeals correctly determined that based on this record, the warrant did not fall within the personal knowledge exception to the affidavit requirement and that the warrant was not validly issued. The State's first assignment of error is without merit.

260 Neb. 417, 424-25, 618 N.W.2d 418, 425-26.

As noted in *Roberts v. State*, 711 P.2d 1131, 1133, n. 1 (Wyo. 1985), which, in turn, cited to *Evans*;

> A bench warrant, like any other warrant, must be based upon probable cause that an offense has been committed and the named person committed it. Normally there is no question that probable cause exists for a bench warrant because a person's nonappearance is obvious to the court.

As mentioned above, Dye's reliance on I.C.R. 4 is misplaced as the rule concerns arrest warrants, not bench warrants. If I.C.R. 4 does not control the present situation, what does? A "bench warrant" is defined as: "A warrant issued directly by a judge to a law-enforcement officer, esp. for the arrest of a person who has been held in contempt, has been indicted, has disobeyed a subpoena, or has failed to appear for a hearing or trial." Black's Law Dictionary, Seventh Ed. (1999), p. 1579. The Idaho Legislature has defined a "bench warrant" (at least for purposes of the Idaho Bail Act), as "…a warrant issued by the court because the defendant failed to appear as ordered, failed to comply with a condition of release or the sureties are no longer sufficient." I.C. § 19-2905(4).

Idaho Code § 19-2927 provides:

> **Forfeiture of bail.** If, without sufficient excuse, the defendant neglects to appear before the court upon any occasion when his presence has been ordered the court must immediately direct the fact to be entered upon its minutes, order the forfeiture of the undertaking of bail, or the

> money deposited instead of bail, as the case may be, and order the issuance of a bench warrant for the arrest of the defendant.

Thus, for purposes of this case (since there is no bail), the statute reads: "If, without sufficient excuse, the defendant neglects to appear before the court upon any occasion when his presence has been ordered the court must immediately…order the issuance of a bench warrant for the arrest of the defendant." None of these Idaho statutes require a probable cause determination, other than the fact that the person failed to appear and the judge noticed such non-appearance, in order for a bench warrant to issue.

Neither Dye nor the State cited any of the above cases. A case arguably supporting Dye's argument, found by this Court, is *State v. Parks,* 136 Wash.App. 232, 148 P.3d 1098 (Wash.App. 2006). Parks was cited with approval by the Washington Supreme Court *en banc* decision in *State v. Erickson,* 168 Wash.2d 41, 46-48, 225 P.3d 948, 950-52 (Wash. 2010). This Court finds these two Washington cases turn upon the specific language in the Washington Criminal Rules, CrRLJ 2.2 and 2.5. Additionally, after reading *Evans* and *Roberts*, the Washington cases appear to be in the minority of jurisdictions which have addressed this issue.

IV. CONCLUSION.

For the reasons stated above, this Court denies Dye's Motion to Suppress and Amended Motion to Suppress.

IT IS HEREBY ORDERED Dye's Motion to Suppress and Amended Motion to Suppress are DENIED. The case remains set for jury trial beginning November 7, 2011.

DATED this 1st day of November, 2011

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of November, 2011 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Sean Walsh
Prosecuting Attorney – Bryant Bushling

Hon. Penny Friedlander
Hon. Patrick McFadden

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy