STATE OF IDAHO)
County of BOUNDARY)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 BOUNDARY

STATE OF IDAHO,)
Plaintiff,)
vs.)
DARLENE SHELTON,)
Defendant.)

Case No. **BOU CRF 2013 727**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

Defendant Darlene Shelton's Motion to Suppress is **DENIED**.
Tevis Hull, Deputy Prosecuting Attorney, lawyer for the Plaintiff.
J. Lynn Brooks, lawyer for Defendant Darlene Shelton.

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I. PROCEDURAL HISTORY.

On June 15, 2013, Darlene Shelton (Shelton) was charged with felony possession of methamphetamine, misdemeanor possession of paraphernalia and misdemeanor driving under the influence of alcohol, drugs and/or intoxicating substance. Following the July 26, 2013, preliminary hearing and a finding of probable cause by the Honorable Lynn Brower, Magistrate Judge, an Information was filed on July 29, 2013, charging those three crimes.

On July 31, 2013, counsel for defendant, Darlene Shelton, filed her Motion to Suppress. On August 27, 2013, Shelton filed her Amended Motion to Suppress and Memorandum in Support of Motion to Suppress. On September 10, 2013, counsel for Shelton sent a Notice of Hearing to the Prosecuting Attorney scheduling the hearing on the

motion to suppress for September 20, 2013. Up to that time the September 20, 2013, hearing the Prosecutor failed to file any brief. On September 20, 2013, District Judge Barbara Buchanan rescheduled the hearing on the motion to suppress for October 28, 2013. As of October 28, 2013, the Prosecutor still had not filed a responsive brief. On October 28, 2013, the undersigned conducted the hearing on Shelton's Motion to Suppress, heard testimony from Officer Willey Cowell and watched the half-hour DVD recording of the June 15, 2013, stop and arrest of Shelton. State's Exhibit 1. At the conclusion of that hearing the Court ordered the Prosecutor to file some sort of response brief by November 7, 2013, and any additional briefing be filed by Shelton no later than November 9, 2013. The State timely submitted its "Brief in Opposition to Suppress." Shelton timely submitted "Defendant's Reply Brief in Support of Motion to Suppress." Shelton's Motion to Suppress is now at issue. The case is presently scheduled for a jury trial before Judge Buchanan beginning November 12, 2013.

II. FACTUAL BACKGROUND.

The following factual summary is primarily from Officer Willie Cowell's testimony at the October 29, 2013, hearing on Shelton's Motion to Suppress held before the undersigned. At that hearing, the DVD recording of the stop was played to the Court. The recording was from a camera affixed to Officer Cowell's chest. Because Shelton has referenced the July 26, 2013, preliminary hearing and Officer Cowell's probable cause affidavit, this Court will note when facts came from those two sources.

On or about June 15, 2013, at approximately 7:56 a.m. Officer Cowell of the Bonners Ferry Police Department observed a Honda Passport ("the Honda") exit the parking lot of Super One Foods in Bonners Ferry, Boundary County, Idaho. According to Officer Cowell, the Honda pulled onto Highway 95 Northbound, and, in doing so, the driver

failed to use the turn signal and failed to come to a complete stop before entering onto Highway 95. Preliminary Hearing, Tr., p. 3, Ll. 22–25. Officer Cowell testified that he was on Bauman Street when he pulled behind the Honda and activated his overhead lights. The driver of the Honda then activated her right turn signal and pulled into the Safeway parking lot. According to Officer Cowell, he continued to follow the Honda as the driver "made a wide berth around the parking lot[.]" Officer Cowell further testified that at one point the Honda was perpendicular to his patrol vehicle, and he could see the driver's face and observed that the Honda contained two female occupants. While Officer Cowell's vehicle was perpendicular to the Honda, at the time he could see the driver's face there was no recognition by the driver that there was an adjacent patrol vehicle with its overhead lights on. Preliminary Hearing Tr., p. 4, L. 14 – p. 5, L. 2. At the October 29, 2013, hearing, Officer Cowell testified that he followed the Honda about three-quarters around the entire outer perimeter of the Safeway parking lot, the entire time with his overhead lights on. Eventually the Honda pulled into a parking stall; Officer Cowell parked behind the Honda and exited his patrol vehicle.

As Officer Cowell approached the Honda, he watched the driver of the Honda get out of her vehicle while still engaged in conversation with the front seat passenger. When the driver turned to go into the store, and thus turned to face the officer, the DVD recording verifies Cowell's testimony that the driver was visibly startled to see Cowell standing there. At the October 29, 2013, hearing, Officer Cowell testified that at that moment the overhead lights of his patrol vehicle were still on. The DVD shows Officer Cowell requested the driver to return to her Honda. Officer Cowell requested the driver's license, registration, and proof of insurance; the driver was identified as Darlene K. Shelton, the defendant. The DVD recording shows Officer Cowell recognized Shelton's passenger. The DVD

recording shows Officer Cowell's conversation with both Shelton and her passenger at all times was very cordial.

Some of the remaining factual history can be confusing, depending on which hearing or affidavit of Officer Cowell is reviewed. However, this Court finds no inconsistency in Officer Cowell's testimony. The Court finds Cowell to be credible. Any difference in Cowell's testimony at various times depends on the questions that Cowell was or was not asked and the fact that Cowell was investigating possible driving under the influence due to drugs and not alcohol.

According to the probable cause affidavit, upon making contact with Shelton, Officer Cowell observed Shelton's eyes were glazed, her speech was excitable and slurred, and she seemed unsteady on her feet. Despite these observations, Shelton satisfactorily performed the horizontal gaze nystagmus test (indicative of influence of alcohol), one leg stand, and partial recital of alphabet. At the preliminary hearing, Officer Cowell simply noted Shelton displayed "some physical indicators" that caused him to suspect she may have been under the influence. Officer Cowell also stated in the probable cause affidavit that he could detect an odor of burnt marijuana and alcoholic beverage coming from the Honda. Ultimately, it was determined the odor of alcohol was coming from the female passenger. In the DVD recording, Shelton was smoking a cigarette as she exited the Honda she was driving, and it appears her passenger was also smoking a cigarette as Cowell approached the vehicle.

Based upon his observations of Shelton, Officer Cowell then requested Shelton perform the following Field Sobriety Tests ("FST"): horizontal gaze nystagmus, walk and turn, one leg stand, partial recital of the alphabet, backward count, and Romberg balance. Probable Cause Affidavit, p. 2. In his probable cause affidavit, Officer Cowell stated

Shelton "failed all SFTS's [sic] with the exception of her recital of the partial alphabet." *Id.* At the preliminary hearing, Officer Cowell was very clear that Shelton "failed" the field sobriety tests he administered. Preliminary Hearing Tr., p. 6, Ll. 22-24. On cross-examination at the preliminary hearing, Officer Cowell testified he based his conclusion that she failed the field sobriety tests based on errors in the walk and turn test and errors in counting backwards. *Id.,* p. 16, Ll. 24 – p. 17, L. 2. However, at no time was Officer Cowell asked at the preliminary hearing about Shelton's performance on the Romberg Balance test or details about her performance on the one leg stand. Also, at no time was Officer Cowell asked at the preliminary hearing about Shelton's speech, dry mouth, anxiousness, failure of the eye convergence test and lack of pupil contraction. The Court finds no inconsistency with Officer Cowell's testimony at the preliminary hearing as compared to his probable cause affidavit or his testimony on October 29, 2013. Any difference in his questions is explained by the questions that were asked of him. Officer Cowell stated in his probable cause affidavit that while Shelton passed the horizontal gaze nystagmus test, Shelton displayed "lack of convergence, dilated pupils and eyelid tremors[.]" While that may sound contradictory, at the October 28, 2013, hearing, Officer Cowell testified that the horizontal gaze nystagmus test is indicative of alcohol impairment, and a lack of convergence is indicative of impairment due to drugs. At the preliminary hearing, Officer Cowell testified he is not a drug recognition expert (DRE), and he did not conduct a DRE examination of Shelton. While Officer Cowell confirmed such at the October 29, 2013, hearing before this Court, Officer Cowell testified that had received ARIDE training (advanced roadside detection of non-alcohol impairment) in February 2013.

At the October 29, 2013, hearing before this Court, Officer Cowell clarified Shelton's performance on the testing. He noted the following physical behavior: unsteadiness on

her feet, her surprise at his presence, the pupils of her eyes were slightly dilated and were not responsive (did not contract) when he shown the light of his flashlight into her eyes, her eyes were glassy and a little bloodshot; on HGN her eyes lacked smooth pursuit; her eyes lacked convergence (meaning that as the officer brought his flashlight in closer to her nose, one eye followed it in as instructed and one eye was lazy); on the walk and turn test she stepped off wrong and walked the wrong number of steps; she missed two of the four points on the one leg stand test (swinged her arms and raised her arms); she failed the counting test; she failed the Rhomberg Balance Test; she seemed anxious and had dryness of mouth. Officer Cowell testified that the odor of alcohol he initially detected emanating from the vehicle as he stood by Shelton's open driver's window came from the passenger and from inside the vehicle where there were a few alcoholic beverages which were spilled: a beer in the center console which had been dumped onto the passenger side floorboard, and a couple of open containers in the back seat. Officer Cowell testified that when he took Shelton to the back of her vehicle to begin the field sobriety tests, he could no longer smell alcohol. The lack of odor of alcohol upon Shelton's person was consistent with Shelton's negative results on the horizontal gaze nystagmus test. Conversely, Shelton having a positive eye convergence coupled and a negative horizontal gaze nystagmus, made it more probable that Shelton was under the influence, but under the influence of something other than alcohol.

Officer Cowell testified at the October 29, 2013, hearing that when he had Shelton return to her vehicle and was asking questions of Shelton while she was in the driver's seat in the Honda, he could smell: 1) cigarettes, 2) the odor of burnt marijuana, and 3) alcohol. At the October 29, 2013, hearing, Officer Cowell testified that based on her performance

on the tests, and based on his smelling the odor of burnt marijuana coming from the Honda, he felt he had probable cause to search the Honda for evidence of marijuana.

According to the probable cause affidavit, Officer Cowell's observations "…led me to believe Shelton's intoxication was drug induced". Probable Cause Affidavit, p. 2. Specifically, he suspected that drug was marijuana or a Central Nervous Stimulant such as methamphetamine. *Id.* Officer Cowell wrote in his probable cause affidavit:

> Shelton's display of lack of convergence, dilated pupils and eyelid tremors led me to believe Shelton was under the influence of marijuana. Shelton's talkative mannerisms, signs of anxiety, apparent dryness of her mouth which was evident, dilated pupils and sped up internal clock (Estimation of 30 seconds passing in 16 seconds), indicated to me Shelton was also under the influence of a central nervous system (CNS) stimulant. CNS stimulants include methamphetamine.

Id. Officer Cowell explained the "sped up internal clock" at the October 29, 2013, hearing, as the Romberg test, where the person being tested must raise their foot and estimate thirty seconds, and Shelton's estimate was only sixteen seconds. Following his observations at the scene and Shelton's performance completing the FSTs, Officer Cowell conducted a search of the Honda.

In Shelton's Memorandum in Support of Motion to Suppress, Shelton argues: "However, his [Officer Cowell] articulated grounds for the opinion that Ms. Shelton was impaired did not mention the odor of marijuana, either at the scene or at the Preliminary Hearing." Memorandum in Support of Motion to Suppress, p. 7. First, Shelton is not accurate that there was no mention of the odor of marijuana at the scene. This Court's viewing of the DVD of the stop shows that Officer Cowell at the inception of the stop mentioned marijuana, and asked Shelton several times about when she last smoked marijuana, and asked the same question of the passenger once. Second, the reason Officer Cowell did not testify about the smell of marijuana at the preliminary hearing is *he*

was never asked about the subject by either attorney. When Officer Cowell was describing what he suspected Shelton to be under the influence of, based on the indicators he observed with Shelton, he was interrupted with an objection made by Shelton's attorney. Preliminary Hearing Tr., p. 6, Ll. 7-15. Officer Cowell can only respond to the questions asked, and if both counsel at the preliminary hearing chose not to ask questions about facts which gave rise to Officer Cowell's probable cause to conduct a warrantless search, that does not mean such facts do not exist.

In any event, at the October 29, 2013, hearing, Officer Cowell made it very clear why he felt he had probable cause to conduct the search: "The search was based on the smell of marijuana coming from the vehicle." Officer Cowell also did not outline any such facts in his probable cause affidavit.

During the search of the Honda, Officer Cowell searched Shelton's purse which was located "on the floor board directly below the driver's seat", and inside that purse he found a substance he suspected to be methamphetamine. Preliminary Hearing Tr., p. 7, Ll. 3-11. Neither marijuana nor paraphernalia used to smoke marijuana were located in the Honda during the search. Following the search, Officer Cowell placed Shelton under arrest for possession of a controlled substance and suspicion of driving under the influence.

III. 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); *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). 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). 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). The application of legal principles to factual findings is given free review. *State v. Hiassen,* 110 Idaho 608, 611, 716 P.2d 1380, 1383 (Ct.App. 1986).

IV. ISSUES PRESENTED.

Due to the undisputed fact that Shelton failed to come to a complete stop and failed to use her turn signal, there is no dispute that the initial stop of Shelton was lawful. In her briefing, Shelton identifies the following issues:

1. Was Shelton unlawfully detained?
2. Was the search of Shelton's purse and vehicle unlawful?
3. Did Officer Cowell have probable cause to arrest Shelton?
4. Should the contraband found in Shelton's vehicle be suppressed under the exclusionary rule?

Memorandum in Support of Motion to Suppress, p. 1. Additionally, the Court will address: whether Shelton's detention was unlawfully extended.

V. ANALYSIS.

A. The Warrantless Search of Shelton's Vehicle was Lawful.

Shelton claims the search of her Honda and her purse was unlawful. Memorandum in Support of Motion to Suppress, pp. 7-9. Shelton argues: "Under the circumstances of

this case, Officer Cowell lacked probable cause to search Ms. Shelton's vehicle, which contained her purse." *Id.* p. 9. Shelton continues:

> Ms. Shelton was being detained but was not under arrest at the time of the search, so the search could not be justified as a search incident to arrest. Officer Cowell represented to Ms. Shelton the he had a right to search her vehicle, based on the alleged odor of marijuana. After Officer Cowell informed Ms. Shelton that he was going to search her vehicle she stated "OK". However, by stating "OK", Ms. Shelton merely acquiesced to the officers' claim of authority to search the vehicle. Even if stating "OK" could be considered consent to search her vehicle, any such consent was ineffective. "A consent to search given during an illegal detention is tainted by the illegality and is therefore ineffective." *State v. Gutierrez,* 137 Idaho at 652.

Id. Turns out, when Officer Cowell told Shelton he had probable cause to search her Honda, he was right.

The automobile exception to the warrant requirement allows law enforcement officers to conduct warrantless searches of automobiles if they have probable cause to believe that the automobile contains contraband or evidence of a crime. *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). These searches may include the search of any container within the car if the container could reasonably contain the suspected contraband or evidence. *United States v. Ross,* 456 U.S. 798, 825, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572, 594 (1982). Probable cause is the possession of information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong presumption that such person is guilty. *State v. Julian,* 129 Idaho 133, 137, 922 P.2d 1059, 1063 (1996). When analyzing the existence of probable cause, this Court must determine whether the facts available to the officers at the moment of the search warranted a person of reasonable caution to believe that the action taken was appropriate. *Julian,* 129 Idaho at 136, 922 P.2d at 1062; *State v. Hobson,* 95 Idaho 920, 925, 523 P.2d 523, 528 (1974). The facts making up the probability are viewed from an objective

standpoint. *Julian,* 129 Idaho at 136-37, 922 P.2d at 1062-63. Additionally, in passing on the question of probable cause, the expertise and experience of the officer may be taken into account. *State v. Ramirez,* 121 Idaho 319, 323, 824 P.2d 894, 898 (Ct.App.1991). Finally, relevant to the case at bar, is the Idaho Court of Appeals' determination that the odor of marijuana is sufficient to establish a warrantless search of the portion of the automobile associated with that odor. *State v. Schmadeka*, 136 Idaho 595, 600, 38 P.3d 633, 638 (Ct.App. 2001). In *Schmadeka*, the Idaho Court of Appeals held the smell of marijuana was sufficient to search the interior of the car (in which the officer found the source of the marijuana smell, Schmadeka's coat), but not sufficient to search the trunk. 136 Idaho 595, 599-600, 38 P.3d 633, 637-38. *Schmadeka* indicates the lack of distinction between a vehicle's "glove compartments, upholstered seats, trunks and wrapped packages" mentioned earlier in State v. Gonzales, 117 Idaho 518, 789 P.2d 206 (Ct.App. 1990), and as cited by the State in the present case (Brief in Opposition to Defendant's Motion to Suppress, p. 7), might no longer be valid, at least as to an unopened trunk when the odor emanates from the passenger compartment. That is of no import in the present case, as Officer Cowell found Shelton's purse in the passenger compartment.

In the present case, Officer Cowell had much more than the smell of burnt marijuana when he searched the passenger compartment of Shelton's Honda. Officer Cowell observed Shelton failing to come to a complete stop, failing to use her turn indicator, and being completely oblivious to his presence when he was following with his overhead lights for quite some time and at one point was perpendicular to her Honda. Officer Cowell observed physical signs indicative not of being under the influence of alcohol, but of being under the influence of a drug. Under *Schmadeka,* Officer Cowell's observation of the odor of burnt marijuana coming from the passenger compartment,

standing alone, serves as sufficient basis for probable cause to conduct a search of the vehicle's passenger compartment. Shelton now argues: "The search of Ms. Shelton's vehicle which resulted in the discovery of alleged methamphetamine was the direct result of Officer Cowell's incredible claim that he smelled the odor of marijuana smoke, distinct from the odor of cigarette smoke that undisputedly was fresh in her vehicle." Defendant's Reply Brief in Support of Motion to Suppress, p. 6. This Court could not disagree more. Officer Cowell's testimony regarding the smell of marijuana was not impeached. Shelton admitted smoking marijuana the night before and the stop occurred at 7:30 a.m. Officer Cowell testified as to his familiarity with the smell of burn marijuana. Because the Court finds Officer Cowell's testimony regarding the smell of marijuana *credible*, on that basis alone Officer Cowell had probable cause to search the passenger compartment of the Honda. In the present case, there is much more evidence of being under the influence of a drug than simply the smell of marijuana; Shelton's failure to stop, failure to signal, obliviousness for the better part of a minute as to Officer Cowell's overhead lights, her visible appearance of dry mouth, slurred speech, anxiousness, unsteadiness, pupils not responding, lack of eye convergence, and her performance on the field sobriety tests, collectively provide a plethora of additional probable cause for Officer Cowell to search the passenger compartment of Shelton's Honda. As to some of these, Shelton makes the argument that the specific symptom in Shelton observed by Officer Cowell is capable of an explanation other than being under the influence. For example, Shelton claims that while Shelton was observed to have had a "dry mouth", Officer Cowell noted that while testifying, he too had a dry mouth "…but denied that he was intoxicated at the time." Defendant's Reply Brief in Support of Motion to Suppress, p. 2. At the October 29, 2013, hearing, Officer Cowell testified that dry mouth was "just another indicator." That is certainly how

the Court views it. While a dry mouth might be experienced for a variety of reasons, it is one more piece of evidence added to the probable cause pile, and with Shelton, that pile quickly became a sizeable heap. Shelton argues: "There was no driving pattern which indicated that Ms. Shelton was impaired." Defendant's Reply Brief in Support of Motion to Suppress, p. 1. The Court disagrees. Shelton failed to stop for a stop sign, failed to use her turn signal, and failed to recognize law enforcement vehicle with its overhead lights on for nearly a minute. Those are all signs of inattentiveness and intoxication. Next, Shelton claims the fact that it was a sunny day made the overhead lights on Officer Cowell's vehicle less visible. While true, the fact of a sunny day does not make the overhead lights on Officer Cowell's vehicle invisible, and for the better part of a minute Shelton failed ever look back and see what was capable of being seen, a police officer trying to pull her over. Shelton then makes the argument: "It is Ms. Shelton's contention that the video shows that Officer Cowell was incorrect when he opined that Ms. Shelton's speech was excitable and slurred, that she was unsteady on her feet, and that she displayed 'anxiety'". *Id.,* p. 2. The Court agrees it would not use the word "excitable" to describe what the Court saw on the recording of the stop. Exhibit 1. But the Court does find the recording shows Shelton to have occasional slurred speech, was unsteady on her feet, and that she displayed anxiety. All these features are relative, the Court has seen people who can barely talk and stand, but this Court finds Officer Cowell's assessment at the October 29, 2013, hearing, that Shelton "seemed more anxious than the general motoring public", to be credible. Again, it is the collective heap of evidence that must be kept in mind, not each individual piece of evidence taken out and inspected in isolation, and placed back on the heap.

An officer's warrantless entry of a vehicle to search it or to seize items within it is presumptively a violation of the Fourth Amendment's prohibition against unreasonable

searches; The State has the burden to prove that the search falls within one of the narrowly drawn exceptions to the warrant requirement. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *State v. Gomez,* 144 Idaho 865, 870, 172 P.3d 1140 (Ct.App.2007). When a warrantless search has been challenged, it is the State's burden to prove the applicability of an exception. *Coolidge v. New Hampshire,* 403 U.S. 443, 455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *State v. Brauch,* 133 Idaho 215, 218-19, 984 P.2d 703 (1999). If the government fails to meet its burden, the evidence obtained as a result of the search, including later-discovered evidence derived by exploitation of the original illegal search, is inadmissible in court. *Segura v. United States,* 468 U.S. 796, 804, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984); *Brauch,* 133 Idaho at 219.

The automobile exception to the warrant requirement allows law enforcement officers to conduct warrantless searches of automobiles *if* they have probable cause to believe that the automobile contains contraband or evidence of a crime. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *Arizona v. Gant*, 556 U.S. 332, 347, 129 S. Ct. 1710, 1721, 173 L. Ed. 2d 485 (2009). These searches may include the search of any container within the car if the container could reasonably contain the suspected contraband or evidence. *United States v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572, 594 (1982). "Police may search a vehicle incident to a recent occupant's arrest *only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest*." *State v. Frederick*, 149 Idaho 509, 515, 236 P.3d 1269, 1275 (2010) (quoting *Arizona v. Gant,* 129 S.Ct. 1710, 1723-24 (2009) (emphasis added).

"[P]robable cause is a flexible, common-sense standard." *State v. Ramirez*, 121 Idaho 319, 323, 824 P.2d 894, 898 (Ct. App. 1991). It requires that the facts available to

the officer would warrant a person of reasonable caution to believe that certain items may be contraband or useful as evidence of a crime. *Id.* Probable cause does not demand proof that such a belief is accurate or more likely true than false. *Id.* "The officer's determination of probable cause must be based on objective facts which would be sufficient to convince a magistrate to issue a warrant under similar circumstances." *Id.*

When analyzing the existence of probable cause, the Court must determine whether the facts available to the officers at the moment of the search warranted a person of reasonable caution to believe that the action taken was appropriate. *Julian*, 129 Idaho at 136, 922 P.2d at 1062; *State v. Hobson*, 95 Idaho 920, 925, 523 P.2d 523, 528 (1974). The facts making up the probability are viewed from an objective standpoint. *Julian*, 129 Idaho at 136-37, 922 P.2d at 1062-63. Additionally, in passing on the question of probable cause, the expertise and experience of the officer may be taken into account. *State v. Ramirez*, 121 Idaho 319, 323, 824 P.2d 894, 898 (Ct.App.1991).

Here, Officer Cowell noted in his probable cause affidavit that he detected the odor of burnt marijuana and alcoholic beverage coming from the vehicle. At the October 29, 2013, hearing, Officer Cowell testified he smelled burnt marijuana, cigarettes and alcohol coming from the passenger compartment of the Honda. At that hearing, Officer Cowell testified as to his past experience and training regarding the smell of burnt marijuana, his training in law enforcement regarding the same, and he described how he was able to distinguish that smell from the smell of cigarettes which were being smoked by both Shelton and her passenger when Officer Cowell arrived. Shelton's most recent argument that Officer Cowell is inconsistent because "…at the preliminary hearing he did not mention smelling the odor of cigarette smoke" (Defendant's Reply Brief in Support of Motion to Suppress, p. 5, citing "Transcript of Preliminary Hearing, p. 13, L 21-23) is not only

unavailing, it is misleading. Officer Cowell was never asked if he smelled cigarette smoke coming from the passenger compartment of the Honda. Officer Cowell was pointedly asked whether as he approached Shelton's vehicle both Shelton and her passenger were smoking cigarettes, to which Officer Cowell responded "I don't remember." This Court finds no inconsistency in Officer Cowell's testimony. Shelton then makes the argument:

> Officer Cowell's testimony at the Suppression Hearing that he could smell the odor of marijuana smoke even though Ms. Shelton and her passenger were actively smoking cigarettes at the time of Officer Cowell's contact with them; and that he could distinguish between the blended odors of cigarette smoke and marijuana smoke, should be disregarded by the Court as inherently not credible.

Defendant's Reply Brief in Support of Motion to Suppress, p. 5. The Court finds that argument entirely baseless. While we are not as gifted as a dog, humans can smell more than one odor at a time.

Regarding the smell of alcohol, Officer Cowell testified he later determined the odor of alcohol was emanating from the female passenger. That is because after he separated Shelton from her vehicle, he no longer smelled alcohol. Officer Cowell also indicated that he suspected Shelton of driving under the influence of drugs. The lack of the odor of alcohol upon Shelton's person, and the negative horizontal gaze nystagmus test, confirms Shelton not being under the influence of alcohol. But if there is evidence that Shelton is under the influence of something (and this Court finds there is ample evidence of that), the fact that alcohol is essentially ruled out makes also it more likely that she is under the influence of a drug.

There is no indication that there was anything within the officer's plain view which would have alerted Officer Cowell as to the presence of contraband inside the vehicle. However, "plain view" is not necessary. As noted above, the automobile exception to the warrant requirement permits the warrantless search of a vehicle if it is reasonable to

believe the vehicle contains evidence of the offense of arrest. Here, at the point Officer Cowell decided to conduct the vehicle search the offense for an arrest would have been driving under the influence. The vehicle did in fact have evidence of driving under the influence *of alcohol* as there were three opened containers. Due to the way Shelton responded to the tests, Officer Cowell suspected she was under the influence of drugs and, due to the smell of burnt marijuana and some of Shelton's manifestations, Officer Cowell thought the drug was marijuana. But Officer Cowell *also* suspected a CNS such as methamphetamine was involved, due to some of Shelton's other physical manifestations. Officer Cowell thus was looking for evidence of marijuana use and use of a central nervous stimulant such as methamphetamine.

This Court finds Officer Cowell had probable cause to search Shelton's vehicle for evidence of marijuana use or central nervous stimulant use, since Officer Cowell suspected Shelton was under the influence of that type of controlled substances.

B. Officer Cowell had Probable Cause to Arrest Shelton.

Shelton argues Officer Cowell did not have probable cause to arrest her. Memorandum in Support of Motion to Suppress, pp. 9-11. Shelton argues:

> In this case, Officer Cowell's opinion of Ms. Shelton's performance on the field sobriety tests is in dispute. The video in this case does not show all of the mistakes that Officer Cowell claimed that Ms. Shelton made on the walk and turn test. Officer Cowell does not dispute that Ms. Shelton passed the horizontal gaze nystagmus, one leg stand and alphabet tests. Therefore, the only test Ms. Shelton may have failed was the counting backwards test.

Id., p. 11. After watching the DVD of the stop, this Court disagrees with Shelton. The video shows Shelton's lack of attention when confronted by Officer Cowell. The video shows her failure on the Romberg test, convergence eye test, hands to side, counting backwards. The only test she performed correctly was counting backwards. Specifically,

regarding the walk and turn test, the video shows Shelton failed Officer Cowell's instructions to count each step out loud, shows she asked for instructions again less than half-way through the test, shows she took the wrong number of steps, shows she stepped off wrong, and shows she was unsteady. Shelton then argues:

> Officer Cowell's finding of probable cause is not supported by the objective facts in this case. Under the all [sic] following circumstances of this case: (a) pulling onto Highway 95 without using a turn signal; (b) Ms. Shelton not noticing Officer Cowell behind her with his overhead lights on for 45 seconds to one minute; (c) Ms. Shelton not noticing Office [sic] Cowell standing behind her while she was engaged in conversation with her passenger; (d) an allegedly failed walk and turn test; and (e) passed horizontal gaze nystagmus test, one leg stand test and alphabet test; Officer Cowell could not have had an "honest and strong suspicion" that Ms. Shelton was guilty of driving under the influence, as required by law in order to have probable cause for arrest.

Id. Shelton's list of circumstances omits that Shelton failed to stop for a stop sign, and most importantly, omits Officer Cowell's smelling burnt marijuana emanating from the passenger compartment of Shelton's vehicle. This Court specifically finds Officer Cowell had an honest and strong suspicion that Shelton was guilty of driving under the influence of drugs. While Shelton passed the horizontal gaze nystagmus test, all that did was help Officer Cowell determine Shelton was not likely under the influence of *alcohol*. As to all the other testing, the only test Shelton performed correctly was spelling. All other tests were performed incorrectly. The incorrectly-performed tests, Shelton's appearance, the smell of marijuana and the lack of eye convergence convince this Court that Officer Cowell had an honest and strong suspicion that Shelton was guilty of driving under the influence of drugs. More recently, Shelton argues "Ms. Shelton performed well on the field sobriety tests." Defendant's Reply Brief in Support of Motion to Suppress, p. 6. This Court finds that claim to be entirely false.

A warrantless arrest is lawful when based upon probable cause. *State v. Veneroso*, 138 Idaho 925, 928, 71 P.3d 1072, 1075 (Ct. App. 2003) (citing *State v. Kerley*, 134 Idaho 870, 874, 11 P.3d 489, 493 (Ct.App.2000)). (*See rules above regarding probable cause*).

> The requirement of probable cause does not mean that arresting officers must have sufficient evidence to secure a conviction. Rather, the test is whether "the facts and circumstances within the officers" knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.

State v. Hollon, 136 Idaho 499, 36 P.3d 1287, 1290, (Ct. App. 2001) (quoting *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225 (1964)) (internal alterations and quotations omitted).

Here, Shelton was arrested for both Driving Under the Influence and Possession of Controlled Substance. This Court has already found there was probable cause for Officer Cowell to search the Honda.

As for the arrest of Shelton for suspicion of Driving Under the Influence, the facts which gave rise to probable cause for her arrest included: Shelton's failure to successfully perform the walk and turn and backward counting tests and Officer Cowell's observations that Shelton displayed "lack of convergence, dilated pupils and eyelid tremors" as well as her "talkative mannerisms, signs of anxiety, apparent dryness of her mouth which was evidence, dilated pupils and sped up internal clock[.]" Probable Cause Affidavit, p. 2; Officer Cowell's Testimony at October 29, 2013 Hearing. As noted, in order to arrest Shelton, Officer Cowell was not required to have facts sufficient to obtain a *conviction* for driving under the influence. The totality of circumstances within Officer Cowell's knowledge simply had to be sufficient such that a prudent man would believe that Shelton had committed the offense of driving under the influence. Despite Shelton's successful performance on two of the field sobriety tests, based upon <u>all</u> the facts and circumstances, Officer Cowell had probable cause to arrest Shelton for driving under the influence.

C. The Exclusionary Rule Cannot be Applied to these Facts.

Shelton correctly notes: "Evidence obtained in violation of the Fourth Amendment generally may not be used as evidence against the victim of illegal government action. *State v. Bishop,* 146 Idaho 804, 810-811 (2009); *State v. Page,* 140 Idaho 841, 846 (2004); *see also Wong Sun v. United States,* 371 U.S. 471, 485 (1963)." Memorandum in Support of Motion to Suppress, p. 12. This Court finds Shelton was not unlawfully detained and this Court finds the search of Shelton's Honda and her purse was lawful. Because this Court finds Shelton's Fourth Amendment rights have not been violated, the exclusionary rule is not applicable.

D. Shelton's Detention was not Unlawfully Extended.

Shelton does not make a separate argument about the extent of the detention, but Shelton does state: "In the present case, the alleged contraband was found by Officer Cowell as a direct result of his unlawfully extended detention of Ms. Shelton…." Memorandum in Support of Motion to Suppress, p. 13. The entire recording of the stop and detention was thirty minutes. State's Exhibit 1. The State claims "The time for the stop, initial investigation, field sobriety evaluations, partial search of the vehicle, and arrest was approximately 25 minutes." Brief in Opposition to Defendant's Motion to Suppress, p. 5. The Court finds that to be accurate.

An investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. *State v. Ramirez*, 145 Idaho 886, 889, 187 P.3d 1261, 1264 (Ct. App. 2008). There is no rigid time limit for determining when a detention has lasted longer than necessary; rather, a court must consider the scope of the detention and the law enforcement purposes to be served, as well as the duration of the stop. *United States v. Sharpe*, 470 U.S. 675, 685-86 (1985). When a person is detained, the scope of

detention must be carefully tailored to its underlying justification. *State v. Parkinson*, 135 Idaho 357, 361, 17 P.3d 301, 305 (Ct. App. 2000). The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. *Ramirez*, 145 Idaho at 889. However, any routine traffic stop might turn up suspicious circumstances that could justify an officer asking further questions unrelated to the stop. *State v. Brumfield*, 136 Idaho 913, 916, 42 P.3d 706, 709 (Ct. App. 2001).

Accordingly, the length and scope of the initial investigatory detention may be lawfully expanded if there exists objective and specific, particular facts that justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity. *Id.* That said, however, "if an officer questions a driver about matters unrelated to the traffic stop after the purpose of the stop has been fulfilled, the questioning, no matter how short, extends the duration of the stop and is an unwarranted intrusion upon the privacy and liberty of the vehicle's occupants." *State v. Bordeaux*, 148 Idaho 1, 8, 217 P.3d 1, 8 (Ct. App. 2009), citing *State v. Gutierrez*, 137 Idaho 647, 651-53, 51 P.3d 461, 465-67 (Ct. App. 2002).

In order to extend the scope or duration of a detention the officer must have objective and specific, particular facts that justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity. *State v. Brumfield*, 136 Idaho 913, 916, 42 P.3d 706, 709 (Ct. App. 2001).

There can be no doubt there is a justifiable reason for Officer Cowell to stop Shelton…Shelton failed to stop at a stop sign and failed to use her turn signal. Shelton does not contest there was good reason for the stop. By the time Shelton was stopped, Officer Cowell had additional evidence of Shelton's inattentiveness. As discussed above, immediately upon making contact with Shelton, Officer Cowell made several observations

regarding Shelton's appearance, her mannerisms and what he smelled (alcohol, marijuana and cigarettes). Additionally, though not explicit in the record, it appears that the investigation for the initial purpose for the stop (failure to use a turn signal and failure to stop at a stop sign) was not completed prior to Officer Cowell developing the suspicion that Shelton had been driving under the influence. The Court arrives at this conclusion because Officer Cowell noticed the odor of alcohol and marijuana immediately after beginning his discussion with Shelton, right after he had her return to her Honda and began asking her questions. Detection of those odors coupled with her driving certainly justified Officer Cowell in requesting Shelton to perform field sobriety tests. Officer Cowell stated in his probable cause affidavit that he developed a suspicion that Shelton was engaged in the criminal activity of driving under the influence based upon her glazed eyes, excitable speech and slurred speech, and unsteadiness on her feet. Therefore, because Officer Cowell extended the duration of the detention based upon objective and specific, particular facts (Shelton's driving led to the stop, the stop led to detection of odors, the presence of odors led to field sobriety tests, which led to Shelton's arrest), the stop was not unlawfully extended.

VII. CONCLUSION.

Based upon the evidence before the Court at this time Shelton's Motion to Suppress must be denied. Looking at the totality of the circumstances, Officer Cowell had probable cause to search Shelton's Honda and her purse, Officer Cowell had probable cause to arrest Shelton, and the detention was not unlawfully extended.

VII. ORDER.

IT IS HEREBY ORDERED THAT Darlene Shelton's Motion to Suppress is **DENIED**.

DATED this 8th day of November, 2013

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of November, 2013 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – J. Lynn Brooks
Prosecuting Attorney – Tevis Hull
Hon. Barbara Buchanan

CLERK OF THE DISTRICT COURT
BONNER COUNTY

BY:_____
Deputy