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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/Respondent,* vs. **COREY RAYMOND HUMPHREYS,** *Defendant/Appellant.*	Case No. **CRF 2015 15522** **MEMORANDUM DECISION AND ORDER ON APPEAL, REVERSING THE MAGISTRATE JUDGE'S DENIAL OF DEFENDANT/APPELLANT'S MOTION TO SUPPRESS**

This matter comes before the Court as an appeal from the Magistrate Court's denial of defendant/appellant Corey Raymond Humphreys' Motion to Suppress. This Court heard oral argument on June 28, 2016. Following oral argument, it took the matter under advisement.

Based on the following, the Court reverses the Order Denying the Motion to Suppress.

I. FACTUAL BACKGROUND

On September 25, 2015, Officer Caleb Hutchinson of the Coeur d'Alene Police Department responded to a call of a sighting of a juvenile runaway at the Budget Saver Hotel. Motion to Suppress Tr., p. 5, Ll. 18–25; p. 6, Ll. 22–25; p. 7, Ll. 3–6. The Budget

Saver Hotel is located on Sherman Avenue, between 15th and 16th streets, in Kootenai County, Idaho. *Id.* at p. 7, Ll. 5–6. When Officer Hutchinson arrived at the Budget Saver Hotel he observed two males walking away from the rear portion of the hotel. *Id.* at p. 7, Ll. 9–11. One of the men was later identified as Appellant Corey Raymond Humphreys. *Id.* at p. 8, Ll. 13–17. The other was identified as Nick Edwards. *Id.* at p. 26, L. 9.

Officer Hutchinson made contact with the manager of the Budget Saver Hotel, Eric Bodenheimer. *Id.* at p. 7, Ll. 11–23. The juvenile runaway had been seen in or around room 302[1], but at this time had left the Budget Saver Hotel with a different older male in a vehicle. *Id.* at p. 8, Ll. 23–25. Mr. Bodenheimer informed Officer Hutchinson that the two men that were walking away had just been kicked out of room 302 because it smelled heavily of tobacco and marijuana smoke. *Id.* at p. 8, Ll. 6–17. He also informed Officer Hutchinson that Humphreys had not been seen with the runaway. *Id.* at p. 28, Ll. 7–24.

Officer Hutchinson testified that as he watched the two men walk away from the Budget Saver Hotel, they continued to look back at him. Motion to Suppress Tr., p. 9, Ll. 9–10. He observed them place a backpack in the rear of a vehicle that was parked in the Budget Saver Hotel parking lot. *Id.* at p. 9, Ll. 10–12. The two men then walked away from the vehicle, southbound on 16th Street. *Id.*, at p. 9, Ll. 17–18. One of the men, later identified as Nick Edwards, glanced at the officer and then sprinted away, while the other man, later identified as Humphreys, crossed 16th Street and went into an outhouse. *Id.* at p. 9, Ll. 18–24; p. 26, L. 9.

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[1] Later in his testimony, Officer Hutchinson refers to this room as Room 307. Motion to Suppress Tr., p. 31, L.16; p. 32, Ll. 20, 23, 24.

Humphreys attested that he rented the room at the Budget Saver Hotel for his daughter and her boyfriend, Nick Edwards. Affidavit of Corey Humphreys, p. 1, ¶ 2. Humphreys claims he did not stay in the room. *Id.* at p. 2, ¶¶ 3–6. He contends that when he arrived back at the room on the day in question, the manger was already standing there. *Id.* at p. 2, ¶ 7. Humphreys then walked away from the Budget Saver Hotel with Nick Edwards to a nearby outhouse. *Id.* at p. 2, ¶¶ 9–10. When he was done using the outhouse, Nick Edwards was gone. *Id.* at p. 2, ¶ 11.

Officer Hutchinson attempted to make contact with Nick Edwards, but lost sight of him. *Id.* at p. 9, Ll. 19–20; p. 10, Ll. 25. Officer Hutchinson then saw Humphreys exit the outhouse and went to make contact with him. *Id.* at p. 10, Ll. 15–18. Officer Hutchinson testified about this encounter as follows:

> . . . I got out of my vehicle and was about to make verbal contact with him, at which point he turned around and immediately put his hands into his trench coat pockets, which for a police officer is a bad sign often times of somebody attempting to conceal something or grab something, so I ordered him to remove his hands from his pockets because I needed to talk to him about why he was running from me and -- or running away and how he was associated with the room and if he was associated with the missing juvenile. After he removed his hands from his pockets, I asked him if he had any weapons on him. He said he had a dive knife strapped to his ankle.

Id. at p. 10 L. 22—p. 11, L. 9. Humphreys immediately complied with the order to remove his hands from his pockets. *Id.* at p. 37, L. 22—p. 38, L. 1. Officer Hutchinson then decided to perform a pat search on Humphreys. *Id.* at p. 12, Ll. 2– 4. He testified about the basis for this search as follows:

> Well, based off of his behavior of glancing at me and then trying to get away from me is how it appeared to me, the way he put his hands in his pockets as soon as I approached him, and then the fact that he admitted to being armed with a concealed knife in, frankly, an odd place, I was concerned that according to my training if there's one, there's two in

> regards to weapons. We apply that to knives. Often times if we find one knife on a person, we find more than one knife, so I told him I was going to pat search him for my safety because of the presence of that knife to take that knife off his person.

Id. at pp. 11, L. 18—p. 12, L. 4. On cross-examination, the following exchange took place regarding Officer Hutchinson's basis for the pat search of Humphreys:

> Q. (BY MR. ONOSKO) No, just a frisk for weapons. Based on your Advanced POST training, what's required for you to be able to pat someone down for weapons?
>
> A. A reasonable suspicion that they have a weapon on them.
>
> Q. And was that the reason you patted Mr. Humphreys down in this case?
>
> A. It was. He admitted that he had a weapon on him.

Id. at p. 37, Ll. 8–16. Officer Hutchinson also testified that:

> Everything about [Humphreys'] behavior up to that point was strange and suspicious to me. The fact that an officer exited his vehicle and asked to speak with him and he immediately put his hands into his trench coat pockets was unnerving to me, so his behavior -- the totality of his behavior up to that point was strange and unnerving to me.

Id. at p. 38, Ll. 8–14. Officer Hutchinson then used his hands to restrain Humphreys' hands behind his back and began to conduct the pat search. *Id.* at p. 12, Ll. 7–9.

Officer Hutchinson began the pat search on the right side of Mr. Humphreys' body, around his hips. *Id.* at p. 12, Ll. 12–16. As he continued his search down Humphreys' right leg, Officer Hutchinson felt what he believed to be a folded knife in Humphreys' right pocket. *Id.* at p. 12, Ll. 16–18. While still restraining Humphreys, Officer Hutchinson then asked Humphreys if he would consent to a search of his person. *Id.* at p. 12, Ll. 18–21; p. 39, Ll. 21–24. Humphreys initially told Officer Hutchinson that he felt uncomfortable with the search and did not want to be searched. *Id.* at p. 39, Ll. 17–20. Officer Hutchinson then asked a follow-up question requesting to

search Humphreys. *Id.* at p. 41, Ll. 2–5. Humphreys then consented to the search of his person. *Id.* at p. 13, Ll. 4–5. Second officer was on scene to assist Officer Hutchinson by this point of the encounter. Affidavit of Benjamin Onosko [In Support of Appellant's Brief], Exhibit A, ¶ 19.

During his search of Humphreys, Officer Hutchinson found a folding knife, a hypodermic syringe, a white bindle baggie with trace amounts of a white powdery substance consistent with methamphetamine, a folded paper with a brown waxy tarry substance that NIK tested for marijuana, and a pipe that had the odor of burnt marijuana residue in it. Motion to Suppress Tr., p. 14, Ll. 1–11, 15–16; p. 16, L. 22—p. 17, Ll. 1–8. Humphreys was then arrested for possession of marijuana and possession of paraphernalia. *Id.* at p. 20, Ll. 10–11.

On January 6, 2016, Humphreys filed a Motion to Suppress. That Motion was supported by his Affidavit. An evidentiary hearing on that motion was held on January 4, 2016, before the Honorable Scott Wayman, Magistrate Judge. At the conclusion of that hearing, before articulating his findings on the record, the Magistrate Judge declined to consider Humphreys' Affidavit. The Magistrate Judge went on to deny the Motion to Suppress, articulating his findings on the record. A transcript of that hearing was furnished to this Court on appeal.

On February 12, 2016, before the Magistrate Judge, Humphreys pled guilty to misdemeanor possession of controlled substance (marijuana) and misdemeanor possession of paraphernalia, reserving his right to appeal the Magistrate Judge's decision on the Motion to Suppress pursuant to Idaho Appellate Rule 11(a)(2). The Magistrate Judge sentenced Humphreys to one day in jail on each offense and gave

credit for one day time served on each offense. Since the Magistrate Judge did not specify whether the sentences ran concurrent or consecutive, by operation of law, the sentences ran concurrent. The sentences have already been served. The Magistrate Judge also imposed costs and fine, restitution to the Idaho State Police (actually a reimbursement) and assessments.

On February 17, 2016, Appellant timely filed his Notice of Appeal. That appeal was assigned to this Court. On March 23, 2016, Humphreys filed Appellant's Brief and supported that brief with the Affidavit of Benjamin Onosko. Attached to Mr. Onosko's affidavit was the Affidavit of Corey Humphreys, which was discussed by the Magistrate Judge in its decision denying the Motion to Suppress. On May 2, 2016, the State of Idaho filed State's Reply Brief. On May 18, 2016, Humphreys filed Appellant's Reply Brief.

Humphreys requests that this Court reverse the Magistrate Judge's decision denying the Motion to Suppress and remand this case to the Magistrate Court for further proceedings to consider the Affidavit of Corey Humphreys.

II. STANDARD OF REVIEW

Idaho Criminal Rule 54.1(d) governs criminal appeals from the magistrate court to the district court and provides that "[a]n order granting a motion to suppress evidence in a misdemeanor criminal action" by a magistrate judge may be appealed to the "district judge's division of the district court". I.C.R. 54.1(d). "When a district judge considers an appeal from a magistrate judge as an appellate proceeding, rather than exercising the option of granting a trial de novo, the district judge is acting as an appellate court, not as a trial court." *State v. Kenner*, 121 Idaho 594, 596, 826 P.2d

1306, 1308 (1992) (citing *Hawkins v. Hawkins,* 99 Idaho 785, 788–89, 589 P.2d 532, 535–36 (1978); *In re Estate of Stibor,* 96 Idaho 162, 163, 525 P.2d 357, 358 (1974)).

"At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court." *State v. Young*, 144 Idaho 646, 648, 167 P.3d 783, 785 (Ct. App. 2006) (citing *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)). In an appeal from an order denying a motion to suppress, the appellate court 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). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance." *State v. Watts*, 142 Idaho 230, 234, 127 P.3d 133, 137 (2005) (quoting *Evans v. Hara's, Inc.,* 123 Idaho 473, 478, 849 P.2d 934, 939 (1993) (citing *Kinney v. Tupperware Co.,* 117 Idaho 765, 769, 792 P.2d 330, 334 (1990)).

Moreover, 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

Humphreys raises two issues on appeal: 1) whether the Magistrate Judge erred in refusing to consider the Affidavit of Corey Humphreys when deciding the Motion to Suppress; and 2) whether the Magistrate Judge erred in denying Humphreys' Motion to Suppress. Notice of Appeal, pp. 1–2. In briefing, Humphreys breaks the denial of his Motion to Suppress down into three areas, alleging he was unlawfully seized, unlawfully frisked, and unlawfully searched. Appellant's Brief, pp. 7–19. All of Humphreys' claims of error were addressed by the trial court, who noted: "We have the initial detention, investigative detention. Then we have the initial frisk or search. Then we have a more expanded search, and then ultimately we have the arrest of defendant." Motion to Suppress Tr., p. 55, Ll. 21–24.

A. Humphrey's Motion to Suppress was not timely filed, but the State of Idaho failed to raise such defect before the Magistrate Judge, and such failure amounts to a waiver.

Idaho Criminal Rule 12(d) governs the filing of Rule 12(b) motions and provides that such motions "must be filed within twenty-eight (28) days after the entry of a plea of not guilty or seven (7) days before trial whichever is earlier…." In this case, Humphreys first appeared at a Pretrial Conference Arraignment before Magistrate Judge Payne on October 6, 2015. At that time Humphreys' request for a public defender was denied, a plea of "not guilty" was entered on his behalf, and the case was set out one month for a status hearing. On November 9, 2015, Humphreys appeared before Magistrate Judge Caldwell. At that hearing the public defender was appointed and a second plea of "not

guilty" was entered on behalf of Humphreys. Judge Caldwell scheduled the case for a Pretrial Conference on December 18, 2015, and a Jury Trial on January 4, 2016. Humphreys requested discovery from the State of Idaho on November 13, 2015. The State of Idaho provided discovery to Humphreys on November 24, 2015.

On December 23, 2015, Humphreys filed his Motion to Suppress, more than 28 days after the entry of his second "not guilty" plea; and more than 28 days after the State of Idaho responded to his discovery requests. Idaho Court Rule 12(d) does provide that the "court in its discretion may relieve a party of failure to comply with the rule and enlarge the time provided 'for good cause shown, or for excusable neglect'". The Magistrate Judge could have made a finding that a delay between the time Humphreys entered a plea and the time the State of Idaho responded to his discovery requests was good cause or excusable neglect to relieve Humphreys from compliance with this rule.

However, Humphreys did not make a motion to extend the time within which to file his Motion to Suppress. The State of Idaho did not object to Humphreys' Motion to Suppress on the basis of untimeliness and the Magistrate Judge did not raise the issue on his own. As a result, the Magistrate Judge did not make any finding of "good cause" or "excusable neglect" required to hear the Motion to Suppress on the merits. As the Idaho Court of Appeals stated in *State v. Dice,* 126 Idaho 595, 597, 887 P.2d 1102, 1104 (Ct. App. 1994), "[a]llowing untimely motions to be heard because they appear meritorious eviscerates the purpose of the rule." Moreover, the Idaho Supreme Court stated in *State v. Alanis*, 109 Idaho 884, 888, 712 P.2d 585, 589 (1985), "[a] court may not arbitrarily enlarge or shorten the filing requirements of the rule. To permit a court to

do so without the required exempting factors would emasculate the intent of the rule."

While Idaho Criminal Rule 12(g) focuses on the conduct of a defendant, it would appear the State of Idaho's failure to object to the untimely filing of Humphreys' Motion to Suppress results in a waiver of that objection by the State of Idaho. This Court specifically finds the State of Idaho has waived any timeliness objection.

B. The Magistrate Judge erred in not considering the Affidavit of Corey Humphreys; however, this Court finds such error to be harmless.

In support of his Motion to Suppress, Humphreys filed the "Affidavit of Corey Humphreys". At oral argument on the instant appeal, counsel for Humphreys explained that the affidavit had been submitted to the Magistrate Court and the State on December 23, 2015, when he submitted his Motion to Suppress and Brief in Support of Motion to Suppress. The hearing on the Motion to Suppress was held eleven days later on January 4, 2016.

At that hearing, Counsel for the State objected as follows to the Magistrate Judge considering the affidavit as follows:

> I would certainly object, first of all, to the Court considering anything in the defendant's affidavit. If the defendant wanted to have that considered as evidence, he should've testified in open court subject to cross examination, and I would object that since the officer has had to do that, that it is inherently unfair to the carriage of justice to allow the defendant to circumvent cross-examination by relying on an affidavit.

Motion to Suppress Tr., p. 50, Ll. 5–13. The Magistrate Judge declined to consider Humphreys' Affidavit, stating:

> When making rulings on motions to suppress where credibility may be questioned and there is an objection made to that, the Court applies a little common sense and the basic rules of evidence that apply to these types of proceedings, and so I cannot consider the bare allegations that were set forth in the affidavit as substantive evidence. . . . [B]ut unless there is no objection to considering that or the parties stipulate to consider either

> police reports or defendant's affidavits or other exhibits, the Court is bound to follow what is being presented as far as evidence, and that would be sworn testimony from the witness stand and any exhibits that may get admitted.

Motion to Suppress Tr., p. 56, Ll. 3–9, 13–19.

The State is mistaken in its objection about affidavits filed in support of criminal motions. An objection based on lack of ability to cross-examine the affiant is not a valid objection. Idaho Criminal Rule 47 gives the moving party discretion to file an affidavit filed in support of a criminal motion. Specifically that rule provides:

> An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which the motion is made and shall set forth the relief or order sought. *It may be supported by affidavit.* Any written order entered shall be on a separate document.

I.C.R. 47 (emphasis added). This rule does not impart the court with discretion. Once an affidavit is filed, the court must consider it. The Magistrate Judge should have overruled the State's objection on the grounds provided. However, in this instance, the result would have likely been the same had the Magistrate Judge had actually considered the affidavit.

Just because the Magistrate Judge was required to consider the affidavit does not mean the entire affidavit was admissible. The Magistrate Judge was only required to consider the paragraphs of the affidavit that comply with the rules of evidence. The affidavit contains hearsay in part of paragraphs 8 and 14, and unsupported conclusions in paragraphs 18, 21, 22 and 23. All of the *admissible* portions of the Affidavit of Corey Humphreys are consistent with the testimony of Officer Hutchinson. Aside from Humphreys attesting he had not been in the hotel room and Officer Hutchinson

testifying that Mr. Bodenheimer, the Budget Saver Hotel manager, told him Humphreys had been evicted from the room associated with the juvenile, the testimony of Officer Hutchinson and the Affidavit of Corey Humphreys are consistent. Officer Hutchinson provided more detail in his testimony and Humphreys provided the Magistrate Court with his internal thoughts through his affidavit, but otherwise, the substantial facts are consistent. As such, the Magistrate Judge's refusal to consider the Affidavit of Corey Humphreys was harmless error.

C. The Magistrate Judge did not make a determination whether there was reasonable articulable suspicion for Officer Hutchinson to detain Humphreys.

Humphrey argues that he "was unlawfully seized when [O]fficer Hutchinson pulled up behind him, ordered him to keep his hands out of his pockets, and ordered him to put his hands behind his back." Appellant's Brief, p. 7. Humphreys further claims that Officer Hutchinson's articulated observations merely amounted to a "bare hunch" that Humphreys had engaged in any past criminal activity. *Id.* at p. 10. In response, the State contends Officer Hutchinson had reasonable articulable suspicion to detain Humphreys for further criminal investigation based on his training and experience and his observations of Humphreys at the motel and just prior to Officer Hutchinson making contact with Humphreys. State's Reply Brief, pp. 10–12.

"A seizure occurs—and the Fourth Amendment is implicated—when an officer, by means of physical force or show of authority, has in some way restrained a citizen's liberty." *State v. Ferreira*, 133 Idaho 474, 479, 988 P.2d 700, 705 (Ct. App. 1999) (citing *State v. Fry,* 122 Idaho 100, 103, 831 P.2d 942, 944 (Ct. App. 1991)0. "The burden of proving that a seizure occurred is on the defendant seeking to suppress evidence

allegedly obtained as a result of an illegal seizure. *State v. Cardenas*, 143 Idaho 903, 907, 155 P.3d 704, 708 (Ct. App. 2006) (citing *State v. Page*, 140 Idaho 841, 843, 103 P.3d 454, 456 (2004)0. "The critical inquiry is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Ferreria*, 133 Idaho at 479, 988 P.2d at 705 (citing *Fry*, 122 Idaho at 104, 831 P.2d at 945).

However, "[a] police officer may stop or temporarily detain an individual for investigative purposes so long as the officer is aware of facts which allow him or her to reasonably conclude 'in light of his [or her] experience that criminal activity may be afoot.'" *State v. Babb*, 133 Idaho 890, 892, 994 P.2d 633, 635 (Ct. App. 2000) (quoting *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868 (1968)). This stop or detention is permissible if the officer has a reasonable and articulable suspicion that the person has or is about to commit a crime. *Id.* (citing *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *State v. DuValt,* 131 Idaho 550, 553, 961 P.2d 641, 644 (1998); *Ferreira,* 133 Idaho at 479, 988 P.2d at 705). If the police officer does not "convey a message that compliance with a request is required, the encounter is deemed consensual and no reasonable suspicion is necessary." *Cardenas*, 143 Idaho at 907, 155 P.3d at 708 (citing *Fry*, 122 Idaho at 102, 831 P.2d at 944).

Officer Hutchinson testified about his initial encounter with Humphreys as follows:

> . . . I got out of my vehicle and was about to make verbal contact with him, at which point he turned around and immediately put his hands into his trench coat pockets, which for a police officer is a bad sign often times of somebody attempting to conceal something or grab something, **so I ordered him to remove his hands from his pockets** because I needed to talk to him about why he was running from me and -- or running away

> and how he was associated with the room and if he was associated with the missing juvenile. After he removed his hands from his pockets, I asked him if he had any weapons on him. He said he had a dive knife strapped to his ankle.

Motion to Suppress Tr., p. 10, L. 22—p. 11, L. 9 (emphasis added). Officer Hutchinson's initial statement to Humphreys was a demand for compliance with an order. Accordingly, the Magistrate Judge was required to make a determination whether there was substantial competent evidence to support a finding that there was reasonable articulable suspicion for Officer Hutchinson to detain Humphreys.

The Magistrate Judge made the following findings of fact regarding the initial detention of Humphreys:

> . . . [T]he officer stops his vehicle, comes out to confront Mr. Humphreys, and as soon as Mr. Humphreys is confronted by the officer, and at this point the officer hasn't done anything to impede the freedom of Mr. Humphreys, Mr. Humphreys puts both hands in his trench coat pocket. Again, there is no law against putting your hands in a trench coat pocket, but the circumstances based on the officer's training and experience indicated to him that this could be a bad sign, and he directed at that point to -- that Mr. Humphreys remove his hands from his pockets.
>
> Now the officer is starting to engage in activity that calls into question the Constitutional provisions regarding searches and seizures. Has the officer at this point done more than have a consensual encounter with the individual identified as Mr. Humphreys or has he crossed over into seizing him at this point? It is a little hard to tell from the testimony, but I can infer that this took place rather quickly because the officer says remove your hands. The officer -- or the defendant removes his hands. The officer then says, "I need to talk to you about the missing juvenile and the room. Do you have any weapons?"

Id. at p. 61, L. 12—p. 62, L. 11.

While the Magistrate Judge summarized the testimony of Officer Hutchinson, it did not actually make a determination whether Officer Hutchinson had reasonable articulable suspicion that Humphreys had or was about to commit a crime. However, this Court does not need to address this issue, because, as articulated below, it has

determined that the frisk and search were unlawful, requiring a reversal of the Magistrate Judge's decision.

D. The pat search, or frisk, was unlawful.

Humphreys argues Officer Hutchinson lacked reasonable suspicion to believe Humphreys was both armed and dangerous. Appellant's Brief, p. 15. Humphreys claims that there is no evidence that he was dangerous. *Id.* at p. 13. He maintains that he was immediately compliant with Officer Hutchinson's order to remove his hands from his pockets and did not act irrationally or violent during the encounter. *Id.* Humphreys contends the only articulated basis for the frisk by Officer Hutchinson was Humphreys' admission that there was a dive knife strapped to his ankle. *Id.* Absent more, Humphreys argues the frisk was unlawful. *Id.* In response, the State contends the trial court properly found Humphreys "posed a potential risk to Officer Hutchinson justifying the safety pat frisk". State's Reply Brief, p. 13.

The Magistrate Judge made the following finding about the frisk:

> . . . The officer then says, "I need to talk to you about the missing juvenile and the room. Do you have any weapons?" And the -- or Mr. Humphreys says "I have a knife strapped to my ankle." Again, whether you carry a knife on your ankle or in your pocket or somewhere else, all of a sudden we have a different scenario from the officer's point of view and the inferences that officer's [sic] draw when someone admits to them that they have a knife.
>
> There's now a weapon in the equation, and as the officer's experience and training tells him, where there's one weapon there's likely to be more than one, and all of this activity has to be taken in light of what has led up to it: The splitting up, the suspicious behavior, and then immediately putting hands in a trench coat upon being confronted.
>
> I find that the officer at this point has reasonable and articulable suspicion based upon objective facts and the inferences to be drawn from those facts that, number one, criminal activity either was afoot or is likely to be afoot in light of what the manager had told him about the alleged drug usage at the room, and that Mr. Humphreys was the

person that rented that room and then walked away from the scene in a manner that certainly raised more suspicions than it solved.

I find that he has -- the officer has reasonable, articulable suspicion based on objective facts that the person he was dealing with was more likely than not to be **armed <u>or</u> dangerous** in light of the fact he admitted he had a weapon strapped to his ankle, not the normal place where people carry weapons, and based on his experience, it's not uncommon that people who carry weapons secreted in a place like that might carry other ones, so the frisk that was done by the officer I find complied with Article I, Section XVII of the Idaho Constitution and the Fourth Amendment of the United States Constitution because it was based upon reasonable suspicion of both prongs of the *Terry v. Ohio* analysis regarding the detention of the defendant and the search done pursuant to the frisking.

Motion to Suppress Tr., p. 62, L. 8—p. 63, L. 24 (emphasis added).

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 permits an officer "to conduct a limited self-protective pat down search of a detainee in order to remove any weapons." *State v. Henage*, 143 Idaho 655, 660, 152 P.3d 16, 21 (2007) (citing *State v. Wright*, 134 Idaho 79, 82, 996 P.2d 298, 301 (2000)). For the pat search to be permissible, "a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger." *Babb*, 133 Idaho at 892, 994 P.2d at 635 (quoting *Terry,* 392 U.S. at 27, 88 S.Ct. 1868) (alteration in original).

In determining whether the pat search is reasonable, the court applies an objective standard, evaluating the search "in light of the 'facts known to the officers on

the scene and the inference of the risk of danger reasonably drawn from the totality of the circumstances.'" *Henage*, 143 Idaho at 660, 152 P.3d at 21 (quoting *State v. Wright*, 134 Idaho 79, 82, 996 P.2d 298, 301 (2000)). Factors that could lead a reasonable person in the officer's position to conclude a person is armed and dangerous include:

> whether there were any bulges in the suspect's clothing that resembled a weapon; whether the encounter took place late at night or in a high crime area; and whether the individual made threatening or furtive movements, indicated that he or she possessed a weapon, appeared nervous or agitated, appeared to be under the influence of alcohol or illegal drugs, was unwilling to cooperate, or had a reputation for being dangerous.

State v. Bishop, 146 Idaho 804, 819, 203 P.3d 1203, 1218 (2009) (citing *Ybarra v. Illinois,* 444 U.S. 85, 93, 100 S.Ct. 338, 343, 62 L.Ed.2d 238, 246 (1979); *Pennsylvania v. Mimms,* 434 U.S. 106, 112, 98 S.Ct. 330, 334, 54 L.Ed.2d 331, 337 (1977); *Henage,* 143 Idaho at 661–62, 152 P.3d at 22–23; *State v. Davenport,* 144 Idaho 99, 103, 156 P.3d 1197, 1201 (Ct. App. 2007); *State v. Greene,* 140 Idaho 605, 609, 97 P.3d 472, 476 (Ct. App. 2004); *State v. Holler,* 136 Idaho 287, 292, 32 P.3d 679, 684 (Ct. App. 2001); *State v. Babb,* 133 Idaho 890, 893, 994 P.2d 633, 636 (Ct. App. 2000); *State v. Simmons,* 120 Idaho 672, 677, 818 P.2d 787, 792 (Ct. App. 1991)). It is up to the officer to "demonstrate how the facts he or she relied on in conducting the frisk support the conclusion that the suspect posed a risk of danger." *Id.* (citing *Henage,* 143 Idaho at 661–62, 152 P.3d at 22–23).

Officer Hutchinson testified about a non-threatening consensual encounter between himself and Humphreys. Specifically, he provided the following testimony as the basis for the frisk:

> Well, based off of his behavior glancing at me and then trying to get away from me is how it appeared to me, the way he put his hands in his

> pockets as soon as I approached him, and then the fact that he admitted to being armed with a concealed knife in, frankly, an odd place, I was concerned that according to my training if there's one, there's two in regards to weapons. We apply that to knives. Often times if we find one knife on a person, we find more than one knife, so I told him I was going to pat search him for my safety because of the presence of that knife to take that knife off his person.

Motion to Suppress Tr., p. 11, L. 18—p. 12, L. 4. On cross-examination, the following exchange took place regarding Officer Hutchinson's basis for the pat search of Humphreys:

> Q. (BY MR. ONOSKO) No, just a frisk for weapons. Based on your Advanced POST training, what's required for you to be able to pat someone down for weapons?
>
> A. A reasonable suspicion that they have a weapon on them.
>
> Q. And was that the reason you patted Mr. Humphreys down in this case?
>
> A. It was. He admitted that he had a weapon on him.

Id. at p. 37, Ll. 8–16. Officer Hutchinson also testified that:

> Everything about [Humphreys'] behavior up to that point was strange and suspicious to me. The fact that an officer exited his vehicle and asked to speak with him and he immediately put his hands into his trench coat pockets was unnerving to me, so his behavior -- the totality of his behavior up to that point was strange and unnerving to me.

Id. at p. 38, Ll. 8–14. Officer Hutchinson then used his hands to restrain Humphreys' hands behind his back and began to conduct the pat search. *Id.* at p.12, Ll. 7–9.

Based on the information he had received from the manager of the Budget Saver Hotel, Officer Hutchinson certainly had reason to want to approach Humphreys and ask him if he was willing to answer questions about the juvenile runaway. But nothing about the information he received from the manager would have led a reasonably prudent person to believe that Humphreys was dangerous. It was incumbent upon Officer

Hutchinson to "demonstrate how the facts he or she relied on in conducting the frisk support the conclusion that the suspect posed a risk of danger." *Bishop*, 146 Idaho at 819, 203 P.3d at 1218. Officer Hutchinson failed to do so.

The only factor Officer Hutchinson testified about in support of the frisk was that Humphreys admitted to having a dive knife strapped to his ankle. There was no testimony that the encounter took place late at night or in a high crime area, or that Humphreys made threatening or furtive movements, appeared nervous or agitated, appeared to be under the influence of alcohol or illegal drugs, was unwilling to cooperate, or had a reputation for being dangerous. *See Bishop*, 146 Idaho at 819, 203 P.3d at 1218. Humphreys' admission to having a knife strapped to his ankle, by itself, is not sufficient to create in Officer Hutchinson a reasonable belief that Humphreys posed a safety risk. As the Idaho Supreme Court noted that "[a] person can be armed without posing a risk of danger. On the other hand, a person can be dangerous, without apparently being armed." *Henage*, 143 Idaho at 661, 152 P.3d at 22. Officer Hutchinson did not testify to any facts that demonstrated Humphreys was a potential threat to him or others. Before Officer Hutchinson actually made contact with Humphreys, Humphreys placed his hands in his pockets and walked <u>away</u> from Officer Hutchinson. When Officer Hutchinson initiated contact with Humphreys, he turned to face Officer Hutchinson and immediately took his hands out of his pockets as ordered.

The Magistrate Judge found Humphreys' suspicious behavior prior to the encounter at the outhouse justified the frisk. Motion to Suppress Tr., p. 63, Ll. 1–9. That behavior was splitting up with the other man who was at the hotel when Officer Hutchinson arrived on scene, immediately putting his hands in his pockets when Officer

Hutchinson approached him, and admitting to possessing a weapon. *Id.* at p. 62, Ll. 22–24. The determination by the Magistrate Judge that the frisk was reasonable was not supported by specific and competent facts necessary to justify a frisk under *Terry*. As such, the Magistrate Judge's order denying the Motion to Suppress on this ground is reversed.

E. Humphreys did not provide valid consent, so the search was unlawful.

Humphreys argues he was subjected to a warrantless search without his free and voluntary consent. Appellant's Brief, p. 15. He contends, "[a]t the time Mr. Humphreys gave his alleged consent to this search he was being physically detained and had two police officers surrounding him. He was in the middle of being unlawfully frisked." *Id.* at p. 18 (citing Motion to Suppress Tr., p. 42, Ll.13–14). Humphreys maintains he "eventually acquiesced to the officer's request after being asked a second time to consent to the search, and he simply replied 'sure'". *Id.* at p. 19 (citing the Affidavit of Benjamin Onosko [In Support of Appellant's Brief], Exhibit A, ¶ 22). The State argues this was valid consent, not coerced by Officer Hutchinson. State's Reply Brief, p. 13.

The Magistrate Judge made the following findings about the search:

> . . . even though Mr. Humphreys is detained by the officer, that this was not one of the circumstances where there was coercion used by the officer to convince an otherwise unwilling person to consent to the expanded search. Mr. Humphreys was for the most part cooperative throughout all of this encounter. The mere fact that he hesitated in saying he was uncomfortable with it I don't find was enough to either deny consent or revoke consent because he hadn't really even granted at that point, so the officer then clarified that, and I don't find that the additional question, even under circumstances where the officer has control of the situation by detaining the person in this case, resulted from duress or coercion directly or impliedly. Mr. Humphreys was cooperative, and I don't find that the officer was using any sort of excessive force or duress or anything like that

> in order to overcome the free and unconstrained will of Mr. Humphreys to either give consent or not give consent, so I will find that the officer was granted valid consent to do the additional search into the pockets where he discovered the marijuana and the pipe.

Id. at p. 65, L. 11—p. 66, L. 7.

Pursuant to the Fourth Amendment, all warrantless searches are per se unreasonable "unless they come within one of the few specifically established and well-delineated exceptions to the warrant requirement." *State v. Zavala*, 134 Idaho 532, 536, 5 P.3d 993, 997 (Ct. App. 2000) (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)). Voluntary consent is one such exception. *Id.* The burden is on the State to demonstrate the consent was not given as the result of duress or coercion. *Id.*

However, "[c]onsent to search does not expunge the taint of unlawful police activity where the events are irrevocably intertwined." *State v. Kerley*, 134 Idaho 870, 874, 11 P.3d 489, 493 (Ct. App. 2000) (citing *State v. Weber,* 116 Idaho 449, 453, 776 P.2d 458, 462 (1989); *State v. Barwick,* 94 Idaho 139, 142, 483 P.2d 670, 673 (1971)). Factors used to determine whether events are irrevocably intertwined "include the presence of intervening circumstances and the length of time between the consent and the frisk." *Id.* at 875, 11 P.3d at 495.

While conducting the pat search for weapons, Officer Hutchinson felt what he believed was another knife in Humphrey's pocket. Motion to Suppress Tr., p. 12, Ll. 16–18. While still restraining Humphreys, Officer Hutchinson then asked Humphreys if he would consent to a search of his person. *Id.* at p. 12, Ll. 18–21; p. 39, Ll. 21–24. Humphreys initially told Officer Hutchinson that he felt uncomfortable with the search

and did not want to be searched. *Id.* at p. 39, Ll. 17–20. Officer Hutchinson then asked a follow-up question, again requesting to search Humphreys. *Id.* at p. 41, Ll. 2–5. Humphreys then consented to the search of his person. *Id.* at p. 13, Ll. 4–5.

The Court has already determined that the frisk was unlawful. It was during the unlawful frisk that Humphreys provided consent. The reason Officer Hutchinson sought consent to search Humphreys was a direct result of the unlawful frisk. There was no appreciable lapse of time between the frisk and Humphreys' consent. The Court finds that those events were irrevocably intertwined, invalidating the consent. Officer Hutchinson was not justified in searching Humphreys. As such, the Magistrate Judge's order denying the Motion to Suppress on this ground is reversed.

IV. ORDER

Accordingly, in view of the foregoing, the Order Denying the Motion to Suppress is reversed and the conviction against Humphreys is vacated. The case is remanded to the Magistrate Court for further proceedings consistent with this opinion.

IT IS HEREBY ORDERED the Magistrate Court's Order Denying the Motion to Suppress is REVERSED and the conviction against Humphreys is VACATED.

IT IS FURTHER ORDERED all costs, fines, reimbursements, restitution and assessments imposed are VACATED.

IT IS FURTHER ORDERED this matter is REMANDED to Magistrate Division.

DATED this 27th day of July, 2016

____
JOHN T. MITCHELL, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the ___________ day of July, 2016 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Benjamin M. Onosko
Prosecuting Attorney – Roy Gowy/Wes Somerton
Hon. Scott Wayman

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY
BY:________________________
Deputy