

FILED \_\_\_\_\_

AT \_\_\_\_\_ O'clock \_\_\_\_M  
CLERK OF THE 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. )  
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 )  
 DANA M. BARTON, )  
 )  
 ) *Defendant.* )  
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 )  
 \_\_\_\_\_ )

Case No. **CRF 2008 19615**

**MEMORANDUM OPINION AND  
ORDER ON MOTION TO SUPPRESS**

Defendant Barton's Motion to Suppress **GRANTED** in part, **DENIED** in part.  
David Whipple, Dep. Prosecuting Attorney, lawyer for the State.  
Anne C. Taylor, Coeur d'Alene, lawyer for Defendant Barton.

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**I. FACTUAL BACKGROUND.**

Defendant Dana Barton was stopped by Detective Mason of the North Idaho Regional Violent Crimes Task Force on April 18, 2008, at 5:30 p.m. Barton's six-year old son was a passenger in her car. According to his police report, the reason given by Mason for stopping Barton was he "knew the vehicle was registered to Dana M. Barton, and I had observed the female driver was Dana. I also knew Dana did not have a valid driver's license." The parties stipulated the CD of the audio portion of the stop could be admitted as Defendant's Exhibit A. The Court has listened to that CD in its entirety.

Upon being pulled over Barton admitted to Mason she knew her license was not valid and she was not supposed to be driving. When Mason questioned Barton, she admitted to having been at drug houses recently and having used methamphetamine the

previous day. Almost immediately, Barton was aware Mason “could” arrest her, as very early on in their conversation, Mason informed her “If you are honest with me I won’t arrest you, if you lie to me you’re going to jail.” Immediately after Mason made that statement, and only thirty seconds into the audio recording, Barton asked Mason: “Do you want me to empty my pockets?”, Mason responded: “Why don’t you just let me do a quick check if you’re ok with that?”, and Barton responded “OK.” According to Mason’s report, Mason says he “had her permission to search her person”, and that is supported by the audio recording. Mason’s report then states he located a small plastic vial coated with a white residue recognized as suspected methamphetamine residue.” The next statement is Mason asking Barton when she last used and she indicated she used a little yesterday. Mason then asked for information on “Kingsly”, and then abruptly stated “See, that’s got some residue on it—that’s an arrestable offense, that’s a felony” and “Anything else you think I’ll find”, to which Barton responded “No”. This was about ninety seconds into the recording. Mason then asked Barton who she purchased the methamphetamine from, and Barton was reluctant to disclose that information. Mason then asked Barton “Are you ok with me taking a look though your vehicle to see if there is something you haven’t forgot?”, to which Barton responded “No, not really.” At two and one half minutes into the recording, Mason then said “OK” and immediately handcuffed Barton, Barton must have scuffled for a brief moment as Mason said “If you don’t put your hands.. you are going to eat the concrete”. Barton then changed her mind and repeatedly said “you can search it”, but Mason kept her handcuffed and then Mason told Barton “You are under arrest for driving with an invalid license, possession of methamphetamine and paraphernalia, and I’m going to search your car incident to an arrest.” Mason then searched Barton’s vehicle. A search of the vehicle uncovered a “plastic baggie with residue.” While searching the vehicle,

Mason asked Barton's six-year old son who was still in the vehicle: "What did your mommy say when I pulled her over?" Most of the rest of the search of the interior of Barton's car is inaudible. The search took a few minutes. Mason asked another officer to take the six-year old out of the car. Mason then came over to Barton, who was apparently located in the back seat of a patrol car, and said "I'm gonna offer a pretty good deal for you in a little bit." Mason then asked several identification questions, and finally, read Barton her Miranda rights. Mason then reiterated that Barton was under arrest for possession of meth, possession of paraphernalia, asked her "What was in it [the vial], coke, meth?", to which Barton replied: "I don't do coke." Mason then asked: "Meth?", and Barton said "Yeah". Mason then said "To keep your son from being lost to the State, be a CI [confidential informant] and I won't arrest you" and promised Barton that if she gave some information the felony would be "knocked down to a misdemeanor." Mason asked "Who did you get your last batch from?" and Barton responded: "Josh Ley", disclosed where she met him, and that she bought ten dollars worth from him and the most she'd bought from him was sixty dollars worth. Mason was obviously in the back of someone's patrol car, as he had to radio to another officer to come open the door for him. Mason let Barton out of the car then let her out of handcuffs, and asked a female ISP officer to search Barton's bra, as that was where Barton had disclosed that was where she normally kept her drugs. The audio portion ended at this point. Apparently, no drugs were found on Barton during the search of her bra. According to Mason's police report, Barton "agreed to come in and speak with me further next week about her drug use", he cited and released Barton on possession of a controlled substance, possession of paraphernalia and driving with an invalid license, and informed Barton she would have to get a licensed driver to come pick up her, the truck and her son from the scene.

Up until the time (two and one half minutes into the recording) that Officer Mason asked Barton “Are you ok with me taking a look though your vehicle to see if there is something you haven’t forgot?”, to which Barton responded “No, not really,” and Mason then said “OK” and immediately handcuffed Barton, the colloquy between Mason and Barton was very friendly. On more than one occasion Barton laughed loudly at a statement Mason made.

Barton filed her Motion to Suppress on October 28, 2008. On November 6, 2008, Barton filed a Notice of Hearing scheduling her Motion to Suppress for December 18, 2008. That hearing did not take place and hearing was moved to December 30, 2008. At the hearing on December 30, 2008, the hearing was continued to January 22, 2009, to allow the State’s attorney the opportunity to listen to the audio recording. On January 22, 2009, Barton filed her “Memorandum in Support of Motion to Suppress”, and at the hearing on that date, the parties stipulated to submit the Motion to Suppress to the Court on briefs (the State being allowed until January 27, 2009 to file its brief), and upon the Court’s listening to the CD of the audio recording of the stop. At 10:00 a.m. on January 27, 2009, the State filed its Brief in Opposition to Defendant’s Motion to Suppress. The Court has reviewed all the briefing and has listened to the CD recording of the stop.

## **II. STANDARD OF REVIEW.**

In an appeal from an order denying a motion to suppress, the Court of Appeals will not disturb findings of fact supported by substantial evidence, but will freely review whether the trial court’s determination as to whether constitutional requirements were satisfied in light of the facts. *State v. Whiteley*, 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct. App. 1993). When evaluating the trial court’s determination of voluntariness of consent given, reviewing courts will not disturb such a decision on appeal if the trial court’s finding is based

on reasonable inferences to be drawn from the record. *State v. Post*, 98 Idaho 834, 837, 573 P.2d 153, 156 (1978). Whether consent to a search was voluntary is a question of fact and reviewing courts accept the factual findings of a trial court unless they are clearly erroneous. *State v. McCall*, 135 Idaho 885, 886, 26 P.3d 1222, 1223 (2001). Findings are not deemed clearly erroneous when supported by substantial evidence in the record. *State v. Benson*, 133 Idaho 152, 155, 983 P.2d 225, 228 (Ct.App. 1999).

### **III. ANALYSIS.**

After listening to the CD of the audio portion of this stop, it is best to break this situation down into three time periods. No party contests the reasonableness of the basis for the stop. Thus, the first time period is from when Mason begins his encounter with Barton, and when he handcuffs her and tells her she is under arrest. The second time period is from where Barton is handcuffed and placed under arrest until Mason finally reads Barton her Miranda rights. It is during this time period that Mason's search of the vehicle take place. The final period is after Barton has been given her Miranda rights.

#### **A. Mason's Search of Barton's Person was With Barton's Voluntary Consent.**

Barton alleges Mason questioned her about whether she was in possession of drug or paraphernalia and informed her that he had observed her at several drug houses, but that he indicated to her that if she was honest about drugs in her possession, he would not take her to jail. Memorandum in Support of Motion to Suppress, p. 2. Barton volunteered to empty her pockets and Mason then asked for consent to search her. Barton denies consent was voluntarily given, but ultimately, the detective did search her, asking her during the search when she'd last used methamphetamines, whereupon she admitted to having used the previous day. *Id.*, pp. 2-3, 6.

This Court disagrees with Barton's position. The short detention was permissible under *Terry v. Ohio*, 292 U.S. 1, 22 (1986). As the State notes, "Once a lawful stop has been made (no party contests this issue), an officer may conduct a limited self-protective pat down search of a detainee and remove anything that feels like a weapon." Brief in Opposition to Defendant's Motion to Suppress, p. 3, citing *State v. Johns*, 112 Idaho 873, 876-77, 736 P.2d 1327, 1330-31. This case does not involve a self-protective pat down, it involves consent by Barton. A mere thirty seconds into the audio recording, it was **Barton** who asked Mason: "Do you want me to empty my pockets?" Up to that point, Mason hadn't even discussed a search of Barton. Mason responded: "Why don't you just let me do a quick check if you're ok with that?", and Barton responded "OK." Barton clearly gave her consent for Mason to search her person. The Court must analyze whether anything in that brief period leading up to that consent was coercive.

Barton argues the search was unlawful because her consent was not given voluntarily. Memorandum in Support of Motion to Suppress, p. 3. She states that she was asked to exit her vehicle, confronted by "several" law enforcement officers, and questioned about matters unrelated to the traffic stop. *Id.*, p. 6. At this point in time, from a review of the audio recording, the female ISP Trooper had clearly not yet arrived (nor had she been requested to respond at this point). Mason's police report shows that at some point in time Post Falls Police Officer J. DeWitts arrived, because that is where Mason placed Barton while Mason searched Barton's vehicle. However, early on it is not clear whether one law enforcement vehicle (Mason's) was present or two were present. There is no indication that at the inception of this encounter that there were "several law enforcement officers", as Barton claims. At most there are two cars. It is unknown if the overhead lights are on. The stop occurred when it was still daylight, and the stop occurred at a busy location, on West

5<sup>th</sup> Avenue in Post Falls, next to the McDonald's restaurant. Barton did not have driving privileges at the time of the traffic stop, and there is no indication by either Barton in briefing, or by listening to the recording or reading the police report, that her license and/or registration were taken.

Barton argues that a warrantless consent search requires the State to prove consent was freely and voluntarily given, without implied or direct duress or coercion, by a preponderance of evidence. *Id.*, p. 3. While substantial evidence is the standard of review by the appellate courts *supra*, preponderance of the evidence is the standard this Court must hold the State to on Barton's motion.

It is well settled that, absent specifically established exceptions, a search conducted without a warrant based on probable cause is *per se* unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). One of the recognized, established exceptions to the warrant and probable cause requirements is a search conducted pursuant to consent. *Davis v. United States*, 328 U.S. 582, 593-594 (1946). *Schneckloth v. Bustamante* stands for the proposition that voluntariness of consent must be proven by the State by a preponderance of evidence and is a determination that does not turn "on the presence or absence of a single controlling criterion." *Schneckloth*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047 (1973). A voluntary decision is one that is the product of "essentially free and unconstrained choice by its maker" *Id.* at 225, 93 S.Ct. at 2046. An involuntary decision, on the other hand, is the result of duress or coercion, direct or implied. *Id.* at 218, 93 S.Ct. at 2041. To determine whether an individual's will has been "overborne and his capacity for self-determination has been critically impaired," a court must assess the totality of the circumstances. *Id.* at 225-26, 93 S.Ct. 2046-47

The voluntariness of the consent given is a question of fact to be determined by all

surrounding circumstances. *State v. Hansen*, 138 Idaho 791, 796, 69 P.3d 1052, 1057 (2003). In a suppression hearing where voluntariness is an issue, the power to assess the credibility of witnesses, resolve conflicts in testimony, weigh the evidence, and draw factual inferences is vested in the trial court. *State v. Abeyta*, 131 Idaho 704, 708, 963 P.2d 387, 391 (Ct. App. 1998). In determining the voluntariness of a consensual search, the Ninth Circuit Court of Appeals considers five factors: (1) whether the defendant was is custody, (2) whether the arresting officers had their guns drawn, (3) whether *Miranda* rights were given, (4) whether the defendant was notified that s/he had a right not to consent, and (5) whether the defendant had been told that a search warrant could be obtained. *U.S. v. Jones*, 286 F.3d 1146, 1152 (9th Cir. 2002). *State v. Garcia*, 143 Idaho 774, \_\_\_, 152 P.3d 645, 649 (Ct. App. 2006), identifies other factors to consider: whether there were numerous officers involved in the confrontation, *Castellon v. U.S.*, 864 A.2d 141, 155 (D.C. 2004), the location and conditions of the consent, including whether it was at night, *U.S. v. Mapp*, 476 F.2d 67, 77-78 (2<sup>nd</sup> Cir. 1973), whether the police retained the individual's identification, *U.S. v. Chemaly*, 741 F. 2d 1346, 1353 (11<sup>th</sup> Cir. 1984), and whether the individual was free to leave, *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996). An additional factor for the Court to consider in this regard is whether the individual knew of his or her right to refuse consent. *State v. Stewart*, 145 Idaho 641, \_\_\_, 181 P.3d 1249, 1256 (Ct.App. 2008).

In *State v. Jaborra*, 143 Idaho 94, 137 P.3d 481 (Ct.App. 2006), the Idaho Court of Appeals agreed with District Court and found that a defendant's consent was the result of coercive circumstances and not voluntary where:

A citizen is surrounded by three policemen who have come to the scene in three different police cars. It is late at night (or more precisely in the wee hours of the morning). One or two of the cars have their overhead lights flashing. The officers are in uniform an armed. The citizen is grabbed by the arm, knocked off balance and told to put his hands on his head. His driver's license, which he gave to one of the deputies, has never been

returned. He is not free to leave... He has not been afforded a *Miranda* warning.

*Jaborra*, 143 Idaho at 98, 137 P.3d at 485. Similarly, and as discussed by Barton in *State v. Stewart*, the Idaho Court of Appeals upheld the District Court's determination that the State had not met its burden of proving voluntary consent. 145 Idaho 641, \_\_\_, 181 P.3d 1249, 1257 (Ct.App. 2008). In *Stewart*, the defendant gave consent to a search of his vehicle, but first asked if he could remove some garbage from the interior; he was allowed to do so and his probation officer, at the scene of the traffic stop along with four other law enforcement officers, offered to throw the garbage into a trash bag in her car. *Id.* at \_\_\_, 181 P.3d at 1251. The search of Stewart's car turned up a methamphetamine pipe under the driver's seat and his probation officer found methamphetamine in the garbage. *Id.* Stewart was arrested and subsequently admitted the contraband belonged to him. *Id.* The District Court granted Stewart's motion to suppress because the presence of five police officers for cars for a mere traffic stop, Stewart's being informed that he was a target of a narcotics investigation, and questioning of Stewart unrelated to the traffic stop was found to be "intended to disconcert Stewart as a prelude to seeking his consent to search the vehicle." *Id.* at \_\_\_, 181 P.3d at 1252. The District Court had also noted that Stewart was not free to go and that his license and registration had been taken by one of the officers. *Id.* at \_\_\_, 181 P.3d at 1256. In upholding the District Court, the Idaho Court of Appeals stated:

Here, the district court's findings note the presence of many of the factors identified in *Jaborra* as bearing upon the determination of voluntariness, including the excessive number of officers who converged at the scene, the fact that Stewart's license and registration had been taken and he was not free to leave, and the facts that Stewart was not informed of his right to refuse consent. The court also found that the police questioned Stewart about matters unrelated to the traffic stop, including the no contact order [forbidding contact with his ex-wife], in a manner that was intended to be and was unsettling and disconcerting, as a prelude to seeking his consent

to search the vehicle. Although the evidence of police coercion here is equivocal and the coercive conduct subtle, they are sufficient to support the trial court's findings.

*Stewart*, 145 Idaho \_\_\_, \_\_\_, 181 P.3d 1249, 1257.

Up to the point in time where Mason asked Barton if he could search her vehicle (which included the point in time where Mason discovered the vial), this had been a friendly discussion. As the State argues: The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of Miranda. Brief in Opposition to Defendant's Motion to Suppress, p. 5, citing *Berkemer v. McCarthy*, 468 U.S. 420, 439-440, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975).

Barton's argument seems to focus on the questioning by the detective on matter unrelated to the traffic stop, the failure to advise her she was not under arrest, and the failure to advise her of her right to not consent to a search. *Id.*, at 6. In this regard, it must be noted that the presence of multiple officers alone does not establish coercion and there is no requirement that the police inform individuals of their right to refuse consent or that they are free to leave; but, "these factors are nevertheless relevant when reviewing the totality of the circumstances. *Stewart*, 145 Idaho \_\_\_, \_\_\_, 181 P.3d 1249, 1256 (citations omitted). The Idaho Court of Appeals, found it relevant the fact that a defendant is questioned about matters unrelated to a traffic stop, as a prelude to seeking consent to search a vehicle, in a manner intended to be unsettling and disconcerting, and where the questioning is in fact unsettling and disconcerting. *Id.* at \_\_\_, 181 P.3d 1249, 1257. In *Stewart*, the Idaho Court of appeals concluded its decision with the following

The court also found that the police questioned Stewart about matters unrelated to the traffic stop, including the no contact order, in a manner that was intended to be and was unsettling and disconcerting, as a prelude to seeking his consent to a search of the vehicle. Although the

evidence of police coercion here is equivocal and the coercive conduct subtle, they are sufficient to support the trial court's findings. Therefore, the district court's determination that the State did not meet its burden of proving voluntary consent must be affirmed.

*Id.* at \_\_\_\_, 181 P.3d 1249, 1257. While this language in *Stewart* make this a relevant factor, there certainly appears to be no prohibition against questioning about matters unrelated to the traffic stop. Depending on *how* these matters unrelated to the stop were related to a person being interrogated, or how that person *reacted* to what may seem to be innocuous unrelated questions, that sort of questioning might enough in itself to establish coercive conduct. For example, had Officer Mason screamed at Barton accusing her of known drug contacts or physically pushed her during this questioning. Had Mason begun asking Barton about her drug use, her drug contacts, even in a calm manner, and as a result Barton became completely hysterical, or had she run, a coercive situation would exist. Those are not the facts here. A review of the recorded stop indicates that until Barton refused to let Mason search her car, the conversation between the two was respectful, calm, matter of fact and at times even light-hearted. Barton was tracking well with what was being told to her and responded quite calmly to all questions asked about her drug use and frequenting places where drugs were sold. Barton even volunteered to empty her pockets before Mason asked anything of Barton along those lines. If Mason's questions to Barton "about matters unrelated to the traffic stop" including her past drug use and drug contacts was "intended to be and unsettling and disconcerting", by Mason, it was not. The State argues that "Questions by police directed to a person detained need not be focused solely on the reason for the stop." Brief in Opposition to Defendant's Motion to Suppress, p. 3, citing *State v. Parkinson*, 135 Idaho 357, 360, \_\_\_\_\_ (Ct.App. 2000). The State notes that case indicates the police may question a detainee regarding controlled

substances even if the original stop was unconnected to illegal drugs. *Id.*, 135 Idaho 357, 361.

Barton was taken into custody following her having volunteered to empty her pockets, and immediately after that, consenting to a search of her person. That search almost immediately turned up the residue-covered vial. Barton makes no argument that the officers' guns were drawn. Barton makes the argument that "several" officers were present, but at least early on in the encounter, that claim is not supported by all the evidence the Court has. From listening to the audio recording, Barton was not notified that she had a right to refuse to consent to a search, nor was Barton ever told that a search warrant could be obtained. It was still daylight and Barton was stopped in a busy location in Post Falls. There is no indication that prior to Barton's consent to search her person, the officers kept Barton's identification or registration. In fact, at the outset Mason tells Barton he knows who she is and it wasn't until Barton was in custody that Mason began asking Barton routine identification questions. There is no indication in the audio recording that Barton was told she could leave, at least until after her arrest and subsequent release from custody due to her stated willingness to cooperate with law enforcement.

On balance, although most of the *Jaborra* factors do not weigh in favor of Barton's claim of coerced consent to search her person, Barton has argued to the Court that she was questioned about matters unrelated to the traffic stop in a manner that was intended to be and was unsettling and disconcerting, and that she was not informed of her right not to answer questions or provided notice that she was not under arrest. Memorandum in Support of Motion to Suppress, p. 6.

Again, this Court finds that up until the time (two and one half minutes into the recording) that Officer Mason asked Barton "Are you ok with me taking a look though your

vehicle to see if there is something you haven't forgot?", to which Barton responded "No, not really," and Mason then said "OK" and immediately handcuffed Barton, the colloquy between Mason and Barton was very friendly. On more than one occasion Barton laughed loudly at a statement Mason made. This Court finds no coercion in the manner in which this conversation occurred up to the point in time Mason took Barton into custody.

In *Berkemer v. McCarthy*, 468 U.S. 420, 437, 104 S.Ct. 3138, 3149 (1984), the United States Supreme Court held that roadside questioning is generally a routine traffic stop that does not amount to a "custodial interrogation." The core inquiry is "whether a traffic stop exerts upon a detained person pressures that sufficiently impair his [or her] free exercise of his privilege against self-incrimination to require that he be warned of his [or her] constitutional rights." *Id.* The totality of the circumstances must be evaluated to determine whether such pressures were present, factors to consider include: the location of the interrogation, the conduct of the officer(s), the nature and manner of the questioning, the time of the interrogation, and other persons present. *State v. Medrano*, 123 Idaho 114, 117-8, 844 P.2d 1364, 1367-68 (Ct.App. 1992). This Court finds, given the totality of the circumstances, did not amount to a custodial interrogation.

The two features of an ordinary traffic stop that lessen the danger that a detainee would be induced to respond to an officer's questions where he would not otherwise freely do so were identified in *Berkemer*. They are: (1) that detention pursuant to a traffic stop is presumptively temporary and brief and (2) that a traffic stop is open to public view and involves at the most two officers, making a traffic stop less "police dominated" than custodial interrogations of the kind at issue in *Miranda*. *Berkemer*, 468 U.S. at 437-39, 104 S.Ct. at 3149-50. As is discussed by Barton, in *State v. James*, the defendant moved to suppress his confession of ownership of methamphetamines arguing that the investigative

traffic stop had evolved into a custodial interrogation such that *Miranda* warnings were required. \_\_\_ Idaho \_\_\_, \_\_\_P.3d\_\_\_, 2008 WL 2389490 (Ct.App. 2008). The Idaho Court of Appeals suppressed James' admission because of several factors "contributing to the coercive atmosphere": the traffic stop took place in the middle of the night on an interstate freeway and afforded little exposure to public view; James knew that when the interrogation occurred it was no longer an investigation of a traffic violation, but had become an investigation of a felony drug offense; all occupants in the vehicle had been subjected to a frisk, which is "permissible for officer safety purposes but is not usually done during a traffic stop"; and the officer's interrogation technique, threatening to arrest all occupants if none admitted possession of the drugs, was more coercive than usual traffic violation questioning. *Id.* at \*3-4. Unlike the facts in the instant case, James was a passenger in a vehicle and a search of the vehicle, consented to by the owner, revealed a bag of methamphetamines following a traffic stop; James confessed ownership of the drugs, stating that he did not want all occupants to be arrested because one of the individuals was on probation, at a point where he had not been given *Miranda* warnings. *Id.* at \*1.

Here, Barton argues that her seizure is also distinguishable from a routine traffic stop: the detective confronted her about her invalid driving status, asked her to exit her vehicle, confronted her with information about her presence at known drug houses, asked her to admit prior drug use, and repeatedly told her she would not be arrested if she cooperated. Memorandum in Support of Motion to Dismiss, p. 9. Barton argues that her detention was for a prolonged period of time and that she was arrested when she refused to consent to a search of her vehicle. *Id.* She argues that the manner in which the detective acted would cause a reasonable person in defendant's position to understand her

freedom was curtailed to a degree associated with formal arrest and that his questions were asked with the express purpose of eliciting incriminating responses. *Id.* at 10.

This Court is not persuaded by Barton's argument. Barton was pulled over by the detective on April 18, 2008 at 5:30 p.m., during daylight hours, in a busy area of Post Falls, was approached by Mason, and the detention and questioning took very little time before she was handcuffed and arrested. The conduct of Mason, other than questioning Barton Defendant repeatedly on matters beyond the scope of the traffic stop, has not been called into question. Unlike the facts of *James*, the instant matter does not involve a traffic stop affording little of the exposure to public view that the Supreme Court in *Berkemer* deemed important to the comfort level of an interrogated driver and the detention here did not occur in the middle of the night on an interstate freeway. Barton volunteered to empty her pockets, and then immediately consented to a search of her person.

There was arguably coercion by the detective such that unless Barton consented to the search of her vehicle, it was clear Barton would be arrested and leaving the site of the traffic stop on her own. But Barton never gave that consent before she was handcuffed, and at the time she was handcuffed, Mason had every right to arrest her. Idaho Code § 19-603 is permissive, allowing an officer to arrest without a warrant for a misdemeanor committed in his presence, but not requiring the officer to do so. The vial containing methamphetamine residue found in defendant's coat pocket, only added to that. Up to the time the handcuffs were brought out, there was no physical restraint and no removal from a public place.

The State has proven by a preponderance of the evidence that Barton' consent to search her person was voluntary. This Court finds the unrelated questioning regarding her

whereabouts, her drug use and drug contacts, was not coercive enough to make her consent to the search involuntary.

**B. Statements by Barton After Mason Placed Her in Custody are Suppressed.**

When Mason found the vial he asked to search the vehicle, and after Barton refused to consent, she was placed under arrest and the detective allegedly again stated that if she cooperated, she would not go to jail. Memorandum in Support of Motion to Suppress, p. 3. Once being handcuffed, Barton changed her mind and told Mason he could search her car. While often the effect of handcuffs is a change in a person's mind, that does not change the fact that Barton remained handcuffed, remained in custody, and Mason *told* Barton she was arrested. It is the custodial aspect to which *Miranda* attaches. Barton states she was also asked to serve as a confidential informant in order to receive reduced charges, she agreed to meet with the detective the following week. *Id.* Barton moves to suppress any and all evidence gathered and statements made because the warrantless stop, arrest, detention, and search were without legal justification, unlawful and in violation of the U.S. Constitution and Idaho and U.S. laws. This Court agrees these statements must be suppressed.

Barton argues her statements were not voluntary because she was in custody during police interrogation and did not receive *Miranda* warnings. Memorandum in Support of Motion to Suppress, p. 6. In *Miranda*, the U.S. Supreme Court held that police must inform individuals of their right to remain silent and their right to counsel before undertaking custodial interrogation in order to protect the Fifth-Amendment privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624 (1966). The *Miranda* rule applies where an individual is "in custody" or where their "freedom of action is curtailed to a degree associated with formal arrest." *Berkemer v. McCarthy*, 468 U.S. 420,

440, 104 S.Ct. 3138, 3150 (1984) (quoting *California v. Behler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520 (1983)). Interrogation includes not only express questioning, but also its functional equivalent; interrogation under *Miranda* refers to “any words or actions on the part of the police... that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *State v. Person*, 140 Idaho 934, 939-40, 104 P.3d 976, 981- 82 (Ct.App. 2004) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300-02, 100 S.Ct. 1682, 1689-90 (1980)).

The State argues “A detention may be lengthened and broadened if the police investigation turns up evidence of other wrongdoing.” Brief in Opposition to Defendant’s Motion to Suppress, p. 3, citing *State v. Pabillore*, 133 Idaho 650, 654 (Ct.App. 2000). That is rather academic because shortly into the discussion with Barton, Mason handcuffed her and informed her she was under arrest. *Miranda* warning were not given until quite some time later. All statements made between Mason’s placing Barton in handcuffs, and the administering of *Miranda* warnings will be suppressed.

### **C. Evidence Found During the Search.**

As Mason told Barton when he handcuffed her, he was “placing her under arrest” and was going to be searching her car pursuant to that arrest. Driving without privileges is addressed in Idaho Code § 18-8001:

Any person who drives or is in actual physical control of any motor vehicle upon the highways of this state with knowledge or who has received legal notice pursuant to section 49-320, Idaho Code, that his driver’s license, driving privileges or permit to drive is revoked, disqualified or suspended in this state or any other jurisdiction is guilty of a misdemeanor.

Pursuant to I.C. § 19-603, an officer may arrest an individual without a warrant for a public offense committed or attempted in his presence. Therefore, having observed Barton driving her vehicle with knowledge that Defendant did not have a valid driver’s license,

Mason was permitted to arrest Defendant for committing a misdemeanor in the Officer's presence. Possession of methamphetamine and paraphernalia only add to that fact.

Even though as soon as Mason began placing the handcuffs on Barton, Barton changed her mind and said several times that Mason could search her car, no one has claimed the search of Barton's vehicle was done with her consent. Given the facts, any such claim of consent to search would be found to be not voluntary.

There was an arrest and there was a search incident to that arrest. This Court is aware of no authority that would indicate that just because the person under arrest is later released (which is what happened here), that such facts somehow make it a search "not" incident to arrest. When a policeman has made a lawful custodial arrest of the occupant of an automobile, he may as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. *New York v. Belton*, 101 S.Ct. 2860, 2863, 453 U.S. 454, 459, 69 L.Ed.2d 768 (1981).

Barton has argued that her statements should be suppressed as tainted fruit of the poisonous tree. Memorandum in Support of Motion to Suppress, p. 11, citing *Wong Sun v. United States*, 371 U.S. 471 (1963). While the post-arrest and pre-Miranda statements are suppressed for reasons other than the fruit of the poisonous tree doctrine, this Court feels it appropriate to discuss the evidence that was obtained in the search of Barton's vehicle during that post-arrest/pre-Miranda time period.

In *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285 (1985), the United States Supreme Court discussed *Miranda* rights in detail. "Prior to *Miranda*, the admissibility of an accused's in-custody statements was judged solely by whether they were 'voluntary' within the meaning of the Due Process Clause." 407 U.S. 298, 304, 105 S.Ct. 1285, 1290. In *Miranda*, however, the Court held suppressible many of the statements that would have

been admissible under the earlier analysis, it presumed that in-custody statements made without adequate warnings were protected by the Fifth Amendment. *Id.* The Court in *Miranda* presumed interrogation in custodial circumstances is inherently coercive and unless a suspect is specifically advised of his rights, statements made are inadmissible. *Id.* at 305, 105 S.Ct. 1285, 1291.

In *Elstad*, the respondent argued his confession was tainted by an earlier failure by police to provide *Miranda* warnings, and he sought exclusion under the fruit of the poisonous tree doctrine. *Id.* But the Court held the procedural requirements of *Miranda* differ significantly from violations of the Fourth Amendment: a Fourth Amendment violation deters unreasonable searches and “taints” a confession (no matter how probative the fruit may be) while “a finding of voluntariness for the purposes of the Fifth Amendment is merely a threshold requirement in determining whether the confession may be admitted in evidence.” *Id.* at 306, 105 S.Ct at 1291.

The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*.

*Elstad*, 470 U.S. 298, 306-307, 105 S.Ct 1285, 1292. Thus, where in the instant matter Barton had been provided *Miranda* warnings, any statements made subsequent to the warnings would have to be sought to be suppressed on the grounds of due process, not a violation of the Fifth Amendment, and Barton has made no due process argument here. Nor has Barton made any argument that she has sustained a due process violation in the search of her vehicle incident to arrest.

Once advised of her right to remain silent, any coercion by the detective should have been met by her remaining silent or requesting counsel. Further, clearly the United States

Supreme Court does not treat exclusion under the fruit of the poisonous tree doctrine pursuant to the Fourth Amendment the same as it does exclusion under *Miranda* Fifth Amendment violations and Barton's motion to suppress her statements on this basis must fail.

**D. Evidence and Statements Made Following *Miranda* Warnings.**

Due to the fact that *Miranda* warnings/rights were eventually given by Mason to Barton, any statements made by Barton after those rights cannot be suppressed.

**IV. ORDER.**

**IT IS ORDERED** that Barton's Motion to Suppress is **GRANTED** as it pertains to statements made following Mason's placing the handcuffs upon her, through the time that *Miranda* warnings were given to her. As to all other issues, Barton's Motion to Suppress is **DENIED**.

Dated this 27TH day of January, 2009.

\_\_\_\_\_  
John T. Mitchell, District Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_\_\_ day of January, 2009 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Anne C. Taylor  
David Whipple

By \_\_\_\_\_  
Jeanne Clausen, Secretary