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AT _____ O'clock ____ M
CLERK, DISTRICT COURT

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.)
)
 NICHOLAS DREW GOODSON,)
)
 Defendant/Appellant.)
)
 _____)

Case No. **CR 2007 14429**

**MEMORANDUM DECISION AND
ORDER ON APPEAL**

I. BACKGROUND AND PROCEDURAL HISTORY.

Appellant Nicholas Drew Goodson (Goodson) was convicted of the misdemeanor violations of I.C. §37-2734(A)(1) (possession of drug paraphernalia) and §37-2732(C)(1) (possession of marijuana less than three ounces) upon his entry of a conditional guilty plea, reserving the right to appeal Judge Wayman's Order Denying Defendant's Motion to Suppress Evidence filed November 28, 2007. On December 17, 2007, Goodson filed his Notice of Appeal from that Order, stating the issue to be whether the Magistrate abused his discretion in denying that motion to suppress.

Briefs were filed by both parties and read by this Court in preparation for oral argument which was scheduled and held on June 26, 2008. At that hearing, Goodson's counsel indicated he would like additional time to brief *State v. Michael S. Ballou*, 08.11

ICAR 524, 2008 Opinion No. 42 (Ct.App. May 22, 2008). Counsel for the State of Idaho (State) indicated such case would not be applicable. The Court allowed additional briefing to be filed and scheduled the matter for argument on appeal on August 25, 2008.

Amended briefs were submitted by both sides, and the Court has read those briefs. On August 25, 2008, the parties submitted a stipulation to submit the appeal on the briefing and vacate oral argument. This Court granted that request and vacated oral argument. The appeal is now at issue.

On June 19, 2007, Officer Brady Reed initiated a traffic stop of the car driven by Goodson. According to the testimony of Officer Reed at the November 15, 2007, hearing on the motion to suppress, Officer Reed asked Goodson whether Goodson had any weapons on him (Tr. p. 7, LI. 8-10), to which Goodson responded “No”. *Id.*, LI 11-13. Then, Officer Reed asked Goodson, “Is it okay if I search you?” or words to that effect (*Id.*, LI. 13-24), to which Goodson replied, “Okay.” Tr. p. 9, LI. 17-25. During the pat down, Officer Reed felt a cigarette package, looked inside, and found marijuana. *Id.* Magistrate Judge Scott Wayman reiterated this dialogue in making his ruling denying Goodson’s motion to suppress, demonstrating he correctly perceived the issue. Tr. p. 47, L. 25 – p. 48, L. 7.

The issue on appeal is whether the Magistrate erred in denying Appellant’s Motion to Suppress. Goodson argues the search exceeded the scope of to which he had consented; that is, only a search for weapons. Brief of Appellant, pp. 3-6; Amended Brief of Appellant, pp. 3-9. Goodson also argues the “plain feel’ doctrine applies in determining whether Officer Reed unlawfully expanded the scope of the consensual search. Brief of Appellant, pp. 6-9; Amended Brief of Appellant, pp. 9-12.

II. STANDARD OF REVIEW.

The standard of review of a suppression motion is bifurcated; the Court of Appeals accepts a trial court's findings of fact supported by substantial evidence and freely reviews the court's application of constitutional principles applied to the facts found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct.App. 1996); *State v. Cruz*, 144 Idaho 906, ___, 174 P.3d 876, 878 (Ct. App. 2007).

III. ANALYSIS.

A. Scope of Consent.

Goodson argues consent searches must conform to the limitations placed upon the consent by the defendant. Amended Brief of Appellant, p. 3. Goodson argues that because it is undisputed that the search in this case was based on Appellant's consent, the officer was required to conform the search to Goodson's consent. *Id.*, p. 4. The parties disagree over the scope of Goodson's consent: Goodson arguing it was consent for weapons only, given Officer Reed's prior question; and the State arguing consent was unlimited. The State also argues Goodson never withdrew consent or expressed any question or objection to the officer, which would be expected if Goodson thought he had only consented to a search of his person for weapons. Amended Respondent's Reply Brief, p. 5.

As set forth above, when asked by the officer, "Is it okay if I search you" (Tr. p. 7, Ll. 13-24), Goodson answered, "Okay." Tr. p. 9, Ll. 17-25. This request for consent posed by the officer came immediately following the prior question to Goodson, which was whether Goodson had any weapons on him, to which Goodson responded; "No." Tr. p. 7, Ll. 8-13 Goodson's consent to be searched was clearly not revoked at any time. Goodson did not tell Officer Reed to stop the search. Goodson's consent was a general consent without any

limitations. For example, Goodson did not say, “Okay, you can search me for weapons.” Goodson did not use any clarifying language such as “Do you mean search me for weapons?” Goodson did not use any language that in any way limited the scope of the search. Goodson’s entire argument is based on a limitation of the scope of the search which was *implied* from Officer Reed’s prior question and Goodson’s answer regarding whether Goodson had any weapons. This Court simply finds such an implication cannot reasonably be made. Simply because the request to search Goodson’s person followed a question about weapons and a denial of that question, that fact does not convince this Court that consent to search the person was thus limited to a search for weapons. These were two separate, albeit sequential, questions and answers. This implication which Goodson urges also defies logic and the understanding a reasonable person would bring to the situation. Essentially, Goodson is arguing that Goodson and any other reasonable person would feel that since Officer Reed asked me if Goodson had any weapons, and Goodson said “No”, when Officer Reed asked the next question, “Is it okay if I search you”, Goodson and any other reasonable person would respond “Yes”, confident that Officer Reed would *only* search for weapons, and, no matter what Officer Reed felt on the body, he would *only* pull out weapons from the body. That is not a reasonable expectation.

The standard for determining the scope of a suspect’s consent under the Fourth Amendment is that of objective reasonableness. *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 1803-1804 (1991). The question is what a typical, reasonable person would have understood by the exchange between the suspect and the officer. *Id.*; *see also State v. Thorpe*, 141 Idaho 151, 154, 106 P.3d 447, 480 (Ct.App. 2004) (*citing Jimeno*, 500 U.S. at 251). The scope of a search is generally defined by its expressed object. *Jimeno*, 500 U.S. at 251; *U.S. v. Ross*, 465 U.S. 798, 102 S.Ct. 2157 (1982). Goodson argues the

expressed object of the search, as expressed by Officer Reed, was a search for weapons. Amended Brief of Appellant, p. 9. This Court disagrees. The prior “question” regarded whether Goodson had any weapons. The expressed object of the search, as expressed by Officer Reed, was general and in no way limited other than by the prior, separate question. Goodson argues that because weapons were the expressed object of the search, a reasonable person would not have understood the consent to search to include the removal of non-contraband [non-weapon] items from Goodson’s person. *Id.* However, as stated by Judge Wayman at the suppression hearing, “there was no explicit limitation placed upon the consent to search, as expressed by Officer Reed.” Tr. p. 77, Ll. 18-19. Goodson’s answer of “Okay” to a question of whether Officer Reed could search him placed no explicit limitation on the consent to search, and Goodson does not contend that he ever withdrew consent. Therefore, the search in this case conformed with the limitations placed on the consent by Goodson, and that is “no limitations.”

B. Plain Feel Doctrine.

Goodson next argues that where an officer unlawfully expands the scope of a consented-to search, the “plain feel” doctrine applies. Amended Brief of Appellant, p. 9. Goodson argues Officer Reed knew the object he felt was a cigarette pack when he removed it from Goodson’s body, but that he searched the pack in spite of this knowledge and such is a violation of the “plain feel” doctrine. Amended Brief of Appellant, p. 12. The State argues Goodson’s pack of cigarettes was lawfully removed and inspected pursuant to *Jimeno*. Amended Respondent’s Reply Brief, p. 5. Because Goodson did not limit the search he had consented to, the State argues Officer Reed did not need to request separate permission to search the cigarette pack, just as the officer in *Jimeno* did not need to ask for separate permission to search the container in the car he had received consent

to search. *Id.* at 5-6, citing *Jimeno*, 505 U.S. 248, 252, 111 S.Ct. 1801, 1804.

An officer may frisk an individual if the officer can point to specific, articulable facts that would lead a reasonably prudent person to believe that individual may be armed and presently dangerous, and where nothing in the initial stages of the encounter dispels this belief. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct.1868, 1883 (1968). The *Terry* requirement for specific, articulable facts that an individual may be armed and dangerous is not present in the case of a consented-to search. In the case of a consented-to search, an officer must conform to the limitations placed on such consent. *State v. Thorpe*, 141 Idaho 151, 154, 106 P.3d 477, 480 (Ct.App. 2004). It is well settled that general, unlimited consent to search a car includes consent to search containers in the vehicle. *Jimeno*, 500 U.S. 248, 111 S.Ct. 1801 (1991); *State v. Zaitseva*, 135 Idaho 11, 13, 13 P.3d 338, 340 (2000). Before this Court now is the question whether the reasoning in *Jimeno* extends to searches of a person; that is, does general, unlimited consent to search an individual include consent to search containers on that individual?

This Court finds Goodson's general, unlimited consent to a search was voluntary and that the scope of that search was defined by the officer's expressed intent ("Is it okay if I search you"). Thus, Goodson's consent to a search of his person would include consent to search containers on him.

C. Voluntariness of Consent.

Voluntariness of the consent has not been argued by the parties, but this Court feels that since this appeal arises out of a discussion between Goodson and Officer Reed, voluntariness must be discussed as part of the appeal on the denial of the motion to suppress. This Court feels it is incumbent to discuss voluntariness, because other than the issue of "hot pursuit" (which is clearly not an issue in the present case), the issue of

voluntariness of consent given by Ballou's wife was the primary issue discussed by the Idaho Court of Appeals in *State v. Ballou*, 08.11 ICAR 524, 2008 Opinion No. 42 (Ct.App. May 22, 2008).

Voluntariness must be proven by the State by a preponderance of evidence and voluntariness is a determination that does not turn "on the presence or absence of a single controlling criterion." *Schneckloth v. Bustamante*, 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. Factors for the Court to consider in this regard include: the location and conditions of the consent, including whether it was at night; whether the police retained the individual's identification; whether the individual was free to leave; and whether the individual knew of his right to refuse consent. *State v. Stewart*, 145 Idaho 641, ___, 181 P.3d 1249, 1256 (Ct.App. 2008). (citations omitted).

In *State v. Jaborra*, 143 Idaho 94, 137 P.3d 481 (Ct.App. 2006), the Idaho Court of Appeals agreed with the district court judge 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 and 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 94, 98, 137 P.3d 418, 485. As in the instant case, the defendant in *Jaborra* was pulled over for a traffic stop. But unlike Goodson, Jaborra was asked whether officers could open a small yellow plastic box that rattled and had been in defendant's pocket. 143 Idaho 94, 96, 137 P.3d 418, 483. Having asked for permission to open the container, both officers on the scene stated that Jaborra nodded his head. *Id.* The Court of Appeals affirmed the order suppressing the evidence found in the pill box because the district court's finding that Jaborra's consent to the opening of the box was involuntary, was not clearly erroneous. 143 Idaho 94, 98, 137 P.3d 418, 485.

In *State v. Kerley*, 134 Idaho 870, 11 P.3d 489 (Ct.App. 2000), the Idaho Court of Appeals stated that "consent does not expunge the taint of unlawful police activity where the events are irrevocably intertwined." 134 Idaho 870, 874, 11 P.3d 489, 493. The Idaho Court of Appeals determined Kerley was unlawfully frisked and that based on the totality of the circumstances, a reasonable person would not have believed that the defendant was armed and dangerous. 134 Idaho 870, 873, 11 P.3d 489, 492. Therefore, Kerley's consent to search and the object the officer felt in Kerley's pants pocket "flowed directly from the officer's unlawful frisk", and the Idaho Court of Appeals reversed the district court's denial of Kerley's motion to suppress. 134 Idaho 870, 874, 11 P.3d 489, 493.

Here, Goodson has not claimed that the underlying stop for a traffic violation was somehow improper or that the encounter was not voluntary. It is unclear from the record exactly when the stop occurred as there is no time noted on the citation. Goodson has not made the argument that his consent was involuntary, only that his consent was limited to a search for weapons. Goodson has not claimed that his identification remained with the officer and it is unclear whether Goodson was free to leave or knew that he had a right to refuse consent. There is nothing in the record to indicate a lack of voluntariness.

Because Goodson gave consent to a search of his person, and such search was not limited by him to a search for weapons, there was no unlawful frisk. In considering the totality of the circumstances, and in light of Goodson having not made the argument that his consent was involuntary, there is no indication Goodson's will was overborne or that his capacity for self-determination was critically impaired.

D. *State v. Ballou.*

After Goodson's request to allow additional briefing to be submitted on *State v. Ballou*, 08.11 ICAR 524, 2008 Opinion No. 42 (Ct.App. May 22, 2008), Goodson's entire argument is: "When the basis for a search is consent, the state must conform its search to the limitations placed upon the right granted by the consent. *State v. Ballou*, ___ Idaho ___, 186 P.3d 696 (Ct.App. 2008)." Amended Brief of Appellant, p. 3. That is an accurate quote from *Ballou*. 186 P.3d 696, 704, 08.11 ICAR 524, 527. *Ballou* concerned the consent given by Ballou's wife, to search the apartment that she and Ballou shared, to search for Ballou's clothes. *Id.* The Idaho Court of Appeals held "A search for the clothing would encompass any part of the apartment where the clothing might be hidden." *Id.* The Court of Appeals held the officer's search of the entire apartment was reasonable and "it was reasonable for the officers to believe that they had consent to search the entire apartment." *Id.* The Idaho Court of Appeals noted that it is *Jimeno* that provides: "The standard for measuring the scope of consent under the Fourth Amendment is that of objective reasonableness—what would 'the typical reasonable person have understood by the exchange between the officer and the suspect.'" *Id.*

As determined by this Court above, Goodson's entire argument is based on a limitation of the scope of the search which was *implied* from Officer Reed's prior question and Goodson's answer regarding whether Goodson had any weapons. This Court simply

finds such an implication cannot reasonably be made. This Court finds “the typical reasonable person” would not have understood the exchange between Officer Reed and Goodson to limit the scope of consent of the search of Goodson’s person, to *only* weapons. Simply because the request to search Goodson’s person followed a question about weapons and an answer in the negative to that question does not convince this Court that consent to search the person was thus limited to a search for weapons. These were two separate, albeit sequential, questions and answers. This implication which Goodson urges also defies logic and the understanding a reasonable person would bring to the situation.

IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED for the reasons stated above, the decision of the Honorable Scott Wayman denying the Motion to Suppress is AFFIRMED. Goodson’s plea of guilty is valid, and his conviction stands. While no further action is anticipated, this matter is remanded to the Honorable Scott Wayman for any further proceedings.

DATED this 26th day of August, 2008.

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 2008 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Sean Walsh
Prosecuting Attorney – Jennifer Tinkey

Honorable Scott Wayman

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____
Deputy