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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,)
)
 vs.)
)
 FRANCISCO LEMUS WISNASKY,)
)
 Defendant.)
 _____)

Case No. **CRF 2009 5869**

**MEMORANDUM DECISION AND
ORDER DENYING DEFENDANT'S
MOTION TO SUPPRESS**

I. FACTUAL BACKGROUND.

According to the police report (attached to the State's brief), on March 22, 2009, Coeur d'Alene Police Officers Brumbaugh and Carroll responded to the 1400 block of Hattie in Coeur d'Alene, Idaho, after their dispatch officer indicated that defendant Francisco Wisnasky (Wisnasky) had discharged a firearm in the presence of Holland Lapp, the reporting party. The report indicates that the officers arrived on the scene nearly at the same time. When they arrived, Officer Brumbaugh contacted Ms. Lapp at 1409 East Hattie Avenue, while Officer Carroll went to Wisnasky's house at 1412 East Hattie Avenue, across the street, to speak with Wisnasky.

The report further states that Officer Carroll knocked on the front door of Wisnasky's residence, and Wisnasky opened the door. According to the police report, Officer Carroll asked Wisnasky to "step outside and speak" with him, which Wisnasky did. At the August

12, 2009, hearing, Officer Carroll testified he “*told*” Wisnasky to step outside. According to the report, Officer Carroll never entered Wisnasky's residence. At the August 12, 2009, hearing, neither Officer Carroll nor Officer Brumbaugh discussed this issue. Wisnasky also testified, and he certainly made no claim that Officer Carroll broke the threshold of Wisnasky’s front door. According to the police report, during the ensuing conversation, Wisnasky related information that, when viewed in concert with the information provided by other witnesses, ultimately led the officers to arrest him. Officer Carroll testified that after he told Wisnasky to step outside, Wisnasky complied and stepped out from his front door. Officer Carroll testified he and Wisnasky had a conversation which took place about ten feet from Wisnasky’s front door. Officer Carroll testified he did not make any threats to get Wisnasky to talk. Officer Carroll testified he first asked Wisnasky for his identification, and Wisnasky complied, giving Officer Carroll his Oklahoma driver’s license. Officer Carroll testified he then patted him down for weapons, and none were found on his person. Officer Carroll then asked Wisnasky about what had happened at his neighbor’s house, and Wisnasky gave his version which was similar in some ways but significantly different than the version of events that the reporting party Lapp was giving to Officer Brumbaugh at the very same time Wisnasky was being interviewed by Officer Carroll.

At the August 12, 2009, hearing, Meliassa Cozino testified. She stated she was living with Wisnasky at the time, and was inside the house when there was a knock on the door. She testified Wisnasky opened the door, an officer asked him his name, to which Wisnasky responded, then the officer demanded he go outside.

Wisnasky also testified at the August 12, 2009, hearing. Wisnasky testified he heard the banging on the door, answered the door, and a police officer was there.

Wisnasky testified the officer “asked me for my name” and then the officer said “You need to come outside with us”, which Wisnasky testified he did.

From the testimony and the police report, it is clear no gun was drawn by Officer Carroll, no threats were made by Officer Carroll. If, as the reporting party Lapp testified, Wisnasky had just discharged a pistol near Lapp’s head, Wisnasky would have had to know he was the target of a criminal investigation. However, as discussed below, that subjective perception is not the standard.

On June 8, 2008, Wisnasky filed a Motion to Suppress which also contained a memorandum. Wisnasky's motion to suppress seeks to suppress that conversation and any evidence gathered during and after the conversation. On August 11, 2009, the State filed its Brief in Opposition to Motion to Suppress. On August 12, 2009, an evidentiary hearing was held. At the conclusion of that hearing, counsel for both sides made oral argument, and each cited an additional case not cited in their briefs. Due to additional cases being cited in argument, this Court took the Motion to Suppress under advisement so that those cases could be reviewed. This case is scheduled for trial September 8, 2009.

Wisnasky claims the contact between himself and Coeur d’Alene police officers was an unlawful invasion by law enforcement into Wisnasky's residence. The State argues the contact was a consensual encounter between the officers and Wisnasky. Neither position is wholly supported by the police report, incorporated into these proceedings by the State’s brief. However, the contact was supported by reasonable suspicion, and thus, did not violate Wisnasky's Fourth Amendment rights.

II. ISSUES PRESENTED.

1. Was Wisnasky "detained" (under a Fourth Amendment analysis) during his conversation with Officer Carroll?
2. If he was detained, was his detention supported by sufficient reasonable suspicion?

III. 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).

IV. ANALYSIS.

A. Wisnasky Was Detained.

There is no evidence indicating Officer Carroll forced or compelled Wisnasky to talk with him. There is no evidence indicating Wisnasky attempted to discontinue the conversation. However, under the circumstances, as viewed through Wisnasky's eyes, it would be unreasonable to assume that Wisnasky felt he could close the door, leave, or in any other way discontinue the conversation. Thus, from Wisnasky's point of view, he was probably detained by Officer Carroll for the duration of their conversation.

While Wisnasky's counsel correctly states the burden of showing that a warrantless action was reasonable under the Fourth Amendment rests with the prosecution (*State v. Yeates*, 112 Idaho 377, 732 P.2d 346 (Ct. App. 1987)), the burden of showing that a

seizure occurred is on the defendant seeking to suppress evidence allegedly obtained as the result of an illegal action. *State v. Page*, 140 Idaho 841, 843, 103 P.3d 454, 456 (2004); *State v. Reese*, 132 Idaho 652, 654, 978 P.2d 212, 214 (1999).

To determine whether an encounter between law enforcement and private citizens is voluntary or a seizure, we must examine the totality of the circumstances to see whether a *reasonable* person would have felt free to terminate the encounter. *Page*, 140 Idaho 841, 843-44, 103 P.3d 454, 456-57. (emphasis added). Put another way, "[s]o long as a *reasonable* person would feel free to disregard the police and go about his business,' an encounter between police and an individual is consensual." *State v. Nickel*, 134 Idaho 610, 613, 7 P.3d 219, 222 (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 2386 (1991)). (emphasis added).

Even through the eyes of a reasonable person, Wisnasky was likely detained once Officer Carroll "told" him to step outside. At the August 12, 2009, hearing, Officer Carroll never testified (nor was he asked) what exact language he used when he "told" Wisnasky to step outside.

Wisnasky argues this case is similar to *State v. Cardenas*, 143 Idaho 903, 155 P.3d 704 (Ct.App. 2006). In that case, two sheriff deputies were looking for a female juvenile runaway named Sarah. They saw Cardenas in a car in a driveway. The deputies parked across the street, and as they walked toward Cardenas' car, Cardenas got out and began walking toward the house. A deputy told Cardenas "he needed to come speak to me" and Cardenas turned and came back. The deputy asked Cardenas if he knew Sarah; Cardenas said he did not. Further questioning occurred about the car, which led to consent to open the glove box, which led to discovery of stolen checks in the car and marijuana on Cardenas' person. 143 Idaho 903, 905, 155 P.3d 704, 706. The district court held "...the

encounter became unlawful when the police continued to detain Cardenas after he said he did not know the runaway, before he was handcuffed.” 143 Idaho 903, 906, 155 P.3d 704, 707. The Idaho Court of Appeals then engaged in a detailed analysis of when a person would feel they are free to leave, following which they determined that as soon as the deputy told Cardenas “he needed to come speak to me”, Cardenas was seized. 143 Idaho 903, 907, 155 P.3d 704, 708. And because that command was unlawful, the initial contact was not consensual. *Id.* The pertinent portion of Cardenas is as follows:

The state asserts that the encounter between Cardenas and the police was consensual, and therefore lawful, until Cardenas was handcuffed. The district court held that the encounter became unlawful when the police continued to detain Cardenas after he said he did not know the runaway, before he was handcuffed. Cardenas argues that the encounter became unlawful even earlier. He submits that his contact with the police began with an order which constituted an illegal seizure at the outset.

The Fourth Amendment to the United States Constitution, and its counterpart, Article I, Section 17 of the Idaho Constitution, guarantee the right of every citizen to be free from unreasonable searches and seizures. However, not all encounters between the police and citizens amount to seizure. *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 1879 n. 16, 20 L.Ed.2d 889, 905 n. 16 (1968); *State v. Page*, 140 Idaho 841, 843, 103 P.3d 454, 456 (2004); *State v. Jordan*, 122 Idaho 771, 772, 839 P.2d 38, 39 (Ct.App.1992); *State v. Knapp*, 120 Idaho 343, 346, 815 P.2d 1083, 1086 (Ct.App.1991); *State v. Zapp*, 108 Idaho 723, 726-27, 701 P.2d 671, 674-75 (Ct.App.1985). Only when an officer, by means of physical force or show of authority, in some way restrains the liberty of a citizen may a court conclude that a seizure has occurred. *Page*, 140 Idaho at 843, 103 P.3d at 456; *State v. Nickel*, 134 Idaho 610, 612-13, 7 P.3d 219, 221-22 (2000); *State v. Fry*, 122 Idaho 100, 102, 831 P.2d 942, 944 (Ct.App.1991); see, e.g., *State v. Rawlings*, 121 Idaho 930, 932, 829 P.2d 520, 522 (1992) (“An individual who is accosted by a police officer and has his freedom to walk away restrained has been seized.”). The United States Supreme Court, in *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 509 (1980), stated:

Examples of circumstances that might indicate seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, *or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.*

(emphasis added). See *State v. Gutierrez*, 137 Idaho 647, 651, 51 P.3d 461, 465 (Ct.App.2002) (“the officer's comments that followed after the

speeding warning were not a sociable exchange...."); *State v. Gomez*, 136 Idaho 480, 482, 36 P.3d 832, 834 (Ct.App.2001) (defendant was seized, the state conceded, when the detective ordered him to "hang up the phone ... [because] I need to talk to you about a warrant."); *State v. Zubizareta*, 122 Idaho 823, 827, 839 P.2d 1237, 1241 (Ct.App.1992) (discussing seizure which occurred in *McAfee*, 116 Idaho at 1008, 783 P.2d at 875, when officers, after awaking McAfee, directed him to step out of his van); *Fry*, 122 Idaho at 103, 831 P.2d at 945 ("[the officer] asked Fry what he was doing.... Unlike other cases in which the police request the subject's cooperation in answering questions, the inquiry here as to what Fry was doing did not give Fry the option of answering or not."); accord WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.4(a) at 433-34 (4th Ed.).

A seizure does not occur simply because a police officer approaches an individual on the street by asking if the individual is willing to answer some questions or by putting forth questions if the individual is willing to listen. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 2386, 115 L.Ed.2d 389, 398 (1991); *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 1323-24, 75 L.Ed.2d 229, 235-36 (1983). See *Page*, 140 Idaho at 843, 103 P.3d at 456 ("Officer Marshall asked Page if he could talk to him for a moment...."); *Zubizareta*, 122 Idaho at 828, 839 P.2d at 1242 ("[T]here is no doubt that the officer requested Zubizareta to turn off the motor, as opposed to ordering him to do so. There was no sign of force or authority beyond the officer's uniform to require Zubizareta to submit or to limit his ability to refuse. A parallel situation occurred when the officer asked Zubizareta to roll down the window. The request was not a seizure, although an order may have been.... Only when [the officer] told Zubizareta to remain seated did the fourth amendment apply."); accord LAFAVE, SEARCH AND SEIZURE § 9.4(a) at 433. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. *State v. Nelson*, 134 Idaho 675, 679, 8 P.3d 670, 674 (Ct.App.2000). Even when officers have no basis for suspecting a particular individual, they may generally ask the individual questions and ask to examine identification, but they may not make a demand. *Fry*, 122 Idaho at 102, 831 P.2d at 944. As long as police do not convey a message that compliance with a request is required, the encounter is deemed consensual and no reasonable suspicion is necessary. *Fry*, 122 Idaho at 102, 831 P.2d at 944. Unless and until there is a detention, there is no seizure within the meaning of the Fourth Amendment and no constitutional rights are infringed. *Royer*, 460 U.S. at 498, 103 S.Ct. at 1324, 75 L.Ed.2d at 236-37.

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. *Page*, 140 Idaho at 843, 103 P.3d at 456; *State v. Reese*, 132 Idaho 652, 654, 978 P.2d 212, 214 (1999); *State v. Fuentes*, 129 Idaho

830, 832, 933 P.2d 119, 121 (Ct.App.1997). Taking into account all the surrounding circumstances, the critical inquiry is whether a reasonable person would have felt free to disregard the police, decline the officer's request or otherwise terminate the encounter. *Page*, 140 Idaho at 843-44, 103 P.3d at 456-57; *Nickel*, 134 Idaho at 613, 7 P.3d at 222; *Reese*, 132 Idaho at 653, 978 P.2d at 213; *Gutierrez*, 137 Idaho at 650, 51 P.3d at 464; *Nelson*, 134 Idaho at 679, 8 P.3d at 674; *State v. Pick*, 124 Idaho 601, 604, 861 P.2d 1266, 1269 (Ct.App.1993); *Jordan*, 122 Idaho at 774, 839 P.2d at 41; *Fry*, 122 Idaho at 103, 831 P.2d at 945. We must determine whether the circumstances of an encounter are "so intimidating as to demonstrate that a reasonable person would have believed he [or she] was not free to leave if he [or she] had not responded." *Nelson*, 134 Idaho at 678, 8 P.3d at 673 ("[M]erely motioning a person to approach a police officer, unaccompanied by verbal communication or show of force, is not inherently coercive."). Compare *State v. Bainbridge*, 117 Idaho 245, 248, 787 P.2d 231, 234 (1990) ("At this point *no* reasonable person would have thought they were free to leave. The officers' "suggestion" [to go to the station house] not only reflected a desire for immediate action, but it directed the course of action to be taken.") with *Nickel*, 134 Idaho at 613, 7 P.3d at 222 (course was not altered by officer because vehicle was already parked and police did not prevent the citizen from departing). Our critical inquiry presupposes an innocent person, which ensures that the scope of Fourth Amendment protection does not vary according to a citizen's state of mind. *Nelson*, 134 Idaho at 679, 8 P.3d at 674. Thus, the hallmark of a seizure is the objective element of compulsion to regard the police, honor an officer's request or continue the police-citizen encounter. *State v. Ferreira*, 133 Idaho 474, 480, 988 P.2d 700, 706 (Ct.App.1999).

When the deputy told Cardenas "he needed to come speak to [the deputy]," under the circumstances, Cardenas was seized. As in *Zubizareta* and *McAfee*, the officer's language was inherently coercive such that reasonable people would not believe they were free to go about their business. Because it was the result of an unlawful command, the initial contact was not consensual. We hold that the initial detention of Cardenas was unlawful because it was not supported by reasonable suspicion. Accordingly, Cardenas' consent to search, given during the unlawful detention, was invalidated by taint of illegality, and the stolen checkbooks were the unattenuated fruit of the illegal detention. See *Gutierrez*, 137 Idaho at 653, 51 P.3d at 467; *State v. Zavala*, 134 Idaho 532, 536, 5 P.3d 993, 997 (Ct.App.2000).

143 Idaho 903, 906-08, 155 P.3d 704, 707-09. This Court finds the present situation where Officer Carroll "Told him [Wisnasky] to step outside", is more like those situations noted in *Cardenas*, where "...the detective ordered him to "hang up the phone ... [because] I need to talk to you about a warrant", or "when officers, after awaking McAfee, directed him to step

out of his van”. 143 Idaho 903, 906, 155 P.3d 704, 707. However, as shown below, Officer Carroll was lawfully present investigating a shooting. That conversation, and even the “command” of Officer Carroll that Wisnasky step outside, was done with “reasonable suspicion”, which the Idaho Court of Appeals found lacking in *Cardenas*.

The State argues this case is more like *State v. Silva*, 134 Idaho 848, 11 P.3d 44 (2000). That case involved a traffic stop where the officer “...asked Silva to step out and come to the rear of truck”, and then, after explaining the citation to Silva but before handing Silva the citation, the officer “...asked, in a conversational tone, ‘Do you mind if I take a look through your truck. Are you alright with that?’” 134 Idaho 848, 851, 11 P.3d 44, 47. Silva gave his consent. *Id.* With all due respect to the State’s argument, this Court disagrees, and finds Officer Carroll telling Wisnasky to step outside is much more akin to the situation in *Cardenas* and cases cited therein, compared to the “asking” and “conversational tone” involved in *Silva*.

The State asserts no seizure actually occurred, and that the contact between Officer Carroll and Wisnasky was a consensual encounter. The burden is on the defendant to show that a reasonable person under similar circumstances would have not felt free to leave. Wisnasky has met that burden due solely to the nature of Officer Carroll’s demand. Additionally, it was evening, (the reports submitted by the police do indicate that Officer Carroll responded an unstated period of time after 10:00 p.m.), and more than one officer was involved, albeit the others were across the street with the reporting party.

B. Even if Wisnasky Was Detained, the Detention was an Investigative Detention Supported by Reasonable Suspicion.

This investigative detention was supported by reasonable suspicion on the part of the officers, and therefore was not violative of Wisnasky's Fourth Amendment rights. This was the determining factor in *Cardenas*. 143 Idaho 903, 906-08, 155 P.3d 704, 707-09. A

trial court must, in evaluating whether an investigative detention is reasonable, determine whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *State v. Roe*, 140 Idaho 176, 181, 90 P.3d 926, 931 (Ct.App.2004); *State v. Parkinson*, 135 Idaho 357, 361, 17 P.3d 301, 305 (Ct.App.2000). "An investigative detention is permissible if it is based upon specific articulable facts which justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity. Such a detention must be temporary and last no longer than necessary to effectuate the purpose of the stop." *State v. Finnicum*, 206 P.3d 501, 503 (Ct. App. 2009) (internal citations omitted).

When Officer Carroll arrived on the scene, he had been informed by a fellow officer that a specific, identified person (Holland Lapp, living at 1409 East Hattie Avenue), had reported that Wisnasky, a neighbor known to Lapp, had just discharged a firearm within the city limits of Coeur d'Alene. The discharge alone would be a violation of Idaho law. The reporting party specifically identified Wisnasky, and the reporting party gave her contact information to the dispatch officer, alleviating any "anonymous informant" issue and alleviating any circumstance where the officers would have to go door to door trying to find Wisnasky. Based on this information, Officer Carroll reasonably believed that Wisnasky had committed a crime, Wisnasky was located in the house in which Officer Carroll found him, and Wisnasky immediately identified himself to Officer Carroll. During his investigation of the report, Officer Carroll asked Wisnasky questions reasonably related to the report he had received from his dispatch officer, such as "what happened at 1411 Hattie?" and the circumstances of the reported firearms discharge. These actions were reasonably related in scope to the information supporting the initial contact, and therefore were not violative of Wisnasky's Fourth Amendment rights.

V. CONCLUSION AND ORDER.

Because Officer Carroll's investigative detention of Wisnasky was supported by reasonable suspicion of wrongdoing, Officer Carroll did not violate Wisnasky's Fourth Amendment rights.

IT IS HEREBY ORDERED Wisnasky's motion to suppress the evidence gathered during and as a result of this detention is DENIED.

DATED this 17th day of August, 2009

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 2009 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Dennis D. Reuter
Prosecuting Attorney – David Whipple

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____
Deputy