

FILED _____

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/Appellant,)

vs.)

ANTHONY MATANZO,)

Defendants/Respondents.)

Case No. **CRM 2008 16665**

**MEMORANDUM DECISION AND
ORDER ON APPEAL**

I. PROCEDURAL HISTORY AND BACKGROUND.

This matter is on appeal from a decision of Magistrate Judge Quentin Harden denying defendant Anthony Matanzo's (Matanzo) motion to suppress. Magistrate Judge Harden heard the motion on March 19, 2009, and on the record denied the motion on that date. Tr. pp. 62-64. An Order Denying Defendant's Motion to Suppress was filed on March 25, 2009. Following a conditional (still maintaining his ability to pursue the appeal of the denial of his Motion to Suppress) guilty plea to misdemeanor possession of marijuana less than three ounces, and possession of drug paraphernalia, Matanzo was sentenced on March 30, 2009, by Magistrate Judge Scott Wayman. On April 28, 2009, Matanzo timely filed his Notice of Appeal, questioning: "Whether the Court abused its discretion by denying Defendant's motion to suppress." Notice of Appeal, p. 2. Each party filed a

memorandum on appeal, and on November 5, 2009, this Court heard oral argument on appeal. At the conclusion of oral argument, this Court announced its decision that the denial of the motion to suppress was reversed, and indicated this Court would issue a decision to clarify matters for law enforcement in the future. This was a request made by counsel for plaintiff.

On August 2, 2008, two law enforcement officers responded to a call from dispatch regarding a domestic disturbance and possible physical disturbance at Matanzo's apartment. Tr. p. 5, LI. 5-25. Officer Buhl (Buhl) testified he knew nothing about the reporting party. Tr. p. 6, LI. 8-13. Upon arrival, the officers knocked and could hear people inside the apartment. Buhl testified Amber Weygandt (Weygandt), Matanzo's girlfriend, looked out of the shades and then answered the door after an amount of time (10-15 seconds) which aroused the officers' suspicion. Tr. p. 7, L. 9 - p. 8, L. 16. This time estimate is consistent with Weygandt's testimony. Tr. p. 37, LI. 18-22. Officer Buhl asked Weygant to step outside (which she apparently did), and Buhl asked her if anyone else was inside. Tr. p. 8, LI. 18-24. Weygandt stated her boyfriend was inside. *Id.* Buhl noted Weygandt appeared calm, had no bruises or marks on her body, and did not appear disheveled. Tr. p. 14, LI. 9-14. "She just - you know, like a normal person answered the door. Hi." Buhl asked, Weygandt if other people were present in the home, and Weygandt informed him Matanzo was in the apartment. Buhl ordered Matanzo to exit the apartment. Tr. p. 9, LI. 1-12. Matanzo came outside. Tr. p. 13, LI. 22-25. Buhl noted that Matanzo was also not bruised or disheveled and, just like Weygandt, Matanzo appeared calm. Tr. p. 14, LI. 22-24.

Buhl testified at the suppression hearing that he had made previous contact within a year of August 2,2008, with Matanzo and Weygandt at their apartment and

knew the following: Matanzo and Weygandt were the two individuals who resided at the apartment; Matanzo worked for Buck Knives; and there were numerous knives (fifty to one hundred in the officer's estimation) in the apartment. Tr., p. 9, L. 16 - p. 10, L. 25. Buhl testified that when Buhl asked Matanzo and Weygandt whether anyone else was in the apartment, both answered "no." Tr. p. 11, LI. 16-20. Weygandt testified she couldn't recall if or when Buhl asked her that question, and she testified she didn't recall saying "no", and that if Buhl did ask she would have said "yes", because that was the truth. Tr. p. 42, LI. 2-23.

Buhl then stepped approximately two feet into the apartment and saw a male individual sitting in the living area. Tr. p. 11, L. 21 - p. 12, L. 9. Buhl thereafter conducted a "protective sweep" of the apartment and discovered marijuana and paraphernalia. Tr. p.12, L. 10-p. 13, L. 13, L.21.

After performing his "protective sweep," Buhl confronted Matanzo and Weygandt with the contraband he had located and requested consent for a more thorough search, to which Matanzo and Weygandt assented. Tr. p. 15, L. 8 - p. 16, L. 22.

Matanzo now seeks an order of this Court holding Magistrate Judge Harden erred in denying the motion to suppress because Buhl's warrantless entry was not justified under a warrant exception and evidence was obtained as a result of the warrantless entry into the apartment.

II. STANDARD OF REVIEW.

Reviewing courts examine the record of the magistrate court independently of, but with due regard for the district court's intermediate appellate decision. *State v. Bowman*, 124 Idaho 936, 939, 866 P.2d 193, 196 (Ct.App. 1993). "The standard of

review applicable to questions of law is one of deference to factual findings, but we freely examine whether statutory and constitutional requirements have been met in light of the facts found." *State v. Hedges*, 143 Idaho 884, 886, 154 P.3d 1074, 1076 (Ct.App. 2007); *see also State v. Cantrell*, 139 Idaho 409, 411, 80 P.3d 345, 347 (Ct.App. 2003).

III. ANALYSIS.

Matanzo argues exigent circumstances did not exist sufficient to justify the initial entry into his home, which in turn led to Buhl's discovery of a third person in the living area, which led to the discovery of the contraband, which preceded the consent. Brief of Appellant, pp. 5-6. Matanzo notes neither he nor Weygandt had any injuries, neither appeared scared, and there were no facts to suggest an altercation had taken place; Matanzo also cites case law holding a report of domestic violence is not in itself sufficient to amount to exigent circumstances. *Id.*, p. 5, citing *State v. Weidenheft*, 136 Idaho 14, 16, 27 P. 3d 873, 875 (Ct.App. 2001). Matanzo goes on to argue that, because Buhl was not confronted with any illegal conduct or evidence to suggest an armed and dangerous person was inside the apartment who would destroy evidence, the protective sweep exception to the warrant requirement is not applicable. *Id.*, p. 7. Matanzo concludes the State failed to meet its burden of showing a reasonable, articulable suspicion of danger to law enforcement or imminent destruction of evidence, and thus, Buhl's entry into the apartment was unlawful and any evidence obtained as a result must be suppressed. *Id.*, pp. 6-7.

In response, the State differentiates between Buhl's initial entry two feet into the apartment (where he noted the third individual) and the protective sweep which followed. Brief of Respondent, p. 5. The State notes that after entering and seeing the third individual, Buhl performed a protective sweep and found marijuana and

paraphernalia (presumably in plain view). *Id.* After finding contraband, Buhl asked for and obtained consent to search the apartment and found additional controlled substances and paraphernalia. *Id.* The State cites case law in support of the position that Weygandt's denial that anything was wrong is not sufficient to preclude Buhl from entering the apartment to confirm her claim. *Id.*, p. 6, citing *State v. Pearson-Anderson*, 146 Idaho 847, 850, 41 P.3d 275, 278 (Ct.App. 2001). The State argues once Buhl checked to ensure Matanzo's and Weygandt's claims that everything was alright were true, by entering two feet into the apartment, he saw a third individual in the apartment and realized Matanzo's and Weygandt's claims that no one else was present were false. *Id.*, pp. 7-8.

As soon as the officer was able to see the living room area, he saw a person sitting on a couch. That clearly communicated to the officer that the claims of Appellant and Ms. Weygandt that no one else was inside the residence were false. That realization called into question everything the officer had been told by Appellant and Ms. Weygandt. A heretofore unknown person in an apartment full of knives could objectively be perceived as a safety risk. A protective sweep of the rest of the apartment was justified to determine whether other unknown persons were there and posing a similar potential safety risk.

Id., p. 8. The State then argues the fruit of the poisonous tree doctrine should not apply to the contraband discovered because, to the extent the initial entry was unlawful, it only resulted in discovery of a third person; discovery of this third person, in turn, justified a protective sweep which turned up contraband and a subsequent search was pursuant to consent given. *Id.*, pp. 9-10.

The State's argument above begins: "As soon as the officer was able to see the living room area, he saw a person sitting on a couch." *Id.*, p. 9. The problem with that argument, and thus, everything that follows, is that it assumes Buhl had a right to enter

the dwelling. Buhl could not see the person sitting on the couch until he entered the dwelling.

The Fourth Amendment safeguards the right of people to be secure in their homes against unreasonable searches and seizures, and an officer's warrantless entry into a home is presumptively unreasonable. *Welsh v. Wisconsin*, 466 U.S. 740, 748, 104 S.Ct. 2091 (1984); *State v. Curl*, 125 Idaho 224, 225, 869 P.2d 224, 225 (1993). An exception to the warrant requirement is presence of exigent circumstances. *Curl*, 125 Idaho 224, 225, 869 P.2d 224, 225; *Payton v. New York*, 445 U.S. 573, 589-90, 100 S.Ct. 1371 (1980). "The unifying question, in determining whether exigent circumstances exist, is whether the facts reveal 'a compelling need for official action and no time to secure a warrant.'" *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949 (1978). Here, the exigency identified by the State, and presumably relied upon by Judge Harden, was Buhl's knowledge that between fifty and one hundred knives were inside the residence. Brief of Respondent, p. 7. Additionally, Buhl testified he had been to the Matanzo/Weygandt apartment previously on domestic violence-related calls. Tr., p. 9, Ll. 16-22.

In *State v. Mitzel*, 685 N.W.2d 120, 127 (N.D. 2004), a Supreme Court of North Dakota decision, citing two Idaho cases, the Court lists numerous cases involving exigent circumstances in light of domestic violence calls to law enforcement. See *State v. DeCoteau*, 592 N.W. 579, 584-85 (N.D. 1999) (Finding anonymous report of domestic disturbance at the low end of the reliability scale and where officers were not confronted with any disturbance and were given a reasonable explanation regarding a broken window, facts did not establish an emergency requiring swift action to prevent imminent danger to life or property.); *Tamborino v. Superior Court*, 41 Cal.3d, 919, 226

Cal.Rptr. 868, 719 P.2d 242,244 (1986) (where officer observed wounded and bleeding person and there had been a report of robbery, officer was justified in searching home for potential victim.); *State v. Sailas*, 129 Idaho 432, 925 P.2d 11 31 (Ct.App. 1996) (exigent circumstances found where officers saw blood on woman's hand and nose and domestic disturbance continued in officers' presence); *Weidenheft*, 136 Idaho 14, 27 P.3d 873 (exigent circumstances found where 911 call was made, police observed injuries, and the person answering the door was visibly upset); *People v. Mascarenas*, 972 P.2d 71 7 (Colo.Ct.App. 1998) (exigent circumstances found where police observed injuries.); *Fletcher v. Town of Clinton*, 196 F.3d 41 (1st Cir. 1999) (exigent circumstances found where restraining order was in place and there had been prior conduct with the alleged abuser.); *State v. Greene*, 162 Ariz. 431, 784 P.2d 257 (1989) (exigent circumstances found where the victim informed police she had been beaten.); *State v. Lynd*, 54 Wash.App. 18, 771 P.2d 770 (1989) (exigent circumstances found where there had been a 91 1 hang-up).

Here, Judge Harden notes a report was received by dispatch, [it is unclear who contacted law enforcement, no information about the reporting party was provided at the suppression motion hearing] and Buhl responded to Matanzo's home, where he had previously responded to another report of domestic violence in the previous year, and where he knew Matanzo worked for Buck Knives and owned "a good collection of knives." Tr., p. 63, LI. 1-10. Regarding the first two-foot entry into the apartment, Judge Harden states:

After [Buhl] arrived, he knocked. Amber answered the door, and shortly thereafter, Mr. Matanzo came out as well, and the door was closed. The officer indicated that he asked if anyone else was inside and that the parties responded no. He stepped inside and observed

another male, and thereafter he made a protective sweep of the residence.

Tr., p. 63, LI. 12-1 8. In light of the discovery of the other person, Judge Harden states, "And I must say I am persuaded that it was reasonable under the circumstances to check and make sure that there was no one else in the house ..." Tr., p. 63, LI. 23-25. However, there are no facts to support that conclusion.

In the course of responding to a situation, once exigent circumstances arise, they might also disappear depending upon information and facts later received. It could be that Buhl had exigent circumstances (report of domestic violence, Matanzo known to possess a lot of knives) to skip the knocking on the front door and instead break down the door and enter the apartment. That is not what happened. Buhl arrived, and exigent circumstances were certainly in place to allow Buhl to knock on the door, require Weygandt to come outside, question her, require Matanzo to come outside and question him. But when both were calm, both were unharmed, both were cooperative, exigent circumstances evaporated. At that point in time, Buhl had no reason, let alone no exigent circumstances, to allow him to do what he did next, step inside the apartment. At that point in time, Buhl could have asked either Matanzo or Weygandt for consent to enter the apartment. He did not. After Matanzo and Weygandt told Buhl there was no one else in the apartment, had Buhl *later* heard someone moving in the apartment, or had he seen a third person through a window, exigent circumstances likely would have *arisen again*. Had dispatch told Buhl there was a reported third person, exigent circumstances *would have never disappeared*. But these scenarios did not occur. Buhl was there to investigate a domestic disturbance between these two people. And even though Buhl had on one prior occasion investigated similar conduct

before and knew Matanzo possessed a lot of knives, once both Weygandt and then Matanzo cooperated with his directive to come outside, and after observing both to appear calm and unhurt, Buhl no longer had exigent circumstances.

Clearly, witness credibility, the weight to be given to their testimony and the inferences to be drawn from the evidence are all matters solely within the province of the trial court. *Larkin v. State*, 15 Idaho 72, 764 P.2d 439 (Ct.App. 1988); *Campbell v. State*, 130 Idaho 546, 549, 944 P.2d 143, 146 (Ct.App. 1997). In its appellate role, this Court cannot properly reweigh conflicting evidence or substitute its judgment for the lower court's on these matters of credibility and weight. *State v. Bettweiser*, 143 Idaho 582, 588, 149 P.3d 857, 863 (Ct.App. 2006). In this case, there are no pertinent facts in dispute. Most of Weygandt's testimony corroborates Buhl's testimony. The only inconsistencies were that Weygandt testified she did not look out the window before answering Buhl's knock, and that she did not recall Buhl asking her about a third person in the apartment. Judge Harden obviously resolved those inconsistencies in Buhl's favor, and that finding must stand.

In his ruling on the record, Judge Harden identifies the exigencies as: a verbal domestic call coming into dispatch, the call possibly being physical, Buhl's having previously been at the residence for a domestic call, but having no evidence of that call being verbal or physical, Buhl's knowing where Matanzo worked, and Buhl knowing Matanzo had a knife collection. Judge Harden states only that upon being told no one else was in the apartment, Buhl "stepped inside and observed another male." Tr., p. 63, Ll. 16-17.

The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S.

297, 313, 92 S.Ct. 2125, 2134 (1972). In the present case, the State relies in large part upon *State v. Pearson-Anderson*, 136 Idaho 847,41 P.3d 275 (Ct.App. 2001).

However, the facts of *Pearson-Anderson* vary greatly from those in the instant matter. *Pearson- Anderson* involved a 911 hang-up and the Idaho Court of Appeal's held a 911 hang-up is qualitatively different from a regular emergency call because officers know nothing about those involved upon arrival at the scene; therefore, officers are not required to simply take the word of a person at the scene of a 911 hang-up. 136 Idaho 847,850,41 P.3d 275, 278. In a 911 hang-up, the location of the residence from which the call emanates is certain, and, presumably, it is the person requesting assistance who made the call and hung up for some reason. In the present case, we know nothing about the reporting party, where the reporting party was located or how far away that location was from Matanzo and Weygandt. We also know nothing about what the reporting party observed or what that person's motives were in reporting this disturbance. Thus, a 911 hang-up creates more certainty to the call than a third party, and the nature of a 911 hang-up creates its own unique exigencies. Further, *Pearson-Anderson*'s explanation to law enforcement about her continuing to struggle with her boyfriend after the officer's arrival involved a third-party who had been the reported cause of the fight. This explanation raised the possibility of third-party involvement and the officers were justified in entering the home to see if any third-party needed help. *Id.*

Here, there was no 911 call or hang-up, no continuing altercation, no blood on either Matanzo or Weygandt, no protective order, and no signs at all of any distress. Judge Harden did not specifically discuss what facts, if any, existed justifying the initial entry. Judge Harden only found it reasonable for Buhl to have entered the apartment to ensure no one else was in the home once Buhl had already opened the door and

entered, discovering the third person. Although Judge Harden's fact findings must be given deference, this Court must engage in an analysis regarding exigent circumstances sufficient to justify Buhl's initial entry, as this was not previously done.

Exigencies justifying warrantless entry must "warrant a man of reasonable caution in the belief that the action taken was appropriate." *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S.Ct. 1684 (1990). "While the claim of emergency must be scrutinized to insure that it is not mere pretext for entries and searches that would otherwise fall under the requirement for a warrant, nonetheless courts should...avoid second-guessing police decisions made in legitimate belief that life may very well be at stake." *State v. Monroe*, 101 Idaho 251, 255, 61 P.2d 1036, 1040 (1980) quoting *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880 (1968). Objectively, Buhl was confronted with Weygandt who took ten to fifteen seconds to open the door after looking out the window; Matanzo who exited the apartment upon being told to told so by Buhl; both Matanzo and Weygandt appeared calm; and neither displaying any marks on their bodies or disheveled clothing. No report regarding any third-persons is found in the record, and neither Matanzo nor Weygandt mentioned a third person, going so far as to state no other person was in the apartment (differentiating the facts of this case from those in *Pearson-Anderson*). In *State v. Reynolds*, 146 Idaho 466, 197 P.3d 327 (Ct.App. 2008), the Idaho Court of Appeals found no exigent circumstances where the only factor suggesting a possible exigency was a report that Reynolds' wife was being held against her will, but by the time the officers arrived, Reynolds was standing outside the house and the front door was ajar. 146 Idaho 466, 471, 197 P.3d 327, 332. "With the couple thus separated, it was apparent that if there was a woman in the house, she was under no immediate risk of harm from Reynolds while he was outside

being questioned by an officer." *Id.* Similarly, in the instant case, having arrived at the apartment in which to Buhl's knowledge only Matanzo and Weygandt resided, and where Weygandt and Matanzo were now outside, calm and unhurt, being questioned by an officer, there were no facts confronting Buhl to suggest an emergency existed and a life may well be in peril. There are no facts for a reasonable person in Buhl's position to have felt opening the door to the apartment and entering was reasonable under the circumstances.

Because the initial entry was likely not supported by exigencies excusing the warrant requirement, the subsequent protective sweep (performed once Buhl discovered a third person in the apartment) was also improper. A protective sweep is a valid exception to the warrant requirement where a suspect is arrested and detained in a residence, but the officer has a reasonable, articulable suspicion that "the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 334, 110 S.Ct. 1093, 1098 (1990). Subsequent to *Buie*, courts have expanded protective sweeps to be applicable even before a suspect is formally arrested and where an arrest occurs outside of a residence. *State v. Revenaugh*, 133 Idaho 774, 777-78, 992 P.2d 769, 772-73 (1999). It was during his "protective sweep" that Buhl found contraband, presumably in plain view. The plain view doctrine, in turn, justifies a warrantless seizure only where two requirements are met: (1) the officer must *lawfully* make an intrusion or otherwise properly be in a position to observe a particular area, and (2) it must be immediately apparent that the item observed is evidence of a crime or otherwise subject to seizure. *State v. Northover*, 133 Idaho 655, 663 n. 2, 991 P.2d 380, 388 n. 2. (Ct.App. 1999) (citing *State v. Hagedorn*, 129 Idaho 155, 159, 922 P.2d 1081, 1085 (Ct.App. 1996)). (emphasis added).

In his concurring opinion in *Pearson-Anderson*, then Chief Judge Schwartzman wrote:

I write separately in this case, just as I did in *State v. Weidenheft*, 136 Idaho 14, 17-1 8, 27 P.3d 873, 876-77 (Ct.App. 2001), to again voice my "constitutional concern" that domestic violence cases do not, *ipso facto*, give the police *carte blanche* to conduct a general exploratory search or protective sweep of the entire premises in every case as a matter of standard operating procedure.

Pearson-Anderson, 136 Idaho 847, 851, 41 P.3d 275, 279 (Ct.App. 2001)

(Schwartzman, J., concurring). In the instant matter, Buhl was not arresting Matanzo or Weygandt. As discussed above, Buhl could not *lawfully* make the intrusion into the apartment as there were no exigent circumstances at the time; and a protective sweep is not permitted unless an officer can point to objectively reasonable, specific, articulable facts that the place to be searched harbors an individual posing a threat to those on the scene. *State v. Schaffer*, 133 Idaho 126, 131, 982 P.2d 961, 966 (Ct.App. 1999) (citing *Buie*, 494 U.S. 334, 337, 110 S.Ct. 1098, 1099)). No facts in the record indicate Buhl had an objectively reasonable articulable suspicion justifying a search of the apartment. Buhl states his reasons for entering to perform a protective sweep were:

Due to the fact they lied to me about nobody else being in the residence, finding another person in there, all the weapons that were in there, I did a protective sweep of the residence to make sure there was no other people in there.

Tr., p. 12, 11. 14-18. This reasoning is sound, but the reasoning presupposes Buhl was *lawfully* in the home to discover the third person present there. Buhl's articulated suspicion to enter the home was not reasonable as all parties known to him were outside the residence, in close proximity to Buhl, cooperative and unhurt. Buhl did not testify as to Matanzo or Weygandt posing any danger to those on the arrest scene.

Thus, although the contraband Buhl found was easily identifiable as contraband, at the time Buhl viewed the contraband, Buhl was where he could not lawfully be at that time.

Finally, as to Buhl's "consent search", the State notes that following the "protective sweep" (during which Buhl saw items he immediately recognized as controlled substances and paraphernalia):

... the officer spoke with both Appellant and Ms. Weygandt further and obtained consent from each of them to enter the residence to search for evidence of controlled substances and paraphernalia. In that consented-to search additional items of controlled substances and paraphernalia were located.

Brief of Respondent, p. 5. Matanzo argues: "Officer Buhl sought and obtained permission to search the apartment only after he informed Matanzo and Weygandt that contraband had already been found." Brief of Appellant, p. 2. That argument is supported by the record. Buhl's testimony was as follows:

Q. Did you ask them if you could search the apartment?

A. I did.

Q. What did they say?

A. Yes.

Q. Both of them said yes?

A. Correct.

Q. Did you say anything else to them before you asked for their consent to search?

A. Not that I recall.

Q. How did you ask them?

A. Verbally. Just said just do you have stuff in your apartment, and the last time I was there I also found a bunch of stuff in their apartment so they have a history of it, and so I just asked them, "I know that you have stuff in your apartment, I've seen more than what you've told me you have, can I have your permission to search it," and they said yes. Both of them.

Tr. p. 15, L. 23 -p. 16, L. 16.

Thus, there are three glaring problems with this consent. First, it was given after Buhl had illegally entered the apartment. Second, it was given in response to Buhl's

statement about already finding "a bunch of stuff" in the apartment, the finding of which occurred while he was illegally in the apartment. Third, it was given in response to Buhl's statement that he knew there was even more stuff: "I know that you have stuff in your apartment, *I've seen more than what you've told me you have ...*" (emphasis added). This was not freely-given consent. Because Buhl was there unlawfully in the first place, that unlawful presence and the request for consent to search are "irrevocably intertwined." Also, because Buhl told them he had already seen more than what they had told him about, the consent given under duress or coercion.

While a search may be rendered reasonable by an individual's consent, the state has the burden of demonstrating consent by a preponderance of the evidence. *State v. Kilby*, 130 Idaho 747, 749, 947 P.2d 420,422 (Ct.App. 1997). The State must show consent given was not the result of duress or coercion, either direct or implied. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248, 93 S.Ct. 2041, 2058 (1973); *State v. Whiteley*, 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct.App. 1993). However, "consent 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)). Where a court determines consent was procured through exploitation of unlawful police conduct, the taint of the unlawful conduct will not be purged from the discovered evidence by consent. See *Wong Sun v. United States*, 371 U.S. 471,478-88, 83 S.Ct. 407, 412-18 (1963).

Relevant factors for the Court to consider in evaluating whether unlawful police activity is intertwined with the consent received include: the length of time between

consent and arrest; the presence of intervening circumstances; and the purpose and flagrancy of the official misconduct. *Taylor v. Alabama*, 457 U.S. 687, 698, 102 S.Ct. 2664, 2671 (1982) (discussing whether a confession was an act of free will so as to purge it of the primary taint of an illegal arrest).

Here, the State has identified for the Court no intervening circumstances which may serve to purge the taint of the initial, unlawful two-foot entry into Matanzo and Weygandt's apartment, nor had any appreciable time elapsed between Buhl's unlawful entry and the consent. In *Kerley*, the Court of Appeals determined that where consent to remove an object from the defendant flowed directly from the officer's unlawful frisk, and where no appreciable time elapsed between the frisk and the consent, the two events were so irrevocably intertwined that the consent did not purge the taint of the unlawful frisk. 134 Idaho 870, 875, 11 P.3d 489,494. See also *State v. Baxter*, 144 Idaho 672, 682, 168 P.3d 1019, 1029 (Ct.App. 2007) (holding illegal frisk and consent were irrevocable intertwined where request to search a wallet flowed directly from discovery of the wallet through an unlawful frisk). Given these facts, the consent given by Weygandt and Matanzo was irrevocably intertwined with Buhl's unlawful conduct of stepping into the residence.

IV. CONCLUSION AND ORDER.

For the reasons stated above, the decision of Judge Harden denying Matzano's motion to suppress is reversed.

IT IS HEREBY ORDERED THAT the March 19,2009, decision of Judge Harden denying Matanzo's motion to suppress (as set forth in the March 25,2009, Order Denying Defendant's Motion to Suppress) is REVERSED. This matter is REMANDED to

Magistrate Division where Matanzo will be allowed to withdraw his guilty plea to the misdemeanor charges of possession of a controlled substance (marijuana less than three ounces) and possession of drug paraphernalia, and those charges must be dismissed.

DATED this 12th day of November, 2009

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

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

Defense Attorney – Sean Walsh
Prosecuting Attorney – Wes Sommerton/Roy Gowey

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____
Deputy