STATE OF IDAHO)
County of BONNER)ss

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AT_____ O'clock _____M
CLERK, 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 BONNER

STATE OF IDAHO,

Plaintiff,

vs.

MATTHEW GILBERT SCOTT,

Defendant.

Case No. **CR 2008 97**

MEMORANDUM DECISION AND ORDER ON APPEAL

I. PROCEDURAL HISTORY AND BACKGROUND.

This matter is on appeal from a decision of Judge Michael Griffin in the Magistrate's Division granting defendant Matthew Gilbert Scott's (Scott) Motion to Suppress. Judge Griffin heard Scott's motion on June 5, 2008, and granted the motion in his decision filed on June 6, 2008. The plaintiff State of Idaho (State) timely filed its Notice of Appeal from that decision on July 3, 2008. Both parties briefed the issue on appeal, and oral argument on the appeal was held September 2, 2009.

On December 29, 2007, Scott was arrested for and charged with misdemeanor driving under the influence. In the early morning hours of December 29, 2009, Sandpoint City Police Officer Derrick Hagstrom (Hagstrom) observed Scott's vehicle accelerate from a stop sign and reach a speed of between 32 and 35 miles per hour in an area with a posted speed limit of 25 miles per hour. Immediately after passing this area where Scott was

traveling, the speed limit increases to 35 miles per hour. Tr. p. 18, Ll. 1-6. It was snowing heavily at the time and about four inches of snow had accumulated on the ground. As a result of the road conditions, Hagstrom had difficulty catching up to Scott's vehicle and did not turn on the overhead lights on his patrol car until Scott's vehicle was outside the city limits. After Hagstrom left the city limits, he caught up to Scott's vehicle and activated his overhead lights. Scott pulled over. Hagstrom effectuated the traffic stop which led to Scott's arrest for driving under the influence. At issue is whether Magistrate Judge Griffin erred in suppressing evidence obtained after finding Hagstrom's traffic stop outside the city limits violated Idaho law where Hagstrom followed Scott outside of his jurisdiction without activating his overhead lights until he was outside Sandpoint.

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.

The State argues Hagstrom had the right to stop a vehicle which he had seen commit a traffic offense immediately prior to leaving the officer's jurisdiction. The State argues Judge Griffin erred in finding Hagstrom was merely "following" Scott, not "pursuing" him within the meaning of Idaho Code § 67-2337. Appellant's Brief, p. 3. Scott argues the State has failed to make a showing that Judge Griffin's findings were clearly erroneous.

Respondent's Brief, pp. 3, *et seq.* Scott states:

> [I]f a set of circumstances was urgent enough to justify extraterritorial jurisdiction, certainly it was urgent enough for an officer to activate his emergency lights This is the substance of the Magistrate judge's factual findings. Having considered all the evidence, he found that the officer was simply not in pursuit.

Id., p. 11.

At issue is I.C. § 67-2337 (Extraterritorial Authority of Peace Officers), which reads:

> All authority that applies to peace officers when performing their assigned functions and duties within the territorial limits of the respective city or political subdivisions, where they are employed, shall apply to them outside such territorial limits to the same degree and extent only when any one (1) of the following conditions exist:
>
> (a) A request for law enforcement assistance is made by a law enforcement agency of said jurisdiction.
> (b) The peace officer possesses probable cause to believe a crime is occurring involving a felony or an immediate threat of serious bodily injury or death to any person.
> (c) When a peace officer is in fresh pursuit as defined in and pursuant to chapter 7, title 19, Idaho Code.

I.C. § 67-2337(2). That statute continues: "Subsection (2) of this section shall not imply that peace officers may routinely perform their law enforcement duties outside their jurisdiction in the course and scope of their employment." I.C. § 67-2337(3). Chapter 7 of Title 19 is entitled "Fresh Pursuit Law." I.C. § 19-701A reads, in relevant part:

> Any peace officer of this state in fresh pursuit of a person who is reasonably believed by him to have committed a felony in this state or has committed, or attempted to commit, any criminal offense or traffic infraction in this state in the presence of such officer, or for whom a warrant of arrest is outstanding for a criminal offense, shall have authority to pursue, arrest and hold in custody or cite such person anywhere in this state.

Idaho Code 19-705 provides the definition of "fresh pursuit" as follows:

> 19-705. "FRESH PURSUIT" DEFINED. The term "fresh pursuit" as used in this act shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include

> the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

In his decision, Judge Griffin recited the facts of the case as follows:

> The officer observed the pickup speeding well within the city limits of Sandpoint, followed the pickup for a significant distance within the city limits, and continued to follow the pickup (separated by a substantial distance) until the pickup was approximately one mile outside the city limits of Sandpoint and turning onto Syringa Road. At that time the officer turned on his vehicle's emergency lights. The pickup stopped immediately. During the ensuing contact between the officer and the defendant, who was the driver of the pickup, the officer concluded that the defendant was under the influence of alcohol and arrested the defendant. The officer did not contact a county deputy.

Order Granting Motion to Suppress, p. 2. Judge Griffin found Hagstrom did not have probable cause to believe a felony, or even driving under the influence, was being committed and that there was no evidence to conclude any person was in immediate danger of death or serious bodily harm. *Id.,* pp. 2-3. There was been no evidence presented suggesting that Hagstrom was acting at the request of the chief law enforcement officer of another city or political subdivision. *See e.g. In re Griffiths,* 113 Idaho 364, 369, 744 P.2d 92, 97 (1987). Therefore, Judge Griffin analyzed whether Hagstrom was in "fresh pursuit" of Scott. Judge Griffin concluded Hagstrom was merely following Scott, as opposed to "pursuing" him, and came to that conclusion because Hagstrom did not turn on his overhead lights while both he and Scott were still in city limits, despite there being "ample opportunity to do that". Order Granting Motion to Suppress, p. 3. Thus, Hagstrom did not put Scott on notice that he was being pursued and was being ordered to stop his vehicle. *Id.,* p. 3. Judge Griffin also noted that a private citizen would not have been permitted to stop Scott after observation of his having exceeded the posted speed limit and, therefore, I.C. §§ 67-2337, 19-701A remained at issue. *Id.,* p. 4.

The State argues Judge Griffin's finding that Hagstrom was "following" Scott, rather than "pursuing" Scott, is erroneous and unsupported by the record because: Hagstrom specifically used the words "to catch up to" in his testimony; the snowy conditions did not allow Hagstrom to catch up to Scott until outside Sandpoint; and Hagstrom's opting not to turn on his overhead lights while some distance behind Scott was a decision Hagstrom made as a matter of police policy to prevent Scott from fleeing. Appellant's Response to Respondent's Brief, p. 2. However, witness credibility, the ability to weigh a witness' testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the trial court. *Larkin v. State,* 115 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. *State v. Bettweiser,* 143 Idaho 582, 588, 149 P.3d 857, 863 (Ct.App. 2006).

At oral argument, the State claimed Judge Griffin did not consider I.C. § 50-209. At oral argument, counsel for the State admitted neither attorney referenced I.C. § 50-209 to Judge Griffin. Idaho Code § 50-209 reads:

> 50-209.POWERS OF POLICEMEN. The policemen of every city, should any be appointed, shall have power to arrest all offenders against the law of the state, or of the city, by day or by night, in the same manner as the sheriff or constable. Whenever such policemen shall be in fresh pursuit of any offender against any law of the state, including traffic infractions, or of the city and the offense has been committed within the corporate limits of such city, such policemen, while in such fresh pursuit may go beyond the corporate or geographical limits of such city subject to the provisions of chapter 7, title 19, Idaho Code, for the purpose of making such arrest or citation.

In its briefing, the State claims I.C. § 50-209 is the more specific code section and should control as it "specifically addresses the issue before the court." Appellant's Brief, p. 5. While Judge Griffin did not reference I.C. § 50-209, that is of no import, as I.C. § 50-209

has “fresh pursuit” as the standard, as does I.C. § 67-2337(2). There is no reason not to believe that the interpretation of “fresh pursuit” in I.C. § 50-209 would not be the same as in I.C. § 67-2337(2), which was considered by Judge Griffin. That interpretation is under I.C. 19-705.

Idaho Code § 50-209 permits a city policeman in fresh pursuit of an offender of any law of the state or city, including traffic infractions, where such offense was committed in the corporate limits of a city, to go beyond the city limits *subject to the provision of Chapter 7, title 9,* to make an arrest or issue a citation. Fresh pursuit in I.C. § 19-705 is defined to include the common law definition along with pursuit of a person who has, or is believed to have, committed a felony and is not limited to “instant pursuit”, but includes “pursuit without unreasonable delay.” Here, Judge Griffin has found Hagstrom had no probable cause regarding any alleged felony committed by Scott (or probable cause to believe a misdemeanor DUI had been committed, for that matter) and the State has set forth no evidence to indicate such a finding was erroneous.

Scott argues fresh pursuit case law generally involves pursuit of a fleeing party who enters his or her home, but that the reasoning of such cases is applicable in this matter because the statute incorporates the common law definition of fresh pursuit. Respondent’s Brief, p. 6. As such, Scott states an officer may only pursue a defendant following a nonviolent misdemeanor having been committed in the officer’s presence where: (1) the pursuit is triggered by flight from a lawful arrest or (2) exigent circumstances beyond the pursuit itself exist. *Id.,* p. 7, citing *State v. Wren,* 115 Idaho 618, 619, 768 P.2d 1351, 1352 (Ct.App. 1989). Scott argues no exigent circumstances exist in this matter as he was driving only seven miles over the posted speed limit immediately before he entered a 35 mph zone. *Id.,* p. 8. In response, the State argues that the heightened expectation of

privacy citizens have in their homes precludes application of *Wren* to these facts. Appellant's Response to Respondent's Brief, p. 4.

Ultimately, this Court is being asked by the State to determine that Judge Griffin erred in his analysis of fresh pursuit given the facts of the instant matter. The State argues:

> The Respondent's (and Magistrate's) reading of the controlling statutory law is erroneous. The Idaho State legislators chose to specifically include language in I.C.[§] 50-209 and I.C. [§] 19-710A that allows an officer that "reasonably believed a traffic infraction has been committed in his presence" to go beyond his jurisdictional limits to issue a citation.

Appellant's Response to Respondent's Brief, p. 3. While this statement is accurate, it presupposes that the officer was in "fresh pursuit." There is nothing before this Court to indicate Judge Griffin's findings (that Hagstrom was merely following, not pursuing) should not be entitled to deference.

Although Judge Griffin was cited no case law at the June 5, 2009, hearing (Tr. p. 20, L. 9 – p. 24, L. 24), and both attorneys declined the invitation of Judge Griffin to provide briefing (Tr. p. 24, L. 25 – p. 25, L. 3), Judge Griffin's sense of the status of the applicable case law regarding "fresh pursuit" was accurate. While there is a dearth of Idaho appellate case law on this issue, this Court has reviewed two cases outside our State.

Seip v. State, 835 A.2d 187 153 Md.App. 83 (Ct.SpecialApp.Md. 2003) has remarkably similar facts. In that case, in the early morning hours, the officer observed Seip speeding within the Ocean City town limits. The officer "…initiated the traffic stop as Seip drove westbound over the Big Assawoman Bay Bridge, waiting, due to safety concerns, to reach the far side before pulling him over." 835 A.2d 187, 188, 153 Md.App. 83, 84. The stop occurred outside the city limits and Seip was arrested for driving while impaired. It is not clear, but a reading of those facts indicates that the officer had activated his lights early on, and simply did not pull him over until after he reached the other side of the bridge. The

Maryland Court of Special Appeals held: "Austin witnessed Seip's violations while still inside the Ocean City corporate limits, and was *pursuing* Seip as he drove over the city line into Worcester County Jurisdiction." 835 A.2d 187, 192, 153 Md.App. 83, 90. (emphasis added).

In *City of Overland Park v. Zabel,* 32 Kan.App.2d 1136, 95 P.3d 124 (Ct.App.Kansas 2004), the officer observed Zabel speeding within Overland Park and "…immediately began pursuing the defendant's vehicle, activating the lights and sirens on his patrol car." 32 Kan.App.2d 1136, 1137, 95 P.3d 124, 125. At the time of the stop, Zabel was in the town of Merriam. Under those facts, the Court of Appeals of Kansas held: "Here, Officer Black observed the defendant speeding in Overland Park and initiated "fresh pursuit." 32 Kan.App.2d 1136, 1139, 95 P.3d 124, 126.

At oral argument, counsel for the State argued that adding the additional requirement of an officer turn on his overhead lights in order for there to be "fresh pursuit" is error. However, neither in oral argument nor in briefing did the State provide any authority for such proposition. The above case law shows Judge Griffin analyzed "fresh pursuit" correctly. Judge Griffin wrote:

> There is a difference between "pursuing" a vehicle and "following" a vehicle.
>
> In this case if the officer had turned his emergency lights on while both he and the defendant's vehicle were within the city limits of Sandpoint (there was ample opportunity to do that), the officer could be fairly said to be "pursuing" the defendant and the defendant would be put on notice that he was being "pursued" and being ordered to stop his vehicle. In this case the officer did not turn on his emergency lights, nor in any other way indicate to the defendant that he was "pursuing" him and ordering him to stop, until they were approximately one mile outside the city limits. The court concludes that while the officer was "following" the defendant's vehicle he was not in "pursuit" of that vehicle.

Order Granting Motion to Suppress, p. 3. While the point in time in which Hagstrom

activated his overhead lights was a significant factor in Judge Griffin's analysis, the above cases show activation of an officer's overhead lights *should* be a significant factor in a "fresh pursuit" analysis. The above also shows activation of Hagstrom's overhead lights was not the *only* factor and that Judge Griffin considered the totality of the circumstances in making his decision. Judge Griffin wrote: "In this case the officer did not turn on his emergency lights, *nor in any other way indicate to the defendant that he was "pursuing" him and ordering him to stop*, until they were approximately one mile outside the city limits. Id. (emphasis added).

Finally, pursuit involves more than just following. Pursuit is defined in Black's Law Dictionary as "The act of chasing to overtake or apprehend. See FRESH PURSUIT." Black's Law Dictionary, 7th Ed., p. 150 (1999). That definition looks at the situation from Hagstrom's point of view or from the point of view of an outside observer. At the time Hagstrom left Sandpoint's city limits, he was doing nothing more than following Scott. When Hagstrom activated his lights, he was at that moment in "pursuit". However, prior to that moment, nothing of Hagstrom's driving would indicate to an outside observer that Hagstrom was doing anything other than driving and perhaps following someone. "Fresh pursuit" is defined as "The right of a police officer to make a warrantless search of a fleeing suspect or to cross jurisdictional lines to arrest a fleeing suspect." *Id.,* p. 977. This definition looks at the situation from Scott's point of view. There is nothing in the record to indicate that Scott, at the time Hagstrom activated his lights, was fleeing anything. Scott testified before Judge Griffin that due to how hard it was snowing, Scott had no idea a police officer was behind him until Hagstrom turned on his overhead lights. Tr. p. 17, Ll. 17-23. Scott's speed did not vary the entire time, he made no attempt to flee. Tr. p. 18, L. 1 – p. 19, L. 10. Nothing indicates Scott was doing anything other than driving, albeit too

fast as he passed by Hagstrom while in the City of Sandpoint. After passing Hagstrom, the speed limit increased, and Scott's speed was below that speed limit the remainder of the time Hagstrom observed Scott's driving.

I.V. CONCLUSION AND ORDER.

For the reasons stated above, the decision of Judge Griffin granting Scott's Motion to Suppress must be affirmed.

IT IS HEREBY ORDERED, the decision of Judge Griffin granting Scott's Motion to Suppress is AFFIRMED in all aspects. The case is remanded to Magistrate Division for any further action.

DATED this 4th day of September, 2009

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

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

Defense Attorney – Doug B. Marks FAX 263 0759
Prosecuting Attorney – Lori Muelenberg FAX 255-1368
Honorable Michael Griffin
403 Oak St.
Grangeville, ID 83530

CLERK OF THE DISTRICT COURT
BONNER COUNTY

BY:_____
Deputy