STATE OF IDAHO)
County of KOOTENAI)ss

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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 KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

JUSTIN LEE HOAGLEN,

Defendant.

Case No. **CRF 2009 23726**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

Defendant Justin Hoaglen (Hoaglen) filed his Motion to Suppress on January 28, 2010. The motion itself included his Brief in Support of Motion to Suppress. On February 18, 2010, the State filed it's Memorandum in Opposition to Defendant's Motion to Suppress. Oral argument was held February 23, 2010. At the conclusion of oral argument, the Court permitted both sides to submit additional simultaneous briefing in support of their arguments, to be filed on March 19, 2010. The Court has reviewed such briefing. On April 27, 2010, the Court heard further oral argument on Hoaglen's Motion to Suppress.

II. FACTUAL BACKGROUND.

On November 18, 2009, Hoaglen was a passenger in his own pickup truck being driven at the time by Bruce Garay (Garay). Garay was stopped by Kootenai County Sheriff's Deputy J. Gorham (Gorham) at mile marker 26.5 on eastbound Interstate 90 at 11:18 p.m. Gorham observed the pickup driven by Garay change lanes almost immediately after Garay activated his turn signal, in violation of I.C. § 49-808. Gorham also

observed an obstructed license plate in violation of I.C. § 49-428. After the stop, Gorham contacted Garay, explained the reason for the stop, and asked for both men's driver's licenses, the pickup's registration, and proof of insurance. Gorham was informed by Hoaglen and Garay that they were returning to Montana from a visit to Hoaglen's father in California, where they picked up the ATV the two were transporting in the bed of the truck. Gorham was also informed by Garay that Garay was on felony probation for burglary charges arising in Montana. Gorham, believing the ATV to possibly be stolen because he did not see any license plate on it, asked Hoaglen for any paperwork on the ATV. Hoaglen did not have any paperwork regarding the ATV to show Gorham. It was shortly after this request for the paperwork on the ATV that Gorham turned off the audio portion of his recording. He did this because Gorham returned to his patrol car and if he does not turn off the audio as he approaches the patrol car, there will be feedback. February 23, 1010, Hearing, Tr. p. 43, L. 15 – p. 44, L. 4. The audio did not come back on for another eight minutes. Tr. p. 59, Ll. 16-18.

While Gorham ran Garay and Hoaglen through central dispatch, another officer, Deputy Kelso, arrived on the scene. Dispatch advised Gorham that both men were "current and clean". Police Report, p. 4. Gorham then asked Garay to step to the rear of the pickup and observe the obstructed license plate. In answering Gorham's questions, Garay stated he and Hoaglen had been in California for three days with Hoaglen's father, and that Hoaglen's father's name was either Bud or Buddy. Gorham then spoke with Hoaglen, who stated his father was going to mail him the registration and paperwork on the ATV, gave Gorham permission to check the ATV's vehicle identification number (VIN), stated his father's name was Frank and his nickname was Bunny, and stated he and Garay had been in California for four days.

Gorham became suspicious as a result of the different answers to his questions

given by Garay and Hoaglen, along with his having observed "at least seven empty energy drinks or coffee cups" in the pickup, which Gorham saw as indicators that the men had something in the truck they did not want to be away from. Police Report, p. 4. Gorham testified these fast food wrappers, bags, energy drinks and empty energy drinks on the floor "…is stuff I've been trained on as indicators that – of possible criminal activity." February 23, 2010, Hearing Tr. p. 22, Ll. 4-14. Gorham asked Hoaglen for consent to search the vehicle and was denied. After Gorham advised Garay that probation officers generally request vehicles probationers are in be searched, Gorham states Hoaglen gave consent for the search. Gorham then stated he merely wanted to investigate whether the ATV was stolen or not and attempted to find the ATV's VIN number, which he was unable to do. Dispatch contacted Gorham and informed him Garay's probation officer in Montana had advised Garay was not supposed to leave the state, but she "did not know if she could grant me consent to search a vehicle in Idaho." Police Report, p. 4. Gorham states he again asked Hoaglen for consent to search the vehicle and this time Hoaglen replied "sure." *Id.*

Gorham's search of the pickup cab turned up a gray tote containing vacuum-sealed bags of marijuana. This tote had caught Gorham's eye "as out of place, on my initial contact." *Id.* Both men were then arrested and read *Miranda* rights. Hoaglen now moves to suppress any and all evidence seized, including all statements made along with any observations by the officers. Motion to Suppress, p. 1. Hoaglen argues the warrantless stop and arrest were without legal justification and therefore violate the United States and Idaho Constitutions. *Id.,* p. 2.

Hoaglen argues: (1) Gorham did not have a reasonable suspicion sufficient to justify the traffic stop itself; (2) the detention and questioning were entirely unrelated to the purpose of the stop; (3) the detention was illegally extended; and (4) any consent

procured during an illegally extended detention is tainted by the illegal detention and therefore invalid. Motion to Suppress, p. 8.

III. 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, 908, 174 P.3d 876, 878 (Ct. App. 2007).

IV. ANALYSIS.

A. The Stop was Valid.

Hoaglen first argues the traffic stop itself is questionable. Motion to Suppress, p. 8. At the preliminary hearing, Gorham testified a "good portion", three or four digits, of the license plate was obstructed by the rope securing the ATV and the pickup changed lanes almost immediately after signaling to do so. Prelim. Tr., p. 4, Ll. 7-14. Hoaglen argues video of the stop shows the rope tying down the ATV to be no wider than the width of a finger. Motion to Suppress, p. 2. During hearing on the motion to suppress, this Court viewed video of the stop. This Court observed the rope to be thin, and that it did not obstruct three to four numbers on the license plate of the truck. To that extent, Gorham is not credible. As set forth below, the credibility finding as to that portion of Gorham's testimony does not affect this Court's finding that the stop was valid. That portion of Gorham's testimony is also not relevant, as I.C. § 49-428 does not specify how much of a license plate must be obstructed. Hoaglen also argues the lane change without sufficient signaling is "conveniently" not preserved on video. *Id.* However, Hoaglen has offered no evidence to rebut that reason for the stop.

"Under the Fourth Amendment, an officer may stop a vehicle to investigate possible

criminal behavior if there is an articulable and reasonable suspicion that the vehicle is being driven contrary to traffic laws." *State v. Dewbre,* 133 Idaho 663, 665, 991 P.2d 388, 390 (Ct.App. 1999) *citing United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 694 (1981). The reasonableness of an officer's suspicion to effect a stop is evaluated based on the totality of the circumstances at the time of the stop and must be more than mere speculation or instinct of the officer, but the standard requires less than probable cause. *State v. Naccarato,* 126 Idaho 10, 12, 878 P.2d 184, 186 (Ct.App. 1994). Here, the traffic stop itself was proper. Idaho Code § 49-428 requires license plates to be free from foreign materials and clearly legible. I.C. § 49-428(2). "Every license plate shall at all times be securely fastened to the vehicle…, be in a place and position to be clearly visible, and shall be maintained free from foreign materials and in a condition to be clearly legible." *Id.* Thus, given the language of the statute, regardless of the size of the rope securing the ATV and obscuring the license plate, anything preventing the plate from being "clearly legible" violates the statute. Similarly, Idaho Code § 49-808 requires a driver to signal for no less than five seconds and 100 feet before moving right or left. I.C. § 49-808(2). Gorham testified Garay signaled only "approximately two seconds and less than a hundred feet." Prelim. Tr., p. 15, Ll. 19-20. Again, in a technical sense, failing to signal for a full five seconds and 100 feet before moving violates the statute. Thus, there was "some objective probable cause to believe that a traffic infraction, however minor, has occurred." *Dewbre,* 133 Idaho 663, 667, 991 P.2d 388, 392 (citing *United States v. Hudson,* 100 F.3d 1049, 1415 (9th Cir. 1996)). Hoaglen does not argue that the driver of the truck, Garay, did in fact signal and change lanes in accordance with the Idaho Code, only that "the stop itself is of questionable legality." Motion to Suppress, p. 8. Simply making such an argument does not make it so. Hoaglen has provided no *evidence* regarding the improper lane change. While this Court finds Gorham not credible as to three digits on the license plate being

obscured, Gorham's testimony on the lane change is uncontradicted. The stop was valid. At oral argument on April 27, 2010, counsel for Hoaglen withdrew the issue of the illegality of the stop, and conceded the stop was valid.

B. The Warrantless Search of the Vehicle Resulted in a Lawful Extension of Detention.

The Fourth Amendment guarantees every citizen the right to be free from unreasonable searches and seizures. *State v. Ramirez,* 145 Idaho 886, 888, 187 P.3d 1261, 1263 (Ct.App. 2008). The stop of a vehicle constitutes a seizure of its occupants and is therefore subject to Fourth Amendment restraints. *Id*. Because a traffic stop is limited in scope and duration, it is analogous to an investigative detention and is analyzed under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868 (1968).

An investigative detention must be temporary and not last longer than necessary to effectuate the purpose of the stop. *Ramirez,* 145 Idaho 886, 889, 187 P.3d 1261, 1264. Because there is no rigid time limit, to evaluate whether a detention has lasted longer than necessary, a court must consider the scope of the detention and the law enforcement purposes to be served along with the duration of the stop. *U.S. v. Sharpe,* 470 U.S. 675, 685-686, 105 S.Ct. 1568 (1985). When an individual is detained, the scope of detention must be carefully tailored to the underlying justification for the stop, but brief inquiries not related to the initial purpose of the stop do not necessarily violate a detainee's Fourth Amendment rights. *State v. Roe,* 140 Idaho 176, 181, 90 P.3d 926, 931 (Ct.App. 2004). A routine traffic stop may turn up suspicious circumstances that could justify an officer asking further questions unrelated to the stop. *State v. Brumfield,* 136 Idaho 913, 916, 42 P.3d 706, 709 (Ct.App. 2001). The length and scope of the initial investigatory stop may lawfully be extended where there exist objective and specific articulable facts that justify suspicion that the detained person is, was, or will be engaged in criminal activity. *Id.* During a lawful

traffic stop, general questioning on topics unrelated to the purpose of the stop is permissible as long as it does not extend the duration of the stop. *State v. Parkinson,* 135 Idaho 357, 363, 17 P.3d 301, 307 (Ct.App. 2000). For example, brief, general questions about drugs and weapons do not extend an otherwise lawful detention. *Id*.

After being provided with licenses, registration and proof of insurance, and dispatch having reported the truck was not stolen, Hoaglen argues Gorham impermissibly extended the traffic detention "based only on his hunch that more was going on." Motion to Suppress, p. 3. Hoaglen's next two issues are directly related. Hoaglen first argues the detention was illegally extended, and second, Gorham's questioning was unrelated to the purpose of the stop. Motion to Suppress, p. 8.

Here, the circumstances confronting Gorham were: a vehicle failed to properly signal a lane change and displayed a partially obstructed license plate; the driver and passenger were clear and current per dispatch; the truck was not stolen and there was proper registration and insurance paperwork regarding the truck; no paperwork was available regarding the ATV and no license plate belonged to or was affixed to the ATV; the driver stated he was on felony probation for burglary in Montana; the passenger and owner of the pickup initially refused to give consent to search the vehicle; when later confronted with the fact that the driver being on probation could result in the probation officer giving consent caused the driver to change his mind regarding consent; Gorham was unable to locate the ATV's VIN or to otherwise determine whether or not it was stolen; and finally, Gorham was informed by dispatch that Garay was not permitted to leave the state of Montana, but his probation officer would not give Gorham permission to search the vehicle as part of Garay's probation. Prelim. Tr, pp. 16-32.

It is entirely unclear from Gorham's testimony at the preliminary hearing at what time he ordered Hoaglen out of the pickup. The details of the entire stop are not clear from the

preliminary hearing transcript. However, viewing the recording made from Gorham's patrol car makes it clear exactly what was said (except the middle gap where the audio was turned off), and it is very clear when Garay left the pickup and when Hoaglen left the pickup. Gorham initially asked Hoaglen for consent to search the vehicle while Hoaglen was still inside the truck, but after Garay had been ordered out of the truck and had been shown the rope securing the ATV to the bed. Post-Hearing Brief in Support of Motion to Suppress, p. 12; Supplemental Memorandum in Opposition to Defendant's Motion to Suppress, p. 5. Both parties agree that Hoaglen refused this initial request. *Id.* Both parties also agree Hoaglen was asked for consent to search the truck at least one additional time after being told that because Garay was on felony probation, probation officers "typically" or "usually" grant requests to search. *Id.* In response to this second request, Hoaglen testified he responded, "you're gonna do what you're gonna do." February 23, 2010, Hearing Tr., p. 77, L. 4. The State simply writes in its brief that Gorham again asked for permission to search the vehicle and Hoaglen consented. Supplemental Memorandum in opposition to Defendant's Motion to Suppress, p. 5. At the hearing on the motion to suppress, Gorham testified he asked Hoaglen to exit the truck while Gorham "jumped up in the back of the truck to look around for the VIN on the four-wheeler or identifying marks." February 23, 2010, Hearing, Tr., p. 25, Ll. 7-12. Gorham stated Hoaglen had already given consent to a search of the truck by this point, but that Gorham was more concerned with "what was going on with this four-wheeler in the back of the truck" and whether the ATV was stolen. *Id.,* p. 23, Ll. 2-12. "[S]o I extended the scope of my investigation from a basic traffic enforcement to possibly a stolen vehicle." *Id.,* Tr., p. 23, Ll. 10-12.

In the present case it is not the overall length of the detention (it was only eighteen minutes) that causes this Court concern. It is the sequence of events and *when* Gorham

acquired knowledge of "specific articulable facts that justify suspicion that the detained person is, was or will be engaged in criminal activity" (*State v. Brumfield,* 136 Idaho 913, 916, 42 P.3d 706, 709) at various points in time during the stop that cause this Court concern and require close analysis.

The inquiry for this Court is whether the detention was unlawfully extended by Gorham's questioning, including his request for consent to search the vehicle. As stated above, brief inquiries not related to the initial purpose of the stop do not necessarily violate a detainee's Fourth Amendment rights. *State v. Roe,* 140 Idaho 176, 181, 90 P.3d 926, 931. And, a routine traffic stop may turn up suspicious circumstances that could justify an officer asking further questions unrelated to the stop. *State v. Brumfield,* 136 Idaho 913, 916, 42 P.3d 706, 709. However, as argued by Hoaglen, it is axiomatic that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purposes of the stop." *Florida v. Royer,* 460 U.S 491, 500, 103 S.Ct. 1319, 1325 (1983). The burden rests with the State to show the seizure was based on reasonable suspicion and sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure. *Id.* The initial reason for the stop was proper. A review of the recording of the stop shows that very early on in the stop, prior to Gorham's showing Garay the obstructed license plate, Garay informs Gorham that he is on felony probation. Prelim. Tr., p. 19, Ll. 7-8.

The chronology here is of great import, but is still somewhat unclear from the record. Gorham testified he continued the detention because the ATV had no license plate or means of identifying the owner. Prelim. Tr., p. 6, Ll. 1-5; Hearing Tr., p. 23, Ll. 5-12. Gorham stated he simply made conversation with Garay outside the vehicle while looking for the ATV's VIN. Prelim. Tr., p. 6, Ll. 21-23. Gorham stated the scope of his investigation was whether or not the ATV was stolen, but admits that there is no requirement that ATVs

display plates while being transferred from state to state. Prelim. Tr., p. 22, Ll. 12-13, 17-21. Gorham testified on cross-examination at the preliminary hearing, "…when I encounter someone that's on felony probation for a theft-related incident I like to be thorough." Prelim. Tr., p. 24, Ll. 19-21. At the preliminary hearing Gorham never testified as to precisely *when* he learned Garay was on felony probation. A review of the recording from Gorham's patrol vehicle, shown at the February 23, 2010, hearing shows that at 21:30, *a mere two minutes into Gorham's questioning at the beginning of the stop*, Gorham asks "Either of you on probation or parole?" and Garay responded that he was for burglary. It is clear Gorham learned this information *before* he asked Hoaglen for consent to search a second time. At the hearing on the motion to suppress, Gorham testified he advised Hoaglen that the driver, Garay, was on felony probation and Garay's probation officer had been contacted. Hearing Tr., p. 22, Ll. 17-18. Gorham then informed Hoaglen "typically people that are on felony probation it is a request of their probation officer to have the person and their vehicle searched on contact with law enforcement." Hearing Tr., p. 22, Ll. 19-22. The State argued Gorham noted an extreme change in Hoaglen's demeanor and body language; that Hoaglen sweated and his voice cracked when he answered no to the first request to search. Supplemental Memorandum in Opposition to Defendant's Motion to Suppress, p. 5. Gorham testified:

> Q. After getting this information from both the driver and passenger what did you do?
> A. Um, at that point I believed I had reasonable suspicion that something was going on here, whether it be the stolen four-wheeler or anything else, um, so I asked for consent to search the vehicle.
> Q. And what did the defendant indicate?
> A. Uh, he had extreme change in body language and he advised no in a cracked voice.
> Q. You describe an extreme change in body language. Can you describe for us what you mean by that?
> A. Sure. He started visibly shaking. Sweat began to protrude from his forehead, and it was cold that night. I believe there was snow on the ground. His—the veins in his neck started throbbing.

February 23, 2010, Hearing, Tr. P. 20, Ll. 2-16.

In Idaho, it should be noted, "courts have generally held that nervousness is of limited value in determining reasonable suspicion and must be treated with caution." *State v. Zuniga,* 143 Idaho 431, 435, 146 P.3d 697, 701 (Ct.App. 2006). "Because it is common for people to exhibit signs of nervousness when confronted with law enforcement regardless of criminal activity, a person's nervous demeanor during such an encounter is of limited significance in establishing the presence of reasonable suspicion." *State v. Gibson,* 141 Idaho 277, 285-286, 108 P.3d 424, 432-33 (Ct.App. 2005). Both *Gibson* and *Zuinga* concern generalized nervousness of a person stopped. Again, in the present case, Gorham testified that the first time he asked Hoaglen for consent to search the vehicle, "…he had extreme change in body language and he advised no in a cracked voice", "He started visibly shaking", "Sweat began to protrude from his forehead, and it was cold that night", "His—the veins in his neck started throbbing." February 23, 2010, Hearing, Tr. p. 20, Ll. 4-16.

This Court finds the State's argument regarding the disparity between answers given by the two men resulting in reasonable suspicion on the part of Gorham to be unpersuasive. There is little to no difference between the length of the trip given by the two (three vs. four days), nor can great weight be given to Garay's not knowing Hoaglen's father's precise nickname (Buddy vs. Bunny).

The Court also places very little weight on Gorham's testimony that fast food wrappers, bags, energy drinks and empty energy drinks on the floor "…is stuff I've been trained on as indicators that – of possible criminal activity." February 23, 2010, Hearing Tr. p. 22, Ll. 4-14. While it may be that at some academy somewhere such a statement was made, fast food wrappers and empty energy drink cans are just as indicative of lawful

activity as unlawful activity. While it may be true Gorham was told such in training, unless cited to the studies of a statistically large sample of people who were stopped with fast food wrappers and energy drink cans who were doing nothing illegal versus those similarly situated who were doing something illegal, this Court simply has no basis to believe such testimony to have any merit.

However, the Court places much weight to the nervousness Gorham observed on the part of Hoaglen. As far as the duration of the stop and reasonable suspicion is concerned, the Court places even more weight on the fact that Garay disclosed he was on felony probation for burglary from a different state.

The State has shown Gorham properly extended the scope of the detention to investigate the ATV's ownership because the State has shown Garay admitted to being on felony probation *prior to* the time Gorham began looking for the ATV's VIN. Gorham testified Garay's probationer status gave rise to his concern the ATV was stolen and his extending the length and scope of his investigatory detention. *See* Prelim. Tr., p. 24, Ll. 19-21. The video recording of the stop corroborates that.

This Court finds the initial detention was properly extended to allow Gorham an opportunity to look for the ATV's VIN based upon Garay's felony probation status for the crime of burglary in Montana, being on felony probation in Montana, and Gorham's belief that "it's a common occurrence to have ATVs stolen out of this area." February 23, 2010, Hearing, Tr., p. 23, Ll. 19-20. The time spent looking at the ATV was only about three minutes. The search of the ATV was concluded when Gorham received his call from dispatch. When Gorham received that call from dispatch, Gorham learned that he did not have the probation officer's permission to search Hoaglen's pickup as a result of the driver Garay's felony probation status. *Id.,* p. 67, L. 24 – p. 68, L. 9. More importantly, at that point Gorham knew he did not have to take Garay into custody for being out of the State of

Montana.

The State, because it has the burden of proving consent, would then need to demonstrate the propriety of the continued detention following Gorham's learning that Garay's probation officer refused to permit him to search the pickup.

This entire issue then turns on how many times Gorham asked Hoaglen permission to search Hogalen's truck, and what Hoaglen said in response. Gorham testified that on the first request Hoaglen unequivocally said: "No". *Id.* P. 53, L. 21 – p. 54, L. 2. Hoaglen's testimony is consistent about this first request for consent and his "No" response. *Id.,* p. 76, Ll. 5-18. This first inquiry is not caught on the recording taken from Gorham's patrol car. Gorham is unclear if he asked two more times or just once after learning that Garay was on felony probation. *Id.,* p. 54, Ll. 8-16. Gorham testified that he did tell Hoaglen that Garay's probation officer "…may or may not request that I search the vehicle." *Id.* That would be consistent with Hoaglen's testimony:

> Q. Do you then recall the officer relating essentially what he said that, well, your buddy's on probation and, uh, it's often the case that we will search a vehicle or there will be a search? Do you remember that?
> A. I do.
> Q. Okay. Did you then give the officer consent to search your vehicle at that time?
> A.. No, I didn't.
> Q. What is it you said to the officer?
> A. I said, "You're gonna do what you're gonna do."

Id., p. 76, L. 19 – p. 77, L. 4. The final inquiry is captured on the recording taken from Gorham's patrol car. The recording clearly has Gorham saying: "Do you give me consent to search your vehicle?", and Hoaglen's (presumably) response: "Sure." At this point in time in the recording the conversation takes place off camera, but the audio is very clear. The conversation takes place off camera because at the time both Garay and Hoaglen are seated next to each other, off camera. Gorham testified:

> It's a pretty casual thing going on right there, believe it or not. I mean everybody's just sitting there B.S.'in about where are you from, what's

> going on, here's why I pulled you over. It's not high stress. It's not sit there, put your—sit on your hands. Nobody's in handcuffs. It's basically stay here, don't get run over by a car while we figure some stuff out.

Id., p. 56, Ll. 9-16. Just before asking the question: "Do you give me consent to search your vehicle", Gorham was speaking to Garay. But this Court finds, by a preponderance of the evidence, that the question: "Do you give me consent to search your vehicle", was directed at Hoaglen, and that it was Hoaglen who responded: "Sure". This finding is made for two reasons. First, because Gorham asked: "Do you give me consent to search *your* vehicle", and at all times through the recording it is clear that Gorham knows it is Hoaglen's vehicle. Had he been asking the question of Garay, Gorham would have instead asked: "Do I have permission to search the vehicle you were driving?" Second, it follows that Gorham would ask Hoaglen the clarifying question: "Do you give me consent to search your vehicle?", when at some point previously Hoaglen had responded obliquely to the same question: "You're gonna do what you're gonna do." Garay never testified, but a thorough review of Gorham's testimony and Hoaglen's testimony shows Hoaglen was the only person Gorham asked for consent to search Hoaglen's pickup.

That being the case, this Court finds there were **three** requests made for consent to search the vehicle. The **first** involved Hoaglen's "No" response. It is unclear when that question was asked, but what is clear is that it was asked while the recording being made from Gorham's car was off. It is also clear that Hoaglen asked for consent this first time after he already knew Garay was on probation. We know that because that was one of the first things that was discussed early in the recorded portion of the stop. The **second** was the request which involved Gorham's statement regarding Garay's probation officer possibly requesting Gorham search the vehicle, to which Hoaglen responded "You're gonna do what you're gonna do." This second request occurred while the recording was off, but both Hoaglen and Gorham testify consistently about this second request. It is also

obvious that this second request was made before Gorham found out that he didn't have permission from Garay's probation officer to search the vehicle, and indeed was made before Gorham hopped in the bed of the truck and began looking at the ATV. This is so because Gorham got the call from dispatch regarding the Montana probation officer's lack of consent while Gorham was in the bed of the truck. Just before Gorham got in the bed of the truck, Gorham had been in his patrol car, exited his car and gone to the back of the truck and then gotten into the bed of the truck to look at the ATV. It was as he left his patrol car on that occasion that he turned the recording audio back on. So, Gorham's second request had to be close in time to the first request, and before Gorham knew he didn't have the Montana probation officer's permission to search the vehicle. Gorham's **third** request was caught on the recording, where, given Hoaglen's previous response; "You're gonna do what you're gonna do", Gorham asked the clarifying question: "Do you give me consent to search your vehicle?" To which Hoaglen, without any hesitation, responded: "Sure". That occurred at about marker 36:15 on the recording, about seventeen minutes into the stop.

Hoaglen listened to Gorham's testimony in court at the February 23, 2010, hearing. Following Gorham's testimony, Hoaglen testified. Hoaglen said he told Gorham "No" to his first request to search the vehicle. February 23, 2010, Hearing, Tr. p. 76, Ll. 5-18. Hoaglen recalls he was still located in the truck at that time. *Id.* Hoaglen then claims he never gave the Gorham consent to search his vehicle when Gorham was telling him "his buddy's on probation and it's often the case that there will be a search of the vehicle" (*Id.,* p. 76, L. 19 – p. 77, L. 5), but instead said "You're gonna do what you're gonna do." *Id.,* p. 77, Ll. 3-5. Hoaglen did not testify about, nor was he asked about his response, caught on the video recording, to Gorham's question: "Do you give me consent to search your vehicle?", to which Hoaglen responded: "Sure".

If the sequence of events were as follows, there would be harassing or badgering by

Gorham, Gorham would have put Hoaglen under duress, and the "consent" would not have been voluntary:

> Gorham asks Hoaglen the first time if he had consent to search Hoaglen's vehicle, and Hoaglen says "No".
>
> Gorham finds out he does not have permission to search the vehicle from Garay's probation officer, *then* nonetheless tells Hoaglen that often the probation officer will give permission to search the vehicle, *then* asks Hoaglen again for permission to which Hoaglen responds "You're gonna do what your're gonna do."
>
> Gorham, knows he doesn't have permission from Garay's probation officer, but then again asks Gorham: "Do you give me consent to search your vehicle?", to which Hoaglen responded: "Sure".

This seems to be the sequence of events Hoaglen advocates. If that were the sequence of events, Gorham at best would have deceived Hoaglen (by telling him that often probation officers give consent to search, when in fact Garay's probation officer had already denied consent to search), and at worst would have lied to Hoaglen.

If the sequence of events were as follows, there would be no harassing behavior by Gorham, no badgering by Gorham, Gorham would not have put Hoaglen under duress and the "consent" would not have been voluntary:

> Before he talks to Hoaglen, Gorham knows that Garay is on felony probation in Montana. Hoaglen knew about this because both he and Garay are still in the cab of the truck when Gorham asks the question and Garay gives his response. Gorham at some point then asks Hoaglen the first time if he had consent to search Hoaglen's vehicle, and Hoaglen says "No".
>
> While waiting to find out whether he has permission from Garay's probation officer to search the vehicle, Gorham reminds Hoaglen about the fact that Garay is on felony probation, tells Hoaglen that often the probation officer will give permission to search the vehicle, then asks Hoaglen again for permission to which Hoaglen responds "You're gonna do what your're gonna do."
>
> Gorham then finds out he doesn't have permission from Garay's probation officer, but then asks Gorham: "Do you give me consent to search your vehicle?", to which Hoaglen responded: "Sure".

Under this scenario there is no untruth spoken by Gorham. It is a fact that probation officers will give permission to search any vehicle in which one of their probationers is

found, especially if that probationer is found out of the state to which they are constrained. According to the recording, Garay had no permission to leave the city of Helena, Montana, let alone leave the state of Montana.

The sequence of events advocated by Hoaglen, that there were only two requests for consent, is not supported by Gorham's testimony, by Hoaglen's own testimony. Most importantly, the sequence of events advocated by Hoaglen is not supported by the fact that one can hear on the recording the last encounter where Gorham said: "Do you give me consent to search your vehicle?", to which Hoaglen responded: "Sure".

The argument could be made that at the point in time that Gorham got the call from dispatch (while he was in the truck bed checking on the ATV) which told him he had no permission from the Montana probation officer to search the vehicle, his search of the ATV had ended. That argument is supported by the fact that Gorham never went back to the ATV issue. The argument could then be made that since Gorham had all he needed to issue citations, and had checked out the ATV, for him to then ask the question: "Do you give me consent to search your vehicle?", impermissibly extended the detention. The argument could be made that such question was simply asked too late in the sequence of events. But that argument would ignore the fact that at some point *before* even getting into the back of the truck bed, Gorham had already asked Hoaglen a second time for consent to search the truck, and stated the fact that probation officers often require a search of the vehicle, and Hoaglen arguably gave that consent when Hoaglen said: "You're gonna do what your're gonna do." So when Gorham asked Hoaglen the third time: "Do you give me consent to search your vehicle?", all he was doing was clarifying whether or not Hoaglen had given Gorham permission before Gorham even got into the questioning and examination of the ATV.

While the Court finds there were three requests for consent made of Hoaglen, the

Court does not find such to be badgering. This is so for several reasons. First, the length of time was very short. The audio is only off for seven minutes. The first two requests were made while the audio was off. The first was simply an outright request. The second was the request with the truthful information that sometimes probation officers require the vehicle be searched. The third request was a clarifying request made in response to the unclear response to the second request, and that was made five minutes after the recording came back on. Thus, only twelve minutes at most transpired for all three requests to have taken place. Second, after having already been denied consent to search at least once by Hoaglen, in response to a straightforward request, Gorham proceeded to ask Hoaglen again, but this time with the *additional* (and truthful) information that probation officers sometimes require the vehicle be searched. It isn't badgering if he gives Hoaglen additional information to consider. Third, the third request was simply a clarifying request justified by Hoaglen's response to the second request. There is "…no legal rule that asking more than once for permission to search renders a suspect's consent involuntary, particularly where the suspect's initial response is ambiguous." *State v. Johnson,* 137 Idaho 656, 660, 51 P.3d 1112, 1116 (Ct.App. 2002), *citing United States v. Jones,* 245 F.3d 696, 696 (9th Cir. 2001). In the present case, there was nothing ambiguous about Hoaglen's first refusal to give consent to Gorham. Nor was Hoaglen confused about what Gorham was asking for when Gorham asked for consent to search Hoaglen's pickup, which were the facts in *Johnson*.

It is clear from *Johnson* that repetitive requests to consent are not always harassing or badgering, nor do they coerce consent as a general rule. *Johnson,* 137 Idaho 656, 660-61, 51 P.3d 1112, 1116-17. Again, the first request was direct and the response unambiguous. The second request was made with Gorham giving Hoaglen additional information, to which Hoaglen gave an ambiguous, though seemingly affirmative, response.

The third request simply clarified any ambiguity in Hoaglen's response to the second request.

Given the facts confronting Gorham, the State has met its burden to show the detention was sufficiently limited in scope and duration to satisfy the conditions of an investigative detention. "In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas,* 443 U.S. 47, 52, 99 S.Ct. 2637, 2641 (1979). Here, there was a reasonable basis for suspicion of misconduct.

As mentioned above, *State v. Brumfield,* 136 Idaho 913, 916, 42 P.3d 706, 709 (Ct.App. 2001), shows "The length and scope of the initial investigatory stop may lawfully be extended where there exist objective and specific articulable facts that justify suspicion that the detained person is, was, or will be engaged in criminal activity." *Id.* This Court has already mentioned the junk food wrappers and the energy drinks are not facts that justify a suspicion that the detained person is, was, or will be engaged in criminal activity. The Court has already mentioned that the discrepancy between what Hoaglen and Garay told Gorham about the number of days and the nickname is not a material discrepancy. The Court has mentioned the significance of Gorham's observation of Hoaglen's nervous reaction when told probation officers usually request the search of a vehicle in which a probationer is found. The presence of an ATV In the back of the truck alone does not justify suspicion of criminal activity, but when coupled with a driver who is on felony probation for burglary outside the state in which he is supposed to be found, there is justification for suspicion of criminal activity.

Most importantly, the vast duration of this fairly short stop, was taken up with Gorham waiting for information regarding Garay's probation status and what should be

done about his presence in Idaho. Within the first minute of the stop, Gorham asked Garay and Hoaglen: "Either of you on probation or parole?", to which Garay responded truthfully that he was and for what crime. At that point Hoaglen knew he had stopped a felony burglary probationer who was outside the state within which he is supervised, driving a truck with an ATV in the back. Gorham at that instant certainly has probable cause and a duty to get to the bottom of *Garay's* status, not just the status of the ATV. As he began collecting that information, and no later than within the first twelve minutes of the stop, Gorham has had the chance to talk to Hoaglen and witness his reaction to his request to search Hoaglen's pickup. Once Gorham then obtained the information from dispatch that Garay's probation officer would not give Gorham permission to search Hoaglen's vehicle, Gorham *already had permission* form Hoaglen to search the pickup due to Hoaglen's response to Gorham's second request. Again, there was nothing wrong with Gorham asking the clarifying question of Hoaglen the third time, essentially clarifying Hoaglen's response to the second request.

This Court finds that in the present case what are "specific articulable facts that justify suspicion that the detained person is, was, or will be engaged in criminal activity" are: the fact that Garay admitted he was on felony probation in Montana; the presence of a newly acquired and undocumented ATV; and Hoaglen's reaction to Gorham's first request for consent to search his pickup.

In *State v. Silva,* 134 Idaho 848, 852-53, 11 P.3d 44, 48-49 (Ct.App. 2000), the Court of Appeals held an officer's request to search a car was lawful where the request was made *before* the issuance of the traffic citation was complete and the request lengthened the process by a mere second or two. But, as quoted extensively by Hoaglen, in *State v. Gutierrez,* 137 Idaho 647, 651-53, 51 P.3d 461, 465-67 (Ct.App. 2002), the Court of Appeals held it to be impermissible for an officer to question a driver about matters

unrelated to the traffic stop *after* the officer issued a written warning to the driver; although the extension of the detention amounted to only sixty to ninety seconds, it was nonetheless held to be an unwarranted intrusion on the vehicle occupants' privacy and liberty. In the present case, the ticket was never issued, due to the arrest being made on the marijuana.

Here, the State has met its burden of demonstrating the reasonableness of extension of the scope and duration of the detention. Gorham acted reasonably in stopping and initially detaining Hoaglen and Garay. As Gorham is finding out preliminary information from the occupants, he finds out the driver is on felony probation. That fact alone extends the detention for most of this brief stop. At the moment Gorham knew he would not be taking Garay into custody for his presence in Idaho while on probation, at the same moment Gorham also knew he could not search the vehicle with the Montana probation officer's consent, *Gorham already had the consent of the owner of the vehicle,* Hoaglen. Any extension of detention here was proper. The State has met its burden of showing the approximately seventeen minutes both men were detained were reasonable in light of *Ramirez, Brumfield,* and *Gutierrez*.

Consent, expressed through words, gestures, or other conduct, provides an exception to the warrant requirement; the burden is upon the State to prove that consent was voluntary, and not the result of duress or coercion, direct or implied. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44 (1973); *State v. Diaz,* 144 Idaho 300, 302, 160 P.3d 739, 741 (2007); *State v. Fleenor,* 133 Idaho 552, 555, 989 P.2d 784, 787 (Ct.App. 1999). There is no requirement that law enforcement must have objectively reasonable grounds to request consent for a search, only that consent be freely given. *Schneckloth v. Bustamante* stands for the proposition that voluntariness of consent must be proven by the State by a preponderance of evidence and is a determination that does not turn "on the presence or absence of a single controlling criterion." *Schneckloth,* 412 U.S.

218, 226, 93 S.Ct. 2041, 2047 (1973). A voluntary decision is one that is the product of "essentially free and unconstrained choice by its maker" *Id.* at 225, 93 S.Ct. at 2046. An involuntary decision, on the other hand, is the result of duress or coercion, direct or implied. *Id.* at 218, 93 S.Ct. at 2041. To determine whether an individual's will has been "overborne and his capacity for self-determination has been critically impaired," a court must assess the totality of the circumstances. *Id.* at 225-26, 93 S.Ct. 2046-47

The voluntariness of the consent given is a question of fact to be determined by all surrounding circumstances. *State v. Hansen,* 138 Idaho 791, 796, 69 P.3d 1052, 1057 (2003). In a suppression hearing where voluntariness is an issue, the power to assess the credibility of witnesses, resolve conflicts in testimony, weigh the evidence, and draw factual inferences is vested in the trial court. *State v. Abeyta,* 131 Idaho 704, 708, 963 P.2d 387, 391 (Ct. App. 1998). In determining the voluntariness of a consensual search, the Ninth Circuit Court of Appeals considers five factors: (1) whether the Defendant was in custody, (2) whether the arresting officers had their guns drawn, (3) whether *Miranda* rights were given, (4) whether the defendant was notified that s/he had a right not to consent, and (5) whether the defendant had been told that a search warrant could be obtained. *U.S. v. Jones,* 286 F.3d 1146, 1152 (9th Cir. 2002). *State v. Garcia,* 143 Idaho 774, 778, 152 P.3d 645, 649 (Ct. App. 2006), identifies other factors to consider: whether there were numerous officers involved in the confrontation: *Castellon v. U.S.,* 864 A.2d 141, 155 (D.C. 2004), the location and conditions of the consent, including whether it was at night, *U.S. v. Mapp,* 476 F.2d 67, 77-78 (2nd Cir. 1973); whether the police retained the individual's identification, *U.S. v. Chemaly,* 741 F. 2d 1346, 1353 (11th Cir. 1984): and whether the individual was free to leave, *Ohio v. Robinette,* 519 U.S. 33, 39-40 (1996). An additional factor for the Court to consider in this regard is whether the individual knew of his or her right to refuse consent. *State v. Stewart,* 145 Idaho 641, 648, 181 P.3d 1249, 1256 (Ct.App. 2008).

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

> A citizen is surrounded by three policemen who have come to the scene in three different police cars. It is late at night (or more precisely in the wee hours of the morning). One or two of the cars have their overhead lights flashing. The officers are in uniform an armed. The citizen is grabbed by the arm, knocked off balance and told to put his hands on his head. His driver's license, which he gave to one of the deputies, has never been returned. He is not free to leave… He has not been afforded a *Miranda* warning.

Jaborra, 143 Idaho at 98, 137 P.3d at 485. Similarly, and as discussed by defendant, in *State v. Stewart,* the Idaho Court of Appeals upheld the District Court's determination that the State had not met its burden of proving voluntary consent. 145 Idaho 641, 649, 181 P.3d 1249, 1257 (Ct.App. 2008). In *Stewart,* the defendant gave consent to a search of his vehicle, but first asked if he could remove some garbage from the interior; he was allowed to do so and his probation officer, at the scene of the traffic stop along with four other law enforcement officers, offered to throw the garbage into a trash bag in her car. 145 Idaho 541, 643, 181 P.3d 1249, 1251. The search of Stewart's car turned up a methamphetamine pipe under the driver's seat and his probation officer found methamphetamine in the garbage. *Id.* Stewart was arrested and subsequently admitted the contraband belonged to him. *Id.* The District Court granted Stewart's motion to suppress because the presence of five police officers for cars for a mere traffic stop, Stewart's being informed that he was a target of a narcotics investigation, and questioning of Stewart unrelated to the traffic stop was found to be "intended to disconcert Stewart as a prelude to seeking his consent to search the vehicle." 145 Idaho 641, 644, 181 P.3d 1249, 1252. The District Court had also noted that Stewart was not free to go and that his license and registration had been taken by one of the officers. 145 Idaho 641, 648, 181 P.3d 1249,

1256. In upholding the District Court, the Idaho Court of Appeals stated:

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

Stewart, 145 Idaho 641, 649, 181 P.3d 1249, 1257.

Gorham testified at the suppression hearing that he would have considered Hoaglen free to leave at any time prior to the drugs being discovered, but not with the truck and the ATV until Gorham figured out the circumstances surrounding their ownership. February 23, 2010, Hearing, Tr. p. 53, L. 1 – p. 58, L. 25. Gorham testified that the encounter was "pretty casual" (*Id.,* p. 56, Ll. 9-16), and indeed a review of the recording indicates that it was a cordial, not stressful conversation and encounter. It is very unlikely that, despite his testimony, Gorham did not consider Hoaglen free to leave, nor would he have permitted Hoaglen to leave the scene of the traffic stop on an interstate highway at night. However, Gorham initially received Hoaglen's consent to search the pickup while Hoaglen was still seated in the cab of the truck, very early on in the encounter. It was the later question, clarifying Hoaglen's consent, which took place while Hoaglen was seated on the side of the road next to Garay and after Gorham had searched the ATV for anything which might identify it. The facts of Gorham's seeking consent in this matter include: two officers were on the scene, one in plainclothes and arriving in an unmarked car; Hoaglen was a passenger in a truck traveling on an interstate highway at night, reasonably open to public view; no guns were drawn on either Hoaglen or Garay; there is no evidence that Gorham

either retained or returned Hoaglen's or Garay's identification; Hoaglen knew of his right to refuse consent; and that Hoaglen was, however, asked to consent for a search again after Gorham made the statement that probation officers tend to permit a search of vehicles under the circumstances present. The Court finds neutral factors include the question of whether driver's licenses were returned to Hoaglen and Garay because no evidence was presented and the fact that the evidence shows all interaction between Gorham on the one hand and Hoaglen and Garay on the other was casual. Factors weighing in favor of the consent having been voluntary include: there only being two officers on the scene (one not in uniform); no guns having been drawn; the traffic stop taking place on an interstate highway where it was open to public view; and Hoaglen definitively knowing he had the right to refuse consent. Factors weighing against a finding of voluntariness include: Gorham's asking for consent to search after Hoaglen unequivocally denied such consent; and that the traffic stop occurred at night.

Given these facts, it cannot be said that the consent given by Hoaglen was involuntary. And, because there was no unlawful extension of the detention in this matter, this Court need not consider whether a prior illegality by police tainted any subsequent consent given. *See Wong Sun v. United States,* 371 U.S. 471, 488, 83 S.Ct. 407, 417 (1963); *State v. Tietsort,* 145 Idaho 112, 117, 175 P.3d 801, 806 (Ct.App. 2007).

IV. CONCLUSION AND ORDER

Based on the above analysis, defendant Hoaglen's Motion to Suppress must be denied.

IT IS HEREBY ORDERED Defendant Hoaglen's Motion to Suppress is DENIED**.**

DATED this 29th day of April, 2010.

_____

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of April, 2010, copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Gary Amendola
Prosecuting Attorney – Kootenai County Prosecutor

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy