

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/respondent,)
)
 vs.)
)
 PATRICK J. HARDING,)
)
)
)
 Defendant/appellant.)
)
 _____)

Case No. **CRM 2008 11891**

**MEMORANDUM DECISION AND
ORDER ON APPEAL**

I. PROCEDURAL HISTORY AND BACKGROUND.

On December 8, 2008, Magistrate Judge Benjamin Simpson entered an Order Denying Defendant's Motion to Suppress Evidence. On December 22, 2008, defendant Patrick J. Harding (Harding) timely filed a Notice of Appeal on that issue. Harding filed an opening brief on appeal (Brief of Appellant) on April 3, 2009. On May 15, 2009, the plaintiff filed Respondent's Brief on Appeal. Harding did not file a reply brief.

Oral argument was scheduled for July 8, 2009. Harding did not file a motion for extension of time within which to file a reply brief. At the hearing set for oral argument, counsel for the parties stipulated that the matter could be decided by the Court on the memorandum that had been filed, and oral argument was waived.

On the night of June 10, 2008, the Coeur d'Alene police dispatch informed Officer A. Wessel that two Hispanic males who were in a car, approached another male about purchasing some drugs. Tr. p. 5, LL. 16-20. Dispatch provided Officer Wessel with the reporting party's name and other identifying information, and a description of the vehicle, including its license plate number. Tr. p. 3, LI. 21-24. Officer Wessel went to the scene. When he arrived, a male flagged him down and told Officer Wessel that he was the one who called dispatch, and indicated that the person who was trying to sell him drugs had just left in a dark colored car. Tr. p. 5, LL. 23-25; p. 6, LI. 1-2. Officer Wessel departed in the indicated direction and, within one city block, located a vehicle matching the description provided to him by dispatch, including the vehicle's license plate number. Tr. p. 6, LI. 6-12. While following the car, he ran the vehicle's license plate information, and determined that it belonged to Harding. Tr. p. 4, LI. 12-15.

Officer Wessel followed the vehicle until it turned into a driveway. Tr. p. 6, LI. 13-18; p. 10, LI. 9-17. Pulling over as well, Officer Wessel parked his car such that it was "partially blocking the driveway but still parallel with the road." Tr. p. 4, LI. 17-22. At the suppression hearing, Officer Wessel testified that "he believed the suspect vehicle had room to get out, but that it would have been a somewhat difficult maneuver." Respondent's Brief, p. 2, citing Tr. p. 10, LI. 14-15. Officer Wessel did not have on any flashing lights, but his headlights were illuminated. Tr. p. 4, LI. 23-25.

Upon approaching the suspect vehicle, Officer Wessel noticed that the windows were rolled down, despite it being a relatively cool night. Tr. p. 7, LI. 20-25. Making contact with the driver, Officer Wessel asked if the driver would speak to him, to which the driver, identified later as Harding, indicated he would. Tr. p. 7, LI. 9-19. Officer Wessel later testified that Harding's speech was clearly slurred and slow. Tr. p. 8, LI. 1-3. Officer

Wessel asked Harding if he could speak with him out of the car. Tr. p. 8, Ll. 15-16. As Harding exited the vehicle, Officer Wessel noticed him swaying and smelled a strong odor of alcohol emanating from Harding. Tr. p. 8, Ll. 19-25; p. 15, Ll. 20-24.

The Coeur d'Alene City Attorney's Office charged Harding with violations of: I.C. § 18-8004, driving under the influence, I.C. § 37-2724A(1), possession of paraphernalia, I.C. § 37-2732(c)(3), possession of a controlled substance under three ounces, and a violation of CDA Municipal Code § 5.08.160A, possession of an open container of alcohol in a motor vehicle.

Harding moved to suppress all evidence obtained during the course of the investigation, asserting that Officer Wessel did not have sufficient reasonable suspicion to detain Harding in violation of Harding's Fourth Amendment right against unreasonable searches and seizures. In denying Mr. Harding's motion to suppress, Judge Simpson found that Officer Wessel objectively knew the facts communicated to him by dispatch—specifically (1) the name of the informant, (2) the alleged crime, (3) the description of the vehicle, and (4) the vehicle's license plate number. Tr. p. 20, Ll. 12-18. The Court held that Officer Wessel had reasonable suspicion to ask Harding to exit his vehicle and detain him when he smelled alcohol and observed bloodshot eyes. Appellant's Brief, p. 2 (citing Tr. p. 21, Ll. 5-10). The Court also held that, even if Officer Wessel had blocked the driveway with his vehicle, he had reasonable suspicion to detain Mr. Harding given the information he had received from dispatch and the reporting party, as well as the information he had discovered during his investigation of the vehicle's registration. Tr. p. 21, Ll. 11-17.

II. ISSUES PRESENTED.

1. Whether Officer Wessel's parking behind Harding constituted an investigatory detention for the purposes of the Fourth Amendment.
2. Whether Officer Wessel's detention of Harding was supported by reasonable suspicion as required by the Fourth Amendment.

III. STANDARD OF REVIEW.

In reviewing a trial court's denial of a motion to suppress, the reviewing court must defer to the trial court's findings of fact, unless they are clearly erroneous. *State v. Medley*, 127 Idaho 182, 185, 898 P.2d 1093, 1097 (1995). However, a reviewing court may "undertake a free review of the trial court's determination as to whether constitutional requirements have been satisfied in light of facts found." *State v. Weber*, 116 Idaho 449, 452, 776 P.2d 458, 461 (1989) (quoting *State v. Heinen*, 114 Idaho 656, 658, 759 P.2d 947, 949 (Ct. App. 1988), *rev. den.*)).

IV. ANALYSIS.

The informant's tip in this case was sufficient, given the information provided by the informant, the known identity of the informant, and the verification of that information through Officer Wessel's efforts, to support an investigatory stop. In order to be constitutional, an investigative detention "must be based on reasonable suspicion, derived from specific articulable facts, that the stopped person has committed, or is about to commit a crime." *State v. Larson*, 135 Idaho 99, 101, 15 P.3d 334, 336 (Ct. App. 2000) (citing *Florida v. Royer*, 460 U.S. 491, 498 (1983)). Reviewing courts look at the "totality of the circumstances" confronting the officer at the time of the stop to determine whether his or her suspicion was reasonable. *United States v. Cortez*, 449 U.S. 411, 417 (1981). The

detaining officer must have a “particularized and objective basis for suspecting the particular person stopped of criminal activity.” *Id.* at 417-18.

An informant’s tip may be sufficient to provide investigating officers with reasonable suspicion to stop and question a suspect. *Larson*, 135 Idaho 99, 101, 15 P.3d 334, 336. Whether a tip is sufficient to support reasonable suspicion depends upon “the content and reliability of the information presented by the source, including whether the informant reveals her identity and the basis of her knowledge.” *Id.* (citing *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 2416, 110 L.Ed.2d 301, 308-09 (1990); *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Adams v. Williams*, 407 U.S. 143, 146-47, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612, 617 (1972)). Where the tipster discloses his or her identity to law enforcement, this is generally sufficient to show veracity and reliability, as there is a risk of accountability if the allegations turn out to be fabricated. *Larson*, 145 Idaho at 101, 15 P.3d at 336 (citing *Gates*, 462 U.S. at 233). Other factors for courts to consider in determining the reliability of an informant’s tip include: “whether the information was based on first-hand observations of events as they were occurring, whether the information the informant provided was subject to immediate confirmation or corroboration by police, whether the informant has previously provided reliable information, and whether the informant provides predictive information.” *State v. Bishop*, 146 Idaho 804, 203 P.3d 1203, 211 (2009).

Whether Officer Wessel first exerted authority over Harding by pulling him over, preventing him from pulling out of the driveway by parking behind him, or by approaching his vehicle and asking him to step out, any of these acts probably qualify as an investigatory detention, and must have been supported by reasonable suspicion in order to pass constitutional muster. From the facts as recited in the parties’ briefs, there does not

appear to be any issue with the scope of the investigation or the length of the detention after Officer Wessel initiated contact with Harding. The parties indicate (and the record supports) that, almost immediately on contacting Harding, Officer Wessel observed indicia of intoxication sufficient to escalate the scope of the investigation and length of the detention. The first legal issue here appears to be whether Officer Wessel had sufficient reasonable suspicion to detain Harding for the brief time it took him to verify or dispel this suspicion created by the information provided him by the informant and his dispatch officer. Next, this Court must address whether Officer Wessel's observations, including the scent of alcohol, Harding's slurred speech and bloodshot eyes, provided him with reasonable suspicion that Harding had been driving while intoxicated. This second investigation, which was unsupported by the informant's tip, must have also been supported by reasonable suspicion in order to be constitutional.

Officer Wessel based his stop of Harding on the information he received from his dispatch officer, and confirmed that information by speaking with the reporting party in person. There is no indication of the reporting party's identity in the briefs, but the transcript indicates that the reporting party had disclosed, and Officer Wessel had been provided with, the reporting party's name and other identifying information. Tr. p. 5, Ll. 22; p. 11, Ll. 10-25; p. 12, Ll. 1-7. This raises the credibility of the informant above that of an anonymous informant. The information provided by the informant also appeared credible because the description of the car, the direction of travel, and particularly the license plate number, all proved accurate when Officer Wessel investigated the informant's statements. Harding argues that he is clearly not Hispanic, nor was he carrying any passengers in his vehicle. However, that information was unavailable to Officer Wessel until *after* he initiated the contact with Harding. While Officer Wessel obtained Harding's name from the vehicle

registration, he could not have known whether Harding was Hispanic, or whether there were any passengers in the car. He also could not have known whether Harding had loaned the car to someone else, or whether the car had been stolen, and the current occupants were engaging in the reported illegal activity. What Officer Wessel knew was that he was able to contact the informant and that the informant's information regarding the vehicle's direction of travel, color, and license plate had proven accurate. Based on the totality of the circumstances, Officer Wessel had a reasonable suspicion that the occupant—or occupants—of the vehicle had been, or were currently, engaging in illegal activity, which he had a duty to investigate.

There was no stop of Harding's vehicle. Harding pulled into this driveway without being signaled to do so by Officer Wessel. At the time Officer Wessel pulled his vehicle in near Harding's vehicle, Officer Wessel had a right to be there and walk up to Harding's car and ask him questions, investigating the possible illegal activity he had been told about by the informant. Almost immediately upon that investigation, Officer Wessel smelled alcohol, saw Harding's condition and heard his speech. That changed the focus of his investigation from selling drugs, to also include reasonable suspicion of driving under the influence.

The detention of an individual who is reasonably suspected of driving under the influence of intoxicants constitutes a permissible warrantless detention. *State v. Buell*, 145 Idaho 54, 56, 175 P.3d 216, 218 (Ct. App. 2008). Immediately upon initiating the contact in this case, Officer Wessel observed that Harding was displaying classic symptoms of intoxication, including slurred speech and bloodshot eyes. These symptoms, when combined with the odor of alcohol, provided objectively reasonable indications sufficient to support the investigative detention Officer Wessel initiated when he asked Harding to exit the vehicle. This reasonable suspicion was additional to and independent of the

informant's tip, and thus, the differences in the crimes observed by Officer Wessel and those reported by the informant are inconsequential to this analysis.

V. CONCLUSION AND ORDER.

Even if Officer Wessel engaged in an investigatory detention when he pulled behind Harding (and the facts are not clear that this occurred), Officer Wessel's acts in investigating the information provided by the informant were supported by a reasonable suspicion of ongoing criminal activity. The facts as to whether Officer Wessel left enough room for Harding to back out of the driveway he had just pulled into are conflicting. Even if Officer Wessel blocked that driveway, it was a driveway Harding had just voluntarily pulled into. Thus, if Harding was simply going to exit his vehicle after arriving in that driveway (since that is obviously where he wanted to be by stopping his car in that driveway), where Officer Wessel parked his car is not relevant. Officer Wessel is not restricting Harding's movement at the time, because Harding voluntarily parked his car apparently where he wanted to be. Harding apparently had no intention of backing out of this driveway after he stopped his car.

Putting aside the issue of where Officer Wessel parked his patrol car, the moment Officer Wessel began his investigation of Harding for allegedly selling drugs (which began when Officer Wessel first spoke with and observed Harding), Officer Wessel's investigation instantly expanded to the additional and separate investigation of Harding for driving while intoxicated. The investigation for driving while intoxicated was also supported by reasonable suspicion, created by Officer Wessel's own observations of objectively reasonable indicia of intoxication. For the foregoing reasons, the decision of Judge Simpson must be affirmed.

IT IS HEREBY ORDERED the December 8, 2008, Order of Judge Simpson Denying Defendant's Motion to Suppress Evidence is **AFFIRMED**, and this matter is **REMANDED** to Magistrate Division for any further action.

DATED this 10th day of July, 2009.

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

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

Defense Attorney – MICHAEL CLAPIN
Prosecuting Attorney – WES SOMMETON
JENNIFER TINKEY

Honorable Benjamin Simpson

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____
Deputy