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AT _____ O'clock ____ M
CLERK, DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,)
)
 Plaintiff,)
)
 vs.)
)
 STEVEN DOUGLAS MCBRIDE,)
)
)
 Defendant.)
)
 _____)

Case No. **CRF 2010 1435**

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

Defendant STEVEN DOUGLAS MCBRIDE's Motion to Suppress **DENIED**
(but statement is excluded under I.R.E. 404(b)).

Arthur Verharen and Jessica Shulsen, Dep. Prosecuting Attorneys for Plaintiff.
Michael G. Palmer Coeur d'Alene, lawyer for Defendant McBride.

I. PROCEDURAL BACKGROUND.

In an Information filed February 19, 2010, Steven Douglas McBride was charged with Possession of a Controlled Substance (Methamphetamine), Operating a Motor Vehicle While Under the Influence of Alcohol and/or Drugs and/or an Intoxicating Substance, Possession of a Controlled Substance (Marijuana) and Possession of Drug Paraphernalia. The events in question occurred on January 7, 2010.

A preliminary hearing in this matter was held on February 12, 2010. A transcript of that hearing was prepared at McBride's request. The Order Holding Defendant was

filed on February 12, 2010. Such order required motions to be filed within 42 days of that order. McBride timely filed his Motion to Suppress on February 16, 2010. The Order Holding Defendant also requires all pretrial motions "...shall be accompanied by a brief in support of the motion and a notice of hearing for a date scheduled through the Court." On February 16, 2010, McBride noticed up the motion to suppress for a hearing on April 22, 2010. On April 19, 2010, McBride filed his "Brief in Support of Motion to Suppress." No objection was made as to the arguably untimely (the pre-printed Order Holding does not make it clear that the brief must be filed *with* the pre-trial motion) filing of this brief. On April 21, 2010, McBride moved to continue the hearing and Judge Hosack signed an Order to Continue Hearing the same day. On May 18, 2010, the State filed its "Memorandum in Opposition to Defendant's Motion to Suppress." An evidentiary hearing was held on June 1, 2010. At that hearing, the State called Lieutenant Stuart Miller as a witness and McBride called his mother, Pamela Caller, as a witness. At the conclusion of the hearing, McBride asked for fourteen days to submit additional briefing, and the State did not object. On June 14, 2010, McBride filed his "Supplemental Brief in Support of Motion to Suppress", and his "Reply Brief to State's May 18, 2010 Memorandum in Opposition to Defendant's Motion to Suppress." The State filed its "Plaintiff's Response to Supplemental Brief in Support of Motion to Suppress" on June 22, 2010. The motion to suppress is now at issue. The Court has reviewed all briefing, the transcript of the preliminary hearing and the Court's notes from the June 1, 2010, hearing.

II. FACTUAL BACKGROUND.

At about 8:00 a.m., on January 7, 2010, Lieutenant Stuart Miller (Miller) of the Kootenai County Sheriff's Department stopped the vehicle in which defendant, Steven

McBride (McBride), and Melissa Watson (Watson) were traveling. Prelim. Tr., p. 11, LI. 8-16. Miller initiated the traffic stop in response to a call by the driver of a Waste Management garbage truck who had reported a physical domestic altercation between the occupants of a red station wagon. Prelim. Tr., p. 12, LI. 9-15. Miller testified he was informed by dispatch that, "...there was a physical domestic and the—the female had tried several times to get out of the vehicle while the car was traveling down the road." Prelim. Tr., p. 23, LI. 9-12. Dispatch provided Miller with a license plate number (Washington 001RYC), and upon approaching the vehicle, he noted two individuals were in the station wagon. Prelim. Tr., p. 12, LI. 9-15. After Miller pulled the vehicle over, he observed Watson was "riffing [sic] in the back seat feverously [sic], and I instructed her to—show me her hands, put her hands up, and uh, had the male driver exit the vehicle." Prelim. Tr., p. 14, LI. 13-15. While McBride was sitting in the driver's seat before being ordered out of the vehicle, "the front passenger seat, was laid all the way back and [Watson] was sitting in the rear seat." Prelim. Tr., p. 15, LI. 3-5.

At the June 1, 2010, hearing on the motion to suppress, Miller testified he immediately contacted the driver McBride, who immediately exited the vehicle he was driving, and Miller ordered McBride to stand by the right front of Miller's patrol vehicle. Miller then went over to the female passenger about sixty seconds after arriving. Miller then went back to question McBride and he had been handcuffed. Miller was not sure who handcuffed McBride, but a Coeur d'Alene Police patrol vehicle had arrived, and later still, another Kootenai County Sheriff patrol vehicle arrived. When Miller came back to talk to McBride, Miller noticed signs of McBride being under the influence, and this is what prompted Miller to ask McBride: "When was the last time you used drugs?"

After having McBride exit the vehicle, Miller identified him via his Washington

driver's license. Miller testified at the preliminary hearing that, at the time he made the traffic stop, a Coeur d'Alene Police Officer "pulled up with me." Prelim. Tr., p. 16, LI. 17-18. Additionally, as Miller spoke to McBride, he observed indications McBride was under the influence and called another Sheriff's Department unit to respond and conduct a DUI investigation. Miller testified McBride was in handcuffs as he spoke with Miller: "I believe he may have been in handcuffs. The Coeur d'Alene officer I think handcuffed him." Prelim. Tr., p. 17, LI. 3-5. Following Deputy Stubbs' DUI investigation, McBride was taken into custody for driving under the influence and the vehicle was inventoried before being towed. Miller testified at the June 1, 2010, suppression hearing that after McBride was taken into custody for driving under the influence, Miller decided to inventory search the vehicle. Miller testified the decision to impound the vehicle was made because of the location of the vehicle on the Interstate onramp, no other person on the scene could legally drive away, when Miller called the owner of the vehicle (McBride's mother) to get permission to search the vehicle (which was denied), the owner was concerned about her son's prior drug involvement, the owner was out of state about thirty miles away, and because McBride's sister called McBride and wanted to know about the status of the vehicle, to which Miller responded it would be impounded and towed, to which McBride's sister had no response.

McBride's mother Pamela Callar testified at the June 1, 2010, hearing on the motion to suppress. She testified she asked the police to please not tow the car, told the police she could pick up the car in a half hour but was told by the police they couldn't leave the vehicle there for a half hour. Callar testified she lived in Airway Heights, about five to ten minutes from the Interstate. Miller testified the Airway Heights exit is at mile post 277, State Line is 299, thus Callar's exit is about 40 miles away from

where her car was located, and she was located about five to ten minutes from that exit. Abiding by speed limits, Callar was at least 45 minutes away, and with rush-hour traffic through Spokane, likely significantly more than 45 minutes away.

McBride argues he was questioned in violation of his right against self-incrimination. “Based on McBride’s physical affect and mannerisms[,] Lt. Miller became suspicious that he was under the influence of alcohol or drugs.” Brief in Support of Motion to Suppress, p. 2. While he was handcuffed, McBride states Miller inquired when he last used any illegal drugs, to which McBride replied the previous day at approximately 8:30 a.m. *Id.*

And, McBride notes that during the DUI investigation he received two telephone calls. The first was from his mother, the owner of the station wagon, who refused to give consent for a search “because in the event that it contained contraband[,] she did not want the car to be impounded as she had limited resources with which to redeem the vehicle from a tow yard.” *Id.*, p. 3. The second was from his sister who called to inquire what would happen to McBride and/or the station wagon. *Id.* Neither McBride’s mother nor his sister were allowed to retrieve the car, and an impound inventory search revealed contraband. *Id.* Because McBride’s counsel has not received video of the field sobriety evaluations or the Kootenai County Sheriff’s Department vehicle impound policy, “the scope of this briefing will be limited to the issue of the admissibility of McBride’s admission to use of Methamphetamine in response to police questioning.” *Id.*

III. STANDARD OF REVIEW.

In an appeal from an order denying a motion to suppress, the Court of Appeals will not disturb findings of fact supported by substantial evidence, but will freely review whether the trial court’s determination as to whether constitutional requirements were

satisfied in light of the facts. *State v. Whiteley*, 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct. App. 1993). When evaluating the trial court's determination of voluntariness of consent given, reviewing courts will not disturb such a decision on appeal if the trial court's finding is based on reasonable inferences to be drawn from the record. *State v. Post*, 98 Idaho 834, 837, 573 P.2d 153, 156 (1978). Whether consent to a search was voluntary is a question of fact and reviewing courts accept the factual findings of a trial court unless they are clearly erroneous. *State v. McCall*, 135 Idaho 885, 886, 26 P.3d 1222, 1223 (2001). Findings are not deemed clearly erroneous when supported by substantial evidence in the record. *State v. Benson*, 133 Idaho 152, 155, 983 P.2d 225, 228 (Ct.App. 1999).

IV. ANALYSIS.

A. Miranda Warnings.

1. Introduction.

McBride argues he had not been formally placed under arrest, but was nevertheless in police custody when questioned about his prior drug use such that *Miranda* warning should have been given. Brief in Support of Motion to Suppress, p. 4. In *Miranda*, the U.S. Supreme Court held that police must inform individuals of their right to remain silent and their right to counsel before undertaking custodial interrogation in order to protect the Fifth-Amendment privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624 (1966). The *Miranda* rule applies where an individual is "in custody" or where their "freedom of action is curtailed to a degree associated with formal arrest." *Berkemer v. McCarthy*, 468 U.S. 420, 440, 104 S.Ct. 3138, 3150 (1984) (quoting *California v. Behler*, 463 U.S. 1121, 1125, 103 S.Ct 3517, 3520 (1983)). Interrogation includes not only express questioning, but also its

functional equivalent; interrogation under *Miranda* refers to “any words or actions on the part of the police... that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *State v. Person*, 140 Idaho 934, 939-40, 104 P.3d 976, 981- 82 (Ct.App. 2004) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300-02, 100 S.Ct. 1682, 1689-90 (1980)).

In *Berkemer*, the Court held that roadside questioning is generally a routine traffic stop that does not amount to a “custodial interrogation.” *Id.* at 437, 104 S.Ct. at 3149. The core inquiry is “whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.” *Id.* The totality of the circumstances must be evaluated to determine whether such pressures were present. Factors to consider include: the location of the interrogation, the conduct of the officer(s), the nature and manner of the questioning, the time of the interrogation, and other persons present. *State v. Medrano*, 123 Idaho 114, 117-8, 844 P.2d 1364, 1367-68 (Ct.App. 1992).

This Court must determine whether McBride’s statements (that he had used methamphetamines the previous day) were the result of custodial interrogation without the *Miranda* requirement having been met. The two features of an ordinary traffic stop that lessen the danger that a detainee would be induced to respond to an officer’s questions where he would not otherwise freely do so were identified in *Berkemer*. They are: (1) that detention pursuant to a traffic stop is presumptively temporary and brief and (2) that a traffic stop is open to public view and involves at the most two officers, making a traffic stop less “police dominated” than custodial interrogations of the kind at issue in *Miranda*. *Berkemer*, 468 U.S 420, 437-39, 104 S.Ct. 3138, 3149-50.

Additionally, to the extent McBride's statements were elicited in violation of *Miranda*, this would nonetheless not result in the suppression of physical evidence discovered as a result of the unwarned statement. *Woodward v. State*, 142 Idaho 98, 106, 123 P.3d 1254, 1262 (Ct.App. 2005). "In other words, with regard to physical evidence later discovered, there is no such thing as 'fruit of the poisonous *Miranda* violation.'" *Id.*, citing *United States v. Patane*, 542 U.S. 630, 124 S.Ct. 2620 (2004).

2. Was McBride in Custody?

In Idaho, the burden of showing custody rests with the defendant who seeks to exclude evidence because of a failure to administer *Miranda* warnings. *State v. James*, 148 Idaho 574,_____, 225 P.3d 1169, 1172. In *James*, the Idaho Supreme Court wrote:

Neither this Court nor the U.S. Supreme Court has ever explicitly identified which party bears the burden of proof regarding custody for purposes of *Miranda*. We join the vast majority of courts that have considered the issue and hold that the burden of showing custody rests on the defendant seeking to exclude evidence based on a failure to administer *Miranda* warnings. (citations omitted) The rationale for this holding was described by the Maryland Court of Special Appeals as follows:

At the threshold of showing the applicability of the *Miranda* requirements, however, the burden is on the defendant to show that applicability. This is the same shift in the allocation of the burden of proof as that which is made between 1) showing the applicability of the Fourth Amendment and 2) showing the satisfaction of the Fourth Amendment. The burden has always been allocated to a defendant to show the threshold applicability of the Fourth Amendment, to show, for example, the coverage of the place, state action, that the defendant has standing to object, etc.

Smith v. State, 186 Md.App. 498, 974 A.2d 991, 1003 (Ct.Spec.App. 2009).

In *James*, the defendant moved to suppress his confession of ownership of the methamphetamine, arguing that the investigative traffic stop had evolved into a custodial interrogation such that *Miranda* warnings were required. The Idaho Court of Appeals suppressed James' admission because of several factors contributing to the

coercive atmosphere: the traffic stop took place in the middle of the night on an interstate freeway and afforded little exposure to public view; James knew that when the interrogation occurred it was no longer an investigation of a traffic violation, but had become an investigation of a felony drug offense; all occupants in the vehicle had been subjected to a frisk, which is not usually done during a traffic stop, but is permissible for officer safety purposes; and the officer's interrogation technique, threatening to arrest all occupants if none admitted possession of the drugs, was more coercive than usual traffic violation questioning. *State v. James*, 2008 WL 2389490, at *3-4 (Ct.App., June 13, 2008) (reversed by 148 Idaho 574, 225 P.3d 1169 (2010)). James argued an officer's threat to arrest all occupants of an automobile if no one occupant incriminated themselves triggered a duty to give *Miranda* warnings. 148 Idaho 574, ____, 225 P.3d 1169, 1170. The Supreme Court reversed the decision of the Court of Appeals and held *Miranda* warnings were not required because James had failed to meet his burden of demonstrating his freedom of movement had been curtailed to the extent associated with formal arrest. 148 Idaho 574, ____, 225 P.3d 1169, 1173.

The Court in *Berkemer* considered a variety of factors: the short duration of the stop, the modest number of questions, and the visibility of the stop. In addition, the Court noted that, "[a]t no point during that interval was respondent informed that his detention would not be temporary." We find that, based on the information before the district court, the factors enunciated in *Berkemer* indicate that James was not in custody. The evidence before the district court did not disclose the duration of the detention in this case nor did it reveal the extent of questioning. As to the visibility of the stop, although it was nighttime, the stop took place on Interstate 84. James was not handcuffed. Setting aside, for the moment, the effect of Deputy Sterling's threat of arrest, it is evident that James failed to demonstrate that his freedom of movement was restrained to the degree associated with formal arrest.

Id. The Supreme Court explicitly stated that "a conditional threat of future lawful arrest alone does not transform detention into 'custody' for the purposes of *Miranda*." 148

Idaho 574, ____, 225 p.3d 1169, 1171.

Specific to the issue of handcuff-use resulting in Idaho Courts finding custody, several cases are reported. In *State v. Frank*, 133 Idaho 364, 368, 986 P.2d 1030, 1034 (Ct.App. 1999), the Court of Appeals found handcuffing and placing a detainee in a patrol car during an investigatory detention was reasonable because a single officer was investigating a possible burglary at night, in a dimly lit, unfamiliar area, and a witness had reported two other burglary perpetrators were unaccounted for. In *State v. DuVault*, 131 Idaho 550, 554, 961 P.2d 641, 645 (1998), the Idaho Supreme Court found the use of handcuffs was valid where officers reasonably believed vehicle occupants encountered in an investigatory stop could pose a danger to officer safety. But, in *State v. Pannell*, 127 Idaho 420, 423, 901 P.2d 1231, 1324 (1995), the Court held handcuffing an individual during an investigatory detention amounted to a warrantless arrest. 127 Idaho 420, 421, 901 P.2d 1321, 1322. The officer in *Pannell* received a call from dispatch that an individual involved in a domestic disturbance was drunkenly operating a gray Ford pickup, driving away from the scene. *Id.* Upon contacting Pannell, the deputy explained he was investigating a domestic disturbance, and Pannell stated he was involved and that he and his wife were having problems. *Id.* The deputy smelled alcohol and, in response to the deputy's question, Pannell admitted he had been drinking, the deputy felt it was unsafe for Pannell to continue driving. *Id.* The deputy then handcuffed Pannell, placed him in the patrol car, and searched the pickup truck after he: "...told the defendant he was going to search the pickup for weapons and asked if he had any problem. The defendant replied 'No.'" 127 Idaho 420, 422, 901 P.2d 1321, 1323. The *Pannell* Court distinguished the facts of that case from those in *State v. Johns*, 112 Idaho 873, 736 P.2d 1327 (1987), where handcuffing was

not an arrest because of a substantial risk of imminent violence being readily apparent. 127 Idaho 420, 424, 901 P.2d 1321, 1325.

The common theme of cases in which Idaho Courts have found handcuffing did not amount to an arrest is the presence of danger to the officer(s) or others. In this case McBride argues:

At the time of the questioning[,] McBride had been stopped by police and not allowed to continue on his course of travel while they conducted their investigations. He and his passenger had been ordered out of his vehicle, separated, and independently questioned. McBride had been required to wait through the questioning of Watson while standing outside in front of Lt. Martin's [sic] police vehicle in approximately fifteen (15) degree (Fahrenheit) weather while he was directly supervised by a police officer. At the time multiple law enforcement officers from at least two (2) jurisdictions (Coeur d'Alene and Kootenai County) had descended upon the scene.

Brief in Support of Motion to Suppress, pp. 4-5. McBride's argument, that no reasonable person would have felt free to go about his business upon being handcuffed while detained by between two and five officers, is well-taken. *Id.*, p. 5. And, even if the stop here was extremely visible, it cannot be said that it was not police-dominated. See *Berkemer*, 468 U.S. 420, 437-39, 104 S.Ct. 3138, 3149-50. However, the purpose of a stop is not necessarily fixed at time the stop is initiated, because "during the course of the detention there may evolve suspicion of criminality different from that which prompted the stop." *State v. Sheldon*, 139 Idaho 980, 984, 88 P.3d 1220, 1224, citing *State v. Parkinson*, 135 Idaho 357, 362, 17 P.3d 301, 306 (Ct.App. 2000). An investigative detention is a permissible seizure if it is based upon specific articulable facts justifying a suspicion that the detained person has been, is, or will be engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 26, 88 S.Ct. 1868 (1968); *State v. Sheldon*, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct.App. 2003). Here, officers had a report of a physical altercation between two individuals in a vehicle being driven on public roads;

the report went so far as to indicate the female passenger was attempting to exit the moving vehicle several times. Prelim. Tr., p. 23, Ll. 9-12. In investigating the altercation, Miller noted signs indicating McBride was intoxicated and shifted the investigation to whether McBride had operated a vehicle under the influence. However, at the time McBride was handcuffed, which appears to have occurred very early in the investigation (before investigation of the alleged DUI even began), the officers were confronted with a readily apparent substantial risk of imminent violence. The passengers had been in an observed physical altercation with the female trying to exit the moving vehicle. The officers were likely acting reasonably in both separating McBride from Watson and handcuffing McBride.

3. Was McBride Interrogated?

Whether McBride was interrogated turns on whether the question posed by Miller regarding McBride's previous drug use amounted to something Miller should know was reasonably likely to elicit an incriminating response from McBride. *State v. Person*, 140 Idaho 934, 939-40, 104 P.3d 976, 981- 82. Interrogation must involve a measure of compulsion beyond that which is inherent in being in custody. *Rhode Island v. Innis*, 446 U.S. 291, 300, 100 S.Ct. 1682, 1691. *Innis* excludes words or actions "normally attendant to arrest and custody" from its definition of interrogation; i.e. booking questions. 446 U.S. 291, 301, 100 S.Ct. 182, 1689-90. In *State v. Bagshaw*, the Court of Appeals held a defendant failed to show his conversations with a jailhouse informant introduced into his cell by law enforcement occurred in a coercive atmosphere such that it amounted to custodial interrogation. 141 Idaho 257, 261-62, 108 P.3d 404, 408-09 (Ct.App. 2004). Thus, the question for this Court is whether Miller's question, posed while McBride was handcuffed, was (1) likely to elicit an incriminating response and (2)

involved a measure of compulsion and/or took place in a coercive atmosphere. Here, “Lt. Miller asked McBride when was the last time he used any illegal drugs...” Brief in Support of Motion to Suppress, p. 2. A question regarding the use of *illegal* drugs is likely to elicit an incriminating response. Additionally, the question was posed of McBride while he was handcuffed and standing between the station wagon and Miller’s police car. *Id.* At this point, McBride has not identified whether or how the question regarding the last time he had used drugs involved compulsion, but this Court finds McBride’s being handcuffed amounted to a coercive atmosphere and/or a measure of compulsion.

4. Was McBride Entitled to *Miranda* Warnings?

There were initially two officers responding to a domestic dispute in an automobile; a third officer arrived to perform a DUI investigation and at least one other officer arrives at some point during the traffic stop. Officer Stubbs testified Miller, two Coeur d’Alene officers, and Deputy Gorham were on the scene when he arrived, for a total of five law enforcement officers. Prelim. Tr., p. 44, LI. 21-23. Miller testified he was informed by dispatch that, “...there was a physical domestic and the—the female had tried several times to get out of the vehicle while the car was traveling down the road.” Prelim. Tr., p. 23, LI. 9-12. When Miller was asked what evidence he had gained to confirm his suspicion of a domestic dispute, he responded: “Uh, just their statements that they were not in a physical altercation, just an argument.” Prelim. Tr., p. 22, LI. 21-22. Miller also testified he did not note any marks on Watson’s person. Prelim. Tr., p. 22, L. 25. Miller noted McBride had a red mark on his face. Prelim. Tr., p. 37, L. 16. This red mark was later determined to have been self-inflicted. Prelim Tr., pp. 41-42, LI. 20-23. Evaluation of totality of the circumstances includes the following factors: the

location of the interrogation, the conduct of the officer(s), the nature and manner of the questioning, the time of the interrogation, and other persons present. *State v. Medrano*, 123 Idaho 114, 117-8, 844 P.2d 1364, 1367-68.

The location of the stop was at the westbound Interstate 90 onramp at Highway 95. It was 8:00 a.m., rush-hour traffic. The location of the stop was open to public view, but the stop itself was clearly police-dominated; eventually there were four police vehicles according to Miller's testimony at the June 1, 2010, hearing on the motion to suppress. The two officers initially on the scene acted reasonably in separating McBride and Watson and in handcuffing Watson, as previous physical contact had been reported and McBride had a red mark on his face (the mark was later determined to have been self-inflicted). Miller's question, as to McBride's most recent drug use, was not in and of itself exceptionally coercive.

In evaluating the totality of the circumstances in the instant matter, the Court concludes Miller's question about the use of illegal drugs, primarily because it occurred so early on in the sequence of events, did not amount to custodial interrogation so as to entitle McBride to *Miranda* warnings. While McBride was handcuffed, this was in response to the domestic violence complaint. And while McBride was handcuffed, he was not yet arrested. While McBride was handcuffed, it was very early on in the detention when Miller began asking questions and immediately noticed signs of intoxication, which led to McBride's arrest for driving under the influence. This initial questioning was simply Miller trying to figure out what had transpired regarding a potential domestic violence situation. Certainly if McBride's passenger is trying to exit a vehicle on the highway, it is reasonable for Miller to infer McBride may be dangerous. At this initial questioning, not all four police vehicles had arrived. While McBride and his

passenger were separated, it had not yet become police dominated. Miller testified no guns were ever drawn. It would be hard to imagine a place more open to public view than this particular interchange at morning rush-hour traffic.

B. McBride's Alternate Theory of Exclusion.

McBride argues this Court should alternatively exclude his statement that he had used illegal drugs the day before as propensity evidence under Idaho Rule of Evidence 404(b). Brief in Support of Motion to Suppress, pp. 6-7. McBride also urges the Court to exclude his statement as highly prejudicial, but of limited probative value under Rule 403. *Id.*, p. 7. To the extent his admission is evidence of other crimes, wrongs, or acts, McBride's motion is proper because on May 20, 2010, the State filed and served notice of intent to use statement under I.R.E. 404(b) for proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake. McBride cites *State v. Sheldon*, 145 Idaho 225, 178 P.3d 28 (2008), as being similar to the facts in this case. Brief in Support of Motion to Suppress, p. 5. However, there are differences between *Sheldon* and the present case. In *Sheldon*, the Court noted the State had not complied with the notice requirements of I.R.E. 404(b). In *Sheldon*, the defendant was asked about having dealt methamphetamine at some time in the past, significantly different than a question about McBride's recent drug use as part of a driving under the influence investigation. 145 Idaho 225, 229-30, 178 P.3d 28, 32-33. Determining whether evidence should be admitted for some purpose other than propensity evidence involves a two-tier analysis: (1) whether the evidence is relevant to a material disputed issue concerning the crime charged and (2) whether the probative value is substantially outweighed by danger of unfair prejudice. 145 Idaho 225, 229, 178 P.3d 28, 32. Thus, an I.R.E. 403 analysis is always a part of the Court's evaluation of I.R.E. 404(b)

applicability. Here, the State argues McBride's statement "that the defendant used methamphetamine within twenty-four hours of the stop. The statement goes to show that defendant was currently under the influence of a controlled substance."

Memorandum in Opposition to Defendant's Motion to Suppress, p. 7. But the State has set forth no support for the contention that use of methamphetamine twenty-four hours prior to a traffic stop shows an individual would be "currently" under the influence. In the absence of such a showing, any probative value of McBride's statement would be very slight, while the prejudicial impact of his statement would be great. Idaho Rule of Evidence 403 balancing results in the Court excluding the 404(b) evidence the State seeks to introduce (that McBride used methamphetamine within twenty-four hours of the stop).

C. Legality of Impound Inventory Search.

This Court heard the instant motion to suppress on June 1, 2010. At the close of that hearing, McBride waived his right to a speedy trial and requested the Court accept additional briefing on the issues surrounding McBride's mother's ownership of the vehicle, her refusal to consent to a search, and the subsequent impound inventory search of the vehicle.

McBride argues the impound inventory search in this matter was unreasonable and therefore unlawful. Supplemental Brief in Support of Motion to Suppress, p. 4 *et seq.*, citing *State v. Weaver*, 127 Idaho 288, 900 P. 2d 196 (1995). McBride frames the issues as: (1) whether the impound was lawful under the facts confronting Miller and (2) whether the inventory search was conducted in accordance with standard, established police procedure. *Id.*, pp. 6-9.

McBride argues the impound itself was unnecessary because the owner of the

vehicle, McBride's mother, refused to consent to search, unequivocally stated she did not wish the vehicle to be impounded, and was ready and willing to retrieve the vehicle from her location approximately one hour away. *Id.*, pp. 6-7. Additionally, McBride argues Watson was not in custody until following the allegedly unlawful inventory search, and the vehicle could have at a minimum been left in her possession while McBride's mother was en route. *Id.*, p. 7. McBride notes neither he nor his mother were asked whether the vehicle should be released to Watson and Watson was never asked if she was willing to take custody of the vehicle. McBride argues:

These were things that the police could have and should have determined. It would have been simple and could have been accomplished in a very brief period of time. As such, making these determinations was required by law was a condition precedent to impounding the vehicle.

Id., p. 8. Additionally, McBride states the car contained a large quantity of personal property, placing the facts confronting Miller within an exception to the Kootenai County tow policy, that: "there is excessive property in the vehicle, making a complete inventory cumbersome and time consuming." *Id.*

As to the county's impound policy itself, McBride argues the policy improperly focuses only incidentally on risk of damage or theft if a vehicle is not impounded, rather than the need to protect citizens' property, "which when read in context appears to have been the concern of the Supreme Court and the Court of Appeals when discussing the criteria underlying a valid impound determination in *Weaver* or [*State v.*] *Foster* [127 Idaho 723, P.2d (Ct.App. 1995)]" *Id.*, p. 9. Because the exceptions swallow the rule and the policy is, "quite vague and ill-defined", McBride argues the Fourth Amendment requirement that reasonable standardized criteria or established routine govern inventory searches was not met here. *Id.*, p. 10. In fact, McBride points to Miller's testimony as demonstrating the county's policy is one of impoundment, not inventory

and “is almost wholly silent on the issue of an inventory search.” *Id.*, p. 11.

What this really suggests is that Kootenai County Sheriff does not have any particular criteria governing when, how, and under what circumstances sheriff deputies may conduct an inventory search of a vehicle or container.

Id., p. 12.

Finally, McBride argues that, even if the impound search was proper given the instant facts, law enforcement had no authority to search any containers (“purse-type bags”) located in the vehicle in the context of an inventory search absent the county’s standardized procedure specifically regulating the opening of closed containers during an inventory search. *Id.*, p. 12.

The State argues in response Miller’s decision to impound the vehicle was reasonable given: the location of the vehicle on the on-ramp to I-90 from Highway 95, a heavily-trafficked “precarious position”; Miller’s effort to establish additional facts by telephoning McBride’s mother, who indicated she was thirty-minutes away and that no one closer to the scene could retrieve the vehicle; and because Watson was not the owner or operator, and was not selected by McBride’s mother to have the vehicle entrusted to. Plaintiff’s Response to Supplemental Brief in Support of Motion to Suppress, p. 6. The State also sets forth, in a conclusory fashion:

Here, Lt. Miller testified that the inventory was taken pursuant to the impoundment; a standard routine. (Prelim. 40:4-9). As standard and established procedure, the inventory search was lawful and the evidence from the search admissible.

Id., p. 7.

At issue here is the Special Order #90A of the Kootenai County Sheriff’s Department which reads:

It is the policy of the Operations Bureau to tow a vehicle whenever the driver is taken into custody. At the deputy’s discretion, a competent driver

may be located in cases where:

1. There is excessive property in the vehicle, making a complete inventory cumbersome and time consuming;
2. There are children involved;
3. Pets, valuable property or materials which need immediate care, i.e. frozen food, hazardous materials, etc., are in the vehicle; or
4. At the discretion of the deputy with regards to other circumstances at the scene.

Operations Bureau personnel WILL NOT lock and park any vehicle then leave it along side of the road or public parking area. Nor will personnel get into the vehicle and move it.

Every time we allow a vehicle to sit at a location after an arrest, we incur a measure of liability for any damage or theft. The same holds true when a deputy moves or drives the vehicle themselves.

Beginning immediately, we will release only to those people who are selected by the owner/operator, possess a valid driver's license, and have been identified and included in the report. All other vehicles will be towed.

Motion to Suppress, Plaintiff's Exhibit No. 1.

In *State v. Weaver*, cited by both parties, the Idaho Supreme Court states:

...[W]arrantless inventory searches, when conducted in compliance with standard and established police procedures and not as a pretext for criminal investigation, do not offend Fourth Amendment strictures against unreasonable searches and seizures. (citations omitted).

127 Idaho 288, 290, 900 P.2d 196, 198. *Weaver* requires that an impoundment itself be lawful in order for an inventory search to be proper; the officer making the decision to impound must act in an objectively reasonable manner under all circumstances known to the officer; and discretion to impound a vehicle must be exercised "according to standard criteria and on the basis of something other than suspicion of criminal activity."

127 Idaho 288, 291, 900 P.2d 196, 199. In *Weaver*, the defendant and his mother were stopped in Kootenai County and Weaver was arrested pursuant to a Pennsylvania warrant. That warrant was for a parole violation and a threat to kill his brother's widow in retaliation for his brother's death following a standoff during which his brother had

taken the wife hostage as part of a domestic dispute. 127 Idaho 288, 289, 900 P.2d 169, 197. After Weaver's arrest, his seventy year-old mother was "removed from the car and placed in the rear of a patrol car for her comfort", the deputy effecting the stop was ordered to perform an inventory of the vehicle, which located a handgun later determined to have been stolen. *Id.* The District Court denied Weaver's motion to suppress, holding the inventory search was valid; and the Idaho Court of Appeals affirmed, reasoning Weaver's mother was incapable of driving the vehicle and impound was therefore necessary. 127 Idaho 288, 290, 900 P.2d 196, 198. The Idaho Supreme Court reversed the Idaho Court of Appeals and the District Court, finding police had failed to attempt to ascertain *readily available facts*, e.g. that Weaver's mother was the owner of the vehicle, had a valid license, and claimed to be able to drive the car. 127 Idaho 288, 291-92, 900 P.2d 196, 199-200. The Idaho Supreme Court found:

However, Sgt. Sopher did not discover this information until after he impounded the vehicle and ordered an inventory search because he did not make any inquiries before deciding to impound the vehicle.

127 Idaho 288, 292, 900 P.2d 196, 200.

McBride claims: "The Weaver case has several remarkable similarities to the matter herein." Supplemental Brief in Support of Motion to Suppress, p. 3. This Court agrees, as noted by the State (Plaintiff's Response to Supplemental Brief in Support of Motion to Suppress, p. 5), the facts of *Weaver* are distinguishable from those in the instant case. McBride's mother, the owner of the vehicle McBride was operating, was more than 30 miles away and Miller did attempt to ascertain readily available facts by telephoning McBride's mother. In *Weaver*, the defendant was driving his mother's car, *and his mother was a passenger in that car.* *Weaver* does not go so far as to require a reasonable attempt to ascertain *additional* "readily available facts", when the officer

already knows that the vehicle's owner is located some 30 or more miles away, and cannot be released to the passenger. And, while McBride argues Watson's driver's license was never requested, the State notes: "Specifically, Lt. Miller testified that the driver was arrested, there was no other person on scene with a lawful driver's license, the registered owner was not immediately available, and the vehicle was parked in a precarious position..." Plaintiff's Response to Supplemental Brief in Support of Motion to Suppress, p. 3. An additional reason exists which rules Watson out. Miller testified at the June 1, 2010, hearing on the motion to suppress that Watson was arrested at the scene as well as McBride. There really are no similarities between this case and *Weaver*, as a fair reading of *Weaver* shows the Idaho Supreme Court was frustrated with the arresting officer's assumption (and failure to inquire) that the passenger/mother/owner of the car was able to drive. Finally, the location of McBride's vehicle is important. Idaho Supreme Court in *Weaver* did not discuss where *Weaver* and his mother were stopped, other than to mention it was "en route" to "Charlotte's home", "driving toward the Sheriff's Department" (127 Idaho 288, 289, 900 P.2d 196, 197), and the arresting officer felt "the vehicle's location presented a traffic hazard." 127 Idaho 288, 291, 900 P.2d 196, 199. As pointed out by the State, *State v. Smith*, 120 Idaho 77, 81, 813 P.2d 888, 892 (1991), show impoundment was reasonable where the vehicle was located at a heavily-trafficked interchange of Highway 12 and Highway 95. The Court fully understands how a vehicle in McBride's location would be a significant traffic hazard, especially at the time of day in question.

Special Order #90 permits a deputy to locate and release a vehicle to a competent driver, at the deputy's discretion, only where that competent driver: (1) is selected by the owner/operator, (2) possesses a valid driver's license, and (3) has been

identified and included in the report. The evidence before this Court indicates Watson was not a competent driver within the meaning of the Order as she was without a lawful driver's license.

The State cites to *State v. Smith*, 120 Idaho 77, 81, 813 P.2d 888, 892 (1991) in support of its argument that impounding a vehicle following an arrest is proper where the vehicle constitutes a traffic hazard. *Id.*, pp. 5-6. The Supreme Court in *Smith* reaches the same conclusion that: "decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable." 120 Idaho 77, 80, 813 P.2d 888, 891.

Further, "the initial decision to impound a vehicle that poses a traffic hazard or following the operator's arrest is left to the discretion of the officer involved." *Id.* McBride argues he was "pulled well off to the side of the road and was not presenting a traffic hazard..." Supplemental Brief in Support of Motion to Suppress, p. 9. The State, meanwhile, argues the vehicle was in a heavily trafficked onramp (the onramp from State Highway 95 to Interstate 90 at 8 a.m., Prelim. Tr., p. 11, Ll. 8-16), and, as Miller testified at the suppression hearing, the vehicle was in a "precarious position." Plaintiff's Response to Supplemental Brief in Support of Motion to Suppress, p. 6. It is for this Court to determine the weight to be given to conflicting evidence. *See State v. Bishop*, 146 Idaho 804, 810, 203 P.3d 1203, 1209 (2009) ("Decisions regarding the credibility of witnesses, weight to be given conflicting evidence, and factual inferences to be drawn are also within the discretion of the trial court."). Miller's testimony is reasonable given the traffic stop occurred on a weekday, at 8 a.m. rush-hour traffic, on the onramp from State Highway 95 to Interstate 90.

McBride's concern with the amount of personal property in the vehicle is likely

also misplaced. See Supplemental Brief in Support of Motion to Suppress, p. 8. While Special Order #90 contains an exception to the tow and impound policy where there is excessive property in the vehicle, as discussed *supra*, this exception contemplates that a competent driver may be located **at the officer's discretion** if certain facts are met. It cannot be said that Miller did not attempt to locate a competent driver in light of his conversation with McBride's mother. The fact that the vehicle was strewn with personal items belonging to the occupants does not negate the facts that McBride's mother was more than 30 minutes away (possibly longer in rush-hour traffic during January), McBride's mother was unable to identify anyone nearby who could take possession, and the passenger Watson was not a "competent driver" within the meaning of the Order as she did not provide Miller with a valid driver's license.

McBride's argument that Special Order #90 is not, and does not create, a "standard and established police procedure" for impound despite its being in writing is not directly or thoroughly addressed by the State. See Supplemental Brief in Support of Motion to Suppress, p. 10. McBride argues *State v. Owen*, 143 Idaho 274, 141 P.3d 1143 (Ct.App. 2006) would prohibit inventory searches based on vague police policies. *Id.* Distinguishing *Owen* from the instant matter is the fact that Special Order #90 is a written policy, while the policy that everything taken into police custody be inventoried in *Owen* was unwritten and found by the Court to violate Fourth Amendment standards in the absence of a specific policy regarding locked containers. 143 Idaho 274, 278, 141 P.3d 1143, 1147. It likely cannot be said the exceptions to the Order's directive that any vehicle of an arrested driver be towed swallow the rule. The Order contemplates that vehicles of arrested drivers be towed; but, a deputy **may** exercise his discretion and locate a competent driver where certain facts are present. And, if a deputy opts to

exercise his discretion and locate a competent driver, that individual must be selected by the owner/operator, must possess a valid driver's license, and must have been identified and included in the report. One of the reasons a deputy may exercise discretion and opt to locate a competent driver is where the vehicle contains excessive property making an inventory time-consuming or burdensome. The plain meaning of the Order indicates that inventories are taken when they are **not** deemed time-consuming or burdensome in a deputy's exercise of discretion. Leaving this decision to the discretion of the deputy does not result in inventories being illegal under any set of circumstance on one hand, nor does it result in the need for and attempt to locate a competent driver to evaporate on the other hand.

McBride's final argument is that containers within the vehicle were unlawfully opened and searched during the inventory. Supplemental Brief in Support of Motion to Suppress, pp. 12-13. McBride cites *Owen* and *State v. Reimer*, 127 Idaho 214, 899 P.2d 427 (1995) in support of the proposition that a standardized inventory procedure must specifically regulate the opening of closed containers found during an inventory search. *Id.*, pp. 12-13. Because Special Order #90 only mentions inventories with regard to the ability of a deputy to exercise his discretion and not impound a vehicle where an inventory would be too burdensome or time-consuming (and where a competent driver meeting certain requirements can be located), McBride argues "there is no credible evidence of any sort of standardized police procedure or established routine governing the opening of closed containers discovered in the context of an inventory search." *Id.*, p. 13. In its brief the State does not address this argument made by McBride.

The purpose of inventory searches has been identified in Idaho case law. In

Smith, the Court quoted *South Dakota v. Opperman*, 428 U.S. 364, 369-70, 96 S.Ct. 3092, 3097-98 (1976):

When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger.

And, *Owen* involved opening of a safe under a bed and *Reimer* involved removing a removable bottom from a mug. *Reimer*, 127 Idaho 214, 216, 899 P.2d 427, 429; *Owen*, 143 Idaho 274, 276, 141 P.3d 1143, 1145. In *Florida v. Wells*, 495 U.S. 1, 110 S.Ct. 1632 (1990), quoted by McBride, the defendant gave Florida Highway Patrol permission to open the trunk of his impounded vehicle and a locked suitcase in the trunk was opened, revealing a large amount of marijuana. 495 U.S. 1, 110 S.Ct. 1632, 1633. None of these cases involve purse-type containers of the type in the instant matter. Where the purpose of inventorying contents is to protect property, protect the police against claims or disputes over lost or stolen property, and protect police from potential danger, the difference between safes, mugs and locked suitcases, on the one hand, and "several purse-type bags" is great. See Supplemental Brief in Support of Motion to Suppress, p. 3. McBride does not allege the bags were locked or secured. And, the contents of a safe, a mug bottom which is "sealed snugly and only comes off if pried with a strong fingernail or a flat object such as a coin or screwdriver" (*Reimer*, 127 Idaho 214, 216, 899 P.2d 427, 429) or a locked suitcase do not pose the possible risk to police that "loose items of clothing, purses and handbags, larger bags, and toiletries" may pose. Supplemental Brief in Support of Motion to Suppress, p. 8. Nor is the risk of claims or disputes regarding missing or stolen items the same. In sum, the facts of this case vary widely from those in *Owen*, *Reimer*, and *Wells*, and based on the record

before the Court, it is unclear whether the items inventoried were “closed” within the meaning of these cases.

V. CONCLUSION AND ORDER.

For the reasons set forth above, the motion to suppress must be denied. Due to I.R.E. 404(b), unless there is further showing, McBride’s statement as to his last use of methamphetamine will not be allowed as evidence.

IT IS HERBY ORDERED THAT STEVEN DOUGLAS MCBRIDE’s Motion to Suppress is **DENIED**.

DATED this 22nd day of July, 2010.

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

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

Defense Attorney - Michael G. Palmer
Prosecuting Attorney – Art Verharen/Jessica Shulsen

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____
Deputy