STATE OF IDAHO)
County of KOOTENAI)ss

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,

vs.

RICHARD ARTHUR ALLEN, JR.,

Defendant.

Case No. **CRF 2010 8022**

MEMORANDUM DECISION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

Defendant RICHARD ARTHUR ALLEN, JR.'s Motion to Suppress is **DENIED**.
Amy Borgman, Deputy Prosecuting Attorney, lawyer for the Plaintiff.
Jonathan B. Hull Coeur d'Alene, lawyer for Defendant Richard Arthur Allen, Jr..

****

I. FACTUAL BACKGROUND.

Neither party has briefed this Motion to Suppress for the Court. However, the "Motion to Suppress Evidence" lists four alleged violations: (1) no legal cause to frisk Allen and the evidence seized was the fruit of an illegal frisk; (2) if legal cause existed for the frisk, it nonetheless exceeded the permissible scope of a frisk and there was no reason to remove non-weapon items from Allen's clothing; (3) if the "glass tee with paint" removed from Allen's clothing was legal, it nonetheless does not form probable cause for arrest and all subsequent items seized were fruits of an illegal arrest; and (4) any statements elicited were in violation of Allen's Fifth and Fourteenth Amendment Rights.

The following is based on the police report in the matter and Idaho case law. On May 2, 2010, at approximately 9:00 p.m., defendant Richard Allen (Allen) was stopped by Post Falls Police Officer Christopher Thompson (Thompson) while traveling west on Seltice Way in Post Falls, Idaho. Thompson observed a driver, later identified to be Allen, travel at a higher rate of speed than the other traffic and swerve in his lane of travel. After stopping and contacting Allen, Thompson noted the odor of alcohol in the vehicle and observed Allen's eyes to be glassy and bloodshot. "I asked if he had consumed any alcohol prior to driving and he stated he had a beer earlier." Police Report, p. 1. Thompson contacted central dispatch, and Allen's driving status was reported to be current and clear.

Thompson approached Allen's vehicle to perform standardized field sobriety tests and asked Allen to step out. Allen initially replied, "No." After Thompson advised Allen, "I wanted him to step out of the vehicle", Allen complied. *Id.* Thompson asked if Allen had any weapons on his person, and Allen advised the officer he had a knife in his pocket. Thompson did not locate the knife in the pocket where Allen said it would be. Thompson continued to frisk Allen and located a hard item in his back pocket. After receiving Allen's permission to enter the pocket, Thompson removed the item and recognized it to be a glass pipe used to smoke controlled substances. Thompson noted the glass pipe had what appeared to be a burnt area on one side; Allen insisted the glass pipe had paint on it. Thompson placed Allen under arrest for possession of paraphernalia.

Thompson transported Allen to the front of the police vehicle to continue searching for the knife. Allen, "did not want me going in his pockets and [stated] he would hand me the knife." Police Report, p. 2. Thompson states he rejected this request for officer safety reasons. Thompson felt hard objects in Allen's left hip pocket, asked for permission to enter the pocket and remove the contents, received Allen's permission to do so, and

recovered a brass-colored pipe with burnt residue and a film canister containing a leafy, green substance he believed to be marijuana. Allen was then also placed under arrest for the possession of these items. Thompson then located another hard object in Allen's left knee pocket, asked Allen if the item was a tire gauge, heard Allen's response that he did not know, and pulled out a five-inch glass pipe with a white, powdery residue. The residue later tested positive for the presence of methamphetamine. Thompson's police report does not indicate a knife was ever located on Allen's person.

The Order Holding Allen was filed May 28, 2010, following his waiver of his preliminary hearing. On June 10, 2010, Allen timely filed his motion to suppress. Again, Allen argues: (1) there was no legal cause to frisk him and evidence seized was the fruit of an illegal frisk; (2) if legal cause existed for the frisk, it nonetheless exceeded to permissible scope of a frisk and there was no reason to remove non-weapon items from Allen's clothing; (3) if the "glass tee with paint" removed from Allen's clothing was legal, it nonetheless does not form probable cause for arrest and all subsequent items seized were fruits of an illegal arrest; and (4) any statements elicited were in violation of Allen's Fifth and Fourteenth Amendment rights. Motion to Suppress, pp. 1-2.

An evidentiary hearing was held on July 27, 2010. Officer Christopher Thompson testified. Allen presented the DVD recording of the stop and search taken from the dashboard of Thompson's patrol car. At the conclusion of that hearing, Allen's counsel asked the Court to review *State v. Bishop,* 146 Idaho 804, 203 P.3d 1203 (2009), *State v. Hudson,* 147 Idaho 335, 209 P.3d 196 (Ct.App. 2009), and *State v. Oviedo,* an unpublished opinion from the Idaho Court of Appeals dated January 8, 2010. Argument was presented by both counsel for Allen and the State. The matter is now at issue.

At the June 27, 2010, hearing, Thompson testified that it was very windy the evening

of May 2, 2010, and that was evident on the audio portion of the DVD of the stop and search. Thompson testified that after his Python radar gun showed Allen's vehicle travelling at 56 miles per hour in a 45 mile per hour zone on Seltice in Post Falls, Thompson turned his patrol vehicle around and followed Allen's 1990 Mercury Cougar. Thompson testified when he began to catch up to Allen's car, he observed it swerving in the fast lane on Seltice, he activated his overhead lights but not his siren, and the DVD shows Allen pulled over quite soon thereafter. Thompson testified that after he stopped Allen's vehicle, he saw the driver (Allen) moving around inside the car, moving back and forth and doing something with his hands. The DVD shows Allen open his driver's door, getting out of his vehicle immediately after the stop, and Thompson yelling: "Get back in the car…get back in the car now."

Thompson testified that he went to the passenger door to approach Allen in his vehicle, and Thompson testified he used that approach as an officer safety issue since Thompson was moving around inside the car. Thompson testified this approach was used because the driver usually expects an officer to approach on the driver's side, and so that Thompson could get a better view of what Allen was doing with his hands. This portion at the driver's door is not captured on the DVD due to the fact that Thompson's dashboard camera was directed at the driver's door.

Thompson testified that Thompson told Allen why he stopped him (told him he was going 56 miles per hour), to which Allen replied: "No way." Thompson obtained Allen's identification from his Idaho driver's license, and Thompson went back to his car to run a driver's query. The DVD captures a conversation during this time when Allen explained the car was his, but not registered to him as he had just traded it for a four-wheel-drive. Allen also stated he'd had "A beer here and there" and that his insurance covers "anything I

drive". When Thompson went back to Allen's car the second time, he approached on the driver's side and planned on having Thompson do field sobriety tests. By this time, Officer Flood arrived in his patrol vehicle. Thompson testified that there was a civilian ride-a-long passenger in Thompson's patrol vehicle but that the citizen remained in Thompson's car at all pertinent times. When Thompson went to Allen's driver door, Thompson testified that Allen locked the driver's door. When Thompson directed him to open the door, Allen said: "No". Thompson again asked Allen to open his door, and Allen complied. On cross-examination, Thompson testified that when Thompson opened the driver's door, he smelled alcoholic beverage from within Allen's car. The DVD shows Allen getting out of his car, wearing heavy insulated coveralls. On the DVD you can also hear Allen nearly yelling: "What's the matter?" to Thompson, in a confrontational tone. Thompson testified he asked Allen if he had any weapons, and Allen replied: "A knife." On the DVD you cannot hear the question by Thompson, but you can hear Allen say: "I know I have a pocket knife in these." Thompson testified he asked Allen where it was located, and that Allen directed him to a specific pocket, though Thompson could not recall which pocket that was at the June 27, 2010, hearing. Thompson testified that while he frisked Allen he had Allen turn away from him, place his hands in the small of his back, and spread his feet wide (a standard procedure for officer safety according to Thompson). Thompson testified if he had Allen's permission to search that pocket and was given such permission. Nothing was in that pocket so Thompson went to his back pockets. In Allen's right-side back pocket he felt a three-inch-long hard object. He asked Allen if he could enter that pocket, and Allen gave permission. Thompson pulled out a glass "T" shaped pipe with what appeared to be burnt areas on one end. Thompson testified he asked Allen what was on the pipe and Allen replied: "Paint." Allen can be heard on the DVD to say in a confrontational tone: "It's not a

meth pipe." After being told he was under arrest, Allen can be heard to say: "It's got paint on it, it's not a pipe, I'm not shitting you." Thompson testified he placed the pipe on the roof of Allen's car and told Allen he was under arrest for paraphernalia. On the DVD you can hear Allen say "Do whatever you're going to do, man", again in a confrontational tone. That pipe was admitted as Exhibit "B" at the June 27, 2010, hearing. Since no knife was found, Thompson testified he continued to search for the knife. In Allen's left hip pocket Thompson felt something hard and asked if he could search that pocket, and Allen gave permission. That produced a pipe with the odor of marijuana. Again Thompson told him he was under arrest for paraphernalia and continued to search. In the pocket near Allen's knee, Thompson felt a long hard object and asked Allen if it was a tire gauge, to which Thompson testified Allen responded: "I don't know." On the DVD, Allen actually said: "I think that's the knife right there in my pocket", in response to Thompson's question as to whether it was a tire gauge. Thompson pulled out another pipe, this one with white powder residue on it. Since Thompson had still not found a knife, he determined Allen didn't have one and placed Allen in his patrol car and took Allen to jail.

II. STANDARD OF REVIEW.

The standard of review of a suppression motion is bifurcated; the reviewing courts accept a trial court's findings of fact supported by substantial evidence and freely review 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). 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).

III. ANALYSIS.

Warrantless searches are presumptively unreasonable unless they fall within certain, well-delineated exceptions to the warrant requirement. *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2031-32 (1971). The United States Supreme Court established one such exception in its decision in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868 (1968). The Terry decision created the stop-and-frisk exception. "The stop and frisk constitute two independent actions, each requiring a distinct and separate justification." *State v. Cox,* 136 Idaho 858, 862, 41 P.3d 744, 748 (Ct.App. 2002) (citing *State v. Babb,* 133 Idaho 890, 892, 994 P.2d 633, 635 (Ct.App. 2000); *State v. Fleenor,* 133 Idaho 552, 556, 989 P.2d 784, 788 (Ct.App. 1999).

First, a reasonable articulable suspicion that an individual has committed, or is about to commit, a crime must be present to justify a stop. *Florida v. Royer,* 460 U.S. 491, 103 S.CT. 1319 (1983); *State v. DuVault,* 131 Idaho 550, 553, 961 P.2d 641, 644 (1998). Allen does not contest the "stop". In any event, Allen was observed to be exceeding the speed limit and swerving within his lane. Upon contact with Allen, Thompson noted the

odor of alcohol and glassy, blood-shot eyes. Traffic stops are limited in duration and are therefore analogous to an investigative detention; they are analyzed under *Terry* principles. *State v. Grantham,* 146 Idaho 490, 496, 198 P.3d 128, 134 (Ct.App. 2008). Thompson's direct observations of Allen's speeding, swerving, and possible intoxication amount to a reasonable articulable suspicion that a crime had been committed (driving in excess of 35 miles per hour in any residential, business or urban district is a violation of I.C. § 49-654(2), operating a vehicle under the influence violates I.C. § 18-8002 *et seq.*). Given the circumstances confronting Thompson, his articulable suspicion that Allen had or would commit a crime was reasonable.

Second, an officer may frisk an individual only where he can point to specific, articulable facts which would lead a reasonably prudent person to believe the individual suspect may be armed and presently dangerous; nothing in the initial stages of the encounter can have served to dispel the officer's belief of that the suspect is armed and presently dangerous. *Terry,* 391 U.S. 1, 27, 88 S.Ct. 1868, 1884; *Babb,* 133 Idaho 890, 892, 994 P.2d 633, 635. "In our analysis of the frisk, we look to the facts known to the officers on the scene and the inferences of risk of danger reasonably drawn from the totality of those specific circumstances." *State v. Muir,* 116 Idaho 565, 567-68, 777 P.2d 1238, 1240-41 (Ct.App. 1989).

Allen, according to Thompson's police report, also stated he had a knife on his person when asked whether he had any weapons on him. Police Report, p. 1. On the DVD, Allen can be heard to say: "I know I have a pocket knife in these", presumably meaning his coveralls he was wearing. This statement by itself is sufficient to satisfy the second prong of the stop-and-frisk test. That is, Allen's report of having a knife on him likely would lead a reasonably prudent person to believe specific articulable facts existed to

support Allen may have been armed and presently dangerous, and nothing in the initial stages of the encounter between Allen and Thompson would have served to dispel Thompson's belief that Allen was armed and presently dangerous. However, there is more evidence. No evidence was presented to contradict Thompson's observations of furtive movements after Allen had stopped his car. This Court finds Thompson's testimony credible as to those furtive movements. Those furtive movements could have been regarding weapons, drugs, an alcoholic beverage or other items. Thompson doesn't know at the time, but those furtive movements are an articulable fact to support Allen may have been armed and dangerous. Allen's immediately getting out of his car after the stop and having to be told twice to get back in his car is another item of evidence as to armed and dangerous. Then, Allen locked the door and wouldn't get out of the car until being told twice…another item of evidence that Allen may have been armed and dangerous. Allen's tone of voice throughout was not at all cordial or cooperative. Thompson testified that once he smelled alcohol on Allen, officer safety issues increase. This Court finds that claim to be credible.

The quality and quantity of information necessary to create reasonable suspicion is less than that necessary to create probable cause. *Alabama v. White,* 496 U.S. 325, 330, 110 S.Ct, 2412, 2416 (1990). And, to be reasonable, an investigative detention must be related in scope to the circumstances justifying the stop in the first place. *State v. Sheldon,* 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct.App. 2003). Here, the stop was the result of Allen's speeding and swerving. The purpose of a stop is not fixed at the time of a stop and an officer may be confronted with facts giving rise to legitimate reasons for new lines of inquiry. *See State v. Peteja,* 139 Idaho 607, 612, 83 P.3d 781, 786 (Ct.App. 2003). At the time Thompson noted the odor of alcohol coming from Allen's vehicle, along with Allen's

glassy, blood-shot eyes, his investigation shifted due to an arguably reasonable suspicion of DUI. His DUI investigation, in turn, involved the reasonable request for field sobriety tests, bringing Allen into close proximity and making a frisk for weapons reasonable.

Although Allen does not raise the issue, the police report indicates he gave consent to Thompson to enter his pockets upon feeling hard objects during the frisk. Thompson's report does not indicate any consent was requested regarding the left knee pocket which contained the five-inch glass pipe, and the DVD bears that out.

It has been discussed above that Thompson had reasonable suspicion that Allen was armed (Allen told him he was armed) and dangerous (the totality of the circumstances discussed above). That justified the frisk. Regarding the first two pipes, Allen gave Thompson *consent* to pull the items out of his pockets. There can be no suppression where there is consent. The third pipe was found well after Allen had been arrested and told he was arrested. Thus, no suppression of that pipe.

One of Allen's arguments is that the first pipe, the glass "T" shaped pipe, has paint on it and not burnt residue, thus is not paraphernalia. The Court has looked at Exhibit B, and it certainly looks like a pipe that would be used to smoke a substance. While no evidence is before the Court as to whether the black on that clear glass pipe is paint or smoke residue from a controlled or legitimate substance, the device looks for all the world like a pipe from which a substance has been smoked in the past. That is what this Court finds Exhibit B to look like in the courtroom in the daytime, let alone what it would appear to an officer at night during a stop being removed from a person's pocket. Even if there is black paint on the otherwise clear glass pipe which makes it look like part of it has been used to smoke a substance, this Court can think of no such legitimate reason to use a clear glass "T" for paint purposes. Even if such a paint purpose could be imagined, this Court

can think of no reason why only one end would have black paint. Finally, if there is such a reason why only one end would have paint, this Court can think of no reason why a person would have such an item in their pocket.

It is odd that no knife was ever recovered from Allen's person. However, that fact does not cut in favor of suppression since it was Allen who told Thompson: "I know I have a knife in these." And while it is odd that Allen would report having a knife on him when he did not have one, and give consent to pull items out of his pocket when at least two of those items were paraphernalia, such could be attributed to intoxication from alcohol or drugs.

In *Cox,* the defendant argued the consent he gave to have items removed from his pockets was involuntary because of the exploitation of an illegal frisk. 136 Idaho 858, 862, 41 P.3d 744, 748. Because the Court of Appeals had already concluded the frisk of Cox was lawful, the Court determined his argument that his consent was obtained by exploitation of an illegal frisk must fail. *Id.* The frisk of Cox had been found lawful because the officer involved had testified to specific articulable facts which would have led a reasonably prudent person to believe Cox may have been armed and dangerous. Those facts included: the officer was alone with Cox; Cox had rented a room in which illegal drugs had been found and a felony arrest had been made shortly before; the man arrested had initially been cooperative and then resisted and assaulted an officer; and an unsheathed, large knife along with mail with Cox's name on it had been found in the room. *Id.* Similarly, in the instant matter, based on the evidence before the Court at this juncture, Thompson's police report contains specific articulable facts which would have led a reasonably prudent person to believe Allen may have committed a crime and may have been armed and presently dangerous.

The Court now turns its attention to the cases cited by Allen at the hearing on July 27, 2010: *State v. Bishop,* 146 Idaho 804, 203 P.3d 1203 (2009), *State v. Hudson,* 147 Idaho 335, 209 P.3d 196 (Ct.App. 2009), and *State v. Oviedo,* an unpublished opinion from the Idaho Court of Appeals dated January 8, 2010, provide no support to suppress. Allen argued *Bishop,* via *State v. Henage*, Idaho 655, 152 P.3d 16 (2007), stands for the proposition that just because there is an indication of a knife does not mean there is justification for a frisk. In *Bishop*, the City Supervisor of Hagerman called the Chief of Police to give him information as to Bishop's solicitation to sell methamphetamine, but nowhere in the opinion is there information given that Bishop was armed. The discussion in *Bishop* about *Henage* was that in *Henage*: "…the passenger's nervous appearance did not justify the conclusion that he was armed and dangerous because the officer 'did not connect [the passenger's] nervousness with anything tending to demonstrate a risk to his safety.'" 146 Idaho 804, 819, 203 P.3d 1203, 1218. The Idaho Supreme Court in *Bishop,* discussing *Henage,* continued:

> Moreover, the passenger's admission that he had a knife did not justify the search because weapon possession, in and of itself, does not necessarily mean that a person poses a risk of danger. *Id.* at 662, 152 P.3d at 23. In fact, the circumstances indicated that the passenger was not dangerous because he did not act threatening, did not have a reputation for violence, did not make any furtive movements, and was cooperative and polite. *Id.* at 661-62, 152 P.3d at 22-23. The fact that the officer may have had a subjective feeling that his safety was compromised was irrelevant under the objective totality of the circumstances analysis. *Id.* at 662, 152 P.3d at 23.

146 Idaho 804, 819, 203 P.3d 1203, 1218. This Court has already set forth its reasons above why Allen, while not "threatening", was aggressive, and certainly was not "cooperative and polite", and did make "furtive movements" that Thompson observed. Given the totality of the circumstances, objectively (the reasonable person standard), Thompson had reason to believe Allen may be armed and dangerous.

Allen argues *State v. Hudson,* 147 Idaho 335, 209 P.3d 196 (Ct.App. 2009) stands for the proposition that if the initiation of the frisk is illegal, then the arrest is illegal. While *Hudson* certainly discusses the attenuation doctrine (the officer placing his foot in the hotel room door caused the unlawful search to never end), *Hudson* does nothing to support the argument that the frisk in the present situation was illegal. The search in Hudson started out unlawful, and due to a lack of attenuation, never became lawful, where the frisk in the present case started out lawful and was at all times lawful.

Finally, Allen argues *State v. Oviedo,* an unpublished opinion from the Idaho Court of Appeals dated January 8, 2010, stands for the proposition that when you are handcuffed, the need to frisk ceases altogether. While the Idaho Court of Appeals did write that, just as in *State v. Muir,* 116 Idaho 565, 777 P.2d 1238 (Ct.App. 1989), "the officers had in effect removed any potential danger conceivably posed by Oviedo," that was a situation where Oviedo was handcuffed outside his vehicle and the point was "…he had no immediate access to any weapons inside the vehicle." Thus, the issue was access to the vehicle, not access to weapons on his person. Also, once the first pipe was found on Allen, he was *arrested* for possession of paraphernalia, and Allen was told such, thus, providing an additional reason (additional to officer safety reasons) for Thompson to search Allen.

At the July 27, 2010, hearing, the State argued *State v. Johnson,* 137 Idaho 656, 51 P.3d 1112 (Ct.App. 2002), is factually similar to the present case. The Court has reviewed Johnson and finds such claim to be accurate. The Idaho Court of Appeals "frisk" discussion in *Johnson* is as follows:

> The next issue presented is whether Wunsch's frisk of Johnson was lawful. Reasonable suspicion justifying a detention does not automatically justify a frisk for weapons. *State v. Robertson,* 134 Idaho 180, 185, 997 P.2d 641, 646 (Ct.App.2000); *State v. Fleenor,* 133 Idaho 552, 556, 989 P.2d 784, 788 (Ct.App.1999). The stop and the frisk constitute two independent actions, each requiring its own justification. *Id.* A frisk is

justified if the officer can point to specific and articulable facts that would lead a reasonably prudent person to believe that the individual with whom the officer is dealing may be armed and presently dangerous. *Terry v. Ohio,* 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889, 909 (1968); *Sibron v. New York,* 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *State v. Rawlings,* 121 Idaho 930, 936, 829 P.2d 520, 526 (1992); *State v. Babb,* 133 Idaho 890, 892, 994 P.2d 633, 635 (Ct.App.2000). In evaluating the propriety of a frisk, "we look to the facts known to the officers on the scene and the inferences of risk of danger reasonably drawn from the totality of those specific circumstances." *Fleenor,* 133 Idaho at 555, 989 P.2d at 787.

Officer Wunsch testified that he decided to frisk Johnson after receiving permission to search the vehicle in order to assure that he would not be attacked with a weapon during the search. Concern for officer safety during routine traffic stops has been recognized by the United States Supreme Court as being "both legitimate and weighty." *Pennsylvania v. Mimms,* 434 U.S. 106, 110, 98 S.Ct. 330, 333, 54 L.Ed.2d 331, 336 (1977). *See also Maryland v. Wilson,* 519 U.S. 408, 412, 117 S.Ct. 882, 885, 137 L.Ed.2d 41, 46 (1997). This is because the "possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop." *Id.* at 414, 117 S.Ct. at 886, 137 L.Ed.2d at 47. This danger "is likely to be greater when there are passengers in addition to the driver in the stopped car." *Id.See also State v. DuValt,* 131 Idaho 550, 554, 961 P.2d 641, 645 (1998).

Johnson argues that if Officer Wunsch had been truly concerned about his safety, he would have conducted a frisk immediately after Johnson admitted that he had a dagger in his vehicle. The officer's failure to do so, Johnson argues, disproves the claim of a later reasonable suspicion that Johnson could be armed. We disagree with Johnson's assessment. An officer's refraining from conducting a frisk early in an encounter does not preclude a finding that the officer had a reasonable basis to conduct a frisk at a later point.

We conclude that the frisk here was justified. It is significant that Johnson had admitted that there was a dagger in his vehicle, because this informed Officer Wunsch that Johnson was a person who carried weapons. In addition, Officer Wunsch's observations led to a reasonable suspicion that Johnson was under the influence of marijuana and was extremely nervous, factors contributing to the risk that he might engage in rash conduct to prevent the officer from discovering contraband in the vehicle. Wunsch was the only officer on the scene and was faced with searching a vehicle while the driver and a passenger stood by. These facts presented sufficient suspicion that Johnson could be armed and sufficient risk of danger to the officer to justify the officer's decision to frisk Johnson before turning his back on Johnson to search inside the vehicle.

137 Idaho 656, 661, 51 P.3d 1112, 1117. In the present case there was only one person (Allen) in his car, and soon after the stop there was another officer present. However, Allen, like Johnson, admitted to having a weapon (Allen a knife on his person and Johnson a dagger in his car). Allen was aggressive; Johnson was nervous. Missing from *Johnson* and present in the instant case are the furtive movements by Allen prior to his exiting the vehicle.

III. CONCLUSION AND ORDER.

For the reasons set forth above, given the evidence and the case law before the Court at this time, Allen's Motion to Suppress must be denied.

IT IS HEREBY ORDERED Allen's Motion to Suppress is DENIED.

DATED this 28th 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 - Jonathan B. Hull
Prosecuting Attorney -

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy