STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,)
Plaintiff,)
vs.)
DOREE ADELE STARNES,)
Defendant.)

Case No. **CRF 2010 1883**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

I. FACTUAL BACKGROUND.

On February 1, 2010, a confidential informant informed the Kootenai County Sheriff's Department that they had completed a buy of approximately one gram of methamphetamine from Kellie Anderson (Anderson) and Frederick Donohoe (Donohoe) at Apartment 202, 4886 Fairway Drive in Coeur d'Alene, Idaho. Memorandum in Support of Motion to Suppress, p. 1. Deputy Brandel (Brandel) of the Kootenai County Sheriff's Department returned to the apartment complex after debriefing of the Confidential Informant took place. Upon his re-arrival at the apartment complex, Brandel immediately noted a woman, who later turned out to be defendant Doree Starnes (Starnes), in or near the driver's seat of a red Jeep Cherokee parked near the apartment, and Donohoe leaning on the passenger door. Both doors of the Jeep were open. The Jeep was one Brandel had earlier observed Donohoe working on earlier during the day while Brandel was

surveilling the apartment complex. At the time Brandel returned and approached Donohoe and the woman, the apartment was being watched while detectives secured a search warrant. Donohoe and Anderson were to be arrested if they were observed leaving the apartment.

Donohoe and Starnes were detained by Brandel at gunpoint until members of the North Idaho Violent Crimes Task Force arrived on the scene, at which time Starnes was arrested. A search of Starnes turned up a small Ziploc bag containing a substance later determined to be methamphetamine. Starnes now moves to suppress the methamphetamine found on her person and any statements made by her to police, arguing her arrest was not properly supported by probable cause.

In order to rule on this particular Motion to Suppress, the Court must determine what happened and what was known by Brandel at various points in time. This will be discussed more thoroughly below.

Starnes filed her Motion to Suppress on March 16, 2010. On March 18, 2010, Starnes filed her Notice of Hearing, scheduling the hearing for Tuesday, May 11, 2010, at 3:00 p.m. Starnes filed her Memorandum in Support of Motion to Suppress on April 29, 2010.

On March 29, 2010, the State issued four subpoenas for the May 11, 2010, hearing on Starnes' Motion to Suppress. The State failed to file a brief until immediately preceding hearing on the Motion to Suppress, filing its Memorandum in Opposition to Defendant's Motion to Suppress at approximately 10:00 a.m. the day of the 3:00 p.m. hearing. When this Court inquired why the State filed its brief in such an untimely fashion, the deputy prosecutor replied she had been in trial for the week prior to the Tuesday, May 11, 2010, hearing on Starnes' Motion to Suppress. The Court was in trial the entire day of May 11,

2010, immediately followed by two law day matters before the 3:00 p.m. Motion to Suppress hearing in the instant case. Accordingly, the Court had no opportunity to read the State's brief which it had filed earlier that day.

Starnes had no objection to the untimely filing of the State's brief. After oral argument on the motion to suppress, because this Court had no opportunity to read the State's brief, and because the State's brief raised issues obviously not anticipated by Starnes, this Court requested additional simultaneous briefing by the parties due on May 12, 2009 at 5:00 p.m. Both parties submitted additional briefs.

II. 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).

III. ANALYSIS.

A. Reasonable Mistake as to the Identity of Starnes.

Starnes argues the search incident to her arrest was unlawful given her arrest was itself illegal. Memorandum in Support of Motion to Suppress, p. 3. Starnes argues she did not commit a public offense in the presence of law enforcement, pursuant to I.C. § 19-603(1), and Brandel did not have probable cause to believe she had been involved in any offense. *Id.,* pp. 3-4. Starnes argues the only information Brandel had at the time of her arrest was that she was in proximity to Donohoe, a person suspected of criminal activity, and was present at a location where a search warrant had been requested but not yet returned. *Id.,* p. 4, citing *State v. Gibson,* 141 Idaho 277, 283, 108 P.3d 424, 430 (Ct.App.

2005).

Idaho Code § 19-603(1) permits a peace officer to make an arrest without a warrant when a public offense is committed or attempted in the officer's presence. An arrest without a warrant is also permitted where a felony has been committed, even outside the officer's presence, or where the officer has reasonable cause to believe a person has committed a felony. I.C § 19-603 (2), (3), (4). Starnes' possession charge is a felony, not a public offense or misdemeanor within the meaning of I.C. § 19-603(1).

In *State v. Weber,* 116 Idaho 449, 776 P.2d 458 (Ct.App. 1989), the defendant was arrested at a time when:

> …[t]he police had no evidence whatever indicating that Kenneth Weber has participated in a delivery of any controlled substance. The only evidence the police had against Ken Weber at the time of his arrest was that he was in the company of another person, Kellie Youngstom, whom the police did have probable cause to believe had delivered a controlled substance.

116 Idaho 449, 451, 776 P.2d 458, 460. The Idaho Court of Appeals upheld the District Court's suppression, holding the District Court's finding that Weber's being at the residence at issue was the only evidence the police had against Weber was not clearly erroneous. 116 Idaho 449, 452, 776 P.2d 458, 461. In *Weber,* the Court discussed *State v. Alger,* 100 Idaho 675, 677, 603 P.2d 1009, 1011 (1979) at some length, distinguishing the facts of that case from those in *Weber*.

> In *Alger* the Court held that the presence of the defendant in an apartment combined with other information the arresting officers had before they went there to execute a search warrant constituted probable cause to arrest the defendant for burglary. The arresting officers had been told by two informants that the informants had been in the apartment, which was occupied by several people including the defendant, and had observed specific items that had been stolen in recent burglaries. One of the other occupants of the apartment had told the informants that he and the defendant had been involved in stealing the items that were in the apartment. When the officers entered the apartment pursuant to he search warrant they had secured based on this information, they

> discovered items matching the description of some of the stolen merchandise.

100 Idaho 675, 678, 603 P.2d 1009, 1012.

The State argues Brandel made a reasonable mistake in mistaking Starnes for Kellie Anderson and instead arresting Starnes. Memorandum in Opposition to Defendant's Motion to Suppress, p. 6. As such, the State argues, because probable cause existed to arrest Anderson, and because Brandel was reasonable in mistaking Starnes for Anderson, the arrest of Starnes was valid. *Id.,* citing *State v. McCarthy,* 133 Idaho 119, 125, 982 P.2d 954, 960 (Ct.App. 1999). Starnes does not dispute probable cause existed to arrest Anderson.

Probable cause is information which would lead a reasonable person to believe or entertain an honest and strong suspicion that a suspect is guilty; this standard is not as high as that necessary for conviction. *Weber,* 116 Idaho 449, 452, 776 P.2d 458, 461, *quoting Alger,* 100 Idaho 675, 677, 603 P.2d 1009, 1011. The State argues, under the totality of the circumstances, Brandel was reasonable in mistakenly believing Starnes was Anderson. The State contends Brandel:

> …did not have reason to believe that anyone else was in the apartment where they had been monitoring the apartment prior to the controlled purchase and after the controlled purchase. When Donohoe was seen leaving the apartment with a female, it was reasonable for Detective Brandel to believe the female was the same female that had sold methamphetamines to [the confidential informant].

Memorandum in Opposition to Defendant's Motion to Suppress, p. 6. In its Supplemental Memorandum, the State clarified:

> In determining the reasonableness of the officers' mistaken belief as to Starnes [sic] identity, one should examine the information the officers had at the time they detained Starnes and Donohoe. At the time, Detective Brandel knew there was a report that Donohoe was armed with a pistol as well as allegations that Donohoe had beaten and raped Kellie Anderson. Detective Brandel had been involved with the surveillance of the

> apartment prior to the controlled purchase and after the controlled purchase. He also listened to the transaction between [the confidential informant] and Kellie Anderson. He had reason to believe that Kellie Anderson was in apartment #202 and he did not have reason to believe any other females were in the apartment. Detective Brandel then sees a blonde woman in the red Jeep with Donohoe shortly after the controlled purchase of methamphetamine occurred.

Supplemental Memorandum in Opposition to Defendant's Motion to Suppress, pp. 8-9.

Starnes argues Brandel did not have a reasonable, good faith belief that Starnes was the "Kellie" [Anderson] identified as having been involved in the controlled purchase."

Supplemental Brief in Support of Motion to Suppress, p. 4. Starnes argues:

> Though the officers did possess probable cause to arrest a woman named "Kellie" they did not possess sufficient information as to her identity or certainly did not testify clearly and convincingly as to "Kellie's" identity as to provide a sufficient basis for selective investigation procedures.

Supplemental Brief in Support of Motion to Suppress, p. 5.

Brandel testified that he was present earlier during the controlled buy. His purpose was to listen to the audio transmitted from the body wire of the confidential informant. As he arrived, the confidential informant was heading into the apartment for a controlled buy. At the time Brandel arrived he noticed a male working on the red Jeep Cherokee. Brandel monitored the wire and listened to the transaction in the apartment. Brandel specifically testified other than the female he assumed was Kellie Anderson and an unidentified male voice he assumed was the confidential informant, he heard no other voices on the audio transmission from the body wire. Once the transaction was complete, Brandel testified he followed the confidential informant back to the local briefing area, then debriefed the informant at the Kootenai County Sheriff's Office. From that debriefing, Brandel learned that the male Rick (Frederick Donohue) had methamphetamine, a 9 mm handgun, and had possibly committed a sexual assault upon Kellie Anderson. Brandel thinks Kellie Anderson was described as having blonde hair. Brandel testified Rick was the person he had seen

earlier working on the red Jeep.

Brandel testified that upon his return, Hildebrandt was obtaining a search warrant for the apartment. Brandel described his purpose upon his return was to arrest Rick Donohoe and Kellie Anderson if he saw them leaving. As Brandel arrived, he saw both doors of the red Jeep open, the male Donohoe leaning on the passenger side door, the blonde female in the driver's seat. Brandel approached Donohoe with Brandel's weapon drawn, ordered him on the ground. Brandel testified Donohoe did not immediately comply with that order. Once on the ground, Brandel had his knee in Donohoe's back and from that position could see the female in the driver's seat. A short time later the female asked Brandel what was going on, and whether she was free to leave, to which Brandel said "No." Brandel testified the female then said "Unless I'm under arrest I'm going to leave", to which Brandel responded "You are under arrest." During this conversation with the female, Brandel testified he was still on top of Donohoe with his knee in Donohoe's back, Donohoe on the ground. While Brandel had his knee in Donohoe's back, Brandel testified he either asked the female for her name or asked if her name was Kellie, and Brandel recalls she responded her name was "Ray". Brandel testified he could not check the female for identification because he was occupied with Donohoe on the ground. Brandel testified that at this time he believed the female was Kellie Anderson, and when he told her she was under arrest, he was arresting her for conspiracy of delivering methamphetamine or delivery of methamphetamine. Brandel was still dealing with controlling Donohoe when another unit, Detective Todd (Todd) arrived. Brandel cuffed and searched Donohoe. Todd moved the blonde female away from the Jeep, handcuffed her and performed a protective pat down search of her for weapons. Brandel did not watch that pat down search. After Starnes was searched, Todd found what appeared to be drugs and paraphernalia on her

person. Todd identified her as Doree Starnes. Brandel testified that once he learned the blonde female was not Kellie Anderson, Brandel then turned his attention on locating Kellie Anderson. Brandel testified that Anderson was located, booked, and that her booking sheet shows she had brown hair.

Brandel testified that he had not seen a picture of Kellie Anderson prior to encountering Starnes. All Brandel knew was he was looking for a blonde female named Kellie. Starnes appeared in court for the hearing on Starnes' Motion to Suppress. Starnes appeared at the hearing on her Motion to Suppress, and has blonde hair.

Detective Todd testified that he received a call to assist from Brandel. At the time Todd was nearby as "overwatch" of the controlled buy. Until he received the call to assist Brandel, Todd had not seen anything near the apartment, due to his position. When Todd arrived he saw the female in the driver's seat and the male near the passenger seat. Todd testified that Brandel asked Todd to take care of the female. Todd testified Brandel had the male at gunpoint, but the situation was not under control as the male was not complying with Brandel's directives. Todd testified he took the female away from the red Jeep as it made sense to him to get her out of the area. Todd detained her in handcuffs, searched her for weapons because he had information a gun had been involved in the drug transaction. As he was moving her away from the red Jeep, Todd testified he asked her for her name, and she responded "Doe Ray" (phonetic). Todd testified that he did not ask for her full name. At the time, the only information Todd had was: a male and a female were involved in a controlled buy, and there was a search warrant coming for the apartments. Todd testified he did not know at the time any names of those involved. Todd specifically testified he was not given any information as to the female's hair color. As Todd patted Starnes down, he felt a cylindrical metal object he thought might be an X-Acto knife. He

removed it and it was a double ended spoon, with a white paste on one end and a white powder residue on the other end. Continuing his search, Todd found a baggie with a white crystalline substance. Todd removed her wallet and cell phone and verified her name as Doree Adele Starnes, according to her Idaho driver's license. Todd testified at some point Starnes told him she "Lived in those apartments." Todd testified that he detained her (Todd later found out Brandel already had told Starnes she was under arrest), and Todd arrested her on charges of possession of a controlled substance and possession of paraphernalia. Todd testified that when he detained her he did so only for his own safety, and did not know Brandel had already told her she was under arrest. Todd testified the pat down search of Starnes was due to the information he had that weapons were involved in the drug transaction, and Todd was concerned the female could be armed.

While Todd knew early on that Starnes claimed her first name was Doree, and not Kellie, Todd did not know who Kellie was or what her involvement was.

Sergeant Hildebrandt testified that at the time of the controlled buy the only information which they had received from the State of Montana's drug task force was the suspect had the first name "Kellie". Hildebrandt testified he believes he was told she was in her mid 40's and blonde, but could not be sure of that. He did not take notes on the description of the female that was supposed to be present at the apartments because his main focus was on the male. During the buy, the female Kellie Anderson related to the confidential informant that she had been raped by Donohoe, and that if she didn't leave with the confidential informant after the buy, she feared she would be beaten and raped again by Donohoe.

It is beyond dispute that there existed probable cause to arrest "Kellie" due to the controlled buy from the confidential informant. The issue is whether the arrest of Doree

Starnes was reasonable. Specifically, the issue is whether the police were *objectively reasonable* in their mistaken belief that Doree Starnes was Kellie Anderson. *State v. McCarthy*, 133 Idaho 119, 125, 982 P.2d 954, 960 (Ct.App. 1999) ("although the officer's subjective belief was likely in good faith, a mistake must be objectively reasonable"); *Hill v. California,* 401 U.S. 797, 802-03, 91 S.Ct. 1106, 1110-11 (1971) ("subjective good-faith belief would not in itself justify either the arrest or the subsequent search…[b]ut sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time").

In the present case, law enforcement knew they were looking for "Rick" (Donohoe) and "Kellie". Law enforcement knew who Donohoe was as Brandel had seen him before the controlled buy. As a result of the body wire transmission during the controlled buy, law enforcement had reason to believe he had a weapon and had sexually assaulted Kellie. When Donohoe was again sighted by Brandel, Donohoe was in the presence of a blond female, and that fit the limited description they had of "Kellie" at that time. Up to this point, law enforcement had every reason to believe Doree Starnes was "Kellie."

The critical issue is once Brandel was told by Starnes that her name was Doree, did Brandel have a right to place her under arrest? This Court answers that question affirmatively. At that point in time when Brandel told Starnes she was under arrest after Starnes said she was leaving, Brandel was there to arrest both Rick and who he thought was Kellie, should they leave. It was not until *after* Brandel informed who he thought was Kellie that she was under arrest that Brandel asked for her name, and she responded "Ray". And even at that moment Brandel had no official identification given by her and was not under a duty to accept the name given ("Ray") as the truth.

Another critical point occurred when Todd was told by the female Starnes that her name was Doree. At that point in time did the detention of Starnes need to cease? The Court answers that negatively. Todd did not even know who "Kellie" was, so his detention was not related to getting the "wrong" person. Todd did not even know that Brandel had already informed Starnes that she was under arrest. Todd testified he took Doree away due to the uncontrolled situation between Brandel and Rick.

As to both critical points, *Hill*, discussed below, shows it is reasonable for the officers to not necessarily believe all they are told about the name given by the person they are encountering.

In its initial brief, the State cites to both *State v. McCarthy*, 133 Idaho 119, 982 P.2d 954 (Ct.App. 1999) and *Hill v. California,* 401 U.S. 797, 91 S.Ct. 1106 (1971). *McCarthy* involved a defendant seeking to suppress evidence revealed in the course of a traffic stop based on the law enforcement officer's allegedly having been mistaken as to the correct speed limit. 133 Idaho 119, 124, 982 P.2d 954, 959. The Court of Appeals found the officer was mistaken both as to fact (the speed limit sign's location) and law (the speed limit itself) and therefore held the officer did not have a *reasonable* suspicion McCarthy was violating the law when stopping him and upheld the District's Court's suppression of evidence. 133 Idaho 119, 125, 982 P.2d 954, 960. Importantly, although the officer's subjective belief was likely in good faith, a mistake must be objectively reasonable. *Id.*

Similarly, in *State v. Baxter,* 144 Idaho 672, 168 P.3d 1019 (Ct.App. 2007), the Idaho Court of Appeals reversed the judgment and conviction of the defendant in part because it was unable to conclude there had been sufficient information for a reasonably prudent officer to have believed the man he was detaining was J.H., a person for whom there was an outstanding warrant. 144 Idaho 672, 680, 168 P.3d 1019, 1027. In Baxter, a bail

recovery agent was looking for J.H. because he failed to show for a court date, and an arrest warrant had issued. The agent called police thinking she had seen J.H. in the front passenger seat of a vehicle, and let them know of the location of the vehicle. The agent was mistaken; the passenger was Baxter. The agent was familiar with both Baxter and J.H., and they bore a close physical resemblance to one another. 144 Idaho 672, 676, 168 P.3d 1019, 1023. The police stopped Baxter's vehicle, asked for his name, and Baxter gave his correct name but had no identification. The officer, believing Baxter was J.H. and was lying to avoid arrest, informed Baxter he was not under arrest but would be detained until his identity could be verified. *Id.* The officer frisked Baxter for weapons, and found baggies of meth in his wallet, along with a social security card bearing Baxter's name. At some point in time, the agent informed another officer at the scene that she had misidentified Baxter as J.H. It was not established whether this took place before or after the discovery of the methamphetamine. *Id.*

Implicit in the Idaho Court of Appeals discussion in *Baxter* is the concept that law enforcement can be mistaken about the detainee's identity, but once that mistake is known to the officer, the probable cause to continue to detain the mistaken individual vanishes. Also implicit is the concept that an officer does not have to believe a detainee's oral representation as to their identity.

The Idaho Court of Appeals in *Baxter* concluded "probable cause to arrest Baxter did not exist prior to the frisk of his person, and the frisk cannot be justified as a search incident to arrest" where the officer had been given no physical description of J.H., the defendant Baxter had given his correct name when questioned and denied being J.H., and the officer was not familiar with J.H.'s appearance from other contact. 144 Idaho 672, 680, 168 P.3d 1019, 1027.

In the present case, Brandel was looking for Rick Donohoe and a female named Kellie. He had come back from the sheriff's office to detain them if they tried to leave before the search warrant for their apartment arrived. At that time Brandel arrived back at the apartment, Brandel knew what Donohoe looked like as Brandel had seen him at the red Jeep earlier in the day, Brandel had reason to believe Donohoe was armed, Brandel knew that Donohoe was last seen with a female named Kellie who was supposedly blonde, Brandel had heard Kellie claim Donohoe had sexually assaulted (raped and beaten) the blonde female named Kellie and that Kellie feared Donohoe would do that to her again, and Brandel knew the blonde female named Kellie had sold drugs to a confidential informant. When Brandel arrived he immediately saw Donohoe with a blonde female, both getting into that same red Jeep. Most importantly, Brandel also knew no one had reported seeing Donohoe *with any <u>other</u> female that day*, other than the blonde female Brandel saw getting into Donohoe's red Jeep with Donohoe, the blonde female Brandel thought was "Kellie". While eventually Brandel asked the female her name, Brandel had every right to believe that the name given might not be correct. Remember, Brandel thinks he is talking to "Kellie" who had just sold drugs to a confidential informant. These facts gave Brandel an objective, reasonable basis to believe the blonde female to whom he was talking while pointing a gun at Donohoe was the same blonde female who the confidential informant had described earlier in the day had sold him drugs and whose voice Brandel had heard over the informant's body wire discuss her fears about Donohoe raping her again. Stated conversely, other than the fact that this female gave the name "Ray" to Brandel, rather than the anticipated "Kellie", Brandel had no information to the contrary that this was *anyone other than* the same person who had sold drugs to the confidential informant, the same person who had claimed she had been beaten and raped by Donohoe, the same person

who claimed Donohoe was armed and likely to beat her and rape her again.

In *Hill v. California,* the United States Supreme Court upheld the California courts' finding that officers had a reasonable, good faith belief the arrestee, Miller, was a person for whom they were looking named Hill. The person was in fact Miller, but in arresting Miller, they found a great deal of property which was Hills. In *Hill*:

> Based on our own examination of the record, we find no reason to disturb either the findings of the California courts that the police had probable cause to arrest Hill and that the arresting officers had a reasonable, good faith belief that the arrestee Miller was in fact Hill, or the conclusion that '(w)hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.' 69 Cal.2d, at 553, 72 Cal.Rptr. at 643, 446 P.2d, at 523. The police unquestionably had probable cause to arrest Hill; they also had his address and a verified description. The mailbox at the indicated address listed Hill as the occupant of the apartment. Upon gaining entry to the apartment, they were confronted with one who fit the description of Hill received from various sources. That person claimed he was Miller, not Hill. But aliases and false identifications are not uncommon. Moreover, there was a lock on the door and Miller's explanation for his mode of entry was not convincing. He also denied knowledge of firearms in the apartment although a pistol and loaded ammunition clip were in plain view in the room. The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quire wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time.

401 U.S. 797, 802-03, 91 S.Ct. 1106, 1110-11. This was the finding of the United States Supreme Court, even though Miller had produced identification indicating that he was in fact Miller. 401 U.S. 797, 799, 91 S.C.t. 1106, 1108.

In the instant matter, Brandel testified he knew only that "Kellie" was a female. On cross-examination he stated he thought he was told Kellie was a blonde, but he could not be certain about that and that he had written no notes on that issue. Brandel, contrary to the State's recitation of facts in briefing, first observed Starnes in the Jeep; he had never

seen her near the apartment for which a search warrant was being sought. Brandel testified Starnes stated her name was Doree, that he did not ask her for identification because he was physically detaining Donohoe at gunpoint at the time, and that he never inquired as to whether the individual he believed to be Kellie (but who was in fact Starnes) had been sexually assaulted or in need of assistance. Brandel testified he did not inform this person whom he believed to be Kellie (but was in fact Starnes) of what was happening, why he had a gun pointed at Rick. Brandel testified the female asked if she could leave, to which he said "No"; the female then said, "Unless I'm under arrest I'm going to leave", to which Brandel responded, "You are under arrest." At that point, without taking her into custody, but through his words, Brandel arrested Starnes, even though it was Todd who moments later moved her away from the scene, handcuffed her and searched her. Todd searched Starnes pursuant to Brandel's arrest. Alternatively, since Todd was ignorant of the fact that Brandel had told Starnes she was under arrest, Todd did a protective pat down search for his own safety.

Todd testified he did not know who Starnes was, indeed, he did not know who Kellie was (or that a "Kellie" was even involved), and did not confirm Starnes' identity before his search of her person. Todd testified he handcuffed Starnes within a minute of contacting her at the Jeep. Todd testified the pat down search of Starnes was due to the information he had received that weapons were involved in the drug transaction, at least with the male, and Todd was concerned the female could be armed.

The Court must look at what Brandel knew and what Todd knew, collectively. "Whether an officer had the requisite reasonable suspicion to detain a citizen is determined on the basis of the totality of the circumstances—the collective knowledge of all those officers and dispatchers involved." *State v. Baxter,* 144 Idaho 672, 678, 168 P.3d 1019,

1025 (Ct.App. 2007).

The facts of this case are distinguishable from those in both *Baxter* and those in *Hill.* In *Baxter*, there was an agent who knew both Baxter and J.H. looked similar, but that information was not passed along to law enforcement. In *Hill*, both Hill and Miller looked similar. In the present case, Kellie was supposedly a blonde female, and Doree is a blonde female. Most importantly, as far as law enforcement knew, the blonde female thought to be Kellie was the *only* female around Donohoe that day. That plays a significant factor in the "sufficient probability" that Doree Starnes was "Kellie" when Brandel arrived and saw Donohoe and a blonde female getting into Donohoe's red Jeep. This Court finds the facts of this case provide more of a "sufficient probability" that Doree was Kellie than the facts in *Hill* show Miller was Hill or than the facts in *Baxter* show Baxter was J.H.

It is also important to note that in *Hill,* Miller showed actual identification proving who he was, and the United States Supreme Court still upheld the search. In *Hill,* Miller produced identification he was Miller *before* the search. In the present case, Doree produced such identification to Todd, but *after* the search.

At the time of the arrest, Brandel knew: Starnes was in a red Jeep he had previously seen a male working on; he knew the male was Donohoe; he knew Donohoe and a female were selling drugs; knew the female had sold drugs to the confidential informant and complained to the confidential informant that she'd been beaten and raped by Donohue; he had information Donohue was armed; he was to arrest Donohoe and the female known as "Kellie" if they left; he saw both doors to the red Jeep were open; Starnes stated her name was Ray (not Kellie); and Starnes stated she would leave unless she was under arrest, so Brandel arrested her. Brandel never saw Starnes in or near the apartment he was surveilling; he had no description whatsoever of "Kellie" other than being a blonde

female (who was later identified on a booking sheet as a brunette); and did not inform Starnes of what was occurring.

It could be construed as inconsistent that while Brandel identified his belief that "Kellie" had been sexually assaulted as an exigency in hurrying to return to the apartment following his debriefing of the confidential informant at the sheriff's office, Brandel never inquired of Starnes (the individual he believed to be Kellie) as to whether she had been sexually assaulted, whether she was in distress, or whether she requested any assistance in that regard. However, Brandel was understandably pre-occupied with Donohoe at the time because initially Donohoe was not cooperating, and even when Brandel had speaks with the female Brandel had Donohoe on the ground with Brandel's knee in Donohoe's back and Brandel's gun pointed at Donohoe. Brandel was otherwise occupied, and nothing inconsistent is found by this Court due to Brandel's insensitivity to "Kellie's" plight.

This Court finds Starnes' Motion to Suppress must be denied because law enforcement involved were *objectively reasonable* in their mistaken belief that Doree Starnes was Kellie Anderson. *State v. McCarthy*, 133 Idaho 119, 125, 982 P.2d 954, 960 (Ct.App. 1999) ("although the officer's subjective belief was likely in good faith, a mistake must be objectively reasonable"). This Court finds there was a "sufficient probability" (*Hill v. California,* 401 U.S. 797, 802-03, 91 S.Ct. 1106, 1110-11 (1971) ("subjective good-faith belief would not in itself justify either the arrest or the subsequent search…[b]ut sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time")), that Starnes was "Kelli" up to the time Todd looked at an actual official identification of Starnes. At that point in time the drugs and paraphernalia had already been discovered pursuant to a legitimate, though

mistaken, arrest of Starnes as “Kellie”.

B. Inevitable Discovery.

Because this Court has denied Starnes’ Motion to Suppress, the issues of “inevitable discovery” and “Terry stop” are moot. However, those theories should be briefly discussed.

The State argues this Court should not exclude the evidence seized, even if it determines Brandel was not reasonable in mistakenly arresting Starnes, under the doctrine of inevitable discovery. Memorandum in Opposition to Defendant’s Motion to Suppress, p. 7. The State agues the proper search warrant in this case, based upon probable cause, carries with it the authority to detain occupants of premises while a search warrant is executed. *Id.,* citing *Michigan v. Summers,* 452 U.S. 692, 101 S.Ct. 2587 (1981); *State v. Kester,* 137 Idaho 643, 51 P.3d 457 (Ct.App. 2002). The State argues:

> In the present case, Sergeant Hildebrandt obtained a warrant to search apartment #202, which could be conducted day or night. Surely, it would have been reasonable to secure the premises and detain Starnes where Starnes was observed leaving an apartment where a controlled purchase of methamphetamines had just occurred and where officers had reason to believe that drugs may still be in the apartment. Through a brief detention officers would have discovered her identity as Doree Starnes. They would have also learned that Doree Starnes was an occupant of apartment #202 and had belongings and paperwork in the apartment.

Memorandum in Opposition to Defendant’s Motion to Suppress, p. 8.

The inevitable discovery doctrine applies as an exception to the exclusionary rule where if the preponderance of evidence demonstrates the information would have inevitably been discovered through lawful means. *State v. Blunting,* 142 Idaho 908, 915, 136 P.3d 379, 386 (Ct.App. 2006) citing *Nix v. Williams,* 467 U.S. 431, 444, 104 S.Ct. 2501, 2509 (1984). In *Bunting,* the Court wrote:

> Evidence that is discovered via an unlawful search of a premise may be admitted at trial, and void suppression, if it would have been inevitably discovered during the execution of an existing, valid search warrant. *Buterbaugh,* 138 Idaho at 102, 57 P.3d at 813. This requires that the

> evidence found through unlawful action would have been discoverable within the scope of the valid search warrant. *Id.* The valid search warrant does not have to arise out of an investigation independent from the one that resulted in the unlawful discovery of evidence for the inevitable discovery exception to apply. *Id.*

142 Idaho 908, 916, 136 P.3d 379, 387. Here, as argued by Starnes, there was no testimony at hearing on the motion to suppress that the search warrant was for anything but the apartment. Indeed, the search warrant itself is specifically for the "apartment complex, apartment #202. 4686 Fairway Dr. Apartment #202. The apartment is on the second level with the number 202 on the front door." Page two of the Search warrant specifically provides for search of the premises, by circling that term and not the term "vehicle" within 24 hours of February 1, 2010 at 5:25 p.m. Starnes was detained at gunpoint, arrested, and searched all before the search warrant was executed. And, although the State claims she had been observed exiting the apartment at issue, no such testimony was heard by this Court and no such evidence exists in the record. The State's argument regarding the inevitable discovery doctrine and the valid search warrant in this case fails. No search warrant was issued for the Jeep, and Starnes was not observed in or near the apartment for which the search warrant was issued.

C. *Terry* Stop.

In its Supplemental Brief, the State argues for the first time that the detention of Starnes would have been reasonable under *Terry* stop principles because of the information law enforcement had regarding the red Jeep and the reasonableness of removing a woman from the areas of the Jeep to determine her identity and possible involvement in the delivery of controlled substances. Supplemental Memorandum in Opposition to Defendant's Motion to Suppress, pp. 9-10.

Starnes replies she had been detained, handcuffed, and searched *before* any

search warrant was issued in this case. Supplemental Brief in Support of Motion to Suppress, p. 7. Additionally, Starnes notes there was no evidence at the hearing on the suppression motion that she was ever seen leaving apartment #202. Starnes argues:

> Though it was later revealed to the officers that Starnes had been living in Apartment #202, no testimony was adduced that at the time of Starnes' seizure and the search of her person that Starnes had been seen in or near Apartment #202. The testimony provided by Sgt. Brandel was that Starnes was seen getting into a red Jeep Cherokee parked in the south parking lot. There was also no evidence that Starnes was seen entering or leaving Apartment #202 which was one of approximately 30 apartment units nearby.

Id., p. 8.

The question remaining for the Court, then, is whether a *Terry* stop of Starnes was reasonable. The reasonableness of a *Terry* frisk is examined by evaluating the totality of the circumstances and asking whether the facts available to the officer at the time of the stop gave rise to a reasonable inference of risk of danger. *State v. Greene,* 140 Idaho 605, 608, 97 P.3d 472, 475 (Ct.App. 2004) citing *State v. Wright,* 134 Idaho 73, 76, 996 P.2d 292, 295 (2000). At the time Starnes was stopped and/or detained, Brandel likely had a reasonable concern regarding his safety given the confidential informant's having told law enforcement Donohoe had a firearm. However, by the time Starnes was frisked by Todd, she was handcuffed and located some distance from Donohoe. Upon approaching Donohoe and Starnes, Brandel had his weapon drawn upon Donohoe. By the time the State claims Starnes was subjected to a *Terry* frisk, she was already arrested and in handcuffs. As discussed above, the person placing her in handcuffs, Todd, did not know at the time that Brandel had arrested her. According to Todd's testimony, he had Starnes handcuffed and searched within thirty seconds of his arrival. Given what Brandel was doing with Donohoe at the time, there is no indication that Brandel had found Donohoe's weapon by that time. This Court finds a *Terry* frisk of Starnes was reasonable. Even

though Todd's testimony was the information they had at the time placed the weapon with the male, at that time a weapon had not yet been discovered on Donohoe. Once the weapon was found on Donohoe, that alone did not preclude the female from possessing a weapon, especially given the female was (mistakenly) believed to have been involved a selling drugs. This Court finds Todd's testimony that had concerns that the female could be armed to be objectively reasonable.

IV. PROFESSIONAL RESPONSIBILITY AND CANDOR TOWARD THE COURT.

As mentioned above, Starnes filed her Motion to Suppress on March 16, 2010. On March 18, 2010, Starnes filed her Notice of Hearing, scheduling the hearing for Tuesday, May 11, 2010, at 3:00 p.m. Thus, the State had fifty-three days notice in advance of the May 11, 2010, hearing regarding Starnes' Motion to Suppress. Starnes filed her Memorandum in Support of Motion to Suppress on April 29, 2010, thirteen days before the hearing on her Motion to Suppress.

On March 29, 2010, the State, through the same deputy prosecuting attorney, issued four subpoenas for the May 11, 2010, hearing on Starnes' Motion to Suppress. Thus, that attorney knew of the May 11, 2010, hearing. However, the State failed to file a brief until immediately before the May 11, 2010, hearing on the Motion to Suppress, filing its Memorandum in Opposition to Defendant's Motion to Suppress at approximately 10:00 a.m. the day of the 3:00 p.m. hearing. The Court *was* in trial the entire morning and early afternoon of May 11, 2010, and following the recess of that trial on that day the Court immediately took up two sentencing hearings at 2:00 p.m. prior to the 3:00 p.m. Motion to Suppress hearing in the instant case. Accordingly, the Court had no opportunity to read the State's brief in the present case which it had that morning at 10:00 a.m.

At the May 11, 2010, hearing on Starnes' Motion to Suppress, this Court inquired

why the deputy prosecutor filed its brief in such an untimely fashion. The deputy prosecutor told the Court, "The brief of the defendant came in on the 29th, I was in a jury trial at that time, and given my scheduling, I was not able to get that done until it was turned in." The 29th of April was a Thursday, twelve days before the May 11, 2010, hearing on the Motion to Suppress in the present case.

In addition to putting the Court at a disadvantage, the untimely filing of the State's brief may have obviated the need for a hearing in the first place. In Starnes' initial Memorandum in Support of Motion to Dismiss there is no indication Starnes or her counsel knew of law enforcement's mistaken identity of Kellie for Doree Starnes. Nothing in the police reports attached to the Complaint in this matter would give that indication. It is only when the State filed its Memorandum in Opposition to Defendant's Motion to Suppress *on the day of the hearing on the Motion to Suppress* that such mistaken identity theory was disclosed for the first time. Had that theory been disclosed to Starnes and her attorney, perhaps the motion would have been withdrawn, or perhaps the facts could have been stipulated with the parties arguing the application of those facts to the law. While somewhat unlikely, either outcome was *possible*. By disclosing for the first time mere hours before a hearing on a motion to suppress, the State foreclosed that *possibility.* Instead of that possible outcome, what actually happened is all involved went through a two-and-one-half-hour evidentiary hearing for which defense counsel had estimated one hour. Obviously, the Court takes no umbrage with Starnes' counsel's estimate of one hour for the hearing because when the motion was filed and noticed for hearing in mid-March, Starnes' counsel had know way of knowing of this "mistaken identity" theory at that time.

Assuming the deputy prosecutor was honest with the Court in that deputy's explanation (that the deputy prosecutor was involved in a trial the week before) for not

providing the Court and counsel with a brief until the morning of the hearing, such explanation leaves other questions unanswered. **First**, if that deputy was in fact in trial every day the week before (and the two days the week before that counting April 29 and 30), what prevented that deputy from coming in over the intervening *two weekends* and at least producing a brief for filing that Monday morning, the day *before* the hearing on the Motion to Suppress? **Second**, if that deputy was in fact in trial every day the week before and the two days the week before that, what prevented that deputy from asking for the help of some other deputy prosecutor to handle the briefing on the present case? Counsel for the State is referred to Idaho Rules of Professional Conduct: Rule 1.3 "Diligence"; Rule 3.2 "Expediting Litigation". The Kootenai County Prosecuting Attorney's office consists of fifteen attorneys. Surely some one of those fifteen attorneys could have handled the briefing in this case. Indeed, any attorney having a supervisory or managerial capacity with the involved deputy prosecutor has an affirmative duty in that regard. Rule 5.1 "Responsibilities of Partners, Managers, and Supervisory Lawyers."

This Court has reason to doubt the veracity of the deputy prosecuting attorney being in trial the week before. The bailiff records show only one jury trial being held the week of May 3, 2010, and that was before the undersigned and that case (*State v. Wesley Deaton,* Kootenai County Case No. CRF 2009 16355) involved a different deputy prosecuting attorney, Terri Laird. The bailiff records show no other jury trials the week of May 3, 2010. Hopefully, there is a non-jury trial that does not appear in the bailiff records. If the deputy prosecutor were involved in a court trial, then the explanation given by the deputy prosecutor to this Court at least infers that deputy's involvement in a court trial for all eight business days between the time of defendant's filing its motion to suppress and the May 11, 2010, hearing. There were no court trials of such duration during that time period.

Counsel for the State is referred to Idaho Rules of Professional Conduct: Rule 3.3 "Candor Toward the Tribunal"; Rule 3.4 "Fairness to Opposing Party and Counsel"; Rule 4.1 "Truthfulness in Statements to Others". If this Court were misled, then counsel for the State has the duty to report such conduct, the Kootenai County Prosecuting Attorney has a duty to report such conduct (and is being sent a copy of this decision), and this Court has an obligation to report this conduct. Rule 8.3 "Reporting Professional Conduct." The only way the Court can be assured it was not misled is for the deputy prosecutor involved to come forward to the Court with some information as to a lengthy trial that is not apparent from the docket in Kootenai County.

V. CONCLUSION AND ORDER.

For the reasons set forth above, Starnes' Motion to Suppress is denied.

IT IS HERBY ORDERED THAT DOREE ADELE STARNES's Motion to Suppress is **DENIED**.

DATED this 19th day of May, 2010.

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

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

Defense Attorney - Daniel G. Cooper
Kootenai County Prosecuting Attorney
Deputy Kootenai County Prosecuting Attorney via interoffice mail

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy