

speeding was legitimate. Jobes testified that prior to approaching the Camry he observed “all three passengers were making furtive movements.” Jobes described the passengers looking back at Jobes, as well as ducking down where heads were going out of view behind seats, including the driver of the car, Poledna. A female passenger was in the front passenger seat and a male passenger, Michael Honchell, was in the back seat.

As Jobes approached the driver, his window was down but Jobes could smell nothing coming from inside the vehicle. Jobes talked to the driver, told him he was stopped for speeding and asked the driver for his driver’s license, insurance and registration. The driver gave Jobes a driver’s license bearing the name Nicholas Poledna, and the driver told Jobes the license was not current, the vehicle was not his, and they looked for the insurance and registration. Jobes asked the other two occupants for their identification, received it, went back to his patrol car and checked the status of all three. Almost immediately after calling dispatch, Jobes received a call over the radio from Officer Pat Leonard of the Post Falls Police Department. Leonard told Jobes that the Camry was associated with a male subject by the name of Jorel Fults who had felony warrants for his arrest, was known to carry guns on his person and was “not law enforcement friendly”. Jobes then called for another officer due to “officer safety concerns”, “because I wanted to make sure myself that I wasn’t dealing with somebody that had felony warrants out, that if that was the circumstances that we could take care of it.” Jobes testified that from pictures he had seen of Fults about two months before, he knew the male in the back seat was not Fults, but was unsure of the driver, as the driver was wearing aviator style glasses and had a bandanna pulled down to the top of the glasses with a black ball cap on top of the bandanna. Jobes testified that at the time he made the request for another officer he assumed the driver could possibly be Fults. Jobes testified Rathdrum Police Officer Friis

arrived about a minute after the request, no longer than 90-seconds after the call was made.

Both officers then approached the Camry, Jobes on the driver's side and Friis on the passenger side. As they approached, Jobes had just learned from dispatch that the driver Poledna's license was suspended. As Jobes approached the Camry, he told the driver he was going to physically identify the driver to see who he was due to the information they had received from Leonard, had him step out of the car and told him they were going to detain him. As he pulled out the driver, Jobes handcuffed the driver and told him he was doing so for officer safety. Jobes then asked the driver if he had any weapons on him and the driver said "no", and Jobes asked the driver if he had his permission to pat search just to be sure there was no weapons and the driver said "fine." At the same time, Friis had pulled the female out of the car, and detained her because she was a confirmed runaway. She was placed in the back of Friis' patrol car and Jobes had Poledna sit on the back bumper of the Camry. Jobes testified the physical description of Fults was "fairly close" to Poledna's appearance, same height and build, but once the cap and glasses were taken off, Jobes could tell Poledna was not Fults and could tell that the driver was the same person as appeared on the driver's license Poledna had handed Jobes. Jobes then told Poledna why they were doing this, that Fults was associated with this Camry, and Jobes testified he believes he told Poledna that they had information that Fults had weapons. Jobes then asked Poledna if he could search the vehicle, and Poledna consented. Jobes testified that at no time up to this point could he see weapons in plain sight within the vehicle, that rarely are weapons left in plain sight, and that with the furtive movements he had observed, there could possibly be weapons hidden outside of plain view. Jobes testified that as soon as he put his head inside the vehicle to search for weapons he could

smell the odor of marijuana. An amount of marijuana sufficient for a felony was found in a tan purse inside the vehicle. It is that evidence which is sought to be suppressed.

II. ISSUES.

Poledna raises three issues: 1) Did the lengthy detention of Defendant exceed that which was necessary to effectuate the purpose of the stop? 2) Was it lawful for the police officer to conduct a frisk search of Defendant? 3) Was the consent given to search the vehicle the product of an unlawful seizure? Brief in Support of Motion to Suppress, p. 2.

III. ANALYSIS.

A. Length of Detention.

At no time during the hearing was any evidence given as to the amount of time that transpired from the stop of the speeding Camry Poledna was driving to the time Poledna was asked if the vehicle could be searched. Since the information about a Jorel Fults was apparently relayed by Officer Leonard shortly after Officer Jobes initially radioed in the identification of the three individuals, Jobes immediately requested backup, and Officer Friis arrived within a minute and a half of the request for back-up, and the conversation with Poledna ensued shortly thereafter, it would seem the time from stop to consent took less than fifteen minutes, perhaps substantially less than fifteen minutes. As noted in *State v. Shyrlene Rae Keene*, 2007 Opinion No. 56, 07.17 ICAR 715, (Ct.App. August 16, 2007), fifteen minutes did not exceed the time necessary to effectuate the purpose of that stop, citing *State v. Brumfield*, 136 Idaho 913, 917, 42 P.3d 706, 710 (Ct.App. 2001), where the time was forty-nine minutes. The detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. *State v. Shyrlene Rae Keene*, 2007 Opinion No. 56, 07.17 ICAR 715, 716, citing *State v. Roe*, 140 Idaho 176, 181, 90 P.3d 1220, 1223 (Ct.App. 2003); *State v. Gutierrez*, 137 Idaho 647, 651, 51 P.3d 461, 465

(Ct.App. 2002). Where a person is detained, the scope of detention must be carefully tailored to its underlying justification. *Id.*, citing *Roe*, 140 Idaho at 181, 90 P.3d at 931. *State v. Parkinson*, 135 Idaho 357, 361, 17 P.3d 301, 305 (Ct.App. 2000). In this case, the purpose of the stop was initially for a speeding ticket. A fifteen-minute detention for speeding is not unreasonable. But once the occupants' identification was radioed in by Jobes and Officer Leonard's concerns about Jorel Fults were made to Jobes, the stop became a stop to address concerns over the Camry's connection to a man with outstanding warrants known to carry weapons and not friendly to law enforcement. Such a stop could easily last more than fifteen minutes. The length of detention was not unlawful.

B. The Frisk Search of Poledna.

Poledna argues that there was no justification for the frisk of Poledna, and thus, it was unlawful. Brief in Support of Defendant's Motion to Suppress, pp. 8-9. Poledna is correct that a frisk requires greater justification than just a stop. *State v. Kerley*, 134 Idaho 870, (Ct.App. 2000). Jobes had that justification when he received Officer Leonard's warnings regarding Fults. At the time Jobes asked Poledna to exit the vehicle and Poledna handcuffed Poledna, Jobes still had concerns that he was dealing with Jorel Fults, a dangerous person. It was only after Poledna was handcuffed and after the frisk was over that Jobes took off Poledna's hat, bandanna and aviator style glasses. It was at that time, based on photos Jobes had reviewed a couple months earlier that Jobes was convinced he was not dealing with Fults. At the time of the frisk, officer safety was the justification for Jobes' frisk of Poledna. Furthermore, Poledna gave Jobes consent to frisk him. In any event, the frisk of Poledna led to no evidence.

C. Consent to Search the Vehicle Poledna Was Driving.

Poledna claims the consent he gave to search the Camry was the product of an

unlawful seizure. This is Poledna's strongest argument. Up to the point in time that Jobes took off Poledna's hat, bandanna and glasses, Jobes had objectively reasonable concerns that he was dealing with Jorel Fults. Once he could see Poledna's face, he realized he was not dealing with Fults and was instead dealing with the person shown on the identification, Nicholas Poledna. At this point, there is a strong argument that Poledna should have been released and un-handcuffed, as "once the articles of clothing were removed and thereby any reasonable doubt as to his legitimate identity diffused, it was not reasonable to continue to detain him further." Brief in Support of Defendant's Motion to Suppress, p. 8. All indications are that Jobes' request for Poledna's consent to search the Camry were made while Poledna was still handcuffed and still being detained by Jobes. Poledna consented to the search of the Camry without hesitation. Had Poledna been un-handcuffed and told he was free to leave before the request for consent to search the vehicle, we would clearly have a voluntary consent.

However, just because Jobes is now convinced he is not dealing with Jorel Fults directly, he still has information that Fults is tied to this car, that Fults is associated with weapons, that this car does not belong to Poledna, and Poledna and the other two occupants engaged in furtive movements as Jobes approached the Camry. There is, at the time of the request by Jobes of Poledna to search the Camry, objectively reasonable concerns for an officer's safety given these facts.

This Court finds that there was still present an officer safety concern, and that a reasonably prudent man in the same circumstances would be warranted in the belief. *State v. Henage*, 143 Idaho 655, 670, 152 P.3d 16, 21 (2007). In addition to the information about Fults, the danger he posed and Fults' connection with this Camry, Jobes also had the fact that the female was an underage runaway and would remain detained. Jobes also

knew Poledna in fact had an invalid license, and Jobes saw the furtive gestures of all the occupants as he approached. Poledna correctly notes that consent does not expunge the taint of unlawful police activity as the events were irrevocably intertwined, as set forth in *State v. Kerly*, 134 Idaho 870 (Ct.App. 2000), and *State v. Baxter*, 07.9 ICAR 386, Docket No. 32597 (Ct.App. 2007). Brief in Support of Defendant's Motion to Suppress, p. 9. However, in the present case, there was no unlawful police activity at the time Jobes made his request of Poledna to search the Camry.

The State of Idaho notes that, under Idaho Code § 49-1407, an officer can use discretion and arrest when the person does not furnish satisfactory evidence of identity or when the officer has reasonable and probable grounds to believe the person will disregard a written promise to appear in court. State's Response to Defendant's Motion to Suppress, pp. 9-10. The State argues that Jobes would have been justified in arresting Poledna for "this offense" (*Id.* p. 10), as "he had reasonable and probable grounds to believe" defendant would disregard his promise to appear in court. *Id.* The Court assumes the State means an invalid license when it mentions "this offense." Even with that assumption, this Court disregards the State's argument, as there was no proof of any such proposition. Poledna had an invalid Washington license. That is no basis upon which to form a belief he would not appear in court. All of this is of no consequence as, in any event, there was not unlawful police activity at the time Jobes made his request to Poledna to search the Camry Poledna had been driving. Poledna freely gave such consent.

An issue not briefed by either party was whether or not Poledna's consent was voluntary. Consent is an exception to the warrant requirement. *State v. Hansen*, 138 Idaho 791, 796, 69 P.3d 1052, 1057 (2003). Whether consent was voluntary, as opposed to being a product of coercion, is a question of fact to be determined in light of all the

surrounding circumstances. *Id. State v. Smith*, ___ Idaho ___, 163 P.3d 1194 (2007).

Here, Poledna gave his consent immediately and without hesitation. As stated in *State v.*

Garcia, 143 Idaho 774, 748-49, 152 P.3d 645, 649-50 (Ct.App. 2006):

A search conducted with consent that was freely given is an exception to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854, 858 (1973); *State v. Dominguez*, 137 Idaho 681, 683, 52 P.3d 325, 327 (Ct.App.2002). It falls to the state to prove, by a preponderance of the evidence, that consent was voluntary as opposed to being the result of duress or coercion, direct or implied. *Schneckloth*, 412 U.S. at 221, 93 S.Ct. at 2044, 36 L.Ed.2d at 859; *State v. Hansen*, 138 Idaho 791, 796, 69 P.3d 1052, 1057 (2003); *State v. Jaborra*, 143 Idaho 94, 97, 137 P.3d 481, 484 (Ct.App.2006); *Dominguez*, 137 Idaho at 683, 52 P.3d at 327; *State v. Fleenor*, 133 Idaho 552, 554, 989 P.2d 784, 786 (Ct.App.1999). A voluntary decision is “the product of an essentially free and unconstrained choice by its maker,” *Schneckloth*, 412 U.S. at 225, 93 S.Ct. at 2047, 36 L.Ed.2d at 862, while an individual's consent is involuntary “if his will has been overborne and his capacity for self-determination critically impaired.” *Id.* To determine whether a subject's will was overborne in a particular case, the court must assess “the totality of all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation.” *Id.* at 226, 93 S.Ct. at 2047, 36 L.Ed.2d at 862. Accordingly, whether consent was granted voluntarily, or was the product of coercion, is a factual determination to be based upon the surrounding circumstances, accounting for subtly coercive police questions and the possibly vulnerable subjective state of the party from whom consent is elicited. *Id.* at 229, 93 S.Ct. at 2048-49, 36 L.Ed.2d at 864; *Hansen*, 138 Idaho at 796, 69 P.3d at 1057; *Jaborra*, 143 Idaho at 97, 137 P.3d at 484; *Dominguez*, 137 Idaho at 683, 52 P.3d at 327.

A determination of voluntariness is not dependent “on the presence or the absence of a single controlling criterion.” *Schneckloth*, 412 U.S. at 226, 93 S.Ct. at 2047, 36 L.Ed.2d at 862. Factors to be considered include whether there were numerous officers involved in the confrontation, *Castellon v. United States*, 864 A.2d 141, 155 (D.C.2004); *United States v. Jones*, 846 F.2d 358, 361 (6th Cir.1988); the location and conditions of the consent, including whether it was at night, *United States v. Mapp*, 476 F.2d 67, 77-78 (2d Cir.1973); whether the police retained the individual's identification, *United States v. Chemaly*, 741 F.2d 1346, 1353 (11th Cir.1984); whether the individual was free to leave, *Ohio v. Robinette*, 519 U.S. 33, 39-40, 117 S.Ct. 417, 421, 136 L.Ed.2d 347, 354-55 (1996); *Chemaly*, 741 F.2d at 1353; *State v. Gutierrez*, 137 Idaho 647, 651, 51 P.3d 461, 465 (Ct.App.2002); and whether the individual knew of his right to refuse consent, *Schneckloth*, 412 U.S. at 248-49, 93 S.Ct. at 2058-59, 36 L.Ed.2d at 875; *Chemaly*, 741 F.2d at 1353; *State v. Jones*, 126 Idaho 791, 793, 890 P.2d 1214, 1216 (Ct.App.1995). Although

the presence of multiple officers does not, standing alone, establish coercion, and there is no requirement that police inform the individual he is free to leave or that he has a right to refuse consent, these factors are nevertheless relevant when assessing the totality of the circumstances. See *Robinette*, 519 U.S. at 39-40, 117 S.Ct. at 421, 136 L.Ed.2d at 354-55; *Schneckloth*, 412 U.S. at 248, 93 S.Ct. at 2058, 36 L.Ed.2d at 875; *Jones*, 846 F.2d at 361; *Chemaly*, 741 F.2d at 1353; *Castellon*, 864 A.2d at 155; *Gutierrez*, 137 Idaho at 651, 51 P.3d at 465; *Jones*, 126 Idaho at 793, 890 P.2d at 1216.

Importantly, the trial court is the proper forum for the “careful sifting of the unique facts and circumstances of each case” necessary in determining voluntariness. *Schneckloth*, 412 U.S. at 233, 93 S.Ct. at 2050, 36 L.Ed.2d at 866. Even if the evidence is equivocal and somewhat in dispute, if the trial court's finding of fact is based on reasonable inferences that may be drawn from the record, it will not be disturbed on appeal, *State v. Post*, 98 Idaho 834, 837, 573 P.2d 153, 156 (1978), *overruled on other grounds by State v. Bottelton*, 102 Idaho 90, 625 P.2d 1093 (1981), since our standard of review requires that we accept a trial court's factual findings unless they are clearly erroneous. *Hansen*, 138 Idaho at 795, 69 P.3d at 1056; *State v. McCall*, 135 Idaho 885, 886, 26 P.3d 1222, 1223 (2001). Findings will not be deemed clearly erroneous if they are supported by substantial evidence in the record. *State v. Benson*, 133 Idaho 152, 155, 983 P.2d 225, 228 (Ct.App.1999). See e.g., *Jaborra*, 143 Idaho at 97, 137 P.3d at 484 (upholding the district court's finding of fact that consent was coerced as supported by substantial evidence and as not clearly erroneous).

In the present case, at the time Jobes asked Poledna for his consent to search this vehicle, it was evening, but not at all dark out. There were two officers present, but only Jobes was dealing with Poledna. Poledna was not free to leave, he was handcuffed. The fact that he was not free to leave is important, but as stated above, that fact is not determinative. The fact that Poledna was not told he was free to leave is likewise important, but not determinative. The location of the stop was out in public, on Meyer road, a well traveled road. Also relevant is the fact that it was not Poledna's vehicle. It is possible that Poledna gave such instantaneous consent because it was not his vehicle, and he may have felt no responsibility for anything found inside the vehicle. Another fact is where the marijuana was found, in a tan purse (with apparently a small amount on the console in an M&M wrapper). Poledna may have not known about the presence of marijuana in the purse, and

if he did, he again may have felt no responsibility for marijuana in some other occupant's purse. Poledna may not have known about the presence of the marijuana on the console as it was in a candy container. The tone of the detention does not appear to be at all confrontational. Jobes was polite, and let Poledna know his concerns were for weapons. Compare that situation to *State v. Jaborra*, 143 Idaho 94, 98, 137 P.3d 481, 485 (Ct.App. 2006), where the Idaho Court of Appeals upheld suppression granted by the district court:

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

Those are not the facts here. Jobes was cordial, and focused only on the weapons. Jobes at no time asked about drinking, drug use, or even whether he would find anything he shouldn't find in the vehicle. The tenor of the whole situation was focused on weapons.

This is a close call. It could have been made an easy call if Jobes had simply warned Poledna that he could refuse his request for consent to search of the vehicle and had taken off the handcuffs prior to the request for consent.

However, Jobes has to control the situation, and being handcuffed while an officer searches the vehicle for weapons, when weapons are suspected, is reasonable. Aside from the handcuffs and not letting Poledna know he was free to refuse to consent, all other factors tip toward a finding that consent was voluntarily given. It was daylight, on a well traveled road, one officer dealing with Poledna and another officer present but not ever interacting with Poledna. The whole situation was focused around weapons and officer safety, and no suspicion of contraband. The marijuana was found in an area where Poledna may not have known it was present, and it was not his car he was driving. Jobes

was cordial. The duration of the detention was not at all long. Most importantly, Poledna's assent to the request to search was instantaneous. On balance, this Court finds Poledna's consent was voluntary.

IV. ORDER.

IT IS ORDERED that Poledna's Motion to Suppress is **DENIED**.

Dated this 5th day of October, 2007.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of October, 2007 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by facsimile or interoffice mail to:

KCPA – DONNA GARDNER

MICHAEL PALMER 676-1683

By _____
Jeanne Clausen, Secretary