

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/Appellant,)
 vs.)
)
 DALE FRANCIS CROOKS,)
)
 Defendants/Respondents.)
)
 _____)

Case No. **CRF 2008 16420**

**MEMORANDUM DECISION AND
ORDER GRANTING MOTION TO
SUPPRESS**

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

Crooks filed his Motion to Suppress on September 3, 2008. A Memorandum in Support of Motion to Suppress was filed on October 20, 2008. The State filed Plaintiff's Response to Defendant's Motion to Suppress on November 10, 2008. Oral argument was held on November 13, 2008. At oral argument, Crooks sought to admit additional case law in support of his motion: *State v. Zapp*, 108 Idaho 723, 701 P.2d 671 (Ct.App. 1985) and *State v. Reimer*, 127 Idaho 214, 899 P.2d 427 (1995). The State did not object, but asked for an opportunity to submit additional briefing if this Court was persuaded that the additional case law was applicable to the facts in this case. No additional briefing was submitted, but *Zapp* and *Reimer* are not dispositive of this case.

On August 4, 2008, Crooks was stopped by Deputy Franssen while turning onto Idaho Street in Post Falls. Franssen observed the vehicle Crooks was driving had a loud, rough-sounding exhaust (a violation of I.C. § 49-937) and that the rear and side windows of

the vehicle were covered with dust and dirt (a violation of I.C. § 49-612(2)). After initiating the stop, Franssen asked Crooks for his license, proof of insurance, and registration. Dispatch informed Franssen that Crooks was “current and clear,” but showed alert codes for “drug user and jail time.” Due to Crooks’ profuse sweating, Crooks appeared nervous to Franssen. Crooks explained that he was sweating and nervous due to seeing emergency lights flashing behind him. Franssen then asked Crooks to walk to the rear of Crooks’ car, and Franssen asked Crooks if he had any weapons on him. Crooks explained he had a pocket knife, so Franssen placed handcuffs on him for officer safety before retrieving the knife. In retrieving the knife, Franssen noted Crooks’ pants pocket contained a pack of cigarettes and two packs of tic-tacs. When asked by Franssen, Crooks would not consent to search of these containers, but did consent to a search of his vehicle. The search of his vehicle did not turn up any contraband. Crooks explained that he was out getting gas for a friend, (the deputy had seen an empty gas can in the vehicle during the consent search).

While handcuffed, Crooks’ cell phone, located in his shirt breast pocket, flashed several times, indicating someone was calling Crooks. On one occasion where the phone was evidently flashing, Franssen said: “Your phone’s ringing off the hook, what do they want?”, to which Crooks responded: “They want their gas”. Franssen then said: “Would you like to answer that call?” Crooks responded affirmatively. Because Crooks was still handcuffed, Franssen then in one motion recovered not only the phone from his shirt breast pocket, but also a pack of cigarettes. Franssen commented: “Wow, you’ve got all sorts of cigarettes.” Franssen held Crooks’ phone to Crooks’ ear, and with his other hand Franssen shook that pack of cigarettes and noted this pack was very light in weight, sounded like it contained a granular substance and the pack had been taped shut. While asking Crooks about the second pack, Crooks told the person on the other end of the phone that “I’m getting arrested.” Franssen then opened the pack and observed a plastic bag containing

what he believed to be methamphetamine and placed Crooks under arrest. During the search incident to arrest Franssen discovered more methamphetamine. Crooks has moved to suppress all evidence seized and statements made, arguing:

1. Law enforcement's continued questioning illegally extended Defendant's detention;
2. Law enforcement did not have reasonable suspicion to detain Defendant on suspicion of intoxication;
3. Law enforcement's weapons frisk was unreasonable;
4. Law enforcement did not have consent to search the second cigarette pack; and
5. Evidence and statements obtained by law enforcement are fruit of the poisonous tree.

Memorandum in Support of Motion to Suppress, pp. 1-2.

II. STANDARD OF REVIEW.

The standard of review for an appellate court on a suppression motion is bifurcated; the Court of Appeals accepts a trial court's findings of fact supported by substantial evidence and freely reviews 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, ___, 174 P.3d 876, 878 (Ct.App. 2007).

III. ANALYSIS.

A. There Was Reasonable Suspicion to Detain Crooks on Suspicion of Intoxication, and the Extension of Crooks' Detention Was Lawful.

Franssen pulled over Crooks for two reasons. One was due to the loud noise his car was making. That fact appears to be beyond dispute, and neither party discussed the validity of the stop. The second reason, the dust and/or mud covering all the windows, is not supported by the facts. The DVD of the stop was shown by the State at the hearing on the motion to suppress. At all times, you can see through not only the back window, but also through to the front window of Crooks' vehicle. Were that the only reason for the stop, the stop would not be justified.

The Fourth Amendment guarantees every citizen the right to be free from

unreasonable searches and seizures. *State v. Ramirez*, 145 Idaho 886, 888, 187 P.3d 1261, 1263 (Ct.App. 2008). The stop of a vehicle constitutes a seizure of its occupants and is therefore subject to Fourth Amendment restraints. *Id.* Because a traffic stop is limited in scope and duration, it is analogous to an investigative detention and is analyzed under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968).

An investigative detention must be temporary and not last longer than necessary to effectuate the purpose of the stop. *Ramirez*, 145 Idaho at 889, 187 P.3d at 1264. Because there is no rigid time limit, to evaluate whether a detention has lasted longer than necessary a court must consider the scope of the detention and the law enforcement purposes to be served along with the duration of the stop. *U.S. v. Sharpe*, 470 U.S. 675, 685-686, 105 S.Ct. 1568 (1985). When an individual is detained, the scope of detention must be carefully tailored to the underlying justification for the stop. *State v. Roe*, 140 Idaho 176, 181, 90 P.3d 926, 931 (Ct.App. 2004). Brief inquiries not related to the initial purpose of the stop do not necessarily violate a detainee's Fourth Amendment rights. *Id.* During a lawful traffic stop, general questioning on topics unrelated to the purpose of the stop is permissible as long as it does not extend the duration of the stop. *Ramirez*, 135 Idaho at 363, 17 P.3d at 307. A routine traffic stop may turn up suspicious circumstances that could justify an officer asking further questions unrelated to the stop. *State v. Brumfield*, 136 Idaho 913, 916, 42 P.3d 706m 709 (Ct.App. 2001). This Court finds such occurred here, due to Crooks' nervousness and profound sweating. Crooks' presentation was consistent with one under the influence of drugs, especially methamphetamine. The length and scope of the initial investigatory stop may lawfully be extended where there exist objective and specific articulable facts that justify suspicion that the detained person is, was, or will be engaged in criminal activity. *Id.* For example, brief, general questions about drugs and weapons do not extend an otherwise lawful detention. *State v. Parkinson*, 135

Idaho 357, 363, 17 P.3d 301, 307 (Ct.App. 2000).

Franssen had evidence of Crooks' profuse sweating and nervous behavior, and also had information from dispatch that Crooks was a drug user and had been in jail. In *State v. Grantham*, the defendant argued that law enforcement impermissibly based its suspicion on a drug-user profile and that the traffic stop was therefore unlawfully extended in scope and length. 2008 Opinion No. 92, 2008 WL 4737280 (Ct.App. October 30, 2008). The Court of Appeals upheld the district court's denial of defendant's motion to suppress, reasoning that the extension in the scope and length of the detention was "based on direct evidence of methamphetamine use which gave rise to a reasonable suspicion of drug possession." 2008 Opinion No. 92, p. 8. The deputy in that case observed defendant's truck swerve over the fog line and noted during the traffic stop that defendant and his passenger were disheveled, unkempt, had pock-marked skin, were gaunt or underweight, and had missing or rotted-out teeth, and that these characteristics were cumulative evidence of methamphetamine use. *Id.*, pp. 2-3, 7-8. Similarly, in *State v. Pabillore*, 133 Idaho 650, 991 P.2d 375 (Ct.App. 1999). the Idaho Court of Appeals concluded that the investigative stop did not develop into an unreasonable detention where police had a legitimate reason to initiate the traffic stop and found paraphernalia on a passenger. 133 Idaho at 654, 991 P.2d at 379. It was the discovery of the paraphernalia pursuant to a valid pat-down search that expanded the investigative focus to include drug-related offenses. During the course of detention, suspicion of further criminal activity developed which also required investigation. *Id.*

Almost immediately after the stop, Franssen questioned Crooks about appearing nervous and sweaty. The question for this Court is whether Franssen's questioning Crooks about appearing nervous and sweaty unlawfully resulted in a detention lasting longer than necessary, considering the scope of the detention and the law enforcement purposes to be

served along with the duration of the stop. Crooks argues Franssen continued to question him about his nervous demeanor and sweating long after the purpose of the detention had been served. Memorandum in Support of Motion to Suppress, p. 4. The State argues that during his contact with Crooks, Franssen observed signs indicative of drug use, and these objective signs, along with the alert codes, supported a reasonable, articulable suspicion that criminal activity may have been afoot. Plaintiff's Response, pp. 5-6. Like the defendants in *Grantham*, Crooks' appearance and behavior, his nervousness manifested through profuse sweating which he attributed to seeing emergency lights flashing and an earlier aneurism, arguably gave rise to suspicion of further criminal activity justifying extending the initial investigatory stop.

This Court finds that there was a reasonable basis for a *Terry* stop. The traffic stop took place at 10:23 at night, initially Franssen had no back-up and was alone, Franssen knew Crooks had drug involvement and had been to jail, and at least as shown on the DVD of the stop, this was a fairly remote location as not much traffic passed by. Most importantly, Crooks told Franssen he had a pocket knife, and was nervous and sweaty when it was seventy degrees outside.

The length and scope of the initial investigatory stop were lawfully extended because the deputy observed objective and specific articulable facts justifying his suspicion that criminal activity was afoot. Reasonable suspicion existed to continue to detain Crooks. The entire length of the detention was about twenty-two minutes. That is not an unreasonable length of time to detain Crooks given the sequence of events that transpired (the stop, identification, call for back-up, frisk for weapons pursuant to *Terry*, conversations regarding Crooks' manifest behaviors, etc.).

B. The Initial Weapons Frisk of Crooks was Reasonable.

As previously stated, a traffic stop of a vehicle is a seizure of its occupants and is therefore subject to the Fourth Amendment prohibition against unreasonable searches and seizures. *Ramirez*, 145 Idaho at 888, 187 P.3d at 1263; *Delaware v. Prouse*, 440 U.S. 648, 653-54, 99 S.Ct. 1391, 1395-96 (1979). A search conducted without a warrant is unreasonable *per se* unless it falls within recognized exceptions to the warrant requirement. One such exception is the “narrowly drawn authority” of a police officer to conduct a pat-down search for weapons on a detainee for the officer’s protection where the officer has “reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.” *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883 (1968). This type of weapons frisk is allowed so that police officers can interact with the individual without fear of violence. *State v. Henage*, 143 Idaho 655, 660, 152 P.3d 16, 21 (2007). “Whether an officer may reasonably justify such a search is evaluated in light of the ‘facts known to the officers on the scene and the inference of the risk of danger reasonably drawn from the totality of the circumstances.’” *State v. Wright*, 134 Idaho 79, 82, 996 P.2d 298, 301 (2000).

In *Henage*, 143 Idaho 655, 152 P.3d 16 (2007), the defendant was a passenger in a car stopped because of a broken taillight. In that case defendant argued his encounter with the officer:

[T]ook a nonconsensual turn when he told Sgt. Baker he had a knife. That is, Sgt. Baker then directed Jeremy to keep his hands where he could see them and proceeded with a search, without asking or receiving Jeremy’s consent to do so. Jeremy argues that when Sgt. Baker laid hands upon him, the encounter became nonconsensual and constituted an unlawful seizure.

143 Idaho at 659, 152 P.3d at 20. The Idaho Supreme Court determined that Sergeant Baker’s limited self-protective pat down search, pursuant to *Terry*, was not justified. 143 Idaho at 662, 152 P.3d at 23. The district court in *Henage* had found that, “[u]pon learning

that the defendant had a knife on his person, and the continued nervous behavior exhibited by the defendant, the officer felt that his safety had been compromised and then proceeded to search the defendant for weapons.” *Id.* The Supreme Court, however, held that,

Weapons searches are not justified by an officer’s subjective feeling, especially when that feeling is not particularized to a particular individual in a specific fact situation. Rather, the court must find that the officer has presented specific facts that can be objectively evaluated to support the conclusion that the subject of the intended search posed a potential risk.

Id. The defendant in *Henage* was polite and cooperative during the encounter and the officer had known the defendant for several years, never having had a combative experience with him. Accordingly, Sergeant Baker had not connected the defendant’s nervousness with anything that would demonstrate a risk to the officer’s safety. 143 Idaho at 661, 152 P.3d at 22.

Those are not the facts in the instant case. Crooks was unknown to Franssen. Crooks advised Franssen he had a pocket knife in his right front pocket and Crooks attempted to take it out even though Franssen told him not to. Franssen told Crooks that Franssen would remove it from his pocket for officer safety. After asking him to place his hands behind his back for officer safety while Franssen retrieved the knife, Crooks began to become more agitated and to sweat even more. As Franssen attempted to retrieve the knife, Crooks tried to grab for it at least one more time and pulled away from Franssen.

While the fact that a detainee is in possession of a weapon and behaves nervously does not necessarily justify a search under *Terry*, this Court finds Crooks’ behavior in this case does amount to specific articulable facts necessary to justify such a search. Crooks became more agitated and more nervous when the deputy attempted to retrieve the knife and, additionally, he tried to pull away several times and tried to grab for the knife at least once. Franssen’s pat-down search of Crooks was reasonable.

However, the second cigarette pack, which wound up containing methamphetamine,

could not be removed from Crooks' pocket when it was removed, under a *Terry* analysis. The weapon, the pocket-knife, had already been removed at the time the phone and cigarettes were removed. Franssen had already handcuffed Crooks, and Franssen had back-up. Neither the phone nor the cigarettes, which were grabbed simultaneously, were a weapon. *State v. Faith* is instructive in this regard. 141 Idaho 728, 117 P.3d 142 (Ct.App. 2005). *Faith* involved the discovery of an unidentified "bulge" in the course of a pat-down search. This Court noted in denying Faith's Motion to Suppress:

Officer Mason mentioned the knife to Officer Dewitt. As Officer Mason recovered the knife, Officer Dewitt performed a patdown search of Faith, and felt what seemed to be a metal tin container in a pocket of a vest the defendant wore under a coat. Officer Dewitt testified it felt like a metal container and that he could hear metal items inside it as he shook it while still on Faith's person.

The metal container was an "Altoids" box, approximately the diameter of a baseball and ½ to ¾ inches thick. Officer Dewitt handed the time to Officer Mason and continued his search. Officer Mason opened the box and found several small baggies with powder inside the baggies. Both officers testified they had seen similar metal containers associated with illegal substances, as well as containing dangerous items such as razor blades, needles, and pen knives.

State v. Faith, Kootenai County Case no. CRF 2004 678, Memorandum Decision and Order Denying Defendant's Motion to Suppress, p. 2. The Idaho Court of Appeals noted the officers removed a container of Altoids, opened the container and discovered contraband. 141 Idaho at 730, 117 P.3d at 144. The officers were entitled to assure themselves that the bulge was not a weapon, but upon satisfying themselves that it was a tin container and not a weapon, the officers had no valid reason to further invade Faith's right to be free from police intrusion in the absence of probable cause to arrest. *Id.* The Court of Appeals reversed this Court's denial of Faith's Motion to Suppress and concluded that the officer's removal of the Altoids tin was beyond the permissible limits of *Terry* and a violation of Faith's Fourth Amendment right to be free from unreasonable searches. *Id.* If the hard metal Altoid container which sounded like it contained metal items in *Faith* could

not be a weapon according to the Idaho Court of Appeals, than according to that same logic, there is even more reason to find that a lighter than normal pack of cigarettes which made only the sound of sea salt, cannot be a weapon.

C. Crooks did not Consent to the Search of the Second Cigarette Pack.

Although warrantless searches are *per se* unreasonable and unconstitutional, specifically enumerated exceptions to the rule exist. *State v. Harwood*, 94 Idaho 615, 617, 495 P.2d 160, 162 (1972); *State v. Bottelson*, 102 Idaho 90, 92, 625 P.2d 1093, 1095 (1981); *State v. Ellis*, 99 Idaho 606, 608, 586 P.2d 1050, 1052 (1978). A common exception to the warrant requirement is a search conducted pursuant to properly given consent. *Harwood*, 94 Idaho at 618, 495 P.2d at 163. The standard for determining the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness. *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 1803-1804 (1991). The question is what a typical reasonable person would have understood by the exchange between the suspect and the officer. *Id.*; *State v. Thorpe*, 141 Idaho 151, 154, 106 P.3d 447, 480 (Ct.App. 2004) (*citing Jimeno*, 500 U.S. at 251). The scope of a search is generally defined by its expressed object. *Jimeno*, 500 U.S. at 251; *U.S. v. Ross*, 465 U.S. 798, 102 S.Ct. 2157 (1982).

Here, Crooks gave consent to Franssen to remove the ringing cell phone from his pocket. However, Franssen went beyond that consent and pulled out not only Crooks' cell phone but also a second pack of cigarettes. Franssen then pushed the send button and held the phone to Crooks' ear so he could talk, and almost immediately made comment about the pack of cigarettes. Crooks argues that "Deputy Franssen intentionally removed the cigarette pack when it was unnecessary to do so in order to remove the mobile phone, he acted unreasonably and not in a minimally intrusive fashion." Memorandum in Support of Motion to Suppress, p. 7. The State argues that "emptying the contents of the pocket to

ensure the cell phone could be obtained was reasonable” and that it was reasonable for the deputy to “obtain other containers in the pocket when he had consent to enter the pocket to retrieve the cell phone.” Plaintiff’s Response, p. 9. But the State’s reliance on cases holding that general, unlimited consent to search a *car* also includes consent to search containers in the car is inapt here. The *Faith* case tells us that.

Franssen initiated this sequence when he asked Crooks if he wanted help answering his phone. The consent given by Crooks was clearly only for Franssen to reach into his breast pocket and retrieve the ringing cell phone. This Court finds it was not objectively reasonable for Franssen to remove, and then search, the second pack of cigarettes. It is unlikely that a reasonable person would have understood the exchange between Franssen and Crooks (“Would you like to answer that phone call?”) to also include consent to search a cigarette pack in the same pocket as the cell phone. Franssen only had consent to remove a ringing phone, not to search the phone or any other contents of the pocket where the phone was located. In fact, it was Franssen who told Crooks the exact object he would remove with that consent, the cell phone.

The case of *State v. DuValt*, 131 Idaho 550, 961 P.2d 641 (1998) is determinative. This Court respectfully disagrees with the State that the facts of *DuValt* are eerily similar to those in this case. There are similarities, but there are key distinguishing features which separate *DuValt* from this case. DuValt was handcuffed, and:

While the officers were attempting to discern DuValt’s true identity, DuValt asked one of the officers to retrieve for him a cigarette out of a pack of cigarettes located in DuValt’s shirt pocket. In attempting to return the pack of cigarettes to DuValt’s pocket, the officer was unable to do so because of an object in the pocket. The officer then reached into DuValt’s pocket and removed a vial of what was later determined to be methamphetamine.

131 Idaho at 552, 961 P.2d at 643. In *DuValt*, the Idaho Supreme Court agreed with the district court that the exchange between DuValt and the officer, regarding his desire for a

cigarette, was a voluntary encounter, initiated by DuValt. 131 Idaho at 555, 961 P.2d at 646. However, *DuValt* involved an officer being unable to return a pack of cigarettes to DuValt's breast pocket because of an object already in the pocket after retrieving a cigarette at DuValt's request. The officer then reached into the breast pocket and removed what was later determined to be a vial of methamphetamine. *Id.* The Idaho Supreme Court found that the need to replace the cigarette pack into DuValt's pocket was a reasonable extension of DuValt's request, and the officer's discovery of the vial of methamphetamine was a direct result of the voluntary request, not the result of illegal police activity implicating the Fourth Amendment. 131 Idaho at 555, 961 P.2d at 646.

Here, the entire sequence was *initiated* by Franssen who stated to Crooks: "Your phone's ringing off the hook, what do they want?" Crooks replied simply they want their gas. Franssen again initiates with the question: "Would you like to answer that phone call?" Crooks answers affirmatively. In *DuValt*, the detainee clearly initiated the request for cigarettes. In the present case, both sentences were *initiated* by Franssen, the officer. The *initiation* in *DuValt* was entirely by DuValt, the detainee. This Court appreciates the importance of that distinction to the Idaho Supreme Court in their analysis. However, this Court is not overly concerned by this distinction because Franssen asked a very open-ended question: "Would you like to answer that phone call?", and the answer by Crooks was voluntary. Accordingly, this Court finds the distinction between this case and *DuValt* as to who initiated the conversation, while important, pales in comparison to the next distinction.

In *DuValt*, the officer simply complied with DuValt's request, and retrieved only the cigarettes from DuValt's breast pocket. In the present case, rather than simply retrieving the phone, Franssen distinguished himself from the officer in *DuValt* by making a wholesale grab of everything in Crooks' breast pocket, both the phone and the pack of cigarettes. If

only the phone had been grabbed, and the deputy had then been unable to put the phone back in the breast pocket because of the cigarette pack, then the facts of this case would be more squarely on point with *DuValt*. But here there was a grab of the phone *and* what appeared to be a cigarette pack. Clearly, that was not what Crooks had consented to. This Court does not find that grabbing the cigarettes was a reasonable extension of the voluntary consent. Therefore, what was found in the cigarette pack by Franssen is suppressed. Any statements made or evidence recovered after Franssen recovered and searched the second cigarette pack is also suppressed under the fruit of the poisonous tree doctrine.

IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED Defendant’s Motion to Suppress is GRANTED. What was found in the cigarette pack by Franssen is suppressed. Any statements made or evidence recovered after Franssen recovered and searched the second cigarette pack is also suppressed under the fruit of the poisonous tree doctrine.

DATED this 18th day of November, 2008

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of November, 2008 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Dennis Reuter/Anne Taylor
Prosecuting Attorney – Kootenai County Prosecutor

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____
Deputy