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AT _____ O'clock ____M
CLERK, DISTRICT COURT

Deputy

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

STATE OF IDAHO,)
)
 Plaintiff,)
)
 vs.)
)
 JAMES LAYTON BARONE,)
)
 Defendant.)
 _____)

Case No. **CRF 2016 18496**

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

Defendant JAMES LAYTON BARONE's Motion to Suppress is **DENIED**.
Rebecca Perez, Deputy Kootenai County Prosecuting Attorney, lawyer for
the Plaintiff.
Amanda R. Montalvo, Deputy Kootenai County Public Defender, lawyer for
Defendant Barone.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

Officer Caleb Hutchison ("Officer Hutchison") testified at the January 4, 2017,
hearing on defendant James Layton Barone's (Barone) Motion to Suppress. The Court
finds Officer Hutchison testified consistent with the testimony at the preliminary hearing as
set forth below. No transcript of the January 4, 2017, hearing exists at the time of writing
this Memorandum Decision and Order. Thus, for clarity, unless otherwise noted, the Court
in this memorandum decision will cite to the September 29, 2016, Preliminary Hearing
Transcript regarding Officer Hutchison's testimony. This is appropriate as counsel for both
Barone and the State cite to the preliminary hearing transcript in their briefing. The Court

also notes counsel for Barone asked the Court to take judicial notice of the transcript of the September 29, 2016, Preliminary Hearing, in closing argument on January 4, 2017. Such request is mandatory under I.R.E. 201(d).

Throughout Barone's brief, counsel for Barone also cites to portions of Officer Hutchison's body camera recording. That recording was not made an exhibit at the January 4, 2017, hearing, nor was it played before the Court at that hearing. Counsel for the State has not objected to such citation.

At the conclusion of the January 4, 2017, hearing, the Court announced that it was denying Barone's Motion to Suppress based on the issues presented to it at the hearing. The Court briefly stated its basis for that ruling and indicated that it would issue a decision as soon as possible to give more detailed reasoning for the Court's decision.

On September 18, 2016 at approximately 6:54 p.m., Officer Hutchison responded to a report of suspicious circumstances in the Safeway parking lot at 1001 N. 4th Street, Coeur d'Alene, Idaho. Aff. Supp. Probable Cause (to which the police report is attached). According to that report, a man was attempting to break into a car at that location and the car's alarm was going off. *Id.*; Prelim. Hr'g Tr. 13–14. The reporting party described the car as black with tinted windows and no plates and said it was occupied by a male, female, and "other parties." Prelim. Hr'g Tr. 13–14. Upon arriving at the Safeway parking lot, Officer Hutchison did not hear a car alarm. *Id.* 13. However, he approached a parked car that, in his opinion, otherwise matched the description given. *Id.* 14. The car he approached was black with tinted windows, it had no license plates but did have a temporary registration slip taped in the rear window, and it was occupied by a female driver, male passenger, and three children in the backseat. *Id.* 13–14; Aff. Supp. Probable Cause. Before reaching the car and from a distance of approximately 15 feet, Officer

Hutchison “noted that the front seat occupants appeared extremely agitated and fidgety.” Aff. Supp. Probable Cause. At that time, Officer Hutchison suspected that the male passenger was under the influence of a stimulant. *Id.*

Upon reaching the car, Officer Hutchison knocked on the driver side window, the female driver rolled down the window, and Officer Hutchison explained the purpose of his contact to the female driver. *Id.*; Memo. in Opp. 4. The female driver verbally identified herself as Breonna Morris (“Morris”) and the male passenger identified himself as James Barone (“Barone”) using his Idaho driver’s license. Aff. Supp. Probable Cause. Morris informed Officer Hutchison that she owned the car and showed him that the keys to the car were in the ignition. *Id.* A second police officer, Officer Wiedebush, arrived at the scene at about that time. *Id.* Upon his arrival, Officer Wiedebush contacted dispatch and began running Barone, Morris, and the car through dispatch. *Id.* Simultaneously, Officer Wiedebush began questioning Morris, while Officer Hutchison spoke with Barone. *Id.*

Officer Hutchison then asked Barone to step out of the car, and Barone complied. *Id.* After Barone got out of the car, Officer Hutchison “smelled meth coming off of his person.” Prelim. Hr’g Tr. 5. At the January 4, 2017, hearing, Officer Hutchison testified as to his training and extensive experience as to the unique smell of methamphetamine. He testified that he encountered methamphetamine nearly every day, both as a jail deputy and as a patrol officer. He also noted Barone’s gaunt appearance, picked scabs on Barone’s face and arms, and Barone’s inability to stay still. Prelim. Hr’g Tr. 5; Aff. Supp. Probable Cause. Officer Hutchison described Barone’s movements as “twitchy” and noted Barone’s tendency of touching and itching his arms. *Id.*; Aff. Supp. Probable Cause. Officer Hutchison “confronted Barone regarding methamphetamine (meth) use.” Aff. Supp. Probable Cause. Barone denied any recent use. *Id.* Officer Hutchison asked Barone if he

had any contraband in his pockets. Prelim. Hr'g Tr. 17. Barone responded by emptying his pockets and putting the contents of his pockets on the trunk of the car. *Id.* By doing so, Officer Hutchison observed Barone pull a bindle baggie out of his pocket and place it on the trunk of the car, while simultaneously "poked something back into his coin pocket." *Id.* Officer Hutchison questioned Barone about his use of the car, the three children in the car, a previous domestic call involving Barone and Morris (in which Officer Hutchison was involved), and Barone's physical condition. Aff. Supp. Probable Cause. While doing so, Officer Wiedebush conducted a consent search of the car. *Id.* As a result of that search, Officer Hutchison saw Officer Wiedebush remove a package of hypodermic needles from the car's rear passenger compartment. *Id.* Officer Hutchison then searched Barone's right coin pocket and located a baggie containing a "white crystal substance [that he] recognized as meth." *Id.* Officer Hutchison arrested Barone for possession of a controlled substance. *Id.*

A preliminary hearing was held on September 29, 2016. At that hearing, Barone indicated his intent to file a motion to suppress. Barone had his arraignment hearing on November 1, 2016. On November 17, 2016, Barone timely (under I.C.R. 12(e) which requires a motion to suppress be filed within 28 days after entry of a plea) filed a Motion to Suppress. The Court notes Barone's motion would not be timely under the terms of the September 29, 2016, bind over Order (requiring all pretrial motions be filed within 42 days of that order), but this Court has made it clear that it disregards such language as it creates inconsistent deadlines and the Idaho Criminal Rule should control. Barone filed a Memorandum in Support of the Motion to Suppress on November 30, 2016. The State filed a Brief in Opposition to the Motion to Suppress on December 1, 2016. A hearing on the Motion to Suppress was held January 4, 2017. The Court notes such hearing was not

timely held under I.C.R. 12(e), however, there was no objection by the State as to the timing of the hearing and the hearing was held sufficiently in advance of the January 17, 2017, trial date so as to no compromise the Court's ability to issue this opinion.

II. STANDARD OF REVIEW.

In an appeal from an order granting or denying a motion to suppress, the Court of Appeals will not disturb findings of fact supported by substantial evidence. *State v. Whiteley*, 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct. App. 1993); *State v. Donato*, 135 Idaho 469, 470, 20 P.3d 5, 6 (2001). However, it freely reviews “the trial court’s determination as to whether constitutional requirements [were] satisfied in light of the facts.” *Whiteley*, 124 Idaho at 264, 858 P.2d at 803; *Donato*, 135 Idaho at 470, 20 P.3d at 6. When evaluating the trial court’s determination of voluntariness of consent given, reviewing courts will not disturb such a decision on appeal if the trial court’s finding is based on reasonable inferences to be drawn from the record. *State v. Post*, 98 Idaho 834, 837, 573 P.2d 153, 156 (1978). Whether consent to a search was voluntary is a question of fact and reviewing courts accept the factual findings of a trial court unless they are clearly erroneous. *State v. McCall*, 135 Idaho 885, 886, 26 P.3d 1222, 1223 (2001). Findings are not deemed clearly erroneous when supported by substantial evidence in the record. *State v. Benson*, 133 Idaho 152, 155, 983 P.2d 225, 228 (Ct.App. 1999).

III. ANALYSIS.

A. There was a Seizure of Barone.

The first issue is whether Barone was seized for Fourth Amendment purposes, and if so, when that seizure occurred. The Fourth Amendment to the U.S. Constitution prohibits unreasonable searches and seizures by government officials. U.S. Const. amend. IV; *State v. Zavala*, 134 Idaho 532, 536, 5 P.3d 993, 997 (Ct. App. 2000). The

Idaho Supreme Court recognizes that “not every police/citizen encounter triggers Fourth Amendment scrutiny.” *State v. Page*, 140 Idaho 841, 844, 103 P.3d 454, 457 (2004). Instead, a seizure within the meaning of the Fourth Amendment occurs only “when an officer, by means of physical force or show of authority, restrains the liberty of a citizen.” *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 2386, 115 L.Ed.2d 389 (1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 1879, n. 16, 20 L.Ed.2d 889 (1968)); *State v. Gottardi*, 161 Idaho 21, 383 P.3d 700, 705 (Ct. App. 2016). The test to determine if an officer has restrained a citizen’s liberty “is an objective one, evaluating whether under the totality of the circumstances ‘a reasonable person would feel free to decline [an officer’s] requests or otherwise terminate the encounter.’” *State v. Henage*, 143 Idaho 655, 658, 152 P.3d 16, 19 (2007) (quoting *Bostick*, 501 U.S. at 436, 111 S.Ct. at 2387, 115 L.Ed.2d at 399). The defendant carries the burden of proving that he or she was seized. *State v. Reese*, 132 Idaho 652, 654, 978 P.2d 212, 214 (1999).

Situations in which a reasonable person might not feel free to end a police encounter include “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 509 (1980). In contrast, “[i]nterrogating a person concerning his identification or requesting identification does not, without more, constitute a seizure,” *Page*, 140 Idaho at 844, 103 P.3d at 457 (quoting *State v. Nickel*, 134 Idaho 610, 613, 7 P.3d 219, 222 (2000)), nor has a seizure occurred “where an officer merely approaches a person who is standing on the street, or seated in a non-moving vehicle located in a public place, and poses a few questions.” *State v. Osborne*, 121 Idaho 520, 523–24, 826 P.2d 481, 484–85 (Ct. App.

1991); *Page*, 140 Idaho at 844, 103 P.3d at 457. “Even when officers have no basis for suspecting a particular individual, they may generally ask the individual questions and ask to examine identification.” *Osborne*, 121 Idaho at 484 (citing *Florida v. Rodriguez*, 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984); *INS v. Delgado*, 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984); *Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497).

Barone argues that he was seized when Officer Hutchison took his Idaho driver’s license. Memo in Supp. 6. The State seems to argue that Officer Hutchison’s initial encounter with Barone was consensual and that this consensual encounter became a seizure when Barone was asked to step out of his car and was questioned about his suspected drug use. Memo in Opp. 4–5. The State in its briefing also at times analyzes this as a “stop”, in addition to consensual encounter. The Court finds a “stop” in the broad sense is not at issue as the vehicle in which Barone was seated as a passenger was already stationary and the Court finds Officer Hutchison had probable cause to investigate that vehicle based on the report he received from dispatch. As discussed below, an investigative stop eventually occurred.

Applying the rules above to this case, this court concludes that no seizure occurred when Officer Hutchison first approached Barone who, at that time, was seated in the front passenger seat of a parked car and that parked car was in a public place, the Safeway parking lot. Aff. Supp. Probable Cause. Additionally, no seizure occurred when Officer Hutchison began asking Barone questions while Barone was still in the car. Initial verbal contact between the two was made when Officer Hutchison knocked on the passenger side window of the parked car. Officer Hutchison testified at the hearing on January 4, 2017, that he spoke to Barone from the passenger side of the car at the same time the

cover officer (Wiedebush) spoke to Morris (the driver) from the driver's side of the car. Officer Hutchison then informed both adult occupants (Morris and Barone) of the purpose of his contact, asked both occupants to identify themselves, which Barone did using his Idaho driver's license, and asked about the car and their use of the car. Aff. Supp. Probable Cause. While Officer Hutchison performed those tasks, no evidence suggests that he displayed his weapon, prevented Barone from leaving, physically touched Barone, or otherwise used language or tone of voice to compel Barone's compliance during this early encounter. Thus, under the totality of the circumstances, Officer Hutchison's initial approach, contact, and questioning of Barone was consensual and the Fourth Amendment was not triggered. However, as Barone argues, the encounter between Officer Hutchison and Barone became non-consensual when Officer Hutchison requested and then *retained* Barone's driver's license. The Idaho Supreme Court has "previously held that a limited detention does occur when an officer *retains* a driver's license or other paperwork of value." *Page*, 140 Idaho at 844, 103 P.3d at 457 (emphasis added) (citing *State v. Godwin*, 121 Idaho 491, 493, 826 P.2d 452, 454 (1992)). Based on available facts, Officer Hutchison requested and received Barone's driver's license for identification purposes during their initial encounter (see discussion above). Upon Officer Wiedebush's arrival, Officer Hutchison gave Barone's driver's license to Officer Wiedebush, and Officer Wiedebush used the driver's license to confirm Barone's identity with dispatch. Prelim. Hr'g Tr. 15. Officer Hutchison does not recall returning Barone's license to him, and thus, he appears to have retained Barone's driver's license for the duration of the 10-20 minute encounter. Prelim. Hr'g Tr. 15. In short, while the request for identification itself does not implicate the Fourth Amendment, the fact that Officer Hutchison *retained* Barone's driver's license to check his identification does. Thus, at that moment, Barone was "seized" for

purposes of the Fourth Amendment. As set forth below, the Court finds the seizure of Barone was reasonable.

An additional issue is raised by Barone in briefing via reference to Officer Hutchison's body camera. Memorandum in Support of Motion to Suppress, 2. In that brief, Barone claims that apparently at least three minutes after Officer Hutchison asked Barone to exit the vehicle, "Mr. Barone said he would like to walk away form Officer Hutchison." *Id.* Later, Barone argues, "Although law enforcement suggest the contact with Mr. Barone was consensual, Mr. Barone was not free to leave. Mr. Barone attempted to cease contact by notifying the officers of his desire to walk away. (*Hutchison body camera video I* at 8:50)." *Id.* 6. Barone also claims that about 45 seconds before Barone told Officer Hutchison he wanted to walk away, Officer Hutchison asked Barone if he could search Barone's pockets, to which Barone denied consent. *Id.* 3. The Court finds that even if there was admissible evidence presented to the Court on this conversation, such conversation presents no issue which changes the Court's analysis. This is because, as set forth more fully below, the Court finds that Officer Hutchison likely had probable cause to arrest Barone for being under the influence of a stimulant prior to even asking Barone to exit the vehicle, and he certainly had probable cause shortly after Barone exited the vehicle and Officer Hutchison could smell methamphetamine on Barone's person.

B. The Seizure of Barone Was Reasonable.

Because Barone was seized, the next issue is whether that seizure was reasonable under the Fourth Amendment. A warrantless seizure is "considered unreasonable per se unless [it] come[s] within one of the few specifically established and well-delineated exceptions to the warrant requirement." *Zavala*, 134 Idaho at 536, 5 P.3d at 997 (citing *California v Acevedo*, 500 U.S. 565, 580, 111 S.Ct. 1982, 1991, 114 L.Ed.2d 619, 634

(1991); *State v. Murphy*, 129 Idaho 861, 863, 934 P.2d 34, 36 (Ct. App. 1997)). One exception to the warrant requirement is an investigative stop. An investigative stop is permissible under the Fourth Amendment if two requirements are met. Each requirement is discussed in turn.

(i) Reasonable Articulate Suspicion

First, a police officer may stop an individual without a warrant “so long as the officer is aware of facts which allow the officer ‘reasonably to conclude in light of his [or her] experience that criminal activity is afoot.’” *State v. Robertson*, 134 Idaho 180, 184, 997 P.2d 641, 646 (Ct. App. 2000) (citing *Terry*, 392 U.S. at 30, 88 S.Ct. at 1884, 20 L.Ed.2d at 911). Thus, the investigative stop “must be justified by a reasonable articulable suspicion that the person has committed or is about to commit a crime.” *Id.* (citations omitted). Idaho courts apply a “‘totality of the circumstances’ test” to determine “whether an officer had the requisite reasonable suspicion to conduct [the] investigatory stop.” *Id.* at 184, 997 P.2d at 645 (citing *State v. Duvalt*, 131 Idaho 550, 553, 961 P.2d 641, 644 (1998)); *State v. Rawlings*, 121 Idaho 930, 932, 829 P.2d 520, 523 (1992).

Barone seems to concede that, or at least does not directly address whether, Officer Hutchison had the requisite reasonable articulable suspicion to detain him to investigate the reported car break-in. Rather, Barone’s argument focuses on the second constitutional requirement (discussed below); that is, he argues that Officer Hutchison’s questions regarding suspected drug use were not reasonably related in scope to the investigation of the reported car break-in and the stop was unlawfully prolonged as a result. Memo in Supp. 5–6. That argument is addressed below. The State seems to argue that Officer Hutchison’s encounter with Barone became non-consensual when Officer Hutchison asked Barone to step out of the car and began questioning him about his suspected drug use.

Memo in Opp. 4. As a result, the State's analysis focuses on whether Officer Hutchison had the requisite reasonable suspicion to initially detain Barone for suspected drug use, and not whether he possessed reasonable suspicion to detain Barone in order to investigate the reported car break-in. *Id.*

This Court finds that the correct inquiry is whether Officer Hutchison articulated facts sufficient to support reasonable suspicion that Barone was attempting to break into, or had recently broken into, a car such that the investigatory stop was justified. This court concludes that he did. In this case, Officer Hutchison responded to the Safeway parking lot based on a report that a male was attempting to break into a car and that car's alarm was going off. Prelim. Hr'g Tr. 13. The car was described as black with tinted windows and no plates; it was reportedly occupied by a male, female, and "others." Prelim. Hr'g Tr. 13–14. When Officer Hutchison arrived at the scene, he did not hear a car alarm. Prelim. Hr'g Tr. 13. However, he saw a car that otherwise matched the reported description—the car was parked in the Safeway parking lot, it was black with tinted windows, it had no license plates (only a temporary permit in the rear window), and it was occupied by a male, female, and others (i.e., Barone, Morris, and their three children). Prelim. Hr'g Tr. 13–14. Based on these facts, Officer Hutchison possessed the requisite reasonable suspicion to temporarily detain Barone by retaining his driver's license in order to complete the investigation into the reported car break-in.

(ii) Duration and Intrusiveness of the Stop

Second, "to meet the constitutional standard of reasonableness, an investigative [stop] must not only be justified by reasonable suspicion, but must be reasonably related in scope to the circumstances that justified the stop in the first place." *State v. Grigg*, 149 Idaho 361, 363, 233 P.3d 1283, 1285 (Ct. App. 2010) (citing *State v. Sheldon*, 139 Idaho

980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003)). In order to meet that standard, the investigative stop “must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983). Additionally, “[t]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.” *Id.* (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 881–82, 95 S.Ct. 2574, 2580–81, 45 L.Ed.2d 607 (1975); *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972)). “It is the State’s burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.” *Id.*

Here, Officer Hutchison’s initial purpose for stopping Barone was to investigate whether Barone was the male reportedly attempting to break into a car in the Safeway parking lot. Aff. Supp. Probable Cause. Officer Hutchison began investigating Barone’s involvement in the reported crime by asking Officer Wiedebush to verify Barone’s and Morris’s identities and check the car’s registration with dispatch. *Id.* Such investigative methods seem to be the least intrusive means Officer Hutchison could use to verify or dispel his suspicions that Barone had broken into the car. While waiting on a response from dispatch, Officer Hutchison asked Barone to step out of the car to talk to him. *Id.* Barone complied. *Id.* Nothing indicates that Barone’s compliance in getting out of the front passenger of that car was anything other than consensual. Officer Hutchison then “confronted [Barone] regarding methamphetamine (meth) use.” *Id.* Barone argues that this line of questioning was unrelated to the purpose of the stop, the questioning occurred after Officer Hutchison’s suspicions of criminal activity had been dispelled, and thus, the stop became unlawful because it was excessive in both scope and duration. Memo in

Supp. 5–6. The State argues that this line of questioning was permissible. It agrees that these questions were unrelated to the reported car break-in, but argues that Officer Hutchison's observations since initiating contact with Barone led him to suspect that Barone was under the influence of methamphetamine. Memo. in Opp 5. Thus, the State concludes that the "investigation was not extended any further than was necessary to investigate the officer's concerns about methamphetamine use." *Id.*

First, in response to Barone's argument that Officer Hutchison's suspicions had been dispelled prior to questions about Barone's suspected drug use, this Court disagrees. To support his argument, Barone states that "Officer Hutchison made contact with the occupants of the vehicle and established the driver of the vehicle, [Breonna] Morris, was the owner of the vehicle and she had keys to the vehicle." Memo in Supp. 5. However, at that point, dispatch had not yet confirmed Morris's identity or that she owned the vehicle, (*Id.*), and during cross-examination at the preliminary hearing, Officer Hutchison stated that the keys to the car were in the car's ignition and not necessarily in Morris's possession. Prelim. Hr'g Tr. 14. Because of these lingering questions, it was reasonable for Officer Hutchison to detain Barone until dispatch confirmed Barone's identity, verified that Morris owned the car, and, in turn, confirmed that both Barone and Morris were lawfully present in the car. Prelim. Hr'g Tr. 14–15. Thus, Officer Hutchison's questioning about Barone's drug use, which occurred while waiting for dispatch to respond, did not impermissibly extend the duration of the initial stop.

Second, while asking Barone about suspected drug use is obviously unrelated to the investigation into the car break-in (i.e. not reasonably related in scope to the circumstances that justified the stop), the Idaho Court of Appeals has upheld similar officer inquiries into suspected drug use following an unrelated traffic stop. *State v. Brumfield*, 136 Idaho 913,

916, 42 P.3d 706, 709 (Ct. App. 2001). As the State points out, “[t]he purpose of a stop is not fixed at the time the stop is initiated,” *State v. Parkinson*, 135 Idaho 357, 362, 17 P.3d 301, 306 (Ct. App. 2000), and “[a]ny routine investigative detention might turn up suspicious circumstances which could justify an officer asking questions unrelated to the initial purpose for the stop.” *State v. Myers*, 118 Idaho 608, 613, 798 P.2d 453, 458 (Ct. App. 1990). In *State v. Perez-Jungo*, 156 Idaho 609, 614–15, 329 P.3d 391, 396–97 (Ct. App. 2014), the Idaho Court of Appeals explains that such unrelated inquiries, if brief, do not necessarily exceed the scope of the initial detention and violate a detainee’s Fourth Amendment rights. *Parkinson*, 135 Idaho at 362, 17 P.3d at 306. Moreover, an officer’s observations and general inquiries, and the events succeeding the stop, may—and often do—give rise to legitimate reasons for particularized lines of inquiry and further investigation by an officer. *Myers*, 118 Idaho at 613, 798 P.2d at 458. Indeed, a detention initiated for one investigative purpose may disclose suspicious circumstances that justify expanding the investigation to other possible crimes. *Brumfield*, 136 Idaho at 916, 42 P.3d at 709. Thus, the length and scope of the initial investigatory detention may be lawfully expanded if there exist objective and specific articulable facts that justify reasonable suspicion that the detained person is, has been, or is about to engage in criminal activity. *State v. Gomez*, 144 Idaho 865, 869, 172 P.3d 1140, 1141 (Ct. App. 2007).

Thus, in order to expand the scope of the investigation to include suspected drug use, the State must be able to point to specific articulable facts that justify Officer Hutchison’s suspicion that Barone is, has been, or is about to use methamphetamine. This court finds that the State has met this burden. Facts supporting this conclusion are as follows: (1) when approaching the car and prior to any contact, Officer Hutchison described Barone’s movements as “jerky” and “twitchy,” Prelim. Hr’g Tr. 5; (2) after the stop and when

Barone stepped out of the car, Officer Hutchison noticed that Barone appeared “gaunt,” had “pick scabs all over his face and arms,” he was unable to stand still, his movements were “twitchy,” and “he tended to touch his arms a lot and itch his arms;” *Id.*; Aff. Supp. Probable Cause; (3) while talking with Barone outside the car, Officer Hutchison smelled “meth coming of [Barone’s] person;” Prelim. Hr’g Tr. 5; and (4) while talking with Barone outside the car, Officer Wiedebush removed a package of hypodermic syringes from the car pursuant to a consensual search. Aff. Supp. Probable Cause. Such facts are objective, specific, and justify Officer Hutchison suspecting that Barone was under the influence of methamphetamine.

C. The Search Was Lawful.

The next issue is whether the search of Barone’s person was lawful as a *Terry* frisk, or in the alternative, whether that same search was lawful as a search incident to arrest. This Court analyzes both, and finds the search was lawful as a search incident to arrest.

(i) *Terry* Frisk

Barone argues that Officer Hutchison conducted an unlawful *Terry* frisk of his person because Officer Hutchison “did not have reasonable suspicion [that he] was presently armed and dangerous.” Memo in Supp. 9. In addition, Barone argues that even if the *Terry* frisk was lawful, Officer Hutchison’s frisk of his person exceeded that which is allowed under the law when he reached into Barone’s pant pockets. *Id.* The State disagrees and argues that the frisk was justified because Barone was armed and dangerous. Memo in Opp. 6–7. The State points to Officer Hutchison’s suspicions that Barone was under the influence of a stimulant and might have a hypodermic needle on his person to support its argument. *Id.* The Court is not persuaded by that argument.

A warrantless search is unreasonable per se unless it qualifies for an exception to

the Fourth Amendment's warrant requirement. *State v. Robertson*, 134 Idaho 180, 185, 997 P.2d 641, 646 (Ct. App. 2000). A stop-and-frisk is a well-recognized exception to that warrant requirement. *Id.*; *Terry*, 392 U.S. at 20–27, 88 S.Ct. at 1878–83, 20 L.Ed.2d at 905–09. Importantly, “[t]he stop and the frisk constitute two independent actions, each requiring a distinct and separate justification.” *State v. Robertson*, 134 Idaho at 185, 997 P.2d at 646. An officer's frisk of an individual will be upheld if a “reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger.” *Id.* (citing *Terry*, 392 U.S. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909). In other words, the officer must be able to “cite to specific and articulable facts that would lead a reasonably prudent person to believe that the individual with whom the officer is dealing may be armed and presently dangerous and nothing in the initial stages of the encounter serves to dispel that belief.” *Id.* (citing *State v. Fleenor*, 133 Idaho 552, 555, 989 P.2d 784, 787 (Ct. App. 1999)). “In reviewing the justification for a protective frisk, [courts] look to the facts known to the officer on the scene and the inferences of danger reasonably drawn from the totality of those specific circumstances.” *State v. Davenport*, 144 Idaho 99, 102, 156 P.3d 1197, 1200 (Ct. App. 2007).

In *State v. Bishop*, 146 Idaho 804, 203 P.3d 1203 (2009), the Idaho Supreme Court listed factors relevant to whether “a reasonable person in [an] officer's position would conclude that a particular person is armed and dangerous.” *Id.* at 819, 203 P.3d at 1218. The factors include: whether there were any bulges in the suspects clothing that resembled a weapon; whether the encounter took place late at night or in a high crime area; and whether the individual made threatening or furtive movements, indicated that he or she possessed a weapon, appeared nervous or agitated, appeared to be under the influence of alcohol or illegal drugs, was unwilling to cooperate, or had a reputation for being

dangerous. *Id.* (citations omitted). Nervousness and evidence that an individual may be under the influence of a stimulant is generally not enough justify a frisk. *Id.* at 820, 203 P.3d at 1220 (citing *State v. Setterstom*, 163 Wash. 2d 621, 183 P.3d 1075, 1077 (2008); *State v. Pearson*, 348 N.C. 272, 498 S.E.2d 599, 600–01 (1998)); *but see State v. Crooks*, 150 Idaho 117, 121, 244 P.3d 261, 265 (Ct. App. 2010) (summarizing cases in which “proximity to or involvement with drug transactions or distribution . . . may be one factor supporting the requisite suspicion to effect a frisk”).

In this case, there are insufficient facts to support a finding that Barone was armed and dangerous when Officer Hutchison frisked him. At the preliminary hearing, Officer Hutchison said he frisked Barone in order to ascertain whether Barone had any hypodermic needles on his person. Prelim. Hr’g Tr. 19–21. He believed that Barone might have hypodermic needles after seeing Officer Wiedebush remove a bag of needles from Morris’s car. Id. 16. The Court finds that a hypodermic needle could be a weapon. However, Officer Hutchison did not testify to seeing any bulges in Barone’s clothing that resembled a hypodermic needle or any other kind of weapon. *Id.* 19–21. In addition, the encounter took place in the Safeway parking lot on a September day at approximately 6:54 p.m.—no one has suggested that the location is a high crime area or that it was dark at the time of the stop. Prelim. Hr’g Tr. 4; Memo in Supp. 2. Further, Officer Hutchison testified that Barone did not verbally or non-verbally threaten him, and he acknowledged that Barone had not verbally or non-verbally threatened him during a previous encounter. *Id.* 10–11, 14. No facts have been presented to suggest that Barone made any furtive or threatening movements. Indeed, Barone appears to have fully cooperated for the entirety of the stop. When asked to identify himself, he provided his Idaho driver’s license; when asked to exit the car, he promptly complied; when asked what he had in his pockets, he

voluntarily emptied his pockets and placed the contents on the car's trunk (with the exception of the methamphetamine discovered during the search; and when asked about prior drug use, he admitted to a problem. Aff. Supp. Probable Cause. In short, the only fact supporting Officer Hutchison's frisk of Barone is his belief that Barone was under the influence of intoxicants. *Id.* 3. As noted above, that alone is not generally sufficient to justify a frisk. In light of these facts, this court concludes that Officer Hutchison's belief that Barone was armed and dangerous was unreasonable under the totality of the above listed circumstances. Thus, Officer Hutchison's frisk of Barone was unlawful.

If the frisk was unlawful, then the evidence that frisk yielded must be suppressed. However, as discussed below, Officer Hutchison possessed probable cause to arrest Barone before he searched Barone's pockets, and as a result, the search was incident to a lawful arrest and the evidence discovered is admissible for that reason.

(ii) Search Incident to a Lawful Arrest

The State argues the search of Barone's pocket was permissible because it was a search incident to a lawful arrest. This court agrees.

Under the Fourth Amendment to the U.S. Constitution, a warrantless arrest is unreasonable per se unless supported by probable cause. *State v. Pannell*, 127 Idaho 420, 425, 901 P.2d 1321, 1326 (1995); see also I.C. § 19-603 ("A peace officer . . . may, without a warrant, arrest a person for a public offense committed or attempted in his presence."). "[R]easonable or probable cause for an arrest exists where the officer possesses information that would lead a person of ordinary care and prudence to believe or entertain an honest or strong suspicion that the person arrested is guilty." *State v. Kysar*, 116 Idaho 992, 993, 783 P.2d 859, 860 (1989). "In evaluating a police officer's determination of probable cause in the field, a court must take into account 'the factual and

practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Id.* (citing *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879, 1890 (1949); *State v. Alger*, 100 Idaho 675, 677, 603 P.2d 1009, 1011 (1979); *State v. Cook*, 106 Idaho 209, 215, 677 P.2d 522, 528 (Ct. App. 1984)). “In determining whether there is probable cause for an arrest, an officer is entitled to draw reasonable inferences from the available information in light of the knowledge that he has gained from his previous experience and training.” *Id.* (citing *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975); *United States v. Brignoni–Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

The State argues that Officer Hutchison had probable cause to arrest Barone for violation of Idaho Code § 37-2732C. That section makes it “unlawful for any person...on public property...to use or be under the influence” of certain controlled substances, including methamphetamine. I.C. § 37-2732C. At the preliminary hearing, Officer Hutchison described his training and experience with respect to people who use methamphetamine. Prelim. Hr’g Tr. 5–6. He stated that he previously worked at the jail, and as a result, he can recognize the “smell of meth on a person.” *Id.* 5. At the January 4, 2017, hearing, Officer Hutchison testified in significant detail as to the smell of methamphetamine. He testified it is a unique biological and chemical smell that comes from the persons pores and remains on their clothes. He stated that he “deal[s] with methamphetamine users almost daily” as a police officer. *Id.* Because of this experience, he is able to recognize symptoms associated with methamphetamine use. *Id.* 6. These symptoms include a gaunt appearance, brittle hair, swollen knuckles, pick scabs and open sores on a user’s body; if actively under the influence, methamphetamine users are unable

to stand still, they have “twitchy movements in their hands and fingers,” and they experience twitching and erratic movements throughout their body. *Id.*

When asked on direct examination whether Barone exhibited those symptoms, Officer Hutchison said yes. *Id.* Specific symptoms Officer Hutchison mentioned he observed with Barone include twitchy/jerky movements, smelling of methamphetamine, pick scabs on his face and arms, an inability to stand still, and a tendency to repeatedly touch and itch his arms. *Id.* 5–6. Additional facts tending to corroborate Officer Hutchison’s suspicion that Barone was under the influence of methamphetamine include finding drug paraphernalia in the car and on Barone’s person; e.g., the hypodermic syringes in the car and the clean bindle baggie that Barone pulled out of his pocket prior to Officer Hutchison’s search of Barone’s person. Based on these facts and in light of Officer Hutchison’s training and experience, this court finds that Officer Hutchison had probable cause to arrest Barone for violating Idaho Code § 37-2732C, under the influence of methamphetamine in a public place. All those facts were known to Officer Hutchison *before* he searched Barone’s person and found the bindle of methamphetamine that Barone had put back in his coin pocket. Thus, once Officer Hutchison had probable for the arrest, the search of his pant pockets was justifiable as a search incident to that arrest. *State v. Holler*, 136 Idaho 287, 292–93, 32 P.3d 679, 684–85 (Ct. App. 2001).

The Court finds that the fact that the search of Barone’s pockets preceded the formal arrest is not problematic. In *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980), the U.S. Supreme Court explained that “[w]here the formal arrest followed quickly on the heels of the challenged search of petitioner’s person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.” *Id.* at 111, 100 S.Ct. at 2564, 65 L.Ed.2d at 645–46. Similarly, in *State v. Chapman*, 146

Idaho 346, 194 P.3d 550 (Ct. App. 2008), the Idaho Court of Appeals said that, “[s]o long as the search and arrest are substantially contemporaneous, and the fruits of the search are not required to establish probable cause for the arrest, the search need not precisely follow the arrest in order to be incident to that arrest.” *Id.* at 351, 194 P.3d at 555. Here, before Barone exited the vehicle, Officer Hutchison had probable cause to believe Barone was under the influence of methamphetamine in a public place. This was based on his appearance and his movements. As Barone exited the vehicle and Officer Hutchison clearly smelled methamphetamine, and that additional fact, coupled with Barone’s movements, certainly gave Officer Hutchison probable cause to believe Barone was under the influence of methamphetamine at the present time. Since that crime was committed in his presence, Officer Hutchison could arrest Barone for the crime of being under the influence in a public place. Officer Hutchison then promptly searched Barone’s pockets, and after finding the bundle of what appeared to be methamphetamine, Officer Hutchison promptly arrested Barone for possession of a controlled substance, methamphetamine.

The Court finds that the fact that Barone was arrested for possession of a controlled substance, and was not arrested for being under the influence of a stimulant in a public place, does not matter. This is because Officer Hutchison had probable cause to make an arrest for being under the influence in a public place prior to the search of Barone’s person. The fruits of the search (i.e., the methamphetamine) of Barone’s person was not needed to establish that probable cause, nor was the actual presence of methamphetamine an element of the crime of being under the influence in a public place. The fruits of the search (i.e., the methamphetamine) of Barone’s person would likely be needed to establish probable cause for the possession, however, Officer Hutchison already had probable cause to arrest for a different crime, being under the influence in a public place. Officer

Hutchison only needed probable cause one crime had been committed, not both, in order for him to arrest Barone and search his person incident to that arrest.

D. Miranda Warnings.

In the Introduction to the Memorandum in Support of Defendant's Motion to Suppress, Barone argues that, "statements made by Mr. Barone while detained and interrogated should be suppressed because those statements were made without the benefit of *Miranda* warnings in violation of the Fifth Amendment." Memo in Supp. 1. In the Conclusion to the same Memorandum, Barone argues that, "[w]hile Mr. Barone was detained he was being interrogated by Officer Hutchison without the benefit of his *Miranda* warnings. Therefore, any statements made by Mr. Barone should be suppressed." Memo in Supp. 11. Other than these two statements, Barone has provided no analysis of this issue. The State did not address this issue in its Memorandum and Brief in Opposition to Defendant's Motion to Suppress.

The preliminary hearing transcript does not include any discussion of this issue. Neither the court minutes nor this Court's notes show the issue of Miranda warnings was raised in Officer Hutchison's testimony on January 4, 2107. The issue was not raised by either counsel in oral argument at the January 4, 2017, hearing. Without knowing when Barone was given his *Miranda* warnings, this issue simply cannot be analyzed.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, the Court denies Barone's Motion to Suppress.

IT IS HEREBY ORDERED THAT JAMES LAYTON BARONE's Motion to Suppress is **DENIED**.

DATED this 6th day of January, 2017

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of January, 2017 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Amanda R. Montalvo
Prosecuting Attorney – Rebecca Perez

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____
Deputy