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. **CONRAD W. PETERSEN**, Defendant.	Case No. CR-11-4470 **MEMORANDUM DECISION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS AND MOTION TO DISMISS**

This matter came before the Court on Defendant's Motion to Suppress and Motion to Dismiss. Oral argument was heard on September 15, 2011 and November 18, 2011. At the conclusion of the November 18, 2011 hearing, the Court gave the parties an opportunity to submit post-hearing briefing, and imposed deadlines on the submission of such briefing. On December 5, 2011, the Court granted the State's Motion for Enlargement of Time, thereby extending the State's deadline by which to file its post-hearing brief to December 9, 2011. This Order also extended Defendant's deadline to file post-hearing briefing for one week, thus rendering Defendant's briefing due on or before December 16, 2011. Upon receipt of the parties' briefing, the Court took this matter under advisement.[1]

[1] Defendant's Reply Brief was file stamped on December 19, 2011, at 8:29 a.m. However, the facsimile information printed upon this document shows that the brief was actually fax filed on December 16, 2011, at 4:53 p.m.

The Court has reviewed the files and records herein, and considered the oral argument of counsel. Now, being fully advised in the premises and good cause appearing therefore, the Court hereby renders its Memorandum Decision and Order.

I.
FACTS

On March 14, 2011, Deputies Gorham and Moffett were conducting a "criminal interdiction" on I-90. *Preliminary Hearing Transcript*, at p. 1-3. During this interdiction they noticed a vehicle, driven by Defendant, which bore no front license plate. *Id.* at 4. The deputies decided to pull the vehicle over. *Id.* While approaching the vehicle to conduct the traffic stop, the officers observed that, while changing lanes to overtake a semi, Defendant used a two to three second signal when changing lanes. *Id.* at 4-6. Additionally, when Defendant's vehicle traveled back into the slow lane of travel, after overtaking the semi, it "didn't leave a very safe distance in-between itself and the semi-truck", which officers also believed constituted an unsafe lane change. *Id.* at 6. The officers then pulled the vehicle over. *Id.*

Upon approaching the Defendant, Deputy Gorham noted that he was friendly and talkative, possibly "overly friendly". *Id.* at 7. The officer noticed that Defendant's hand was shaky. *Id.* The officer also noticed a number of "criminal indicators", which are "seemingly innocent things to most people" but, "when taken in the totality of the circumstances . . . lead [an officer] to start to develop reasonable suspicion." *Id.* at 8. First, the officer noticed that Defendant's car was very clean. *Id.* He also noticed a 12 pack of Diet Pepsi, about half gone, sitting on the passenger seat. *Id.* There were two cell phones in the vehicle, some paperwork, an air freshener, and one pair of jeans in the back seat. *Id.* The officer said, alone, the clean car means that "[t]he guy's clean." *Id.* at 9. But, the officer noted the cleanliness because "most people that travel long distances and go on long road trips, they'll throw their fast food wrappers

and other stuff throughout the vehicle." *Id.* The Diet Pepsi made the officer suspect that Defendant was on a long journey and needed caffeine to stay alert and awake. *Id.* at 9. The two cell phones interested the officer "because most people that traffic drugs, or sell drugs, or buy drugs will often use multiple cell phones to avoid detection . . ." *Id.* The jeans interested the officer because "it just showed a – an initial lack of luggage. Most of the time people put their suitcases and stuff in the back seat rather than the trunk." *Id.* at 10.

While Deputy Moffett ran Defendant's information, Deputy Gorham ordered Defendant out of the car while he issued a warning citation. *Id.* The deputy then handed Defendant his documentation, and asked Defendant if he was "good to go." *Id.* Defendant said that he was, shook the officers' hands, and then started back toward his car. *Id.* Deputy Gorham then "engaged [Defendant] in casual conversation", asking him about the reason for his trip, what he did for a living, and so on. *Id.* During this conversation, the officer noticed indicators that made the officer believe that Defendant was "under a high level of stress." *Id.* at 11. At some point, Deputy Gorham asked for consent to search the trunk. *Id.* The Defendant said "sure", popped the trunk for the officers, and lifted the lid. *Id.* Prior to opening the trunk, officers asked the Defendant whether he was in possession of a large amount of money, and the Defendant replied that he had $55,000.00 in his trunk. *Id.* at 12. During the subsequent search of the trunk officers found one bag which, among other things, contained a large sum of money which was bound in thousand dollar stacks. *Id.* The cash found in the trunk and on Defendant's person actually amounted to approximately $72,000.00. *Id.* at 51. The officers thought that the packaging of the money was suspicious because officers "run into people all the time that have valid reasons to carry this much money with them . . . and they never . . . package it that way. . . And they usually

always have documentation of what I intend to do with this money, where I got it, so on, so forth." *Id.* at 12.

Deputy Gorham asked Defendant what he intended to do with the cash, and Defendant said he was going to Seattle to visit his girlfriend and to purchase a motor home. *Id.* at 13. He told the officer that he travels with that much cash all of the time. *Id.* Defendant said that this was his second trip to Seattle. *Id.* at 13-14. Deputy Gorham found it suspicious that Defendant was headed to Seattle, because the officer knows Seattle to be a major distributor of marijuana. *Id.* at 27.

After finding the money in the trunk and questioning Defendant, Deputy Moffett searched the passenger compartment of the vehicle, which the officers believed was justified as a probable cause search. *Id.* at 39-40. When asked what the officers were looking for in passenger compartment of the the vehicle, the officer said:

> A. Uh, to further (inaudible) . . . of our investigation, cell phone records indicating uh, contacts in Seattle to purchase drugs or um, get receipts of his trip. Just all kinds of other things, product, more currency. Um, packaging material for the currency. Ledgers.
>
> Q. Your conclusion is that because there was cash that Conrad Petersen is a drug dealer?
>
> A. No.
>
> Q. Well, what was the conclusion then?
>
> A. My conclusion is that with the totality of everything that I observed, in conjunction with the cash, I believed he was, yes, going to Seattle or somewhere on the West Coast to purchase drugs.
>
> Q. So, he was a drug dealer?
>
> A. Uh, he was a money launderer.

Id. at 40. The deputy went on to state that he believed Defendant was a money launderer, and had thus engaged in a pattern of racketeering activity, because "[Defendant] told me it was his

second trip – trip to Seattle and he usually carries this much currency with him." *Id.* at 41. As a result of the search of the passenger compartment, officers found a misdemeanor amount of marijuana, a marijuana pipe, and paperwork which included a receipt from a hydroponics supply store and a document that appeared to officers to be a diagram on how to properly grow marijuana. *Id.* at 50, 55, 60. Once the officers found the marijuana, Defendant was placed under arrest and read his Miranda warnings. *Id.* at 41-42. At that time, he was arrested for the marijuana and paraphernalia. Once the car was impounded and an odometer reading gathered, it was determined that Defendant's car had been driven approximately 11,000 miles in one month, which Deputy Moffett also deemed suspicious. *Id.* at 62-63, 66.

On cross-examination, Deputy Gorham said that Defendant's vehicle was actually temporarily registered out of Montana, and thus bore a paper, temporary registration in the back. *Id.* at 18. The officers could tell, from a safe following distance, that the car was so registered. *Id.* However, the officer still considered this a violation of traffic code, because he "did not know anywhere in the code book" that it said that temporary registration was only required to be displayed on the back of the vehicle. *Id.* In order to determine the length with which Defendant used his blinker when changing lanes, the officer counted aloud and also observed the number of times Defendant's blinker light blinked, thus assuming the blinker blinked once each second. *Id.* at 19. When overtaking the semi, upon Defendant's return to the slow lane, the officer did not notice that the semi had to swerve, or brake, or otherwise change its driving to accommodate what the officer observed to be an unsafe lane change. *Id*. at 20.

As explained by Hildebrandt at Preliminary Hearing, the Defendant later incurred a charge of attempted destruction of evidence after making numerous phone calls while housed in

the Kootenai County jail, the substance of which indicated to officers that Defendant was attempting to get a third party to destroy potentially incriminating evidence in Minnesota.

II.

DISCUSSION

1. Whether officers lacked reasonable, articulable suspicion to execute a warrantless traffic stop of Mr. Petersen's vehicle?

The stop of a vehicle constitutes a seizure of its occupants and is therefore subject to Fourth Amendment restraints. *Delaware v. Prouse*, 440 U.S. 648, 653-54, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979); *State v. Ramirez*, 145 Idaho 886, 888, 187 P.3d 1261, 1263 (Ct. App. 2008). A vehicle stop, although limited in magnitude compared with other seizures, is nonetheless an intrusion and must not be conducted with "unbridled discretion" on the part of law enforcement officials. *Prouse*, 440 U.S. at 661, 99 S.Ct. at 1400.

Under the Fourth Amendment, an officer is justified in stopping a vehicle if there is reasonable suspicion to believe that a traffic offense, however insignificant, has been committed. *State v. Roe,* 140 Idaho 176, 180, 90 P.3d 926, 930 (Ct. App. 2004); *State v. Rader*, 135 Idaho 273, 275, 16 P.3d 949 (Ct. App. 2000); *see also State v. Pressley*, 131 Idaho 277, 954 P.2d 1073 (Ct. App. 1998). A traffic stop is analyzed under the principles set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *State v. Sheldon*, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003). Under the totality of the circumstances known to the officer at the time of the stop, the officer must have had a "particularized and objective basis for suspecting the particular person stopped…." *Id.* (citing *United States v. Cortez,* 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981)) (other citations omitted). Reasonable suspicion will not be found to be justified if the conduct observed by the officer falls "within the broad range of

what can be described as normal driving behavior." *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996) (citation omitted).

"The reasonable suspicion standard requires less than probable cause but more than mere speculation or instinct on the part of the officer." *Roe,* 140 Idaho at 180, 90 P.3d at 930 (citing *State v. Ferreira,* 133 Idaho 474, 483, 988 P.2d 700, 709 (Ct. App. 1999)). "An officer may draw reasonable inferences from the facts in his or her possession, and those inferences may be drawn from the officer's experience and law enforcement training." *Id.* (Citing *State v. Montague,* 114 Idaho 319, 321, 756 P.2d 1083, 1085 (Ct. App. 1988)). Under the Fourth Amendment, once a seizure has been proven by the defendant, the State must prove that the seizure was reasonable. *State v. Yeates*, 112 Idaho 377, 732 P.2d 346 (Ct. App. 1987). If a seizure is found to be unreasonable, then the exclusionary rule prohibits evidence acquired as a result of the illegal seizure. *State v. Luna*, 126 Idaho 235, 239, 880 P.2d 265, 269 (Ct. App. 1994); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

a. Was the missing front license plate a valid reason to stop Mr. Petersen's vehicle?

Here, the officers based their decision to initiate traffic stop, in part, upon a belief that Defendant was violating Idaho law by displaying his vehicle's temporary registration on the rear of the vehicle only.

Under Idaho law, license plates must be displayed on the front and rear of a vehicle. I.C. § 49-428. However, I.C. § 49-523 provides, in part, that an original, temporary registration "shall be displayed in the rear window of the vehicle for which it is issued . . ." Montana, the state from which the temporary registration was issued, also requires temporary registration to be displayed on the rear of a vehicle. MT ST 61-3-224. Here, Defendant was driving a vehicle with a temporary registration, which was displayed on the rear of the vehicle. Deputy Gorham testified

at Preliminary Hearing that, while officers could see that the registration was a paper-form, temporary registration, they nevertheless believed the lack of a front plate formed a basis with which to stop the vehicle because, as Deputy Gorham testified, "I don't know anywhere in the code book that it says differently." However, as is clear from both Idaho and Montana law, it is legal to display a temporary registration only on the rear of a vehicle. This requirement is clear from the applicable statutes. Therefore, Defendant's missing front license plate was an insufficient basis with which the officers could have formed a reasonable suspicion to stop the Defendant's vehicle.

b. Did Mr. Petersen's use of his blinkers when changing lanes create a valid reason to stop his vehicle?

Officers also based their stop of Defendant's vehicle upon what they perceived to be a violation of I.C. § 49-808. Defendant argues that the State cannot prove reasonable suspicion with regard to whether or not Defendant's blinker was activated for five seconds because Deputy Gorham utilized a potentially inaccurate method to determine the length of time that the blinker was activated by counting the number of times the Defendant's blinker actually blinked.

I.C. § 49-808 provides, in pertinent part:

> (2) A signal of intention to turn or move right or left when required shall be given continuously to warn other traffic. On controlled-access highways and before turning from a parked position, the signal shall be given continuously for not less than five (5) seconds and, in all other instances, for not less than the last one hundred (100) feet traveled by the vehicle before turning.

From the Court's reading of I.C. § 49-808, a five second signal is required in two specific instances: when a vehicle is travelling on a controlled-access highway *and* when a vehicle turns from a parked position. While Defendant disputes this interpretation of the statute, the Court finds that the language of the statute clearly and unambiguously required a five second signal where, as here, Defendant is travelling on a controlled access highway.

Even with the requirement of a five second signal, Defendant argues that, here, officers assumed that the blinker on Defendant's vehicle blinked one time each second, and therefore the officers' estimation of the length of the signal given for the pass was questionable.

There are no facts in the record with which to determine whether or not Defendant's blinker actually blinks in one second intervals. However, Deputy Gorham also testified that he counted, "1,001, 1,002, 1,003," when measuring the time during which the Defendant used his blinker to indicate his intent to change lanes. Taken together, between the monitoring of the number of times the blinker blinked as well as counting out loud, a reasonable officer could certainly conclude that a count to three was insufficient to meet the five second requirement of I.C. § 49-808. Therefore, Mr. Petersen's perceived failure to signal for five seconds prior to changing lanes constituted a sufficient basis for officers to conduct a traffic stop.

c. **Was the allegedly unsafe lane change a valid reason to stop Mr. Petersen's vehicle?**

Lastly, the officers indicated that Defendant made an unsafe lane change by failing to leave a safe distance between his vehicle and a semi, after passing the semi and returning to the right/slow lane of travel. Deputy Gorham testified that Defendant only left between one and a half and two car lengths between his vehicle and the semi. Deputy Gorham, in part, pulled the Defendant over based upon this activity, considering it an additional violation of I.C. § 49-808. ("No person shall turn a vehicle onto a highway or move a vehicle right or left upon a highway or merge onto or exit from a highway unless and until the movement can be made with reasonable safety . . .").

During cross-examination at Preliminary Hearing, Deputy Gorham said that he did not see the semi change its driving pattern or behavior as a result of Defendant's allegedly unsafe lane change. Further, the semi did not have to apply its brakes in order to avoid colliding with the

back of Defendant's vehicle. However, as Deputy Gorham explained, "Most of those [semi] drivers are pretty seasoned and they are in a bigger vehicle, so I don't think they're gonna slam their brakes on and jackknife their – their truck for a little car that's trying to . . ." *Preliminary Hearing Transcript*, at 21.

The Court finds that it is reasonable for an officer to conclude that a lane change was unsafe under the circumstances presented here, as Defendant left two car lengths, at most, between itself and a semi he was passing. While I.C. § 49-808 does not specify what acts are to be considered safe and unsafe, an officer would be reasonable to consider the size of the vehicle being overtaken, as well as whether the vehicle, such as with a semi, has a blindspot in front of it. Thus, under the circumstances, officers had reasonable suspicion to stop Defendant's vehicle for a possible unsafe lane change pursuant to I.C. § 49-808, even though the semi did not have to change its manner of travel or use its brakes in order to avoid a collision with the Defendant's vehicle.

Defendant also argues that I.C. § 49-632, "Overtaking a Vehicle on the Left", provides that "[t]he driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle." Thus, here, because Defendant "did not disrupt the driving pattern of the truck that he passed", Defendant contends that his lane change did not constitute a statutory violation. However, I.C. § 49-632 does not provide a definition of "safely clear of the overtaken vehicle." It does not seem reasonable that a car is "safely clear" in every instance in which the vehicle being overtaken does not have to apply its brakes or swerve to avoid a collision. Therefore, I.C. § 49-632, even if applicable, does not change this Court's conclusion.

2. Did the officers unlawfully delay or extend the traffic stop?

Defendant next argues that his consent to the search of his trunk was invalid for two reasons: first, because deputies delayed or extended the traffic stop beyond that which was constitutionally permissible, resulting in a consent derived from an unconstitutional seizure, and second, because the consent was not voluntary.

a. Was the stop unconstitutionally extended?

An investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. *State v. Ramirez*, 145 Idaho 886, 889, 187 P.3d 1261, 1264 (Ct. App. 2008). There is no rigid time limit for determining when a detention has lasted longer than necessary; a court must consider the scope of the detention and the law enforcement purposes to be served, as well as the duration of the stop. *United States v. Sharpe*, 470 U.S. 675, 685-86, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605 (1985). When a person is detained, the scope of detention must be carefully tailored to its underlying justification. *State v. Parkinson*, 135 Idaho 357, 361, 17 P.3d 301, 305 (Ct. App. 2000). The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. *Ramirez*, 145 Idaho at 889, 187 P.3d at 1264. However, any routine traffic stop might 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 706, 709 (Ct. App. 2001). Accordingly, the length and scope of the initial investigatory detention may be lawfully expanded if there exists objective and specific, particular facts that justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity. *Id.* That said, however, "if an officer questions a driver about matters unrelated to the traffic stop after the purpose of the stop has been fulfilled, the questioning, no matter how short, extends the duration of the stop and is an unwarranted intrusion upon the privacy and liberty of the vehicle's occupants." *State v. Bordeaux*, 148 Idaho 1, 8, 217 P.3d 1, 8 (Ct. App.

2009) (citing *State v. Gutierrez*, 137 Idaho 647, 651-53, 51 P.3d 461, 465-67 (Ct. App. 2002)). An officer's mere hunch or unparticularized suspicion cannot withstand scrutiny under the Fourth Amendment. *State v. Swindle*, 148 Idaho 61, 64, 218 P.3d 790, 793 (Ct. App. 2009) (citation omitted).

A suspect's nervousness, including the nervous behaviors he or she exhibits, can contribute to an officer's reasonable suspicion that drug activity is occurring. *State v. Johnson*, 137 Idaho 656, 660, 51 P.3d 1112, 1116 (Ct. App. 2002). However, this evidence is of "limited significance." *State v. Gibson*, 141 Idaho 277, 285-86, 108 P.3d 424, 432-33 (Ct. App. 2005) ("[B]ecause it is common for people to exhibit signs of nervousness when confronted with law enforcement regardless of criminal activity, a person's nervous demeanor is of limited significance in establishing the presence of reasonable suspicion.") (Citations omitted).

Here, the Defendant recognizes that if the initial traffic stop is deemed lawful, the stop was likely constitutional up to the point at which the officer returned the Defendant's license and other documentation, and asked him "are you good to go?" The questioning after this point forms the basis for Defendant's argument.

Following the issuance of Defendant's citation, officers appear to have had no more than a mere hunch that Defendant may have been committing a crime—in total, at that time, officers knew that Defendant was traveling west to Seattle, which the Defendant said was for the purpose of visiting a female friend. Defendant had two cell phones in his car, an air freshener, some paperwork, a pair of pants, a partially consumed 12-pack of Diet Pepsi, his car was clean, and his hands were shaky. Even taken together, these facts, at most, form an unparticularized suspicion that criminal activity may be afoot. Thus, the officers' continued questioning, and Defendant's continued presence at the scene of the traffic stop, was either consensual, or unconstitutional.

"Not all contacts between policemen and citizens constitute seizures of the individuals. A seizure occurs only when the officer, through physical force or show of authority, restrains an individual's liberty." *State v. Gutierrez*, 137 Idaho 647, 650, 51 P.3d 461, 464 (Ct. App. 2002) (citations omitted).

> The test to determine whether someone is restrained is whether, considering all of the circumstances surrounding the encounter, the police conduct would communicate to a reasonable person that he or she is not at liberty to ignore the police presence and go about his or her business.

Id. (citations omitted). "A detention may evolve into a consensual encounter where the officer returns the driver's license and other documents and engages in any subsequent questioning without further show of authority, which would convey a message that the individual is not free to leave." *State v. Huffstutler*, 145 Idaho 261, 263, 178 P.3d 626, 628 (Ct. App. 2006) (citing *State v. Roark*, 140 Idaho 868, 870, 103 P.3d 481, 483 (Ct. App. 2004)) (other citation omitted). "Where consent to search is obtained after an officer informs a person that he or she is free to leave, the consent occurs during a consensual encounter and is not the product of an illegal detention." *Id.* (Citation omitted). That said, however, just because an officer does not inform a motorist that he or she is free to leave does not, in and of itself, prevent consent from being freely given. *Id.* (Citation omitted).

In *Gutierrez*, an officer pulled a vehicle over for speeding. 137 Idaho at 649, 51 P.3d at 463. The officer asked for the driver's license and registration, which the driver produced. *Id.* The officer believed the driver was excessively nervous. *Id.* The officer then took five minutes to run the driver's information, which revealed no problems with the license or registration. *Id.* The officer then went back to the vehicle and, before returning the driver's documents, asked the driver to step out of his vehicle. *Id.* Once the driver exited his vehicle, the officer delivered the warning and returned the driver's information. *Id.*

Thereafter, without turning off the overhead lights on his patrol car, indicating that the driver could return to his vehicle, or otherwise informing the driver that he was free to leave, the officer asked the driver whether he had weapons in the vehicle, whether he had any alcohol or open containers in the vehicle, and/or whether he had any controlled substances in the vehicle. *Id.* The officer told the driver he was asking these questions because one of the passengers in the vehicle appeared to be exceedingly nervous. *Id.* Although the driver answered each question in the negative, the officer believed that the driver continued to exhibit undue nervousness and was being deceptive, prompting the officer to ask for permission to search the vehicle. *Id.* The driver consented, and incriminating evidence was found within the vehicle. *Id.*

A motion to suppress was filed wherein the defendants argued that the evidence should be suppressed because the officer prolonged the vehicle stop and searched the vehicle after the purpose of the stop had been concluded. *Id.* The magistrate denied the motion to suppress, and the district court affirmed. *Id.* On appeal, the Court of Appeals reversed, explaining:

> We conclude, based on the totality of the circumstances, that no such evolution from detention to consensual encounter occurred here. First, after learning from dispatch that there were no problems with Cheek's driver's license or registration, and after deciding to issue only a warning for speeding, Bunderson required Cheek to get out of his vehicle before Bunderson handed back the documents or gave the warning. Bunderson never thereafter indicated to Cheek that he could return to his vehicle. Although the practice of requesting a driver to step out of the vehicle during the execution of a traffic stop is lawful, *Pennsylvania v. Mimms,* 434 U.S. 106, 111 n. 6, 98 S.Ct. 330, 333 n. 6, 54 L.Ed.2d 331, 337 n. 6 (1977); *State v. Parkinson,* 135 Idaho 357, 363, 17 P.3d 301, 307 (Ct.App.2000), it is also likely that a person who has been directed by an officer to exit a vehicle would not believe that the traffic stop was over until he or she was permitted to return. Without telling Cheek that he was free to leave, Bunderson asked Cheek about alcohol, controlled substances, and weapons. We recognize that the United States Supreme Court has declined to adopt a bright-line rule that would require officers to first say that the motorist is free to leave before a post-traffic stop consent to search could be deemed voluntary. *Ohio v. Robinette,* 519 U.S. 33, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). However, whether the officer said that the motorist was free to leave remains one of the myriad circumstances that courts should examine in determining whether the consent was freely given. *See Id.* at 39–40, 117 S.Ct. at 421–422, 136 L.Ed.2d at 354–355. Here, Cheek was neither told that he was free to leave nor told that he could reenter his automobile before Bunderson began posing questions about alcohol, drugs and weapons. In

> addition, throughout the questioning, the patrol car's overhead lights remained on. This use of the emergency lights was indicative of a continued detention. *See* I.C. § 49–625 (requiring that drivers stop upon the approach of a police vehicle using emergency lights and remain stopped until the police vehicle has passed or the driver has been otherwise directed by a police officer); I.C. § 49–1404(1) (prohibiting a driver from fleeing or attempting to elude a police vehicle when given a signal to stop by use of the police officer's emergency lights) . . . [citations omitted]. Finally, the officer's comments that followed after the speeding warning were not a sociable exchange; the officer engaged in questioning that carried accusatory tenor in its reference to the alleged nervousness of Cheek's passenger, Anthony Gutierrez. The totality of these circumstances would not have led a reasonable motorist to infer that he was free to ignore the officer's questions and drive away.

Id. at 651, 51 P.3d at 465.

Here, Defendant argues that his case is analogous to *United State v. Chavez-Valenzuela*, 268 F.3d 719 (9th Cir. 2001) (overruled in part on other grounds). There, the defendant was pulled over for a traffic violation and questioned for seven minutes, during which time a dispatcher checked his license and registration. *Id.* at 721. The officer noticed that the defendant was very nervous; his hand shook severely when he handed the officer his documentation, and later, during questioning, the defendant avoided eye contact and his entire body trembled. *Id.* at 722. When the defendant's license and registration came back valid, the officer asked defendant for permission to search the vehicle, and defendant consented. *Id.* Incriminating evidence was found within the vehicle. *Id.* A suppression motion was filed, wherein the defendant argued in part that the prolonged detention and search violated his rights under the Fourth Amendment. *Id.* On appeal, the court held:

> We note first that the stop had not become a consensual encounter even after David returned Chavez–Valenzuela's license and registration to him. An encounter is not consensual if "a reasonable person would have believed he was not free to leave." *United States v. Mendenhall,* 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). At this stage of the encounter, Chavez–Valenzuela had been standing by the side of a highway for more than seven minutes and subjected to a number of "fishing expedition" questions about his travel plans and his occupation. Upon returning Chavez–Valenzuela's documents, David then asked him a question implying that he suspected Chavez–Valenzuela of criminal activity. Confronted with this situation, a reasonable motorist—even with license and registration in hand—most likely would not have believed he could disregard the officer's inquiry and end

> the conversation. We therefore conclude that Chavez–Valenzuela was not voluntarily present even after David returned his document.

Id. at 724-25.

Here, Defendant argues that, as in *Chavez-Valenzuela*, the stop had not become a consensual encounter. Defendant argues that this is evidenced, in part, by the fact that the Defendant herein actually turned to leave when the officer reinitiated contact with him by asking further questions.

The Court finds that the facts presented are analogous in some ways to both *Gutierrez* and *Chavez-Valenzuela*. Even so, there are sufficient differences between our case and these precedents which effect the ultimate determination as to the constitutionality of the officer's continued questioning in this matter. Here, the officers returned the Defendant's license and accompanying information, and also asked Defendant if he was "good to go." The Defendant actually did think he was free to go, which is clearly evidenced by the fact that he acknowledged that he was good to go, shook the officer's hands, and began to leave before the officers reinitiated questioning. While there is no indication as to the tone of the exchange, the officers' testimony indicates that the continued questioning was not immediately directed toward accusing Defendant of a crime, or inquiring about his nervousness—instead, officers continued to ask about the purpose of Defendant's trip, and his intended destination. Therefore, under the facts at bar, the Court finds that a reasonable person would have believed he or she was at liberty to ignore the police presence and go about his or her business once the officers terminated their questioning, returned Defendant's documentation, and asked if he was good to go.[2]

b. Was the consent to search voluntary?

[2] It is worth noting that law enforcement encounters do not become consensual in every instance in which an officer poses the question, "are you good to go?". If officers wish to communicate that a suspect is free to leave, the better practice is for officers to communicate Defendant's freedom to leave through a *statement,* rather than a *question.*

Defendant argues that his consent to search was tainted by the prior unlawful police conduct. However, given the conclusions set forth above, the Court holds that there was no unconstitutional activity tainted Defendant's consent to search. In addition to this argument, Defendant claims that his consent to search was involuntary.

"It is the State's burden to prove, by a preponderance of the evidence, that the consent was voluntary rather than the result of duress or coercion, direct or implied." *State v. Rector*, 144 Idaho 643, 645, 167 P.3d 780, 782 (Ct. App. 2006) (citation omitted). "A voluntary decision is one that is the product of an essentially free and unconstrained choice by its maker." *Id.* (Internal quotation omitted).

> An individual's consent is involuntary, on the other hand, if his will has been overborne and his capacity for self-determination critically impaired. In determining 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. Thus, whether consent was granted voluntarily, or was a 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 granting the consent to a search.

Id. (Internal quotations omitted).

> A determination of voluntariness does not turn "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, 421-22, 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] [citations omitted]. Although the presence of multiple police officers does not, standing alone, establish coercion, and there is no requirement that police inform the individual that he is free to leave or that he has a right to refuse consent, these factors are nevertheless relevant when viewing the totality of the circumstances. [Citations omitted].

Id.

Here, there were two officers at the scene, and the Defendant was alone. It is not clear whether or not the Defendant knew of his right to refuse consent, although it appears that he said "sure", and then popped the trunk and opened it for the officers. The officers' emergency lights were on throughout the duration of this encounter.

On the other hand, here, the stop occurred during the day. Defendant's identification and other documentation had been returned to him. Officers asked Defendant if he was good to go. After stating that he was, the officers shook hands with him, and he turned to leave, prior to being asked additional questions. The Defendant admitted to the contents of the trunk, even prior to popping it and saying "sure" in response to the officers' request to search. The stop occurred on an interstate, as opposed to in a secluded location. Thus, based upon the totality of the circumstances, the Court finds that Defendant's consent was voluntary.

3. Were the searches of the trunk, bag and passenger compartment valid?

Defendant next argues that, while he gave consent for the search of the trunk, he did not give consent to a search of the bag within the trunk, nor did he consented to the search of the passenger compartment. Therefore, Defendant argues that the items found within the passenger compartment and within the duffel bag must be suppressed.

Here, it is undisputed that Defendant consented to the search of the trunk. Unless limited, consent to search a vehicle includes the containers therein. *State v. Frizzel*, 132 Idaho 522, 524, 524 nt. 1, 975 P.2d 1187, 1189, 1189 nt. 1 (Ct. App. 1999) (citing *United States v. Snow*, 44 F.3d 133, 135 (2d Cir. 1995) (A person who gives open-ended consent to search a car should reasonably expect that readily-opened, closed containers discovered inside the car will be opened and examined)); *United States v. Zapata*, 18 F.3d 971, 977-98 (1st Cir. 1994) (A consensual search of a car extended to duffel bags in the trunk, even where the object of the search was

unannounced). Therefore, Defendant's consent to search the trunk, sans a limitation on that consent, extended to the containers located within the trunk. However, consent was specifically granted with regard to the trunk, and not the passenger compartment of the car. Deputy Gorham's report indicated that the search of the passenger compartment was a probable cause search. Therefore, the issue is whether officers had probable cause to search the passenger compartment of the vehicle, as they were not given consent to search it.

The automobile exception to the warrant requirement allows law enforcement officers to conduct warrantless searches of automobiles if they have probable cause to believe that the automobile contains contraband or evidence of a crime. *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). These searches may include the search of any container within the car if the container could reasonably contain the suspected contraband or evidence. *United States v. Ross,* 456 U.S. 798, 825, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572, 594 (1982). Probable cause is the possession of information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong presumption that such person is guilty. *State v. Julian,* 129 Idaho 133, 137, 922 P.2d 1059, 1063 (1996). When analyzing the existence of probable cause, this Court must determine whether the facts available to the officers at the moment of the search warranted a person of reasonable caution to believe that the action taken was appropriate. *Julian,* 129 Idaho at 136, 922 P.2d at 1062; *State v. Hobson,* 95 Idaho 920, 925, 523 P.2d 523, 528 (1974). The facts making up the probability are viewed from an objective standpoint. *Julian,* 129 Idaho at 136-37, 922 P.2d at 1062-63. Additionally, in passing on the question of probable cause, the expertise and experience of the officer may be taken into account. *State v. Ramirez,* 121 Idaho 319, 323, 824 P.2d 894, 898 (Ct.App.1991).

Here, in total, officers pulled over Defendant's vehicle. He was from out of state, and

headed to Seattle. He had Diet Pepsi in the car, an air freshener, paperwork, two cell phones, a pair of pants, and his hands shook (which he told officers was likely from the caffeine). His car was clean. He was very friendly to the officers and obeyed their commands. When asked for consent to search, he told officers he had a large sum of money in the trunk, and agreed to allow officers to search his trunk. Officers found the large sum of money, and Defendant said he was headed to Seattle to buy a motor home. He had no documentation for the money, but told officers that he always traveled with and performed his transactions in cash. Officers found the bundling of the money suspicious and in accordance with how other criminals bundle cash. Based upon these facts, Deputy Gorham believed he had probable cause that the passenger compartment of Defendant's vehicle contained evidence of the crime(s) of money laundering and/or conspiracy to traffic drugs.

The Court finds that the totality of the circumstances fail to establish probable cause that incriminating evidence would be present within the passenger compartment of Defendant's vehicle, as there was insufficient information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong presumption that Defendant had incriminating evidence therein. Because probable cause did not exist, the evidence found within the Defendant's passenger compartment must be suppressed as the fruits of an unconstitutional search.

MOTION TO DISMISS

Defendant's Motion to Dismiss seeking dismissal of Count I (Money Laundering) and Count II (Attempted Destruction of Evidence) of the Information.

a. Count I – Money Laundering

First, the Court focuses on whether the language of the Information, with regard to Count I, is overly broad, given the narrow basis upon which the Defendant was bound over on this Count.

I.C. § 18-8201(1) provides:

> It is unlawful for any person to knowingly or intentionally give, sell, transfer, trade, invest, conceal, transport, or make available anything of value that the person knows is intended to be used to commit or further a pattern of racketeering activity as defined in section 18-7803(d), Idaho Code, or a violation of the provisions of chapter 27, title 37, Idaho Code.

At the conclusion of the Preliminary Hearing, with regard to Count I, the magistrate stated:

> The only provision that the Court finds that the state's met its burden, Criminal Rule 5.1 is the – basically 18-8201 subsection (1), it's unlawful for any person to knowingly or intentionally give, sell or transfer, trade, invest, conceal, transport or make available anything of value that the person knows is intended to be used to commit.
> And I would find that the bind over order would be only as to the second part of that sentence, which is a violation of the provisions of Chapter 27 Title 37 of the Idaho Code.

Preliminary Hearing Transcript, at 104. The Information, filed May 12, 2011, charges Count I by the following language:

> That the defendant, CONRAD WALTER PETERSEN, on or about the 14th day of March, 2011, in Kootenai County, Idaho, did unlawfully and knowingly and/or intentionally conceal and/or transport items of value, to wit: $71,505.00, that he knew was intended to be used to commit or further a pattern of racketeering activity, as defined in Idaho Code § 18-7803(d), to wit: possession, distribution, manufacture, trafficking, and/or delivery of controlled substances, or a violation of the provisions of Chapter 27, Title 37, Idaho Code; and/or that the Defendant did knowingly and/or did intentionally plan, organize, initiate, finance, manage, supervise, and/or facilitate the transportation or transfer of proceeds, known by him to be derived from a pattern of racketeering activity, as defined in Idaho Code § 18-7803(d), to wit: possession, distribution, manufacture, trafficking, and/or delivery of controlled substances, or a violation of the provisions of Chapter 27, Title 37, Idaho Code;

From the plain language uttered by the court at the Preliminary Hearing, the Court specifically rules that the State only met its burden of I.C. § 18-8201(1) and particularly only the subpart dealing with a violation of chapter 27, title 37, Idaho Code. From the posture of its

briefing, the State apparently agrees that Count I is appropriate only as it relates to an alleged violation of Chapter 27, Title 37.[3] However, the Information does not limit itself to the magistrate's ruling. Therefore, to the extent that the language of Count I does not limit itself accordingly, it must be dismissed.

Defendant also argues that the allegations set forth in Count I are insufficiently clear and detailed, pursuant to the rules governing Indictments and Informations. As Defendant's briefing explains, Indictments and Informations are generally held to the same standards of specificity with regard to the offense(s) charged. *See* I.C. §19-1303 ("The offense charged in all informations shall be stated with the same fullness and precision in matters of substance as required in indictments in like cases . . ."), I.C. §19-1304 ("The provisions of this code in relation to Indictments . . . shall in the same manner and to the same extent, as near as may be, apply to informations and all prosecutions and proceedings thereon."). Defendant focuses on the following portions of the statutes governing specificity of Indictments, arguing that the Information in this matter is deficient and thus should be dismissed.

> § 19-1409. Requirements of Indictment. The indictment must contain:
>
> . . . 2. A statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended.
>
> § 19-1418. Sufficiency of Indictment. The indictment is sufficient if it can be understood therefrom:
>
> . . . 4. That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein.
>
> . . . 6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

[3] *See, e.g.,* Plaintiff's Reponse to Motion to Suppress, at 9.

Additionally, Defendant argues that the Information fails to meet the requirements of I.C. § 19-1411:

> Certainty Requited of Indictment. It must be direct and certain as it regards:
>
> 1. The party charged.
>
> 2. The offense charged.
>
> 3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense.

As set forth above, Count I of the Information alleges that on or about March 14, 2011, Mr. Peterson, while in Kootenai County, Idaho, knowingly and intentionally concealed and/or transported $71,505.00, that he knew was used to commit or further a pattern of racketeering activity, or a violation of chapter 27, title 37, Idaho Code. The Information continues, alleging that Defendant knowingly and/or intentionally organized, planned, initiated, financed (etc.,) the transportation of proceeds which he knew were derived from a pattern of racketeering activity or a violation of chapter 27, title 37. While the Court agrees with Defendant that the language of Count I could be more succinct, it nevertheless sets forth the factual basis for the charge, followed by the statutory language of the pertinent statutes. As the Court has concluded above, the language is much more broad that that which is appropriate given the narrow basis of the magistrate's bind over. However, the Court finds that the charge, as set forth in Court I, does adequately set forth a factual basis for a charge of money laundering. As required by Idaho law, the act or omission charged as the offense must be clearly and distinctly set forth in ordinary and concise language, without repetition—here, the statutory language is repeated, but not the act or omission charged; the act or omission charged, as is clearly set forth in Count I, is that the Defendant transported or concealed money which he knew was intended to be used to commit or further a pattern of racketeering activity, or a violation of Chapter 27, Title 37. Thus, there are

sufficient facts set forth in the Information to permit a person of common understanding to know what is intended, and Defendant's argument must fail.

Lastly, Defendant argues that the magistrate erred in binding him over on Count I, even as it pertains to a potential violation Chapter 27, Title 37, because there is no evidence of any violation of Chapter 27, Title 37.

I.C.R. 5.1 provides, in part:

> (b) **Probable cause finding.** If from the evidence the magistrate determines that a public offense has been committed and that there is probable or sufficient cause to believe that the defendant committed such offense, the magistrate shall forthwith hold the defendant to answer in the district court. The finding of probable cause shall be based upon substantial evidence upon every material element of the offense charged . . .

Pursuant to I.C. § 19-815A, once a defendant has been bound over, the defendant may challenge the sufficiency of the evidence presented at the preliminary hearing through a motion to dismiss, filed with the district court. If the district court determines an offense was not committed, or that there was not probable cause to hold the defendant to answer, the district court must dismiss the complaint. *State v. Pole*, 139 Idaho 370, 372, 79 P.3d 729, 731 (Ct. App. 2003) (citing I.C. § 19-815A).

> A magistrate's finding of probable cause that a defendant has committed a public offense should be overturned only upon a showing that the magistrate abused its discretion. . . .
>
> The legal standard applicable to a finding of probable cause at a preliminary hearing does not require the state to prove the defendant guilty beyond a reasonable doubt. Rather, the state need only show that a crime was committed and that there is probable cause to believe the accused committed it. A finding of probable cause must be based upon substantial evidence as to every material element of the offense charged. This requirement may be satisfied through circumstantial evidence and reasonable inferences to be drawn from that evidence by the committing magistrate. A reviewing court will not substitute its judgment for that of the magistrate as to the weight of the evidence. Stated another way, a magistrate's finding of probable cause at a preliminary hearing will not be disturbed if, under any reasonable view of the evidence including permissible inferences, it appears likely that an offense occurred and the accused committed it.

Id. (Internal citations omitted).

Here, Defendant was bound over on one count of money laundering, however, he was only bound over pursuant to the second basis set forth in I.C. § 18-8201(1). A finding of probable cause must be based upon substantial evidence as to each material element. One such element in Defendant's case would require the State to prove Defendant was transporting or concealing the money, knowing that it was intended to be used to commit or further a violation of the provisions of chapter 27, title 37, Idaho Code. Here, there is substantial evidence that Defendant knowingly transported and/or concealed something of value, but there are no facts in the record, nor permissible inferences which may be drawn from those facts, which would indicate that Defendant knew or intended the money be used to commit a violation of chapter 27, title 37, Idaho Code. While there may be an inference that the money was obtained through improper means in the state of Minnesota, or that Defendant was traveling through the Idaho panhandle on his way to purchase controlled substances from a buyer in Washington, there are no facts showing a violation of Idaho Code, chapter 27, title 37. At most, the State may argue, and in fact did argue at the Preliminary Hearing, that Defendant would be returning through the state of Idaho after his trip to Seattle, and may be carrying items in his car which would violate Idaho Code, chapter 27, title 37. As the State argued at the Preliminary Hearing:

> Instead of going through each of the separate pieces that I've already articulated, I think there's more than enough evidence to prove that Mr. Petersen would have been on his way back through the State of Idaho with plants, with drugs, with something illegal that certainly would have violated Title 37.

Preliminary Hearing Transcript, at 94. The State also made this argument later in the hearing:

> With regard to the violation of Idaho statute, in all likelihood if Mr. Petersen drove from Mon – excuse me, Minnesota to Washington, in all likelihood he would have taken that same route back on I-90, which is the fastest route and would have been driving back through Idaho. There's no indication that he would have gone south or anyplace else, it simply doesn't make sense.

Id. at 103. However, this is mere speculation, and cannot reasonably form the basis of a jury's finding of guilt beyond a reasonable doubt that Defendant knew or intended the money he transported to be used to commit a violation of chapter 27, title 37, Idaho Code. Therefore, this Court finds that the magistrate court abused its discretion in binding Defendant over on the charge of money laundering, and this charge must be dismissed, because there is no evidence, only mere speculation, of any potential violation of chapter 27, title 37, Idaho Code.

b. Count II – Attempted Destruction of Evidence:

Next, Defendant argues that Count II of the Information must be dismissed because it is unconstitutionally vague, and the evidence submitted at the Preliminary Hearing was insufficient to support the charge. Count II of the Information states:

> That the defendant, CONRAD WALTER PETERSEN, on or about the 14th-15th days of March, 2011, in Kootenai County, Idaho, did willfully attempt to destroy, alter and/or conceal records, objects, matters, or things, knowing that the same was about to be produced, used or discovered as evidence in a felony investigation, proceeding, and/or trial, with the intent to prevent it from being so produced, used or discovered, or did aid and abet another in so doing[.]

i. Whether the Information is unconstitutionally vague:

First, Defendant argues that Count II of the Information violates Defendant's due process rights pursuant to the Fourteenth Amendment because the Information is unconstitutionally vague. However, without a showing of prejudice due to the alleged vagueness, Defendant's argument must fail. In *State v. Dorsey*, 139 Idaho 149, 75 P.3d 203 (Ct. App. 2003), the court considered a due process challenge based upon the alleged vagueness of an Information charging trafficking in methamphetamine by manufacturing. There, the court explained:

> Dorsey further poses a due process challenge to the sufficiency of the information, alleging that he was prejudiced in his defense because of the vagueness of the information, and that this constitutes a denial of due process. A defendant, however, cannot legitimately claim that he was surprised to his substantial prejudice by the absence in the information of specific details relating to an offense where those details are already known to the defendant or

> provided to the defendant by a means other than through the language in the information. *See State v. Gumm,* 99 Idaho 549, 552, 585 P.2d 959, 962 (1978).

Id. at 151, 75 P.3d at 205. The *Dorsey* court further explained its holding, citing *State v. Owen*, 129 Idaho 920, 935 P.2d 183 (Ct. App. 1997):

> In *Owen,* the defendant was convicted of twenty-nine counts of grand theft and one count of attempted grand theft. On appeal, Owen claimed that she could not determine whether she was accused of committing theft of the specified property by physically stealing items from the victim's residences or places of businesses, by embezzling goods entrusted to her by an employer or business associate, by possessing property stolen by someone else, or by any other of the multitude of means of committing theft that are contemplated within I.C. § 18-2403. Therefore, Owen asserted that the informations were insufficient because she did not know the alleged facts which she would need to refute at trial. This Court held that the preliminary hearings disclosed the state's position with regard to the circumstances, method, manner or way each charged crime was committed, which satisfied the due process requirement of apprising Owen of the particularities of the state's theories. *Owen,* 129 Idaho at 927-28, 935 P.2d at 190-91.
>
> In the instant case, even if we were to assume the information was lacking in some respect, the preliminary hearing evidence establishes that Dorsey was given notice of how the state intended to present its case, and the evidence which had to be refuted at trial. Consequently, Dorsey cannot claim prejudice to his defense, and his due process challenge fails.

Id. at 151-52, 75 P.3d at 205-06.

Here, as with *Dorsey* and *Owen*, the same result must follow. Assuming that Count II gives insufficient detail to enable Defendant to prepare a defense and understand the charge for which he is being held to answer, no prejudice flows from this insufficient detail because sufficient facts were set forth at the Preliminary Hearing to enable Defendant to understand the factual basis and nature of the charges against him. Therefore, because Defendant had the benefit of learning the factual basis of the State's asserted charge from the testimony at the Preliminary Hearing, this argument fails.

a. Sufficiency of evidence presented at the Preliminary Hearing:

Defendant also argues that, based upon the evidence submitted at the preliminary hearing, the Court should dismiss Count II as the evidence was insufficient to support the bind over.

Count II is charged pursuant to I.C. §§ 18-2603, 18-306 and 18-204, as is evidenced by the first page of the Information. I.C. § 18-2603, entitled Destruction, Alteration, or Concealment of Evidence, provides:

> Every person who, knowing that any book, paper, record, instrument in writing, or other object, matter or thing, is about to be produced, used or discovered as evidence upon any trial, proceeding, inquiry, or investigation whatever, authorized by law, wilfully destroys, alters or conceals the same, with intent thereby to prevent it from being produced, used or discovered, is guilty of a misdemeanor, unless the trial, proceeding, inquiry or investigation is criminal in nature and involves a felony offense, in which case said person is guilty of a felony and subject to a maximum fine of ten thousand dollars ($10,000) and a maximum sentence of five (5) years in prison.

The crime is further charged as an attempt, pursuant to I.C. § 18-306. When charged as a felony offense, I.C. § 18-2603 requires the State to prove the following:

> 1. The defendant knew that an object was about to be produced, used, or discovered as evidence in any legally authorized trial, proceeding, inquiry, or investigation involving a felony offense[;]
>
> 2. The defendant willfully destroyed, altered, or concealed that object; and
>
> 3. The defendant in acting to destroy, alter, or conceal that object intended to prevent the object's production, use, or discovery.

State v. Peteja, 139 Idaho 607, 610, 83 P.3d 781, 784 (Ct. App. 2003).

Count II was supported at the Preliminary Hearing by two main sources: tape recorded conversations between Defendant and an unknown female, and the testimony of Sergeant Hildebrandt. A portion of Defendant's recorded conversations states:

> Conrad: (inaudible) . . . "tell Debbie" (inaudible) . . .
>
> Female: "Yeah."
>
> Conrad: (inaudible) . . . "um, search warrant."
>
> Female: "Okay."
>
> Conrad: "Call and tell her."

Female: "Okay. (inaudible) . . . all right. Bye."

Conrad: "And – and bottom drawer" (inaudible).

Preliminary Hearing Transcript, at 79. Another conversation included the following exchange:

Conrad: "Hello."

Female: "Yeah."

Conrad: "Yeah. Um, (inaudible) . . . everything?"

Female: "What? The" –

Conrad: "Huh?"

Female: "As much as we could."

Id. at 80. Defendant also told the female to "Well . . . the property, remove the property." *Id.* at 81. Lastly, the following conversation was admitted into evidence:

Conrad: "Yeah, they outta there yet?"

Female: "No."

Conrad: "What are they doing?"

Female: "What do you think."

Conrad: "I don't know. Are they uh – you said there was nothing there. I told you to get everything out. So, if there's nothing there, there shouldn't be anything to get. So, what, are they watching you?"

Female: "Yeah."

Additionally, Hildebrandt testified that Mr. Peterson told the female on the phone "to tell Deb, and he paused a little bit, and said 'search warrant, top drawer'". Defendant also told the female that he wanted paperwork and a firearm "gotten rid of". He also said that this was going to be the last time that he came out, and that he should not have even come out this time.

Based on the foregoing, the Court concludes that substantial evidence has been set forth with regard to each material element of the offense charged. Therefore, Defendant's Motion to Dismiss, with regard to Count II, is denied.

ORDER:

IT IS HEREBY ORDERED that the Defendant's Motion to Suppress is GRANTED IN PART AND DENIED IN PART in accordance with this opinion.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss is GRANTED as to Count I of the Information, and DENIED as to Count II in accordance with this opinion.

IT IS FURTHER ORDERED that if the Defendant wishes to file any additional briefing, discussing how the suppression of the evidence found inside Defendant's vehicle may affect the viability of Count II of the Information, the Defendant has seven (7) days from the date of this Order to so file any briefing. Thereafter, the Plaintiff shall have seven (7) days to file a response, if any, at which point the Court will take that discrete issue under advisement.

Dated this _____ day of December, 2011.

_____
Honorable Benjamin R. Simpson, District Judge

CLERK'S CERTIFICATE OF MAILING/DELIVERY

I herby certify that on this _____ day of December, 2011, a true and correct copy of the foregoing was mailed / delivered by regular U.S. Mail, postage prepaid, interoffice mail, hand delivered, or faxed to:

Michael G. Palmer
PALMER | GEORGE, PLLC
923 N. 3rd St.
Coeur d'Alene, ID 83814
Fax (208) 676-1683

Kootenai County Prosecutor's Office
Fax (208) 446-1833

Hon. Robert Caldwell
Magistrate Judge
Interoffice Mail

CLERK OF THE DISTRICT COURT

By _____
Deputy Clerk