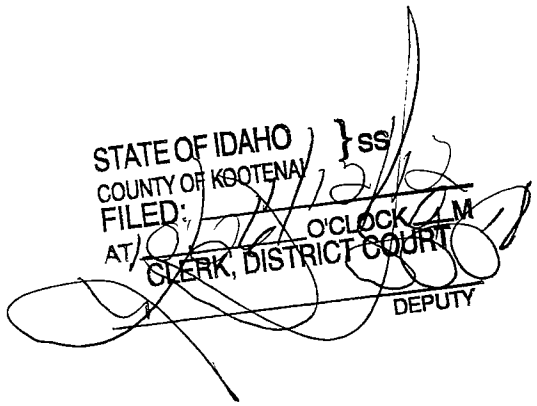

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, Plaintiff, v. RUSSELL LLOYD LAUCK, Defendant.	**CASE NO. CR- 2011 – 7086** MEMORANDUM OPINION AND ORDER RE: DEFENDANT'S MOTION TO SUPPRESS AND MOTION TO DISMISS

Michael Palmer, PALMER GEORGE, PLLC., for the Defendant.

Bryant Bushling, KOOTENAI COUNTY PROSECUTING ATTORNEY, for the State.

I. INTRODUCTION

The State filed an Amended Criminal Complaint on May 12, 2011, charging the Defendant with two felonies as follows: Count I, Money Laundering (I.C. § 18-8201) and Count 2, Conspiracy to Commit Possession of a Controlled Substance with the Intent to Deliver, (I.C. § 37-2732(a), 18-1701). The Defendant was also charged with Possession of a Controlled Substance (Marijuana) (I.C. § 37-2732(C)(3)) and Drug Paraphernalia Use or Possession with Intent (I.C. § 37-2734). A preliminary hearing was held on May 12, 2011, and the magistrate determined that probably cause existed to bind the Defendant over to this Court. The State charged the Defendant by

information with the four counts on June 20, 2011. The Defendant filed a Motion to Suppress on May 13, 2011, and a Motion to Dismiss on September 15, 2011. This Court heard from Deputies Jerry Moffett and Joel Gorham, as well as the Defendant, on January 3, 2012, and took the matter under advisement. This Court has reviewed the testimony and now issues this decision.

I. FACTS

This case involves a stop and search of the Defendant's late model, white pick-up, with Minnesota plates, between 10:44 a.m. and 11:16 a.m., by Deputies Moffett and Gorham, on April 27, 2011, on westbound Interstate 90 near mile posts 38-40. (Audio Recording, Motion to Suppress Hearing, January 3, 2012.) As part of their duties, the Deputies were observing traffic to identify vehicles involved in drug trafficking. (Id.)

As the officers were driving in the eastbound lane at approximately 50-55 miles per hour, Deputy Moffett observed the Defendant's vehicle pass in the opposite direction at a speed of 75 miles per hour (heading westbound). (Preliminary Hearing Transcript, p.15, Ls. 24-25.) Deputy Moffett testified at the preliminary hearing and at the suppression hearing that he observed that the "windows" of the Defendant's vehicle had "extremely dark tint." (Prelim. Hrg. Tr., p.5, Ls.3-7; Audio Recording, Jan. 3, 2012.) Specifically, Deputy Moffett testified as follows: "We saw a white truck go by with extremely dark tint. At that time we decided to pull the vehicle over and at least try to attempt a contact with that vehicle." (Audio Recording, Jan. 3, 2012.) Deputy Moffett testified that he had not received any formal training in recognizing the opaqueness or lumination percentage of tinted windows since the 1990s, and had not given any citations for window tinting violations. Deputy Moffett also stated that he did not have

any meter or other device to use to investigate the opaqueness or lumination percentage of the windows with him that day. (Id.) At the preliminary hearing, Deputy Moffett testified that he did not know the Minnesota tint standard law, but in Idaho he believed "the lumination, it has to be li – there' a 35 percent marker in there." (Prelim. Hrg. Tr., p.16, Ls. 24-25.) At the suppression hearing, Deputy Moffett testified that he did know the lumination standard for tinted windows in Minnesota, but did not state the standard. (Audio Recording, Jan. 3, 2012.) Deputy Moffett testified that he usually visually compared the tint of his "mustang's windows" (which he was not driving that day) with that of the alleged offender's windows to determine opaqueness, because he knows that the mustang's windows are the legally allowed opaqueness. (Id.) Deputy Moffett did not describe which windows on the Defendant's vehicle were "extremely" tinted or describe how he intended to investigate the opaqueness of the Defendant's windows. (Id.)

The Deputies performed a U-turn, moved into the westbound lane, and followed the Defendant's vehicle. According to Deputy Moffett's testimony at the preliminary hearing he "observed [the Defendant] commit two signal violations changing lanes. And then after the second violation had occurred uh, we performed a traffic stop on the vehicle." (Prelim. Hrg. Tr., p.5, Ls.3-6.) At the suppression hearing, Deputy Moffett testified that he observed the Defendant signal for "only two seconds" before changing lanes from right to left, and then again signaled for "only two seconds" after passing another vehicle and changing lanes from left to right. (Audio Recording, Jan. 3. 2012.) The State in its brief states that the "deputies observed the truck change lanes from right to left after only signally (sic) for approximately three seconds. The vehicle then

made a second lane change, from the left land (sic) to the right after signally (sic) for only approximately two (2) seconds." Deputy Moffett testified that he measured the time by counting the seconds, and did not use any other device or method to measure the time period. (Id.) At the preliminary hearing Deputy Moffett testified that he did not measure the Defendant's speed or distance traveled while the Defendant's signal was activated. (Prelim. Hrg. Tr., p.17, L. 25 – p.18, L.20.) Deputy Moffett also testified that he did not activate his patrol car lights until after the Defendant had completed the lane changes, so there was no video recording or audio recording of the lane changes.[1] (Audio Recording, Jan. 3. 2012.) On cross examination, however, Deputy Moffett testified that the Defendant only signaled for "maybe three seconds." (Id.)

The Deputies activated the patrol car lights and stopped the Defendant's vehicle. The patrol car lights remained activated during the duration of the stop. (Prelim. Hrg. Tr., p.19, Ls. 1-6.) Deputy Moffett testified that he is trained in looking for the following "indicators" of drug trafficking and lying during traffic stops: 1) excessive nervousness, 2) excessive calmness, 3) air fresheners, 4) GPS/Radar devices, 5) the presence of a dog, 6) grooming behaviors (running fingers through hair, touching one's face), 7) shaking hands, 8) quick breathing, 9) stretching, 10) fidgeting, 11) dark tinted windows, 12) cell phones, 13) energy drinks, and 14) increased blood flow to the corroded artery.[2] (Audio Recording, Jan. 3. 2012.) Notably Deputy Moffett testified that "most people are not nervous unless involved in criminal activity." (Id.; *See also*, Prelim. Hrg. Tr., p.19,

[1] Deputy Moffett testified that instead of utilizing audio and video, it is practice to have two officers so that they may confirm their observations with each other and corroborate the reasons for initiating a stop. However, Deputy Gorham did not offer any corroborating testimony at either the preliminary hearing or the suppression hearing. Also, at the suppression hearing the State asked Deputy Moffett to count five seconds without looking at a clock. Deputy Moffett counted five seconds, but a clock in the courtroom measured six seconds.

[2] Deputy Moffett testified that he does not possess any degree in psychology or physiology, but has some college education.

Ls. 7-24.) The Defendant objected to this testimony, as lacking proper foundation for expert testimony. (Audio Recording, Jan 3. 2012.)

Deputy Moffett testified that when he contacted the Defendant on the side of the road, he observed the following indicators: 1) excessive air freshener, 2) a black Labrador Retriever, 3) dark tinted windows, and 4) the slight odor of raw marijuana.[3] (Id.) The Defendant produced his Minnesota driver's license and a bill showing that he had paid his insurance. (Id.) The Defendant did not produce any registration documentation, but stated he owned the vehicle. (Id.) Deputy Moffett testified that when the Defendant handed over the documents his hand was shaking. (Id.) Deputy Moffett testified that he asked the Defendant where he was going, the Defendant stated that he was going to Washington to help his friend "Pate" move. (Id.) Deputy Moffett informed the Defendant that he would receive a warning for the signal violation and for the tinted window violation, and then went to his patrol car to check the Defendant's license and registration. (Id.) Deputy Moffett confirmed that the vehicle was properly registered and that there were no warrants out for the Defendant. (Id.) Deputy Moffett testified that he did not tell the Defendant that he smelled marijuana, or ask him to exit the vehicle at that time because he was concerned about the "destruction of evidence." (Id.) Deputy Moffett explained that "usually after I tell the driver they are getting a warning, the driver will typically settle down." (Id.)

While he was completing a warning citation for the Defendant, Deputy Moffett noted with Deputy Gorham his observations of the Defendant's behavior. (Id.) Upon returning the Defendant's documents to the Defendant, Deputy Moffett asked the

[3] Deputy Moffett testified that he had conducted "thousands of traffic stops" and "smelled marijuana thousands of times."

Defendant to exit the vehicle and sign the citation. (Id.) Deputy Moffett admitted during the suppression hearing that a person is not required to sign a warning citation and that verbal warnings are allowed in lieu of a written warning. (Id.) Deputy Moffett stated that he asked the Defendant for his signature and to exit the vehicle so that Deputy Moffett could further "observe" the Defendants' behavior. (Id.) Deputy Moffett testified that he observed increased blood flow to the Defendant's carotid artery and continued nervousness. (Id.) Deputy Moffett then asked the Defendant if he was "good to go," and returned the Defendant's documents. (Id.) However, during the suppression hearing Deputy Moffett stated that the Defendant was not "free to go" at that time because Deputy Moffett believed he had probable cause to search the Defendant and his vehicle based on the Defendant's behavior, the indicators of drug trafficking in the Defendant's vehicle, and the slight odor of raw marijuana that Deputy Moffett detected. (Audio Recording, Jan. 3, 2012; *see also* Prelim. Hrg. Tr., p.23, Ls.4-20.)

The Defendant turned and walked back to his vehicle and at that time Deputy Moffett asked the Defendant if he could "ask a few more questions." (Id.) Deputy Moffett testified that he wanted the Defendant to engage in further conversation so that Deputy Moffett could obtain the Defendant's consent to search the vehicle. (Id.) Deputy Moffett asked the Defendant what he intended to help his friend move since his pick up's bed was covered, or if he was going to pull a trailer, and asked what he was going to do with his dog because it would be in the way. (Id.) The Defendant answered that he did not know what he was going to help move, and that the Defendant's friend also had a dog and that they would play. (Id.) Deputy Moffett testified that the Defendant's pick up was equipped with a trailer hitch. (Id.)

Deputy Moffett testified that at this time he believed the Defendant was lying and asked him if he could search the Defendant's vehicle. (Id.) The Defendant refused to consent to a search. (Id.) Deputy Moffett testified at the preliminary hearing that he asked the Defendant about whether he possessed drugs, listing numerous kinds, and that the Defendant stated he did not have any. (Prelim. Hrg. Tr., p.8, Ls.10-14.) Deputy Moffett also asked the Defendant if he had "large amounts of United States currency," and the Defendant state he did not. (Id. at p.8., Ls.15-17.) Deputy Moffett then asked the Defendant if everything in the vehicle was the Defendant's and the Defendant answered "mostly." (Id.) Deputy Moffett took this to mean that the Defendant would claim that some items in the vehicle were not his, and asked again if he could search the vehicle. (Id.) The Defendant refused to give consent a second time. (Id.) Deputy Moffett then informed the Defendant that he smelled marijuana and that the Defendant was not free to leave because a K-9 unit was in route to search the Defendant's vehicle. (Id.) Deputy Moffett asked the Defendant if he had any marijuana on him. The Defendant admitted that he had some, giving Deputy Moffett a hand gesture of two fingers about an inch apart. (Id.)

Deputy Moffett then searched the vehicle based on the Defendant's admission. (Id.) Deputy Moffett recovered $47,000 in cash from the Defendant's vehicle, in three separate bindles. (Id.) Deputy Gorham then talked to the Defendant and asked him about the money. (Id.) The Defendant claimed he was going to use the money to purchase a home in Washington. (Id.) Deputy Gorham did not note anything unusual about the Defendant's responses except that he seemed to delay in giving the response as if the Defendant was thinking about what to say. (Id.) The Deputies also recovered

a mason jar with less than three ounces of raw marijuana in it, two smoking pipes, some shake in a duffle bag, several air fresheners, a cell phone, a GPS device, and some ski gear in a large bag. (Id.) The Deputies examined the cell phone and GPS to ascertain where the Defendant was going and what he was doing. (Id.) The Deputies determined that the Defendant was going to Leavenworth, WA and matched the number in the cell phone to a "Pate" at the address. (Id.) The Defendant was then arrested. (Id.)

Conversely, the Defendant testified that he signaled for five seconds or more when he changed lanes. (Id.) The Defendant also testified that he did not see the police car behind him and that he did not tell Deputy Moffett that he had marijuana. (Id.)

II. ANALYSIS

A. MOTION TO SUPRESS

The Defendant moves to suppress "any and all evidence gathered against the above-named Defendant including all statements made by Defendant, the observations made by the officers of Defendant before, during and after the detention and/or arrest of Defendant, and any evidence seized subsequent to the arrest." (Defendant's Motion to Suppress, pp.1-2.)

1. The Stop

A stop and investigatory detention is a recognized exception to the warrant requirement. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). An officer may stop and detain an individual if, based on the totality of the circumstances, the officer has a reasonable suspicion, based on specific and articulable facts, that the suspect has been, is, or is about to engage in criminal activity. United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2547 (1975); State v. Rawlings, 121 Idaho 930, 829 P.2d 520 (1992).

A stop is an intermediate response that allows an officer to maintain the status quo, identify the suspect and investigate possible criminal activity, even though the officer does not have sufficient information to establish probable cause to make an arrest. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2547.

When an officer stops an individual and restrains that individual's freedom, even momentarily, that person is seized within the meaning of the Fourth Amendment. Therefore, the stop and detention must comply with the constitutionals standards of reasonableness. Terry, 392 U.S. 1, 88 S.Ct. 1868.

There are three types of contacts between law enforcement and private citizens: 1) consensual encounter (not a seizure, and therefore no justification is required); 2) stop/investigative detention (a seizure justified by reasonable suspicion); and 3) actual arrest (a seizure justified by probable cause). State v. Holcome, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995). The stop in this case concerns the second types of contact.

A stop and detention of a suspect is justified under the Fourth Amendment if the officer has a reasonable suspicion, based on specific and articulable facts, that the suspect has been, is, or is about to engage in criminal activity. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2547; Rawlings, 121 Idaho 930, 829 P.2d 520. Although reasonable suspicion requires a lower quantum of proof than probable cause, the information underlying the stop must have some indicia of reliability. In other words the stop must be based on more than mere speculation, inarticulate hunches or instinct. Terry, 392 U.S. 1, 88 S.Ct. 1868, State v. Flowers, 131 Idaho 205, 953 P.2d 645 (Ct. App. 1998). To determine whether a stop is valid, this Court must evaluate the facts known to the officer at the time of the stop based on the totality of the circumstances or the whole

picture. United State v. Arvizu, 534 U.S. 266, 122 S.Ct.744 (2002); Rawlings, 121 Idaho 930, 829 P.2d 520. The officer, of course, is permitted to draw rational inferences from the facts in light of his/her experience and training. Id.

Ordinary and routine traffic stops are analogous to a Terry stop, and are considered a seizure within the meaning of the Fourth Amendment. Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984). Therefore, the stop must be based on a reasonable, articulable suspicion that the vehicle his being driven in violation of the traffic laws or that the vehicle or an occupant has been or is about to engage in criminal activity. United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690 (1981); State v. Kimball, 141 Idaho 489, 111 P.3d 625 (Ct. App. 2005). 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, 880 P.2d 265, 269 (Ct. App. 1994).

a. The Deputies did not have a reasonable and articulable suspicion that the Defendant's window tint violated Idaho Code such that they could stop the Defendant.

The parties do not dispute that the Defendant was stopped and seized within the meaning of the Fourth Amendment. Thus, the burden is on the State to show that the stop was reasonable. Idaho Code section 49-944 establishes the standards for window tinting, and provides that a violation of the section is an infraction. This section provides no less than seven different descriptions of allowable light transmission and luminous reflectance for the windshield, side windows, and rear windows of a vehicle. The issue

in this case is whether Deputy Moffett had a reasonable and articulable suspicion that the Defendant's vehicle was being driven in violation of Idaho Code section 49-944.

Based on the totality of the circumstances and the testimony of Deputy Moffett, this Court concludes that the Deputies did not have a reasonable and articulable suspicion that the Defendant was driving his vehicle in violation of Idaho Code § 49-944. First, Deputy Moffett offered no description of which windows on the Defendant's vehicle had an "extremely dark tint." It is reasonable to posit that all, none, or some of the windows were darkly tinted. Additionally, it is difficult to fathom that Deputy Moffett could definitively visually observe the opaqueness of the Defendant's windows when both vehicles were going a high rate of speed in opposite directions. Further, Deputy Moffett admitted he had not been trained since the 1990s to visually identify the opaqueness of window tint, and lacked either specialized equipment or a comparative window to investigate the luminous reflectivity or the opaqueness of the Defendant's windows. Notably, Deputy Moffett as much as admitted that he had no intention of citing the Defendant, or any other person, for a violation of I.C. § 49-944 and Deputy Gorham did not offer any corroborating testimony.

This Court questions the credibility of Deputy Moffett's testimony and concludes that he had no basis to cite, much less warn, the Defendant about the opaqueness of the Defendant's vehicle windows. Thus, because this reason for stopping the Defendant's vehicle amounts to mere speculation, the Deputies had an insufficient basis to form a reasonable suspicion to stop the Defendant.

b. The Deputies did not have a reasonable and articulable suspicion that the Defendant failed to signal for five seconds when changing lanes in violation of Idaho Code such that they could stop the Defendant.

Deputy Moffett also testified that he observed the Defendant violate I.C. § 49-808(2) by failing to activate his signal for five seconds when changing lanes right to left, and again left to right. This section requires that "on controlled – access highways . . ., the signal shall be given continuously for not less than five (5) seconds." There is no dispute that the Defendant was traveling on a controlled access highway at the time,[4] the but the Defendant argues that the Deputies did not use any method, much less an accurate method, to determine the length of time that the Defendant activated his signal when changing lanes. The Defendant's argument is well taken.

Notably, in another recent case, State v. Peterson, Kootenai County Case No. CR-11-4470, the same Deputies initiated a traffic stop for the same reason. In that case, Deputy Gorham testified that he used two methods to determine the length of time that Peterson activated his signal when changing lanes: 1) counting "1,001, 1,002, 1,003," and 2) an assumption that Peterson's blinker flashed every second. Peterson, *Memorandum Decision and Order on Defendant's Motion to Suppress and Motion to Dismiss*, pp.8-9. Given the use of some method of tracking the length of time Peterson signaled the district court found Deputy Gorham's testimony credible. In this case, however, no such supporting methods were used. Instead, Deputy Moffett testified that he simply counted in his head the seconds during which the Defendant activated his signal, and did not testify that he used any other method to calculate the time period or that he verified his estimation of the time period with Deputy Gorham. Merely counting

[4] In the recent case of State v. Peterson, Kootenai County Case No. CR-11-4470, the Defendant argued that I.C. § 49-808(2) should be interpreted to require a five second signal period only when a vehicle is "turning rom a parked position." The Defendant makes this argument in this case also. However, this Court agrees with Judge Simpson's reading of the statute that "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." Peterson, Memorandum Decision and Order on Defendant's Motion to Suppress and Motion to Dismiss, CR 11-4470, p. 8.

in one's head is not a credible method of determining the length of time a traffic signal is activated because the result is unreliable and uncorroborated. This is shown by Deputy Moffett's own inconsistent testimony that the Defendant signaled for either 2 or 3 seconds and Deputy Moffett's inability to accurately estimate a five second period in the courtroom. Further, it is clear that the Deputies have in the past engaged in a practice of using some sort of method or assumption to assist in calculating the length of time a person uses a traffic signal in order to lend some credibility to their testimony.

Deputy Moffett's lack of any supporting method to calculate time, then, brings into question the credibility of his testimony. As a result, the Deputies had an insufficient basis to form a reasonable suspicion that the Defendant violated I.C. § 49-808(2) such that the Deputies could stop the vehicle. As a result, the stop of the Defendant was unreasonable.

2. The Investigatory Detention

Regardless of the insufficient basis for the stop, the State has met its burden and shown that the Deputies lawfully extended the stop. 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)).

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). "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). 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 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 also 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 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.

These cases were recently applied to a set of facts nearly identical to this case. In State v. Peterson, Kootenai County Case No. CR-11-4470, Deputies Moffett and Gorham returned Peterson's license, asked Peterson "are you good to go?," and then engaged Peterson in conversation based on an "unparticularized suspicion that criminal activity was afoot." Peterson, *Memorandum Decision and Order On Defendant's Motion to Suppress and Motion to Dismiss*, pp.12-13. In that case, the court determined that Peterson believed he was free to go because he turned to leave upon receiving his documents before Deputies Moffett and Gorham reinitiated questioning that was "not immediately directed toward accusing the Defendant of a crime, or inquiring about his

nervousness – instead, officers continued to ask about the purpose of the Defendant's trip, and his intended destination." Id. As a result, the investigatory detention became a consensual encounter, and Peterson later gave his consent to search the vehicle. Id.

The Defendant agrees that if the stop was lawful, then the stop was likely constitutional up until Deputy Moffett returned the Defendant's documentation and asked him "are you good to go?" This Court finds that the facts presented are analogous in to Gutierrez, Chavez-Valenzuela, and Peterson. First, the "evidence" of nervousness, dishonesty, and the inconsistent "indicators" of drug trafficking are merely speculative hunches and not sufficient to justify the extension of the stop into investigate further.[5] Additionally, this Court would agree that the encounter became consensual because the Defendant believed he was free to leave upon receiving his documentation because he turned and began to walk to his truck, and then voluntarily agreed to answer Deputy Moffett's questions regarding his travel and motive for travel.

Unlike the Gutierrez, Chavez-Valenzuela, and Peterson cases, however, the Defendant here refused to give consent to search the vehicle on two occasions during his contact with Deputy Moffett and answered in the negative Deputy Moffett's investigatory questions about possessing drugs and money. The consensual encounter, then, the purpose of which Deputy Moffett admitted was to obtain voluntary consent to search the Defendant's vehicle, had served its purpose. This is clear by the

[5] This Court is not persuaded that the "indicators" the Deputies relied on are indicia of drug trafficking, lying or other criminal behavior. It has been well-established by Idaho case law that the observations of "human lie detectors" not only carry very little weight, but also try the limits of admissibility. Second, the items described by the Deputies are found in most every person's vehicle, and given the inconsistency with which the Deputies interpret the purposes and uses of the items, this Court has no confidence that the items are indicators of anything in particular.

fact that Deputy Moffett terminated the consensual encounter by stating that he smelled raw marijuana in the vehicle and that he had requested K-9 assistance.

As a result, the initial stop was not unlawfully extended, but instead evolved into a consensual encounter which served its purpose when the Defendant declined to consent to a search and answered the Deputy's questions in the negative. Thus, if the stop is a valid stop, which it is not, the stop evolved from an investigatory detention into a consensual encounter, which ended at the time Deputy Moffett stated that he smelled raw marijuana and was going to search the Defendants' vehicle.

3. The Search

The comparisons to Gutierrez, Chavez-Valenzuela, and Peterson, however, do not account for one salient fact present in this case, that is not present in the other cases: Deputy Moffett's testimony that he smelled raw marijuana and therefore believed that he had sufficient probable cause to search the Defendant's vehicle. Warrantless searches by law enforcement officials are presumptively unreasonable, and therefore, in violation of the Fourth Amendment. In order to overcome this presumption, the burden of proof is on the state to show that the search fell within one of the well-delineated exceptions to the general warrant requirement or was otherwise reasonable under the circumstances. California v. Acevedo, 500 US 565, 111 S.Ct. 1982 (1991); State v. Weaver, 127 Idaho 288, 900 P.2d 196 (1995). "The lawfulness of a search is to be determined by the court, based upon an objective assessment of the circumstances which confronted the officer at the time of the search." State v. Shepard, 1118 Idaho 121, 124, 795, P.2d 15, 18 (Ct. App. 1990).

The plain smell doctrine is an exception to the warrant requirement. The plain smell doctrine extends to the identification of incriminating evidence by private property that is detected by an officer lawfully located in a particular area. State v. Rigoulot, 123 Idaho 267, 846 P.2d 918 (Ct. App. 1992). In this case, Deputy Moffett testified that he smelled the "slight odor of raw marijuana," emanating from the Defendant's vehicle, and foundation was properly laid that Deputy Moffett could smell and identify the substance. Deputy Moffett believed this gave him probable cause to search the Defendant's vehicle.[6] It appears well settled that the slight odor of contraband in the passenger compartment of a vehicle is sufficient to meet the "plain smell" exception to the warrant requirement in Idaho. State v. Schmadeka, 136 Idaho 595, 38 P.3d 633 (2001)(slight odor of burnt marijuana alone emanating from a passenger compartment is sufficient cause to search only the passenger compartment, but not the trunk of a vehicle). *See also* State v. Shepard, 118 Idaho 121, 795 P.2d 15 (1990).

This Court finds credible Deputy Moffett's testimony that the Defendant admitted to possessing a small amount of marijuana prior to the search of the vehicle. However, this Court does not find credible Deputy Moffett's testimony that he smelled raw marijuana that was located in a sealed mason jar or small amounts of shake scattered in the Defendant's vehicle. Thus, the Defendant's motion to suppress would be granted because Deputy Moffett did not possess probable cause to search the vehicle based on the smell of raw marijuana. However, the Defendant's admission that he possessed a small amount of marijuana would be a basis for a search of the Defendant's vehicle.

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[6] Notably, despite this belief, Deputy Moffett ensured the stop evolved into a consensual encounter and sought the consent of the Defendant before performing a search.

4. Summary

The State failed to meet its burden and show that the reasons given for the stop of the Defendant's vehicle were supported by a reasonable suspicion, and therefore the stop of the defendant's vehicle was unreasonable. The Defendant's Motion to Suppress is granted on this basis, and the exclusionary rule prohibits any evidence subsequently obtained as a result of the illegal seizure.

B. MOTION TO DISMISS

1. The Amended Information

The Defendant also moves to dismiss Count I and II of the Amended Information filed December 27, 2011, because it fails to "clearly and distinctly set forth in ordinary and concise language, without repetition," the charges "in a manner as to enable a person of common understanding to know what is intended." Specifically the Defendant argues that the State failed to allege facts in the Information.

Whether a charging document provides notice to the Defendant such that he is adequately apprised of the charges is a due process and a jurisdictional challenge. State v. Cahoon, 116 Idaho 399, 775 P.2d 1241 (1989) (stating "that this jurisdictional challenge "[i]n essence ... presents an issue of notice, that being whether the citation given to Mr. Cahoon adequately apprised him of the charges so that he could prepare a defense.") Pursuant to Idaho Criminal Rule 12(b)(2), an assertion that a charging document fails to show jurisdiction of the court or to charge an offense, may be raised at any time during the pendency of the proceedings, but due process challenges must be raised prior to trial or a guilty plea. State v. Murray, 143 Idaho 532, 534, 148 P.3d 1278,

1280 (Ct. App. 2006), *citing* State v. Jones, 140 Idaho 755, 757, 101 P.3d 699, 701 (2004). As stated in Murray,

> Following *Cahoon's* lead, many subsequent decisions of the Idaho Supreme Court and of this Court, when addressing jurisdictional challenges to charging documents, considered whether the document gave adequate notice to the defendant to apprise him of the charges and whether the document's deficiencies prejudiced the defendant, although these are factors more commonly associated with due process concerns than with jurisdictional analysis. *See, e.g., State v. Summer,* 139 Idaho 219, 221–22, 76 P.3d 963, 965–66 (2003); *State v. McNair,* 141 Idaho 263, 268, 108 P.3d 410, 415 (Ct.App.2005); *State v. Sohm,* 140 Idaho 458, 459, 95 P.3d 76, 77 (Ct.App.2004); *State v. Mayer,* 139 Idaho 643, 84 P.3d 579 (Ct.App.2004); *State v. Halbesleben,* 139 Idaho 165, 168, 75 P.3d 219, 222 (Ct.App.2003); *State v. Owen,* 129 Idaho 920, 926, 935 P.2d 183, 189 (Ct.App.1997); *State v. Chapa,* 127 Idaho 786, 787–88, 906 P.2d 636, 637–38 (Ct.App.1995); *State v. Leach,* 126 Idaho 977, 979, 895 P.2d 578, 580 (Ct.App.1995); *State v. Robran,* 119 Idaho 285, 805 P.2d 491 (Ct.App.1991).

143 Idaho at 534-35 148 P.3d 1278-80. However, in Jones, the Idaho Supreme Court noted that:

> when considering the legal sufficiency of a charging document, "[t]here are two standards to consider." *Id.* at 758, 101 P.3d at 702. The first is whether the document is sufficient for the purpose of due process and the second is whether it is sufficient to impart jurisdiction. *Id.*

Murray, 143 Idaho 532, 534, 148 P.3d 1278, 1280, *citing* Jones (citation omitted)(emphasis added).

> To be legally sufficient, an indictment or information must meet two standards:
>
> First, there is the question of whether an indictment or information is legally sufficient for the purpose of due process during proceedings in the trial court. Second, there is the separate question of whether an indictment or information is legally sufficient for the purpose of imparting jurisdiction. State v. Murray, 143 Idaho 532, 535-36, 148 P.3d 1278, 1281-82 (Ct. App. 2006).

State v. Quintero, 141 Idaho 619, 621, 115 P.3d 710, 712 (2005)

Notably, Count I of the Amended Information in this case survives a jurisdictional challenge because it meets the minimum requirements for jurisdiction set forth in Jones and Quintero: 1) the statutes are listed (I.C. 18-7803(d)), 2) it is claimed that the crime happened in the State of Idaho, Kootenai County, and 3) it is claimed that the crime happened on or about a specific date. At first blush, Count II appears to be jurisdictionally deficient because in the body of Count II the State failed to list the applicable Idaho Code sections, even though the State did assert that the territory of the crime is the State of Idaho, Kootenai County and listed the specific date. However, it appears that in the opening paragraph of the Information, the State noted that Idaho Code Sections "37-2732(a), 18-1701" apply to Count II.

A reading of an Information for jurisdictional purposes should not be an overly technical exercise. Though it is more desirable to list the statute in both the introduction and the body of the count, the statute should be listed at least one time. Therefore this Court concludes that the Amended Information is adequate to confer jurisdiction.

The Defendant also makes a due process challenge to the Amended Information. As stated in State v. Holcomb:

> An information must present a plain, concise, and definite statement of the essential facts constituting the offenses charged. I.C.R. 7(b). *See also* I.C. §§ 19–1303, 19–1409 through 19–1418; *State v. Darbin,* 109 Idaho 516, 519, 708 P.2d 921, 924 (Ct.App.1985). The legal sufficiency of an information turns upon whether it fulfills the basic functions of a pleading instrument. To meet this functional standard, an information must, first, contain the elements of the offense charged and fairly inform the defendant of the charge against which he must defend, and, second, enable the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. United States,* 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); *State v. Gumm,* 99 Idaho 549, 551, 585 P.2d 959, 961 (1978); *Robran,* 119 Idaho at 287, 805 P.2d at 493.

128 Idaho 296, 300, 912 P.2d 664, 668 (Ct. App. 1995). The Court further elaborated in Murray that "There are a host of due process requirements that must be met by a charging document, such as factual specificity adequate to **'enable a person of common understanding to know what is intended' and to shield against double jeopardy."** 143 Idaho 532, 534, 148 P.3d 1278, 1280, *quoting* State v. Grady, 89 Idaho 204, 208–09, 404 P.2d 347, 349–50 (1965) (Emphasis added).

The State is correct that it is not required to allege evidence or disclose the proof upon which it intends to rely. State v. McKeehan, 91 Idaho 808, 815, 430 P.2d 886, 891 (1967). A close reading of the Amended Information shows that the State, while using the minimum required language, has met the requirements of due process alleging all the necessary elements of the crime that the Defendant violated the listed statutes by committing the specific acts.

2. The Commitment

The Defendant's argues that the commitment does not meets the requirement of I.C.R. 5.1(b) that "the finding of probable cause shall be based upon substantial evidence upon every material element of the offense charged." Probable cause is an objective conclusion that a reasonable basis exists to believe that a crime has been committed and that the defendant has committed the crime. State v. Zubizareta, 122 Idaho 823, 839 P.2d 1237 (Ct. App. 1992). Probable case is more than a mere suspicion, but less than evidence that would justify a conviction. Id.

Both Count I and II require proof that the Defendant intended to use the money in his possession to engage in an illegal drug purchase, possession, or trafficking. The State generally alleges that the Defendant was traveling from Minnesota with $47,000 to

Leavenworth, WA, as shown by the GPS device in his car, to purchase marijuana from Mr. Ryan Pate who maintains a medical marijuana grow at his residence. According to the information presented, Mr. Pate was authorized by his medical doctor to grow 15 plants, but had approximately 50 juvenile plants and a cell phone with text messages from the Defendant on it. The officers in Washington who conducted the search of Mr. Pate's property did not discover any processed or packaged marijuana, but there was testimony that $47,000 is enough money to purchase 20-30 pounds of marijuana.

The facts presented at the preliminary hearing are nothing more than a suspicion that because the Defendant is 1) in possession of a personal use quantity of marijuana, 2) has a large some of money, and 3) is traveling from Minnesota through Idaho to Washington to see a friend who grows marijuana, then the Defendant is going to use the money to engaged in unlawful activity. A reasonable person may surmise that the Defendant is "up to no good," but to conclude that the Defendant is planning to engage in "racketeering" or that he is a member of a conspiracy to "traffic" marijuana is a quantum leap of logic that goes beyond the evidence presented given that the contact in Washington has immature plants and there is no other evidence of an intent to purchase. Thus, the connection between the Defendant's possession of the money and the potential purchase of marijuana from Mr. Pate means little without more evidence.

This Court, then, concludes that the State failed to show that a reasonable basis exists to believe that crimes have been committed and that the Defendant has committed the crimes alleged in the Amended Information. The Defendant's Motion to Dismiss is hereby granted, and Counts I and II of the Amended Information are hereby dismissed.

III. CONCLUSION

The Defendants' Motion to Suppress is hereby GRANTED. The Defendant's Motion to Dismiss is hereby GRANTED. Counts I and II are hereby dismissed with prejudice.

DATED this 12th day of January, 2012.

John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER RE: DEFENDANT'S MOTION TO SUPRESS AND MOTION TO DISMISS was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the 12 day of January, 2012 to the following:

Michael Palmer
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CLIFFORD T. HAYES
Clerk of the District Court

By: _____
Deputy Clerk