11-7-2012

State v. Friedrich Appellant's Brief Dckt. 39462

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. TORREY LEE FRIEDRICH, Defendant-Appellant.	)	NOS. 39462 & 39463 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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Nature of the Case

Torrey Friedrich appeals from the judgments of conviction in two cases, one involving a DUI charge and the other, a grand theft charge. He asserts that the district court erred when it denied his motion to suppress evidence in his DUI case, and that it abused its discretion, imposing excessive sentences in both cases. He therefore requests that this Court remedy those errors.

The motion to suppress was based on the fact that the State failed to demonstrate that the officer's decision to detain Mr. Friedrich was based on reasonable suspicion that Mr. Friedrich was engaged in criminal activity. The State tried to argue two justifications for the stop. The first, which was the only justification articulated by the officer in his report and at the preliminary hearing, was that Mr. Friedrich's car had fishtailed on the slick, snow-packed road. However, the district court found that Mr. Friedrich was reasonably compensating for the conditions, and that his evidence demonstrated that there was no reasonable suspicion for the warrantless detention on that ground. The second justification was that the officer knew Mr. Friedrich to be driving on a suspended license. However, the officer testified that he was unable to determine whether the vehicle he saw was, in fact, the same vehicle for which he was looking, or that it was Mr. Friedrich driving the vehicle until after he had initiated the detention of that vehicle.

Based on the facts in the record, neither of those purported justifications actually validates the warrantless detention. As such, the warrantless detention violated both the United States and Idaho Constitutions, and the evidence discovered thereafter

(including all the evidence relied upon in regard to the DUI charge) should have been suppressed.

In regard to the excessive sentences, the district court imposed concurrent ten-year unified sentences, with three years fixed, upon Mr. Friedrich for DUI and grand theft. It did so without sufficiently considering Idaho's recognized sentencing objectives, as it did not sufficiently consider the mitigating factors present in the record. As such, those sentences are both excessive and constitute abuses of the district court's discretion. This Court should remedy those errors.

Statement of the Facts and Course of Proceedings

In regard to the DUI charge, Officer Steve Moore was investigating a driver he had been told was driving on a suspended license. (*See* Tr., p.21, Ls.1-14.) He testified that he had been informed during a unit briefing that another officer, Deputy Meacham, had attempted to perform a traffic stop on an SUV-type vehicle. (Tr., p.17, Ls.16-17; p.19, Ls.2-7.) However, Deputy Meacham had to take extra time to turn around because of bad road conditions. (Tr., p.17, Ls.17-18.) By the time he had relocated the suspect vehicle, the driver had parked it and walked away. (Tr., p.17, Ls.19-22.) Officers were unable to locate the driver. (Tr., p.17, L.23 - p.18, L.2.) As part of that investigation, officers checked the status of the owner of the vehicle, Mr. Friedrich, and determined that he had a suspended driver's license. (Tr., p.18, Ls.7-9.) For that reason only, officers were requested to watch the neighborhood around Mr. Friedrich's house. (Tr., p.21, Ls.7-9.)

Officer Moore did as requested on the evening of December 1, 2010, parking on the side of the road near Mr. Friedrich's house. (Tr., p.21, L.10 - p.22, L.13.) According to the officer, conditions were "snowy and terrible" that night. (Tr., p.39, L.13.) He also

testified that the roads were "snow-covered, and it was very slick out." (Tr., p.24, Ls.16-17.) As he watched, a vehicle similar to that investigated by Deputy Meacham drove down the road toward the officer, though it never got far enough to pass him. (Tr., p.30, Ls.1-23.) Officer Moore was not sure whether it was actually the same vehicle that Deputy Meacham had investigated. (Tr., p.30, Ls.13-16.) Officer Moore did not report the license plate to dispatch to find out if it was the same vehicle. (Tr., p.30, Ls.17-21.) Officer Moore did see the vehicle fishtail as it pulled into a driveway, though he was not sure which driveway. (Tr., p.30, Ls.7-9; p.22, Ls.23-24.)

Mr. Friedrich, who, as it turned out, was driving the vehicle, testified that he had reduced his speed to five to ten miles an hour, despite a twenty mile per hour speed limit. (Tr., p.11, L.18 - p.12, L.1.) He also testified that he felt he could safely navigate the roads so long as he did so with precaution. (*See* Tr., p.12, Ls.10-12.) Despite his reasonable cautionary efforts, the vehicle was still affected by the conditions of the road. (Tr., p.11, Ls.8-11.) Nevertheless, Officer Moore decided to detain the driver of the vehicle because the car fishtailed on snowy, slick roads.[1] (Presentence Investigation Report (*hereinafter*, PSI), p.82 (Officer Moore's police report); Prelim. Tr., p.10, L.24 - p.11, L.7.)[2] Therefore, he pulled up behind the car, which had parked in the

[1] Officer Moore's testimony changed between the preliminary hearing and the hearing on the motion to suppress. At the preliminary hearing, he testified that the only reason he initiated the detention of the driver was because of the fishtailing, but at the hearing on the motion to suppress, he added the justification that he knew the driver's license to be suspended. (*Compare* Prelim. Tr., p.10, L.24 - p.11, L.7 *with* Tr., p.28, Ls.19-23.) He also testified that he did not know who was driving the car until he initiated the stop and activated his spotlight. (Tr., p.31, Ls.10-14.)

[2] PSI page numbers correspond with the page numbers of the electronic PDF file "FriedrichPSI." Included in this file is the PSI report as well as all the documents attached thereto (police reports, letters of support, etc.). The transcript of the preliminary hearing is provided in a separate electronic PDF file, "FriedrichPreTrans."

driveway, with his emergency lights activated and "initiated a traffic stop."[3] (Tr., p.24, Ls.22-23, p.35, L.1.)

Once he had pulled in behind the suspect vehicle, Officer Moore activated his spot light and, at that point, recognized the driver as Mr. Friedrich. (PSI, p.82; Tr., p.31, Ls.13-14.) Based on the information he received at the unit briefing, Officer Moore placed Mr. Friedrich under arrest for driving on a suspended license. (PSI, p.82; *see* Tr., p.32, Ls.6-12.) However, Officer Moore testified, and the State later stipulated that, had he run Mr. Friedrich's information in the Idaho database, it would have informed the officer that Mr. Friedrich's driving privileges had been restored and Mr. Friedrich's license was not suspended. (Tr., p.32, Ls.6-10; R., p.89.)

Upon placing Mr. Friedrich under arrest, Officer Moore testified that he smelled the odor of alcohol on Mr. Friedrich. (PSI, p.82.) He decided that because of the conditions, the field sobriety tests could not be reliably performed on site. (Tr., p.37, Ls.7-10.) Therefore, he waited to have Mr. Friedrich perform the tests until he had been transported to the jail. (PSI, p.82.) Officer Moore's report indicates that Mr. Friedrich failed all three tests, although the probable cause form only indicates that he failed two.[4] (*Compare* PSI, p.82 *with* PSI, p.33.) A subsequent breathalyzer indicated that Mr. Friedrich had a blood alcohol content of 0.09 percent. (PSI, p.35.) One and one-

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[3] The district court took issue with this phrasing of the event when defense counsel subsequently used it during cross examination of the officer. (Tr., p.34, Ls.8-16; *see also* Tr., p.41, L.16 - p.42, L.16.) Regardless, as defense counsel pointed out, when the officer approached with his emergency lights activated, he seized the driver of the vehicle. (Tr., p.42, Ls.15-16.) Officer Moore also testified that he intended to seize the driver. (Tr., p.36, Ls.12-25.)

[4] Additionally, of eight potential indicators on the walk and turn test, Mr. Friedrich was only presented two, losing his balance just once while the instructions were being given and turning in the wrong direction. (PSI, p.35.) He was not lethargic or otherwise impaired in his movements, and his speech was not slurred. (PSI, p.35.)

half hours after he initiated the detention, Officer Moore checked Mr. Friedrich's driving privileges in Oregon and found them to be suspended. (Tr., p.33, L.15 - p.34, L.7, p.34, L.21.)

At the hearing on Mr. Friedrich's motion to suppress, the district court made several findings of fact. First, "I think 5 to 10 miles an hour is quite a reasonable way to handle the snow. He [Mr. Friedrich] had to go to work in the morning, and he has to come home in the evening, and I think it's unreasonable to expect that people wouldn't drive at all, and 5 to 10 miles an hour is a very reasonable way to cover the snow-covered roads." (Tr., p.14, L.22 - p.15, L.3.) As such, it found that Mr. Friedrich had established that the officer lacked reasonable suspicion to initiate the stop/detention on that basis. (Tr., p.14, Ls.17-19.) It also found that Officer Moore could rely on the unit briefing in regard to Mr. Friedrich's license status without rechecking to make sure that information was still correct before initiating the warrantless detention. (Tr., p.46, Ls.13-17, p.47, Ls.7-13.) Upon confirming that the driver was, in fact, Mr. Friedrich, the district court found that the officer could arrest him. (Tr., p.46, L.23 - p.47, L.6.) As such, it denied the motion to suppress in that regard.[5] (Tr., p.47, Ls.22-23.) Mr. Friedrich subsequently entered a conditional guilty plea, preserving those issues for appeal. (R., pp.109-10.)

As the DUI case was proceeding, the State filed a second complaint, charging Mr. Friedrich with grand theft by possessing stolen property. (R., pp.131-32.) Christopher Novak had reported that several computer devices had been taken from his

[5] Officers had also elicited several statements from Mr. Friedrich regarding the status of his license and whether he had consumed alcohol without advising him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). (Tr., p.37, Ls.11-21; *see* R., pp.83-87.) The district court granted Mr. Friedrich's motion to suppress those statements. (Tr., p.48, L.22 - p.49, L.11.)

home and he supplied officers with the serial numbers of the various items. (*See, e.g.,* PSI, p.100.) A confidential informant subsequently informed officers that Mr. Friedrich had those items and was attempting to sell them. (PSI, p.101-02.) Officers then initiated a traffic stop on Mr. Friedrich. (PSI, 102; Tr., p.69, L.19.) They searched his car and found several of the stolen devices. (PSI, p.102.) Ultimately, he entered a plea agreement with the state and admitted he knew the devices were, in fact, stolen when they were in his possession. (Tr., p.67, L.22 - p.68, L.20.)

The plea agreement encompassed both the DUI and the grand theft cases. (*See* Tr., p.58, L.14 - p.59, L.25.) In regard to the DUI case, Mr. Friedrich agreed to plead guilty to the DUI charge via a conditional plea and was free to argue as to the appropriate sentence, and the State agreed to dismiss the two misdemeanor charges, to withdraw the habitual offender enhancement, and to recommend a unified sentence of fourteen years, with four years fixed. (Tr., p.58, L.19 - p.59, L.5.) In regard to the grand theft charge, Mr. Friedrich agreed to plead guilty and was free to argue as to the appropriate sentence, and the State agreed to recommend a unified sentence of fourteen years, with four years fixed, concurrent to the sentence imposed in the DUI case, and to not file a habitual offender enhancement. (Tr., p.59, Ls.2-3, 16-25.) The district court accepted those pleas and set the cases for sentencing. (Tr., p.70, Ls.9-18.)

The presentence investigation report revealed that Mr. Friedrich had a troubled childhood due to mental abuse at the hand of his father. (PSI, p.6.) He suffered from symptoms of depression throughout his childhood and was currently displaying symptoms consistent with Major Depressive Disorder and Generalized Anxiety Disorder. (PSI, pp.20, 24.) And, while Mr. Friedrich did not report any formal

diagnoses, he did place in the high range of the Internal Mental Distress Scale. (PSI, pp.24-25.) Mr. Friedrich indicated that he had come to understand that these issues were playing a role with his drug and alcohol abuse, as he used those substances to self-medicate for his depression symptoms. (PSI, p.12.) As such, he requested treatment not only for his substance abuse issues, but for his depression symptoms as well. (*See, e.g.,* PSI, p.12.) The GAIN-I Recommendation and Referral Summary (*hereinafter*, GRRS) recommended that Mr. Friedrich participate in an intensive outpatient treatment program to address these issues. (PSI, p.23.) He also received letters of support from several family members, including his mother, fiancée, brother, sister-in-law, and cousin. (PSI, pp.14-18.) They, along with the GRRS, indicated that a significant change in Mr. Friedrich's life occurred with the birth of his son earlier that year. (*See* PSI, pp.14-18, 21.) And while the PSI indicated that Mr. Friedrich should not be considered for probationary release, it did not rule out a period of retained jurisdiction as an available option. (*See* PSI, p.12.)

At sentencing, defense counsel indicated that Mr. Friedrich did not object to the request for restitution associated with the grand theft case. (Tr., p.76, Ls.21-22.) Counsel also pointed out that Mr. Friedrich is a trained electrician. (Tr., p.79, Ls.17-20.) As such, defense counsel recommended that, despite his criminal history, Mr. Friedrich should be afforded the opportunity to rehabilitate via a period of retained jurisdiction, particularly given his current insights and amenability to treatment. (Tr., p.76, L.13 - p.82, L.9.) Mr. Friedrich himself expressed his remorse and accepted responsibility for his actions. (Tr., p.82, Ls.11-14, p.84, Ls.5-7.) He also expressed his continuing desire to get treatment and rehabilitate himself, so as to be a good father for his newborn son. (*See, e.g.,* Tr., p.83, L.16 - p.84, L.7.) Despite these factors, the district court imposed a

unified sentence of ten years, with three years fixed, in each case and ordered those sentences to be served concurrently. (Tr., p.90, Ls.11-15; R., pp.123-24, 167-68.) Mr. Friedrich filed timely notices of appeal in each case.[6] (R., pp.119-21, 164-66.) The Idaho Supreme Court consolidated those appeals. (Order, dated December 16, 2011.)

[6] He also filed motions for leniency pursuant to I.C.R. 35, which were denied. (*See* Augmentation to the Record.) Those motions are not challenged on appeal.

ISSUES

1. Whether the district court erred when it denied Mr. Friedrich's motion to suppress because the officer did not have reasonable suspicion to justify the warrantless detention of Mr. Friedrich.

2. Whether the district court abused its discretion by imposing excessive sentences on Mr. Friedrich in the two cases on appeal.

ARGUMENT

I.

The District Court Erred When It Denied Mr. Friedrich's Motion To Suppress Because The Officer Did Not Have Reasonable Suspicion To Justify The Warrantless Detention Of Mr. Friedrich

A. Introduction

The district court erroneously denied Mr. Friedrich's motion to suppress the evidenced gained as a result of Officer Moore's detention of Mr. Friedrich. Because that detention was not based on reasonable suspicion, it violated Mr. Friedrich's Fourth Amendment rights, as well as his rights pursuant to Article I, § 17 of Idaho Constitution. The only justification the officer provided in his report and in his testimony at the preliminary hearing (the fishtailing of the vehicle) did not provide reasonable suspicion because that event was caused by the road conditions and the district court found that Mr. Friedrich was driving reasonably given those conditions. As such, that observation did not provide reasonable suspicion that Mr. Friedrich was driving contrary to the traffic laws, and thus, did not provide a basis to initiate a warrantless detention of the driver.

The other justification the State subsequently proffered (the information regarding Mr. Friedrich's license status) also failed to provide reasonable suspicion. Officer Moore admitted that he could not determine whether the vehicle was the same vehicle for which he was watching, nor could he determine who was driving that vehicle, until *after* he initiated the warrantless detention. As such, *at or before the time he initiated the detention*, he had no information upon which he could base a reasonable suspicion that this driver was driving contrary to the law, and thus, had no reasonable suspicion upon which to justify a warrantless detention of that driver.

As neither of the forwarded justifications actually validates the warrantless detention, that detention was prohibited by the state and federal constitutions and the evidence subsequently gained during that detention should have been suppressed. The district court erred by not suppressing that evidence. This Court should remedy that error and reverse that decision.

B. Standard Of Review And Overarching Principles

The Idaho Supreme Court has held that "[w]hen reviewing a motion to suppress, the standard of review is bifurcated. This Court defers to the trial court's findings of fact unless the findings are clearly erroneous. This Court freely reviews the trial court's application of constitutional principles to the facts as found." *State v. Willoughby*, 147 Idaho 482, 485-86 (2009) (citations omitted).

In this case, the motion to suppress invoked the constitutional protections against unreasonable seizures. (R., pp.80-81.) The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend IV. The Fourth Amendment is enforceable against the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *State v. Johnson*, 110 Idaho 516, 524 (1986). The Idaho Constitution provides its own, similar protections against unreasonable searches and seizures. IDAHO CONST. Art. I, § 17; *State v. Donato*, 135 Idaho 469, 471 (2001).

In order to effectuate a reasonable warrantless seizure of a person, the officer must have at least reasonable and articulable suspicion that the person has violated the law. *See, e.g., Willoughby*, 147 Idaho at 490. Whether or not an officer had reasonable suspicion is determined based on the information known to the officer at or before he

initiated the warrantless detention. *State v. Bishop*, 146 Idaho 804, 811 (2009). If the detention is not supported by reasonable suspicion, the information and observations which occur during that detention are considered fruits of the poisonous tree, and thus need to be suppressed. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (holding that the exclusionary rule extends to the indirect products of an illegal seizure); *State v. Salinas*, 134 Idaho 362, 366 (Ct. App. 2000) (recognizing the same); *see also State v. Allgood*, 98 Idaho 525, 527 (1977) (holding that the detention must be lawful for subsequently-observed evidence to be admissible); *State v. Limberhand*, 117 Idaho 456, 461 (Ct. App. 1990) (holding that if the officer's initial actions violate the Fourth Amendment's protections, his testimony as to his subsequent observations are inadmissible). The defendant's burden is only to show a causal connection between the illegal seizure and the evidence or testimony sought to be suppressed. *State v. Babb*, 136 Idaho 95, 98 (Ct. App. 2001). Once the defendant demonstrates the connection between the taint and the suppressible evidence, the burden shifts to the government to prove that the taint should not extend to that evidence. *Alderman v. United States*, 394 U.S. 165, 183 (1969); *Babb*, 136 Idaho at 98.

In this case, Officer Moore seized Mr. Friedrich when he activated his overhead lights. *See, e.g., State v. Mireless*, 133 Idaho 690, 692 (Ct. App. 1999) (citing I.C. § 49-1404, which prohibits fleeing or eluding an officer when signaled to stop via the officer's emergency lights). It does not matter whether this was a "traffic" stop, as this analysis applies equally to vehicles and pedestrians. *See Brown v. Texas*, 443 U.S. 47, 52 (1979) (requiring at least reasonable suspicion for an officer to detain a pedestrian); *State v. Page*, 140 Idaho 841, 845 (2004) (recognizing the same). Furthermore, Mr. Friedrich met his burden, demonstrating that, but for the illegal detention, the officer

would not have uncovered the evidence Mr. Friedrich sought to suppress. (*See* R., pp.83-87.) However, as will be discussed *infra*, the State did not demonstrate that the warrantless detention was justified by reasonable suspicion based on the information known to the officer *at the time he initiated the detention. See Bishop*, 146 Idaho at 811. As such, because the warrantless detention was not justified by reasonable suspicion, the evidence resulting from that illegal detention should have been suppressed. *See, e.g., Wong Sun*, 371 U.S. at 484; *Limberhand*, 117 Idaho at 461.

C. The Officer Did Not Have Reasonable Suspicion To Detain Mr. Friedrich Based On The Observed Fishtailing Of Mr. Friedrich's Car Because The Officer Could Not Determine That Driving Pattern Was Not Caused By The Road Conditions And The District Court Found That Mr. Friedrich Was Driving Reasonably Given Those Conditions

The Idaho Supreme Court has stated that "[a] reasonable suspicion exists when the officer—or officers—can articulate specific facts which, together with rational inferences from those facts, reasonably justify a suspicion that *criminal activity* is occurring." *See State v. Danney*, ___ Idaho ___, 283 P.3d 722, 726-27 (2012) (emphasis added). The test for reckless driving is objective, and so it does not matter whether or not Officer Moore believed that the car was being driven recklessly. (*See* Tr., p.24, Ls.10-13.) Rather, the criminal activity can only occur if the car was being driven in an objectively unreasonable manner. *See* I.C. § 49-1401 (to be driving recklessly, the driver must be driving "carelessly and heedlessly or without due caution and circumspection . . .").

Mr. Friedrich testified that, even though the speed limit on that particular section of road was twenty miles per hour, he was only driving five to ten miles per hour. (Tr., p.11, L.23 - p.12, L.1, p.12, L.25 - p.13, L.5.) However, the roads were not

impassible; they just needed to be navigated with reasonable care, which Mr. Friedrich was doing. Nevertheless, he testified that the conditions were affecting his vehicle. (Tr., p.11, Ls.8-11.) Based on the totality of the circumstances in this case, the district court found "5 to 10 miles an hour is quite a reasonable way to handle the snow. He [Mr. Friedrich] had to go to work in the morning, and he has to come home in the evening, and I think it's unreasonable to expect that people wouldn't drive at all, and 5 to 10 miles an hour is a very reasonable way to cover the snow-covered road." (Tr., p.14, L.22 - p.15, L.3.) The district court also found this evidence sufficient to sustain the motion to suppress (absent the State's presentation of evidence) as it established a lack of probable cause for the stop based on reckless driving. (Tr., p.14, Ls.14-20.) Therefore, based on the district court's findings, the seizure of Mr. Friedrich could not be reasonably based on the fishtailing of the vehicle. *See Danney*, 283 P.3d at 726-27.

Based on the district court's findings, Officer Moore did not have reasonable suspicion that Mr. Friedrich was driving his car in contravention of the traffic laws when he observed it fishtail. *Id.* The district court made the finding that Mr. Friedrich was driving in an objectively reasonable manner, with due caution and circumspection. (*See* Tr., p.14, Ls.22 - p.15, L.3.) Therefore, the fact that the car fishtailed, based on the facts in this case, does not lead to a reasonable conclusion that the car was being driven recklessly or otherwise contrary to the law. As such, that event did not provide Officer Moore with reasonable suspicion that criminal activity was occurring, and thus, could not justify the warrantless detention. *See, e.g., Danney*, 283 P.3d at 726-27. As such, the warrantless detention was invalid and all subsequently-gathered evidence

and testimony thereto, should have been suppressed. *See, e.g., Wong Sun*, 371 U.S. at 484; *Limberhand*, 117 Idaho at 461.

D. The Officer Did Not Have Reasonable Suspicion, Even With The Information From The Unit Briefing, When He Initiated The Stop Because He Had Not Identified Either The Vehicle Or The Driver, And So Could Not Have Known At The Time He Initiated The Warrantless Detention Whether That Person Had A Valid License

Because the officer did not premise the detention of Mr. Friedrich on the status of his driver's license, it should not be considered as a potential basis upon which to justify the stop. Assuming, however, such a rationale is properly considered, it could not provide the necessary reasonable suspicion to justify the seizure because Officer Moore failed to confirm that the vehicle he observed that night was, in fact, the vehicle for which he was watching or that it was being driven by the person for whom he was waiting *before initiating* the warrantless detention.

An officer must have reasonable suspicion based on the information known to him *at or before* the moment he initiated the warrantless detention. *See Bishop*, 146 Idaho at 812. Officers cannot garner reasonable suspicion from hunches, instinct, speculation, or lucky guesses. *See, e.g., United States v. Sokolow*, 490 U.S. 1, 16 (1989) (holding "[f]or law enforcement officers to base a search, even in part, on a "pop" guess . . . stretches the concept of reasonable suspicion beyond recognition . . .").

The evidence in this case shows Officer Moore did not have any information *at or before* the time he initiated the warrantless detention that would give him reasonable suspicion to believe that the driver of a random vehicle was not properly licensed. *See, e.g., Bishop*, 146 Idaho at 812. Officer Moore admitted that he could not identify the vehicle by sight as the one for which he was looking. (Tr., p.30, Ls.6-12.) The vehicle did not pass him on the road. (Tr., p.30, Ls.22-23.) The conditions were "snowy

and terrible." (Tr., p.39, L.13.) And, despite his inability to identify the vehicle, he did not ask dispatch to check to the license plates on that vehicle to determine if it was, in fact, the same vehicle, or a different vehicle merely similar in appearance. (*See* Tr., p.30, Ls.10-12, 17-21.) Officer Moore also admitted that he was not sure who it was driving the vehicle until he pulled up to Mr. Friedrich with his emergency lights activated and his spotlight trained on the vehicle.[7] (Tr., p.23, Ls.7-10, p.35, L.1, p.46, L.24 - p.47, L.2.) In fact, he wrote in his report that it was only after he initiated the detention of Mr. Friedrich that he recognized the driver of the vehicle. (*See* PSI, p.82.) Therefore, Officer Moore could not have reasonably based his decision to detain the driver of the vehicle based on knowledge that the driver had a suspended license – he did not know who the driver was *until after initiating the detention of that person.*

Therefore, the warrantless detention was illegal and violated the both the Idaho and the United States Constitutions. *See, e.g., Sokolow*, 490 U.S. at 16; *Bishop*, 146 Idaho at 812. As a result, the evidence resulting from that illegal warrantless detention should have been suppressed, and this Court should reverse the district court's decision to the contrary. *See, e.g., Wong Sun*, 371 U.S. at 484; *Limberhand*, 117 Idaho at 461.

[7] Activating the emergency lights initiated the detention. *Mireless*, 133 Idaho at 692. Officer Moore testified that when he pulled in behind the car, he had already activated his emergency lights. (Tr., p.35, Ls.1-4.) Therefore, he initiated the stop before he had an opportunity to identify the vehicle or driver.

II.

The District Court Abused Its Discretion By Imposing Excessive Sentences On Mr. Friedrich In The Two Cases On Appeal

A. Introduction

Both of the sentences imposed on Mr. Friedrich in these cases were excessive because the district court imposed both sentences without sufficiently considering the recognized sentencing objectives or the mitigating factors present in this case. As such, the district court abused its discretion. This Court should remedy that abuse.

B. Both Of The Imposed Sentences Are Excessive Because They Were Imposed Without Sufficient Consideration Of The Mitigating Factors Present In This Case

Where a defendant contends that the sentencing court imposed an excessively harsh sentence the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771, 772 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Friedrich does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, he must show that, in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria, or sentencing objectives, are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* The protection of society is the primary objective the court should

consider. *State v. Charboneau*, 124 Idaho 497, 500 (1993). Therefore, a sentence that protects society and also accomplishes the other objectives will be considered reasonable. *Id.*; *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). This is because the protection of society is influenced by each of the other objectives, and as a result, each must be addressed in sentencing. *Charboneau*, 124 Idaho at 500; I.C. § 19-2521.

There are several factors that the appellate court should consider to determine whether the objectives are served by a particular sentence. *State v. Knighton*, 143 Idaho 318, 320 (2006). They include, but are not limited to: "the defendant's good character, status as a first-time offender, sincere expressions of remorse and amenability to treatment, and support of family." *Id.* Insufficient consideration of these factors has been the basis for a more lenient sentence in several cases. *See, e.g., Cook v. State*, 145 Idaho 482, 489-90 (Ct. App. 2008); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991); *State v. Carrasco*, 114 Idaho 348, 354-55 (Ct. App. 1988), *rev'd on other grounds*, 117 Idaho 295, 301 (1990); *State v. Shideler*, 103 Idaho 593, 595 (1982). In this case, several of those factors are present, but were insufficiently considered by the district court as it crafted Mr. Friedrich's sentence, and, as a result, the sentence does not serve the objectives, and is excessive.

First, Mr. Friedrich had a troubled childhood, suffering mental abuse at the hands of his father. (PSI, p.6.) That is a factor that should be considered in mitigation. *See State v. Williamson*, 135 Idaho 618, 620 (Ct. App. 2001). Not surprisingly, he has been dealing with depression, though unreported, since he was five years old. (PSI, p.20.) His current symptoms are consistent with Major Depressive Disorder and Generalized Anxiety Disorder, and Mr. Friedrich rates in the high range of internal mental distress. (PSI, pp.24-25.) Mr. Friedrich indicated that he realizes he has been

self-medicating for these issues with drugs and alcohol. (PSI, p.9.) As such, he has requested to participate in treatment for the depression as well as the substance abuse to help address all the issues, which would give him a better chance to successfully rehabilitate. (PSI, pp.12, 26.) Therefore, Mr. Friedrich's mental health issues, as well as his amenability to treatment should have also weighed in mitigation at sentencing. *See, e.g., Hollon v. State*, 132 Idaho 573, 581 (1999). In order to most effectively address these issues, the GRRS recommended that Mr. Friedrich participate in intensive outpatient treatment. (PSI, p.23.)

Mr. Friedrich expressed sincere remorse and accepted responsibility for his actions. (Tr., p.82, Ls.12-13, p.84, Ls.5-7.) Acknowledgment of guilt and acceptance of responsibility by the defendant are critical first steps toward rehabilitation. *See Kellis*, 148 Idaho at 815. By making these two acknowledgements, Mr. Friedrich demonstrated that he has taken these critical first steps. Additionally, the timing of such rehabilitation and treatment is important. *See State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227, 228 (1971); *State v. Nice*, 103 Idaho 89, 91 (1982); *Cook,* 145 Idaho at 489; *State v. Eubank*, 114 Idaho 635, 639 (Ct. App. 1988). Additionally, sentences are to be crafted so that they do not force the prison system to continue detaining a person once rehabilitation or age has decreased the risk of recidivism. *Cook*, 145 Idaho at 489; *Eubank*, 114 Idaho at 639. Imposing extensive sentences without providing rehabilitative opportunities operates against these requirements, and therefore, demonstrate the abuse of the district court's discretion. He was also willing to pay the requested restitution (*see* Tr., p.76, Ls.21-22), another factor which indicated a more lenient sentence was appropriate. *State v. Hall*, 114 Idaho 887, 889 (Ct. App. 1988). And while Mr. Friedrich does have a criminal

record (PSI, pp.3-6), even the habitual offender will not be subjected to an excessive sentence. *Carrasco*, 114 Idaho at 354-55.

Furthermore, Mr. Friedrich received several letters of support from various family members. (PSI, pp.14-18.) Family constitutes an important part of a support network, which can help in rehabilitation. *See State v. Kellis*, 148 Idaho 812, 817 (Ct. App. 2010) (holding that familial support offered to affirm the defendant's innocence does not equate to familial support offered in consideration of rehabilitation, implying that had the support been offered for rehabilitation, it would be a mitigating factor worthy of consideration). As such, those letters should have also weighed in favor of a more lenient sentence. Additionally, as the GRRS indicated, the birth of his son within the past year is a factor which the district court needed to sufficiently consider. (PSI, p.21.) He also has employable skills, as he is trained, for example, as an electrician. (Tr., p.79, Ls.17-20.)

A sufficient examination of all these factors reveals that a more lenient sentence, one which considers rehabilitation, still addresses all the other objectives – protection of society, punishment, and deterrence. *See State v. Ransom*, 124 Idaho 703, 713 (1993) (requiring that alternative sentences still address all the sentencing objectives). When a sentencing court retains jurisdiction, it still imposes and executes a sentence. Therefore, both the retributive and the deterrent effects of the imposed sentence are still present. *See State v. Crockett*, 146 Idaho 13, 14-15 (Ct. App. 2008) (discussing how even a sentence for a period of probation addresses all the sentencing objectives and how the court's continuing jurisdiction affects those objectives). Such a sentence would punish Mr. Friedrich by depriving him not only of his liberty during his period of retained jurisdiction, but several of his rights (such as the right to possess a firearm) as well,

since this is a felony offense. These results, along with the imposed sentence, would also serve as a deterrent to society at large. *See id.* Furthermore, it would deter Mr. Friedrich specifically because the sentence need not be suspended should he perform poorly or otherwise violate the terms of the rider. Even if he were to complete the rider and be placed on probation, the looming sentence would still deter him from violating his probation.

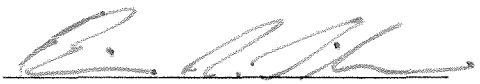
In this case, the district court would not lose anything in terms of protection of society, deterrence, or punishment by retaining jurisdiction. Society would have received equally similar protection by retaining jurisdiction as it would by incarcerating him. Mr. Friedrich would be in the custody of the Department of Correction either way. He could not harm society during that period, so society would be protected whether he was on a rider or in prison. Furthermore, the district court would retain the ability to relinquish jurisdiction and leave Mr. Friedrich incarcerated for the entire fixed term of the sentence if he does not show progress. And if the district court did that, the parole board would have broad discretion over whether to release him on parole during the indeterminate term of his sentence. *See, e.g., State v. Stover*, 140 Idaho 927, 931 (2005). However, the district court could relinquish jurisdiction and enforce the prison sentence knowing that all the sentencing objectives were properly addressed.

What the rider would provide that a term sentence does not is the opportunity to rehabilitate, and as the Supreme Court has noted, rehabilitation is more likely now than in the future. *See Owen*, 73 Idaho at 402. Therefore, because it did not sufficiently consider the mitigating factors, and thus, the sentencing objectives, the district court abused its discretion when it imposed the sentences in this case.

CONCLUSION

Mr. Friedrich respectfully requests that this Court reverse the district court's decision to deny his motion to suppress and remand that case for further proceedings. Otherwise, he respectfully requests that this Court reduce his sentences as it deems appropriate, or alternatively, vacate those sentences and remand to the district court for a new sentencing hearing.

DATED this 7th day of November, 2012.



BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of November, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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