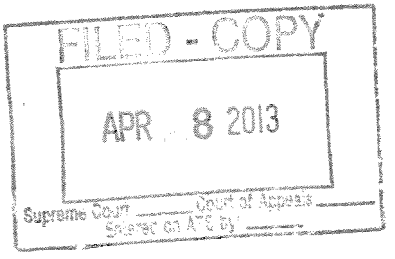
4-8-2013

State v. Widner Appellant's Brief Dckt. 39908

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintif-Respondent, vs. DANIEL L. WIDNER, Defendant-Appellant.	)	S.Ct. No. 39908 D.Ct. No. CR-2011-494 (Elmore County)

OPENING BRIEF OF APPELLANT



Appeal from the District Court of the Fourth Judicial District of the State of Idaho In and For the County of Elmore

HONORABLE LYNN G. NORTON
District Judge

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A. Nature of the Case

This appeal follows Appellant Daniel Widner's conditional guilty plea to one count of trafficking in marijuana, I.C. § 37-2732B(a)(1)(A) and (D) and one misdemeanor count of concealing a dangerous weapon while in a motor vehicle, I.C. § 18-3302(2) and (14). R 188-191; 196-199. Mr. Widner should be granted relief on appeal because the district court erred in denying his motion in limine to exclude evidence obtained as the result of an unconstitutional stop.

B. Course of Proceedings in the District Court

On March 29, 2011, the state filed an information in Elmore County charging Mr. Widner with trafficking in marijuana and concealing a dangerous weapon within a motor vehicle. R 35-36. Mr. Widner was arraigned on April 18, 2011. R 37-38.

The court entered a scheduling order setting the case for a pretrial conference on July 8, 2011, and a jury trial on August 3, 2011. R 39-40.

On June 7, 2011, defense counsel filed a motion in limine pursuant to IRE 104(a) and ICR 12(b) to exclude all evidence obtained incident to Mr. Widner's arrest. R 43-44.

While the state filed a memorandum in opposition to the motion in limine on the basis that the evidence in question was constitutionally obtained, R 130-149, the state never objected to the denomination of the motion as a motion in limine as opposed to a motion to suppress evidence and the state never objected to the motion as being untimely. ROA.

When the motion came up for hearing, the district court specifically addressed counsel about the denomination of the motion:

> The Court: All right. My question, I guess, just to clarify my thinking is, why are you calling this a motion in limine instead of a motion to suppress under Rule 12 of the criminal rules?
>
> Defense Counsel: Well, we just called it a motion in limine, Your Honor, just because that fits within the general category of any motion pretrial.
>
> The Court: All right.
>
> Prosecutor: You Honor, the state would waive any opening and reserve for closing.

Tr. 9/13/11, p. 4, ln. 23 - p. 5, ln. 7.

Following a hearing, the district court denied the motion in limine. Tr. 10/27/11, p. 158, ln. 4 - p. 168, ln. 12; R 175-176.

Thereafter, Mr. Widner entered a conditional guilty plea to both charges. Tr. 12/19/11. The nature of the plea is demonstrated by the following exchange between court and counsel:

> The Court: All right. Is this a conditional plea?
>
> Defense Counsel: Yes, it is Your Honor.

Tr. 12/19/11, p. 9, ln. 12-14.

The state did not object to this description of the plea. Tr. 12/19/11, p. 9, ln. 15-25.

When reminded by the court that a conditional plea should be documented in writing, defense counsel apologized for being unaware of the requirement. The court then took a recess to allow counsel to write out the agreement. Tr. 12/19/11, p. 10, ln. 14 - p. 12, ln. 13.

Thereafter, proceedings resumed and the district court stated that it understood that the plea preserved the right to appeal the court's prior decision on the motion in limine and clarified with Mr. Widner that this conformed to his understanding. Tr. 12/19/11, p. 20, ln. 20 - p. 21, ln. 1. A few minutes later, the court stated:

> And, for the record, I would say I approve – in accordance with the Rule – I would approve the right to enter the conditional plea, reserving your right the right to appeal.

Tr. 12/19/11, p. 23, ln. 7-10.

Again, the state did not object to the description of the plea as conditional upon the right to appeal the motion in limine. Tr. 12/19/11, p. 23, ln. 10-25.

At the close of the plea hearing, in accepting the plea, the court stated, "This is a conditional plea. We've already covered that." Tr. 12/19/11, p. 35, ln. 17-18. Again, the state did not object. Tr. 12/19/11, p. 35, ln. 19-25.

The ROA does not reflect that written documentation of the plea agreement was ever filed. ROA.

However, at sentencing, defense counsel again referred to the conditional nature of the plea, Tr. 3/21/12, p. 82, ln. 8-10; p. 93, ln. 17-18, and the state again did not object. Tr. 3/21/12, p. 82, ln. 11 - p. 96, ln. 19.

The district court imposed a sentence of one year fixed plus 14 indeterminate on the trafficking charge and 180 days concurrent on the misdemeanor. Tr. 3/21/12, p. 99, ln. 13 - p. 100, ln. 20.

This appeal follows. R 196-99, 235.[1]

C. Facts Relevant to Appeal

At the preliminary hearing, Mountain Home Police Officer Ryan Malenese testified that he conducted a traffic stop of a Honda driven by Mr. Widner about 11:22 p.m. on January 30,

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[1] Mr. Stewart, the owner and passenger of the car unconstitutionally stopped, joined in the motion in limine. His appeal is currently pending before this Court in *State v. Stewart*, No. 39887, Elmore County No. CR-2011-493.

2011. Tr. 2/25/11, p. 4, ln. 11 - p. 8, ln. 18. He testified that he noticed the Honda because it was going 28 miles per hour on a street which comes into town from the direction of the interstate. The street's speed limit begins at 45 miles per hour, decreases to 35 and then decreases again to 25. The Honda was near the place where the speed transitions from 45 to 35 miles per hour. Tr. 2/25/11, p. 5, ln. 1-25.

Officer Malenese followed the car and ultimately initiated a stop because Mr. Widner did not signal when the roadway increased from a one-lane to a two-lane road and because he did not later signal when he continued on the roadway as it went through what Officer Malenese called a T-intersection. Tr. 2/25/11, p. 8, ln. 2-18.

Mr. Widner filed his motion in limine to exclude the evidence obtained following this traffic stop on the basis that the stop was not valid because he had broken no traffic laws in either going 28 miles per hour or in not signaling at either place noted by the officer. R 45-89.

The district court reviewed the preliminary hearing transcript and evidence presented at a hearing on the motion and held that there was no basis to conduct a traffic stop because there was no duty to signal either where the lanes expanded from one to two or where the roadway turned to the right. Tr. 10/11/11 p. 112, ln. 21 - p. 120, ln. 22; Tr. 10/27/11 p. 6, ln. 24 - p. 10, ln. 7.

The state then presented evidence to provide a different basis for stopping the Honda.

Detective Jessup of the Mountain Home Police Department testified that a confidential informant (CI) working off a charge of delivery of marijuana had identified Mr. Widner as a "target." Tr. 10/27/11, p. 17, ln. 16 - p. 18, ln. 15. Detective Jessup testified that he had four "operations" with the CI and that in those "operations" he was able to verify the information from the CI "both by taking the information given, just attempting to cooperate through other

informants' sources and surveillance." Tr. 10/27/11, p. 18, ln. 20 - p. 19, ln. 10.

Detective Jessup testified that the CI made two controlled purchases from Mr. Widner. Tr. 10/27/11, p. 19, ln. 16-18. The dates of the buys were October 19, 2010, and December 14, 2010. Tr. 10/27/11, p. 33, ln. 3-4. However, neither of these purchases resulted in any arrest or prosecution. Tr. 10/27/11, p. 38, ln. 3-5.

Detective Jessup testified that the CI advised him on January 11, 2011, "that he or she believed that Mr. Widner was going to be traveling to California either on that weekend or the following weekend to resupply marijuana." Tr. 10/27/11, p. 21, ln. 18 - p. 22, ln. 4. Detective Jessup asked the CI to confirm the information and contact him. However, apparently nothing happened. Tr. 10/27/11, p. 22, ln. 7-11. Detective Jessup offered no testimony about the CI's basis of knowledge. Tr. 10/27/11, p. 22.

Then on January 21, 2011, Detective Jessup initiated contact with the CI who told him that he or she had not had any contact with Mr. Widner and believed that Mr. Widner was probably out of marijuana. Tr. 10/27/11, p. 22, ln. 21-24. Again, Detective Jessup offered no testimony regarding the CI's basis of knowledge of anything other than his or her own lack of contact with Mr. Widner. Tr. 10/27/11, p. 22.

According to Detective Jessup, later that day, the CI contacted him again to say that Mr. Widner was in town but that he was going to be traveling to California. Tr. 10/27/11, p. 23, ln. 7-10. Again, Detective Jessup offered no testimony regarding the CI's basis of knowledge. Tr. 10/27/11, p. 23.

Detective Jessup testified that he contacted the CI again on January 26. At that time, the CI said he or she had not talked to Mr. Widner for a couple of days. Tr. 10/27/11, p. 23, ln. 16 -

p. 24, ln. 6. According to Detective Jessup, "The informant eventually told me that he or she had learned that Mr. Widner was going to be traveling to California on that weekend." Tr. 10/27/11, p. 24, ln. 13-15. Again, Detective Jessup offered no testimony as to the basis of the CI's knowledge of anything except his or her own lack of contact with Mr. Widner. Tr. 10/27/11, p. 24.

Detective Jessup testified that on January 29, he again initiated contact with the CI who told him that he or she had not spoken with Mr. Widner for a couple of days and believed that Mr. Widner had left Mountain Home. Tr. 10/27/11, p. 24, ln. 17 - p. 25, ln. 4. Again, Detective Jessup offered no testimony as to the basis of the CI's knowledge as to whether Mr. Widner was in Mountain Home or not. Tr. 10/27/11, p. 25.

Detective Jessup testified that based upon the CI's information he conducted surveillance on Mr. Widner's house to see if his car was missing. Tr. 10/27/11, p. 25, ln. 7-10. In a later contact that day, the CI said that he or she had learned that Mr. Widner was planning to leave in the early morning hours of January 30. Tr. p. 10/27/11, p. 25, ln. 16-19. Detective Jessup said that the CI told him that Mr. Widner would return either the night of January 30 or the morning of January 31. Tr. p. 10/27/11, p. 25, ln. 20-23. Again, the detective did not testify to the CI's basis of knowledge. Tr. p. 10/27/11, p. 25.

On January 30, Detective Jessup went to Mr. Widner's house and saw that both his cars were there and stayed there throughout the day. So, he contacted the CI again. Tr. 10/27/11, p. 26, ln. 1-15. Detective Jessup testified that the CI had no further information as to whether Mr. Widner had left or what vehicle he was in. Tr. 10/27/11, p. 26, ln. 20 - p. 27, ln. 2.

Then, according to the detective, at about 6:00 p.m., the CI contacted him. Detective

Jessup testified, "I was told that by the informant that the information he or she learned was that Mr. Widner had traveled to California with a roommate, Alex Stewart, and they were said to be in Mr. Stewart's vehicle." Tr. 10/27/11, p. 27, ln. 7 - p. 28, ln. 11. Again, the detective did not testify as to the CI's basis of knowledge. Tr. 10/27/11, p. 27.

The detective knew that Mr. Stewart drove a 1988 Honda Civic with Elmore County plates. He had seen the car in the past at Mr. Widner's residence and at Mr. Stewart's place of employment. Tr. 10/27/11, p. 28, ln. 12 - p. 29, ln. 2. He drove by Mr. Widner's residence and Mr. Stewart's place of employment on the 30th and did not see Mr. Stewart's car. Tr. 10/27/11, p. 29, ln. 3-20; p. 30, ln. 20 - p. 31, ln. 10.

In sum, the CI had told Detective Jessup that Mr. Widner was going to California on the 14th or 21st of January, but the predictions did not come true as far as Detective Jessup was aware. Tr. 10/27/11, p. 39, ln. 7 - p. 41, ln. 2. Then the CI said that he or she "had learned," without specification of how or from whom, that Mr. Widner had gone to California with Mr. Stewart and "that they were said," again without specification of by whom, or this person's basis of knowledge, to be traveling in Mr. Stewart's car. Tr. 10/27/11, p. 28, ln. 7-11.

Detective Jessup testified that he drove past Mr. Widner's house and Mr. Stewart's place of employment, but did not see Mr. Stewart's car at either place. Tr. 10/27/11, p. 28, ln. 22 - p. 31, ln. 21.

Based upon this information, Detective Jessup and Sergeant Griggs "just came up with a plan to meet later . . . in an attempt to intercept the vehicle as it came back to Mountain Home." Tr. 10/27/11, p. 29, ln. 23 - p. 30, ln. 5. Detective Jessup told a patrol supervisor about the plan, but the information did not go out by radio. Tr. 10/27/11, p. 56, ln. 2-25. No one made any

effort whatsoever to obtain a warrant either to arrest Mr. Widner or to search Mr. Stewart's car. Tr. 10/27/11, p. 259, ln. 18 - p. 60, ln. 7.

Officer Malenese testified that he was advised by a sergeant to be on the lookout for a car bearing a certain license number. He testified:

> I was given the license plate number and told that if I saw the vehicle and could develop my own probable cause for stopping the vehicle, to do so, and that the vehicle had a large amount of marijuana in it.

Tr. 10/27/11, p. 71, ln. 17-22.

Officer Malenese testified that after being given the plate number, he ran it to determine what sort of car to watch for. From that he understood that he was to be looking for a Honda Accord. Tr. 10/27/11, p. 76, ln. 19-23. However, the car he actually stopped was a 1988 Honda Civic. Tr. 10/27/11, p. 78, ln. 10-11. Later, he testified that he did not actually have a specific recall of the model as opposed to the make of the car that came back when he ran the license plate number. Tr. 10/27/11, p. 80, ln. 20-23.

When Officer Malenese stopped Mr. Widner, Detective Jessup heard about the stop on the radio and responded immediately to the scene. Tr. 10/27/11, p. 58, ln. 1-18.

Defense counsel argued that the evidence obtained as a result of the stop should be suppressed because there was no testimony given as to the basis of the CI's information including even where the CI was getting the information. Defense counsel also argued that what little information was generated about the CI's history of giving information revealed that the CI was often simply wrong. And, lastly, on January 30, 2011, the CI's information was only that Mr. Widner was said by some unknown person to be traveling to California in Mr. Stewart's car. Tr. 10/27/11, p. 85, ln. 2 - p. 92, ln. 25. As argued by counsel:

> The last call there's no further information in here about whether they're going to California, who they're going to be getting marijuana from, when they're exactly leaving, when they're coming back, what exactly are they driving, how much are they bringing back, what is it going to be packaged in.

Tr. 10/27/11, p. 90, ln. 2-8.

Counsel concluded:

> . . . they did not have a valid reason to stop either for the [traffic] violation or for the tip from the confidential informant. The tip was not nearly reliable enough, speaking of which, when Detective – or excuse me, Officer Malenese attempted to independently corroborate the information he had been given, the license plate number for the pass-along meeting, he runs that through his system, and he testified it came back Honda Accord, and then he pulled over a Honda Civic.
>
> That indicates that none of these officers had sufficient information, sufficiently reliable information, from this confidential informant to make a valid stop or to get a warrant, either one. There was not sufficient here, Your Honor, based on any of the prongs that are in *State v. Bishop*[, 146 Idaho 804, 203 P.3d 1203 (2009)]. We would argue that, therefore, because of that, anything seized as a result of the stop must be suppressed.

Tr. 10/27/11, p. 93, ln. 25 - p. 94, ln. 19.

However, the district court denied the defense motion stating:

> And so my ruling is, while the officers did not have a basis to stop the car on the signal, the officers did have a reasonable basis, suspicion, based upon the totality of all of the circumstances from October 21 up to and including the night of January 30, all of the dealings between the CI and the officers, culminating in these two defendants have left town to get the marijuana, they're in this car, the officer knew the car, Jessup, the detective, knew the license number and that was told.

Tr. 10/27/11, p. 97, ln. 16 - p. 98, ln. 1.

Thereafter, Officer Malenese testified that when he stopped the car, he told Mr. Widner that the stop was for failure to signal. He testified that his purpose for the stop was not marijuana. Tr. 10/27/11, p. 108, ln. 1-16.

Officer Malenese testified that when he approached the car, he could smell marijuana. Tr. 10/27/11, p. 123, ln. 20 - p. 124, ln. 4. Eventually the car was searched and marijuana was found. PH Tr. p. 62, ln. 22-16; PH Tr. p. 88, ln. 5-10.

III. ISSUE PRESENTED ON APPEAL

Can a tip from a confidential informant which passes along hearsay information given to the informant by an unidentified person or persons whose information has proven incorrect in the past and whose basis of knowledge, reliability and veracity are completely unknown, provide reasonable and articulable suspicion to support an investigatory stop?

IV. ARGUMENT

A. <u>This Court May Consider the Challenge to the Erroneous Denial of the Motion in Limine on Appeal</u>

1. *The State is Estopped from Arguing that Mr. Widner does not have the Right to Appeal*

Due to the absence of a written reservation of appellate rights, the state may attempt to argue that there is not an adequate conditional plea of guilty under ICR 11(a)(2) and that Mr. Widner does not have the right to appeal. However, the state is judicially estopped from taking a position directly opposite to the position it took in the district court.

> Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. *Sword v. Sweet,* 140 Idaho 242, 252, 92 P.3d 492, 502 (2004). The Idaho Supreme Court adopted the doctrine of judicial estoppel in *Loomis v. Church,* 76 Idaho 87, 277 P.2d 561 (1954).

A & J Const. Co., Inc. v. Wood, 141 Idaho 682, 684, 116 P.3d 12, 14 (2005). As explained by the Court of Appeals, there are very important reasons behind the doctrine of judicial estoppel:

> One purpose of the doctrine is to protect the integrity of the judicial system, by

> protecting the orderly administration of justice and having regard for the dignity of judicial proceedings. The doctrine is also intended to prevent parties from playing fast and loose with the courts.

Robertson Supply, Inc. v. Nicholls, 131 Idaho 99, 101, 952 P.2d 914, 916 (Ct. App. 1998) (internal citations omitted) *cited with favor in A & J Const., Inc. v. Wood,* 141 Idaho at 685, 116 P.3d at 15.

Here, the state obtained a guilty plea from Mr. Widner conditioned on its concession that he could appeal from the denial of his pretrial motion. The state agreed the plea was conditional repeatedly, both at the guilty plea hearing and again at sentencing. Tr. 12/19/11, p. 9, ln. 12-25; Tr. 12/19/11, p. 23, ln. 7-25; Tr. 12/19/11, p. 35, ln. 17-25; Tr. 3/21/12, p. 82, ln. 11 - p. 96, ln. 19. Thus, the state is barred by the doctrine of judicial estoppel from arguing before this Court that the plea was not conditional and that Mr. Widner cannot now appeal.

2. *The State is Estopped from Arguing that Mr. Widner's Motion was an Untimely ICR 12(b)(3) Motion to Suppress*

The state may also attempt to argue that appellate relief should be denied because Mr. Widner's pretrial motion was not a motion in limine but rather an untimely ICR 12(b)(3) motion to suppress evidence. However, the state is judicially estopped from taking a position opposite the position it took in the district court. *A & J Const., Inc. v. Wood, supra*; *Robertson Supply, Inc. v. Nicholls, supra.*

The district court specifically questioned the denomination of the motion in limine asking

why it was a motion in limine[2] rather than a motion to suppress under ICR 12(b). Tr. 9/13/11, p. 4, ln. 23 - p. 5, ln. 7. Defense counsel stated that it was a motion in limine and the state did not object. *Id.* In fact, the state itself referred to the motion as a motion in limine. R 130-149 (Memorandum in Opposition to Motion in Limine). And, as a motion in limine, the motion was timely as the district court had not set a cutoff date for such motions. R 39-40.

The state achieved an advantage in having the motion treated as a motion in limine insofar as it insulated itself from a later post-conviction claim that defense counsel was ineffective in failing to file a timely suppression motion. Because the state took the position that the motion was a motion in limine, it is now judicially estopped from arguing that the motion was actually an ICR 12(b)(3) motion to suppress evidence and that the district court erred in hearing the motion in the absence of a district court finding of good cause or excusable neglect per ICR 12(d). *See State v. Dice,* 126 Idaho 595, 597, 887 P.2d 1102, 1104 (Ct. App. 1994); *State v. Gleason,* 130 Idaho 586, 591, 944 P.2d 721, 726 (Ct. App. 1997); *State v. Cochran,* 129 Idaho 944, 947, 935 P.2d 207, 210 (Ct. App. 1997), requiring a finding of good cause or excusable neglect. *But see, State v. James,* 148 Idaho 574, 575-76, 225 P.2d 1169, 1170-71

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[2] According to Professor Lewis:

> A motion in limine is a request for a ruling on the admissibility of evidence, made in advance of the offer of the evidence and outside the presence of the jury.
>
> The motion in limine is not mentioned in the civil or criminal rules of procedure. It is nonetheless a recognized means for obtaining an advance ruling on the admissibility of evidence . . . It also provides an opportunity for briefing, argument, and reasoned consideration by the court on complex evidentiary questions.

D. Craig Lewis, Idaho Trial Handbook § 3:2 (2d ed.).

(2010), addressing on the merits a challenge to the denial of a suppression motion made nearly four months after entry of a not guilty plea without any apparent finding of good cause or excusable neglect.

Because the state did not move to dismiss the motion as an untimely motion to suppress, because it did not object to, but rather embraced the denomination of the motion as a motion in limine, and because by doing so it protected itself from a later post-conviction claim, the state is now judicially estopped from arguing in this appeal that the motion was an untimely motion to suppress. *A & J Const., Inc. v. Wood, supra*; *Robertson Supply, Inc. v. Nicholls*, *supra.*

B. The Motion In Limine Should Have Been Granted Because the Police Lacked a Reasonable and Articulable Suspicion to Support the Stop of the Honda

1. *Standard of Review*

The standard of review of a suppression motion should be applied to this motion in limine as both concern the same issue - whether the evidence against Mr. Widner should be excluded from trial because it was obtained in violation of the Fourth and Fourteenth Amendments of the United States Constitution and Idaho Const. Art. I, § 17.

The standard of review applied to suppression motions is as follows:

> The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact which are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson,* 138 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996).

State v. Crooks, 150 Idaho 117, 119, 244 P.3d 261, 263 (Ct. App. 2010).

2. *Argument*

An investigatory stop may only be made if the police have a reasonable and articulable

suspicion that a person has committed, or is about to commit, a crime. While reasonable and articulable suspicion may be grounded in information received from an informant including hearsay known to the informant and related to the police, in this case where the informant's hearsay information had a history of being wrong and the state could not demonstrate either the identity of the hearsay declarant or declarants, or the basis of knowledge, reliability, or veracity of the declarant or declarants, the tip was insufficient to support the stop.

The applicable law is set out in *State v. Bishop,* 146 Idaho 804, 203 P.3d 1203 (2009):

> The Fourth Amendment to the United States Constitution protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' U.S. CONST. Amend. IV. This guarantee has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states. *See, e.g. Mapp v. Ohio,* 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081, 1089 (1961). Evidence obtained in violation of the amendment generally may not be used be used as evidence against the victim of the illegal government action. *State v. Page,* 140 Idaho 841, 846, 103 P.3d 454, 459 (2004); *see also Wong Sun v. United States,* 371 U.S. 471, 485, 83 S.Ct. 407, 416, 9 L.Ed.2d 441, 453 (1963). This rule, know as the exclusionary rule, applies to evidence obtained directly from the illegal government action and to evidence discovered through the exploitation of the original illegality, or the fruit of the poisonous tree. *Page,* 140 Idaho at 846, 103 P.3d at 459; *Wong Sun,* 371 U.S. at 487-88, 83 S.Ct. at 417-18, 9 L.Ed.2d at 455. The test is ' "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of [the original] illegality or instead by means sufficiently distinguishable to be purged of the primary taint."' *Wong Sun,* 371 U.S. at 488, 83 S.Ct. at 417, 9 L.Ed.2d at 455 (quoting MAGUIRE, EVIDENCE OF GUILT 221 (1959)). Under this test, evidence that is sufficiently attenuated from the illegal government action may be admitted at trial. *Page,* 140 Idaho at 846, 103 P.3d at 459; *see also Wong Sun,* 371 U.S. at 488, 83 S.Ct. at 417, 9 L.Ed.2d at 455. When a defendant moves to exclude evidence on the grounds that it was obtained in violation of the Fourth Amendment, the government carries the burden of proving that the search or seizure in question was reasonable. *State v. Anderson,* 140 Idaho 484, 486, 95 P.3d 635, 637 (2004).
>
> The Fourth Amendment's reasonableness requirement has been held to apply to brief investigatory detentions. *See Terry v. Ohio,* 392 U.S. 1, 19, 88 S.Ct. 1868,

1878, 20 L.Ed.2d 889, 904 (1968). To determine whether such seizures are reasonable, courts first ask 'whether the officer's action was justified at its inception.' *Id.* at 19-20, 88 S.Ct. at 1878-79, 20 L.Ed.2d at 904–05. The level of justification required depends on the intrusiveness of the seizure. *Id.* at 20-22, 88 S.Ct. at 1879-80, 20 L.Ed.2d at 905-06. Next, they consider whether the action 'was reasonably related in scope to the circumstances which justified the interference in the first place.' *Id.* at 19-20, 88 S.Ct. at 1878-79, 20 L.Ed.2d at 904-05.

Typically, seizures must be based on probable cause to be reasonable. *Florida v. Royer,* 460 U.S. 491, 499-500, 103 S.Ct. 1319, 1324-1325, 75 L.Ed.2d 229, 237-238 (1983). However, limited investigatory detentions, based on less than probable cause, are permissible when justified by an officer's reasonable articulable suspicion that a person has committed, or is about to commit, a crime. *Id.* at 409, 103 S.Ct. at 1324, 75 L.Ed. 2d at 236. Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts. *See State v. Sheldon,* 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003); *Terry,* 392 U.S. at 21, 88 S.Ct. at 1879, 20 L.Ed.2d at 905. The quantity and quality of information necessary to establish reasonable suspicion is less than that necessary to establish probable cause. *Alabama v. White,* 496 U.S. 325, 330, 110 S.Ct. 2412, 2416, 110 L.Ed.2d 301, 308 (1990). Still, reasonable suspicion requires more than a mere hunch or 'inchoate and unparticularized suspicion.' *Id.* at 329, 110 S.Ct. at 2416, 110 L.Ed.2d at 308 (quoting *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1, 10 (1989)). Whether an officer possessed reasonable suspicion is evaluated based on the totality of the circumstances known to the officer at or before the time of the stop. *Sheldon,* 139 Idaho at 983, 88 P.3d at 1223; *United States v. Cortez,* 449 U.S. 411, 417-18, 101 S.Ct. 690, 694-95, 66 L.Ed.2d 621, 628-29 (1981).

An informant's tip regarding suspected criminal activity may give rise to reasonable suspicion when it would 'warrant a man of reasonable caution in the belief that a stop was appropriate.' *White,* 496 U.S. at 329, 110 S.Ct. at 2415, 110 L.Ed.2d at 308 (quoting *Terry*, 392 U.S. at 22, 88 S.Ct. at 1880, 20 L.Ed.2d at 906) (internal quotation and alteration marks omitted). Whether a tip amounts to reasonable suspicion depends on the totality of the circumstances including the substance, source, and reliability of the information provided. *See id.* at 328-29, 110 S.Ct. at 2415, 110 L.Ed.2d at 307-08 (noting that 'an informant's "veracity," "reliability," and "basis of knowledge" are highly relevant factors in determining whether reasonable suspicion exists). In other words, a tip must possess adequate indicia of reliability in order to justify a *Terry* stop. *Adams v. Williams,* 407 U.S. 143, 147, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612, 617 (1972). The more reliable the tip, the less information required to establish reasonable suspicion. *White,* 496 U.S. at 330, 110 S.Ct. at 2416, 110 L.Ed.2d at 308. Factors indicative of

> reliability include whether the informant reveals his or her identity and the basis of his or her knowledge, whether the location of the informant is known, whether the information was based on first-hand observations of the events as they were occurring, whether the information the informant provided was subject to immediate confirmation or corroboration by police, whether the informant has previously provided reliable information, whether the informant provides predictive information, and whether the informant could be held criminally liable if the report were discovered to be false. *White,* 496 U.S. at 331-32, 110 S.Ct. at 2416-17, 110 L.Ed.2d at 309-10; *Williams,* 407 U.S. at 146-47, 92 S.Ct. at 1923-24, 32 L.Ed.2d at 617; *State v. Larson,* 135 Idaho 99, 101-02, 15 P.3d 334, 336-37 (Ct. App. 2000). If a tip lacks adequate indicia of reliability, police generally must engage in further investigation before conducting a *Terry* stop. *Williams,* 407 U.S. at 147, 92 S.Ct. at 1923, 32 L.Ed.2d at 617.
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> *State v. Bishop,* 146 Idaho at 811-812, 203 P.3d at 1210-11 (footnote omitted).

Bishop was decided only on a federal constitutional analysis. *Id.*, 145 Idaho at 822, 203 P.3d at 1221, ftnt. 4. However, a violation of the Fourth Amendment is also a violation of Idaho Const. Art. I, § 17. *State v. Schaffer,* 133 Idaho 126, 130, 982 P.2d 961, 965 (Ct. App. 1999).

When a tip is offered by a known citizen informant, independent police verification of the tip is not generally necessary. Nonetheless, under the totality of the circumstances analysis, the content of the tip and the informant's basis of knowledge remain relevant in determining whether the tip gave rise to reasonable suspicion. *State v. Bishop,* 146 Idaho at 812, 203 P3.d at 1211, citing *State v. Zapata-Reyes,* 144 Idaho 703, 708, 169 P.3d 291, 296 (Ct. App. 2007).

While a tip based upon hearsay is not automatically precluded from establishing reasonable suspicion, the original hearsay declarant's basis of knowledge, reliability, and veracity are factors to be considered under the totality of the circumstances analysis. *Bishop,* 146 Idaho at 813-14, 203 P.3d at 1212-13. *See United States v. Monteiro,* 447 F.3d 39, 45-46 (1st Cir. 2006) (concluding that an informant's tip that based on information that his relative told him did not give rise to reasonable suspicion because the informant would not identify the relative and

"police . . . had no way of knowing the [relative's] state of mind . . . when she gave her information, or whether she was a person who could be relied on to relate events accurately").

When a tip is based upon hearsay from an unknown source, it is akin to an anonymous tip. *Monteiro,* 447 F.3d at 45. When a tip is anonymous and it merely provides a description of a suspect and alleges that he or she committed a crime, the tip generally will not give rise to a reasonable suspicion. *Bishop,* 146 Idaho at 812, 203 P.3d at 1211. *See Florida v. J.L.,* 529 U.S. 266, 271-72, 120 S.Ct. 1375, 1378-79, 146 L.Ed.2d 254, 260-61 (2000) (concluding that a tip that a young man was carrying a gun did not give rise to reasonable suspicion because the anonymous informant merely alleged that the man committed a crime and provided a description of the suspect.)

In this case, the state presented the following evidence to support the stop of Mr. Widner:

1) On January 11, 2011, the confidential informant said that he/she believed that Mr. Widner was going to California either that weekend or the next to resupply marijuana. Tr. 10/27/11, p. 21, ln. 18 - p. 22, ln. 4.

The state did not offer any information as to the basis for the CI's belief - however, clearly, the CI was relying on hearsay - whether hearsay from Mr. Widner or from someone else as to Mr. Widner's intentions. In fact, the CI's "belief" could have been based on multiple levels of hearsay. And, no information about the identity of the hearsay declarant or declarants, their basis of knowledge, reliability, or veracity was offered.

Moreover, this tip was apparently inaccurate as the state presented no evidence that Mr. Widner made any trip to California or even possessed any marijuana on the weekend of January 15, 2011, or the weekend of January 22, 2011.

2) On January 21, 2011, the CI stated that he or she had not had any contact with Mr. Widner and "believed" he was probably out of marijuana. Tr. 10/27/11, p. 22, ln. 21-24. Later, that day, the informant stated that Mr. Widner was still in town, but was going to travel to California.

Again, the state presented no information as to the informant's basis of knowledge as to whether Mr. Widner was in town, was out of marijuana, and was going to California. And, again, the information offered by the informant must have been hearsay obtained either from Mr. Widner or some other source, because no one but Mr. Widner could have anything but hearsay knowledge of his intentions. There could have been multiple levels of hearsay. Yet, the state offered no information about the identity of the hearsay declarant or declarants, their basis of knowledge, reliability, or veracity.

3) On January 26, 2011, the informant again told the police that he or she had not spoken to Mr. Widner for a couple of days. Later that day, the informant said that "he or she had learned that Mr. Widner was going to be traveling to California on that weekend." Tr. 10/27/11, p. 24, ln. 1-15.

Again, the informant's information was clearly based upon hearsay, possibly multiple levels of hearsay - someone had told the informant that Mr. Widner was going to go to California that weekend. But, again, the state did not offer any information whatsoever about the identity of the hearsay declarant or declarants, their basis of knowledge, reliability, or veracity.

4) On January 29, 2011, the informant told the police that he or she had not spoken to Mr. Widner for a couple of days and that he or she believed he had left Mountain Home.

Again, the informant's information appears to be based upon hearsay because the

informant did not claim to have seen Mr. Widner leaving town. And, again, the state did not present any information whatsoever about the identity of the hearsay declarant or declarants, or these individuals' basis of knowledge, reliability or veracity. Moreover, the information that Mr. Widner had left town proved to be wrong, because a few hours later the CI contacted the police to say that Mr. Widner was not leaving until January 30, 2011.

5) Later in the day on January 29, 2011, the CI contacted the police to say that "he or she had learned that Mr. Widner was planning to leave in the early morning hours of January 30 to go resupply his supply of marijuana" and would return sometime that night or the early morning hours of the next day. Tr. 10/27/11, p. 25, ln. 14-23.

Again, the CI's information was clearly based upon hearsay. But, again, the state did not provide any information about the identity of the hearsay declarant or declarants, those individuals' basis of knowledge, reliability or veracity.

6) When the police attempted to verify the CI's information, they could not. Rather, the police determined that both of Mr. Widner's cars were at his home. Tr. 10/27/11, p. 26, ln. 5-12. So, the police asked the CI for more information. And, later that day, the CI said that "he or she learned that Mr. Widner had traveled to California with a roommate, Alex Stewart, and they were said to be in Mr. Stewart's vehicle." Tr. 10/27/11, p. 28, ln. 7-11.

Again, the CI's information was clearly based upon hearsay, possibly multiple levels of hearsay. And, again, the state presented no evidence of the hearsay declarant or declarant's identity, basis of knowledge, reliability, or veracity.

Assessing the totality of the circumstances, the state did not have a reasonable articulable suspicion to support a *Terry* stop.

Consider first the CI him or herself. While the CI was known to the police, his or her basis of knowledge, reliability and veracity remain relevant to an assessment of whether the CI's tip was sufficient to provide a basis for a *Terry* stop. *Bishop,* 146 Idaho at 812, 203 P3.d at 1211.

The CI's basis of knowledge varied. While the CI had made two controlled buys in the past and could offer first hand information about those buys, those buys were in the past and their relevance to the current tip was limited. The first occurred three and a half months prior to the stop and the most recent occurred nearly seven weeks prior to the stop. While there is no magical number of days within which information is fresh and after which it is stale, and while the case law states that in narcotics trafficking cases a time delay in a sequence of events is of less significance, *State v. Alexander,* 138 Idaho 18, 24-25, 56 P.3d 780, 786-87 (Ct. App. 2002), three and a half months since the first buy and seven weeks since the second buy is a significant amount of time.

But, most importantly, while the CI may have had a good basis of knowledge and may have been (the evidence presented by the state was insufficient to establish this) reliable and honest in the controlled buy situations where he or she was reporting first hand knowledge, by the time the police decided to pull over the Honda on the highway in the middle of the night, the CI no longer was giving the police information based upon his or her own observations. Rather, the CI was reporting hearsay from an unknown source or sources. The basis of knowledge no longer supported a finding of reasonable and articulable suspicion.

With regard to reliability, the CI may have had a history of reliable information related to the controlled buys (the state did not provide sufficient evidence about these buys to establish how reliable the information was - but apparently, the information was not such that the state was

willing to file an information and prosecute for delivery), but the CI's reliability was bad by the time the police decided to rely on his/her tip to stop the Honda. The CI repeatedly told the police that Mr. Widner was going to depart or had departed for California when he had not. Even if the CI had been reliable in the past (which Mr. Widner does not concede), the CI was no longer reliable by the time the police decided to act on his/her tip to stop the Honda.

With regard to veracity, the CI's motivations should be considered. The CI was "working off" delivery charges and to save him/herself criminal prosecution and the CI had "targeted" Mr. Widner. Tr. 10/27/11, p. 17, ln. 21 - p. 18, ln. 15. As discussed by Professor Natapoff, informants working off charges are notoriously lacking in reliability and veracity.

A. Beyond Unreliable

> Judicial as well as much scholarly discomfort with informants traditionally has flowed from their infamous unreliability as witnesses. Courts have held that without procedural protections against unreliability, using criminals who testify in exchange for benefits may raise due process and other fairness issues for defendants against whom informant testimony is levied. Commentators have documented numerous horror stories of fabrication and perjury by informants.

Alexandra Natapoff, Snitching: The Institutional and Communal Consequences, 73 U. Cin. L. Rev. 645, 663 (2004). *See also,* Michael Rich, Coerced Informants and Thirteenth Amendment Limitations on the Police-Informant Relationship, 50 Santa Clara L. Rev. 681 (2010), discussing the enormous pressures, amounting to involuntary servitude, on informants who must choose between providing information and facing their own criminal prosecutions. Such relationships are obviously conducive to the reporting of manufactured false information.

Consider next the identity, basis of knowledge, reliability, and veracity of the hearsay declarant or declarants whose statements regarding Mr. Widner's intents and travels were

reported to the police by the confidential informant. Nothing is known about the identity or the basis of knowledge. And, the reliability and veracity are known to be bad - repeatedly incorrect information was passed regarding when the supposed trip would be made.

Applying a totality of the circumstances test, the information known to the police was not sufficient to establish a reasonable and articulable suspicion to allow the *Terry* stop of the Honda and its occupants. *Bishop, supra*; *Monteiro, supra.* (Even the police apparently recognized this because Officer Malenese was instructed to develop his own independent probable cause to stop the Honda. Tr. 10/27/11, p. 71, ln. 17-22.) Therefore, this Court should reverse the order denying the motion in limine and remand with instructions to allow Mr. Widner to withdraw his guilty plea.

V. CONCLUSION

For the reasons set forth above, Mr. Widner requests that the order denying the motion in limine be reversed and that the case be remanded so that he can withdraw his guilty plea.

Respectfully submitted this 9th day of April, 2013.

Deborah Whipple
Attorney for Daniel Widner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of April, 2013, I caused a true and correct copy of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Idaho Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Deborah Whipple