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State v. Hedgecock Appellant's Brief Dckt. 33950

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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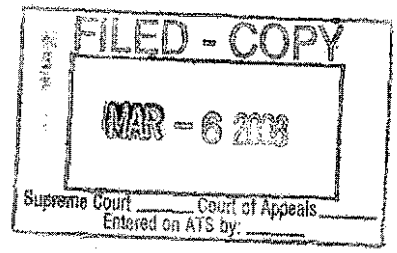
STATE OF IDAHO, Plaintiff-Respondent, v. WILLIAM TROY HEDGECOCK, Defendant-Appellant.	)	NO. 33950 APPELLANT'S BRIEF



BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

HONORABLE BARRY WOOD
District Judge

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 33950
	)	
v.	)	
	)	
WILLIAM TROY HEDGECOCK,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
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STATEMENT OF THE CASE

Nature of the Case

William Troy Hedgecock appeals from the Judgment of Conviction Upon a Plea of Guilty to One Felony Count, and Order of Commitment. After the district court denied his motion to suppress, Mr. Hedgecock entered a conditional plea of guilty to the charge of possession of forged bank bills. Although Mr. Hedgecock had waived his right to be free from unreasonable searches as a condition of his probation, he did not waive his right to be free from unreasonable seizures. Mr. Hedgecock asserts that the district court erred in denying his motion to suppress evidence because the right to be free from unreasonable seizures, protected by the Fourth and Fourteenth Amendments to the United States Constitution and Article I § 17 of the Idaho Constitution, was violated when law enforcement officers improperly seized him without reasonable suspicion or prior consent, and as such, the evidence derived from the improper seizure must be suppressed.

Furthermore, Mr. Hedgecock asserts that the district court abused its discretion in sentencing him to an excessive sentence without properly considering the mitigating factors in his case. Further, Mr. Hedgecock asserts that the district court abused its discretion by denying his Idaho Criminal Rule 35 (*hereinafter,* Rule 35) motion for a reduction of sentence.

Statement of the Facts and Course of Proceedings

On December 19, 2005, an Information was filed charging Mr. Hedgecock with possession of forged bank bills. (R., pp.11-12.) Mr. Hedgecock entered a guilty plea to

the charge. (R., pp.18-19.) However, because of some confusion as to the plea agreement, Mr. Hedgecock was allowed to withdraw his guilty plea. (R., pp.20-29.)

Mr. Hedgecock then filed a Motion to Suppress "statements the defendant made and evidence seized in violation of the defendant's rights under the United States Constitution and Idaho State Constitution." (R., pp.38-39.) The district court held a hearing on the motion. (R., pp.40-42.)

The first witness to testify was Mr. Neumeyer, a senior probation and parole officer. (Tr.10/3/06, p.11, Ls.13-25.) In November of 2005, Mr. Neumeyer was supervising Mr. Hedgecock who was on felony probation for unrelated charges. (Tr. 10/3/06, p.12, Ls.8-12.) Mr. Neumeyer went to Mr. Hedgecock's residence to conduct an initial home visit and search. (Tr. 10/3/06, p.13, Ls.6-18.) Mr. Neumeyer and three other felony probation officers arrived at the residence, discovered Mr. Hedgecock's roommate at the apartment, and learned that Mr. Hedgecock was not home. (Tr. 10/3/06, p.13, L.21 – p.14, L.21.)

During the search of the apartment, three officers from the Gooding County Sheriff's Office and an officer from the Wendell Police Department, Officer Waugh, arrived at the scene. (Tr. 10/3/06, p.15, Ls.21-25.) Officer Waugh told Mr. Neumeyer that he had stopped an SUV a week or more ago and that Mr. Hedgecock had been a passenger in the vehicle. (Tr. 10/3/06, p.19, L.21 – p.20, L.14.) At some point the officers were standing on the balcony of the apartment and noticed a vehicle pull up to a stop sign about 50 yards away. (Tr. 10/3/06, p.19, Ls.3-19.) Officer Waugh pointed at the vehicle and identified it as being the same SUV that he had stopped Mr. Hedgecock

in previously. (Tr. 10/3/06, p.20, Ls.13-14.) The vehicle did not belong to Mr. Hedgecock. (Tr. 10/3/06, p.25, Ls.1-3.)

At around 11:30 p.m., Mr. Neumeyer was able to view the SUV stopped at the stop sign for a couple of seconds, noticed there were people in the SUV, although he was unable to tell who they were, and observed the SUV accelerate quickly away from the stop sign at about 25 to 30 miles an hour. (Tr. 10/3/06, p.21, Ls.4-15.) Based upon his observation and the information from Officer Waugh, Mr. Neumeyer requested that a couple of the county officers stop the vehicle to "see if Mr. Hedgecock was actually in that vehicle." (Tr. 10/3/06, p.23, Ls.16-21.) He also requested that if Mr. Hedgecock was in the SUV that the officers check the vehicle and detain Mr. Hedgecock until Mr. Neumeyer arrived at the scene. (Tr. 10/3/06, p.24, Ls.9-11.)

Two officers stopped the vehicle and discovered that Mr. Hedgecock was inside. (Tr. 10/3/06, p.25, L.19 – p.26, L.1.) When Mr. Neumeyer arrived, Mr. Hedgecock had been removed from the SUV. (Tr. 10/3/06, p.26, Ls.12-14.) He requested that Mr. Hedgecock be detained and that the officers search the vehicle again. (Tr. 10/3/06, p.26, Ls.17-20.) Mr. Neumeyer had wanted to detain Mr. Hedgecock to question him about a scanner they had found at his home and to inform him that they had found illegal drugs on his roommate, making it inappropriate for Mr. Hedgecock to continue living in the residence. (Tr. 10/3/06, p.27, Ls.4-21.)

During the detention, Mr. Hedgecock admitted that he had been using methamphetamines. (Tr. 10/3/06, p.28, Ls.12-25.) Another officer came over and informed Mr. Neumeyer that during the search they had discovered some counterfeit $100 bills in the center console. (Tr. 10/3/06, p.29, Ls.7-14.) Mr. Hedgecock was

Mirandized[1] and then admitted that the bills were counterfeit and the original was in his wallet. (Tr. 10/3/06, p.30, Ls.5-24.) After locating the original bill in his wallet, Mr. Hedgecock was arrested. (Tr. 10/3/06, p.33, Ls.7-10.)

On cross examination, Mr. Neumeyer admitted that there were no warrants for Mr. Hedgecock's arrest and there were no pending probation violations. (Tr. 10/3/06, p.34, Ls.7-13.) Mr. Neumeyer admitted that there was no basis to pull the vehicle over other than his request that the officers do so. (Tr. 10/3/06, p.39, Ls.3-6.) At this time, the State stipulated that the only reason the officers stopped the vehicle was based upon Mr. Neumeyer's request. (Tr. 10/3/06, p.39, Ls.7-9.) Mr. Neumeyer also admitted that the word "seizure" did not appear anywhere in Mr. Hedgecock's conditions of probation. (Tr. 10/3/06, p.40, L.4 – p.43, L.3.)

The second witness was Officer Kiger. (Tr. 10/3/06, p.44, Ls.16-24.) Officer Kiger was asked by Mr. Neumeyer to stop the vehicle that had been seen near the apartment. (Tr. 10/3/06, p.45, Ls.14-20.) He did not observe any traffic violations committed by the driver of the vehicle. (Tr. 10/3/06, p.45, Ls.21-25.) Officer Kiger discovered a woman was driving the vehicle and Mr. Hedgecock was in the passenger seat. (Tr. 10/3/06, p.46, L.5 – p.47, L.13.) He requested that Mr. Hedgecock exit the vehicle and detained him until Mr. Neumeyer arrived at the scene, about five minutes later. (Tr. 10/3/06, p.47, L.15 – p.48, L.17.) After Mr. Neumeyer arrived, the officer searched the vehicle. (Tr. 10/3/06, p.48, Ls.18-24.)

Mr. Hedgecock was the next witness to testify. (Tr. 10/3/06, p.52, Ls.12-23.) Mr. Hedgecock testified that the windows in the SUV were darkly tinted. (Tr. 10/3/06, p.54, Ls.9-12.) When the vehicle was stopped officers ordered him out at gun point, he

[1] *See Miranda v. Arizona,* 384 U.S. 436 (1966).

was placed in handcuffs, and the vehicle was searched immediately, prior to Mr. Neumeyer arriving on scene. (Tr. 10/3/06, p.55, L.12 – p.57, L.10.)

Mr. Hedgecock and the female driver had been pulled over about three weeks prior to the night in question. (Tr. 10/3/06, p.58, Ls.8-21.) He was positive that everything was legal with the car on the night in question because the two had renewed the woman's license, obtained proof of insurance, and had renewed the vehicle tags as a result of the previous traffic stop. (Tr. 10/3/06, p.57, L.13 – p.58, L.7.)

The final witness was Deputy Smith. (Tr. 10/3/06, p.61, Ls.1-13.) Deputy Smith was asked to search the vehicle after the stop. (Tr. 10/3/06, p.64, Ls.18-23.) Prior to arriving at the traffic stop, Deputy Smith had been asked by Mr. Neumeyer to stop Mr. Hedgecock if he came in contact with him. (Tr. 10/3/06, p.69, Ls.15-23.)

The district court then made the following findings:

> The findings of fact that I would make are that the Defendant Hedgecock was on probation, felony level probation; had listed an address described in the record his at Wendell as to where he was living. [sic]
>
> Frank Neumeyer went to that residence with other probation officers and police officers to conduct probation business. While there, discovered drugs on Secord, and this scanning machine.
>
> Neumeyer was in possession of evidence – or of information from a fellow officer that –
>
> Recognizing that Waugh is a city of Wendell officer and Neumeyer is the state probation officer, but Neumeyer was in possession of information that Hedgecock had been stopped in the vehicle sometime previously.
>
> While standing at that – on the residence porch, a vehicle matching that description pulled up. The people in it could be seen moving, but could not be recognized as to who they were.

The vehicle took off from the residence – or the intersection as described here. Neumeyer instructed Kiger, Officer Kiger, who was present with him, to stop that vehicle. Kiger in fact did stop that vehicle.

Jeromy Smith was not present with the vehicle drove by the residence and stopped at the intersection. Jeromy Smith was approximately a half a mile away.

That Jeromy Smith came back to the location of the stop. That when Smith arrived, Hedgecock was already out of the vehicle and handcuffed. Neumeyer was present, and that is when the search of the vehicle occurred.

So the only question that I needed legal briefing from – And in fact, essentially, it would be that I would conditionally deny your motion to suppress subject to being revisited, so I don't have to do a bunch of writing, unless I can get some briefing that changes the picture.

And that is what basis does Hedgecock have to object to the conduct here, as opposed to –

I can understand why the driver of the vehicle should say, "Wait a minute, there's no basis to perform this stop." You know, no PC there.

But paint with a real fine brush what is Hedgecock's basis to object to the conduct.

. . .

And I guess the second part would be any statement you have as to the effect of the waiver signed by Hedgecock as to the probation – or to the search and seizure of the passenger portion of the vehicle where the counterfeit money was located.

(Tr. 10/3/06, p.71, L.23 – p.74, L.5.)

Following the conditional denial of the motion, defense counsel filed a Memorandum in Support of Motion to Suppress. (R., pp.42a-g.) In the memorandum, Mr. Hedgecock specifically addressed the questions of whether Mr. Hedgecock had standing to contest the stop and whether he had waived his right to be free from unreasonable seizures. (R., pp.42a-g.) On October 31, 2006, the district court revisited

the suppression motion. (Tr. 10/31/06, p.78, L.1 – p.80, L13.) The district court found that:

> On October 3, 2006, I conditionally denied it. I have reviewed the briefing. I'll again deny it. There is a case that does grant the passenger standing but I believe that the police, and would make the finding, had a reasonable, articulable suspicion under the totality of the circumstances; the identity of the vehicle and so for that had been identified as the one Hedgecock was riding in. I'll deny it.

(Tr. 10/31/06, p.79, Ls.6-14.)

Mr. Hedgecock entered a conditional guilty plea, reserving the right to appeal the district court's denial of the suppression motion. (R., pp.44-48.) At sentencing, the prosecution recommended a unified fourteen year sentence, leaving the fixed portion to the district court's discretion. (Tr. 1/23/07, p.80, Ls.1-20.) Defense counsel requested that the district court impose a two year fixed sentence, leaving the indeterminate portion of the sentence up to the district court's discretion. (Tr. 1/23/07, p.83, Ls.17-19.) The district court imposed a unified sentence of fourteen years, with seven years fixed. (R., pp.52-57.) Mr. Hedgecock filed a Notice of Appeal timely from the district court's Judgment of Conviction Upon a Plea of Guilty to One Felony Count, and Order of Commitment. (R., pp.59-61.) Mr. Hedgecock also filed a timely Idaho Criminal Rule 35 motion. (R., pp.63-64.) The motion was denied. (R., pp.67-72.)

ISSUES

1. Did the district court err when it denied Mr. Hedgecock's motion to suppress?

2. Did the district court abuse its discretion when it imposed, upon Mr. Hedgecock, a unified sentence of fourteen years, with seven years fixed, following his plea of guilty to possession of forged bank bills?

3. Did the district court abuse its discretion when it denied Mr. Hedgecock's Idaho Criminal Rule 35 Motion for a Reduction of Sentence?

ARGUMENT

I.

The District Court Erred When It Denied Mr. Hedgecock's Motion To Suppress

A. Introduction

Mr. Hedgecock's right to be free from unreasonable seizures was violated when officers illegally seized him. Without reasonable articulable suspicion, based only upon the officers' mere hunch that Mr. Hedgecock may be inside the vehicle, officers stopped a vehicle in which Mr. Hedgecock was a passenger. Mr. Hedgecock had not waived his right to be free from unreasonable seizures as a condition of his probation, and therefore, officers could not seize him without reasonable suspicion. As such, the district court's order denying Mr. Hedgecock's motion to suppress should be reversed.

B. Standard Of Review

The review of a suppression motion is bifurcated. *State v. Lafferty*, 139 Idaho 336, 338, 79 P.3d 157, 159 (Ct. App. 2003). When a decision on a motion to suppress is challenged, the trial court's findings of fact that are supported by substantial evidence are accepted; however, the application of constructional principles to the facts as found are freely reviewed. *State v. McCall*, 135 Idaho 885, 886, 26 P.3d 1222, 1223 (2001). At a suppression hearing, the power to assess the credibility of all witnesses, weigh evidence, resolve factual conflicts and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995).

C. The District Court Erred When It Denied Mr. Hedgecock's Motion To Suppress

The Fourth Amendment 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; Idaho Const. Art. I, § 17. The purpose of these constitutional rights is to "impose a standard of reasonableness upon the exercise of discretion by governmental agents and thereby safeguard an individual's privacy and security against arbitrary invasions." *State v. Maddox*, 137 Idaho 821, 824, 54 P.3d 464, 467 (Ct. App. 2002) (citing *Delaware v. Prouse*, 440 U.S. 648, 653-654 (1979)). The United States Supreme Court has held that when evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure. *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914)).

1. The Officer's Lacked Reasonable Suspicion To Stop The Vehicle

The Fourth Amendment safeguard against unreasonable searches and seizures applies to the seizures of persons through detentions falling short of arrest or an arrest. *United States v. Brignoni-Ponce,* 422 U.S. 873, 878 (1975); *Terry v. Ohio,* 392 U.S. 1, 16 (1968). The stop of a vehicle constitutes a seizure of its occupants and is, therefore, subject to the Fourth Amendment restraints. *State v. Flowers*, 131 Idaho 205, 208, 953 P.2d 645, 648 (Ct. App. 1998). A vehicle stop is of limited magnitude compared to other types of seizures; however, it is nonetheless a "constutionally cognizable" intrusion and therefore my not be conducted "at the unbridled discretion of law enforcement officials." *Prouse*, 440 U.S. at 661.

When the purpose of the detention is to investigate a possible traffic offense or other crime, it must be based upon reasonable, aritculable suspicion of criminal activity. *State v. Schumacher,* 136 Idaho 509, 37 P.3d 6 (Ct. App. 2001); *Florida v. Royer,* 460 U.S. 491, 498 (1983). Although the required information leading to formation of reasonable suspicion in the mind of the police officer is less than the information required to form probable cause, it still "must be more than mere speculation or a hunch on the part of the police officer." *State v. Cerino*, 141 Idaho 736, 738, 117 P.3d 876, 878 (Ct. App. 2005). The reasonableness of the officer's suspicion is evaluated based upon the totality of the circumstances at the time of the seizure. *Flowers*, 131 Idaho at 208, 953 P.2d at 648. A passenger in the vehicle has standing to contest the reasonableness of an investigatory stop of the vehicle as well as its continued detention. *State v. Haworth*, 106 Idaho 405, 679 P.2d 1123 (1984); *State v. Luna*, 126 Idaho 235, 237, 880 P.2d 265, 267 (Ct. App. 1994); *U.S. v. Twilley*, 222 F.3d 1092 (9th Cir. 2000).

In the case at hand, there was not reasonable articulable suspicion to stop the vehicle. The only information available to officers was that Officer Waugh had told Mr. Neumeyer that he had stopped an SUV, which did not belong to Mr. Hedgecock, a week or more ago and that Mr. Hedgecock had been a passenger in that vehicle. (Tr. 10/3/06, p.19, L.21 – p.20, L.14, p.25, Ls.1-3.) A vehicle pulled up to a stop sign about 50 yards away which matched the description of the vehicle Mr. Hedgecock had been seen in weeks earlier. (Tr. 10/3/06, p.19, Ls.3-19.) Officer Waugh pointed at this vehicle and identified it as being the same vehicle that he had stopped Mr. Hedgecock in previously. (Tr. 10/3/06, p.20, Ls.13-14.) It was approximately 11:30 p.m. and

although Mr. Neumeyer was able to see people in the vehicle, he was unable to identify the people. (Tr. 10/3/06, p.21, Ls.4-15.) The vehicle accelerated quickly away from the stop sign at about 25 to 30 miles an hour. (Tr. 10/3/06, p.21, Ls.4-15.) There were no warrants for Mr. Hedgecock's arrest and there were no pending probation violations. (Tr. 10/3/06, p.34, Ls.7-13.)

Based upon this information, Mr. Neumeyer requested that county officers stop the vehicle to "see if Mr. Hedgecock was actually in that vehicle." (Tr. 10/3/06, p.23, Ls.16-21.) Officer Kiger, who effectuated the stop, did not observe any traffic violations committed by the driver of the vehicle. (Tr. 10/3/06, p.45, Ls.21-25.) Mr. Neumeyer admitted that there was no basis to pull the vehicle over other than his request that the officers do so. (Tr. 10/3/06, p.39, Ls.3-6.) Additionally, the State stipulated that the only reason the officers stopped the vehicle was based upon Mr. Neumeyer's request. (Tr. 10/3/06, p.39, Ls.7-9.)

Mr. Neumeyer had only a mere speculation or hunch that Mr. Hedgecock was inside the vehicle. His testimony reflects that he did not know whether Mr. Hedgecock was in vehicle, as he wanted it stopped in order to determine if he was actually inside the vehicle. Mr. Hedgecock's presence in the vehicle, on one occasion, weeks prior the night in question, can not provide reasonable suspicion that he was in the vehicle at that time. It is absurd to find that by riding in a vehicle, on one occasion, that it would be reasonable to assume that every time the vehicle is driven, the same individuals are again located inside the vehicle. Looking at the totality of circumstances, neither Mr. Neumeyer nor any other officer present had reasonable suspicion that

Mr. Hedgecock was in the vehicle. Further, there was no reasonable suspicion that a traffic violation had occurred.

Therefore, the district court's finding that, "I believe that the police, and would make the finding, had a reasonable, articulable suspicion under the totality of the circumstances; the identity of the vehicle and so for that had been identified as the one Hedgecock was riding in," is not based upon substantial competent evidence. (Tr. 10/31/06, p.79, Ls.6-14.) As such, the district court erred in finding that there was reasonable suspicion to stop the vehicle.

2. Mr. Hedgecock Could Not Be Seized Pursuant To His Probation Agreement

Although the district court failed to address the question of whether Mr. Hedgecock had waived his right to be free from unreasonable seizures, stopping the analysis at the question of whether the officers had reasonable suspicion to stop the vehicle, Mr. Hedgecock asserts that he did not waive this right as a condition of his probation. As such, his probationary agreement cannot be used to provide alternate grounds for the unreasonable seizure.

A probation agreement is similar to a contractual agreement. In case of ambiguous contract terms, the contract is to be construed in favor of the non-drafting party, in this case Mr. Hedgecock. *Haener v. Ada County Highway Dist.* 108 Idaho 170, 173, 697 P.2d 1184, 1187 (1985). When reviewing the probationary terms, it is clear that Mr. Hedgecock did not waive his right to be free from unreasonable seizures. Conditions of probation, especially a waiver of a Fourth Amendment right, cannot be implied. *State v. Klingler,* 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006).

Mr. Hedgecock's conditions of probation include the following relevant sections:

> 1. **LAWS AND COOPERATION:** I shall respect and obey all laws and comply with any lawful request of my supervising officer, any agent of the Division of Community Corrections, or any police officer.
>
> 6. **SEARCH:** I agree and consent to the search of my person, automobile, real property, and any other property at any time at any place by any Agent of the Division of Community Corrections or any police officer and waive my constitutional right to be free from searches.
>
> 10. **Submit to Searches:** The defendant shall submit to a search of his/her person, residence or vehicle at the request of any Probation Officer or a police officer.

(R., p.42d; Augmentation: Judgment of Conviction Upon a Plea of Guilty to Two Felony Counts, Suspending Sentence and Order of Supervised Probation I.C. 19-2601(2).)

Idaho courts have acknowledged that probationers have a diminished expectation of privacy and will enforce Fourth Amendment waivers as a condition of probation. *State v. Cruz*, 144 Idaho 906, ___, 174 P.3d 876, 878 (Ct. App. 2007). Even when there is no warrantless search condition, a probation officer may conduct a search of a probationer and his or her residence if the officer has "reasonable grounds" to believe that they have violated a probation condition and the search is reasonably related to the disclosure of confirmation of that violation. *Id.*

In the case at hand, there were no "reasonable grounds" to seize Mr. Hedgecock. Officers did not have any information that he had violated the terms of his probation. Mr. Neumeyer testified that there were no warrants for Mr. Hedgecock's arrest and there were no pending probation violations. (Tr. 10/3/06, p.34, Ls.7-13.) Further, the only item that officers located which could be attributed to Mr. Hedgecock was a scanner. (Tr. 10/3/06, p.34, Ls.14-17.) Mr. Neumeyer specifically noted that it was not illegal for a probationer to possess a scanner. (Tr. 10/3/06, p.34, Ls.18-20.)

Additionally, there were no reports of Mr. Hedgecock's involvement in any possible criminal activity. As such, officers did not have "reasonable grounds" to believe Mr. Hedgecock had violated a probation condition and could not properly seize him based upon those grounds.

In *Samson v. California,* 547 U.S. 843, 126 S.Ct. 2193 (2006), the United States Supreme Court held that a completely suspicionless search of the parolee on a public street was reasonable because parolees had a diminished expectation of privacy due to the State's interest in supervising parolees outweighing the parolee's privacy interest. *Id.,* 547 U.S. at ----, 126 S. Ct. at 2197-02. The Supreme Court reasoned that probationers have greater expectations of privacy than parolees. *Id.,* 547 U.S. at ---- & n. 2, 126 S. Ct. at 2198 & n. 2. The Court also renounced the proposition that parolees, like prisoners, have no Fourth Amendment rights and specifically recognized California's prohibition against "arbitrary, capricious or harassing" parole searches. *Id.,* 547 U.S. at ----, 126 S. Ct. at 2202.

Recently, in *State v. Purdum,* ___ Idaho ___, ___ P.3d ___, 2008 WL 183377 (Ct. App. 2008) (decision not final)[2], the Idaho Court of Appeals held that "because of Purdum's reduced expectation of privacy as a probationer who had submitted to 'random blood, breath and or/urine analysis upon the request of ... any law enforcement official,' the police officer was empowered to conduct a suspicionless search (i.e., drug test) of these bodily fluids." *Id.* The Court of Appeals recognized that the "Idaho Supreme Court has said that conditions of probation, especially a waiver of a Fourth Amendment right, cannot be implied, an officer must be able to temporarily detain a

[2] Upon opinion and belief, a Petition for Review has been filed in *State v. Purdum.* On the date of this filing, the Brief in Support of Petition for Review has not yet been filed.

probationer in order to effectuate this search condition. Any other reading would render the provision a nullity." *Id.* (internal citations omitted).

Despite the holding of *Purdum*, Mr. Hedgecock maintains that implying a waiver of his right to be free from unreasonable seizures is an unlawful interpretation of his probationary agreement and would be directly at odds with the holding of *State v. Klingler.* *Id.* at 496, 148 P.3d at 1242.

However, the case at hand is easily distinguishable from *Purdum*. In *Purdum*, the facts provided that the officer "decided to stop Purdum and ask him to submit to a drug test" in compliance with his probationary conditions. *Purdum*, 2008 WL 183377. In the present case, no such connection between the actions of the officers and the seizure of Mr. Hedgecock can be drawn.

As to probation condition number one, Mr. Hedgecock was required to comply with the lawful request of law enforcement. (R., p.42d; Augmentation: Judgment of Conviction Upon a Plea of Guilty to Two Felony Counts, Suspending Sentence and Order of Supervised Probation I.C. 19-2601(2).) In this case, the officers did not have reasonable suspicion to stop the vehicle, see section I(C)(1), as such the stop of the vehicle was illegal and could not have been the product of a lawful request. Therefore, Mr. Hedgecock should not have been required to submit to the seizure.

Probation conditions numbers six and ten required Mr. Hedgecock to consent to and submit to a search of his person at request. (R., p.42d; Augmentation: Judgment of Conviction Upon a Plea of Guilty to Two Felony Counts, Suspending Sentence and Order of Supervised Probation I.C. 19-2601(2).) At no time, prior to his unlawful seizure, did any probation officer or law enforcement official state that they desired to

detain Mr. Hedgecock to effectuate a search of his person, residence, or vehicle. Mr. Neumeyer requested that a officers stop the vehicle in question to "see if Mr. Hedgecock was actually in that vehicle." (Tr. 10/3/06, p.23, Ls.16-21.) He also requested that, if Mr. Hedgecock was in the SUV, that the officers check the vehicle, which was known to belong to an individual other than Mr. Hedgecock, and detain Mr. Hedgecock until Mr. Neumeyer arrived at the scene. (Tr. 10/3/06, p.24, Ls.9-11.) Mr. Neumeyer wanted to detain Mr. Hedgecock to question him about a scanner they had found at his home and to inform him that they had found illegal drugs on his roommate, making it inappropriate for Mr. Hedgecock to continue living in the residence. (Tr. 10/3/06, p.27, Ls.4-21.) Mr. Neumeyer did not state that he wanted to detain Mr. Hedgecock to complete a search. As such, no implied seizure was required to fulfill Mr. Neumeyer's supervision needs.

Mr. Hedgecock's probation agreement does not contain a waiver of his right to be free from unreasonable seizures, officers did not have "reasonable grounds" to believe he had violated his probation, and there were no circumstances present which would provide for an implication of a seizure waiver. As such, the seizure of Mr. Hedgecock constituted a violation of his rights under the Fourth Amendment and Article I § 17 of the Idaho Constitution.

3. All Evidence Collected Against Mr. Hedgecock Following The Illegal Traffic Stop Must Be Suppressed As It Is Fruit Of The Illegal Governmental Activity

The application of the exclusionary rule to suppress evidence is appropriate only to evidence that is fruit of the illegal governmental activity. *Segura v. United States,* 468 U.S. 796, 815 (1984); *Wong Sun v. United States,* 371 U.S. 471 (1963); *State v.*

Bainbridge, 117 Idaho 245, 249, 787 P.2d 231, 235 (1990). 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 that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun,* 371 U.S. at 488 (quoting MAGUIRE, EVIDENCE OF GUILT, p. 221 (1959)). Suppression is required only if "the evidence sought to be suppressed would not have come to light but for the government's unconstitutional conduct." *State v. Wigginton*, 142 Idaho 180, 184, 125 P.3d 536, 540 (Ct. App. 2005) (quoting *Nava-Ramirez,* 210 F.3d at 1131).

In the case at hand, the above evidence clearly shows that Mr. Hedgecock was illegally seized without reasonable suspicion or a waiver of his right to be free from unreasonable seizures. Had Mr. Hedgecock not been illegally seized, the evidence located in the vehicle would not have been discovered. The State failed to meet its burden in showing that the evidence is untainted; therefore, all the evidence collected after the impermissible seizure must be suppressed as fruit of the illegal police activity.

II.

The District Court Abused Its Discretion When It Imposed, Upon Mr. Hedgecock, A Unified Sentence Of Fourteen Years, With Seven Years Fixed, Following His Plea Of Guilty To Possession Of Forged Bank Bills

Mr. Hedgecock asserts that, given any view of the facts, his unified sentence of fourteen years, with four years fixed, is excessive. 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, 653 P.2d 1183 (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, 939 P.2d 1372, 1373 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577, 602 P.2d 71, 75 (1979)). Mr. Hedgecock does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Hedgecock must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145, 814 P.2d 401, 405 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992)). The governing criteria, or objectives of criminal punishment 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.* (quoting *State v. Wolfe*, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978)).

Mr. Hedgecock asserts that the district court failed to properly consider the mitigating factors that exist in his case. Specifically, he asserts that the district court failed to give proper consideration to his admitted substance abuse problem and desire for treatment. Idaho courts have previously recognized that substance abuse and a desire for treatment should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89, 645 P.2d 323 (1982), *see also State v. Alberts*, 121 Idaho 204, 209, 824 P.2d 135, 140 (Ct. App. 1991).

Mr. Hedgecock began using marijuana, methamphetamine, and cocaine at the age of thirteen. (Presentence Investigation Report (*hereinafter,* PSI), p.13.) He used marijuana and cocaine "often" and methamphetamine "daily." (PSI, p.13.) Previously,

Mr. Hedgecock has used heroin, mushrooms, and acid. (PSI, p.13.) He has used illegal substances as a major tool to cope with life issues. (Brief Consultation and Screening Report, dated 5/15/06, p.3.)

Mr. Hedgecock reported that he had relapsed on methamphetamine a few weeks after being placed on probation in 2005. In July of 2005, he began participating in Intensive Outpatient treatment, completing the 21 required sessions in September of the same year. (Updated Presentence Investigation Report (*hereinafter,* UPSI) 5/18/06, p.6.) While on bond for the case at hand, Mr. Hedgecock attended regular AA meetings and was able to stay clean. (UPSI 5/18/06, p.3.) He admitted that he was struggling, but was trying to remain drug free. (UPSI 5/18/06, p.3.)

Mr. Hedgecock recognizes his addiction and that he has been able to receive some treatment; however, he also recognizes that he needs further treatment to overcome his addition. In a letter to the district court he wrote, "I am still struggling with my addiction, but I have learned to take responsibility for my actions. . . . I now understand that it is up to me to make my own choices and that the choice has always been mine." (Augmentation: Notice of Deposit, Exhibit C.) He has a strong desire to stay sober. (Brief Consultation and Screening Report, dated 5/15/06, p.3.) At the sentencing hearing, Mr. Hedgecock told the district court that:

> I have been on the street since I was 14 years old, and all I have done is drugs. And you know, I have done a lot of wrong.
>
> I have made many, many mistakes; and last year the first time I ever really learned what addiction was, you know, other than – I learned about addiction instead of just having a problem, you know. And January of 2005 was the first time in my life that I have ever been free from incarceration and lived, you know, sober for seven months.

> And when I got locked back up this time was because of a relapse. And you know, I sat there and thought to myself, you know, what is wrong with me. You know, why do I keep doing this. [sic]
>
> Why, why, why. [sic] I'm tired. I'm tired of this lifestyle. I'm tired, you know, of having to deal with this. I'm sure you guys – I know you guys are tried of me, you know.
>
> . . .
>
> When I get out, I plan on checking into a treatment program down there in Texas once I'm paroled. That is, you know, just, you know intensify the rehab and what I need.

(Tr. 1/23/07, p.83, L.23 – p.84, L.25.)

Idaho courts have previously recognized that Idaho Code § 19-2523 requires the trial court to consider a defendant's mental illness as a sentencing factor. *Hollon v. State*, 132 Idaho 573, 581, 976 P.2d 927, 935 (1999). Mr. Hedgecock has been previously diagnosed with Substance Induced Mood Disorder – Provisional, and Adult Antisocial Personality Disorder. (UPSI 5/18/06, p.5.) In 2006, Mr. Hedgecock was diagnosed with Adult Antisocial Behavior. (Brief Consultation and Screening Report, dated 5/15/06, p.3.) In completing testing, it was discovered that Mr. Hedgecock suffered from a severe level of depression, experienced a high level of irrational thinking, and presented symptoms of a mood disorder. (Brief Consultation and Screening Report, dated 5/15/06, p.3.) Mr. Hedgecock believes that he would benefit from counseling and would like to be placed on medication to control his mood swings and anxiety attacks. (UPSI 5/18/06, p.6.)

Furthermore, in *State v. Shideler*, 103 Idaho 593, 594, 651 P.2d 527, 528 (1982), the Idaho Supreme Court noted that family and friend support were factors that should be considered in the Court's decision as to what is an appropriate sentence. *Id.*

Mr. Hedgecock has the support of his family. His mother, Ms. Gilmore, wrote a letter of support for him. (Augmentation: Notice of Deposit, Exhibit A.) Ms. Gilmore noted that Mr. Hedgecock had made great strides in his life. (Augmentation: Notice of Deposit, Exhibit A.) Mr. Chapman also wrote a letter of support for Mr. Hedgecock noting, "His parents, my friend and I that study with Troy, and others have noticed a change in Troy. . . . he seems to view things in a more positive and responsible [manner]. (Augmentation: Notice of Deposit, Exhibit B.)

Mr. Hedgecock's mother and stepfather have offered him a place to stay. (UPSI 1/19/07, pp.1-2.) He is excited about the support he is receiving from his mother and noted that it "means everything to him right now." (UPSI 1/19/07, p.2.) At the sentencing hearing, Mr. Hedgecock acknowledged that, "I got [sic] the support of my family, something that's never been there before since I was a kid." (Tr. 1/23/07, p.84, Ls.19-21.) Mr. Hedgecock also noted that he believes that having his family's support will "help make a difference this time." (Augmentation: Notice of Deposit, Exhibit C.)

Additionally, Mr. Hedgecock has expressed his remorse for committing the instant offense. In *State v. Alberts*, 121 Idaho 204, 824 P.2d 135 (Ct. App. 1991), the Idaho Court of Appeals reduced the sentence imposed, "In light of Alberts' expression of remorse for his conduct, his recognition of his problem, his willingness to accept treatment and other positive attributes of his character." *Id.* 121 Idaho at 204, 824 P.2d at 209. Mr. Hedgecock has expressed his remorse for committing the instant offense stating, "I am sorry for making the mistake I did." (UPSI 5/18/06, p.7.)

Mr. Hedgecock has also made a great deal of progress during his incarceration. Mr. Gibbs, jail administrator for Gooding County, testified that Mr. Hedgecock had taken

on leadership roles in programming, initiated participation in distance learning for college credits, attempted to get his GED, enrolled in Cognitive Self-Change group, and enrolled in Breaking Barriers. (Tr. 1/23/07, p.62, L.6 – p.63, L.18.) Mr. Hedgecock has made great strides in his self-discovery, completing a criminal inventory, and trying to change his old behavior. (Tr. 1/23/07, p.64, L.23 – p.65, L.2.)

Additionally, Mr. Hedgecock submitted a letter from Ms. Velasquez, a deputy with Gooding County Sheriff's Office. (Augmentation: Notice of Deposit, Exhibit D.) Ms. Velasquez noted that, "I have been working on developing programs for the inmates and inmate William T. Hedgecock has been [an] active participant in helping develop several of the programs." (Augmentation: Notice of Deposit, Exhibit D.)

Based upon the above mitigating factors, Mr. Hedgecock asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his substance abuse, desire for continued treatment, mental health issues, friend and family support, remorse, and good behavior during incarceration, it would have crafted a sentence that focused on his further rehabilitation rather than incarceration.

III.

The District Court Abused Its Discretion When It Denied Mr. Hedgecock's Rule 35 Motion For A Reduction Of Sentence

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253, 869 P.2d 568, 570 (Ct. App. 1994) (citing *State v. Forde*, 113 Idaho

21, 740 P.2d 63 (Ct. App.1987) and *State v. Lopez*, 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984)). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* (citing *Lopez*, 106 Idaho at 450, 680 P.2d at 872). "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.* (citing *State v. Hernandez*, 121 Idaho 114, 822 P.2d 1011 (Ct. App. 1991)). "When presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007).

Mr. Hedgecock supplied additional information to the district court, a letter from the mother of his son. (R., pp.65-66.) Ms. DeNaughel wrote that:

> [redacted] Really the only thing that Troy and I have in common is our son, [redacted] who is now eleven. . . . My son has just recently started to grow a bond with his dad, and his dad has grown a bond with his son. . . . I feel that with [redacted] supportiveness and the truth how it is will help in Troy's rehabilitation. . . . Troy and [redacted] need each other. Together with the help of whoever is willing to help (so many people contribute to recovery for addicts) we can help him.

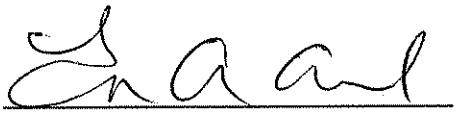
(R., p.65.)

Mr. Hedgecock asserts that in light of the above additional information and the mitigating factors mentioned in section II, which need not be repeated, but are incorporated by reference, the district court abused its discretion in denying his Rule 35 motion.

CONCLUSION

Mr. Hedgecock respectfully requests that this Court vacate the district court's order of Judgment and Commitment and reverse the order which denied his motion to suppress. Alternatively, he requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that the order denying his Rule 35 motion be vacated and the case remanded to the district court for further proceedings.

DATED this 6th day of March, 2008.



ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of March, 2008, 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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624 MAIN STREET
GOODING ID 83330

BARRY WOOD
DISTRICT COURT JUDGE
GOODING COUNTY DISTRICT COURT
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ATTORNEY AT LAW
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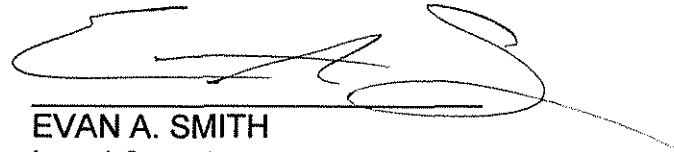

EVAN A. SMITH
Legal Secretary

EAA/eas

STATE OF IDAHO

OFFICE OF THE STATE APPELLATE PUBLIC DEFENDER

April 16, 2008

HAND DELIVERY

Mr. Stephen Kenyon
Clerk of the Courts
P.O. Box 83720
Boise, ID 83720-0101
HAND DELIVER

Re: *State v. Hedgecock*, No. 33950
Notice of Typographical Error

Dear Mr. Kenyon:

It has come to my attention that there is a typographical error which appears on page 18 of the Appellant's Brief. I incorrectly characterized the sentence as a "unified sentence of fourteen years, with four years fixed." (Appellant's Brief, p.18.) The actual sentence was a unified sentence fourteen years, with **seven** years fixed. I apologize for the error. If the Court would prefer, I will gladly file a revised brief.

Thank you for your assistance in this matter.

Very truly yours,

FOR ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

EAA/eas

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