8-31-2017

State v. Elwood Appellant's Brief Dckt. 44778

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NOS. 44778 & 44779**
Plaintiff-Respondent,	)	
	)	**CANYON COUNTY**
	)	**NOS. CR 2016-5250 & CR 2016-5300**
v.	)	
	)	
KARLY I. ELWOOD,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE BRADLY S. FORD
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Karly Irene Elwood entered a conditional guilty plea to two counts of possession of methamphetamine and one count of misdemeanor possession of drug paraphernalia, preserving her right to appeal the denial of her motion to suppress. Ms. Elwood asserts that the district court erred by denying her motion to suppress evidence because police illegally detained her without reasonable, articulable suspicion that a crime was afoot.

Statement of the Facts and Course of Proceedings

On March 20, 2016, at approximately midnight, officers were dispatched to a house for suspicious circumstances. (7/26/16 Tr., p.14, L.13 – p.15, L.23.) A neighbor reported that a white car was parked in the driveway of a house that was believed to be bank-owned and uninhabited. (7/26/16 Tr., p.15, Ls.6-20.) When the officers arrived at the house, there was no vehicle in the driveway. (7/26/16 Tr., p.42, Ls.7-12.) The officers looked around and found no points of access and no forced entry inside the house, but noticed that the house appeared abandoned and had notices in the window stating the property was bank-owned. (7/26/16 Tr., p.16, Ls.2-18, p.23, L.19 – p.24, L.9.) However, when the officers peeked in the windows, they saw drink cups and food items inside the house. (7/26/16 Tr., p.23, Ls.13-18.)

After completing the call notes, Officer Orvis saw a silver passenger car pull up in front of the house, parallel to the road. (7/26/16 Tr., p.24, L.10 – p.25, L.10; State's Exhibit 4.) The car pulled up facing the opposite lane of traffic. (7/26/16 Tr., p.24, Ls.16-21.) The driver exited the car and walked towards the front door of the house. (7/26/16 Tr., p.26, Ls.1-13.) Officer Orvis made contact with the driver, who said he was there helping a friend move.

(7/26/16 Tr., p.30, Ls.5-13.) Officer Orvis obtained the driver's identification card and then ordered him to go back to the car. (7/26/16 Tr., p.50, Ls.2-12.)

Officer Orvis then obtained identification or driver's licenses from all of the passengers in the car. (7/26/16 Tr., p.31, L.9 – p.32, L.11.) After he had collected these items, he went back to his car and moved it so that it was behind the silver car, with the emergency lights flashing. (7/26/16 Tr., p.28, Ls.13-19, p.31, Ls.9-12.) Officer Orvis called in the driver and passengers to dispatch. (7/26/16 Tr., p.28, Ls.13-16, p.32, Ls.9-23.) He also ran his K-9, Faro, around the car. (7/26/16 Tr., p.31, Ls.5-8.) After Faro alerted, Officer Orvis interviewed Ms. Elwood who admitted to having a container with two blue pills in it. (7/26/16 Tr., p.35, Ls.17-25.) Upon learning she was going to be transported to county jail, Ms. Elwood asked for her purse, which contained multiple items of drug paraphernalia. (R., p.9.) A foil package containing a substance that tested presumptively positive for methamphetamine was located in a black bag behind the headrest of the seat in which Ms. Elwood was sitting. (R., p.10.)

Based on these facts, the State filed an Information which alleged that Ms. Elwood committed two counts of possession of methamphetamine.[1] (R., pp.30-31.) Thereafter, Ms. Elwood filed a Motion and Memorandum in Support of Motion to Suppress and two affidavits in support of her motion to suppress. (R., pp.40-49, 62-66.) She asserted that the evidence gathered against her should be suppressed for three reasons: First, any reasonable suspicion of criminal activity had dissipated by the time Ms. Elwood arrived at the house; second, her initial warrantless detention was not justified by reasonable, articulable suspicion; and third, Officer Orvis abandoned the purpose for the traffic stop and impermissibly extended

[1] Ms. Elwood was also charged with misdemeanor possession of drug paraphernalia in the companion case, Canyon County case number CR 2016-5300, a case consolidated on appeal with this case, Canyon County case number CR 2016-5250. (R., p.165.)

the duration of the stop to allow the K-9 sniff of the car. (R., pp.40-49, 62-66.) A hearing was held on Ms. Elwood's motion. (R., pp.51-54; 7/26/16 Tr.) After the hearing, the State filed its objection to Ms. Elwood's motion to suppress. (R., pp.68-74.)

Twenty-seven days later, the district court denied both the motion to enlarge time to file a motion to suppress and the motion to suppress itself. (R., pp.108-127.) The district court denied Ms. Elwood's motion to suppress finding that the motion was filed twenty-seven days late and neither good cause nor excusable neglect excused the late filing, but even had the motion been timely filed, the initial stop was lawful, the officer had reasonable, articulable suspicion to do a driver's license/identification check on all of the occupants of the vehicle because he believed they were about to engage in unlawful behavior by entering the vacant house, the length of the investigatory detention was not unlawfully extended, and the canine alert gave the officers probable cause to search the interior of the vehicle. (R., pp.108-127.)

In denying the motion to suppress on the merits, the district court held that the initial encounter between Officer Orvis and the driver was consensual:

> The initial encounter was essentially consensual and only developed into an investigatory detention when Officer Orvis requested driver's licenses and/or identification from the driver of the vehicle and its occupants.

(R., p.119). The court concluded, at the time Officer Orvis asked for the identification from the passengers, that he had reasonable, articulable suspicion to believe that the driver and/or the passengers in the car may have, or were about to engage in unlawful behavior by entering the vacant house. (R., p.124.)

The court concluded:

> Also, though the purpose of the investigation may initially have been to determine whether a citation for the traffic violations observed was appropriate or whether the parties had illegally entered or were about to enter the empty residence, Officer Orvis' testimony disclosed at least three other factual circumstances that

> would support a reasonable suspicion that one or more of the vehicle's occupants possessed controlled substances.
>
> First, Officer Orvis testified that upon his initial contact with the passengers in the vehicles [sic], he recognized Mr. Schlapia as an individual that he knew to be the subject of prior Nampa City Police investigations for illegal use and distribution of narcotics. While this fact alone may have provided an adequate basis for reasonable suspicion, it isn't the only factor that was observed by Officer Orvis at that time. Officer Orvis also observed that when he made contact with the Defendant she had difficulty answering simple questions, was making quick jerky movements, and appeared nervous. Officer Orvis testified that, based upon his training and experience, those characteristics can indicate that the person is under the influence of narcotics. Finally, Officer Orvis also testified that while he was providing the vehicle occupants' identification information to dispatch so that a warrant check could be run, he had observed furtive movements by the vehicle occupants, consistent with an attempt to hide or conceal something in the vehicle. Taken together, these factors provide an adequate basis for the officer to reasonably suspect that the vehicle's occupants were in possession of illegal narcotics, and thus the officer had not impermissibly expanded the scope of the investigation beyond what the facts confronting him suggested.

(R., p.123) (internal citations omitted). The court then found:

> When Officer Orvis approached the suspect vehicle to gather identification from the occupants, the focus of his investigation quickly shifted form the earlier inquiry to an investigation of illicit drug activities, based on the furtive movements of the vehicle occupants, the Defendant's behaviors suggesting narcotics impairment, and the recognition of Mr. Schlapia with knowledge of his background in illegal drug activities.

(R., p.124.)

The court concluded that Officer Orvis had reasonable, articulable suspicion that the driver and passengers were involved in criminal activity regarding the house. The court also concluded that, when Officer Orvis spoke to the passengers and obtained their identification, he had reasonable, articulable suspicion that the passengers in the car were involved in drug activity:

> After Officer Orvis had provided the information to dispatch, and before dispatch responded to the check, Officer Orvis proceeded to run his K-9, Faro, around the suspect vehicle. Officer Orvis ran his drug canine around the suspect vehicle based on circumstances of this contact, including the late night

> suspicious activity call, his personal familiarity with Mr. Schlapia's prior history of involvement with illegal narcotics transactions in Nampa, the furtive movements of the vehicle's occupants, the reluctance or difficulty the vehicle occupants demonstrated in providing identifying information and eye avoidance.[2] The K-9 alerted at an external location between the front and rear passenger doors of the Toyota.

(R., p.113)[3] (footnote added).)

Ms. Elwood entered a conditional guilty plea, pleading guilty to two counts of felony possession of a controlled substance and one count of misdemeanor possession of drug paraphernalia but preserving her right to appeal the denial of the motion to suppress. (8/15/16 Tr., p.88, Ls.4-9; 8/17/16 Tr., p.99, Ls.3-23, p.103, L.19 – p.107, L.2, p.124, L.22 – p.125, L.1; 12/12/16 Tr., p.147, L.19 – p.148, L.9; R., pp.90-103.) On December 20, 2016, the district court withheld judgment and placed Ms. Elwood on probation for four years. (12/12/16 Tr., p.167, Ls.2-7; R., pp.153-155.) On January 17, 2017, Ms. Elwood filed a Notice of Appeal timely from the district court's Order of Probation on Withheld Judgment. (R., pp.156-159.)

[2] The district court conducted the analysis without acknowledging that a dog sniff is not a "search" under the Fourth Amendment and therefore does not have to be justified by reasonable, articulable suspicion of criminal conduct. *United States v. Place*, 462 U.S. 696, 707 (1983). Further, the court also found, pursuant to *United States v. Rodriguez*, 135 S. Ct. 1609, 1614-16 (2015), that the dog sniff did not extend the duration of the stop. (R., pp.113, 122.) It is not clear why the district court analyzed whether the officer had reasonable, articulable suspicion of drug activity in these circumstances.

[3] These findings are not a verbatim recitation of the entirety of the district court's four pages of facts.

ISSUES

I. Did the district court err when it denied Ms. Elwood's motion to enlarge time to file a motion to suppress?

II. Did the district court err when it denied Ms. Elwood's motion to suppress?

ARGUMENT

I.

The District Court Erred In Denying Ms. Elwood's Motion To Enlarge Time To File A Motion To Suppress

A. Introduction

Ms. Elwood did not file her motion to suppress within the time limit designated by I.C.R. 12(d). However, Ms. Elwood asserts that the district court erred in denying her motion to enlarge the time to file a motion to suppress where she demonstrated good cause and excusable neglect. Ms. Elwood asserts that the neglect of her attorney was excusable in that she was overburdened with an excessive caseload. She further asserts that she has shown good cause in that the interests of judicial economy warranted the district court hearing her motion to suppress on its merits. This is particularly true where, at the time the district court denied the motion, it was moot because the suppression hearing had already been held and the motion to suppress decided on the merits. Thus, Ms. Elwood asserts that the district court acted inconsistently with applicable law.

B. Relevant Rules And Standard Of Review

Idaho Criminal Rule 12 governs the filings of pre-trial pleadings and motions, generally, and motions to suppress evidence, specifically. I.C.R. 12(b)(3). Rule 12(d) governs the timelines for filing such motions and reads as follows:

> Motions under Rule 12(b) must be filed within 28 days after the entry of a plea of not guilty or seven days before trial whichever is earlier. In felony cases, motions under 12(b) must be brought on for hearing within 14 days after filing or 48 hours before trial, whichever is earlier. *The court may shorten or enlarge the time and, for good cause shown or for excusable neglect, may relieve a party of failure to comply with this rule.*

I.C.R. 12(d) (emphasis added).

When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry. The sequence of the inquiry is: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989).

C. The District Court Erred In Denying Ms. Elwood's Motion To Enlarge Time To File A Motion To Suppress Where Ms. Elwood Demonstrated Both Good Cause And Excusable Neglect

Ms. Elwood asserts that she showed excusable neglect and good cause, and that the district court abused its discretion in denying her motion to enlarge time. Idaho Criminal Rule 12(d) requires motions to suppress to be filed "within 28 days after the entry of a plea of not guilty or seven days before trial whichever is earlier." I.C.R. 12(d). Ms. Elwood's motion to enlarge time and motion to suppress were filed on June 23, 2016, twenty-seven days late. (R., pp.38, 40, 109.) At the hearing on the motions to enlarge time and to suppress, Ms. Elwood's counsel told the district court that she did not file a timely motion to suppress because she was handling a heavy caseload of 140 active cases, and she failed to calendar the motion to suppress deadline. (8/8/16 Tr., p.7, L.23 – p.8, L.13; Augmentation, p.1.) She also did not have contact with her client for almost two months after arraignment. (8/8/16 Tr., p.7, Ls.17-23.) Ms. Elwood's attorney's failure to timely file the motion to suppress stemmed from poor communication and poor file management. Defense counsel admitted she was at fault, but asked the court to find good cause or excusable neglect for the late filing. (7/26/16 Tr., p.7, L.23 – p.8, L.13.)

Counsel's failure to timely file the motion was certainly neglectful; however, Ms. Elwood asserts that this neglect was excusable given the difficulties of representation by an overworked public defender. The National Legal Aid & Defender Association (NLADA) National Advisory Commission Standards on Criminal Justice Standards and Goals, Defense Standard 13.12 provides: "The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150." *See* http://www.nlada.org/defender-standards/national-advisory-commission/black-letter. Defense counsel told the court she was handling 140 active cases at that time, which is far beyond the recommended standards.[4] (Augmentation, p.1.) In light of these alleged statewide problems, it certainly does not behoove the courts to further compound the public defense shortcomings by penalizing public defense clients for untimely filings.

Although the district court did not dispute the existence of an overburdened public defense system in Canyon County,[5] it ultimately denied the motion, finding that "[n]either good cause nor excusable neglect have been establish that support entry of an order enlarging the time for filing the Motion to Suppress." (R., pp.114-117.) In denying the motion, the court wrote, "Likewise, if this long period of delay is justifiable because of the heavy case load

[4] There is a pending class action lawsuit against the State of Idaho, *Tucker v. State*, a case in which plaintiffs alleged that the State is providing constitutionally insufficient representation to its indigent residents. *Tucker v. State*, 162, Idaho 11, __, 394 P.3d 54, 62 (2017) ("Appellants alleged systemic, statewide deficiencies plaguing Idaho's public defense system. Appellants seek to vindicate their fundamental right to constitutionally adequate public defense at the State's expense, as required under the Sixth Amendment to the U.S. Constitution, and Article I, Section 13 of the Idaho Constitution.") In *Tucker*, "Appellants allege their injuries are due, in part, to a 'lack of ongoing training and professional development' for public defenders, and public defenders' crushing caseloads. They explain that many public defenders' caseloads are 'well above national standards and impossible for one person to handle effectively.'" 394 P.3d at 67. The *Tucker* plaintiffs' Complaint was filed in 2015. *Id.* at 59.

noted, absent other unanticipated or unavoidable circumstances, then good cause and excusable neglect would exist for untimely motions in virtually all criminal cases being handled by the public defender's office in this county." (R., p.116.)

Despite the district court's recognition that such a problem existed, it refused to find such constituted the "good cause" or "excusable neglect" required by Rule 12(d). The court's decision effectively punished Ms. Elwood for the struggling public defense system in Idaho. Such was an abuse of discretion. Ms. Elwood asserts that the district court abused its discretion in denying her motion to enlarge time, by acting inconsistently with applicable legal standards in failing to recognize the neglect displayed was excusable.

Additionally, even if this Court determines that the district court did not abuse its discretion on the excusable neglect question, Ms. Elwood asserts that the district court abused its discretion in failing to grant the motion to enlarge time for good cause shown. The interests of judicial economy would have been best served by the district court hearing the motion to suppress. Absent successfully prosecuting this appeal, Ms. Elwood can pursue an otherwise unnecessary post-conviction action against the public defender's office and the deficient performance prong is easily established. *See generally*, *Strickland v. Washington*, 466 U.S. 668 (1984). Whether the district court rules in her favor or in favor of the State in post-conviction proceedings, the aggrieved party would be able to appeal the decision, thus, saddling the appellate courts with an additional, yet otherwise unnecessary, appeal. *See* I.C. § 19-4909.

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[5] The court noted, "[t]he court is aware that the Defendant's counsel, like the other public defenders, prosecutors and even the judges serving this county carry a heavy caseload. The court is sympathetic with this plight." (R., p.115.)

Furthermore, although not specifically listed as a factor to consider in I.C.R. 12(d), the State was prepared to, and did, address the merits of the suppression motion during the July 26, 2016 hearing. (7/26/16 Tr., p.11, L.17 – p.73, L.5.) The hearing on Ms. Elwood's motion to enlarge time was held nearly a month before trial was scheduled to begin. (7/26/16 Tr., p.71, Ls.22-23.)

In denying the motion to enlarge time, the district court wrote, ". . . the result of the delay is that the court was requited [sic] to consider these motions so close to the scheduled trial." (R., p.116.) Ms. Elwood recognizes that there is no case law (that she is aware of) that defines the meaning of "good cause" (or "excusable neglect" for that matter) as used in I.C.R. 12(d). However, Ms. Elwood asserts that where there is no prejudice to the State, judicial economy considerations do constitute good cause to enlarge the time to hear a motion to suppress. Motions to suppress are the vehicle by which a defendant can keep illegally obtained evidence from being used against him or her. *See* I.A.R. 12(b)(3). Ms. Elwood asserts that where an opportunity for a full and fair hearing on the merits of an untimely motion to suppress can be held, where the State is prepared to address the merits of the motion, where a ruling can be issued well before trial, and where doing so avoids the unnecessary costs of post-conviction litigation, good cause has been shown. Thus, Ms. Elwood asserts the district court abused its discretion in denying her motion to enlarge time to file her motion to suppress.

D. The District Court Erred In Denying Ms. Elwood's Motion To Enlarge Time To File A Motion To Suppress Where The Motion Had Either Been Impliedly Granted Or Had Become Moot As The District Court Had Already Held A Hearing And Issued A Written Ruling On The Merits

On June 23, 2016, Ms. Elwood filed her motion to enlarge time to file a motion to suppress simultaneously with her motion to suppress. (R., pp.38-49.) She asked the court "to

enlarge the time for filing pre-trial motions" and included an affidavit in which she asserted that she had 140 active cases. (R., p.38; Augmentation, p.1.) The district court held a hearing on both motions on July 26, 2016. (R., pp.51-54; 7/26/16 Tr.) It first heard the motion to enlarge time. (7/26/16 Tr., p.6, L.14 – p.11, L.17.) After hearing defense counsel's reasons for the untimely motion to suppress, the district court said, "I'll take it under advisement and consideration. So I'm letting you know I still may not grant the motion to enlarge, but I want to review it and think about the context of what we're doing. All right. So on the motion to suppress." (7/26/16 Tr., p.11, Ls.12-17.) The State called Officer Orvis who testified at length regarding the incident giving rise to Ms. Elwood's criminal charges. (7/26/16 Tr., p.12, L.10 – p.70, L.14.)

At the conclusion of the suppression hearing, the district court offered the parties an opportunity to submit additional briefing based upon the testimony. (7/26/16 Tr., p.71, L.2 – p.73, L.5.) After both parties submitted supplemental briefing in support of their positions (R., pp.62-75), the district court issued a written decision twenty-two days after hearing the motion to suppress (R., pp.108-136). In its order on defendant's motion to enlarge time and motion to suppress evidence, the district court went through the facts of both motions, including a five page summary of the facts adduced at the suppression hearing, analyzed the legal authority, and denied both motions. (R., pp.108-126.) Although it began its analysis of the merits of the motion to suppress by writing, "Even if the Motion to Suppress had been timely filed, it would not be granted," the court went on, in over eight pages, to analyze the facts of Ms. Elwood's case with the relevant legal authority. (R., pp.117-135.)

However, the district court had already impliedly granted the motion by holding a suppression hearing, allowing the parties additional time to submit briefing in support of their

arguments, and then issuing a written decision on the merits of the suppression motion. The fact is, by the time the district court denied the motion, it was moot—all of the time necessary to proceed with the motion to suppress had been taken, thus, time had already been "enlarged" to allow the suppression motion, hearing, briefing, decision, etc. There was nothing left for the court to decide.

In *State v. Youmans*, the Idaho Court of Appeals explained:

> A question is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome. *State v. Manzanares*, 152 Idaho 410, 419, 272 P.3d 382, 391 (2012); *State v. Long*, 153 Idaho 168, 170, 280 P.3d 195, 197 (Ct. App. 2012). Even where a question is moot, there are three exceptions to the mootness doctrine: (1) when there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) when the challenged conduct is likely to evade judicial review and this is capable of repetition; and (3) when an otherwise moot issue raises concerns of substantial public interest. *State v. Barclay*, 149 Idaho 6, 8, 232 P.3d 327, 329 (2010).

State v. Youmans, 161 Idaho 4 (Ct. App. 2016).

The motion to enlarge was mooted, if not by the hearing, at least by the time the court issued its ultimate ruling on the merits of the suppression motion, which was issued simultaneously with the filing of the order denying the motion to enlarge time to file a motion to suppress. Where the purpose of the I.C.R. 12(d) motion is for judicial efficiency, holding a hearing, allowing additional time for the parties to submit briefing based on what was adduced at the hearing, then issuing a written decision on the merits of the motion effectively negates any reason to decide a motion for enlargement of time to file a motion to suppress.

In *State v. Dice*, the Idaho Court of Appeals held, "If no good cause or excusable neglect was established to the satisfaction of the district court, the motion should not have been heard." *State v. Dice*, 126 Idaho 595, 597 (Ct. App. 1994) (holding that "[a]llowing untimely motions to be heard because they appear meritorious eviscerates the purpose of the rule.").

The district court erred in denying the motion, as it had been mooted and/or its purpose eviscerated when the court heard and decided the suppression issue.

II.

The District Court Erred When It Denied Ms. Elwood's Motion To Suppress

A. Introduction

Ms. Elwood asserts that the police officer's taking of her driver's license was an unlawful seizure in violation of the Fourth Amendment. Any investigation of the house had concluded when the car in which Ms. Elwood was a passenger pulled up in front of the house, and the driver's justification for going toward the front entrance did not give rise to reasonable and articulable suspicion that Ms. Elwood, a passenger still sitting in the car, was engaged in criminal wrongdoing. The facts known to the officer were insufficient to establish a reasonable suspicion of criminal activity by Ms. Elwood. Ms. Elwood was unlawfully seized when Officer Orvis obtained her identification, thus, the district court erred by denying Ms. Elwood's motion to suppress the evidence obtained.

B. Standard Of Review

"The standard of review of a suppression motion is bifurcated." *State v. Holland*, 135 Idaho 159, 161 (2000). When a decision on a motion to suppress is challenged, the appellate court should "accept the trial court's findings of fact which were supported by substantial evidence, but freely review the application of constitutional principles to the facts as found." *Id.*

C. The District Court Erred When It Denied Ms. Elwood's Motion To Suppress Where Officer Orvis Seized Ms. Elwood Absent Reasonable, Articulable Suspicion Of Criminal Wrongdoing

Officer Orvis agreed that Ms. Elwood, as a passenger in the car, was detained when he took the driver's identification. (7/26/16 Tr., p.51, L.24 – p.52, L.1.) She was detained when Officer Orvis obtained her identification. (7/26/16 Tr., p.52, Ls.2-7.) The district court found that "[a]ll parties were reasonably detained while the identification, driver's license and warrants check was being conducted." (R., p.123.) The sole issue in this case is whether that detention was supported by reasonable articulable suspicion. It was not.

"The Fourth Amendment of the United States Constitution protects citizens from unreasonable search and seizure." *State v. Hansen*, 138 Idaho 791, 796 (2003). "Article I, Section 17 of the Idaho Constitution nearly identically guarantees that '[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.'" *State v. Green*, 158 Idaho 884, 886 (2015) (alteration in original). A warrantless search is presumptively unreasonable, unless it falls within "one of several narrowly drawn exceptions." *State v. Anderson*, 154 Idaho 703, 706 (2012). The State bears the burden of demonstrating a warrantless search or seizure falls into an exception to the warrant requirement. *State v. Worthington*, 138 Idaho 470, 472 (Ct. App. 2002).

This prohibition against unreasonable searches and seizures applies to investigatory detentions of a person falling short of arrest, as well as formal arrests. *State v. Gutierrez*, 137 Idaho 647, 65 (2002); *State v. Knapp*, 120 Idaho 343, 346 (Ct. App. 1991). Although an arrest of an individual must be based on probable cause, police may seize a person through an investigatory stop without probable cause, provided there is a reasonable articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *Knapp*, 120 Idaho at 346-47;

State v. Cook, 106 Idaho 209, 220 (1984). An investigative detention is permissible if it is based upon specific articulable facts which justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity. *State v. Sheldon*, 139 Idaho 980, 983 (Ct. App. 2003). The purpose of a traffic stop is not permanently fixed at the moment the stop is initiated, however, for during the course of the detention there may evolve suspicion of criminality different from that which initially prompted the stop. *State v. Parkinson*, 135 Idaho 357, 362 (Ct. App. 2000).

"Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts." *State v. Morgan*, 154 Idaho 109, 112 (2013) (quoting *State v. Bishop*, 146 Idaho 804, 811 (2009)). "[A]n officer may take into account his experience and law enforcement training in drawing inferences from facts gathered," *State v. Danney*, 153 Idaho 405, 411, 283 P.3d 722, 728 (2012), but "[t]he officer, of course, must be able to articulate something more than an 'inchoate and unparticularized suspicion or 'hunch.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *see also Morgan*, 154 Idaho at 112 (same). "The test for reasonable suspicion is based on the totality of the circumstances known to the officer at or before the time of the stop." *Morgan*, 154 Idaho at 112. The State bears the burden of proving that an investigatory stop or detention is based on reasonable suspicion and is limited in its scope and duration to the issue being investigated. *Florida v. Royer*, 460 U.S. 491, 500 (1983).

"In order to satisfy constitutional standards, an investigative stop must be justified by a reasonable suspicion on the part of the police, based upon specific articulable facts, that the person to be seized has committed or is about to commit a crime." *State v. Sevy*, 129 Idaho 613, 615 (Ct. App. 1997). Reasonable suspicion may be based on a message an officer

receives from dispatch, rather than personal observations, if the message was based upon facts that themselves give rise to reasonable suspicion. *Id.* The reasonableness of the officer's suspicion is evaluated based on the "totality of the circumstances at the time." *Id.* In other words, the "collective knowledge" of all the officers and dispatchers involved. *State v. Van Dorne*, 139 Idaho 961, 964 (Ct. App. 2004).

A seizure occurs when officers detain someone through physical force or show of authority. *State v. Page*, 140 Idaho 841, 843 (2004). A seizure occurs when an officer secures the driver's license of a pedestrian or the passenger of an automobile and runs his or her name through dispatch to check for outstanding warrants. *State v. Zapata-Reyes*, 144 Idaho 703, 707 (Ct. App. 2007). Once the driver of a vehicle is seized, the passenger reasonably feels subject to suspicion and is also seized. *Brendlin v. California*, 551 U.S. 249, 257-259 (2007).

In *State v. Page*, 140 Idaho 841 (2004), the Idaho Supreme Court found that no seizure has occurred when an officer simply approaches an individual on the street or other public place, by asking him if he is willing to answer some questions, or by putting questions to him if he is willing to listen. *Id*. at 844. In *Page* there was no indication that the officer threatened or touched Mr. Page, displayed his weapon, or exhibited other intimidating behavior that would indicate Mr. Page was not free to simply discontinue the encounter and walk away. *Id.* However, once there was no longer a justification for contact between Mr. Page and the officer, it was not reasonable for the officer to seize Mr. Page's driver's license and go back to his patrol vehicle to run a record check. *Id.* at 847.

Here, Officer Orvis, after seeing the driver violate the traffic laws, initiated an encounter with the driver to let him know of the traffic violation. Officer Orvis was within

Page in taking the driver's driver's license and checking his driving status, and doing so constituted a seizure of the driver.

1. The District Court Erred In Finding Officer Orvis Had Reasonable, Articulable Suspicion Criminal Activity Was Afoot At The House

The district court's finding that Officer Orvis "had reasonable articulable suspicion to believe that the driver and the passengers in the vehicle had or were about to unlawfully enter the empty residence" is erroneous. (R., p.119.) Officer Orvis did not have reasonable, articulable suspicion of criminal wrongdoing regarding the house—while he had confirmed that it was possibly uninhabited, there was no evidence of criminal activity and the access points were all secure. (7/26/16 Tr., p.24, Ls.10-21; p.63, Ls.14-24.) Further, while the car that pulled up next to the house was similar to the one that had reportedly been parked in the driveway of the house earlier, it was not described as being the same color. (7/26/16 Tr., p.41, L.21 – p.42, L.1.) Further, the location in which the driver parked the silver car was different from that reported by the neighbor—in the driveway versus on the street. (7/26/16 Tr., p.15, Ls.15-20, p.24, Ls.16-21.) Finally, the passengers were still in the car, only the driver had exited the car and gone towards the front door of the house. (7/26/16 Tr., p.26, Ls.1-4.)

The facts of Ms. Elwood's case are similar to *State v. Zapata-Reyes*, 144 Idaho 703 (Ct. App. 2007) and *State v. Morgan*, 154 Idaho 109, 112 (2013) (holding, "Although the officer stated that he believed Morgan may have been trying to avoid him, the officer provided no factual justification for that belief. Absent other circumstances, driving around the block on a Friday night does not rise to the level of specific, articulable facts that justify an investigatory stop."), both of which involved denials of motions to suppress that were reversed on appeal. In *Zapata-Reyes*, a resident called the police and reported that he was concerned that his house

may be shot at by three or four people in a "white Corsica, or Buick like, a Pontiac." *Id*. at 705. The police then located a white Oldsmobile in the area, in which Mr. Zapata-Reyes was the sole passenger, and proceeded to inquire of him and eventually search him. *Id*.

On appeal, the Idaho Court of Appeals reversed the district court's order denying Zapata-Reyes' motion to suppress. *Id.* at 709. The Court held that the totality of the circumstances did not provide reasonable and articulable suspicion that he had committed or was going to commit a crime. *Id.* The Court based its holding on the fact that the caller did not indicate how much time had passed since the last time the car had driven by his home; the caller described a car of common color and did not provide any other significant distinguishing characteristics to help identify the car; no evidence was presented to show whether the Oldsmobile Zapata-Reyes was in resembled a Corsica or Buick; and the caller stated there were three or four people in the car, not two. *Id.* at 708–709.

The vehicle in *Zapata-Reyes* was described as a white passenger car; in this case the description was a "white car." (R., p.110.). Just as in *Zapata-Reyes,* Officer Orvis was provided with no significant distinguishing features, and there was no information as to *when* the white vehicle had been seen in the driveway.

However, the facts of Ms. Elwood's case are similar to *Morgan*, and thus easily distinguishable from *Naverette v. California*, ___ U.S. ___, 134 S. Ct. 1683 (2014),[6] and

[6] In *Navarette* an anonymous caller reported that they had been run off the road five minutes earlier, and identified the automobile by type and license plate. *Id.* at __, 134 S. Ct. at 1686-87. Thereafter, an officer spotted the vehicle and pulled it over.*Id.* at __, 134 S. Ct. at 1687. The defendants filed motions to suppress asserting the officers lacked reasonable suspicion that criminal activity was afoot, which were denied. *Id*. The United States Supreme Court found that it was reasonable under the circumstances for the officer to perform a traffic stop, and noted that while the caller was anonymous, she had eyewitness knowledge of the driver, gave a detailed description of the automobile, and made a 911 call shortly after the incident occurred. *Id.* at __, 134 S. Ct. at 1689.

Zapata-Reyes because there was no criminal conduct being investigated. Officer Orvis was not provided with information that would constitute criminal activity. Officer Orvis' testified that all he knew of the "suspicious circumstances" was that a neighbor reported a white car in the driveway of a home believed to be unoccupied/abandoned. (7/26/16 Tr., p.15, Ls.6-20.) It is not illegal for a car to be parked in the driveway of a house, even if the neighbors believe the house may be vacant. It is not illegal or criminal for there to be clothes and garbage or food items inside a house that the neighbors suspect might be vacant. At most, it is weird; however, these facts do not necessitate additional investigation, particularly where the homeowner had not even been contacted or their permission given for the police to enter the house or be on the curtilage. In fact, Officer Orvis had concluded whatever investigation he performed at the request of the concerned neighbors when the silver car pulled up and parked on the street in front of the house. (7/26/16 Tr., p.24, Ls.10-21, p.63, Ls.14-24.)

Like the four left turns in *Morgan*, the neighbor here did not have eyewitness knowledge of criminal activity, merely a suspicion. Nor did the officers' observations of the house warrant further investigation. Officer Orvis testified that, after checking the access points, "At that point I had exhausted every investigative technique that I had." (7/26/16 Tr., p.23, L.1 – p.24, L.15, p.63, L.25 – p.64, L.4.) "Even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that 'criminal activity may be afoot.'" *Navarette*, __ U.S. __, 134 S. Ct. at 1690 (quoting *Terry*, 392 U.S. at 30). Here, there was not even a viable claim of trespassing, where the owner of the home had not even been contacted to determine whether they had authorized someone to be at the home or park in the driveway. There was no crime.

2. The District Court Erred In Finding Officer Orvis Had Reasonable, Articulable Suspicion To Support A Drug Investigation When He Approached The Car

When Officer Orvis obtained identification cards and driver's licenses from the passengers, he unlawfully seized all of the passengers in the vehicle, however, the seizure was not justified by reasonable, articulable suspicion of criminal activity. There had been no criminal activity identified at the house. Further, the facts surrounding Officer Orvis' initial encounter with the passengers did not give rise to reasonable and articulable suspicion of drug activity such that the officer could initiate a drug investigation at that point. Based on the totality of the circumstances, Officer Orvis did not have reasonable, articulable suspicion that the vehicle's occupants possessed illegal narcotics when he initially seized them. The district court erred in so finding.

After Officer Orvis collected the driver of the vehicle's driver's license and then told him to go sit in the car. (7/26/16 Tr., p.50, Ls.2-11.) Officer Orvis testified that at that point the driver was not free to leave, and the occupants of the car were not free to leave either. (7/26/16 Tr., p.51, L.24 – p.52, Ls.4.) Officer Orvis then collected identification cards and driver's licenses from all of the people in the car. (7/26/16 Tr., p.31, Ls.9-12, p.38, Ls.17-21, p.40, Ls.11-18, p.52, Ls.2-7; R., p.112.) Once the driver of a vehicle is seized, the passenger reasonably feels subject to suspicion and is also seized. *Brendlin v. California*, 551 U.S. 249, 257-259 (2007). While the initial encounter with the driver may have been consensual, it quickly turned into a seizure when Officer Orvis took his driver's license, and then the identifications of the car's passengers and pulled his car, with the lights flashing, behind the silver car.

The district court based this conclusion on three facts, holding that, when viewed in the totality of the circumstances, these facts would lead the officer to conclude that the vehicle's occupants were engaged in illicit drug activities:

> When Officer Orvis approached the suspect vehicle to gather identification from the occupants, the focus of his investigation quickly shifted form the earlier inquiry to an investigation of illicit drug activities, based on the furtive movements of the vehicle occupants, the Defendant's behaviors suggesting narcotics impairment, and the recognition of Mr. Schlapia with knowledge of his background in illegal drug activities.

(R., p.124.)

The district court also found significant the officer's impression that the passengers in the vehicle demonstrated difficulty or reluctance to provide identifying information to the officer. (R., p.113.) Further, they avoided looking into the officer's eyes. (R., p.113.) The district court found that Ms. Elwood exhibited quick, jerky movements, she was slow to respond to questions, and she appeared nervous. (R., p.123; 7/26/16 Tr., p.39, Ls.4-7.) However, the court's legal conclusion that Officer Orvis had reasonable, articulable suspicion of criminal wrongdoing when he approached the vehicle is clearly erroneous.

As previously discussed herein in Section 1, the late night suspicious activity call involved an unoccupied house and such a vague report does not give rise to reasonable, articulable suspicion of drug activity. The court's next factor—that one of the passengers had a prior history of drug use/involvement—does not give rise to reasonable, articulable suspicion of current drug activity. A prior criminal record "is not, standing alone, sufficient to create reasonable suspicion." *United States v. Davis*, 94 F.3d 1465, 1469 (10th Cir. 1996).

Assuming *arguendo*, that Ms. Elwood's response was slow, a slow response or hesitation in answering does not constitute probable cause or even reasonable suspicion to believe that Ms. Elwood was involved in criminal activity. In fact, any search pursuant to what

Officer Orvis subjectively felt was a slow response to his question was based solely on a hunch, which does not qualify as an exception to the warrant requirement. Further, avoidance of eye contact does not provide reasonable, articulable suspicion that criminal activity is afoot. *See Illinois v. Wardlow*, 528 U.S. 119, 130-31 (2000) (in which government conceded that "an innocent person—even one distrustful of the police—might 'avoid eye contact or even sneer at the sight of an officer,' and that would not justify a *Terry* stop or any sort of *per se* inference."); *see also Snow v. State*, 578 A.2d 816, 824 (Maryland 1990) (holding that driver was nervous and avoided making eye contact; was traveling from Philadelphia to Washington, D.C.; had three air fresheners hung from the rear-view mirror; and did not consent to the requested search of the vehicle did not constitute reasonable, articulable suspicion of drug activity).

When pressed, Officer Orvis admitted that he perceived Ms. Elwood only as acting "nervous."[7] (7/26/16 Tr., p.52, Ls.15-25.) A person's nervous demeanor during an encounter with law enforcement "is of limited significance in establishing the presence of reasonable suspicion" "because it is common for people to exhibit signs of nervousness when confronted with law enforcement regardless of criminal activity." *State v. Gibson*, 141 Idaho 277, 285-86 (Ct. App. 2005); *see also State v. Bly*, 159 Idaho 708, 710 (Ct. App. 2016) (noting that "lawful, albeit unusual, conduct" is insufficient, standing alone, for reasonable suspicion). Nervous

[7] During the suppression hearing, defense counsel took a recess to allow Officer Orvis time to review the video recording of his contact with the driver and passengers because, "everything that you're saying is inconsistent with your video." (7/26/16 Tr., p.44, Ls.1-20.) Although the video recording was not admitted at the hearing, when defense counsel again asked Officer Orvis about Ms. Elwood's behavior, Officer Orvis agreed that she just looked nervous. (7/26/16 Tr., p.52, Ls.15-19, p.64, Ls.11-16.) He also claimed that the furtive movements he observed by the back seat passengers could not be seen on the video's narrow field of view. (7/26/16 Tr., p.52, L.20 - p.53, L.22.)

behavior, standing alone, is insufficient for reasonable suspicion. *See United States v. Chavez-Valenzuela*, 268 F.3d 719, 726 (9th Cir. 2001) (noting that no circuit court has held that nervousness alone suffices for reasonable suspicion and holding that even extreme nervousness alone does not support reasonable suspicion), *amended by United States v. Chavez-Valenzuela*, 279 F.3d 1062 (9th Cir. 2002), *overruled on other grounds by Muehler v. Mena*, 544 U.S. 93 (2005). Ms. Elwood's nervous behavior, in and of itself, does not create a reasonable suspicion that she had committed or was about to commit a drug-related crime.

As the final factor of its analysis, the district court found it significant that the passengers made furtive movements when Officer Orvis ran their identification while sitting in his patrol car. (R., p.124.) However, the "furtive movements" of the occupants adds nothing that supports reasonable suspicion of drug activity. This is demonstrated by Officer Orvis' initial testimony that the furtive movements made him concerned for officer safety. (7/26/16 Tr., p.29, Ls.11-14.) Although he later testified the furtive movements formed a basis for him to believe the passengers "were trying to hide items of contraband, specifically drugs and/or narcotic paraphernalia" (7/26/16 Tr., p.29, L.15 - p.30, L.4), his initial reaction was a safety concern, not that the occupants of the car might be hiding contraband. Further, the occupants' engagement in furtive movements did not occur until after the officer had collected the identifications of those in the car and was calling them in to dispatch.[8] (R., p.112.) This could not have formed the basis for the initial seizure of the passengers of the car. Thus, the district court's conclusion was clearly erroneous where the other two facts—the presence of someone with a criminal history of drug convictions and the nervousness of Ms. Elwood—were not

[8] In arguing thusly, Ms. Elwood does not concede the issue, but maintains that the three facts, even aggregated to be viewed in the totality of the circumstances, did not provide reasonable, articulable suspicion of criminal wrongdoing.

sufficient, even together, to give rise to reasonable, articulable suspicion that illegal drugs were present.

Here, none of the objective circumstances preceding the officer's detention of Ms. Elwood and the vehicle's occupants justify his suspicion that they were involved in criminal activity. None of the circumstances known to Officer Orvis at the time of the seizure establish a reasonable suspicion to justify the seizure.

Thus, the detention of Ms. Elwood was illegal because it was not supported by reasonable articulable suspicion that criminal activity was afoot. The fruits of the search of Ms. Elwood that followed that illegal detention must therefore be suppressed as "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 478-488 (1963); *State v. Schrecengost*, 134 Idaho 547, 549 (Ct. App. 2000).

CONCLUSION

Ms. Elwood respectfully requests that this Court vacate the district court's judgment and order of probation and reverse the order which denied her motion for enlargement of time and her motion to suppress.

DATED this 31st day of August, 2017.

_____/s/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of August, 2017, 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:

KARLY I ELWOOD
16761 BLUE JAY LOOP
NAMPA ID 83687

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_____/s/_____
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SJC/eas