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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 41158
Plaintiff-Respondent,)	
)	JEROME COUNTY NO. CR 2012-6058
v.)	
)	
JOSE GUADALUPE PEREZ-JUNGO,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

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

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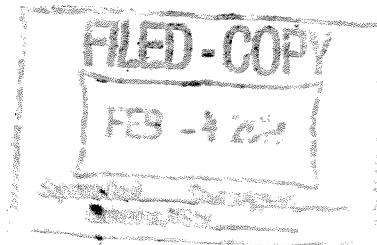


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STATEMENT OF THE CASE

Nature of the Case

Jose Guadalupe Perez-Jungo entered a conditional plea of guilty to the charge of possession of methamphetamine, preserving his right to challenge the district court's order denying his Motion to Suppress. Mr. Perez-Jungo asserts that the district court erred in denying his Motion to Suppress because his prolonged detention and the subsequent search of his vehicle violated his Fourth Amendment rights.

Statement of the Facts and Course of Proceedings

On November 1, 2012 at approximately 1:37 a.m., Trooper Marquez of the Idaho State Police saw a truck parked to the side of a two-lane road. (Tr., p.8, Ls.10-15, p.11, Ls.13-24.)¹ The road was gravel with no divider markers and had borrow pits on both sides of the gravel. (Tr., p.11, Ls.19-25, p.12, Ls.1-9.) The truck was pulled to the edge of the gravel. (Tr., p.11, Ls.6-24; Exhibit 12.) Trooper Marquez testified at the hearing on the Motion to Suppress that he thought the vehicle might be abandoned or that someone might need help. (Tr., p.13, Ls.24-25, p.14, Ls.1-24.) He turned on his emergency lights and his spotlight, which he trained on the driver's side mirror. (Tr., p.15, Ls.2-7.) Trooper Marquez explained that he activated his emergency lights for officer safety because he wanted to let people know he was a police officer. (Tr., p.15, Ls.8-25.) Trooper Marquez also testified that he thought the truck might have been involved in "vandalisms or thefts" that had occurred in the area four to six weeks earlier or that the truck may have been stolen. (Tr., p.14, Ls.1-5, p.40, Ls.14-25.)

Trooper Marquez approached the passenger-side window and saw Mr. Perez-Jungo sitting in the driver's seat. (Tr., p.19, Ls.22-24.) Trooper Marquez knocked on the passenger-side window. (Tr., p.20, Ls.1-3.) Mr. Perez-Jungo was attempting to roll down the window when Trooper Marquez opened the passenger door. (Tr., p.20, Ls.15-21.) Trooper Marquez testified that he opened the passenger door because he "just wanted to know what was going on and why [Mr. Perez-Jungo] was out there to make sure he didn't need assistance." (Tr., p.20, Ls.15-21.)

Trooper Marquez testified that, after he opened the door, he saw a figurine of Santa Muerte² mounted on the dashboard. (Tr., p.20, Ls.22-25, p.21, Ls.1-10.) He also testified that Mr. Perez-Jungo's eyes were bloodshot and glassy. (Tr., p.22, Ls.7-10.) Trooper Marquez asked Mr. Perez-Jungo what he was doing and Mr. Perez-Jungo explained that he was waiting for someone who was going to talk to him about employment. (Tr., p.23, Ls.11-15.) Trooper Marquez asked if he had been drinking and Mr. Perez-Jungo said he had not. (Tr., p.42, Ls.8-12.) Trooper Marquez then asked for Mr. Perez-Jungo's license and registration, which he took back to his patrol car.

¹ All transcript citations refer to the transcript of the Motion to Suppress hearing held on January 29, 2013, unless otherwise indicated.

² Santa Muerte is a female folk saint who appears as a skeletal figure dressed in a long robe. She is venerated primarily in Mexico and the United States, and is associated with healing, protection, and safe delivery into the afterlife. In the late 2000s, it was estimated that there were around five million devotees in Mexico, constituting approximately five percent of the country's population. Santa Muerte also has tens of thousands of followers in the United States, primarily among Hispanic populations. Santa Muerte is most popular in poor communities and, as a result, has been associated with criminal activity due to the public belief in her by certain, mostly low-level, criminal organizations. See Wikipedia, *Santa Muerte*, http://en.wikipedia.org/wiki/Santa_Muerte (describing the history of Santa Muerte) (as of Jan. 31, 2014, 15:55 GMT).

(Tr., p.24, Ls.9-10.) Trooper Marquez ran the license plate for the truck through dispatch and determined the truck was not stolen. (Tr., p.41, Ls.18-22.)

While he continued to detain Mr. Perez-Jungo, Trooper Marquez asked dispatch to send a drug detection dog and requested a second patrol unit. (Tr., p.24, Ls.13-21.) When he was told by dispatch that a drug dog would take at least 20 minutes to arrive, Trooper Marquez said that he “didn’t have enough time” to wait for the dog. (Exhibit 12, at 10:21). While still holding Mr. Perez-Jungo’s license and registration, Trooper Marquez waited 10 or 15 minutes for another unit to arrive. (Tr., p.27, Ls.4-8.) Three additional units arrived and Trooper Marquez ordered Mr. Perez-Jungo out of his truck. (Tr., p.44, Ls.20-22, p.25, Ls.19-23.) Trooper Marquez spoke with his sergeant and with the other officers and told them that the reason for the detention was that “obviously something was not right.” (Tr., p.47, Ls.15-19.) At no point did Trooper Marquez tell any of the other officers that he was investigating Mr. Perez-Jungo for driving under the influence. (Tr., p.47, Ls.3-14.)

Trooper Marquez placed Mr. Perez-Jungo in front of his patrol car and questioned him about prior drug use. (Tr., p.27, Ls.13-25, p.28, Ls.1-6.) Mr. Perez-Jungo was never asked to perform any sobriety tests or answer any questions that would be used to evaluate a person for driving under the influence. (Tr., p.44, Ls.5-19.) Meanwhile, other officers shined their flashlights into the windows of Mr. Perez-Jungo’s truck. (Tr., p.27, Ls.21-22, p.48, Ls.20-24.) Following this examination of the interior of Mr. Perez-Jungo’s truck, Deputy Kingsland told Trooper Marquez that he saw a baggie with an orange substance in it on the dashboard and a “hollowed out” light bulb in the netting behind the passenger seat, which he testified can be used as a smoking device

to inject narcotics. (Tr., p.28, Ls.7-18, p.57, Ls.1-3, 16-23.) Trooper Marquez then searched the truck. (Preliminary Hearing Transcript 11/21/12, p.13, Ls.17-24.) Trooper Marquez scraped the light bulb and tested the residue using a NIK test, which returned a presumptive positive for cocaine. (Preliminary Hearing Transcript 11/21/12, p.14, Ls.1-23.) Trooper Marquez then found a baggie in the pocket of a jacket on the passenger seat containing a substance that he also tested, which returned a presumptive positive for cocaine and amphetamine. (Preliminary Hearing Transcript 11/21/12, p.16, Ls.18-25, p.17, Ls.1-2.)

Mr. Perez-Jungo was charged with one count of possession of cocaine, but the information was later amended to change the substance to methamphetamine, and one misdemeanor count of possession of drug paraphernalia. (R., pp.52-53, 155-156.) Mr. Perez-Jungo filed a Motion to Suppress arguing that the detention, search, and interrogation violated his Fourth and Fifth Amendment rights. (R., pp.67-80.) The district court denied, in part, Mr. Perez-Jungo's Motion to Suppress. (R., pp.116-139.) Mr. Perez-Jungo then entered a conditional guilty plea to one count of possession of methamphetamine, preserving the ability to challenge the district court's order denying his Motion to Suppress. (R., pp.172-178.) Thereafter, the district court imposed a unified sentence of five years, with two years fixed, but suspended the sentence and placed Mr. Perez-Jungo on probation. (R., pp.170-171.) Mr. Perez-Jungo timely appealed. (R., pp.193-194.)

ISSUE

Did the district court err in denying Mr. Perez-Jungo's Motion to Suppress because his detention was unduly prolonged and, therefore, the subsequent search of his person and vehicle violated the Fourth Amendment?

ARGUMENT

The District Court Erred When It Denied Mr. Perez-Jungo's Motion To Suppress

A. Introduction

The district court erred in denying Mr. Perez-Jungo's Motion to Suppress because Mr. Perez-Jungo's Fourth Amendment rights were violated when police officers illegally prolonged their detention of Mr. Perez-Jungo. The State failed to meet its burden of showing that Trooper Marquez had reasonable suspicion to continue to detain Mr. Perez-Jungo after Trooper Marquez performed a welfare check. As such, the district court's order denying Mr. Perez-Jungo's Motion to Suppress should be reversed.

B. Standard Of Review

In *State v. Cutler*, 143 Idaho 297 (Ct. App. 2006), the Court of Appeals articulated the following standard of review for an appeal from a motion to suppress:

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact which are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court.

Id. at 302 (citations omitted).

C. The District Court Erred When It Denied Mr. Perez-Jungo's Motion To Suppress Because His Detention Was Illegally Prolonged And, Therefore, Any Evidence Collected Must Be Suppressed As Fruit Of Illegal Government Activity

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. The purpose of this constitutional right 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 (Ct. App. 2002). Searches or detentions conducted without a warrant are presumptively unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971); *State v. Butcher*, 137 Idaho 125, 129 (Ct. App. 2002). The State "bears the burden to demonstrate that a warrantless search either fell within a well-recognized exception to the warrant requirement or was otherwise reasonable under the circumstances." *State v. Martinez*, 129 Idaho 426, 431 (Ct. App. 1996). If the government fails to meet this burden, the evidence acquired as a result of the illegal search, including later-discovered evidence derived from the original illegal search, is inadmissible in court. *Segura v. United States*, 468 U.S. 796, 804 (1984); *State v. Brauch*, 133 Idaho 215, 219 (1999).

1. Trooper Marquez Lacked Reasonable Suspicion To Detain Mr. Perez-Jungo After He Determined That Mr. Perez-Jungo Did Not Need Assistance

Trooper Marquez seized Mr. Perez-Jungo when he activated his emergency lights and pulled up behind him. A person is seized or detained within the meaning of the Fourth Amendment if, in view of all the circumstances, a reasonable person would have believed he or she was no longer free to leave. *State v. Waldie*, 126 Idaho 864, 866 (Ct. App. 1995). Although a detention may not have been intended by Trooper Marquez at this point, a detention occurred because Mr. Perez-Jungo was not free to leave. See I.C. § 49–1404 (prohibiting fleeing or attempting to elude a police officer when signaled to stop by the officer's emergency lights and/or siren); *Maddox, supra*, 137 Idaho at 824; *State v. Mireles*, 133 Idaho 690, 692 (Ct. App. 1999) (holding that an

officer activating emergency lights while performing a caretaking function constitutes a *de facto* detention). Further, even if Trooper Marquez's use of his emergency lights did not constitute a seizure, a seizure occurred when Trooper Marquez took and retained Mr. Perez-Jungo's driver's license and registration since Mr. Perez-Jungo could not drive away without his license. *State v. Goodwin*, 121 Idaho 491, 493 (1991); *State v. Osborne*, 121 Idaho 520, 524 (Ct. App. 1991).

Although the initial detention was justified under Trooper Marquez's community caretaking function, the detention became illegal because Trooper Marquez continued to detain Mr. Perez-Jungo after his community caretaking role was complete. The community caretaking function arises from the duty of police officers to help citizens in need of assistance and is totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. *Maddox, supra*, 137 Idaho at 824. The community caretaking function only justifies a detention if there is a present need for assistance. *Cutler, supra*, 143 Idaho at 303.

Here, Trooper Marquez testified that, upon seeing the truck, he was (1) concerned that the truck was abandoned; (2) concerned that someone might need help; (3) concerned that the vehicle was stolen; and (4) concerned that the truck might be involved in thefts or vandalisms that occurred in the area. (Tr., p.40, Ls.14-25.) In order to justify the detention of a citizen under the community caretaking exception, the officer must have a genuine and warranted concern rather than simply the officer's curiosity, an unsubstantiated suspicion of criminal activity, or an unwarranted concern that help might be needed. *State v. Page*, 140 Idaho 841, 844 (2004); *Maddox, supra*, 137 Idaho at 824–25. Clearly, only the first two concerns identified by Trooper Marquez fall under

the community caretaking function as defined by the Idaho Supreme Court in *Page*. The other two concerns are criminal in nature and require reasonable suspicion to justify a detention. See *Terry v. Ohio*, 392 U.S., 1, 21 (1968). As discussed in section C-2, reasonable suspicion did not exist to support Trooper Marquez's hunches that the truck was stolen or that it was involved in the vandalism of radio towers.

Therefore, Trooper Marquez's initial detention of Mr. Perez-Jungo can only be justified by the community caretaking function, the scope of which is limited. After shining his spotlight on the truck, Trooper Marquez could clearly see that there was a person in the driver's seat, immediately dispelling any concern that the truck was abandoned. (Tr., p.41, Ls.1-4.) Upon making contact with Mr. Perez-Jungo, Trooper Marquez questioned Mr. Perez-Jungo about what he was doing and Mr. Perez-Jungo explained that he was waiting for a friend to talk to about a job. (Tr., p.23, Ls.11-15.) At this point, both of Trooper Marquez's caretaking concerns had been addressed; the truck was not abandoned, and Mr. Perez-Jungo did not need help.

Trooper Marquez then requested Mr. Perez-Jungo's license and registration. Although this action lengthened Mr. Perez-Jungo's detention, the Idaho Supreme Court has held that, even when an officer is acting in a community caretaking capacity and has determined that the driver does not need assistance, he may request and run a status check on the person's driver's license. *Goodwin, supra*, 121 Idaho at 494-95. Therefore, this action was not outside the boundaries of the community caretaking exception. However, after running Mr. Perez-Jungo's license and registration through dispatch and determining that there were no issues, Trooper Marquez did not return the license and registration and allow Mr. Perez-Jungo to leave, as was required at the

conclusion of his community caretaking duties. Rather, Trooper Marquez continued to detain Mr. Perez-Jungo for at least 10 minutes while he waited for back-up units, and then proceeded to order Mr. Perez-Jungo out of his car. (Tr., p.25, Ls.5-12, 21-23.) Once the license and registration came back clear, Trooper Marquez had no further cause to detain Mr. Perez-Jungo and no reason to order him out of his car. This constituted an illegal detention that was not justified by the community caretaker exception.

2. Trooper Marquez Did Not Have Reasonable Suspicion To Continue To Detain Mr. Perez-Jungo

An investigative detention is constitutionally permissible based upon reasonable suspicion, derived from specific articulable facts, that the person stopped has committed or is about to commit a crime. *Terry, supra*, 392 U.S. at 21; *State v. Salato*, 137 Idaho 260, 264 (Ct. App. 2001). 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 (Ct. App. 2005). The reasonableness of the suspicion must be evaluated upon the totality of the circumstances at the time of the stop, and the “whole picture must yield a particularized and objective basis for suspecting that the individual being stopped is or has been engaged in wrongdoing. *State v. Sevy*, 129 Idaho 613, 615 (Ct. App. 1997).

Here, Trooper Marquez testified to four possible suspicions of criminal activity: (1) The truck Mr. Perez-Jungo was driving was stolen; (2) Mr. Perez-Jungo was somehow involved in the vandalisms or thefts involving radio towers that had occurred

in the area four to six weeks prior; (3) Mr. Perez-Jungo was driving under the influence; and (3) Mr. Perez-Jungo was trafficking narcotics. None of these suspicions were supported by specific, articulable facts.

a. Trooper Marquez Did Not Have Reasonable Suspicion That Mr. Perez-Jungo's Truck Was Stolen

Trooper Marquez testified that he was initially concerned that Mr. Perez-Jungo's truck was stolen. (Tr., p.40, Ls.24-25.) Trooper Marquez did not provide a single fact supporting this hunch. However, upon running Mr. Perez-Jungo's license and registration through dispatch and determining that the truck was, in fact, not stolen, his unsubstantiated concern was immediately dispelled. (Tr., 41, Ls.18-22.) Therefore, Trooper Marquez had no reason to continue the detention to investigate whether the truck was stolen.

b. Trooper Marquez Did Not Have Reasonable Suspicion That Mr. Perez-Jungo Was Involved In Vandalisms Or Thefts Of Radio Towers

Trooper Marquez did not articulate a single reason why he suspected that Mr. Perez-Jungo was involved in the vandalism or thefts of radio towers. Trooper Marquez testified that he received an email in the last four or six weeks stating that there had been prior vandalisms of radio towers in the area. (Tr., p.9, Ls.8-11.) However, there is no evidence in the record to indicate that the rural, gravel road where Mr. Perez-Jungo was parked is, or ever was, a "high crime" area. Further, even if the location were a high crime area, mere presence in a high crime area is not enough to support a reasonable, articulable suspicion that criminal activity is afoot. *Illinois v. Wardlaw*, 528 U.S. 119, 124 (2000); see also *State v. McAfee*, 116 Idaho

1007, 1010 (1989) (holding that a driver who hesitates at a stop sign for a longer period than usual, in the middle of the night, in an area where recent burglaries had taken place, does not rise to the articulable level of suspicion necessary for a seizure). As the Idaho Supreme Court stated in *McAfee*, “citizens do not become prospective detainees merely because they are driving late at night and decide to lawfully park on a city street.” *Id.* at 1009.

The fact that a crime may have occurred in the area more than a month prior is not grounds for detaining a person who happens to be parked in that area. Such a rule would allow officers to stop every single person on the road for months after a crime occurs. Here, there was no evidence tying Mr. Perez-Jungo to the vandalisms or thefts of the radio towers. There was no indication that a suspect or vehicle description existed or that it matched Mr. Perez-Jungo or his truck. There were no statements, tips, photos, or any other evidence implicating Mr. Perez-Jungo. Therefore, Trooper Marquez’s hunch was entirely unsubstantiated and he did not have reasonable suspicion to investigate Mr. Perez-Jungo for theft or vandalism.

c. Trooper Marquez Did Not Have Reasonable Suspicion That Mr. Perez-Jungo Was Driving Under The Influence

Reasonable suspicion should be evaluated by considering the totality of the information known to the officer at the time. *United States v. Cortez*, 449 U.S. 411, 417 (1981). Trooper Marquez testified that he suspected that Mr. Perez-Jungo might be driving under the influence because his eyes were glassy and bloodshot. (Tr., p.22, Ls.19-21.) Although bloodshot and glassy eyes may be considered in the totality of the circumstances in evaluating whether reasonable suspicion exists, no reported case has

ever held that bloodshot and glassy eyes, alone, constitutes reasonable suspicion. In Idaho, every case involving bloodshot and glassy eyes as reasonable suspicion identifies some other evidence of alcohol or drug use. See, e.g., *State v. Grigg*, 149 Idaho 361, 364 (Ct. App. 2010) (detention was reasonable when defendant had bloodshot and glassy eyes, reddening of the conjunctiva of his eyes, and eyelid tremors); *State v. Finnicum*, 147 Idaho 137, 140 (Ct. App. 2009) (probable cause existed to arrest defendant who smelled strongly of alcohol, slurred her speech, had glassy and bloodshot eyes, and seemed confused); *State v. Johnson*, 137 Idaho 656, 658-60 (Ct. App. 2002) (further detention of defendant was reasonable when defendant exhibited extreme nervousness, smelled like alcohol, admitted to drinking alcohol, and had dilated and bloodshot eyes); *State v. Pick*, 124 Idaho 601, 605 (Ct. App. 1993) (reasonable suspicion existed to detain defendant when defendant had bloodshot eyes, admitted to consuming alcohol, and slurred her speech). Other jurisdictions have found that bloodshot eyes alone are not enough to establish reasonable suspicion that a crime is being committed. See, e.g., *Ferris v. State*, 735 A.2d 491 (Md. 1999); *State v. Thirty Thousand Six Hundred Sixty Dollars and No/100 in U.S. Currency*, 136 S.W.3d 392 (Tex. Ct. App. 2004).

Further, no additional factors existed that would support reasonable suspicion that Mr. Perez-Jungo was under the influence of drugs or alcohol. In addition to observing Mr. Jungo-Perez's eyes, Trooper Marquez stated that he was aware of the time of night, the remote location, the "odd hours to be talking to someone about employment," and the presence of the Santa Muerte figurine. (Tr., p.23, Ls.13-25, p.22, Ls.16-21.) These observations do not amount to reasonable suspicion to believe that

Mr. Perez-Jungo was under the influence of alcohol or drugs. As discussed above, the location where Mr. Perez-Jungo was parked was not a high crime area and simply driving or parking late at night is not, by itself, suspicious. Similarly, Mr. Perez-Jungo's explanation for why he was there, that he was meeting a friend to discuss a job, was not contradicted. Although Trooper Marquez was not required to believe Mr. Perez-Jungo's explanation, the explanation itself was forthright and reasonable. See, *contra*, *State v. Brumfield*, 136 Idaho 913, 916 (2001) (co-travelers' conflicting stories about their destination and the purpose of their trip supported reasonable suspicion). Finally, the presence of a Santa Muerte figurine, discussed in section C-2-d, has no relation to driving under the influence and should not be considered as reasonable suspicion to investigate a person for DUI.

Mr. Perez-Jungo asserts that none of the factors identified by Trooper Marquez, even taken together, support reasonable suspicion that a person is driving under the influence except for bloodshot and glassy eyes. Mr. Perez-Jungo further asserts that bloodshot and glassy eyes, alone, are not enough to establish reasonable suspicion that an individual is under the influence of alcohol or drugs. There are numerous other causes for bloodshot and glassy eyes. Here, Mr. Perez-Jungo was driving late at night and tiredness often causes bloodshot and glassy eyes. If this factor, alone, is sufficient to create reasonable suspicion, any tired driver or person suffering from allergies will be subject to detention for an investigation into the possibility they are under the influence of drugs or alcohol.

- i. Even If Bloodshot And Glassy Eyes Are Sufficient Reasonable Suspicion That A Person Is Under The Influence, Trooper Marquez Illegally Prolonged The Detention Because He Did Not Investigate Mr. Perez-Jungo For Driving Under The Influence

Even if this Court were to determine that bloodshot and glassy eyes are sufficient, alone, to justify a detention and investigation for driving under the influence, Trooper Marquez went beyond the scope of the investigation and illegally prolonged his detention of Mr. Perez-Jungo. Where a person is detained, the scope of detention must be carefully tailored to its underlying justification. *Florida v. Royer*, 460 U.S. 491, 500 (1983). An investigative detention “must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” *Id*; see also *Goodwin, supra*, 121 Idaho at 501. Further, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. *Id*. In a DUI investigation, field sobriety tests are the least intrusive means of investigation. *State v. Ferreira*, 133 Idaho 474, 482 (Ct. App. 1999).

Here, Trooper Marquez never actually investigated Mr. Perez-Jungo for driving under the influence. Rather, Trooper Marquez continued to detain Mr. Perez-Jungo for at least ten minutes while he requested back-up units and a drug dog. (Tr., p.24, Ls.9-15, p.25, Ls.1-12.) When back-up units arrived, rather than conducting field sobriety tests or otherwise evaluating Mr. Perez-Jungo for driving under the influence, the officers shined their flashlights into Mr. Perez-Jungo's truck. (Tr., p.27, 9-23.) Further, it is clear that Trooper Marquez never intended to investigate Mr. Perez-Jungo for driving under the influence. Even after back-up units arrived, Trooper Marquez testified that he was still waiting for a drug dog even though a drug dog is unnecessary for a DUI

investigation. (Tr., p.27, Ls.22-23.) Trooper Marquez never told dispatch that he was investigating a DUI. (Exhibit 12.) He never told his sergeant that he was investigating a DUI. (Tr., p.47, Ls.2-14.) He never told the back-up officers that arrived at the scene that they were investigating a DUI. (Tr., p.47, Ls.6-14.) In fact, when back-up units arrived, Trooper Marquez told them that the reason for the stop was because, "something isn't right." (Tr., p.47, Ls.15-19.) It is clear that Trooper Marquez made no effort to dispel or confirm his suspicion that Mr. Perez-Jungo was driving under the influence and, as such, the detention was illegally prolonged.

d. Trooper Marquez Did Not Have Reasonable Suspicion That Mr. Perez-Jungo Possessed Or Was Trafficking Drugs

Trooper Marquez testified that he suspected that Mr. Perez-Jungo might be trafficking drugs. The reasons that Trooper Marquez gave to support this hunch were the same as those he gave to support his hunch that Mr. Perez-Jungo was driving under the influence, namely the time of night, the remote location, the "odd hours to be talking to someone about employment," and the presence of the Santa Muerte figurine. (Tr., p.23, Ls.13-25, p.22, Ls.16-21.) As discussed above, the first three factors do not create reasonable suspicion of any crime, and certainly not drug trafficking. The only other factor Trooper Marquez identified was the presence of a Santa Muerte figurine on the dashboard, which he testified was associated with drug traffickers. (Tr., p.21, Ls.1-4.)

Courts have only begun to determine what significance, if any, to give to the presence of figurines of certain saints in drug trafficking cases. Most courts that have

addressed these saints, commonly Jesus Malverde³ and Santa Muerte, have done so in the context of expert testimony. See, e.g. *United States v. Pena Ponce*, 588 F.3d 579 (8th Cir. 2009). However, several courts have refused to consider the presence of such saints at all, citing constitutional concerns. See e.g. *State v. De La Rosa*, 208 P.3d 1012, 1018 n.2 (Or. Ct. App. 2009) (refusing to consider the observation of a Jesus Malverde medallion in its reasonable suspicion calculus, despite the officer's "detailed testimony" about the training and experience he received regarding its symbolism, because Jesus Malverde is also celebrated by poor people in Latin America and "permitting officials to conduct otherwise unlawful searches based on a medallion that supposedly has significance only to Hispanics raises the same kind of serious constitutional concerns as other forms of profiling").

Although some courts have found that the presence of a Santa Muerte or Jesus Malverde statue or image can be a factor in a reasonable suspicion determination, the officers in every one of those cases had significant particularized suspicion beyond the presence of the saints. See, e.g., *Pena-Ponce, supra*, 588 F.3d. at 584 (officers had reasonable suspicion of drug trafficking when suspect stalled while answering questions, the passenger in the car showed excessive nervousness, the suspect and the passenger had conflicting stories about where they had been, there were multiple cell phones in the truck and the passenger tried to kick one of the phones out of view,

³ Jesus Malverde is a Mexican folk hero who earned a Robin Hood-type image, making him popular among the poor. Because of his outlaw image, he has been adopted by certain criminal organizations as their "patron saint." However, his intercession is also sought by those with troubles of various kinds, and a number of supposed miracles have been locally attributed to him, including personal healings and blessings. See Wikipedia, *Jesus Malverde*, http://en.wikipedia.org/wiki/Jesus_Malverde (describing history of Jesus Malverde) (as of Jan. 28, 2014, 05:37 GMT).

and there was a Santa Muerte figurine on the dashboard); *United States v. Lopez-Gutierrez*, 334 Fed. Appx. 880 (10th Cir. 2009) (officers had reasonable suspicion when they saw scarring on the seat belt bolts and a reattached airbag indicating alterations designed to hide contraband, air fresheners and a rose to mask the smell of drugs, three cell phones, one small suitcase that contradicted the suspects' story that they had spent more than a week in Las Vegas, and two pictures of Jesus Malverde on the dashboard and around the suspect's neck); *State v. Alvarez*, 147 P.3d 425, 433 (Utah 2006) (officers had reasonable suspicion when they observed the suspect make two short visits on consecutive days to condominiums known for drug dealing, two tips had been received about drug dealing in the condominiums, one of which was specific to the suspect's vehicle, and a Jesus Malverde medallion was present).

Unlike clothing displaying marijuana leaves or other direct drug references, Santa Muerte is a valid religious symbol for millions of people. While it is true that innocuous items may indicate drug possession or trafficking, such items individually do not, without more, create reasonable suspicion. For example, a straw would not, without additional factors, amount to reasonable suspicion of criminal activity. A straw is a common piece of drug paraphernalia, but it also has obvious ordinary uses. Similarly, a Santa Muerte figurine may indicate drug trafficking, but it may also indicate a popular religious symbol or simply an affinity for skeletons in robes. Here, Trooper Marquez did not have any evidence of drug trafficking beyond the presence of the Santa Muerte figurine and his hunch that "something isn't right." At the time that he detained Mr. Perez-Jungo, Trooper Marquez did not smell marijuana, see any residue or indication of drugs, or see anything that could be identified as drug paraphernalia. He merely saw a person

parked at night in a rural area with a Santa Muerte figurine on the dashboard. This is exactly the “mere speculation or hunch” that the Fourth Amendment prohibits.

In sum, Trooper Marquez’s hunches ranged from driving under the influence to trafficking narcotics to vandalizing radio towers. Not a single one of these hunches was supported by reasonable suspicion, and multiple unsubstantiated hunches do not create particularized suspicion of criminal activity. Contrary to the district court’s ultimate finding, the State failed to provide evidence of reasonable articulable suspicion for Trooper Marquez to continue to detain Mr. Perez-Jungo and, therefore, all evidence obtained as a result of the prolonged detention must be suppressed.

3. All Evidence Collected Following The Illegal Detention 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, supra*, 468 U.S. at 815; *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Bainbridge*, 117 Idaho 245, 249 (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, supra*, 371 U.S. at 488. Suppression is required 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 (Ct. App. 2005).

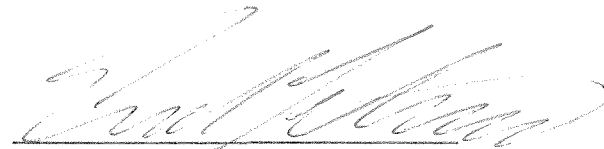
Trooper Marquez illegally prolonged his detention of Mr. Perez-Jungo after he had performed his caretaking function. Had Mr. Perez-Jungo not been illegally seized, the evidence located in the vehicle would not have been discovered. The State failed to

meet its burden of 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.

CONCLUSION

Mr. Perez-Jungo respectfully requests that this Court vacate the judgment and commitment, reverse the order denying his Motion to Suppress, and remand the case to the district court for further proceedings.

DATED this 4th day of February, 2014.


KIMBERLY E. SMITH
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of February, 2014, 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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