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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45755-2018**
Plaintiff-Respondent,	)	
	)	**Power County Case No.**
v.	)	**CR-2016-772**
	)	
DAVID J. WHITECOTTON,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF POWER

HONORABLE ROBERT C. NAFTZ
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

David J. Whitecotton appeals from the judgment of the district court entered upon the jury verdict finding him guilty of Unlawful Possession of a Firearm. On appeal, Whitecotton argues the district court erred when it denied his motion to suppress and abused its discretion when it sentenced him to five years with two years fixed.

Statement Of The Facts And Course Of The Proceedings

Robercha Brillhart reported to the police that there was an unknown man with a handgun strapped to his chest behaving strangely at the local pharmacy. (R., pp. 13-22;[1] 91-99.) Ms. Brillhart reported that while she was picking up her prescription, this unknown man was pacing in front of the pharmacy. (Id.) The man then entered the store and started asking about maps. (Id.) Then, as Ms. Brillhart was standing outside talking to her brother, the man walked up to them and introduced himself. (See id.) The man was wearing a handgun on his chest and kept turning to his side, which had the effect of exposing his handgun to Ms. Brillhart and her brother. (Id.) The man remained standing there as Ms. Brillhart and Mr. Roberts continued their conversation. (Id.) Ms. Brillhart thought this behavior was odd and suspicious. (Id.)

After Ms. Brillhart reported the odd behavior of the unknown man with the gun, the American Falls police department dispatched Officer Rodriguez. (Id.) Officer

[1] There appear to be several copies of the record in the case. However it appears that Appellant is using the record labeled "David Whitecotton Appeal-Final.pdf." Unless otherwise noted, Respondent will use the same record.

Rodriquez made contact with the man matching Ms. Brillhart's description. (Id.) The man was sitting in a parked truck and Officer Rodriguez could see the handgun strapped to his chest. (See id.; see also Ex. C[2] at 0:30 to 6:00.)

Officer Rodriguez started to ask the man about the report of suspicious behavior, but the man started up the truck and said he was leaving. (See id.) Officer Rodriguez then instructed the man to turn off the truck so they could talk. (See id.) The man eventually turned off the truck. (Id.) Officer Rodriguez asked for the man's driver's license, but the man was reluctant to provide his driver's license, and instead provided a veteran's identification card. (Id.) The card identified the man as Whitecotton. (Id.)

Officer Rodriguez returned to his vehicle to run the record check. (See R., pp. 13-22, 91-99; see also Ex. C. at 6:00 to 15:30.) The record check showed that Whitecotton's driving status was revoked due to a felony DUI in 2014. (Id.) Officer Rodriguez then got back out of his car and explained to Whitecotton that due to his revoked driving status he could not be driving. (Id.) Whitecotton said he could call a cab or get a ride from someone else. (Id.)

Officer Rodriguez and Whitecotton discussed how wearing the gun could scare people and make them feel uncomfortable. (See Ex. C at 11:30 to 15:30.) Whitecotton said he was carrying the gun because it made people "less likely to commit crime." (Id.)

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[2] The parties stipulated to the admission of a recording of Officer Rodriguez's body camera. (See R., pp., 80-91, 96, n .1; Ex. C.) The relevant electronic file contained in that exhibit for this appeal is labeled AXON_Flex_Video_2016-08-01_1624.mp4. Time citations are to this file and are approximate.

Officer Rodriguez explained that because Whitecotton's driver's license was revoked he could arrest him now for driving to the store, but he did not want to do that. (Id.) Officer Rodriguez cautioned Whitecotton not to drive on a revoked license. (Id.) They shook hands. (Id.)

Officer Rodriguez returned to his patrol car. (See R., pp. 13-21; 92-93.) Officer Rodriguez then saw Whitecotton drive his truck out of the parking spot. (Id.) Officer Rodriguez pulled out and started to follow Whitecotton when Whitecotton parked in another parking spot. (Id.)

Dispatch informed Officer Rodriguez that Whitecotton had additional felony convictions. (Id.) Due to his felony convictions, Whitecotton could not legally be in possession of a firearm. (Id.) Officer Rodriguez then requested Whitecotton turn over his firearm. (Id.) Whitecotton refused and drove away. (Id.) Officer Rodriguez gave chase and then stopped Whitecotton and arrested him. (Id.)

The state charged Whitecotton with Unlawful Possession of a Firearm. (R., pp. 50-51, 136-137.) Whitecotton filed a Motion to Suppress seeking to suppress "all evidence obtained and statements made as a result of an illegal traffic stop without probable cause[.]" (R., pp. 65-66.) The state responded. (R., pp. 70-87.) The parties stipulated to the admission of the "Police Report, Witness Statement, and Body Cam video attached to the affidavit of Anson L. Call II, in Support of Opposition to Defendant's Motion to Suppress[.]" (R., p. 92, n. 1; see also pp. 76-87.) The district court issued a Memorandum Decision and Order. (R., pp. 91-99.)

The district court found that the initial encounter between Officer Rodriguez and Whitecotton was consensual; however, once Officer Rodriguez instructed Whitecotton to

turn off his truck, the encounter was no longer consensual and Whitecotton was seized. (R., pp. 93-95.) The district court next analyzed whether Officer Rodriguez had reasonable articulable suspicion to conduct this investigatory stop. (R., pp. 95-98.) The district court found that Ms. Brillhart, the reporting party, was known to Officer Rodriguez and thus Officer Rodriguez was justified in acting upon the information of a suspicious and armed individual that was provided by Ms. Brillhart. (See id.)

> In this case, the reporting party was known to Officer Rodriguez. She was reporting that an armed man was acting suspiciously outside the Rockland Pharmacy. Her report was subject to immediate confirmation by law enforcement, and if she made a willfully false report, she would have been subject to prosecution under Idaho Code § 18-705. Based on those fact, Officer Rodriguez was justified in relying upon Ms. Brillhart's report as a basis for the investigative stop. *See Adams* [*v. Williams*], 407 U.S. [143], 146, 92 S.Ct. [1921], 1923 [(1972)]. A brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information may be most reasonable in light of the facts known to the officer at the time. *Id.* In addition, the information provided by Ms. Brillhart carried a particular indication of reliability in that it was based upon her own first-hand observation of the reported events. Her report was further corroborated by Officer Rodriguez's observation of a man sitting in a black Ford pick-up truck with Oregon plates and fitting the description provided by [Ms.] Brillhart.

(R., p. 98.) The district court denied Whitecotton's motion to suppress. (Id.)

Whitecotton pled guilty to unlawful possession of a firearm and the state agreed to dismiss the misdemeanors. (2/10/17 Tr., p. 18, L. 5 – p. 37, L. 16.) However, prior to the sentencing hearing, Whitecotton absconded. (See R., pp. 114-121.) Whitecotton was re-arrested. (Id.)

After his re-arrest, at the time scheduled for his new sentencing hearing, Whitecotton moved to withdraw his guilty plea. (8/30/17 Tr., p. 2, L. 3 – p. 9, L. 9.) The

district court granted the motion to withdraw the guilty plea and set the case for jury trial. (Id.)

The jury found Whitecotton guilty of unlawful possession of a firearm. (R., p. 171; 12/5/17 Tr., p. 201, L. 18 – p. 204, L. 17.) At sentencing, the state requested a sentence of five years with four years fixed, in part because Whitecotton had absconded from probation in Oregon and Whitecotton failed to appear at an earlier sentencing hearing. (12/15/17 Tr., p. 211, L. 8 – p. 213, L. 23.) Whitecotton argued for probation. (12/15/17 Tr., p. 214, L. 3 – p. 218, L. 3.) The district court reviewed the presentence investigation report and considered the facts and circumstances of the case as well as considering Whitecotton's prior criminal record. (12/15/17 Tr., p. 224, L. 20 – p. 227, L. 7.) The district court noted that this was not Whitecotton's first felony conviction. (12/15/17 Tr., p. 224, L. 20 – p. 227, L. 7.) The district court entered judgment and sentenced Whitecotton to five years with two years fixed. (Id.; see also R., pp. 177-179.)

Whitecotton moved for reduction of sentence under Idaho Criminal Rule 35. (R., pp. 208-212.) The district court held a hearing on the Rule 35 motion. (R., p. 217; 4/27/18 Tr., p. 5, L. 5 – p. 16, L. 21.) The district court denied the Rule 35 motion for leniency. (4/27/18 Tr., p. 14, L. 8 – p. 16, L. 18.) Whitecotton timely appealed. (R., pp. 180-182.)

ISSUES

Whitecotton states the issues on appeal as:

> I. Whether the district court erred when it denied Mr. Whitecotton's motion to suppress because it failed to conduct the requisite analysis, and because under the proper analysis, the contents of Ms. Brillhart's report did not objectively demonstrate he was, or was about to be, engaged in any sort of criminal conduct.
>
> II. Whether the district court abused its discretion by considering the fact that Mr. Whitecotton exercised his rights when it imposed his sentence, as evidenced by its explanation that it, "Certainly had to look at the case much differently once he withdrew that plea and required the State to prove his guilt to a jury."

(Appellant's brief, p. 6.)

The state rephrases the issues as:

1. Has Whitecotton failed to show the district court erred when it determined, based upon Ms. Brillhart's report, that Officer Rodriguez had reasonable articulable suspicion to temporarily detain Whitecotton for investigation?

2. Has Whitecotton failed to show the district court abused its discretion when it sentenced Whitecotton?

ARGUMENT

I.
The District Court Correctly Denied Whitecotton's Motion To Suppress Because Officer Rodriguez Had Reasonable Suspicion Of Potential Criminal Conduct To Check Whitecotton's Identification

A. Introduction

The district court found that Officer Rodriguez could rely upon Ms. Brillhart's report of an unknown man, with a gun strapped to his chest, acting strangely at the local pharmacy, in order to temporarily detain Whitecotton to investigate. (See R., pp. 91-99.) On appeal, Whitecotton argues the district court applied the incorrect analysis because the district court was required to identify a specific crime based upon Ms. Brillhart's report. (See Appellant's brief, pp. 7-16.) Whitecotton then argues there were insufficient facts to find he had or was about to commit a theft or criminal exhibition of a firearm. (See id.) Whitecotton's argument is contrary to Idaho law and has been previously rejected. See State v. Perez-Jungo, 156 Idaho 609, 329 P.3d 391 (Ct. App. 2014). Reasonable suspicion does not require a belief that a specific crime has been or is about to committed. See id. In addition to being contrary to Idaho law, the cases cited by Whitecotton do not support his conclusion that the district court erred. The district court properly found that, based upon Ms. Brillhart's report and Officer Rodriguez's observations, Officer Rodriguez could conduct a brief stop to determine Whitecotton's identity and obtain additional information. (See R., pp. 97-98.) Whitecotton has failed to show the district court erred.

B. Standard Of Review

The appellate court reviews the denial of a motion to suppress using a bifurcated standard. State v. Linze, 161 Idaho 605, 607, 389 P.3d 150, 152 (2016) (citing State v. Purdum, 147 Idaho 206, 207, 207 P.3d 182, 183 (2009)). The appellate court will accept the trial court's findings of fact unless they are clearly erroneous. Id. (citing Purdum, 147 Idaho at 207, 207 P.3d at 183). However the appellate court freely reviews the trial court's application of constitutional principles in light of the facts found. Id. (citing Purdum, 147 Idaho at 207, 207 P.3d at 183).

C. The District Court Did Not Err Because Officer Rodriguez, Based Upon The Report Of A Known Informant, Had Reasonable Suspicion Of Some Potential Criminal Activity

The district court found that Officer Rodriguez temporarily seized Whitecotton when Officer Rodriguez told Whitecotton to turn off his truck. (See R., pp. 94-98.) The district court found that Ms. Brillhart's report to Officer Rodriguez was reliable, and that the details of that report – that Whitecotton was armed and acting odd and suspiciously – provided reasonable articulable suspicion for Officer Rodriguez to detain Whitecotton in order to investigate the situation and Whitecotton's identification. (Id.) Using Whitecotton's identification, Officer Rodriguez was able to determine the Whitecotton was a convicted felon who could not legally possess firearms. (See R., pp. 13-22, 91-99.) The district court did not err and properly applied the reasonable suspicion standards to determine that the detention in order to obtain Whitecotton's identification did not violate the Fourth Amendment of the United States Constitution.

Pursuant to the Fourth Amendment of the United States Constitution "[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." U.S. Const. amend. IV. A police officer may detain a person for the purpose of investigating possible criminal behavior "if there is an articulable suspicion that the person has committed or is about to commit a crime." State v. Wright, 134 Idaho 73, 76, 996 P.2d 292, 295 (2000) (quoting State v. Rawlings, 121 Idaho 930, 932, 829 P.2d 520, 522 (1992)). Such a 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, 88 P.3d 1220, 1223 (Ct. App. 2003) (citing Terry v. Ohio, 392 U.S. 1, 21 (1968); United States v. Cortez, 449 U.S. 411, 417 (1981)).

"Investigatory detentions are permissible when justified by an officer's reasonable articulable suspicion that a person has committed, or is about to commit, a crime." State v. Fairchild, ___ Idaho ___, 429 P.3d 877, 883 (Ct. App. 2018) (citing State v. Morgan, 154 Idaho 109, 112, 294 P.3d 1121, 1124 (2013)). "'Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts. Reasonable suspicion requires more than a mere hunch or inchoate and unparticularized suspicion.'" Id. (quoting Morgan, 154 Idaho at 112, 294 P.3d at 1124). "The reasonableness of the suspicion must be evaluated upon the totality of the circumstances at the time of the stop." Id. (citing State v. Ferreira, 133 Idaho 474, 483, 988 P.2d 700, 709 (Ct. App. 1999)). Reasonable suspicion "requires less than probable cause but more than mere speculation or instinct on the part of the officer." Id. (citing Ferreira, 133 Idaho at 483, 988 P.2d at 709). "An officer may draw reasonable inferences

from the facts in his or her possession, and those inferences may be drawn from the officer's experience and law enforcement training." Id. (citing State v. Montague, 114 Idaho 319, 321, 756 P.2d 1083, 1085 (Ct. App. 1988)). "'A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct.'" Id. (quoting United States v. Arvizu, 534 U.S. 266, 277 (2002)). "The assessment of reasonable suspicion 'must be based on common sense judgments and inferences about human behavior.'" State v. Nevarez, 147 Idaho 470, 210 P.3d 578 (Ct. App. 2009) (citing Illinois v. Wardlow, 528 U.S. 119, 125 (2000)).

"An informant's tip regarding suspected criminal activity may give rise to reasonable suspicion when it would 'warrant a man of reasonable caution in the belief that a stop was appropriate.'" State v. Bishop, 146 Idaho 804, 811-812, 203 P.3d 1203, 1210-1211 (2009) (citing Alabama v. White, 496 U.S. 325, 329 (1990); Terry, 392 U.S. at 22.) "Whether a tip amounts to reasonable suspicion depends on the totality of the circumstances including the substance, source, and reliability of the information provided." Id. (citing White, 496 U.S. at 328-329.) "In other words, a tip must possess adequate indicia of reliability in order to justify a *Terry* stop." Id. (citing Adams v. Williams, 407 U.S. 143, 147 (1972). "The more reliable the tip, the less information required to establish reasonable suspicion." Id. (citing White, 496 U.S. at 330.) "Factors indicative of reliability include whether the informant reveals his or her identity and the basis of his or her knowledge, whether the location of the informant is known, whether the information was based on first-hand observations of events as they were occurring, whether the information the informant provided was subject to immediate confirmation or corroboration by police, whether the informant has previously provided reliable

information, whether the informant provides predictive information, and whether the informant could be held criminally liable if the report were discovered to be false." Id. (citations omitted.)

Whitecotton first argues that the district court only evaluated whether Ms. Brillhart's report could be relied upon and did not "evaluate whether the facts in Ms. Brillhart's report objectively demonstrated that Mr. Whitecotton was, or was about to be, engaged in criminal conduct." (Appellant's brief, pp. 7-11.) Whitecotton argues that the district court was required to specifically identify what crime Whitecotton was supposed to have committed or have been about to commit. (See id.) Whitecotton then goes on to argue that there were insufficient facts to support reasonable suspicion of a "theft-type offense" or an "exhibition of a firearm" type offense. (See Appellant's brief, pp. 12-16.)

Whitecotton's argument is incorrect and is contrary to Idaho law. The relatively low standard required for "reasonable suspicion" does not require the police to identify a specific crime. Rather, reasonable suspicion is established if the facts known to the officer tend objectively to show that some crime has been or is about to be committed. See Perez-Jungo, 156 Idaho at 615, 329 P.3d at 397.

In Perez-Jungo, the Idaho Court of Appeals rejected the argument that Whitecotton now raises. See id. at 156 Idaho at 615, 329 P.3d at 397 ("Perez-Jungo argues that the extension of his detention could only be justified by reasonable suspicion that a *specific* crime had been committed. In other words, he contends that there must have been objective facts that provided reasonable suspicion of at least one of the specific crimes the officer suspected Perez-Jungo of having committed.") (emphasis original). Reasonable suspicion only requires a "showing of objective and specific articulable facts

giving reason to believe that the individual has been or is about to be involved in *some* criminal activity." Id. (emphasis original).

> Perez-Jungo misapprehends the applicable standard. Just as with probable cause to search a vehicle, reasonable suspicion does not require a belief that any *specific* criminal activity is afoot to justify an investigative detention; instead, all that is required is a showing of objective and specific articulable facts giving reason to believe that the individual has been or is about to be involved in *some* criminal activity. This analysis is based on the totality of the circumstances, meaning that we look at the whole picture, including those facts that may support suspicion of one crime but not another. Even if there is not sufficient reasonable suspicion of any *specific* crime, there may still be reasonable suspicion that *some* criminal activity is afoot, which is all that is required to extend an investigative detention.

Id. (internal citations omitted; emphasis original). Whitecotton's argument on appeal, that the district court was required to identify a specific crime, is contrary to Idaho law.

Further, the cases relied upon by Whitecotton undercut his argument and support the analysis of the district court because none of these three cases require the type of specific crime identification Whitecotton proposes. (See Appellant's brief, p. 10 (citing Terry v. Ohio, 392 U.S. 1 (1968); Navarette v. California, 572 U.S. 393 (2014); Adams v. Williams, 407 U.S. 143 (1972).) In Terry, the United States Supreme Court asked whether "the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry, 392 U.S. at 21-22 (citations omitted). The Court found that an officer may investigate "possibly criminal behavior even though there is no probable cause to make an arrest." Id. at 22. In making that determination the Court detailed the objective facts available to the officer at the time he temporarily detained the suspects in that case:

> [Officer McFadden] had observed [the three men] go through a series of acts, each of them perhaps innocent in itself, but which taken together

> warranted further investigation. There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.

Id. at 22-23. Importantly, when determining whether it was appropriate for Officer McFadden to detain the three men to investigate, the Court did not require Officer McFadden (or the trial court) to specify whether the three men were going to commit a robbery, theft, or other specific crime. See id. at 22-23. The Court only noted the officer's experience in the detection of thievery. See id. The Court required the officer to articulate the specific reasons for his suspicions but not the specific crime.

The same is true in Adams v. Williams. At 2:15 a.m. Sergeant Connolly was on duty in a high-crime area of Bridgeport, Connecticut, when a person known to Sergeant Connolly told him that an individual in a nearby car was carrying narcotics and had a gun. Adams, 407 at 144-145. Sergeant Connolly approached the car and asked the occupant, Robert Williams, to open the door. Id. at 145. Williams rolled the window down instead. Id. Sergeant Connolly could not see the gun. Id. However, based upon the information provided by the informant, Sergeant Connolly reached into the car and grabbed the gun. Id. The gun was where the informant said it would be. Id. Sergeant Connolly arrested

Williams for unlawful possession of a gun. Id. A subsequent search found large quantities of heroin. Id. The United States Supreme Court found that the initial seizure of the gun was constitutional. See id. at 145-146. The Court reiterated the Terry standard that an officer can investigate "possibly" criminal behavior even if the officer does not have probable cause for an arrest. Id. The Court stated: "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." Id. (citations omitted).

Again, like in Terry, the Court in Adams did not require an articulation of which specific crime is suspected. Whitecotton's argument on appeal appears to be similar to the rejected argument of the dissent in Adams. The dissent argued, in part, that Sergeant Connolly's actions were not justified under Terry because he did not know if Williams was even committing a crime by having a gun or narcotics:

> With respect to the gun, the officer did not know if or when the informant had ever seen the gun, or whether the gun was carried legally, as Connecticut law permitted, or illegally. And with respect to the narcotics, the officer did not know what kind of narcotics respondent allegedly had, whether they were legally or illegally possessed, what the basis of the informant's knowledge was, or even whether the informant was capable of distinguishing narcotics from other substances.

Id. at 158-159 (Marshall, J., dissenting). The majority in Adams did not accept this rationale and instead held it was reasonable for an officer to briefly stop a suspicious individual in order to determine his or her identify and to obtain more information. See id. at 145-146. The level of specificity Whitecotton argues is required is not supported in the case law.

Finally, Navarette v. California does not support Whitecotton's argument. In Navarette, the United States Supreme Court held that an officer had reasonable suspicion to stop a driver based upon an anonymous caller's report that the driver "ran the [caller] off the roadway." Navarette, 572 U.S. at 398-404. While the bulk of the opinion focused on whether the anonymous tip had sufficient indicia of reliability on which the police could rely, the Court did ultimately conclude that the reported driving behavior was a significant indicator of potential drunk driving and, thus, the officer had reasonable suspicion to detain the driver. See id. Nowhere in the Navarette opinion does the Court require the detaining officer to identify a specific criminal offense.

"[R]easonable suspicion does not require a belief that any *specific* criminal activity is afoot to justify an investigative detention; instead, all that is required is a showing of objective and specific articulable facts giving reason to believe that the individual has been or is about to be involved in *some* criminal activity." Perez-Jungo, 156 Idaho at 615, 329 P.3d at 397 (emphasis original). Here, the district court found that Officer Rodgriuez, based upon the known informant's report of the odd and suspicious behavior of an individual with a gun strapped to his chest, had reasonable suspicion to temporarily detain Whitecotton in order to check his identification and gather further information. (See R., pp. 91-98.) The district court applied the correct standard and did not err.

II.
The District Court Did Not Abuse Its Discretion When It Imposed A Sentence Within The Applicable Legal Limits

A. Introduction

The district court imposed a legal sentence. (See 12/15/17 Tr., p. 224, L. 20 – p. 227, L. 7; see also R., pp. 177-179.) On appeal, Whitecotton argues that one comment made during the district court's ruling on his Rule 35 motion indicates the district court abused its discretion when it initially imposed the sentence. (Appellant's brief, pp. 17-22.) Whitecotton's argument takes a single comment out of context and does not show the district court abused its discretion. Further, even if the comment was erroneous, the district court provided other proper reasons for its sentence and, thus, under Idaho Supreme Court precedent there is no abuse of discretion.

B. Standard Of Review

Idaho appellate courts use an abuse-of-discretion standard of review to determine whether a sentence is excessive. State v. Matthews, 164 Idaho 605, 434 P.3d 209, 211 (2019) (citing State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016)). Under the abuse-of-discretion standard the appellate Court considers "whether the trial court: "(1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by an exercise of reason." Id. (citing Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)).

C. Whitecotton Has Failed To Show The District Court's One Isolated Comment, Taken Out Of Context, Constituted An Abuse Of Sentencing Discretion

The jury found Whitecotton guilty of unlawful possession of a firearm, a violation of Idaho Code § 18-3316. A violation of this code section is punishable by up to five years in state prison. I.C. § 18-3316(1). The district court imposed a sentence of five years with two years fixed. (12/15/17 Tr., p. 224, L. 20 – p. 227, L. 7; see also R., pp. 177-179.) Thus the sentence imposed by the district court was within the boundaries of its discretion.

"Generally, when appealing a sentence as an abuse of discretion, the appellant 'must establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment.'" Matthews, 164 Idaho at ___, 434 P.3d at 212 (citing State v. Varie, 135 Idaho 848, 856, 26 P.3d 31, 39 (2001); State v. Wolfe, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978)). "Those objectives are (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrong-doing." Id. (citations omitted). "When reviewing whether a sentence is excessive, [the Appellate Court] review[s] all the facts and circumstances in the case and focus[es] on whether the trial court abused its discretion in fixing the sentence." Id. (citing State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001); State v. Zaitseva, 135 Idaho 11, 13 P.3d 338 (2000)). "Where ... the district court imposes a sentence within the statutory limits, 'the appellant bears the burden of demonstrating that it is a clear abuse of discretion.'" Id. (citing State v. Miller, 151 Idaho 828, 834, 264 P.3d 935, 941 (2011); State v. Windom, 150 Idaho 873, 875, 253 P.3d 310, 312 (2011)). "'In deference to the trial judge, [the

Appellate Court] will not substitute its view of a reasonable sentence where reasonable minds might differ.'" Id. (quoting State v. Stevens, 146 Idaho 139, 148-49, 191 P.3d 217, 226-227 (2008)). Since here the district court imposed a sentence within the statutory limits, Whitecotton has the burden to show a clear abuse of discretion.

On appeal, Whitecotton argues that one comment made by the district court when denying his Rule 35 motion for leniency is proof that the district court abused its discretion when it imposed the sentence. (Appellant's brief, pp. 17-22.) When the district court denied Whitecotton's Rule 35 motion, the district court made the following comments:

> THE COURT: All right. Thank you.
>
> Well, as far as the illegal sentence is concerned, the Court agrees with [the prosecutor] that legality of the sentence on a Rule 35 is whether or not the Court exceeded its authority with regard to the maximum penalty that could be imposed, the maximum penalty here could be up to five years in prison, and the court imposed a two-year fixed, three-year indeterminate sentence, for a total of five years.
>
> So I really think that this is more of a plea of leniency under Rule 35 because since it's not an illegal sentence, his questions with regard to evidentiary hearing were decided previously, both at trial and during pretrial motions, and so the Court has to look at whether or not the defendant has shown that the sentence is excessive in light of any new or additional information that has been subsequently provided to the Court in support of that motion.
>
> The Court's reviewed his – and it's a pro se Rule 35 motion with regard to his being a – in service with the military, that he had volunteered previously with the veterans in Pocatello, I think those were primarily intermixed with his evidentiary hearing and things like that. Those were the primary things he talked about with regard to additional information, and, in fact, that information was known to the Court at the time of sentencing. He was quite clear about his previous service, and I saw that in the presentence investigation report, and he also talked about his volunteering with veterans in Pocatello and with their families, so that was

> something the Court did take into consideration at the time of sentencing. So that's really not new information.
>
> Looking at whether or not further leniency with regard to the fixed sentence, he had previously pled guilty, and we were set for sentencing, and then just determined in his mind that he was not going to appear for sentencing, and so then we had to have him arrested, and then he withdrew his plea, and he had his opportunity to go to trial.
>
> Certainly had to look at the case much differently once he withdrew that plea and required the State to prove his guilt to a jury. I think the two-year fixed sentence I think is sufficient in order to accomplish the goals of punishment and protection of society. The three-year indeterminate sentence, I would hope that he would be able to parole and be a productive citizen here in either Idaho or Oregon, but I think that would be the idea behind the rehabilitation for him.
>
> So considering those goals of sentencing, I think the two-year fixed, three years indeterminate sentence was appropriate under the circumstances. And so, based on that, the Court is going to deny the Rule 35 motion.

(4/27/18 Tr., p. 14, L. 8 – p. 16, L. 18.) Whitecotton focuses on the district court's statement that "Certainly had to look at the case much differently once he withdrew that plea and required the State to prove his guilt to a jury." (See Appellant's brief, pp. 17-22.) Whitecotton argues that this comment indicates that when the district court imposed the initial sentence the district court was punishing Whitecotton for exercising his constitutional right to a jury trial. (See id.) While it is true that a district court cannot punish a defendant for exercising a constitutional right, Whitecotton's argument ignores the context of that statement. Immediately preceding that comment the district court was discussing Whitecotton's absconding and not appearing for sentencing: "he had previously pled guilty, and we were set for sentencing, and then just determined in his mind that he was not going to appear for sentencing, and so then we had to have him arrested, and then he withdrew his plea, and he had his opportunity to go to trial." (See

id.) Thus, when the district court subsequently made the comment about having to look at the case differently after Whitecotton withdrew his guilty plea and went to trial, that comment is in the context of Whitecotton's absconding and not appearing for sentencing. A defendant's appearance, or non-appearance, and actions during the course of a trial are proper considerations for sentencing. Thus, the district court did not make an improper comment and did not abuse its discretion.

Further, even if that isolated comment was improper, the Idaho Supreme Court has held that when determining whether a district court abused its discretion the appellate court can sever the potentially inappropriate rationale if there are proper rationales also expressed by the district court. See State v. Matthews, 164 Idaho 605, ___, 434 P.3d 209, 214 (2019). The Idaho Supreme Court stated:

> The rationale expressed in the district court's statement can be severed from its decision to award partial restitution because there is no indication in the record that the comment was the district court's only rationale. The State argues that because the comment was the lone rationale voiced at the hearing, it must be taken as the only possible rationale. But this view isolates the district court's comment and strips the comment of the context in which it was made. We decline to adopt such a restrictive view. Here, the district court was not statutorily required to articulate its reasoning for declining to award total or partial restitution for prosecution costs. Therefore, the articulation of one reason does not erase all others.

Id. If the district court considered, either expressly or by implicitly, at least one proper factor, then the district court did not abuse its discretion. See id. Here, the record reflects the district court considered a multitude of proper factors including Whitecotton's prior criminal record, his prior failure on probation and his absconding behavior, and mitigating factors such as his volunteer work. (See 12/15/17 Tr., p. 224, L. 20 – p. 227, L. 7; 4/27/18 Tr., p. 14, L. 8 – p. 16, L. 18.) For example, the court reasoned:

> Sir, I think you're an undue risk to be placed on probation, because I think that you would violate your probation within a very short amount of time, and that's just based on your history.
>
> You absconded from Oregon. Since you were charged with a crime here, there have been more charges and allegations against you. You absconded from the court. You didn't show up for sentencing. You just really didn't do what you were supposed to do

(12/15/17 Tr., p. 225, Ls. 7-17.)

> I think you need correctional treatment based on the information that I have from the presentence investigation report. I think a lesser sentence would depreciate the seriousness of the crime. You're a convicted felon, caring [sic] a firearm. There are rules out there that say you can't do that. There is a reason for that. And, yet, you don't follow the rules.

(12/15/17 Tr., p. 226, Ls. 4-11.) The district court properly exercised its discretion when it imposed a sentence within the statutory limits. Whitecotton has failed to show an isolated comment, taken out of context, constituted a clear abuse of discretion.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court.

DATED this 7th day of May, 2019.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of May, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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/s/ Ted S. Tollefson
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TST/dd