2-12-2019

State v. Alexander Appellant's Brief Dckt. 45957

Electronically Filed
2/12/2019 12:48 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45957**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-17-25122**
v.	)	
	)	
BRANDON MICHAEL ALEXANDER,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Brandon Michael Alexander was charged with trafficking in heroin and possessing drug paraphernalia based on drug evidence discovered as the result of a *Terry* pat-down search. Prior to his trial, Mr. Alexander moved to suppress the evidence asserting that the search was unjustified and violated his constitutional rights against unreasonable searches and seizures. The district court denied the motion, the evidence was admitted at trial, and the jury convicted him on both charges.

On appeal, Mr. Alexander argues that the denial of suppression was erroneous because the State failed to carry its burden of showing that the objective facts known to the officer at the time of the *Terry* search justified a reasonable suspicion that Mr. Alexander was armed and presently dangerous. He asserts the district court's conclusion that the search was justified rests on factual findings that are not supported by the record and results from a misinterpretation and misapplication of the relevant factors identified in *State v. Bishop*, 146 Idaho 804, 819 (2009). The district court's decision to deny suppression should be reversed and Mr. Alexander's judgment of conviction should be vacated.

Statement of the Facts and Course of Proceedings

The following evidence was presented at the suppression hearing.[1] On a June afternoon, at around 3:40, Meridian Police Officer Kyle Ludwig was dispatched to the Blue Sky Bagel shop

[1] At the suppression hearing, the State called Meridian Police Officer Kyle Ludwig and the parties stipulated to the admission of the bodycam videos of Officer John Gonzalez (Exhibit B) and Officer Ludwig (Exhibit C). (Tr., p.6, L.16 – p.7, L.9.) The district court indicated in its written decision that it also considered the transcript of the July 12, 2017 preliminary hearing at which Officer Ludwig had testified. (R., p.85, n.1.) Copies of both bodycam videos have been augmented into the appellate record as Confidential Exhibits. (*See* Order Granting Motion to Augment, dated January 7, 2019.) Citations to "Ex.C" in this Appellant's Brief are to the copy

in Meridian in response to a caller's report that "a male and female had been spending an extended period of time in the store, going back and forth to the bathroom for lengthy periods of time." (Tr., p.10, L.18 – p.11, L.21.)[2] On his way to the location, Officer Ludwig called the reporting party – a bagel shop employee – who told the officer that the same couple was in the bagel restaurant the previous day, doing the same thing, and that during their shift employees found what they "believed to be drug paraphernalia" in the trash: a small, Ziploc-style bag with orange and black markings of a skull or skeleton. (Prelim.Tr., p.17, Ls.1-10; Tr., p.11, L.23 – p.12, L.7.)

Officer Ludwig arrived at Blue Sky Bagel with his assist officer, Sergeant Gonzalez; as the officers entered the restaurant they were directed to a female seated alone at one of the tables and were advised the male was in the bathroom. (Tr., p.12, Ls.14-24, p.29, Ls.10-14.) Officer Ludwig observed the female begin to manipulate her cell phone, looking up at the officers, and then going back to texting. (Tr., p.13, Ls.20-25, p.28, L.14 – p.29, L.9.) Officer Ludwig assumed the female was texting the male to notify of the police presence, and he immediately walked over to the bathroom and knocked on the door. (Tr., p.13, Ls.20-25, p.28, L.14 – p.29, L.9.) Officer Ludwig testified that he heard movement inside "but nothing that I deemed alarming, at the time [such as] the destruction of evidence or anything like that." (Tr., p.14, L.24 – p.15, L.2; Ex.C, 00:44 – 1:10.) Within a few seconds, Mr. Alexander stepped out and Officer Ludwig confronted him. (Tr., p.15, Ls.3-17; Ex.C, 00:44.)

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of Officer Ludwig's bodycam video admitted at the suppression hearing. The redacted version of Officer Ludwig's bodycam video admitted at trial as State's Exhibit 3 is also part of the appellate record.

[2] The transcripts of the suppression hearing, jury trial, and sentencing hearing are contained in a single transcript volume, cited as "Tr."; the transcript of the preliminary hearing is contained in a separate transcript volume, cited as "Prelim.Tr." "Exhibit C" refers to the video recording of

Officer Ludwig's bodycam video shows that Mr. Alexander stepped out of the bathroom slowly and calmly, with his hands empty and out in front him and plainly visible to the officer; the video shows Mr. Alexander was wearing basketball shorts and a short-sleeved shirt that revealed a bandage on his wrist. (Ex.C, 00:44.) The bodycam also recorded the brief discussion that ensued:

Officer Ludwig:	Can I see your ID real fast?
Mr. Alexander:	My wallet is out there.
Officer Ludwig:	What's going on with your wrist?
Mr. Alexander:	I have, like a, abscess.
Officer Ludwig:	You have an abscess? 'Kay. Is that from drug use?
Mr. Alexander:	Um. [Shrugs]
Officer Ludwig:	I can see your arm.
Mr. Alexander:	Yah.
Officer Ludwig:	You shoot up in the bathroom?
Mr. Alexander:	No, I did not.
Officer Ludwig:	Do me a favor. Put your hands on top of your head and lace your fingers for me….

(Ex.C, 00:44 – 1:10.)[3]

The video shows that Mr. Alexander promptly complied with the officer's instructions, placing his hands on his head and turning around with his back to the officer. (Ex.C, 00:44 –

Officer Ludwig's bodycam. Appellant's Counsel has attempted to accurately quote from its audio, recognizing the Exhibit is the official record.

[3] *After* he began the search, the officer asked additional, rapid-fire questions about what was in the pockets; as this Court can see from the video, Mr. Alexander's shorts are being manipulated by the officer *before* Mr. Alexander answers these questions. (*See*, Ex.C, 01:15-25.)

1:10.) Officer Ludwig testified he then conducted a pat-search for weapons. (Tr., p.20, Ls.6-18; Prelim.Tr., p.8, L.23 – p.12, L.17.) In conducting that search, the officer felt a syringe and foil, which he suspected were drug paraphernalia, which led to his discovering drug paraphernalia and a small knife; based on his discovery of those items, the officer placed Mr. Alexander in handcuffs and searched his shirt pockets and backpack, discovering additional drug evidence including several grams of heroin. (*See, e.g.*, Tr., p.20, Ls.6-18; Prelim.Tr., p.8, L.23 – p.12, L.17.)

The State charged Mr. Alexander with heroin trafficking and possession of drug paraphernalia. (R., pp.10-11, 24-25.) Mr. Ludwig filed a motion to suppress the evidence asserting that the pat-down search[4] was not consensual and done without reason to believe that he was presently armed and dangerous, in violation of his constitutional rights against unreasonable searches and seizures. (R., pp.55-62.) The State filed a brief in opposition. (R., pp.77-81.)

At the suppression hearing, Officer Ludwig testified that the gym-style basketball shorts Mr. Alexander was wearing were being "weighed down by apparently several objects in his pockets."[5] (Tr., p.17, Ls.5-8.) The officer testified he was concerned for his safety "based on my observations of the female that the male had been notified to law enforcement's presence and that potentially the items in his pocket could be used as a weapon." (Tr. p.17, Ls.21-22.) The officer also testified he "was concerned about the presence of syringes." (Tr., p.18, Ls.1-8.) According to the officer, Mr. Alexander was sweating profusely, his eyes had a "glazed-over kind of look to them" and was "moving very, very slowly as he exited the bathroom." (Tr., p.16,

[4] Trial counsel advised the district court that Mr. Alexander was not challenging the stop. (Tr., p.31, Ls.4-6.)

L.20 – p.17, L.5; p.21, Ls.14-21; Prelim.Tr., p.21, Ls.19-21.) The officer testified that based on these observations and his training and experience, he believed Mr. Alexander was under the influence of a controlled substance. (Tr., p.17, Ls.12-16.) When asked about safety, the officer stated,

> Obviously people that are under the influence of controlled substances can act in irrational or dangerous manners. An individual that is under the influence and has access to a knife or syringe or anything else can become concerned about the level of punishment that they're potentially looking at, become frightened by the presence of law enforcement and can lash out. …
>
> And just dealing with you know, with drugs you're typically dealing with weapons.

(Tr., p.19, Ls.3-22.)

The district court denied Mr. Alexander's motion to suppress. (R., pp.84-91.) Referencing the Idaho Supreme Court's multi-factored inquiry set forth in *State v. Bishop*, 146 Idaho 804, 819 (2019), the district court concluded that Officer Ludwig was justified in conducting the pat search based on its findings that the following factors were present:

> (1) The Defendant had bulging pockets that resembled a weapon, (2) the Defendant appeared nervous, (3) the Defendant appeared to be under the influence of drugs, and (4) the Defendant was uncooperative to the extent that he denied using or possession drugs. In addition to those factors, the officers had a tip that the Defendant might be selling drugs from the bathroom and the officers saw the female suspect send a text potentially alerting the Defendant about the police presence. …
>
> Based on the totality of the circumstances, Officer Ludwig made a reasonable inference that the defendant posed a safety risk *or* was potentially armed and dangerous.

(R., p.91.) (Emphasis added.)

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[5] The video from Officer Ludwig's bodycam does not show the area below Mr. Alexander's waist until after he turns around. (*See generally*, Ex.C.)

Mr. Alexander went to trial and the drug evidence was admitted. (*See* Tr., p.229, L.8 – p.237, L.17.) The jury found Mr. Alexander guilty of both charges. (Tr., p.305, Ls.2-7.) The district court sentenced Mr. Alexander to ten years, with three years fixed, on the trafficking charge, and imposed a concurrent term of 90 days' jail on the paraphernalia charge. (Tr., p.331, Ls.10-15.) Mr. Alexander filed a Notice of Appeal timely from his judgment of conviction. (R., pp.155-157.)

ISSUE

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

ARGUMENT

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

A. Introduction

Officer Ludwig violated Mr. Alexander's Fourth Amendment rights when, without an objective factual basis for suspecting Mr. Alexander was both armed and dangerous, the officer conducted a pat search of his person for weapons. As set forth below, the district court's conclusion that the officer was justified in conducting a weapons search is based on factual findings that are not supported by the record and results from a misinterpretation and misapplication of the relevant factors identified in *State v. Bishop*, 146 Idaho 804, 819 (2009). The district court's denial of suppression should be reversed and Mr. Alexander's convictions should be vacated.

B. Standard Of Review

Review of a trial court's decision denying a suppression motion is bifurcated. The appellate court defers to the trial courts factual findings unless they are shown to be clearly erroneous. *State v. Downing*, 163 Idaho 26, 31 (2017). "This Court maintains free review, however, over whether the facts surrounding the search and seizure satisfy constitutional requirements." *Id*.

The deference to the trial court's factual findings reflects "the trial court's special role to weigh conflicting evidence and judge the credibility of witnesses." *State v. Anderson*, 164 Idaho 309, 313 (2018). However, where the appellate court has exactly the same evidence before it as was considered by the district court, the appellate court does not extend the usual deference to the district court's evaluation of the evidence. *Id.* "Under these limited circumstances, the appellate court's role is to freely review the evidence and weigh the evidence in the same manner

as the trial court would do." *Id.*, 164 Idaho at 313 (citing *State v. Lankford*, 162 Idaho 477, 492 (2017)).

C. The District Court Erred When It Denied Suppression Because The Officer's Pat-Down Search Was Not Justified By A Reasonable Belief That Mr. Alexander Was Armed And Presently Dangerous

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. Evidence obtained in violation of the Fourth Amendment is subject to the exclusionary rule, which requires all evidence obtained as a direct or indirect result of the illegal search or seizure, *i.e.*, the "fruit of the poisonous tree," to be excluded. *E.g.*, *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963); *Segura v. United States*, 468 U.S. 796, 804 (1984) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)); *State v. Downing*, 163 Idaho 26, 30 (2017).

A warrantless search is *per se* unreasonable unless an exception to the warrant requirement exists. *Downing*, 163 Idaho at 30. "One such exception allows an officer to conduct a limited self-protective pat down search of a detainee in order to remove any weapons." *Id*. (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). The "stop and frisk" decisions begin with *Ohio v. Terry*, and its holding that:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

392 U.S. 1, 30 (1968).

Thus, a pat search, or weapons "frisk," is *only* justified "when, at the moment of the frisk, the officer has reason to believe that the individual he or she is investigating is 'armed and presently dangerous to the officer or to others' and nothing in the initial stages of the encounter dispels the officer's belief." *State v. Bishop*, 146 Idaho 804, 817 (quoting *Terry*, 392 U.S. at 24, 30) (emphasis added). "The test is an objective one that asks whether, under the totality of the circumstances, a reasonably prudent person would be justified in concluding that the individual posed a risk of danger." *Bishop*, at 817 (citing *State v. Henage*, 143 Idaho 655, 660–61 (2007) and *Terry*, 392 U.S. at 27.) "To satisfy this standard, the officer must indicate 'specific and articulable facts which, taken together with rational inferences from those facts,' in light of his or her experience, justify the officer's suspicion that the individual was armed and dangerous." *Bishop*, at 888-19; *Terry*, 392 U.S. at 21.

Even if there are grounds to justify a lawful investigatory stop, such grounds do not automatically justify a frisk for weapons. *State v. Freeland*, 162 Idaho 532, 533 (Ct. App. 2017). An officer may frisk an individual only if the officer can point to specific and articulable facts that would lead a reasonably prudent person to believe that the individual with whom the officer is dealing is armed and presently dangerous and nothing in the initial stages of the encounter serves to dispel this belief. *Id*.

In *Bishop*, the Idaho Supreme Court gleaned from *Terry* and its progeny[6] eight, non-exclusive, factors that influence whether a reasonable person in the officer's position would conclude that a particular individual was armed and dangerous:

[6] The Court cited the following: *Ybarra v. Illinois*, 444 U.S. 85, 93 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977); *State v. Henage*, 143 Idaho at 661–62; *State v. Davenport*, 144 Idaho 99, 103 (Ct. App. 2007); *State v. Holler*, 136 Idaho 287, 292 (Ct. App. 2001); *State v. Babb*, 133 Idaho 890, 893 (Ct. App. 2000); *State v. Simmons*, 120 Idaho 672, 677 (Ct. App. 1991).

> [1] whether there were any bulges in the suspect's clothing that resembled a weapon; [2] whether the encounter took place late at night or in a high crime area; and [3] whether the individual made threatening or furtive movements, [4] indicated that he or she possessed a weapon, [5] appeared nervous or agitated, [6] appeared to be under the influence of alcohol or illegal drugs, [7] was unwilling to cooperate, [8] or had a reputation for being dangerous.

146 Idaho 804, 819 (2009). The Court stated that, "Whether any of these considerations, taken together or by themselves, are enough to justify a *Terry* frisk depends on an analysis of the totality of the circumstances." *Id*. The Court also emphasized that the frisk must be justified based on *objective* facts, and that an officer's *subjective* feeling that his safety was compromised is irrelevant under the objective totality of the circumstances analysis. *Bishop*, at 819.

As explained below, the district court's application of the *Bishop* factors is flawed, as it relies on factual findings that are not supported by the record, and on an apparent misunderstanding and resulting misapplication of the law. Upon a correct application of the *Bishop* factors to the facts properly found, and to the undisputed evidence in the record, it is clear that the State failed to meet its burden of showing that the objective facts known to the officer at the moment of the search justified a belief that Mr. Alexander was armed and dangerous.

1. The District Court's Finding That Mr. Alexander "Had Bulging Pockets That Resembled A Weapon" Is Not Supported By The Record And Is Clearly Erroneous

Under the first *Bishop* factor, the district court found that "the Defendant had bulging pockets that resembled a weapon." (R., p.91.) The record, however, does not support this finding. The video does not show Mr. Alexander's shorts' pockets and the officer never testified that what he observed "resembled a weapon."

The video and officer testimony show that Mr. Alexander was wearing gym basketball-style shorts as he exited the bathroom. (Tr., p.17, Ls.5-8; *See generally* Ex.C.) While the video does not show Mr. Alexander's shorts' front pockets as he stepped out of the bathroom (*see*

generally Ex.C, 00:44 -1:11), Officer Ludwig described what he observed at that time. The officer described the shorts as being big "baggy shorts." (Prelim.Tr., p.8, Ls.1-3.) He testified he noticed "there were several items in his pocket that were weighing down his basketball shorts" (Prelim.Tr., p.7, Ls.21-23), and that based on the apparent texting from the female and the "weight and *unknown objects* in his pockets" he conducted the pat search "just to make sure there weren't any weapons" (Prelim.Tr., p.8, L.8-12). At the preliminary hearing, when asked what it was that made him believe the pockets contained a weapon, the officer answered, "*because of the weight* of it, I *felt that there could be* a firearm in the wallet – or in – in the pockets." (Prelim.Tr., p.18, Ls.11-13.) Subsequently, at the suppression hearing, the officer testified that, "the shorts were being weighed down by several objects in his pockets" (Tr., p.17, Ls.5-8), and that he was concerned "*potentially* the items in his pockets *could be utilized as* a weapon" (Tr., p.17, Ls.21-22).

Nowhere in the officer's testimony does he suggest that what he observed "resembled a weapon." The officer does not indicate the items appeared to have a weight that was different from items that are commonly carried in a man's front pockets, like keys, coins, or a cellphone. (*See generally*, Tr., p.8, L.23 – p.29, L.14; Prelim.Tr., p.4, L.5 – p.25, L.17.) Rather, the officer described them as "unknown objects" and said only that "there *could* be a firearm in there" and that he conducted the pat search "just to make sure there weren't any." (Prelim.Tr., p.8, Ls.8-12.)

Moreover, as the Idaho Supreme Court noted in *Bishop*,

> The fact that Bishop "could possibly" be carrying a weapon does not distinguish him from any other individual the police encounter. An officer can never be sure whether a person is carrying a weapon because Idaho law authorizes individuals to carry concealed weapons once they obtain a permit. *See* I.C. § 18–3302. If an officer's bare assertion that a suspect "could possibly" be carrying a weapon was enough to establish that a person posed a risk of danger, officers could frisk any person with whom they come into contact.

146 Idaho 804, 819 n.13.

Because there is no evidence to support the district court's erroneous finding, under the first *Bishop* factor, of any bulge observed in Mr. Alexander's clothing "that resembled a weapon," the district court erred in considering this as a factor in its analysis of totality of the circumstances to determine the reasonableness of the search.

2. The Encounter Did Not Take Place Late At Night Or In A High Crime Area

The second *Bishop* consideration is whether the encounter took place late at night or in a high crime area. 146 Idaho at 819. It is undisputed that the encounter took place inside the Blue Sky Bagel on Fairview Avenue, in Meridian, on a June afternoon. (Tr., p.11, Ls.9-14; R., p.85.) There is no finding or evidence to suggest this was an area or establishment known for its crime. (*See generally*, Tr., p.11, Ls.9-14.) Thus, the time and location of the encounter lend no support to a reasonable belief that Mr. Alexander was armed and presently dangerous.

3. Mr. Alexander Made No Threatening Or Furtive Movements

The third *Bishop* factor asks whether the individual "made threatening or furtive movements." 146 Idaho at 819. A review of Officer Ludwig's body video and the officer's own testimony demonstrates that Mr. Alexander was calm and his movements remarkably slow when the officer accosted him outside the bathroom. (*See* Ex.C, 00:44 – 1:10.) Mr. Alexander was standing, in full view of the officer; his hands were empty and held out where the officer could see them. (See Ex. C, 00:44 – 1:10.) At no point did Mr. Alexander ever attempt to put his hands in his pockets or make quick movements. (Ex.C, 00:44 – 1:10.) On the contrary, in the words of the officer, Mr. Alexander was "moving very, very slowly as he exited the bathroom" and even his speech was "slow paced." (Tr., p.21, Ls.14-21; Prelim.Tr., p.29, Ls.19-21.) Nor did

the officer testify that Mr. Alexander made any type of movement that concerned him. (*See generally*, Tr., p.8, L.23 – p.29, L.14; Prelim.Tr., p.4, L.5 – p.25, L.17.)

Instead, Officer Ludwig testified that his safety concern was based on his belief that while Mr. Alexander was in the bathroom, the female had sent him texts alerting him to law enforcement's presence. (Prelim.Tr., p.8, Ls.8-12; Tr., p.17, Ls.5-22.) The officer never articulated how or why alerting Mr. Alexander to the officers was connected to officer safety. (*See generally*, Tr., p.8, L.23 – p.29, L.14; Prelim.Tr., p.4, L.5 – p.25, L.17.) However, to the extent Officer Ludwig feared that the texts might prompt Mr. Alexander to attack the officers, that fear would have been dispelled once Mr. Alexander had stepped out of the bathroom, with empty hands visible to the officer, and with movements that were slow and non-threatening.

The facts in this case are like those in *Henage*, wherein the Idaho Supreme Court concluded the objective facts did not justify the officer's pat search. 143 Idaho at 622. Like the defendant in *Henage*, Mr. Alexander made no suspicious movements for his pockets or other areas from which a weapon might be readily retrieved. *Id.*

4. Mr. Alexander Did Not Indicate That He Had A Weapon

A review of the record makes clear that, prior to the pat search, Mr. Alexander did not indicate to the officer that he had a weapon. (*See* Ex.C, 00:44 – 1:10.) Thus, there is no justification for the pat search under the fourth *Bishop* factor.

5. Mr. Alexander Did Not Appear Nervous Or Agitated, Contrary To Finding Of The District Court

The district court's finding, made under *Bishop's* fifth factor, that Mr. Alexander appeared to be nervous (R., p.91), is not supported by the record and is clearly erroneous. Although the *prosecutor* argued to the district court that Mr. Alexander had appeared nervous to

the officer (Tr., p.35, Ls.13-14), neither Officer Ludwig's testimony nor the video from his bodycam support such a finding. First, Officer Ludwig did not testify that he thought or perceived Mr. Alexander to be nervous or agitated. (*See generally*, Tr., p.8, L.23 – p.29, L.14; Prelim.Tr., p.4, L.5 – p.25, L.17.)[7] On the contrary, the officer described Mr. Alexander as "moving very, very slowly as he exited the bathroom" and his speech was "slow paced." (Tr., p.21, Ls.14-21; Prelim.Tr., p.219, Ls.19-21.) Officer Ludwig testified that Mr. Alexander was sweating profusely, but the officer repeatedly attributed this symptom to the use and influence of some controlled substance. (Tr., p.16, L.20 – p.17, L.17.)

Second, as this Court will see upon its review of the same video, Mr. Alexander's behavior as he stepped out of the bathroom and was confronted by the officer does *not* show that he was "nervous or agitated." (*See* Ex.C, 00:44 – 1:10.) Just as the officer had described, the video shows that Mr. Alexander was "moving very, very slowly" and that his speech, likewise, was "slow paced." (*See* Ex.C, 00:44 – 1:10.) Mr. Alexander appears congenial, even if bewildered by having been accosted by a uniformed officer. (*See* Ex.C, 00:44 – 1:10.) As is evident from the video, there is nothing in Mr. Alexander's behavior, actions, or manners that shows a nervousness that is in any way indicative of dangerousness.

6. Officer Ludwig's *Generalized* Statements Regarding Possible Behaviors Of Persons Under The Influence Failed To Justify An *Individualized* Suspicion That Mr. Alexander Was Armed And Presently Dangerous

Although it appeared to Officer Ludwig that Mr. Alexander was under the influence of

[7] At one point during his question of the officer, the prosecutor stated, incorrectly, "you said he appeared nervous," and then asked, "Was that especially a concern for you?" (Tr., p.19, Ls.14-16.) Although Officer Ludwig answered "Yes," the explanation that followed made clear he was referring to Mr. Alexander's drug use; Officer Ludwig never mentioned nervousness nor described nervous behavior that he believed was indicative of dangerousness. (Tr., p.19, Ls.17-21; *see generally*, Tr., p.7, L.21 – p.29, L.24; Prelim.Tr., p.5, L.3 – p.25, L.9.)

drugs, the officer's *generalized* statement regarding possible behaviors of people who are under the influence, was insufficient to support the required *individualized* suspicion that Mr. Alexander was armed and dangerous. Officer Ludwig testified that, "Obviously people that are under the influence of controlled substances *can act* in irrational or dangerous manners." (Tr., p.19, Ls.3-5 (emphasis added).) However, such a generalized statement "does not constitute the type of specific articulable fact necessary to justify initiating a search under *Terry*." *See Henage*, 143 Idaho 662. Like the officer in *Henage*, Officer Ludwig failed to particularize his general statement about how "people … can act" to Mr. Alexander whose actual behavior, as shown in the video, was calm and non-threatening, and neither irrational nor dangerous.

Additionally, Mr. Alexander was observed by Blue Sky employees for extensive periods of time inside the restaurant, that day and the day before, but there is no evidence or any complaint of disruptive or aggressive behavior. Moreover, Officer Ludwig himself observed that, when he knocked on the bathroom door, he heard movement inside "but nothing that I deemed alarming," (Tr., p.14, L.24 – p.15, L.2), and that after Mr. Alexander stepped out of the bathroom he was calm and polite, and moved and spoke slowly (*See* Tr., p.21, Ls.14-21; Prelim.Tr., p.219, Ls.19-21; Ex.C, 00:44 – 1:10).

Thus, not only was the officer's general statement about "people that are under influence" not particularized to Mr. Alexander, the evidence showing Mr. Alexander's actual conduct and demeanor served to dispel any reasonable fear of *Mr. Alexander* acting in an irrational or dangerous manner.

7. The District Court Erred When It Concluded That Mr. Alexander Was "Uncooperative" When He Denied Using Or Possessing Drugs

The seventh *Bishop* factor asks whether the defendant "was unwilling to cooperate." 146 Idaho at 819. The district court erred in its application of this factor when it concluded that Mr. Alexander was "uncooperative to the extent that he denied using or possessing drugs." (R., p.91.) The district court appears to have misunderstood the meaning of "willingness to cooperate" used in *Bishop*, to mean admitting to the officer's accusations of criminal conduct, which has no bearing on the analysis of whether there is a reason to believe the individual is armed and dangerous.

The officer's questioning and Mr. Alexander's responses *prior*[8] to the pat search was as follows:

Officer Ludwig:	What's going on with your wrist?
Mr. Alexander:	I have, like a, abscess.
Officer Ludwig:	You have an abscess? 'Kay. Is that from drug use?
Mr. Alexander:	Um. [Shrugs]
Officer Ludwig:	I can see your arm.
Mr. Alexander:	Yah.
Officer Ludwig:	You shoot up in the bathroom?
Mr. Alexander:	No, I did not.
Officer Ludwig:	Do me a favor. Put your hands on top of your head and lace Your fingers for me….

(Ex.C, 00:44 – 1:10.)

[8] *After* he began the search, the officer asked additional, rapid-fire questions about what was in the pockets; as this Court can see from the video, Mr. Alexander's shorts are being manipulated by the officer *before* Mr. Alexander answers these questions. (*See*, Ex.C, 01:15-25).

Mr. Alexander's denial of the officer's very specific accusation, "You shoot up in the bathroom?" may well have been true; in any event, his denial does not show an unwillingness to cooperate that is indicative of dangerousness under *Bishop's* totality of the circumstances analysis.

Moreover, the district court's finding that Mr. Alexander was "uncooperative" within the meaning of *Bishop* is not supported by the evidence and is clearly erroneous. Officer Ludwig's bodycam video affirmatively demonstrates that prior to the pat search, Mr. Alexander was wholly cooperative and that he complied, completely, with all of Officer Ludwig's instructions and commands. (*See* Ex.C, 00:44 – 1:10.) Mr. Alexander came out of the bathroom in response to the officer's knock at the door; when the officer asked for ID, Mr. Alexander told him where it was and offered to retrieve it; and when the officer told him to place his hands on his head, lacing his fingers, and indicated for him to turn around, Mr. Alexander obeyed immediately and without questions or complaints. (*See* Ex.C, 00:44 – 1:10.) The district court's finding and conclusion that Mr. Alexander was "uncooperative" was erroneous and cannot be considered as a factor to justify Officer Ludwig's decision to conduct a weapons search.

8. There Is No Evidence That Mr. Alexander Had A Reputation For Dangerousness

Although not commented upon by the district court, there is no evidence that Mr. Alexander had a reputation of being a dangerous person. (*See generally*, Tr., p.7, L.21 – p.29, L.24; Prelim.Tr., p.5, L.3 – p.25, L.9.) As noted above, the police received reports that Mr. Alexander was observed in the bagel restaurant spending extended periods of time, on two separate days, going back and forth to the bathroom. (Tr., p.10, L.18 – p.11, L.21.) There was no report of any aggressive, violent, or other dangerous behaviors by Mr. Alexander during these

periods, and no other evidence that he was known or believed by anyone to be dangerous. (*See generally*, Tr., p.7, L.21 – pp.29-24; Prelim.Tr., p.5, L.3 – p.25, L.9.)

9. The Non-*Bishop* Factors Relied Upon By The District Court Do Not Support A Reasonable Suspicion That Mr. Alexander Was Armed And Presently Dangerous

The district court cited additional facts as justification for Officer Ludwig's conduct of weapons search: the "tip" from the bagel shop employee who "believed Mr. Alexander might be selling drugs"; and the officer's belief that the female was sending texts to Mr. Ludwig while he was in the bathroom. (R., p.91.) For the reasons below, neither one of these facts supports a reasonable belief, at the time of the pat search, that Mr. Alexander was armed and dangerous.

a. The Caller's Purported "Tip" Lacked An Objective Factual Basis

Contrary to the district court's analysis (R., p.91), the fact the officer received a "tip" that the bagel shop employee believed Mr. Alexander "might be selling drugs from the bathroom" cannot be used to justify Officer Ludwig's pat search, because that the tip was not supported by sufficient objective, articulable facts. While it is true that an officer's reasonable suspicion for *Terry* stop and frisk may be based on information supplied by a third person, *see Adams v. Williams*, 407 U.S. 143, 147 (1972); *United States v. Hensley*, 469 U.S. 221 (1985), the "reasonable suspicion" required to justify the officer's actions "is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330, 1 (1990); *see also State v. Zapata-Reyes*, 144 Idaho 703, 708 (Ct. App. 2007). The bagel shop employee's "tip" that Mr. Alexander was "selling drugs" provided neither. The information consists solely of the facts that (1) Mr. Alexander and a female had been spending extended periods of time in the restaurant that day, and the day before, going back and forth between the bathroom, and (2) a small plastic Ziploc bag with skull markings was found in a

trash can. (Tr., p.10, L.18 – p.11, L.21; Prelim.Tr., p.17, Ls.1-10.) However, there is no testimony or other evidence that indicated the significance of a baggie with skull markings, or that connected this baggie to Mr. Alexander *prior* to the time of the pat search. Nor is there any evidence of suspected drug transactions. (*See generally*, Tr., p.7, L.21 – p.29, L.24; Prelim.Tr., p.5, L.3 – p.25, L.9.) Like an "officer's hunch," a tipster's unsupported speculation or concern that a crime may be taking place cannot justify a warrantless search or seizure. *State v. Zapata-Reyes*, 144 Idaho 703, 708 (Ct. App. 2007). Thus, the caller's unsupported speculation that Mr. Alexander might be selling drugs cannot serve as a factor, in the totality of the circumstances analysis, to justify a reasonable believe that Mr. Alexander was armed and dangerous.

b. Officer Ludwig's Observation Of The Female Potentially Sending Texts To Mr. Alexander While He Was In The Bathroom Did Not Justify A Reasonable Belief That Mr. Alexander Was Armed And Dangerous

Officer Ludwig's observation of the female texting while Mr. Alexander was in the bathroom and potentially alerting him to the presence of the police did not provide justification for a belief that Mr. Alexander was armed and dangerous, because the officer's subsequent observations of Mr. Alexander as he stepped out of the bathroom served to dispel any reasonable fear of attack.

Officer Ludwig testified that, because he believed the woman was notifying the male in the bathroom about the officers' presence, he went immediately to the bathroom and knocked on the door. (Prelim.Tr., p.8, Ls.8-12; Tr., p.17, Ls.5-22.) Officer Ludwig did not articulate why the texting presented a safety concern; however, to the extent he feared that the texts might prompt Mr. Alexander to attack the officers, the officer's subsequent observations would have served to dispel such fear. After he knocked on the bathroom door, Officer Ludwig detected movement inside but "nothing that I deemed alarming, at that time." (Tr., p.14, L.24 – p.15,

L.2.) Mr. Alexander stepped out of the bathroom, in compliance with the officer's request; Mr. Alexander spoke and moved calmly and slowly, with empty hands that were visible to the officer. (*See* Ex.C, 00:44 – 1:10.) *Accord Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979) (holding weapons pat search was unjustified where defendant's hands were empty, he gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening). The fact the officer had observed the woman texting prior to his encounter with Mr. Alexander, does not provide justification for reasonable belief, at the moment of the pat search, that Mr. Alexander was armed and presently dangerous.

Application of the *Bishop* factors, under the totality of the circumstances analysis, shows that a reasonable person in Officer Ludwig's position would *not* conclude that Mr. Alexander was armed and presently dangerous. The encounter occurred in a restaurant in the middle of a summer day. Mr. Alexander and the female had been observed for extensive periods of time, that day and the day before, without any reported incident of disruptive, violent, or erratic behavior. Mr. Alexander was wearing gym basketball shorts and carried items in his pockets, but nothing that resembled a weapon. Even if the texting female led the officer to fear that Mr. Alexander was in the bathroom planning to attack, such fear was dispelled once the officer observed Mr. Alexander step out of the bathroom, empty handed, and politely engage with the officer. Officer Ludwig's generalized statements about the possible actions of persons under the influence of drugs were neither particularized to Mr. Alexander nor consistent with the evidence of Mr. Alexander's actual demeanor or conduct.

The totality of the circumstances in this case are insufficient to support a reasonable belief that, at the moment of the pat search, Mr. Alexander was armed and presently dangerous.

Officer Ludwig's search of Mr. Alexander for weapons was constitutionally unlawful, and the district court's denial of Mr. Alexander's motion to suppress was erroneous. The drug evidence discovered as the result of the unlawful frisk should not have been admitted at Mr. Alexander's trial and the judgment, entered upon the jury's verdicts convicting him of trafficking in heroin and possession of the drug paraphernalia, should be vacated.

CONCLUSION

Mr. Alexander respectfully asks that this Court reverse the district court's order denying suppression, vacate his judgment of conviction for possession of a controlled substance and possession of drug paraphernalia, and remand his case to the district court for further proceedings.

DATED this 12th day of February, 2019.

/s/ Kimberly A. Coster
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of February, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:
Delivered via e-mail:

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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

KAC/eas