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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 vs.)
)
 KENNETH RANDALL SMITH,)
)
 Defendant-Appellant.)
)
)

No. 41661
Kootenai Co. Case No.
CR-2012-17350

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

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District Judge**

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Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

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STATEMENT OF THE CASE

Nature Of The Case

In a consolidated appeal, Kenneth Randall Smith appeals from his judgment of conviction for possession of methamphetamine in Docket No. 40996 and from his judgment of conviction for aggravated assault, aggravated battery, and driving under the influence in Docket No. 41661. On appeal, he contends that the district court erred by denying his motions to suppress evidence, and abused its discretion by allowing the state to impeach his credibility with evidence of a prior burglary conviction.

Statement Of The Facts And Course Of The Proceedings

On August 24, 2012, at approximately 2:30 a.m., Officer Cwik pulled over Smith for failing to signal. (3/4/2013 Tr., p.10, L.11 – p.11, L.9.) Contacting Smith, Officer Cwik noticed a weapon under the driver's seat and asked Smith to step out of the car. (Id., p.11, L.17 – p.14, L.20.) Smith relaxed shirtless against the trunk of his car, removing his jacket and laying it behind him. (State's Ex. 1; 3/4/2013 Tr., p.15, L.16 – p.16, L.12.) As the officer ran Smith's information through dispatch, he learned that Smith had a history of physical altercations with the police. (3/4/2013 Tr., p.17, L.10 – p.18, L.18.) Smith's license was also expired. (Id., p.18, L.15.) Officer Cwik informed Smith that his license was expired, and Smith, claiming that a valid license with his registration was inside the car, gave the officer permission to search through the front seat of the car to locate them. (Id., p.20, L.4 – p.21, L.2; 4/19/2013 Tr., p.63, Ls.7-10.)

Before searching the vehicle, Officer Cwik patted down Smith's jacket. (3/4/2013 Tr., p.21, Ls.3-7.) Inside a pocket he located a sock containing a "hard rectangular object" which he recognized as "sort of a homemade, fashioned weapon." (Id., p.21,

Ls.17-20; p.23, Ls.5-25.) The rectangular object turned out to be a container. (Id., p.24, L.24 – p.25, L.2.) The container was not secure and, as Officer Cwik shook it out of the sock to neutralize the weapon, its contents spilled out, revealing syringes and a baggy with white residue. (Id., p.24, L.10 – p.26, L.8.) Smith admitted that the items belonged to him. (Id., p.31, Ls.4-18.) Officer Cwik seized the contraband and, after citing Smith for possession of paraphernalia, released him. (Id., p.32, Ls.9-12.) The white residue later tested positive for methamphetamine. (40996 R., pp.10-11.)

While he was still at large on September 21, 2012, Smith, again shirtless, engaged in altercations at an apartment complex. Witnesses claimed that Smith first used his chest to shove Ms. Pichotta. (10/1/2013 Tr., p.88, L.19 – p.89, L.9; p.100, L.25 – p.101, L.17.) Then, when her sister, Ms. Ferguson, distracted his attention, he used his chest to shove her around. (Id., p.90, L.10 – p.91, L.6; p.102, Ls.10-18.) A roommate called 911 and read off Smith's license plate number. (Id., p.90, Ls.4-8.) Smith yelled at them not to call the police and then quickly drove away from the apartment complex. (Id., p.103, Ls.4-15.) The sisters reported the incident to the police. (Id., p.92, Ls.17-21.)

Meanwhile, Ms. Sullivan was at home with her husband, Mr. Brumbaugh, when they heard a loud crash. (Id., p.108, L.22 – p.109, L.14; p.130, L.20-22.) Ms. Sullivan ran outside to investigate and saw Smith's car swerving down the middle of the road. (Id., p.110, L.8 – p.111, L.6.) She heard the vehicle stop just around the corner and, with her husband, decided to follow the vehicle to get its license plate number and report a possible DUI. (Id., p.111, Ls.10-22; p.131, Ls.16-19.) Ms. Sullivan stopped alongside Smith's car and Mr. Brumbaugh, sitting in the passenger seat, rolled down the

window to see if Smith, who was standing outside of his car, was okay. (Id., p.114, Ls.2-23; p.131 L.25 – p.132, L.8.) Smith responded by swinging a machete into their car and striking Mr. Brumbaugh's neck. (Id., p.114, L.24 – p.115, L.1; p.132, Ls.8-9.) Mr. Brumbaugh pushed the machete away while Ms. Sullivan drove off and reported the incident to the police. (Id., p.115, Ls.5-10; p.133, Ls.8-18.)

Smith then began shouting at Mr. Moorhouse and approaching him aggressively. (Id., p.149, L.14 – p.150, L.2.) Mr. Moorhouse tried to explain that he was at his house and he was going back inside, but Smith just became more agitated and approached Mr. Moorhouse more quickly. (Id., p.150, Ls.2-6.) Mr. Moorhouse retreated around the front of his truck. (Id., p.150, Ls.6-12.) Smith, brandishing his machete, then chased Mr. Moorhouse around Mr. Moorhouse's truck several times while threatening decapitations. (Id., p.117, Ls.7-24; p.133, L.25 – p.134, L.7; p.150, L.12 – p.151, L.21.) The chase around the vehicle finally ended when a friend of Mr. Moorhouse intervened and Smith left the scene. (Id., p.152, Ls.3-14.) Mr. Moorhouse then reported the incident to police. (Id., p.153, Ls.7-12.)

Responding to the several reports, police were later able to locate Smith, who was riding a bike. (Id., p.170, Ls.5-20.) As police pursued him with their emergency overhead lights engaged, Smith attempted to evade them. (Id., p.170, L.21 – p.171, L.13.) Eventually, police were able to surround Smith. (Id., p.171, Ls.14-23.) Smith then aggressively approached police until an officer deployed his CED (taser) on him. (41661 R., pp.15-16.) Smith fell to the ground, but attempted to rip the wires off while continuing to disregard police commands. (Id., p.16.) After the officer activated the taser a second time, Smith complied. (Id.)

Under arrest, Smith was placed into the backseat of a patrol car. (Id., p.14.) Smith began chewing on the door of the patrol car. (Id.) Police then transported Smith to Kootenai Medical Center where, after receiving his license suspension advisory, he cooperated with a warrantless blood draw. (10/1/2013 Tr., p.175, L.18 – p.176, L.20; 41661 R., pp.15, 59.) The blood examination revealed that Smith had recently used methamphetamine. (10/1/2013 Tr., p.183, L.7 – p.184, L.6.)

When Smith fell to the ground after being tasered, he dropped a syringe and pocket knife that police recovered. (41661 R., p.14.) Police also recovered Smith's machete. (10/1/2013 Tr., p.69, Ls.2-13.)

In Docket No. 40996, arising out of the incident from August 24, 2012, the state charged Smith with possession of methamphetamine and with being a persistent violator of the law. (40996 R., pp.34-35.) Smith filed a motion to suppress the evidence discovered during the course of the pat down of the jacket. (Id., pp.40-42.) Following a hearing on the motion (Id., pp.83-84; 3/4/2013 Tr.), the district court ultimately denied Smith's motion (40996 R., p.120). Smith entered a conditional guilty plea to the possession charge, reserving his right to appeal the denial of his suppression motion. (Id., pp.108-09.)

In Docket No. 41661, arising out of the several incidents from September 21, 2012, the state charged Smith with aggravated assault for chasing Mr. Moorehouse around his vehicle while brandishing the machete; aggravated battery for cutting Mr. Brumbaugh's neck with the machete; a misdemeanor for driving under the influence of methamphetamine; two batteries for pushing Ms. Pichotta and Ms. Ferguson; malicious injury to property for chewing on the door of the police vehicle; possession of

paraphernalia for the syringe; and resisting and obstructing arrest. (41661 R., pp.97-100.) The state also filed enhancements against Smith for use of a deadly weapon and being a persistent violator of the law. (Id.)

Smith filed a motion *in limine* to exclude testimony relating to his prior criminal convictions, especially his 2000 conviction for burglary out of Washington; to exclude testimony relating to the syringe police found on Smith; and to exclude testimony relating to the lab results of Smith's blood test, which revealed the presence of methamphetamine. (Id., pp.142-44.) At a hearing on the motion, the state expressed that it had no intention to bring in the prior convictions, except for the burglary for the purpose of impeachment. (Id., pp.157-59; 5/13/2013 Tr., p.20, L.16 – p.23, L.8.) The district court denied the motion in regards to the prior burglary conviction. (41661 R., p.167; 5/13/2013 Tr., p.26, L.20 – p.27, L.10.) Recognizing that parts III and IV of the motion were really motions to dismiss charges, the district court denied those portions without prejudice. (41661 R., p.167; 5/13/2013 Tr., p.27, L.11 – p.28, L.8.)

Smith then filed a motion to suppress the evidence from the blood draw. (41661 R., pp.160-63.) The district court held a hearing on the motion (Id., pp.183-84; 5/31/2013 Tr.), and ultimately denied it (41661 R., pp.185, 197).

Smith pleaded guilty to the misdemeanors of injury to property, possession of paraphernalia, and resisting and obstructing an officer (Id., p.231; 9/20/2013 Tr. p.54, L.2 – p.55, L.6; p.56, L.22 – p.57, L.5), and went to trial on the remaining counts (41661 R., pp.247-72). The jury found Smith guilty of aggravated battery, aggravated assault, and driving under the influence, but acquitted him of the other two batteries. (41661 R., pp.317-18.)

In accordance with Smith's guilty plea in Docket No. 40996, the district court entered judgment against Smith for possession of methamphetamine and sentenced him to a term of five years fixed. (40996 R., pp.131-35.) Pursuant to the jury's finding of guilt in Docket No. 41661, the district court entered judgment against Smith and sentenced him to unified terms of 23 years with eight years fixed each on the aggravated assault and on the aggravated battery. (41661 R., pp.331-35.) The district court ordered that Smith serve all sentences concurrently. (40996 R., p.132; 41661 R., p.332.)

Smith filed timely notices of appeal. (40996 R., pp.111-13; 41661 R., pp.345-48.)

ISSUES

Smith states the issues on appeal as:

1. Did the district court err when it denied Mr. Smith's motion to suppress in the possession case?
2. Did the district court err when it denied Mr. Smith's motion to suppress in the aggravated assault case?
3. Did the district court abuse its discretion when it denied Mr. Smith's motion in limine in the aggravated assault case and permitted the State to impeach his credibility with his prior conviction for burglary?

(Appellant's brief, p.12.)

The state rephrases the issues as:

1. Has Smith failed to show error in the denial of his motion to suppress evidence of methamphetamine discovered in the course of a Terry¹ frisk?
2. Has Smith failed to show error in the denial of his motion to suppress the evidence acquired through the warrantless blood draw?
3. Has Smith failed to show that the district court abused its discretion by allowing the state to impeach Smith's credibility with his prior conviction for burglary?

¹ Terry v. Ohio, 392 U.S. 1 (1960).

ARGUMENT

I.

Smith Has Failed To Show That The District Court Erred By Denying His Motion To Suppress Evidence Discovered In The Course Of A Terry Frisk

A. Introduction

On appeal, Smith challenges the district court's denial of his suppression motion, arguing that the traffic stop was unlawfully extended, that the Terry frisk of Smith's jacket was unlawful, and that Smith's Miranda² rights were violated when officers asked him if he owned the items in the container found during the Terry frisk. (Appellant's brief, pp.13-26.) None of these arguments have merit. Application of the correct legal standards to the relevant facts found by the district court shows no error in the denial of Smith's suppression motion.

B. Standard Of Review

On review of a ruling on a motion to suppress, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence and exercises free review of the trial court's determination as to whether constitutional standards have been satisfied in light of the facts found. State v. Willoughby, 147 Idaho 482, 485-86, 211 P.3d 91, 94-95 (2009). 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. State v. Valdez-Molina, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995).

² Miranda v. Arizona, 384 U.S. 436 (1966).

C. Officers Did Not Violate Smith's Fourth Amendment Rights

The Fourth Amendment of the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV. The right of persons to be free from government intrusions “must be shaped by the context in which it is asserted. For ‘what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.’” Terry v. Ohio, 392 U.S. 1, 9 (1960) (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)). “When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.” Terry, 392 U.S. at 24. “The purpose of this limited search is not to discover evidence of a crime, but to allow the Officer to pursue his investigation without fear of violence.” Adams v. Williams, 407 U.S. 143, 146 (1972). In determining the validity of a Terry search, the question for reviewing courts is an objective one: “Would 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 (citing Carroll v. United States, 267 U.S. 132 (1925); Beck v. Ohio, 379 U.S. 89, 96-97 (1964)).

While routine traffic stops by police officers implicate the Fourth Amendment's prohibition against unreasonable searches and seizures, the reasonableness of a traffic stop is also analyzed under Terry, because a traffic stop is more similar to an

investigative detention than a custodial arrest. Delaware v. Prouse, 440 U.S. 648, 653 (1979); State v. Sheldon, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003). “An investigative detention is permissible if it is based upon specific articulable facts which justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity.” Sheldon, 139 Idaho at 983, 88 P.3d at 1223 (citing Terry, 392 U.S. at 21; United States v. Cortez, 449 U.S. 411, 417 (1981)).

An investigative detention must not only be justified at its beginning, but must also be conducted in a manner that is reasonably related in scope and duration to the circumstances which justified the interference in the first place. Florida v. Royer, 460 U.S. 491, 499-500 (1983); State v. Roe, 140 Idaho 176, 181, 90 P.3d 926, 931 (Ct. App. 2004). “The purpose of a stop is not permanently fixed, however, at the moment the stop is initiated, for during the course of the detention there may evolve suspicion of criminality different from that which initially prompted the stop.” Sheldon, 139 Idaho at 984, 88 P.3d at 1224. Routine traffic stops may turn up suspicious circumstances which could justify an officer asking questions unrelated to the stop. State v. Myers, 118 Idaho 608, 613, 798 P.2d 453, 458 (Ct. App. 1990). “The officer’s observations, general inquiries, and events succeeding the stop may—and often do—give rise to legitimate reasons for particular lines of inquiry and further investigation by an officer.” Id.

Application of the foregoing standards to the facts found by the district court shows no violation of Smith’s Fourth Amendment rights.

1. Smith’s Detention Was Not Unlawfully Extended

As he did below, Smith asserts on appeal that his detention was unlawfully extended. (Appellant’s brief, pp.15-22.) It was not.

In relation to this issue, the district court explained that “the facts become particularly clear upon reviewing the video [State’s Ex. 1]” that there was no unlawful extension of the detention. (4/19/2013 Tr., p.62, L.23 – p.63, L.21.) Upon contact, Officer Cwik requested Smith’s license and proof of insurance. (Id., p.63, Ls.3-5.) The license Smith produced was expired. (Id., p.63, Ls.5-7.) Smith claimed that he had valid documents in the car and gave the officer permission to search the vehicle for those documents. (Id., p.63, Ls.7-10.)

An officer may lawfully request a driver’s license and proof of insurance. State v. George, 127 Idaho 693, 699, 905 P.2d 626, 632 (1995). Officers need to correctly identify suspects and “determin[e] the validity and status of the driver’s license upon which that identification is based.” State v. Godwin, 121 Idaho 517, 520, 826 P.2d 478, 481 (Ct. App. 1991). Therefore, Officer Cwik did not, indeed could not, extend the detention’s duration by merely requesting and receiving consent to locate Smith’s license, registration, and proof of insurance.

2. Officer Cwik’s Terry Frisk Of Smith’s Jacket Was Reasonable

Smith also asserts, as he did below, that the Terry frisk of his jacket was unlawful. (Appellant’s brief, pp.17-22.) Terry frisks are justified when the officer has reason to believe that the individual he is investigating is “armed and presently dangerous to the officer or to others.” State v. Bishop, 146 Idaho 804, 818, 203 P.3d 1203, 1217 (2009) (citing Terry, 392 U.S. at 24). “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.” Id. (citing State v. Henage, 143 Idaho 655, 660-61, 152 P.3d 16, 21-22 (2007)).

The district court found the following relevant facts: The stop occurred late at night. (4/19/2013 Tr., p.65, L.23.) During the course of the stop, Officer Cwik saw weapons inside Smith's vehicle. (Id., p.63, L.24 – p.64, L.1.) Dispatch also advised that Smith had previously been charged with assault on an officer. (Id., p.64, Ls.1-5; see also 3/4/2013 Tr., p.18, Ls.15-18.) The jacket was "well within [Smith's] reach." (4/19/2013 Tr., p.64, Ls.7-9.) And when Officer Cwik went to examine the jacket, Smith became agitated and lunged at the officer. (Id., p.64, Ls.18-22; p.66, Ls.3-6.) Based on the totality of these circumstances, the district court found that Officer Cwik's frisk of Smith's jacket was reasonable because Smith posed a risk of danger.

Smith also asserts on appeal that, even if Officer Cwik was justified in performing a Terry frisk, the officer exceeded the scope of that frisk when he removed the canister from the sock. (Appellant's brief, pp.20-22.) Smith's argument fails. The justification for a Terry search is the protection of police officers in the performance of their duties. Terry, 392 U.S. at 27. While patting down Smith's jacket, Officer Cwik discovered a sock containing a hard rectangular object. (3/4/2013 Tr., p.21, Ls.17-23; p.23, Ls.5-18.) As Officer Cwik testified, and Idaho caselaw confirms, a sock containing a solid object can be used as a deadly weapon. (Id., p.10, Ls.8-10; p.23, Ls.15-25; see also State v. Creech, 105 Idaho 362, 364, 670 P.2d 463, 465 (1983).) Once a weapon has been discovered, it would be "unreasonable to deny the officer the power to take necessary measures to ... neutralize the threat of physical harm." Terry, 392 U.S. at 24.

Smith contends that, once "the sock was in the officer's possession, it was not necessary to further examine it or remove its contents to discover weapons which might have been used to harm the officer." (Appellant's brief, p.20.) But this entirely misses

the point. Neither the sock nor the solid canister, alone, is a weapon. It is the solid object inside of the sock that can be used as a weapon to deadly effect. See, e.g., Creech, supra. By separating the canister from the sock, Officer Cwik neutralized the threatening weapon—which is the purpose of a Terry frisk.

Smith's attempts to analogize his case to State v. Faith, 141 Idaho 728, 117 P.3d 142 (Ct. App. 2005), are equally unavailing. In Faith, officers found an Altoids tin on the suspect which, after seizing, they then opened to ensure that it did not contain weapons. Faith, 141 Idaho at 730, 117 P.3d at 144. But, as the Court explained, an Altoids tin is just a container, not a weapon. Id. The officers, therefore, were not permitted to seize the tin, let alone search it. Id. Unlike an Altoids tin, the sock-with-solid-object combo can be used as a weapon, and it was reasonable for the officer to neutralize that weapon by disassembling it. Had the officer opened the canister to search its contents after neutralizing the threat, then this case would be like Faith. But that is not what happened. The canister was not secured and simply fell open when removed from the sock, exposing its contents to the officer's plain view. (3/4/2013 Tr., p.24, L.15 – p.25, L.23.) The Court's holding in Faith does not apply.

Because Smith posed a threat, Officer Cwik's Terry frisk was reasonable. When that frisk revealed a weapon, neutralizing the threat by seizing and disassembling the weapon was also reasonable. The district court correctly denied Smith's suppression motion because Smith's rights were not violated. The district court should be affirmed.

D. Officers Did Not Violate Smith's *Miranda* Rights

As he did below, Smith asserts on appeal that his Miranda rights were violated by the police when he admitted that the syringes and baggie that fell out of the canister

belonged to him. (Appellant's brief, pp.22-26.) Smith's rights were not violated because Smith was never in custody such that Miranda would apply.

To safeguard the privilege against self-incrimination afforded by the Fifth Amendment of the United States Constitution, the United States Supreme Court held in Miranda v. Arizona that before an individual is subjected to custodial interrogation, the interrogating officers must advise the individual of certain rights, including the right to remain silent. Id., 384 U.S. at 478-79. Miranda rights may not be invoked, however, unless a defendant is in custody equivalent to formal arrest. State v. Hurst, 151 Idaho 430, 436, 258 P.3d 950, 956 (Ct. App. 2011). The defendant bears the burden of establishing that he was in custody for purposes of Miranda. State v. James, 148 Idaho 574, 577, 225 P.3d 1169, 1172 (2010).

The test for determining whether an individual is in custody for purposes of Miranda is whether, objectively considering the totality of the circumstances surrounding an interrogation, there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)). Relevant factors in making this determination include the time, location, public visibility of the interrogation, the conduct of the officers, the nature and manner of the questioning, the extent to which officers confront the suspect with evidence of his guilt, and the presence of other persons. State v. Albaugh, 133 Idaho 587, 591, 990 P.2d 753, 757 (Ct. App. 1999); State v. Medrano, 123 Idaho 114, 117, 844 P.2d 1364, 1367 (Ct. App. 1992). Because the "in custody" test for Miranda requires a restraint on freedom associated with formal arrest, "the temporary and relatively nonthreatening detention involved in a traffic stop

... does not constitute Miranda custody.” Maryland v. Shatzer, 559 U.S. 98, 113 (2010) (citing Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984)).

The district court, objectively examining the totality of the circumstances, found that Smith was not in custody and, therefore, the dictates of Miranda did not apply. (4/19/2013 Tr., p.68, Ls.4-8.) Specifically, the district court found that (1) Smith was not arrested; (2) he was not handcuffed; (3) he was not placed in the police car; (4) the questioning took place in an open space between the police car and Smith’s car; (5) there were only two policemen present and only one of those questioned Smith; (6) the questioning only took a few minutes; and (7) Smith was released following the questioning. (Id., p.67, L.18 – p.68, L.3.) These findings are supported by the record (see State’s Ex. 1), and are undisputed on appeal. Based on the totality of these circumstances, the district court correctly determined that Smith was not in custody and properly denied his suppression motion.

On appeal, Smith asserts that he was in custody because, with police present, he might not feel free to go. (Appellant’s brief, pp.23-26.) But that does not show custody. As quoted above, “the temporary and relatively nonthreatening detention involved in a traffic stop ... does not constitute Miranda custody.” Shatzer, 559 U.S. at 113. Smith failed to meet his burden of showing that he was in custody equivalent to formal arrest such that the dictates of Miranda would apply to his detention. The district court correctly denied his suppression motion and should be affirmed.³

³ It is also worth noting that, even if officers were required to give Miranda warnings in this case, the failure to do so would constitute harmless error because questioning Smith was not necessary to establish his ownership over the contraband. As can be seen in the video recording of the incident, Smith repeatedly and strenuously asserted

II.

Smith Has Failed To Show Error In The Denial Of His Motion To Suppress The Evidence Acquired Through The Warrantless Blood Draw

A. Introduction

Below, Smith was subject to a warrantless blood draw under Idaho Code § 18-8002. (41661 R., pp.28, 42.) Smith later filed a motion to suppress the evidence acquired through that blood draw. (Id., pp.160-63.) Applying the legal precedents in effect at the time, the district court held that Smith impliedly consented to the blood draw and that implied consent is irrevocable and denied the motion. (5/31/2013 Tr., p.46, L.16 – p.47, L.20.)

During the pendency of this appeal, the Idaho Supreme Court adopted a new implied consent standard for warrantless blood draws in State v. Wulff, 157 Idaho 416, 337 P.3d 575 (2014). Applying this new legal standard to the facts before the district court still shows no error in the district court's denial of Smith's suppression motion. The district court's order should therefore be affirmed.

B. Standard Of Review

On review of a ruling on a motion to suppress, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence and exercises free review of the trial court's determination as to whether constitutional standards have been satisfied in light of the facts found. State v. Willoughby, 147 Idaho 482, 485-86, 211 P.3d 91, 94-95 (2009). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual

his ownership over the container, which he claimed held his "sacred" "gay porn," before officers ever questioned him regarding the container or its contents. (State's Ex. 1.)

inferences is vested in the trial court. State v. Valdez-Molina, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995).

C. Because The Record Is Devoid Of Evidence That Smith Revoked His Implied Consent, That Consent Was Valid

The Fourth Amendment of the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV. Requiring that a person submit to a blood alcohol test is a search and seizure under the Fourth Amendment. Schmerber v. California, 384 U.S. 757, 767 (1966). “[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” Katz v. United States, 389 U.S. 347, 357 (1967). One exception to the warrant requirement is a search done pursuant to consent. Schneekloth v. Bustamonte, 412 U.S. 218, 219 (1973) (citations omitted). The voluntariness of an individual’s consent is a question of fact to be determined based upon the totality of the circumstances. Id. at 227.

Consent may be implied under Idaho’s implied consent statute. State v. Diaz, 144 Idaho 300, 302-03, 160 P.3d 739, 741-42 (2007). As recently held by the Idaho Supreme Court, for implied consent under Idaho Code § 18-8002 to be voluntary, (1) drivers must give their initial consent voluntarily and (2) drivers must continue to give voluntary consent. Wulff, 157 Idaho at ____, 337 P.3d at 582. “Drivers in Idaho give their initial consent to evidentiary testing by driving on Idaho roads voluntarily.” Id. (citing Diaz, 144 Idaho at 303, 160 P.3d at 742). That Smith voluntarily drove on Idaho

roads is uncontested. Therefore, his initial implied consent for evidentiary testing was voluntary and valid.

The question remains whether Smith's consent continued to be valid. The district court, applying the legal standards in existence at the time, noted that Smith could not "withdraw the consent that was implied under the statute." (5/31/2013 Tr., p.47, Ls.8-11 (citing State v. Wheeler, 149 Idaho 364, 233 P.3d 1286 (Ct. App. 2010).) That is no longer good law. The Idaho Supreme Court now recognizes that a driver may revoke or withdraw his implied consent. State v. Halseth, Docket No. 41169, 2014 Opinion No. 127, pp.5-6 (Idaho, December 2, 2014). But to do so, the driver must at least object to the blood draw. Id.

Below, Smith argued that he did not affirmatively consent to the blood draw. (5/31/2013 Tr., p.40, Ls.5-14.) But he was not required to affirmatively consent to the blood draw. By driving on Idaho roads, Smith impliedly consented to the blood draw. Wulff, 157 Idaho at ____, 337 P.3d at 582. While implied consent is revocable, until it is unambiguously revoked, it is valid. Asserting that Smith did not affirmatively consent to the blood draw is a markedly different contention than asserting that he subsequently revoked or withdrew his implied consent.

There is no evidence that suggests, let alone demonstrates, that Smith revoked or withdrew his implied consent. At no time below did Smith assert that he revoked his implied consent. (See 41661 R., pp.160-63, 177-82; 5/31/2013 Tr., p.40, L.20 – p.43, L.7; p.44, L.5 – p.45, L.2.) There is no evidence that he objected to the blood draw. (See 41661 R., pp.27-28, 43-45.) The record shows that when given the suspension advisory, Smith did not refuse evidentiary testing. (Id., p.42.) In fact, the only testimony

presented about the blood draw was that Smith “cooperated.” (10/1/2013 Tr., p.176, Ls.6-20.)

The analysis begins with Smith’s valid implied consent. Unless and until Smith revokes that consent, it stands. Smith submitted to the blood draw; he did not refuse it. Not only is there no evidence, there is no argument that Smith unambiguously revoked his implied consent at any time below. Applying the new standard articulated by the Idaho Supreme Court in Wulff, the blood draw was valid. The district court therefore did not err by denying Smith’s suppression motion and its order should be affirmed.

D. Harmless Error

Even if the record demonstrated sufficient evidence that Smith had in fact withdrawn his implied consent, admission of evidence from the blood draw would still constitute harmless error in regards to Smith’s felony convictions. “[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one.” Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). The standard for determining whether error is harmless is whether there is a reasonable possibility that the error contributed to the jury’s verdict “and that the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” State v. Jones, 125 Idaho 477, 488, 873 P.2d 122, 133 (1994). “An error is harmless beyond a reasonable doubt if the Court can conclude, based upon the evidence and argument presented during the trial, that the jury would have reached the same result absent the error.” State v. Christiansen, 144 Idaho 463, 471, 163 P.3d 1175, 1183 (2007) (citation omitted).

The evidence that Smith cut Mr. Brumbaugh’s neck with his machete and chased Mr. Moorhouse around his truck while brandishing that machete was overwhelming.

The admission of evidence from the warrantless blood draw showing that Smith had recently used methamphetamine would have had no effect on either of Smith's felony convictions. This Court can therefore conclude that any error in admitting the evidence is harmless in regards to those convictions.⁴

III.

Smith Has Failed To Show That The District Court Abused Its Discretion By Allowing The State To Admit Evidence Of Smith's Prior Burglary Conviction To Impeach Him

A. Introduction

Smith argues that the district court abused its discretion by denying his motion *in limine* and allowing the state to impeach Smith with evidence of his prior conviction for burglary. (Appellant's brief, pp.34-41.) Application of the correct legal standards to the facts of this case shows no abuse of the court's discretion.

B. Standard Of Review

The trial court has broad discretion in the admission of evidence, and its judgment will be reversed only when there has been a clear abuse of discretion. State v. Perry, 139 Idaho 520, 521, 81 P.3d 1230, 1231 (2003). Relevance of a prior conviction is a question of law reviewed *de novo* while the prejudicial impact of such evidence is reviewed for an abuse of discretion. State v. Thompson, 132 Idaho 628, 630, 977 P.2d 890, 892 (1999) (citing State v. Raudebaugh, 124 Idaho 758, 766, 864 P.2d 596, 604 (1993)).

⁴ This argument does not apply to Smith's misdemeanor DUI conviction. The state recognizes that evidence that Smith had used methamphetamine while driving would be directly relevant to his DUI conviction. If admission of that evidence was erroneous, the state concedes that the DUI conviction, alone, would need to be vacated and the case remanded for further proceedings on that charge.

C. The District Court Properly Allowed The State To Admit Evidence Of Smith's Prior Conviction For Burglary Under Idaho Rule Of Evidence 609

Idaho Rule of Evidence 609(a) governs the admissibility of evidence of a prior felony conviction and provides, in relevant part:

For the purpose of attacking the credibility of a witness, evidence of the fact that the witness has been convicted of a felony and the nature of the felony shall be admitted if elicited from the witness or established by public record, but only if the court determines in a hearing outside the presence of the jury that the fact of the prior conviction or the nature of the prior conviction, or both, are relevant to the credibility of the witness and that the probative value of admitting this evidence outweighs its prejudicial effect to the party offering the witness.

The Idaho Supreme Court, addressing this rule, has explained

that “different felonies have different degrees of probative value on the issue of credibility. Some, such as perjury, are intimately connected with that issue; others, such as robbery and burglary, are somewhat less relevant; and [a]cts of violence ... generally have little or no direct bearing on honesty and veracity.”

State v. Ybarra, 102 Idaho 573, 580-581, 634 P.2d 435, 442-443 (1981) (quoting California v. Rollo, 569 P.2d 771, 775 (Cal. 1977)) (alteration added, ellipses original).

The Court has further stated that “[t]he determination whether evidence of a particular felony conviction is relevant to credibility depends on the particular facts and circumstances of each case and must therefore be decided on a case-by-case basis.”

State v. Bush, 131 Idaho 22, 31, 951 P.2d 1249, 1258 (1997).

Below, Smith argued that evidence of his prior conviction for burglary was “stale” because it dated back to 2000, and otherwise had limited probative value. (5/13/2013 Tr., p.17, L.24 – p.19, L.23; p.26, Ls.2-11.) Reviewing Rule 609, the district court recognized that, because Smith was not released from prison until 2005 on the conviction, the conviction was within the ten year rule. (Id., p.26, L.20 – p.27, L.1; see

also I.R.E. 609(b) (“Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date....”).) Applying relevant legal standards, the district court also found, consistent with Ybarra, that Smith’s burglary conviction weighed on credibility. (5/13/2013 Tr., p.27, Ls.2-4.) Recognizing its discretion to admit such evidence, the district court properly exercised that discretion and denied Smith’s motion *in limine*, allowing the state to use the conviction for impeachment at trial. (Id., p.27, Ls.5-10.)

On appeal, Smith claims that the district court erred because it “did not weigh the probative value of the evidence of the prior conviction against its unfair prejudicial effect.” (Appellant’s brief, pp.36-38.) Smith’s argument fails. Smith did not identify any unfair prejudice, below or on appeal. Where the defendant fails to identify any unfair prejudice, the district court does not commit error by not conducting the Rule 403 balancing test on the record. State v. Fordyce, 151 Idaho 868, 871, 264 P.3d 975, 978 (Ct. App. 2011).

“Evidence is not unfairly prejudicial simply because it is damaging to a defendant’s case. Evidence is unfairly prejudicial when it suggests decision on an improper basis.” Id. at 870, 264 P.3d at 977 (citations omitted). While defense counsel asserted that presenting evidence of Smith’s prior burglary would have “extreme prejudice” (5/13/2013 Tr., p.26, Ls.9-11), counsel never supported this naked assertion, let alone identified any *unfair* prejudice. Nor does Smith identify any unfair prejudice on appeal. (See Appellant’s brief, pp.36-41.) Because Smith failed to identify any unfair prejudice to weigh against the probative value of his burglary conviction, the district

court was not required to conduct a weighing of the probative value of the prior conviction against its (nonexistent) unfair prejudice on the record. And even if it was error to not conduct the weighing on the record, such error is necessarily harmless, again, because Smith has never identified unfair prejudice that would weigh against the evidence's probative value. Smith has failed to show any error by the district court in denying his motion *in limine*; the district court should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's orders denying Smith's motion to suppress evidence in Docket No. 40996 and denying Smith's motion to suppress evidence and motion *in limine* in Docket No. 41661.

DATED this 14th day of January, 2015.



RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of January, 2015, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BEN P. McGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm