Electronically Filed
4/23/2019 11:45 AM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 46174-2018**
Plaintiff-Respondent,	)	
	)	**Bonneville County Case No.**
v.	)	**CR-2017-9957**
	)	
BRANDON D. G. PARRIS,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

HONORABLE BRUCE L. PICKETT
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KALE D. GANS
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

ATTORNEYS FOR PLAINTIFF-RESPONDENT

ANDREA W. REYNOLDS
Deputy State Appellate Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712
E-mail: documents@sapd.state.id.us

ATTORNEY FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nature Of The Case

Brandon D. G. Parris appeals from his judgment of conviction for possession of methamphetamine, challenging the order denying his motion to suppress.

Statement Of The Facts And Course Of The Proceedings

There was a heist at the Idaho Falls Zoo. In a brazen move, the perpetrator—later dubbed the "Zoo Burglar"—made his way in by cutting the fence surrounding the zoo. (Aug. Ex. 1, p.1.) After breaching the perimeter fence the Zoo Burglar made off with "the coins from the 'Coins for Conservation' vortex collection bucket." (Aug. Ex. 1, p.1.)

In the aftermath of the heist an investigation ensued. There was no video of the heist itself, but Twin Falls police had surveillance photos[1] of a suspect on a bike from some prior "incident" in August. (Aug. Ex. 1, p.1) Someone "matching the description" of the August incident was also "recorded riding a similar bike through the zoo parking lot" at around 2:00 a.m. on the night of the heist. (Aug. Ex. 1, p.1.) Photos "from both incidents" showing the suspected Zoo Burglar and his bike, along with a written description, were distributed to the entire police department—because, as the detective who wrote the email concluded, anyone "who would steal from monkeys is a guy that needs to be stopped." (Aug. Ex. 1, p.1.)

---

[1] It is unclear from the face of the exhibit which photos were from the night of the heist and which photos were from the "last incident" in August of 2017. (See Aug Ex. 1, p.1.) However, it is clear that the photos are from two different incidents: two photos show the suspect in a hoodie and without a backpack; the other two show the suspect in a t-shirt and baseball hat, with a backpack. (Compare Aug. Ex. 1., pp.2-3 with pp.4-5.)

The district court made the additional factual findings that are relevant to this appeal:

> On February 14, 2017, [Parris pleaded] guilty to one count of driving without privileges. Parris was then placed on probation for one year. Judge Walker orally advised Parris that he "must follow other normal terms of probation…." The judgment and order of conviction indicates that Parris is required to "Refuse no alcohol or drug test *or search of person, property & vehicle*."
>
> On September 17, 2017, near 11:30 PM, Officer Brian Smith ("Smith") was on patrol when he noticed a man riding a BMX style bicycle, wearing a backpack, and carrying items in his hands. The bicycle did not have safety lights on it. The man, along with the bicycle he was riding, matched the description of an individual who had previously burglarized the Idaho Falls Zoo. Smith initiated a stop to investigate further. Smith identified the unknown man as Parris and discovered that Parris was currently on probation.
>
> When Smith stopped Parris, Parris was wearing a backpack. Smith was suspicious that some of the stolen items from the zoo might be in the backpack. Smith requested to search Parris's person and backpack. Parris refused consent. Smith then attempted to contact Smith's [sic] probation officer.
>
> Smith was unable to reach Parris's probation officer directly but did speak with another supervising probation officer, Carol Martin ("Martin"). Martin gave Smith permission to search Parris and indicated that if Parris refused, she would meet him at the jail with an agent's warrant. Smith communicated this to Parris and Parris consented to a search of his person and backpack. After officers discovered what appeared to be a knife in Parris's pocket, Parris was placed in handcuffs for officer safety. During the search Smith also found a small baggy that contained a white crystalline substance in one of Parris's pockets. This substance tested presumptive positive for methamphetamine.

(R., pp.104-05 (footnotes omitted, emphasis in original).)

The state charged Parris with possession of methamphetamine and possession of paraphernalia. (R., pp.40-43.) Parris filed a motion to suppress evidence, in which he conceded that the initial stop was lawful. (R., pp.78-85; Tr., p.34, Ls.18-21.) However,

Parris moved to suppress the drug evidence "based upon two grounds": his seizure "was unreasonably extended" and his "consent to the search of his property and person was coerced." (R., p.78.)

The district court disagreed. It made a factual finding on the record at the hearing "that Parris resembled the suspected [Zoo Burglar] shown in the photos." (R., p.111; Tr., p.35, L.23 – p.36, L.12.) The district court concluded, among other things, that 1) the "zoo burglary was one of the reasons for the initial stop" and thus "the stop was not extended due to the zoo burglary investigation"; 2) Parris waived "the warrant requirement by consenting to warrantless searches as [a] condition of probation, and [his] consent was not coerced"; and 3) "discovery of the methamphetamine was inevitable." (R., pp.112, 114 (emphases altered).) The district court accordingly denied the motion. (See R., pp.110-15.)

Parris pleaded guilty to possession of methamphetamine, reserving the right to appeal from the district court's order denying suppression. (R., p.121.) The district court sentenced Parris to four years imprisonment, fixing one-and-a-half years, and placed Parris on probation. (R., p.144.) Parris timely appealed. (R., pp.128-31, 149-53.)

ISSUES

Parris states the issue on appeal as:

Did the district court err in denying Mr. Parris' motion to suppress?

(Appellant's brief, p.4.)

The state rephrases the issues as:

I. Has Parris failed to show the evidence should be suppressed because he has failed to address the district court's holding that Parris waived his right to warrantless searches and seizures as a term of probation?

II. Has Parris failed to show the evidence should be suppressed because he has failed to address the district court's holding that the methamphetamine would have been inevitably discovered?

III. Has Parris failed to show clear error, insofar as his argument depends on a demonstrably incorrect presumption that the blurry photocopy of the exhibit was the same quality as the photos the district court relied on?

ARGUMENT

I.
Parris Fails To Show The Evidence Should Have Been Suppressed Because He Has Failed To Challenge The District Court's Conclusion That Parris Waived His Right To Warrantless Searches And Seizures As A Term Of Probation

"Where a lower court makes a ruling based on two alternative grounds and only one of those grounds is challenged on appeal, the appellate court must affirm on the uncontested basis." Rich v. State, 159 Idaho 553, 555, 364 P.3d 254, 256 (2015) (quoting State v. Grazian, 144 Idaho 510, 517-18, 164 P.3d 790, 797-98 (2007)). To preserve arguments on appeal parties must raise issues in their opening briefs. Patterson v. State, Dep't of Health & Welfare, 151 Idaho 310, 321, 256 P.3d 718, 729 (2011) ("In order to be considered by this Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief.").

The district court denied suppression for several reasons. (See R., pp.110-17.) One of those reasons was that Parris waived the warrant requirement when he consented to warrantless searches as a term of probation:

> Based upon the judgment and order of conviction [in the prior case where Parris was placed on probation], the Court concludes that Parris was aware that he was waiving his right to warrantless searches and seizures as a condition of probation. The Court also concludes that he did waive this right. He had legal counsel at the hearing and could have consulted his counsel. Mr. Parris signed the document but … he did not have to do so; he could have served the jail term instead. Parris also could have withdrawn his consent prior to the search. However, when presented with the legal options and implications of withdrawing his consent (i.e., being taken into custody and serving the jail time originally imposed), Parris chose not to withdraw consent and subjected himself to the search.

(R., p.114.)

Parris concedes the initial stop was proper (Appellant's brief, p.5) and he has only raised one issue on appeal: he claims the stop was extended "without reasonable suspicion of criminal activity" (Appellant's brief, p.6 (emphasis altered)). He does not bother to mention, much less challenge, the district court's conclusion that the ensuing search was proper because Parris voluntarily waived his right to warrantless searches. (See Appellant's brief.) Accordingly, the district court's decision must be affirmed on this uncontested basis.

II.
Parris Fails To Show The Evidence Should Have Been Suppressed Because He Has Failed To Challenge The District Court's Conclusion That The Methamphetamine Would Have Been Inevitably Discovered

There is another uncontested basis for affirming the district court's order. The district court additionally concluded it would not suppress the methamphetamine because it would have been inevitably discovered:

> As stated above, Parris was on probation when he was stopped by Officer Smith. Testimony was proffered at the Motion to Suppress hearing that if Parris had persisted in withdrawing consent to search, … Parris would have been arrested on an agent's warrant for violating the terms of his probation and been taken to jail. The Court heard testimony that Parris would have been searched subsequent to arrest, placed in Smith's patrol car, and transported to jail. The Court also heard testimony that Parris would have been searched when he was booked into the jail. A search at either of these junctures would have been lawful; therefore, the Court concludes that the discovery of the methamphetamine was inevitable and Parris's Motion to Suppress should be denied.

(R., p.115.)

This is another conclusion that Parris has not bothered to mention, much less contest. (See Appellant's brief.) Parris concedes the initial stop was proper and has only argued that the detention was unreasonably extended. (Appellant's brief, pp.4-6.)

Because Parris does not challenge the court's conclusion that the methamphetamine would have been inevitably discovered (and because he cannot do so for the first time in his Reply brief), the district court's decision must be affirmed on this uncontested basis. Rich, 159 Idaho at 555, 364 P.3d at 256; Patterson, 151 Idaho at 321, 256 P.3d at 729.

III.
Parris Fails To Show Clear Error Because His Argument Depends On A Demonstrably Incorrect Presumption That The Blurry Photocopy Of The Exhibit Is Representative Of The Actual Exhibit The District Court Relied On

A. Introduction

Parris begins with a sensible concession: he admits that Officer Smith had reasonable suspicion to initially detain him. (Appellant's brief, p.5.) But Parris goes on to argue that the district court clearly erred when it concluded that Parris resembled the Zoo Burglar. (Appellant's brief, pp.5-10.) Parris claims this was clearly erroneous because "[t]here is simply not enough detail in the photographs for a trier of fact to determine Mr. Parris resembles the person photographed." (Appellant's brief, p.8 (footnote omitted).) Based on this purported error, and purported lack of "sufficient connection between Mr. Parris and the zoo burglar," Parris concludes that "Officer Smith did not have reasonable suspicion to believe Mr. Parris was the zoo burglar," and the stop was unlawfully extended. (Appellant's brief, pp.7-8 (emphasis altered).)

This argument fails because it is premised on a demonstrably incorrect presumption. Parris thinks the exhibit currently "contained in the appellate record" "is presumably the same as the quality of the image considered by the district court." (Appellant's brief, p.8, n.3.) This is incorrect. The district court did not look at a blurry

photocopy; rather, it examined the photos that can be seen in the augmented record.[2] (State's Mot. to Augment, pp.1-2; Solis Aff. pp.1-2; Aug. Ex. 1.) Because high-quality copies of the actual photos show that Parris truly does resemble the Zoo Burglar, Parris comes nowhere near showing clear error.

Moreover, Parris's additional arguments regarding the lack of "sufficient connection" similarly fail. (See Appellant's brief, pp.8-10.) Both Parris and his bike tended to resemble the person and bike shown in the photos and described in the email. Based on this, the district court correctly concluded there was ample reasonable suspicion to justify an investigation of the zoo burglary.

Finally, regardless of the court's decision on reasonable suspicion, Parris has failed to challenge the district court's conclusions regarding the probation waiver and inevitable discovery. Because those conclusions were correct, and because Parris has not even attempted to contest them on the merits, the order denying the suppression motion should invariably be upheld.

B. Standard Of Review

On review of a ruling on a motion to suppress, the appellate court defers to the trial court's findings of fact unless clearly erroneous, but exercises free review of the trial court's determination as to whether constitutional standards have been satisfied in light of the facts. State v. Willoughby, 147 Idaho 482, 485-86, 211 P.3d 91, 94-95 (2009); State v. Fees, 140 Idaho 81, 84, 90 P.3d 306, 309 (2004). If findings are supported by

[2] Contemporaneous with the filing of this brief, the state is moving to augment the record with the full-color, high-quality scanned copy of the pictures the district court examined at the hearing. (See State's Mot. to Augment; Solis Aff.; Aug. Ex. 1.)

substantial evidence in the record, those "[f]indings will not be deemed clearly erroneous." State v. Stewart, 145 Idaho 641, 648, 181 P.3d 1249, 1256 (Ct. App. 2008) (quoting State v. Jaborra, 143 Idaho 94, 98, 137 P.3d 481, 485 (Ct. App. 2006)).

C. A Review Of A Full-Color, High-Quality Scanned Copy Of Exhibit 1 (And Not A Blurry Photocopy) Shows The District Court Correctly Concluded Parris Resembles The Zoo Burglar

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. 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)). Whether an officer had reasonable suspicion to conduct an investigatory seizure is determined by the totality of the circumstances. State v. Rawlings, 121 Idaho 930, 932, 829 P.2d 520, 522 (1992).

The district court correctly determined that Officer Smith had reasonable suspicion to stop Parris to investigate the zoo burglary. (R., pp.111-12.) The most suspicious factor was simple: the officer concluded that Parris "matched the general description I remembered from the zoo burglar." (Tr., p.12, Ls.6-9.)

The district court agreed. It concluded that "Parris resembled the suspected burglar shown in the photos." (R., p.111.) The district court made this factual finding

after looking at Parris in the suppression hearing, looking at the photos, and comparing the two:

> [Defense Counsel]: And so one of the issues that the Court will need to look into is whether this is just basically a stalking horse situation, where law enforcement is trying to circumvent the Idaho constitution, the United States constitution, Mr. [Parris's] right, in the guise of an investigation into probation, when they're really investigating the [zoo] burglary.
>
> THE COURT: Mr. Crane, let me ask: Tell me why they can't just legitimately be investigating the burglary.
>
> MR. CRANE: Because, Your Honor, there's not enough of a connection between Mr. Parris and the burglary.
>
> THE COURT: Well, let me just indicate for your purposes of your own argument. I mean, I looked at the photographs and prepared to, you know—as I was looking, because the Court has to make the findings of facts.
>
> I looked at the photographs and looked at your client, and for the record, they appear to be pretty similar. And so I guess my question is—I mean, that's going to be my finding of fact, so you are going to have to deal with that. And I'm kind of giving you a heads up.
>
> MR. CRANE: Okay.
>
> THE COURT: They appear, just by the photograph, and looking at them here in court, specifically it's up to the Court to make that finding. They're pretty similar. So with that in mind, tell me where you go.

(Tr., p.35, L.9 – p.36, L.12.)

A review of the high-quality copies of the photos the district court examined unmistakably supports this conclusion. Parris, who can be seen in the officer's on-body video that was admitted into evidence, clearly resembles the suspected Zoo Burglar in the photos. (Compare, for example, Aug. Ex. 1, p.3 with Defense Ex. 3, 00:25-00:30.)

On appeal Parris claims that this factual finding was clearly erroneous. (Appellant's brief, pp.7-8.) He argues that "[t]here is simply not enough detail in the

photographs for a trier of fact to determine Mr. Parris resembles the person photographed." (Appellant's brief, p.8.) This is the driving reason for Parris's conclusion that "Officer Smith did not have reasonable suspicion to believe Mr. Parris was the zoo burglar." (Appellant's brief, pp.9-10.)

But Parris has failed to meet his high burden to show clear error. In fact, his entire argument depends on a fatally flawed presumption about the exhibits in the record. Parris states that:

> Appellate counsel cut and pasted the image [set forth in Parris's briefing] directly from the exhibit contained in the appellate record, located at Exhibit Volume 1, p.3. The quality of the image in this brief is the same as the quality of the image located in the record, *which is presumably the same as the quality of the image considered by the district court.*

(Appellant's brief, p.8, n.3 (emphasis added).)

The latter presumption is simply incorrect.[3] The blurry exhibit currently residing in the record is an obvious photocopy of the actual exhibit, and it does not reflect what the district court laid eyes on when it made its comparison. (Compare Defense Ex. 1 with Aug. Ex. 1.) The district court clerk's affidavit affirms this: the photocopy does not accurately reflect what the district court examined. (Solis Aff., pp.1-2.) Because Parris fails to show that the photocopied photos are "the same as the quality of the image considered by the district court," he fails to prove his central thesis: that "[t]here is simply

[3] The former presumption is equally dubious. There is no reason to presume that a "cut and pasted image" will be of the same quality when it is transferred from a full-size image file into a Word-document brief. Digital images degrade when they are compressed and resized. In any event, whether the "quality of the image in the brief is the same as the quality of the image located in the record" is beside the point, insofar as the image currently "located in the record" is nothing close to the photos the district court actually considered. (See Solis Aff., pp.1-2.)

not enough detail in the photographs for a trier of fact to determine Mr. Parris resembles the person photographed." (Appellant's brief, p.8 (footnote omitted).)

To the contrary, the actual photos contain more than enough detail to support an in-court identification, as the augmented exhibit shows. (See Aug. Ex. 1.) And comparing high-fidelity scanned copies of the actual photos with the on-body video shows the district court got it right: Parris clearly resembles the Zoo Burglar. (Compare, for example, Aug. Ex. 1, p.3 with Defense Ex. 3, 00:25-00:30.)

Parris's tertiary arguments fare no better in light of the augmented exhibit. For example, Parris argues that,

> [e]ven if Mr. Parris resembled the person photographed, there was not a sufficient connection between Mr. Parris and the zoo burglar to create reasonable suspicion that Mr. Parris was the zoo burglar. Officer Smith testified he suspected Mr. Parris of being the zoo burglar because he was on a bike, carrying a backpack, wearing a hoodie and a baseball hat. Significantly, the email from the detective did not refer to a backpack, a hoodie, or a baseball hat, *and it is not clear from the photographs that the suspect was wearing a backpack, a hoodie, or a baseball hat.*

(Appellant's brief, p. 8 (internal citations omitted, emphasis added).)

This is likewise incorrect. The actual photos plainly show the Zoo Burglar sporting a backpack (Aug. Ex. 1, pp.4-5), a hoodie (Aug Ex. 1, pp.2-3), and a baseball hat (Aug. Ex. 1, pp.4-5). They show the Zoo Burglar had facial hair. (Aug. Ex. 1, pp.4-5.) Parris fit this description to a tee on the night he was stopped: he had a backpack, a hoodie, a hat, and "similar" facial hair. (Tr., p.22, Ls.7-23.) It was therefore entirely reasonable for the officer to conclude that Parris "matched the general description of the individual referenced in [the] e-mail *and in the photos*," and to stop him and investigate. (Tr., p.22, Ls.1-23 (emphasis added).) It was just as reasonable for the district court to

determine, as a finding of fact, that Parris "matched the description of an individual who had previously burglarized the Idaho Falls Zoo." (R., p.105.)

Parris makes a similarly futile attempt to distinguish Parris's bike and the Zoo Burglar's bike. (Appellant's brief, pp.8-9.) He claims that "[w]ith respect to the bike, Officer Smith did not testify that Mr. Parris's bike matched the description of the zoo burglar's bike, and the district court did not make any findings regarding the bike." (Appellant's brief, p.9.) This twice-mistaken couplet ignores both the officer's testimony and the district court's explicit factual finding that Parris was riding "a BMX style bicycle"—precisely the style of bike identified in the email. (R., p.105; Tr., p.12, Ls.20-22; Aug. Ex. 1, p.1.)

Moreover, the photos plainly affirm that the two bikes resembled one another. They show that the Zoo Burglar was riding a "BMX style [bike] with a dark frame and light colored (possibly silver or chrome) front fork," just as the email described it. (Aug. Ex. 1., pp.1-5.) Parris's bike was a near-exact match—the on-body video reveals it was a BMX-style bike with a dark frame (see, e.g., Defense Ex. 3, 16:54) and a light colored, silver or chrome front fork (see, e.g., Defense Ex. 3, 21:01, 21:57).

Parris concludes by dismissing the zoo burglary investigation as a pretext. (Appellant's brief, p.10.) Seizing on Officer Smith's offhand remark that he knew Parris had methamphetamine based on a "trade secret," Parris surmises that the only thing underpinning the extended detention was a hunch that Parris had drugs. (Appellant's brief, p.10 (citing Defense Ex. 3 at 24:45-50).)

Incorrect. A hunch is a "feeling or guess based on intuition rather than fact." See Hunch, Oxford Living Dictionary, https://en.oxforddictionaries.com/definition/hunch

(last visited April 9, 2019). And here, Officer Smith had ample fact-based suspicion to detain Parris, as explained above. The district court therefore correctly concluded that Officer Smith had reasonable suspicion to detain Parris to investigate the zoo burglary and that Smith "did not deviate from or abandon that purpose." (R., p.111.) And because the detention was a legitimate investigation supported by reasonable suspicion, Parris fails to show the district court erred.

D. Irrespective Of The Duration Of The Stop, The District Court Correctly Concluded That The Evidence Should Not Be Suppressed Because Parris Waived His Right To Warrantless Searches, And Because The Evidence Would Have Been Inevitably Discovered, Neither Of Which Have Been Challenged On The Merits On Appeal

As noted in Sections I and II above, the district court denied Parris's suppression motion for two additional reasons: because Parris waived his right to be free from warrantless searches as a condition of probation, and because the evidence would have been inevitably discovered. (R., pp.112-115.) Because Parris has not bothered to mention, much less challenge, either holding (and because he cannot do so for the first time in his Reply), the district court should be affirmed on these uncontested bases as a matter of course. Rich, 159 Idaho at 555, 364 P.3d at 256

Alternatively, even if this Court concludes that the stop was unreasonably extended, it should affirm the district court on either (or both) of these alternative holdings. The district court wrote a well-reasoned and thoughtful opinion that is attached as Appendix A to this briefing. In it, the court relied on Idaho authority and correctly explained why Parris consented to waive his right to a warrantless search, and why the evidence would have been inevitably discovered. (App. A; R., pp.104-18.) And based on

those correct, uncontested conclusions the evidence should not have been suppressed—regardless of whether the stop was unreasonably extended.

The state accordingly incorporates the district court's alternate holdings, which are uncontested on appeal, and asks this Court to affirm on those merits should it reach them.

CONCLUSION

The state respectfully requests this Court affirm the order denying Parris's motion to suppress evidence.

DATED this 23rd day of April, 2019.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of April, 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:

ANDREA W. REYNOLDS
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd

APPENDIX A

2018 FEB 23 AM 10: 06

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

STATE OF IDAHO, Plaintiff, v. BRANDON D G PARRIS, Defendant.	Case No. CR-2017-9957 OPINION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

This Opinion and Order is in response to Defendant's Motion to Suppress.

I. FINDINGS OF FACT

For purposes of this Opinion and Order, the Court finds the following facts:

On February 14, 2017, Brandon D G Parris ("Parris") plead guilty to one count of driving without privileges. Parris was then placed on probation for one year. Judge Walker orally advised Parris that he "must follow other normal terms of probation . . . ."[1] The judgment and

[1] Exhibit 2, *State v. Parris,* Bonneville County case no. CR-2017-9957 (admitted February 5, 2018) (hereinafter "Exhibit 2"), at 09:23.

order of conviction indicates that Parris is required to "Refuse no alcohol or drug test *or search of person, property & vehicle.*"[2]

On September 17, 2017, near 11:30 PM, Officer Brian Smith ("Smith") was on patrol when he noticed a man riding a BMX style bicycle, wearing a backpack, and carrying items in his hands. The bicycle did not have safety lights on it. The man, along with the bicycle he was riding, matched the description of an individual who had previously burglarized the Idaho Falls Zoo. Smith initiated a stop to investigate further. Smith identified the unknown man as Parris and discovered that Parris was currently on probation.

When Smith stopped Parris, Parris was wearing a backpack. Smith was suspicious that some of the stolen items from the zoo might be in the backpack. Smith requested to search Parris's person and backpack. Parris refused consent. Smith then attempted to contact Smith's probation officer.

Smith was unable to reach Parris's probation officer directly but did speak with another supervising probation officer, Carol Martin ("Martin"). Martin gave Smith permission to search Parris and indicated that if Parris refused, she would meet him at the jail with an agent's warrant. Smith communicated this to Parris and Parris consented to a search of his person and backpack. After officers discovered what appeared to be a knife in Parris's pocket, Parris was placed in handcuffs for officer safety. During the search Smith also found a small baggy that contained a white crystalline substance in one of Parris's pockets. This substance tested presumptive positive for methamphetamine.

[2] Exhibit 4, *State v. Parris,* Bonneville County case no. CR-2017-9957 (admitted February 5, 2018) (hereinafter "Exhibit 4").

II.
APPLICABLE LAW

1. United States Constitution, Amendment IV; Idaho Constitution, Art. I, § 17

"The Fourth Amendment to the United States Constitution guarantees freedom from unreasonable searches and seizures. Its purpose is to impose a standard of reasonableness upon the exercise of discretion by governmental agents to safeguard an individual's privacy and security against arbitrary invasions."[3] The Idaho State Constitution offers the same protection, with language similar to the Federal Constitution: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized."[4] In order to ensure these rights and protect against erosion the courts have declared, "[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."[5]

2. Reasonable Suspicion

Generally, a seizure of a person must be based on probable cause to be deemed reasonable.[6] However, the United States and Idaho Supreme Courts have delineated this narrow exception:

> [L]imited investigatory detentions, based on less than probable cause, are permissible when justified by an officer's reasonable articulable suspicion that a person has committed, or is about to commit, a crime. Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts. The quantity and quality of information necessary to

---

[3] *State v. Van Dorne,* 139 Idaho 961, 963, 88 P.3d 780, 782, (Idaho Ct. App. 2004).
[4] IDAHO CONST. art. I, § 17; see also, U.S. CONST. amend. IV.
[5] *Katz v. United States*, 389 U.S. 347, 356, 88 S.Ct. 507, 514 (1967).
[6] *State v. Bishop,* 146 Idaho 804, 811, 203 P.3d 1203, 1210 (2009).

> establish reasonable suspicion is less than that necessary to establish probable cause. Still, reasonable suspicion requires more than a mere hunch or inchoate and unparticularized suspicion. Whether an officer possessed reasonable suspicion is evaluated based on the totality of the circumstances known to the officer at or before the time of the stop.[7]

Regarding the level of reasonable suspicion necessary to warrant a stop, the Idaho Supreme Court has stated that:

> 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. Whether a tip amounts to reasonable suspicion depends on the totality of the circumstances including the substance, source, and reliability of the information provided. In other words, a tip must possess adequate indicia of reliability in order to justify a *Terry* stop. The more reliable the tip, the less information required to establish reasonable suspicion.[8]

3. Warrantless Search Exception: Consent or Waiver as a Condition of Probation.

"[C]onsent voluntarily given by someone with authority is an exception to the warrant requirement."[9] However, when consent is asserted, the State carries the burden "to show that constitutionally sufficient consent was given."[10] Idaho Courts have held that: "This exception encompasses Fourth Amendment waivers, which operate as consents to search, given as a condition of probation or parole."[11]

Generally, such a waiver should be included in "the conditions of probation in the probation order . . ." but failure to include them is not dispositive.[12] For instance, an oral advisement by the sentencing court of the Fourth Amendment waiver as a term of probation is generally sufficient.[13] The critical element is notice of the waiver.[14] This is so that "[a] defendant

---

[7] *Bishop,* 146 Idaho at 811-12, 203 P.3d at 1210-11 (internal quotes and citations omitted).
[8] *Id.* at 811, 1210 (internal quotes and citations omitted).
[9] *State v. Westlake*, 158 Idaho 817, 820, 353 P.3d 438, 41, (Idaho Ct. App. 2015).
[10] *Id.*
[11] *State v. Armstrong,* 158 Idaho 364, 370, 347 P.3d 1025, 1031 (Idaho Ct. App. 2015).
[12] *State v. Santana*, 162 Idaho 79, __, 394 P.3d 122, 126 (Idaho Ct. App. 2017).
[13] *Id.*
[14] *Id.*

has the right to decline probation when he or she deems its conditions too onerous and may, instead, serve the suspended portion of the sentence."[15]

4. Warrantless Search Exception: Inevitable Discovery.

The inevitable discovery exception was recently explained by the Idaho Supreme Court in *State v. Downing.*[16] In doing so, it adopted the explanation set forth by the United States Supreme Court, which stated:

> "If the prosecution can establish by a preponderance of the evidence that the [evidence] ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense."[17]

Therefore, this exception "asks courts to engage in a hypothetical finding into the lawful actions law enforcement *would have inevitably taken* in the absence of the unlawful avenue that led to the evidence."[18] If the evidence would have been discovered through the inevitable, lawful actions taken by law enforcement, it is thus saved from the exclusionary rule.[19] "The premise is that law enforcement should be 'in the same, not a worse, position that they would have been' absent the misconduct."[20]

5. Miranda Warnings

"The U.S. Supreme Court's decision in *Miranda* requires that 'an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.'"[21] Such a warning is only required in custodial

---

[15] *Id.*
[16] 164 Idaho 26, __, 407 P.3d 1285, 1289-90 (2017).
[17] *Id.* at __, 1290 (*quoting Nix v. Williams,* 467 U.S. 431, 444 (1984)) (emphasis added).
[18] *Id.*
[19] *See id.*
[20] *Id.* (*quoting Nix v. Williams,* 467 U.S. 431, 444 (1984).
[21] *State v. James,* 148 Idaho 574, 576, 225 P.3d 1169, 1171 (Idaho 2010) (*quoting Miranda v. Arizona,* 384 U.S. 436, 471 (1966)).

Interrogations.[22] Determining whether the interrogation was custodial requires a court to "'examine all of the circumstances surrounding the interrogation.'"[23] This test "'is how a reasonable man in the suspect's position would have understood his situation.'"[24] The burden is on the defendant to show they were in custody at the time the interrogation occurred.[25] As a general rule, "'persons temporarily detained pursuant to [traffic] stops are not 'in custody' for the purposes of *Miranda.*'"[26]

III.
ANALYSIS

As stated above, "The Fourth Amendment to the United States Constitution guarantees freedom from unreasonable searches and seizures. Its purpose is to impose a standard of reasonableness upon the exercise of discretion by governmental agents to safeguard an individual's privacy and security against arbitrary invasions."[27] The Idaho State Constitution offers the same protection, with language similar to the Federal Constitution: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized."[28] In order to ensure these rights and protect against erosion the courts have declared that seizures and "searches 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."[29] These exceptions include (1) seizure

---

[22] *Id.*
[23] *Id.* at 577, 1172 (*quoting Stansbury v. California,* 511 U.S. 318, 322 (1994)).
[24] *Id.* (*quoting Berkemer v. McCarty,* 468 U.S. 420, 442 (1984)).
[25] *Id.*
[26] *Id.* (*quoting Berkemer v. McCarty,* 468 U.S. 420, 440 (1984)).
[27] *Van Dorne,* 139 Idaho at 963, 88 P.3d at 782.
[28] IDAHO CONST. art. I, § 17; see also, U.S. CONST. amend. IV.
[29] *See Katz,* 389 U.S. at 356, 88 S.Ct. 514.

based upon reasonable suspicion (2) waiver by consent, and (3) inevitable discovery. Each of these is discussed in greater detail below. The Court also discusses the *Miranda* issue raised by the defendant.

1. Officer Smith Murdock had Reasonable Suspicion to Seize Brandon Parris.

Generally, a seizure of a person must be based on probable cause to be deemed reasonable.[30] However, the United States and Idaho Supreme Courts have delineated this narrow exception:

> [L]imited investigatory detentions, based on less than probable cause, are permissible when justified by an officer's reasonable articulable suspicion that a person has committed, or is about to commit, a crime. Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts. The quantity and quality of information necessary to establish reasonable suspicion is less than that necessary to establish probable cause. Still, reasonable suspicion requires more than a mere hunch or inchoate and unparticularized suspicion. Whether an officer possessed reasonable suspicion is evaluated based on the totality of the circumstances known to the officer at or before the time of the stop.[31]

Regarding the level of reasonable suspicion necessary to warrant a stop, the Idaho Supreme Court has stated that:

> 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. Whether a tip amounts to reasonable suspicion depends on the totality of the circumstances including the substance, source, and reliability of the information provided. In other words, a tip must possess adequate indicia of reliability in order to justify a *Terry* stop. The more reliable the tip, the less information required to establish reasonable suspicion.[32]

The Court heard testimony at the Motion to Suppress hearing that Smith observed a man riding his bike on the evening of September 17, 2017. The Court notes that prior to September 17, 2017, Smith had been provided with a description and photos of an individual suspected of

[30] *Bishop,* 146 Idaho at 811, 203 P.3d at 1210.
[31] *Id.* at 811-12, at 1210-11 (internal quotes and citations omitted).
[32] *Id.* at 811, 1210 (internal quotes and citations omitted).

burglarizing the Idaho Falls Zoo. When he observed the man riding his bike, he noticed the bike did not have any lights (a violation of law) and that the rider resembled the individual in the photos provided to him (i.e. the photos of the man who had burglarized the zoo). Based on these facts, Smith initiated a stop to investigate further. During the course of this stop, Smith discovered methamphetamine on Parris's person and placed him under arrest.

The Court notes that the photos and an email describing the zoo burglar were entered as exhibits at the hearing. The Court compared the photos at the Motion to Suppress hearing, the Court made a finding on the record that Parris resembled the suspected burglar shown in the photos.

In support of the Motion to Suppress, Parris's legal counsel has argued that Smith extended the duration of the stop longer than necessary and abandoned the original purpose of the stop. The Court does not find this persuasive. Based on the Court's analysis, Officer Smith had reasonable suspicion to stop Parris and investigate two suspected crimes: (1) riding a bicycle at night without proper lights and (2) the zoo burglary.

In Idaho, "an investigative detention 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'" [33] As discussed above, Smith initiated the stop in order to investigate at least two suspected violations of law. Based on the Court's analysis in this and other sections of its opinion, Smith had reasonable suspicion to justify the stop and did not deviate from or abandon that purpose of investigating the zoo burglary. If the only purpose for the stop was the fail to have lighting on the bicycle, then the defense is correct in arguing that stop was extended. However, as stated, the stop involved two separate incidents (i.e. the lights

[33] *State v. Aguirre,* 141 Idaho 560, 563, 112 P.3d 848, 851 (Idaho Ct. App. 2005) (*quoting Florida v. Royer,* 460 U.S. 491, 500 (1983)).

and the zoo burglary). Because the zoo burglary was one of the reasons for the initial stop, the stop was not extended due to the zoo burglary investigation.

2. The Defendant Waived the Warrant Requirement by Consenting to Warrantless Searches as Condition of Probation, and Consent was not Coerced.

As stated above, "[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."[34] Consent is one of these exceptions.[35] The Idaho Supreme Court has stated: "[C]onsent voluntarily given by someone with authority is an exception to the warrant requirement."[36] However, when consent is asserted, the State carries the burden "to show that constitutionally sufficient consent was given."[37]

The consent exception "encompasses Fourth Amendment waivers, which operate as consents to search, given as a condition of probation or parole."[38] Generally, such a waiver should be included in "the conditions of probation in the probation order . . ." but failure to include them is not dispositive.[39] For instance, an oral advisement by the sentencing court of the Fourth Amendment waiver as a term of probation is generally sufficient.[40] The critical element is *notice* of the waiver.[41] This is so that "[a] defendant has the right to decline probation when he or she deems its conditions too onerous and may, instead, serve the suspended portion of the sentence."[42]

In support of the Motion to Suppress, Parris argues that he never consented or waived this right as a condition of probation. Additionally, he argues that he was never apprised of this

---

[34] *Katz,* 389 U.S. at 356, 88 S.Ct. at 514.
[35] *Westlake*, 158 Idaho at 820, 353 P.3d at 41.
[36] *Id.*
[37] *Id.*
[38] *Armstrong,* 158 Idaho at 370, 347 P.3d at 1031.
[39] *Santana*, 162 Idaho at __, 394 P.3d at 126.
[40] *Id.*
[41] *Id.*
[42] *Id.*

waiver prior to being placed on probation. The State has objected and asserts that Parris did indeed waive his Fourth Amendment rights as a condition of probation. In support, the State points to the order of probation completed at Parris's sentencing for his prior charge of driving without privileges. At argument, Parris's counsel asserted that Parris was not orally advised of this waiver at the time of sentencing, a copy of the sentencing audio was provided to the Court.

Based on the following, the Court concludes that Parris did waive his rights regarding warrantless searches and seizures under the Fourth Amendment. First, the judgment and order of conviction indicates that Parris was to "Refuse no alcohol or drug test or search or person, property & vehicle."[43] Although Parris's counsel argued this box was merely checked as a matter of course, this is of little consequence. It is checked as a matter of course because it is a standard condition of probation. Therefore, the box was checked, clearly indicating that a condition of Parris's probation was that he "Refuse no alcohol or drug test or search or person, property & vehicle."[44]

Parris had the right to decline probation if he deemed its conditions too onerous and could have served the suspended portion of the sentence.[45] Instead of declining probation, Parris signed the order of probation. The Court finds that his signature is on the form, alongside the statement "DEFENDANT hereby agrees to conditions of probation." The magistrate, Judge Walker, also signed this form.[46]

Second, Judge Walker orally advised Parris that he "must follow other normal terms of probation. . . ."[47] The Court concludes that this was sufficient to apprise Parris of his waiver of his rights regarding warrantless searches and seizures. The Court recognizes that being subject to

---

[43] Exhibit 4.
[44] Exhibit 4.
[45] *Santana*, 162 Idaho at __, 394 P.3d at 126.
[46] Exhibit 4.
[47] Exhibit 2, at 9:23.

warrantless searches and seizures is a normal condition of probation. Additionally, Parris was represented by counsel at sentencing and could have asked questions regarding what Judge Walker meant by "other normal terms" if Parris desired. The Court notes the absence of any objection or question in the record to this effect.

Based upon the judgment and order of conviction, the Court concludes that Parris was aware that he was waiving his right to warrantless searches and seizures as a condition of probation. The Court also concludes that he did waive this right. He had legal counsel at the hearing and could have consulted his counsel. Mr. Parris signed the document but it he did not have to do so; he could have served the jail term instead. Parris also could have withdrawn his consent prior to the search. However, when presented with the legal options and implications of withdrawing his consent (i.e. being taken into custody and serving the jail time originally imposed), Parris chose not to withdraw consent and subjected himself to the search. If Parris had persisted in withdrawing his consent the legal consequence would have occurred: he would have been arrested, booked into jail, and searched.

3. Discovery of the Methamphetamine was Inevitable.

As explained above, the doctrine of inevitable discovery requires the prosecution to "'establish by a preponderance of the evidence that the'" wrongfully obtained evidence "'ultimately or inevitably would have been discovered by lawful means . . .'"[48] Accordingly, this "asks courts to engage in a hypothetical finding into the lawful actions law enforcement *would have inevitably taken* in the absence of the unlawful avenue that led to the evidence."[49] If the evidence would have been discovered through the inevitable, lawful actions taken by law

[48] *Downing,* 164 Idaho at __, 407 P.3d at 1290 (*quoting Nix v. Williams,* 467 U.S. 431, 444 (1984)).
[49] *Id.*

enforcement, it is thus saved from the exclusionary rule.[50] "The premise is that law enforcement should be 'in the same, not a worse, position that they would have been' absent the misconduct."[51]

As stated above, Parris was on probation when he was stopped by Officer Smith. Testimony was proffered at the Motion to Suppress hearing that if Parris had persisted in withdrawing consent to search, he Parris would have been arrested on an agent's warrant for violating the terms of his probation and been taken to jail. The Court heard testimony that Parris would then have been searched subsequent to arrest, placed in Smith's patrol car, and transported to jail. The Court also heard testimony that Parris would have been searched when he was booked into the jail. A search at either of these junctures would have been lawful; therefore, the Court concludes that the discovery of the methamphetamine was inevitable and Parris's Motion to Suppress should be denied.

4. Miranda

"The U.S. Supreme Court's decision in *Miranda* requires that 'an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.'"[52] Such a warning is only required in custodial interrogations.[53] Determining whether the interrogation was custodial requires a court to "'examine all of the circumstances surrounding the interrogation.'"[54] This test "'is how a reasonable man in the suspect's position would have under stood his situation.'"[55] The burden is on the defendant to show they were in custody at the time the interrogation occurred.[56] As a

---

[50] *See id.*
[51] *Id.* at __, 1290 (*quoting Nix v. Williams,* 467 U.S. 431, 444 (1984).
[52] *James,* 148 Idaho at 576, 225 P.3d at 1171 (*quoting Miranda v. Arizona,* 384 U.S. 436, 471 (1966)).
[53] *Id.*
[54] *Id.* at 577, 1172 (*quoting Stansbury v. California,* 511 U.S. 318, 322 (1994)).
[55] *Id.* (*quoting Berkemer v. McCarty,* 468 U.S. 420, 442 (1984)).
[56] *Id.*

general rule, "'persons temporarily detained pursuant to [traffic] stops are not 'in custody' for the purposes of *Miranda.*'"[57]

In this case, the Court concludes that Smith was not required to provide Parris with a *Miranda* warning because Parris was not in custody. Regarding the *Miranda* warning, the United States Supreme Court has stated:

> Although the circumstances of each case must certainly influence a determination of whether a suspect is "in custody" for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.[58]

The Court has reviewed Smith's encounter with Parris as presented in the footage from Smith's bodycam footage.[59] Upon review, the Court does not find the circumstances of this encounter were sufficient to conclude that Parris was "in custody" for *Miranda* purposes. Although Smith directed Parris to stand or remain where another officer directed him, for most of the encounter Parris was not placed in handcuffs or placed in a patrol car and maintained some freedom of movement. Smith did conduct a pat-down search of Parris but this was not a custodial search. The pat-down was cursory and was merely to determine whether Parris posed a threat to the officers on scene while Smith attempted to contact Parris's probation officer.

Although Parris was placed in handcuffs near the end of the encounter, this was only done to ensure the officers' safety during a search of Parris's person. One of the officers specifically told Parris, "Sir, you're not under arrest; we're just detaining you because we gotta get that knife out of your pocket."[60] The Court notes that Parris wasn't placed in handcuffs until a concern of officer safety arose.

---

[57] *Id.* (*quoting Berkemer v. McCarty,* 468 U.S. 420, 440 (1984)).
[58] *California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520 (1983) (*quoting Oregon v. Mathiason,* 429 U.S. 492, 495 (1977)).
[59] Exhibit 3, *State v. Parris,* Bonneville County case no. CR-2017-9957 (admitted February 5, 2018) (hereinafter "Exhibit 3").
[60] Exhibit 3, at 25:45.

The Court also notes the absence of any sort of interrogation during the encounter. Although Smith did ask some questions, these were related to confirming that Parris was on probation and identifying his probation officer, and items on Parris's person and in his pockets. Absent from the exchange are any interrogatory questions.

The Court notes the discovery of a small plastic baggy of methamphetamine in one of Parris's pockets. However, the discovery of the methamphetamine was not the result of any sort of interrogation; it was the result of a search. The provision of a *Miranda* warning has nothing to do with a search. As stated above, it is only required as a precursor to a custodial interrogation. Based on the foregoing analysis, Parris was not in custody and was not the subject of an interrogation; therefore, he was not entitled to a *Miranda* warning and Defendant's motion should be denied.

IV.
CONCLUSION

Based on the foregoing, the Court orders as follows:

1- Defendant's Motion to Suppress is DENIED.

IT IS SO ORDERED.

Dated this 23rd day of February 2018.

Bruce L. Pickett
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of February 2018 the OPINION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS was entered and a true and correct copy was served upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

Counsel for Plaintiff:

Jordan S. Crane
Bonneville County Public Defender
Courthouse Box
Idaho Falls, Idaho 83402

Counsel for Defendant:

Michael McCracken
Prosecuting Attorney's Office
Courthouse Box
Idaho Falls, Idaho 83402

Penny Manning
Clerk of the District Court
Bonneville County, Idaho

by _____
Deputy Clerk