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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. 47024-2019**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY**
	)	**NO. CR28-18-16962**
v.	)	
	)	
DAVID CHARLES ANDERSON,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE SCOTT WAYMAN
District Judge

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STATEMENT OF THE CASE

David Charles Anderson entered a conditional plea of guilty to possessing a controlled substance, expressly reserving his right to appeal the district court's order denying his motion to suppress. On appeal, Mr. Anderson argues that he was unlawfully detained when, without reasonable suspicion or other constitutional justification, an officer approached him while he was sitting in his parked vehicle, requested his identification, and then retained it to run his license information through dispatch. He further argues that the evidence later discovered was the result of the officer's unlawful conduct and that suppression was required under the exclusionary rule.

Statement of the Facts and Course of Proceedings

The following facts were established at the suppression hearing.[1] Coeur d'Alene Police Officer Nathan Herbig was out on patrol at about 9:30 at night when he noticed a driver – Mr. Anderson – sitting in a pickup truck parked in the lot next to a bus stop. (Tr., p.8, L.2 – p.11, L.11.) Officer Herbig was not investigating criminal activity in the area, nor did he hold any suspicions of criminal activity. (Tr., p.18, Ls.3-16; p.46, Ls.16-18.) Officer Herbig pulled into the lot and parked, walked up to the pickup truck, and Mr. Anderson rolled down his window and greeted him. (Ex., 1:55-2:00; Tr., p.8, L.2 – p.11, L.11.) Officer Herbig asked Mr. Anderson if he was waiting for someone, and Mr. Anderson answered that he was waiting for his girlfriend to arrive on the bus so he could give her a ride home before working his shift at McDonald's.[2] (Ex., 2:00-15.)

[1] The State called two witnesses, Officer Herbig and his patrol supervisor, Sergeant Jared Reneau; the DVD of Officer Herbig's bodycam was also admitted at the suppression hearing. (Tr., p.12, Ls.12-15; Ex.1.) The district court ruled from the bench, and its findings are contained in the transcript of the suppression hearing, ("Tr."), at Tr., p.36, L.20 – p.38, L.13.)

[2] Mr. Anderson was wearing a work uniform and hat bearing the McDonald's logo. (Ex.1, 2:00 - 23:41.)

Officer Herbig then asked Mr. Anderson for his I.D. and Mr. Anderson handed over his driver's license. (Ex., 2:10-15.) Later, Officer Herbig testified that his reason for requesting the license was "to identify who I was talking to" (Tr., p.13, Ls.13-14), and "to protect myself from any allegations or anything to that effect" (Tr., p.19, Ls.12-15), and that by running the name through dispatch he would have "a log of the name." (Tr., p.20, Ls.7-9).

Officer Herbig radioed dispatch and provided Mr. Anderson's information from his driver's license and learned that Mr. Anderson was on probation, and he returned the license to Mr. Anderson. (Ex., 2:15-55.) Upon returning the license, Officer Herbig asked Mr. Anderson, "Are you still on probation? What was that for?" (Tr., p.13, Ls.14-17; Ex.1, 3:30-35.) Mr. Anderson answered that he was on probation for possessing methamphetamine, a controlled substance charge, from about two years prior. (Ex.1, 3:35-40.) Officer Herbig then questioned Mr. Anderson in detail about his prior drug use and requested the name of his probation officer, which Mr. Anderson provided. (Ex.1, 3:40-5:11.) Officer Herbig asked Mr. Anderson if he had anything illegal on him, and then asked, "Are you good with me checking, that way if your PO asks me I can tell him, 'Yeah, I checked him. He was good with it. He was cooperative.'" (Ex.1, 5:00-5:10.)

Mr. Anderson answered all of Officer Herbig's questions and said "yep" to the request for consent to search. (Ex., 5:15.) Officer Herbig had Mr. Anderson step out of the vehicle and searched his person, then asked if Mr. Anderson was okay with him searching the vehicle and Mr. Anderson said, "yeah, go ahead." (Ex., 5:15-40.) Officer Herbig searched the vehicle and found a small baggie of containing white powdery substance, then arrested Mr. Anderson for possession of methamphetamine. (Ex.1, 5:40-18:55.) The amount of time between the officer's request for the license and the discovery of the drugs was approximately sixteen minutes. (Ex.1, 2:55 – 18:55.)

Mr. Anderson filed a motion to suppress the evidence. (R., pp.33-42.) He claimed Officer Herbig violated his rights against unreasonable seizures, as protected by Article I, Section 17 of the Idaho Constitution, and the United States Constitution's Fourth Amendment, when Officer Herbig detained him in order to run a driver's license check without reasonable suspicion or other constitutionally-reasonable justification. (R., pp.33-42.) Mr. Anderson argued that the subsequent discovery of the drug evidence in the vehicle was the tainted "fruit" of Officer Herbig's intentional and flagrant violation his constitutional rights, and that suppression of that evidence was required under Idaho's exclusionary rule, in accordance with *State v. Cohagen*, 162 Idaho 717, 720 (2017). (R., pp.33-42.) In his briefing, he further argued that the State could not carry its burden to establish the "attenuation" exception to the exclusionary rule under the facts of this case. (R., pp.33-42.)

In response to the motion, the State argued two points. First, it argued that Officer Herbig's request for Mr. Anderson's driver's license and retention of the license to run it through dispatch was constitutionally reasonable because the contact was consensual, at least up to the point when the identification was requested, and that no reasonable suspicion was therefore requested under *State v. Godwin*, 121 Idaho 491 (1992), and *State v. Landreth*, 139 Idaho 986, 988 (Ct. App. 2004). (R., pp.47-57.) At the hearing, the State presented testimony from Officer Herbig, which mirrored that of his supervisor's testimony, that he requested the license and ran it through dispatch "to identify who I was talking to" (Tr., p.13, Ls.13-14), and "to protect myself from any allegations or anything to that effect" (Tr., p.19, Ls.12-15), and to create "a log of the name" for future reference (Tr., p.20, Ls.7-9). The district court accepted these reasons as adequate justification for conducting the license check. (Tr., p.47, Ls.1-23.) The State presented no evidence or argument that the officer possessed facts sufficient to provide reasonable suspicion of a law infraction or other wrongdoing. (*See generally* R., pp.47-56; Tr., p.5, L.4 –

37, L.19.) Nor did the State claim or present evidence to show that Officer Herbig had reason to believe Mr. Anderson was in need of assistance or that the officer was otherwise carrying out his community caretaker duties. (*See generally* R., pp.47-56; Tr., p.5, L.4 – 37, L.19.)

Second, the State argued that the drug evidence was obtained as the result of a search of Mr. Anderson's vehicle, conducted pursuant to Mr. Anderson's valid consent, and therefore the drug evidence was admissible. (R., pp.56-57.) The State presented no alternative theory or argument for the application of any exception to the exclusionary rule, in the event the officer's conduct was found to amount to an unlawful detention. (*See generally* R., pp.47-57; Tr., p.36, L.20 – p.38, L.13.) Notably, the State did not cite *Cohagan* or address the question whether there was sufficient attenuation between the request for identification and the discovery of the drugs. (*See generally* R., pp.47-57; Tr., p.36, L.20 – p.38, L.13.)

The district court denied Mr. Anderson's suppression motion. (Tr., p.48, Ls.10-13; R., p.69.) In a ruling from the bench, the district court concluded that the officer's request for and retention of Mr. Anderson's identification did not amount to a detention, finding that the officer's request was made in a friendly manner and that Mr. Anderson had "voluntarily" provided his driver's license in response. (Tr., p.46, Ls.16-25.) The district court additionally concluded that, in any event the officer's conduct in requesting Mr. Anderson's license "was an entirely reasonable request." (Tr., p.46, L.3 – p.47, L.9.) The district court specifically ruled that the officer's retention of the license did not amount to a detention that required reasonable suspicion. (Tr., p.46, Ls.12-15.) The district court found that the detention

> was for a brief time of just identifying who they're dealing with. And both officers explained some of the reasons why they do that. So they know who they're dealing with, there's safety concerns, possible liability concerns, who knows. And in this case it was a very de minimis detention of that driver's license or the ID that was presented.

(Tr., p.47, L.23 – p.48, L.3.)

The district court went on to conclude that the State had met its burden of showing that Mr. Anderson gave valid, voluntary consent to search the vehicle. (Tr., p.47, L.10 – p.48, L.9.) The district court made no alternative findings regarding whether the State had shown sufficient attenuation. (*See generally* Tr., p.46, L.3 – p.48, L.9.)

Mr. Anderson entered a conditional guilty plea to possessing a controlled substance, expressly reserving his right to challenge the district court's decision on appeal. (R., pp.64, 67; Tr., p.51, Ls.18-23.) The district court sentenced him to a suspended term of six years, with three years fixed, and placed him on probation. (R., p.72.) Mr. Anderson timely appealed. (R., p.83.)

<u>ISSUE</u>

Did the district court err in denying Mr. Anderson's motion to suppress, where the evidence discovered was the fruit of the officer's suspicionless, unjustified detention of Mr. Anderson, and the State failed to establish the applicability of any exception to the exclusionary rule?

ARGUMENT

The District Court Erred When It Denied Mr. Anderson's Motion To Suppress Because The Evidence Discovered Was The Fruit Of The Officer's Unconstitutional Detention, And The State Failed To Establish The Applicability Of Any Exception To The Exclusionary Rule

A. Introduction

Officer Herbig unlawfully detained Mr. Anderson when, without suspecting him of any traffic violation or other wrongdoing, or that he was in need of assistance, the officer walked up to Mr. Anderson who was sitting in his parked vehicle, and asked him for identification, took his driver's license, and then ran the license through police dispatch. Because the subsequent discovery of the evidence was the result of the officer's unlawful detention, and in the absence of a showing of sufficient attenuation, the exclusionary rule required suppression of that evidence. The district court's denial of suppression should be reversed.

B. Standard Of Review

When reviewing a district court order granting or denying a motion to suppress evidence, the standard of review is bifurcated. *State v. Cohagan*, 162 Idaho 717, 720 (1017). The appellate court accepts the trial court's findings of fact, unless they are clearly erroneous, and freely reviews the trial court's application of constitutional principles in light of the facts found. *Id*.

C. Officer Herbig's Conduct Violated Mr. Anderson's Fourth Amendment Rights

The Fourth Amendment to the United States Constitution protects the right of the people to be free from unreasonable seizures. U.S. Const. amend. IV; *State v. Cohagan*, 162 Idaho 717, 721 (2017); *State v. Guzman*, 122 Idaho 981 (1992). When, as in this case, a defendant seeks to suppress evidence obtained as the result of an illegal seizure, the defendant bears the initial

burden to show a seizure occurred. *State v. Page*, 140 Idaho 841, 843 (2004). The burden then shifts to the State to demonstrate that the seizure was constitutionally reasonable. *Id*.

1. <u>Officer Herbig's Request For And Retention Of Mr. Anderson's Identification Amounted To A "Seizure" Within Meaning Of The Fourth Amendment</u>

While not all encounters with police amount to a Fourth Amendment "seizure," a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 19, n.16 (1968)). There is a "show of authority" when the words or actions of an officer would convey to a reasonable person that the officer was ordering him or her to restrict his or her movement. *State v. Maland*, 140 Idaho 817 (2004) (citing *California v. Hodari D.*, 499 U.S. 621 (1991)). The crucial test is whether the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Bostick,* 501 U.S. at 434.

It is well-settled that a driver is not free to disregard an officer's request for identification but is legally obligated to surrender his license to the officer. *State v. Cohagan*, 162 Idaho 717, 724-25 (2017); *State v. Godwin*, 121 Idaho 491 (1992); *State v. Osborne*, 121 Idaho 520, 526 (Ct. App. 1991). It is also settled law that, upon surrendering his license to the officer and until the license is returned to him, an individual is "seized" within the meaning for the Fourth Amendment. *Cohagan*, 162 Idaho at 724-25; *Page*, 140 Idaho at 843; *Osborne*, 121 Idaho at 526.

Here, the district court found, and the undisputed evidence shows, that Officer Herbig approached Mr. Anderson and asked for his identification, and that Mr. Anderson handed over his license. (Tr., pp.142, Ls.1-12.) Under the controlling precedent, and as State conceded in the

district court,[3] Mr. Anderson was not free to disregard the officer's request but was required by statute to surrender his license to the officer. *See State v. Osborne*, 121 Idaho 520, 524 (Ct. App. 1991) (concluding the driver of a parked vehicle was "seized" when the officer requested his license, since he was obligated by statute, I.C. § 49-316, to comply with the officer's request and could not drive away without violating the law.) He therefore was "seized" within the meaning of the Fourth Amendment, and his detention continued while officer retained his license and until the license was returned. *Godwin*, 121 Idaho at 493 (a detention occurs when an officer retains a driver's license); *Page*, 140 Idaho at 844 (same). The district court's contrary conclusion, that Mr. Anderson was not detained because he voluntarily handed the officer his license,[4] was error as a matter of fact and as a matter of law.

Because Mr. Anderson was "seized" within the meaning of the Fourth Amendment, the State bore the burden to justify the seizure as constitutionally reasonable. *State v. Page*, 140 Idaho 841, 843 (2004). As demonstrated below, the State failed to carry its burden.

2. <u>The State Failed To Carry Its Burden Of Demonstrating That The Seizure Was Reasonable</u>

Officer Herbig testified that his *only* reasons for requesting identification from Mr. Anderson and running the license through dispatch were "to identify who I was talking to"

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[3] The State told the district court that under the case law, Mr. Anderson was obligated to give up his driver's license to Officer Herbig. (*See* Tr., p.33, Ls.18-25.) That concession is binding on the State on appeal. *Cohagan*, 162 Idaho at 722.

[4] The district court ruled that,

> the defendant consented to letting the officer look at his ID, I find under the circumstances here that that was a valid consent, that it was not coerced, that it was not involuntary, and that it was an entirely reasonable request of the officer to do so, and he did nothing to convince the defendant to do so. It was just a simple request. *The defendant could have said no, but he didn't.*

(Tr., p.46, L.16 – p.47, L.9.)

(Tr., p.13, Ls.13-14), "to protect myself from any allegations or anything to that effect" (Tr., p.19, Ls.12-15), and to create "a log of the name" (Tr., p.20, Ls.7-9). The district court accepted these as the officer's reasons[5] and noting that the detention was brief, and the intrusion "de minimis," concluded that Officer Herbig's conduct was reasonable and found no Fourth Amendment violation. (Tr., p.47, L.23 – p.48, L.3.) The district court's legal conclusion was erroneous.

a. A Detention Requires Reasonable Articulable Suspicion

For a seizure to be "reasonable" within the meaning of Fourth Amendment there must be facts capable of measurement against an objective standard, whether this is probable cause or a less stringent test. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). A person may not be detained, even momentarily, without reasonable, objective grounds for doing so. *Florida v. Royer*, 460 U.S. 491, 498 (1983).

It is unreasonable, and therefore unlawful, for an officer to detain an individual for questioning absent reasonable articulable suspicion that the person is engaged, or about to be engaged, in criminal activity, or that he has committed an offense. *Rodriguez v. United States*, 575 U.S. 348, 353 (2016); *Terry v. Ohio*, 392 U.S. 1 (1968). The Idaho Supreme Court has held it is unreasonable for an officer to detain a citizen for the purpose of obtaining his identification and running a license check absent reasonable suspicion the person is engaged in wrongdoing. *Cohagan*, 162 Idaho at 722. Moreover, such unjustified, suspicionless seizures of citizens – where the officer lacks reasonable suspicion but wants to ask for identification anyway – are

[5] The district also mentioned "safety concerns" and "who knows" as additional reasons. (Tr., p.47, L.23 – p.48, L.3.) However, these additional reasons are not supported by the evidence in the record and are clearly erroneous, and therefore they cannot be used to support the district court's decision. *See State v. Henage*, 143 Idaho 655, 659 (2007) (facts not supported by the record are clearly erroneous); *In re Trottier*, 155 Idaho 17, 23 (Ct. App. 2013) (clearly erroneous factual findings not entitled to deference on appeal).

exactly the type of flagrantly unlawful conduct that the Fourth Amendment prohibits. *Id.* at 724.

The fact a state has enacted a statute requiring the individual to identify himself to police upon request does not alter the requirement that the officer first must have reasonable suspicion that justifies detaining the person. *See Brown v. Texas*, 443 U.S. 47, 50 (1979). As the United States Supreme Court stated in *Brown*,

> In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference. The Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in large metropolitan centers: prevention of crime. But even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.

Id.

Similarly, the fact a statute requires motorists to possess a valid license and to surrender it upon an officer's request, does not permit an officer to detain the motorist absent reasonable suspicion. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

While it is true that whenever an officer conducts a valid traffic stop, supported by reasonable articulable suspicion,[6] the officer is permitted to request the driver's license and registration, and run license and warrants checks incident to the stop, this is so because these are inquiries *related to the mission* of the traffic stop, and are justified by the reasonable suspicion for the stop. *See Rodriguez*, 575 U.S. at 355. However, the fact that a vehicle and its driver already are stopped does *not* justify additional police intrusions, such as the extension of the

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[6] A traffic stop is justified if the officer has a reasonable, articulable suspicion that the driver has committed an offense, such as a traffic offense, or that the driver is engaged in other criminal activity, such as driving under the influence. *State v. Neal*, 159 Idaho 439, 442 (2015).

duration of the stop. *Rodriquez*, 575 U.S. at 355; *State v. Linze*, 161 Idaho 605, 608 (2016). On the contrary, for an additional intrusion to be lawful, it must be justified by its *own* reasonable suspicion. *Rodriguez*, 575 U.S. at 355; *Linze*, 161 Idaho at 608. Even "de minimis" intrusions violate the Fourth Amendment. *Rodriguez*, 575 U.S. at 355; *Linze*, 161 Idaho at 608.

In this case, Officer Herbig testified he was aware of *no* reports of suspicious activity in the area and observed *no* suspicious behavior whatsoever by Mr. Anderson. (Tr., p.18, Ls.2-16.) According to the undisputed evidence, the officer simply observed Mr. Anderson sitting in a parked vehicle, parked in a lot waiting for the bus. (Tr., p.18, Ls.2-16.) The officer gave no legitimate reason, or any reason at all, for initiating the contact with Mr. Anderson. (*See generally* Tr., p.18, L.3 – p.20, L.25.) However, the record is clear that the he detained Mr. Anderson solely for the purpose of obtaining his identification and running it through police dispatch. (Tr., p.18, Ls.2-16.) In other words, Officer Herbig was just fishing.

Because the officer lacked the constitutionally required reasonable suspicion to conduct even a brief detention, Officer Herbig's conduct was unreasonable under the circumstances, and violated Mr. Anderson's Fourth Amendment rights.

b. The Decisions in *State v. Godwin* And *State v. Landreth* Are Not Controlling In This Case

In the district court, the State filed briefing arguing that the officer's conduct was reasonable under the holdings of *State v. Godwin*, 121 Idaho 491, 494 (1992), and *State v. Landreth*, 139 Idaho 986 (Ct. App. 2004). (R., pp.47-57.) However, neither of these cases support Officer Herbig's detention of Mr. Anderson in this case.

In *Godwin*, an officer stopped a vehicle because of an equipment violation. 121 Idaho at 492. During the stop, another vehicle, driven by Godwin, stopped on the roadside one hundred yards in front of the first vehicle. *Id.* While the officer spoke with the driver of the first vehicle,

a sheriff's deputy stopped behind Godwin's vehicle. *Id.* The two vehicles were traveling together and the driver of the first vehicle thought her driver's license was in Godwin's vehicle. *Id.* However, Godwin was unable to locate the license. *Id.* The deputy asked to see Godwin's license and returned to his patrol car to conduct a driver's license check. *Id.* Dispatch informed the deputy that Godwin's license was suspended and Godwin was arrested. *Id.* A search of Godwin's vehicle incident to the arrest revealed plastic bags containing cocaine. *Id.*

In a plurality decision, a fractured majority of the Court agreed Godwin was "seized" when the deputy retained his license to run a license check and that the seizure was reasonable. *Id.* However, in *Godwin*, unlike in this case, the Court's lead opinion reasoned that the seizure of Godwin was tethered to the valid traffic stop of the first car because the two cars were traveling together. *Id.* Moreover, the officers there were told that the driver's license of the first vehicle was in Godwin's possession. *Id.* No such circumstances are present in Mr. Anderson's case.

In *Landreth*, the officer responded to a report of suspicious activity in the parking lot of a grocery store and when he arrived, observed the defendant sitting in a parked vehicle with extension cords extending from the vehicle to the store, and suspected possible theft of electricity. 139 Idaho 986. Based on those facts, the officer initiated contact with the defendant, and, although his suspicions were then dispelled, asked for his driver's license anyway. *Id.* at 987. Citing the reasoning of the lead opinion in *Godwin*, the Idaho Court of Appeals held that the detention was reasonable under the circumstances, even though lacking reasonable suspicion, because the officer provided an articulable "legitimate reason" for initiating the contact in the first place. *Id.* In Mr. Anderson's case, the officer articulated no legitimate reason for initiating the stop, and the facts provide none. (*See generally* Tr., p.46, L.3 – p.48, L.9.) On the contrary,

Officer Herbig's contact with and decision to detain Mr. Anderson demonstrates the very unbridled exercise of discretion that the Idaho Supreme Court in *Cohagan* emphasized is prohibited by the Fourth Amendment. 162 Idaho at 720 (citing *Godwin*, 121 Idaho at 492).

D. The Exclusionary Rule Required Suppression Because The Evidence Was Discovered As The Result Of The Officer's Illegal Conduct And The State Failed To Argue Any Exception To Rule

Evidence obtained in violation of the Fourth Amendment is subject to the exclusionary rule, which requires unlawfully seized evidence to be excluded from trial. *E.g.*, *Wong Sun v. United States*, 371 U.S. 471, 485 (1963); *Cohagan*, 162 Idaho at 720; *State v. Page*, 140 Idaho at 846. The exclusionary rule requires the suppression of both "primary evidence obtained as a direct result of an illegal search or seizure" and, pertinent here, "evidence *later discovered* and found to be derivative of an illegality,"[7] the proverbial "'fruit of the poisonous tree.'" *Cohagan*, 162 Idaho at 721 (quoting *Segura v. United States*, 468 U.S. 796, 804 (1984)) (emphasis added); *see e.g.*, *State v. Bishop*, 146 Idaho 804, 810–11 (2009). The rule "extends as well to the indirect as the direct products of unconstitutional conduct." *Segura*, 468 U.S. at 804.

There are, of course, exceptions to the application of the exclusionary rule, three of which, including the doctrine of attenuation, involve the causal relationship tween the unconstitutional act and the discovery of the evidence. *Cohagan*, 162 Idaho at 721 (citing *Utah v. Strieff*, _ U.S._, 136 S.Ct. 2056 (2016)). However, the burden rests with the State to argue and establish there was "sufficient attenuation" to break the causal connection between the

[7] Thus, even if Mr. Anderson was no longer detained when he consented to the search of his vehicle, the evidence discovered is subject to suppression because it was derived from the officer's exploitation of the information he had obtained as the direct result of his unlawful conduct, minutes earlier. The State's argument, below, that the detention was "undone" when Mr. Anderson's license was returned to him (Tr. p.35, L.2 – p.36, L.18), did not operate to "undo" the taint of the officer's illegal conduct. *Cohagan*, 162 Idaho at 721.

officer's illegal conduct and the discovery of the evidence. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

In this case, the evidence found during the search of Mr. Anderson's vehicle was discovered as the result Officer Herbig's unlawful conduct. Officer Herbig unlawfully seized Mr. Anderson and his license and obtained information about Mr. Herbig – specifically that he was on probation – as the direct result of that illegal conduct. Officer Herbig used the ill-gotten information to interrogate Mr. Anderson about his probation status and, prior to requesting consent, make the point that Mr. Anderson's "cooperation" with the officer's requests and the search would be reported to his probation officer, *e.g.*, "Are you good with me checking, that way if your PO asks me I can tell him, 'Yeah, I checked him. He was good with it. He was cooperative.'" (S*ee* Ex.1, 5:00-5:10.) Mr. Herbig's consent was the product of this question, and the search and discovery of the evidence, the ultimate fruit of the officer's unlawful conduct.

Notably, the district court's factual finding that Mr. Anderson's consent was "voluntary" does not operate by itself to break the causal chain; rather, the State must establish "sufficient attenuation" under a multi-factor test. *See Brown v. Illinois*, 422 U.S. 590, 603-04 (1975) ("The voluntariness of the statement is a *threshold* requirement. And the burden of showing admissibility rests, of course, on the prosecution.") *Brown v. Illinois* was decided shortly after *Wong Sun*. In *Brown*, the United States Supreme Court stated that in order for the causal chain between the illegal seizure and the subsequent statements to be broken, "*Wong Sun* requires not merely that statements be voluntary but that it be 'sufficiently an act of free will to purge the primary taint.'" 422 U.S. at 603-04.

The Idaho Court of Appeals has recognized that these standards apply not only to confessions, but also to other statements including consent, and that "the same standards apply,

requiring the State to prove that the consent was voluntary and not derived by exploitation of an earlier violation." *State v. Tietsort*, 145 Idaho 112, 118 (Ct. App. 2007). Where consent to search is preceded by unlawful police conduct, "the State must also prove that the consent was not procured by the exploitation of the previous illegality. *State v. Reynolds*, 146 Idaho 446, 472 (Ct. App. 2008) (abrogated on other grounds) (citing *Wong Sun*, 371 U.S. at 488); *see also State v. Teitsort*, 145 Idaho at 115.

Officer Herbig's unlawful seizure of Mr. Anderson and the running of his license through dispatch preceded the giving of consent to search and the ensuring discovery of the drug evidence. (Ex.1, 2:10-5:40.) Thus, the consent and subsequent search do not prevent the application of the exclusionary rule, absent a showing of sufficient attenuation *Cf. Cohagan*, 162 Idaho at 722 (holding that that discovery of an outstanding arrest warrant, though it compelled the arrest and authorized the lawful search incident that ultimately revealed the drug evidence, was an intervening circumstance that weighed in favor of attenuation under the multi-factor test, but was outweighed by the flagrancy and purposefulness of the preceding illegal detention Fourth Amendment violation – which, like in this case, was the unjustified, suspicionless detention of a citizen to request identification).

Additionally, because the State failed even to argue there was sufficient attenuation, or that any other exception to the exclusionary rule applied, it has waived the issue. *State v. Hoskins*, 165 Idaho 217, _, 443 P.3d 231, 240 (2019) (rejecting the State's request for a remand to determine the application of exceptions to exclusionary rule, where the State had failed to argue any exception in the district court).

CONCLUSION

Mr. Anderson respectfully asks that this Court reverse the district court's order denying suppression, vacate his judgment of conviction, and remand his case to the district court to permit him to withdraw his guilty plea.

DATED this 12th day of December, 2019.

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

CERTIFICATE OF SERVICE

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

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/s/ Evan A. Smith
EVAN A. SMITH
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KAC/eas