

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 47291-2019
 Plaintiff-Respondent,)
) Kootenai County Case No.
 v.) CR28-18-21327
)
 TANYA ELAINE WHITE,)
)
 Defendant-Appellant.)
 _____)

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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STATEMENT OF THE CASE

Nature Of The Case

Tanya Elaine White appeals from the judgment of conviction entered upon her conditional guilty plea to possession of methamphetamine. She challenges the district court's denial of her motion to suppress. She also challenges the district court's denial of her I.C.R. 36 motion to correct a clerical error in the judgment.

Statement Of The Facts And Course Of The Proceedings

In December 2018, Deputy Arek Brock of the Kootenai County Sheriff's Office observed a woman exiting a Walmart and entering the back seat of a vehicle parked on a sidewalk nearby. (R., p.22.) Two men were sitting in the front of vehicle. (Id.) The vehicle started to drive towards the exit, as the three occupants looked back at Deputy Brock. (Id.) The vehicle parked at a nearby parking lot, and then drove back to Walmart after Deputy Brock began conducting an unrelated traffic stop. (Id.) The woman and one of the male passengers exited the vehicle, continued to watch Deputy Brock, and then entered the Walmart. (Id.) The man later exited the Walmart, saw Deputy Brock again, and went back inside the Walmart. (Id.)

Finding this behavior to be suspicious, Deputy Brock approached the parked vehicle and engaged in a consensual contact with the remaining occupant, Deavan Tristan. (Id.; State's Exhibit 1, 13:26:00 – 13:27:40.) Deputy Brock smelled a faint odor of marijuana emitting from the vehicle. (R., p.22.) Tristan admitted to Deputy Brock that there was marijuana in the trunk of the vehicle and that he was "pretty sure" that the man who was in the vehicle was "smoking

weed.” (Id.; State’s Exhibit 1, 13:27:00 – 13:27:30.) Other officers soon arrived and began to search the vehicle. (R., pp.22-23.)

Deputy Brock entered the Walmart to look for the other two occupants of the vehicle. (R., p.23.) Deputy Brock located and detained both individuals—Tanya White and Robert Mann—near the middle of the store. (Id.; State’s Exhibit 1, 13:34:20 – 13:35:00.) He and another officer placed both individuals in handcuffs and escorted them back to the vehicle, where he read them their *Miranda* rights. (R., p.23; State’s Exhibit 1, 13:37:52 – 13:38:06, 13:39:21-13:39:40.) Both White and Mann were informed that they were being detained. (State’s Exhibit 1, 13:39:10 – 13:39:28.)

Deputy Austin Norris advised Deputy Brock that he recovered marijuana and a marijuana pipe in the rear portion of the vehicle, alongside medical paperwork with the name Tristan on it. (R., p.23.) Tristan admitted ownership of the marijuana and pipe, and told Deputy Brock that White, his mother, was aware that this contraband was in the vehicle. (Id; State’s Exhibit 1, 13:42:08 – 13:43:12.) He also told Deputy Brock that he believed that White used methamphetamines. (State’s Exhibit 1, 13:42:08 – 13:43:12.) White initially indicated that the marijuana was hers (R., p.23; State’s Exhibit 1, 13:39:40 – 13:41:05), but later acknowledged that she was just trying to protect Tristan (R., p.23; State’s Exhibit 1, 13:44:49 – 13:45:09).

Deputy Norris also advised Deputy Brock that he had located a women’s bag in the vehicle containing methamphetamine and drug paraphernalia. (R., p.23.) When Deputy Brock confronted White with the bag, she asked Deputy Brock not to open it in front of Tristan—which Deputy Brock took to indicate White’s knowledge of the contents of the bag. (R., p.23; State’s

Exhibit 1, 13:47:00 – 13:47:21.) Deputy Brock then placed White under arrest. (R., p.23.) Later, Sgt. Ellis informed Deputy Brock that security footage from Walmart depicted White and Mann going directly into the store bathroom after entering the building the second time. (R., pp.23, 33.) Sgt. M. Ellis¹ recovered a bag with methamphetamine residue inside the bathroom trash can. (Id.)

The state charged White with possession of methamphetamine and drug paraphernalia. (R., pp.55-56.) Deputy Brock cited Tristan for marijuana and paraphernalia possession. (R., p.24.) Mann was cited for possession of drug paraphernalia found in his pocket, and was arrested on an outstanding arrest warrant. (Id.)

White filed a motion to suppress her statements made to officers, any observations made by the officers about her, and all evidence seized. (R., p.58-66.) In the motion, White argued that the deputies illegally arrested her inside of the Walmart by placing her in handcuffs and escorting her back to the vehicle when they lacked probable cause to effectuate such an arrest. (Id.) This constitutional violation, asserted White, necessitated the suppression of all of the evidence subsequently obtained against her. (Id.) In response, relevant to this appeal, the state argued: (1) The detention of White made inside of the Walmart constituted merely a valid *Terry* investigative detention, which the deputies had reasonable suspicion to conduct; (2) that even if the handcuffing of White converted the investigative detention into an arrest, the deputies possessed probable cause to conduct such an arrest; and (3) even if the detention constituted an arrest, and even if the deputies lacked probable cause to lawfully effectuate such an arrest,

¹ Sgt. Ellis' full first name does not appear in the clerk's record.

White's statements were still admissible pursuant to a proper application of the attenuation doctrine. (R., pp.79-97.)

The parties agreed to forgo the presentation of live testimony at a suppression hearing, and instead submitted the police reports and Deputy Brock's body camera footage for the court's consideration. (4/18/19 Tr., p.5, Ls.17-22; p.6, L.23 – p.7, L.9.) Also at the hearing, White clarified that she was not seeking the suppression of any of the evidence found in the vehicle, but merely her statements and any observations about her demeanor made by the officers. (4/18/19 Tr., p.6, Ls.11-18; see also R., p.100.)

In a Memorandum Decision and Order, the district court denied White's motion to suppress. (R., pp.107-121.) The court concluded that White's detention constituted merely an investigative detention for which the deputies had reasonable suspicion to lawfully conduct. The court did not consider whether the deputies additionally had probable cause to arrest White, or if White's statements were subject to suppression even assuming that she was unlawfully arrested. (See id.)

Pursuant to a plea agreement with the state, White entered a conditional guilty plea to possession of methamphetamine and the state agreed to dismiss the drug paraphernalia charge and recommend that White be placed on probation. (R., pp.191, 209-210; 6/3/19 Tr., p.6, L.12 – p.14, L.19.) White preserved her right to appeal from the district court's order denying her

motion to suppress.² (6/3/19 Tr., p.6, L.16 – p.7, L.5; p.10, Ls.2-17.) The court imposed a unified three-year sentence with one year fixed, but suspended the sentence and placed White on probation for two years. (8/15/19 Tr., p.9, Ls.3-10.) White timely appealed. (R., pp.215-218.)

In December 2019, White filed an I.C.R. 36 motion to correct a clerical error in the judgment. (Aug.³, pp.1-2.) White noted that, as stated above, the district court verbally imposed and suspended a unified three-year sentence with one year fixed at the sentencing. (Id.) The subsequently-entered written judgment of conviction, however, set forth a unified four-year sentence with two years fixed. (Id.; R., pp.201-205.) White requested that the judgment of conviction be corrected to reflect the correct sentence verbally imposed at the sentencing hearing. (Aug., pp.1-2.) The state affirmatively declined to object to the motion, which the district court denied. (Id.)

² White also preserved her right to appeal from the district court's order (R., p.188), granting the state's motion in limine to exclude certain evidence. However, White does not challenge this order on appeal. (Appellant's brief, p.8 n.4.)

³ The Idaho Supreme Court granted White's motion to augment the appellate record with her I.C.R. 36 motion to correct a clerical error (which also contained the district court's denial order superimposed upon it), and an audio recording of the August 15, 2019 sentencing hearing. (2/4/20 Order.)

ISSUES

White states the issues on appeal as:

- I. Did the district court err by denying Ms. White's motion to suppress when Deputy Brock and Deputy Ellis arrested her without probable cause?
- II. Did the district court err by denying Ms. White's Rule 36 Motion to correct a clerical error in the judgment?

(Appellant's brief, p.11.)

The state rephrases the issues as:

1. Has White failed to show that the district court erred by denying her motion to suppress?
2. Did the district court make an incorrect factual finding in denying Ms. White's I.C.R. 36 motion to correct a clerical error in the judgment, necessitating remand?

ARGUMENT

I.

White Has Failed To Show That The District Court Erred By Denying Her Motion To Suppress

A. Introduction

White contends that the district court erred by denying her motion to suppress. (Appellant's brief, pp.12-26.) Specifically, White contends that the court erred by concluding that the deputies conducted an investigative detention of her in the Walmart, rather than a formal arrest. (Id., pp.12-19.) White also contends that that the deputies lacked probable cause to effectuate the arrest, and that her subsequent statements must therefore be suppressed as "fruit of the poisonous tree." (Id., pp.19-26.)

White's contentions fail. A review of the record and the applicable law reveals: (1) the deputies' handcuffing of White did not transform the investigative detention into an arrest; (2) even if the deputies arrested White, they had probable cause to do so based upon evidence that there was marijuana in the vehicle, combined with White's suspicious behavior; and (3) even if the deputies performed an arrest when only an investigative detention was justified, this does not necessitate suppression of White's subsequent statements in light of the intervening circumstances of the *Miranda* warnings given to White by Deputy Brock, and the deputies' discovery of marijuana and methamphetamine in the vehicle in the course of a lawful search. White therefore has failed to demonstrate that the district court erred in denying her motion to suppress.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. Generally, when a decision on a motion to suppress is challenged, the appellate court accepts the trial court’s findings of fact that are supported by substantial evidence, but exercises free review of the application of constitutional principles to the facts as found. State v. Atkinson, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). 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).

However, in the “unusual situation” where the appellate court has before it exactly the same evidence as was considered by the district court—such as when there was no live testimony presented at a suppression hearing—the appellate court’s role is “to freely review and weigh the evidence in the same manner as the trial court would do.” State v. Anderson, 164 Idaho 309, 313, 429 P.3d 850, 854 (2018) (quoting State v. Lankford, 162 Idaho 477, 492, 399 P.3d 804, 819 (2017)).

C. The District Court Correctly Denied White’s Motion To Suppress

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. In this case, the district court properly applied Fourth Amendment principles in denying White’s motion to suppress.

1. The Deputies' Utilization Of Handcuffs To Detain White Did Not Transform The Investigative Detention Into An Arrest

While a police officer may subject an individual to an investigative detention upon reasonable 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), the Fourth Amendment permits an officer to make a warrantless arrest only upon probable cause that such individual has committed a crime, State v. Julian, 129 Idaho 133, 136, 922 P.2d 1059, 1062 (1996); I.C. § 19-603.

There is no bright line rule to determine when an investigatory detention has become an arrest. Instead, “common sense and ordinary human experience must govern over rigid criteria.” State v. Buti, 131 Idaho 793, 796, 964 P.2d 660, 663 (1998) (quoting State v. Pannell, 127 Idaho 420, 423, 901 P.2d 1321, 1324 (1995)). If an investigative detention becomes unreasonable, the detention is transformed into an arrest. Pannell, 127 Idaho at 423, 901 P.2d at 1324. However, officers may, without converting an investigatory detention into an arrest, take any measures that are “reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.” United States v. Hensley, 469 U.S. 221, 235 (1985).

In determining whether a detention became unreasonable, a court should consider the duration of the invasion imposed by the additional restriction and the law enforcement purposes served. State v. DuVault, 131 Idaho 550, 961 P.2d 641 (1998) (citing Pannell, 127 Idaho at 420, 901 P.2d at 1324); see also United States v. Sharpe, 470 U.S. 675, 685 (1985)). Additional factors to be considered in distinguishing an investigatory stop from a *de facto* arrest may include

the seriousness of the crime, the location of the encounter, the length of the detention, the reasonableness of the officer's display of force, and the conduct of the suspect as the encounter unfolds. State v. Martinez, 129 Idaho 426, 431, 925 P.2d 1125, 1130 (Ct. App. 1996); State v. Knapp, 120 Idaho 343, 347, 815 P.2d 1083, 1087 (Ct. App. 1991).

In this case, White does not appear to dispute that the officers had reasonable suspicion to detain her, or that escorting her from the Walmart back to her vehicle was reasonable. (See Appellant's brief, pp.14-19.) Instead, White contends that the district court erred by concluding that the deputies' utilization of handcuffs to detain and escort her back to the vehicle transformed the detention into arrest for which they lacked probable cause. (Id.) White notes that she was fully compliant with the deputies, and that the district court, despite finding that no arrest had occurred, concluded that she did not pose a threat to officer safety. (Id., pp.17-19.) However, a review of the applicable law and the totality of the circumstances demonstrates that the district court correctly recognized that the circumstances of encounter created a substantial risk that White could attempt to flee, and that the officers' use of handcuffs was reasonable.

To be sure, the utilization of handcuffs is a significant factor in a determination of whether an arrest has occurred. See e.g. Pannell, 127 Idaho at 423, 423-425 901 P.2d at 1324; State v. Johns, 112 Idaho 873, 877-878, 736 P.2d 1237, 1330-1331 (1987); State v. Frank, 133 Idaho 364, 367-369, 986 P.2d 1030, 1033-1035 (Ct. App. 1999); State v. Buell, 145 Idaho 54, 57, 175 P.3d 216, 219 (Ct. App. 2008); DuVault, 131 Idaho at 553-555, 961 P.2d at 644-645. However, the "[h]andcuffing of a suspect does not necessarily dictate a finding of custody. Strong but reasonable measures to insure the safety of the officers or the public can be taken

without necessarily compelling a finding that the suspect was in custody.” Johns, 112 Idaho at 878, 736 P.2d at 1332 (quoting United States v. Booth, 669 F.2d 1231, 1236 (9th Cir. 1981)). For example, depending on the facts of a particular encounter, handcuffs may be justified in the context of an investigative detention where there is a substantial risk of suspect flight. See Pannell, 127 Idaho at 424, 901 P.2d at 1235.

The cases analyzing deputies’ utilization of handcuffs to detain individuals do not stand for the proposition that, before handcuffs may be utilized in an investigative detention, a suspect must affirmatively perform some action demonstrating that she poses a risk to the safety of the officer or others, or that some specific non-compliance with an officer’s lawful orders demonstrates a risk that the suspect may flee. Instead, as with any Fourth Amendment analysis, it is the particular circumstances of a case from which the reasonableness of an officer’s decision to utilize handcuffs must be evaluated. Here, the particular circumstance which justified the officers’ use of handcuffs was the need to transport White and Mann from the middle of a large and crowded Walmart store, to the vehicle outside where the investigation was already being conducted.

While in other circumstances, such movement of a suspect may indicate that an arrest has taken place, here, the conducting of a prompt and efficient investigation required the deputies and the suspects to be in the vicinity of the vehicle, where a search and subsequent recovery of controlled substances was underway. See United States v. Charley, 396 F.3d 1074, 1080 (9th Cir. 2005) (“police may move a suspect without exceeding the bounds of an investigative detention when it is a reasonable means of achieving the legitimate goals of the detention given the

specific circumstances of the case”) (internal quotations and citations omitted); Gallegos v. City of Los Angeles, 308 F.3d 987, 990-993 (9th Cir. 2002) (valid investigative stop where police officers pulled over a man they mistakenly believed to be a burglary suspect, ordered him out of his vehicle at gunpoint, handcuffed him, placed him in the back of their patrol car, and brought him back to the scene of the incident for identification). It was reasonable for the deputies to handcuff White and Mann for the purpose of safely escorting them back to the vehicle.

The deputies encountered White and Mann after they had already demonstrated a coordinated effort to evade Deputy Brock. After the vehicle in which White was a passenger appeared to exit and then promptly return to the Walmart while being observed by Deputy Brock, White and Mann entered, left, and re-entered the Walmart upon noticing Deputy Brock’s continued surveillance. (R., p.22.) While, as White correctly notes (Appellant’s brief, pp.17-18), White and Mann had “every right” to avoid Deputy Brock and refuse to speak with him, it does not follow that this or other non-criminal actions of suspects, or other neutral observations made about the particular circumstances of an encounter, cannot lawfully inform an officer’s reasonable determination of what degree of restraint is necessary to safely and efficiently effectuate an investigative detention. In determining whether reasonable suspicion exists to effectuate an investigative detention in the first place, for example, “officers are not required to ignore the suspicious nature of relevant surrounding circumstances.” State v. Perez-Jungo, 156 Idaho 609, 616, 329 P.3d 391, 398 (Ct. App. 2014) (citing Illinois v. Wardlow, 528 U.S. 119, 124 (2000)).

Here, by the time the deputies encountered White and Mann inside of the Walmart, Deputy Brock had smelled marijuana in the vehicle that White and Mann had just been in, and had learned from David Tristan, the other vehicle occupant, that marijuana was also currently present in the vehicle. (R., pp.22-23.) Based upon their suspicious behavior, Deputy White also believed that White and Mann may have been in possession of other contraband that they entered the store to dispose of. (See State's Exhibit 1, 13:43:32 – 13:43:52 (Deputy Brock informing White that he was waiting for the Walmart security videos to be made available so he could see whether White and Mann disposed of any contraband in the store)). The store was large, crowded with people, and contained aisles that would make it difficult for the officers to locate White and Mann should they flee. (See State's Exhibit 1, 13:28:04 – 13:35:46.)

Once White and Mann were escorted from the store, the investigation continued without delay. The vehicle was searched (revealing more contraband), and Deputy Brock spoke with all three suspects—including by confronting of White with the methamphetamine found in the women's bag. (R., p.23; State's Exhibit 1, 13:36:10 – 13:47:30.) The officers were continuously acquiring new information through the suspects' statements and the search of the vehicle. The handcuffing of White therefore did not extend the duration of the stop. Finally, as discussed in greater detail below, even if probable cause was not established by the time White was initially detained, it was established by the time, or shortly after, White and Mann were escorted outside when the controlled substances were recovered from the vehicle, and when White (falsely) admitted ownership of the recovered marijuana. (R., p.23; State's Exhibit 1, 13:39:40 – 13:41:05, 13:46:55 - 13:47:30.) Under these circumstances, the officers' utilization of handcuffs

to briefly detain White while a multifaceted, multi-suspect investigation was being expeditiously carried out in a crowded public area was not unreasonable, and did not transform the investigative detention into a formal arrest.

The district court properly concluded that under the circumstances of this case, it was reasonable for the deputies to utilize handcuffs in their investigative detention of White. The use of the handcuffs therefore did not transform the investigative detention into an arrest. Because White was never unlawfully arrested, the district court properly denied White's motions to suppress her statements made while detained. This Court should affirm the court's denial order.

2. In The Alternative, Even If Deputy Brock Arrested White Inside The Walmart, He Possessed Probable Cause To Lawfully Do So

In the alternative, as the state argued to the district court⁴ (R., pp.86-89), even if the deputies' utilization of handcuffs converted their detention of White into an arrest, such an arrest was lawful because Deputy Brock possessed probable cause to effectuate such an arrest.

"[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." State v. Lee, 162 Idaho 642, 649, 402 P.3d 1095, 1103 (2017) (citing Devenpeck v. Alford, 543 U.S. 146, 152 (2004)). As the United States Supreme Court stated in Maryland v. Pringle, 540 U.S. 366 (2003), probable cause deals with "probabilities" and not "[f]inely tuned standards such as proof beyond a reasonable doubt."

⁴ Having concluded that White was merely detained and not arrested inside the Walmart, the district court did not reach this issue. (See R., pp.111-120.)

In Pringle, police stopped a car with three people in it, found cocaine in the car, and arrested all three occupants of the vehicle. Pringle, 540 U.S. at 368-369. Pringle asserted officers lacked probable cause to arrest him. Id. at 369. The Maryland Court of Appeals agreed and held that, “absent specific facts tending to show Pringle’s knowledge and dominion or control over the drugs, the mere finding of cocaine in the back armrest when Pringle was a front seat passenger in a car being driven by its owner is insufficient to establish probable cause for an arrest for possession.” Id. (internal quotes and brackets omitted). However, this analysis was rejected by the United States Supreme Court, which reiterated that probable cause deals with “probabilities and depends on the totality of the circumstances” and consists of a “reasonable ground for belief of guilt” that is “particularized with respect to the person to be searched or seized.” Id. at 370-374. The Court reasoned that the presence of cocaine and a significant amount of cash in the car where it was accessible to all three occupants created “an entirely reasonable inference ... that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine.” Id. at 372. This was because, unlike patrons in a business or guests in a residence, “a car passenger ... will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits of the evidence of their wrongdoing.” Id. at 373 (quoting Wyoming v. Houghton, 526 U.S. 295, 304-305 (1999)).

In this case, by the time Deputy Brock made contact with White and Mann inside of the Walmart, he had observed White in the backseat of the vehicle outside, had smelled the odor of marijuana coming from that vehicle, and had been told by Tristan that there was, in fact, marijuana in the trunk of the vehicle. Further, the “trunk” of the vehicle appears from Deputy

Brock's bodycam video to be of a type of trunk that can be accessed from the rear passenger seats, where Deputy Brock observed White (as opposed to the other two vehicle occupants, whom Deputy Brock observed in the front seats) (See R., p.22; State's Exhibit 1, 13:41:20 – 13:41:40.) Additionally, as discussed above, Deputy Brock observed White and Mann make numerous efforts to elude him before his contact with them took place, including by entering the Walmart where they would have had the opportunity, as Deputy Brock suspected, to attempt to dispose of any contraband they possessed. See State v. Greene, 100 Idaho 464, 466, 600 P.2d 140, 142 (1979) ("Suspicious behavior of a defendant when he becomes aware of the police is a circumstance that can link him to drugs found on the premises of which he is in non-exclusive possession.") (citations omitted).

While it does not appear that Deputy Brock was aware that other officers had actually located the marijuana in the vehicle by the time he made contact with White and Mann,⁵ the circumstances remain similar to Pringle and other cases where contraband is found in a vehicle containing more than one occupant, and where these circumstances suggest that multiple occupants had knowledge of and control over the contraband, creating probable cause to arrest more than one of the occupants.

⁵ It is unclear from Deputy Brock's bodycam footage and the police reports precisely when the marijuana and the methamphetamine were found in the car relative to other actions which occurred during the investigation. While he was looking for White and Mann in the Walmart, Deputy Brock sent a request over his radio for other officers to search the vehicle to look for contraband "besides the weed." (State's Exhibit 1, 13:29:52 – 13:30:05.) By the time Deputy Brock returned to the vehicle with White and Mann, his bodycam video depicts that the vehicle's trunk door had been opened, and that several police vehicles were then present. (Id., 13:37:20 – 13:37:30.) Less than a minute later, while Deputy Brock is speaking with Mann, an officer can be seen searching the open trunk. (Id., 13:37:56 – 13:38:20.)

The deputies had probable cause to arrest White inside of the Walmart. Therefore, even assuming that their utilization of handcuffs transformed the investigative detention into a formal arrest, the arrest was still constitutional, and White's subsequent statements were thus admissible. As a result, even if the district court erred in characterizing the deputies' detention of White, this Court should still affirm the district court's denial of White's motion to suppress.

3. In The Further Alternative, Even If Deputy Brock Arrested White Inside The Wal-Mart But Lacked Probable Cause To Lawfully Do So, Proper Application Of The Attenuation Doctrine Precludes Suppression

In the further alternative, as the state argued to the district court⁶ (R., pp.92-96), even if the deputies conducted an arrest of White inside the Walmart and lacked probable cause to do so, proper application of the attenuation doctrine reveals that White's subsequent statements⁷ need not have been suppressed.

The exclusionary rule requires suppression of evidence that is gained through unconstitutional governmental activity. Segura v. United States, 468 U.S. 796, 815 (1984); State v. Wigginton, 142 Idaho 180, 184, 125 P.3d 536, 540 (Ct. App. 2005). This prohibition against the use of derivative evidence extends to the indirect as well as the direct "fruit" of the government's misconduct. Segura, 468 U.S. at 804; Wong Sun v. United States, 371 U.S. 471,

⁶ Having concluded that White was merely detained and not arrested inside the Walmart, the district court did not reach this issue. (See R., pp.111-120.)

⁷ White did not specify to the district court any particular incriminating statement she wished to have suppressed, but the state and the court recognized White's question to Deputy Brock, "can you not open that up in front of my son?" (referring to the women's bag that contained methamphetamine), as being the most incriminating and relevant to the charges brought against White. (R., pp.92-93, 96, 118.)

484 (1963). The exclusionary rule applies to verbal statements obtained as a result of officer misconduct as well as to the more traditional seizure of physical evidence. Wong Sun, 371 U.S. at 485; Brown v. Illinois, 422 U.S. 590, 606-607 (1975).

However, evidence is not necessarily inadmissible “fruit of the poisonous tree” even it would not have come to light except for the illegal police activity. Instead, the inquiry is whether the evidence objected to came to light by “exploitation of that illegality.” Brown, 422 U.S. at 599; Wong Sun, 371 U.S. at 487-488. The fruit of the poisonous tree doctrine requires that a court ask “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” Wong Sun, 371 U.S. at 488. Evidence need not be excluded if: (1) “the Government learned of the evidence ‘from an independent source’”, Id. at 487 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)); or (2) where “the connection between the lawless conduct of the police and the discovery of the challenged evidence has ‘become so attenuated as to dissipate the taint,’” Id. (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)).

Pursuant to the attenuation doctrine, a court may admit evidence that would not have been discovered but for officer misconduct if the causal connection between the illegal conduct and the acquisition of the evidence is sufficiently attenuated to purge the evidence of its initial taint. See Wong Sun, 371 U.S. at 487-488; Brown, 422 U.S. at 603-604. In Brown, the United States Supreme Court held that in determining whether the causal chain has been sufficiently attenuated, courts should consider: how much time elapsed between the illegality and the

acquisition of the evidence, the presence of intervening circumstances, and the purpose and flagrancy of the officer conduct. Brown, 422 U.S. at 603-604; see also Utah v. Strieff, ___ U.S. ___, 136 S. Ct. 2056, 2060-2064 (2016) (application of Brown attenuation factors).

No one Brown attenuation factor is controlling, and other factors also may be relevant to the attenuation analysis. Brown, 422 U.S. at 603. Attenuation can occur not only when the causal connection is remote but also when suppression would not serve the interest protected by the constitutional guarantee violated. Hudson v. Michigan, 547 U.S. 586, 593 (2006).

At the outset, it is important to properly characterize the circumstances of the present case as being different than typical attenuation doctrine cases, such as Brown itself, and two other cases cited by White on appeal (Appellant’s brief, pp.23-24)—Dunaway v. New York, 442 U.S. 200 (1970) and Kaupp v. Texas, 538 U.S. 626 (2003). In each of those three cases, officers unlawfully arrested a suspect and transported him to the police station, where the suspect made incriminating statements. Brown, 422 U.S. at 592-596; Dunaway, 442 U.S. at 202-203; Kaupp, 528 U.S. at 627-629. Each of these suspects were therefore only in the position to make incriminating statements because they were in a place—the police station—that the officers had *no* lawful authority to transport them to. In this case, even assuming that the deputies *arrested* White in the Walmart and lacked probable cause to do so, they still had the lawful authority to instead effectuate an investigative detention upon White and escort her outside, where they would still have had the opportunity to continue their investigation and to question White. Therefore, a corresponding “fruit of the poisonous tree”/attenuation analysis must view the intervening circumstances discussed below in the context of whether such circumstances

demonstrate that the officers exploited not White's presence, but her enhanced level of detention, in order to obtain her statements.

The first significant intervening circumstance was the officers' discovery of marijuana and methamphetamine, both of which were obtained pursuant to a lawful search of the vehicle that White has not challenged. (R., p.23.) The officers' retrieval of this contraband from the vehicle was accomplished completely independently from the level of restraint utilized to detain White during the investigation to that point. Further, the contraband was obtained prior to when White made incriminating statements indicating her knowledge of the presence of the methamphetamine in the women's bag. (Id.) If White could not have been lawfully arrested initially, she could have instead been lawfully arrested, at the very least, following the recovery of these controlled substances.⁸

Secondly, Deputy Brock read White *Miranda* warnings prior to White making any statements outside of the store. (State's Exhibit 1, 13:39:21-13:39:40.) Therefore, regardless of the degree of restraint that was lawfully appropriate at this point, White was fully informed of her right to remain silent, but chose to make statements to Deputy Brock regardless. While the fact that a *Miranda* warning was given does not *alone* purge the taint of an initial illegality, such a fact remains "an important factor ... in determining whether the confession is obtained by exploitation of an illegal arrest." Brown, 422 U.S. at 603. Here, combined with the intervening

⁸ As the state (R., pp.92-93) and district court (R., p.118), noted below, while White made some statements regarding the marijuana prior to when Deputy Brock confronted her with the women's bag, these statements were not incriminating relative to the methamphetamine and paraphernalia charges that White was actually subjected to. Regardless, White continues to assert that all of her statements should have been suppressed. (Appellant's brief, p.24, p.8.)

factor of the discovery of the contraband, and application of the other Brown attenuation factors, the *Miranda* warnings help to weigh the analysis in the state's favor.

Next, the deputies' conduct in arresting White rather than merely detaining her, if done in error, was far less flagrant than the unlawful arrests and transports at issue in Brown, Dunaway, and Kaupp. Deputy Brock was attempting to manage a multi-faceted investigation involving multiple suspects, and there was no indication that he was doing so in bad faith. For all the reasons discussed above as to why the state asserts that the deputies' utilization of handcuffs did not transform the detention of White into an arrest, the state also asserts that the deputies' actions, even if incorrect, were not flagrantly incorrect.

Finally, the state acknowledges that with respect to the third Brown attenuation factor, the time elapsed between an unlawful act and when the evidence was obtained, the United States Supreme Court's "precedents have declined to find that this factor favors attenuation unless 'substantial time' elapses between an unlawful act and when the evidence is obtained." Strieff, 136 S. Ct. at 2062 (citing Kaupp, 538 U.S. at 633). Here, while the time between the deputies' contact with White inside of the Walmart, and White's incriminating statements, was not so instantaneous that other officers weren't able to search the vehicle and recover contraband in the interim, a "substantial time" did not elapse. However, the state submits that in light of the other factors discussed above, a proper overall application of the appropriate attenuation factors demonstrates that the attenuation doctrine renders White's statements admissible.

Two intervening circumstances combined with the lack of flagrant police misconduct demonstrate that the officers did not obtain White's incriminating statements through an exploitation of any illegality. Therefore, even assuming that the deputies arrested, rather than detained White in the Walmart, and even further assuming that the officers lacked probable cause to effectuate such an arrest, White's subsequent statements still need not have been suppressed based on a proper application of the attenuation doctrine. This Court should thus affirm the district court's denial of White's motion to suppress.

II.

The District Court Made An Incorrect Factual Finding In Denying Ms. White's I.C.R. 36 Motion To Correct A Clerical Error In The Judgment, Necessitating Remand

Idaho Criminal Rule 36 provides that a court may "at any time correct a clerical error in a judgement." This rule may be utilized to correct disparities between a defendant's sentence in a court's oral pronouncement and its written order. See State v. Timbana, 145 Idaho 779, 782, 186 P.3d 635, 638 (2008); State v. Wallace, 116 Idaho 930, 931-932, 782 P.2d 53, 54-55 (Ct. App. 1989). "Although a written judgment is presumably a correct statement of the judgment pronounced in open court, and for that reason is ordinarily treated as an expression of the judgment itself, the principle remains that the only legally cognizable sentence in a criminal case is the actual oral pronouncement in the presence of the defendant." Wallace, 116 Idaho at 932, 782 P.2d at 55 (citing United States v. Bergman, 836 F.2d 1220, 1221 (9th Cir. 1998)) (internal quotation omitted). Therefore, "[i]f an order of commitment does not accurately represent the court's oral sentence pronouncement that constitutes the judgment, it is manifestly proper to correct the error under Rule 36 so the written expression is consistent with that judgment." Id.

(citations omitted); see also State v. Luna, 118 Idaho 124, 125-126, 795 P.2d 18, 19-20 (Ct. App. 1990).

In this case, prior to sentencing, the state recommended that the district court place White on probation, and that it was otherwise leaving the sentence to the court's discretion. (8/15/19 Tr., p.6, Ls.11-12.) White recommended that the district court "place her on a couple years probation." (8/15/19 Tr., p.7, Ls.21-22.) According to both the reporter's transcript of the sentencing hearing (8/15/19 Tr., p.9, Ls.3-10), and the audio recording of the hearing (8/15/19 hearing audio recording, 5:11 – 5:43), the district court imposed a unified three-year sentence with one year fixed and suspended the sentence. However, the judgment of conviction and the minutes of the hearing both stated that a unified four-year sentence with two years fixed was imposed. (R., pp.199, 201-205.)

White filed a stipulated I.C.R. 36 motion, to which the state affirmatively did not object, requesting that the court amend the judgment of conviction to correct this discrepancy. (Aug, pp.1-2.) The district court (through a different judge than who had sentenced White) denied the motion by superimposing the following onto the motion:

The court minutes indicate a 4 year unified sentence with two yeas fixed. The court listened to the record of the hearing several times. Judge Carey said he would impose a suspended sentence of three years with two fixed and the two years indeterminate. This court believes he misspoke when he used the words "three years" and intended a four year sentence.

(Aug., p.2.)

On appeal, White argues that neither the sentencing hearing transcript nor the audio recording of that hearing indicate that the district court stated that it was imposing a sentence "of

three years with two fixed and the two years indeterminate,” and that there is no other indication in the record that court merely “misspoke” when verbally imposing sentence. (Appellant’s brief, pp.28-31.) Having come to the same conclusion, the state joins White’s request to reverse the district court’s order denying her I.C.R. 36 motion and to remand this case for the district court to enter a new judgment of conviction with the corrected sentence.

CONCLUSION

The state respectfully requests this Court to affirm the district court’s denial of White’s motion to suppress and White’s judgment of conviction; but to reverse the district court’s I.C.R. 36 denial order and remand the case for the court to enter a new judgment of conviction with the corrected sentence.

DATED this 23rd day of April, 2020.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of April, 2020, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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MWO/dd