

Uldaho Law

Digital Commons @ Uldaho Law

Not Reported

Idaho Supreme Court Records & Briefs

2-16-2021

State v. Fitzpatrick Respondent's Brief Dckt. 47818

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Fitzpatrick Respondent's Brief Dckt. 47818" (2021). *Not Reported*. 6847.
https://digitalcommons.law.uidaho.edu/not_reported/6847

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 47818-2020
 Plaintiff-Respondent,)
) Ada County Case No.
 v.) CR01-19-18740
)
 DANIELLE L. FITZPATRICK,)
)
 Defendant-Appellant.)
)
)

BRIEF OF RESPONDENT

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

**HONORABLE STEVEN J. HIPPLER
District Judge**

**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**COLLEEN D. ZAHN
Deputy Attorney General
Chief, Criminal Law Division**

**ANDREW V. WAKE
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**

**JACOB L. WESTERFIELD
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

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE.....	1
Nature Of The Case.....	1
Statement Of The Facts And Course Of The Proceedings.....	1
ISSUE	6
ARGUMENT	7
The District Court Correctly Determined That Officer Bish Had Reasonable Suspicion That Fitzpatrick Was Under The Influence Of Narcotics When He Began His Drug Investigation	7
A. Introduction.....	7
B. Standard Of Review	8
C. Officer Bish Had Reasonable Suspicion Sufficient To Detain Fitzpatrick To Investigate Whether She Was Under The Influence Of Narcotics	8
CONCLUSION.....	16
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Bolognese v. Forte</u> , 153 Idaho 857, 292 P.3d 248 (2012)	8
<u>State v. Fairchild</u> , 164 Idaho 336, 429 P.3d 877 (Ct. App. 2018).....	9
<u>State v. Ferreira</u> , 133 Idaho 474, 988 P.2d 700 (Ct. App. 1999)	9
<u>State v. Grantham</u> , 146 Idaho 490, 198 P.3d 128 (Ct. App. 2008).....	10
<u>State v. Grigg</u> , 149 Idaho 361, 233 P.3d 1283 (Ct. App. 2010).....	10
<u>State v. Kelley</u> , 160 Idaho 761, 379 P.3d 351 (Ct. App. 2016)	13, 14, 15
<u>State v. Linze</u> , 161 Idaho 605, 389 P.3d 150 (2016).....	8
<u>State v. Montague</u> , 114 Idaho 319, 756 P.2d 1083 (Ct. App. 1988).....	9
<u>State v. Morgan</u> , 154 Idaho 109, 294 P.3d 1121 (2013)	9
<u>State v. Neal</u> , 159 Idaho 919, 367 P.3d 1231 (Ct. App. 2016)	4, 13, 14, 15
<u>State v. Nevarez</u> , 147 Idaho 470, 210 P.3d 578 (Ct. App. 2009).....	9
<u>State v. Perez-Jungo</u> , 156 Idaho 609, 329 P.3d 391 (Ct. App. 2014)	9
<u>State v. Rawlings</u> , 121 Idaho 930, 829 P.2d 520 (1992).....	8
<u>State v. Sheldon</u> , 139 Idaho 980, 88 P.3d 1220 (Ct. App. 2003).....	9
<u>State v. Spies</u> , 157 Idaho 269, 335 P.3d 609 (Ct. App. 2014)	15
<u>State v. Valdez-Molina</u> , 127 Idaho 102, 897 P.2d 993 (1995)	8
<u>State v. Wright</u> , 134 Idaho 73, 996 P.2d 292 (2000)	8
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968)	9
<u>United States v. Arvizu</u> , 534 U.S. 266 (2002)	9
<u>United States v. Cortez</u> , 449 U.S. 411 (1981).....	9

United States v. Streck, No. 1:12-CR-157-BLW, 2012 WL 6022431
(D. Idaho Dec. 4, 2012)..... 10

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 8

STATEMENT OF THE CASE

Nature Of The Case

Danielle L. Fitzpatrick appeals from her conviction, entered on a conditional guilty plea, for possession of methamphetamine and argues that the district court erred by denying her motion to suppress.

Statement Of The Facts And Course Of The Proceedings

In early May of 2019, at around 9:50 a.m., Boise Police Officer Jered Bish was patrolling on a bicycle when he observed a distinctive Ford Mustang being driven by a white female. (R., p. 99.¹) Officer Bish then observed the same vehicle illegally parked between a “no parking” sign and a stop sign near an intersection. (Id.) Officer Bish asked the driver, Fitzpatrick, to move the vehicle back, in front of the “no parking” sign, so that she would be parked legally. (Id.)

Shortly thereafter, Officer Bish again saw the vehicle parked illegally, this time two to three feet from the curb. (R., p. 100.) Officer Bish activated his body-camera and went to speak with Fitzpatrick. (R., p. 100; State’s Ex. 1.²) Bish attempted to speak with Fitzpatrick through the partially-open, driver’s-side window, but Fitzpatrick was “seemingly unaware or unconcerned that Officer Bish was standing there waiting to speak to her.” (R., p. 100; State’s Ex. 1, 00:24 – 00:50.) “Her speech while on the phone was rapid and incessant, and she was wildly gesticulating with her hands and moving her head back and forth.” (Id.) When she

¹ The factual recitation herein relies extensively on the district court’s factual findings, none of which are challenged on appeal. (R., pp. 99-101.) References to “Tr.” are to the transcript of the hearing on Fitzpatrick’s motion to suppress, held October 9, 2019.

² State’s Ex. 1 is in the record in an mp4 file titled “Bish 2 DUI_PCS(2).mp4,” and was admitted by stipulation during the hearing on Fitzpatrick’s motion to suppress. (Tr., p. 42, Ls. 15-23.) References to the video are to the run-time.

acknowledged Officer Bish's presence, "she put down the phone yet continued to behave manically, persistently talking about various unrelated topics, gesticulating and swinging her head from side to side." (R., p. 100; State's Ex. 1, 00:50 – 02:58.) "Her speech was difficult for Officer Bish to understand and she often mumbled and slurred her words." (Id.) "She would not look at Officer Bish and it appeared at times that she was unaware of his presence." (Id.) Though it was cool out and she was "wearing light clothing," Fitzpatrick "was sweating profusely." (Id.) Officer Bish interrupted Fitzpatrick's monologue and asked if he could see her identification, and Fitzpatrick responded that she did not have her driver's license, but provided her name, date of birth, and driver's license number, as well as her registration. (R., p. 100; State's Ex. 1, 02:58 – 04:52.) Officer Bish stepped away to run Fitzpatrick's information through dispatch and, at the same time, requested a narcotics dog. (R., p. 100; State's Ex. 1, 05:05 – 08:02.) When dispatch responded, he returned to the vehicle. (Id.³)

Fitzpatrick again appeared to be on the phone, speaking in the same, unusual, fast-paced manner, and "Officer Bish waited a few minutes until he realized that [Fitzpatrick] was not talking on the phone but was apparently talking to him." (R., p. 101; State's Ex. 1, 08:02 – 10:19.) "She continued to ramble on excitedly about various topics. She could not maintain eye contact with Officer Bish and he could hardly get a word in edgewise." (Id.) Still holding Fitzpatrick's registration, Officer Bish then asked Fitzpatrick whether she "used anything today," noting that he had interacted with her previously and she seemed much more agitated and was sweating despite the cool weather. (R., p. 101; State's Ex. 1, 10:20 – 13:58.) Fitzpatrick's "manic monologue then turned to her mental health and aversion to drugs." (Id.) Officer Bish

³ At the hearing on the motion to suppress, Officer Bish testified that he believed dispatch informed him that Fitzpatrick had a valid license. (Tr., p. 33, L. 23 – p. 34, L. 3.)

was then informed that there was no narcotics dog available. (R., p. 100 n.4; Tr., p. 36, Ls. 20-25; State's Ex. 1, 13:50 – 13:58.) Over the next few minutes, Officer Bish asked if she had taken any narcotics, whether there were drugs or weapons in the car, whether a drug dog would alert on the car, and whether he could search the car, with Fitzpatrick responding by continuing her monologue. (R., p. 101; State's Ex. 1., 13:58 – 28:08.) Rather than providing any clear answers, Fitzpatrick spent much of that time frantically explaining an issue involving her fiancé and a debit card that was allegedly seized by officers in a separate incident, asking for Officer Bish's help in resolving that issue, and discussing her mental health history. (State's Ex. 1., 13:58 – 28:08.)

Officer Bish asked Fitzpatrick if she would step out of the vehicle and talk to him on the sidewalk, stating that he was having a hard time hearing her. (R., p. 101; State's Ex. 1, 28:08 – 28:48.) Fitzpatrick declined. (Id.) Officer Bish again explained that he had "concerns" that she was under the influence of a narcotic and was driving. (State's Ex. 1, 28:48 – 29:13.) After Fitzpatrick refused instructions to open the car door and told her passenger to likewise disobey commands to step out of the vehicle, Officer Bish opened the door and assisted Fitzpatrick out and to the sidewalk. (R., p. 101; State's Ex. 1, 29:13 – 31:45.) Officer Bish attempted to administer a field sobriety test—the horizontal gaze nystagmus test—but Fitzpatrick "was unable to concentrate and unable to follow directions." (R., p. 101; State's Ex. 1, 31:45 – 36:49.) Eventually, Fitzpatrick claimed that she was concerned she was having a heart attack and asked for an ambulance, and Officer Bish called for paramedics. (State's Ex. 1, 36:49 – 37:10.) At the same time, another officer notified Officer Bish that there was a white crystal substance in plain view near the driver's seat of the vehicle, which Officer Bish then verified. (State's Ex. 1, 37:10 – 38:00; see R., p. 101.) When paramedics arrived and attended to Fitzpatrick, Officer Bish

conducted a field test of the crystal substance and the test was presumptive positive for methamphetamine. (R., p. 101.) Fitzpatrick was then arrested on suspicion of DUI and unlawful possession of a controlled substance. (Id.) Officer Bish secured a warrant for a blood draw which was positive for methamphetamine and amphetamine (PSI., pp. 94-95, 69-70), and the white crystal substance on the floor of the vehicle tested positive for methamphetamine (PSI, p. 72).

Fitzpatrick was charged with possession of methamphetamine and driving under the influence of narcotics. (R., pp. 40-41.) The information was later amended to add a third count, for misdemeanor possession of paraphernalia. (R., pp. 58-59.) Fitzpatrick filed a motion to suppress, arguing that Officer Bish “lacked reasonable and articulable suspicion to detain [her] on suspicion of DUI and employ field sobriety tests.” (R., pp. 62-67.) Relying primarily on State v. Neal, 159 Idaho 919, 367 P.3d 1231 (Ct. App. 2016), Fitzpatrick argued that her demeanor and conduct during the encounter was indicative, at most, of ordinary nervousness associated with interacting with law enforcement, which is not a significant factor towards reasonable suspicion of criminal conduct. (R., pp. 65-67.)

Following a hearing at which only Officer Bish testified and his body-cam video was admitted, the district court denied the motion. (R., pp. 99-105.) The court held that

[Fitzpatrick’s] nervousness is not at all typical of what one would expect for being stopped for a traffic infraction. The video shows Defendant speaking rapidly, repetitively, and sometimes hard to understand. She appears to be ranting to herself, embarking on scattered, digressive tangents while Officer Bish attempts to focus her with simple questions. She is visibility [sic] sweating on her face despite the cool temperature and her light clothing. She does not make eye contact with him. There is clearly more going on than nervousness. While she attempts to explain her actions on her mental issues, such as anxiety and schizophrenia, her behavior is bizarre enough to give rise to reasonable suspicion that a stimulant is also a factor attributing to her demeanor. In no uncertain terms, Defendant was what is colloquially described as “tweaking” throughout the entire encounter.

(R., p. 103.) “In fact, Defendant is so obviously impaired, the Court [found] her attempt to characterize her behavior as mere nervousness frankly astonishing. Under no reasonable view of the evidence would any court find such behavior is insufficient to give rise to reasonable suspicion of DUI.” (Id. n. 7.) The court determined that Fitzpatrick was detained as part of a DUI investigation when Officer Bish returned to the vehicle after having run Fitzpatrick’s information through dispatch and, while still holding her registration, asked her about drug use. (R., pp. 100-01.) The court determined that Officer Bish acquired reasonable suspicion that Fitzpatrick was under the influence of narcotics before that point, very shortly after first interacting with Fitzpatrick and while diligently attempting to resolve the parking issue. (R., p. 104.)

After the denial of her motion to suppress, Fitzpatrick entered a conditional guilty plea, reserving the right to appeal the denial of that motion. (R., pp. 108-17.) The district court sentenced Fitzpatrick to five years with two years fixed on the felony possession charge, suspended in favor of probation, and 30 days in jail with time served on the DUI charge. (R., pp. 128-33.⁴) Fitzpatrick filed a timely notice of appeal. (R., pp. 141-43.)

⁴ The paraphernalia charge was dismissed pursuant to the plea agreement. (R., p. 129.)

ISSUE

Fitzpatrick states the issue on appeal as:

Did the district court err by denying Ms. Fitzpatrick's motion to suppress because the officer did not have reasonable suspicion to justify a deviation from the original purpose of the traffic stop?

(Appellant's brief, p. 7.)

The state rephrases the issue as:

Has Fitzpatrick shown that the district court erred by concluding that Officer Bish developed reasonable suspicion of drug crimes during the course of his contact with Fitzpatrick?

ARGUMENT

The District Court Correctly Determined That Officer Bish Had Reasonable Suspicion That Fitzpatrick Was Under The Influence Of Narcotics When He Began His Drug Investigation

A. Introduction

Fitzpatrick argues that Officer Bish deviated from the purpose of his initial interaction with her—to address a parking violation—and began a DUI and drug investigation when, after running her name and registration through dispatch, he returned to her vehicle and “ask[ed] Ms. Fitzpatrick multiple questions about controlled substances.” (Appellant’s brief, pp. 12-13 (arguing that the deviation for a drug investigation occurred at roughly 15:30:42, or 11:09 on the run-time of the video, when Officer Bish first asked about narcotics); see also R., pp. 100-01 (district court holding that Fitzpatrick was detained for a drug-related investigation when Officer Bish returned to the vehicle having spoken with dispatch, but retained Fitzpatrick’s registration and asked drug-related questions).) As she did below, she argues that her demeanor and behavior did not provide reasonable suspicion that she was under the influence of narcotics because that behavior suggested only that she was “nervous” about interacting with Officer Bish. (Appellant’s brief, pp. 11-15.) That argument fails. As the district court correctly found, relying on both Officer Bish’s testimony and the video from his body-cam, Fitzpatrick’s demeanor and behavior was “not at all typical of what one would expect for being stopped for a traffic infraction” and “[t]here was clearly more going on than nervousness.” (R., p. 103.) “In no uncertain terms, Defendant was what is colloquially described as ‘tweaking’ throughout the entire encounter.” (Id.) Indeed, Fitzpatrick was “so obviously impaired, the Court [found] her attempt to characterize her behavior as mere nervousness frankly astonishing.” (R., p. 103 n. 7.) That characterization is no less astonishing on appeal.

B. Standard Of Review

This Court reviews the denial of a motion to suppress using a bifurcated standard. State v. Linze, 161 Idaho 605, 607, 389 P.3d 150, 152 (2016). The Court will accept the trial court’s findings of fact unless they are clearly erroneous, but freely reviews the trial court’s application of constitutional principles in light of the facts found. Id. The power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences at a suppression hearing is vested in the trial court. State v. Valdez-Molina, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995).

C. Officer Bish Had Reasonable Suspicion Sufficient To Detain Fitzpatrick To Investigate Whether She Was Under The Influence Of Narcotics

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.⁵ A police officer may detain a person for the purpose of investigating possible criminal behavior “if there is an articulable suspicion that the person has committed or is about to commit a crime.” State v. Wright, 134 Idaho 73, 76, 996 P.2d 292, 295 (2000) (quoting State v. Rawlings, 121 Idaho 930, 932, 829 P.2d 520, 522 (1992)). 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

⁵ Below, Fitzpatrick relied on the Idaho Constitution. (R., pp. 62, 87-90.) She does not do so, however, on appeal. (See generally Appellant’s brief (including no citations to the Idaho Constitution).) This Court “will not consider assignments of error not supported by argument and authority in the opening brief.” Bolognese v. Forte, 153 Idaho 857, 866, 292 P.3d 248, 257 (2012).

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)).

“Investigatory detentions are permissible when justified by an officer’s reasonable articulable suspicion that a person has committed, or is about to commit, a crime.” State v. Fairchild, 164 Idaho 336, ___, 429 P.3d 877, 882 (Ct. App. 2018) (citing State v. Morgan, 154 Idaho 109, 112, 294 P.3d 1121, 1124 (2013)). “Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts. Reasonable suspicion requires more than a mere hunch or inchoate and unparticularized suspicion.” Id. (quoting Morgan, 154 Idaho at 112, 294 P.3d at 1124). “The reasonableness of the suspicion must be evaluated upon the totality of the circumstances at the time of the stop.” Id. (citing State v. Ferreira, 133 Idaho 474, 483, 988 P.2d 700, 709 (Ct. App. 1999)). Reasonable suspicion “requires less than probable cause but more than mere speculation or instinct on the part of the officer.” Id. (citing Ferreira, 133 Idaho at 483, 988 P.2d at 709). “A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct.” Id. (quoting United States v. Arvizu, 534 U.S. 266, 277 (2002)).

“An officer may draw reasonable inferences from the facts in his or her possession, and those inferences may be drawn from the officer’s experience and law enforcement training.” Id. (citing State v. Montague, 114 Idaho 319, 321, 756 P.2d 1083, 1085 (Ct. App. 1988)). “Due weight must be given to the reasonable inference that a law enforcement officer is entitled to draw from the facts in light of his experience.” State v. Nevarez, 147 Idaho 470, 474, 210 P.3d 578, 582 (Ct. App. 2009) (citing Terry, 392 U.S. at 27). Physical or behavioral indications of drug or alcohol use can provide reasonable suspicion. State v. Perez-Jungo, 156 Idaho 609, 616, 329 P.3d 391, 398 (Ct. App. 2014) (relying on bloodshot and glassy eyes to support finding of

reasonable suspicion of drug or alcohol use); State v. Grigg, 149 Idaho 361, 364, 233 P.3d 1283, 1286 (Ct. App. 2010); State v. Grantham, 146 Idaho 490, 497, 198 P.3d 128, 135 (Ct. App. 2008) (in determining that officer had reasonable suspicion to continue narcotics investigation, noting that “Wilkes was excessively nervous while speaking with Deputy Strangio, and unable to stop moving, which is also indicative of being under the influence of methamphetamine”); United States v. Streck, No. 1:12-CR-157-BLW, 2012 WL 6022431, at *2-3 (D. Idaho Dec. 4, 2012) (officer had reasonable suspicion that passenger in vehicle was under the influence of methamphetamine where she was “(1) extremely nervous; (2) moving as far away from the door as she could get; (3) fidgeting with her hands; (4) displaying jerky head movements; (5) refusing to look the Deputy in the eye; (6) appearing pale or clammy; and (7) having a pulsating carotid artery”).

Relying on the body-cam video and Officer Bish’s testimony, the district court correctly concluded that Fitzpatrick’s behavior and demeanor provided reasonable suspicion that Fitzpatrick was under the influence of narcotics, and because he had just seen her driving and she was still behind the wheel of the vehicle, he had reasonable suspicion to initiate a DUI investigation. (R., pp. 102-04.)

Officer Bish had been certified as a drug recognition expert and, though his certification had lapsed, he had significant training and experience in the recognition of behaviors indicating that a person is under the influence of narcotics. (Tr., p. 6, L. 16 – p. 8, L. 5.) The district court specifically found that Officer Bish’s training and experience qualified him to recognize the behaviors associated with being under the influence of a stimulant like methamphetamine. (Tr., p. 55, Ls. 2-17; R., p. 100 n.3.) Though Fitzpatrick notes that Officer Bish testified that his certification as a drug recognition expert had lapsed, she does not challenge the district court’s

finding that Officer Bish nevertheless had the training and experience necessary to recognize behaviors indicative of being under the influence of methamphetamine.

Officer Bish testified that Fitzpatrick was “very animated, she was turning her head back and forth, hands were constantly moving,” and her speech was “mumbling but constantly talking,” in a low tone of voice. (Tr., p. 14, Ls. 8-18; p. 15, Ls. 2-12.) She was “constantly turning her head back and forth.” (Tr., p. 14, Ls. 19-22.) “It was very difficult to get her to answer questions.” (Tr., p. 15, Ls. 13-22.) She was “constantly moving her head and arms and just her upper body was moving constantly.” (Tr., p. 15, L. 23 – p. 16, L. 1.) Though it was cool with a breeze that morning, and her passenger was not sweating, Fitzpatrick “had beads of sweat on her forehead.” (Tr., p. 16, Ls. 1-10.) He testified that the behavior he observed was indicative of being under the influence of a narcotic, and was not at all indicative of the common, ordinary nervousness he often encounters during a traffic stop. (Tr., p. 16, L. 11 – p. 17, L. 17.) In addition, Officer Bish had previously interacted with Fitzpatrick and she had not exhibited this sort of behavior in their prior interactions. (Tr., p. 13, L. 18 – p. 14, L. 2; p. 16, Ls. 22-25.)

The video of his encounter with Fitzpatrick confirms Officer Bish’s testimony. As the district court repeatedly emphasized below, it is difficult to watch the video without coming to the conclusion, or at least suspicion, that Fitzpatrick was under the influence of narcotics. (R., p. 103-04, 103 n. 7; Tr., p. 48, Ls. 1-9 (“if one were to come up with a caricature of somebody who is under the influence of methamphetamine and/or . . . ‘tweaking,’ I think they would just take this and overlay it. I mean, she could not focus at all on anything, she did not stop talking the entire time, she’s flitting from one topic to another, she’s sweating, she is extremely hyper, extremely manic, frankly.”); p. 56, L. 23 – p. 57, L. 1 (“this is as manic as I’ve seen somebody, and I see a lot of manic people in my job in mental health court.”)). From the moment Officer

Bish attempted to engage with Fitzpatrick, she embarked on a virtually non-stop, manic, semi-coherent, semi-responsive monologue; she was visibly sweating, though it was cool that morning; she was gesticulating wildly and swinging her head, arms, and upper-body about; she was frequently not looking at Officer Bish and could not focus enough to answer his questions. (State's Ex. 1, 00:30 – 04:53, 08:00 – 11:10.) “In no uncertain terms, Defendant was what is colloquially described as ‘tweaking’ throughout the entire encounter.” (R., p. 103.)

In fact, defense counsel below essentially conceded as much. The district court judge repeatedly observed during the hearing on the motion to suppress that the video was a perfect exemplar of the behavior of someone under the influence of methamphetamine. (Tr., p. 48, Ls. 1-11; p. 49, L. 23 – p. 50, L. 6.) In response, defense counsel agreed, but suggested that that was so only if you look at the entire video, rather than only the period during which Officer Bish was allegedly required to develop reasonable suspicion. (Tr., p. 48, Ls. 12-20; p. 50, Ls. 7-10.) Defense counsel argued that that was the first three minutes of the video because a detention associated with a drug investigation began when Officer Bish asked to see her identification. (Tr., p. 48, Ls. 12-20; p. 50, Ls. 7-10; p. 53, Ls. 2-9.) But the district court rejected that view about when a detention associated with a drug investigation occurred (R., pp. 100-01) and, on appeal, Fitzpatrick concedes that the drug investigation began much later, around eleven minutes into the video, when Officer Bish returned to the vehicle and asked questions regarding drugs while still holding Fitzpatrick's registration. (Appellant's brief, pp. 12-13 (arguing that a drug investigation began at roughly 15:30:42 on the time-stamp, or 11:09 on the run-time of the video).) But whether focusing on the first three minutes, the first eleven minutes, or the entire video, Fitzpatrick's conduct is consistent throughout. If her behavior later in the video is exemplary of someone under the influence of methamphetamine, that same behavior early in the

video is as well. Nor were Officer Bish, the district court judge, or defense counsel the only ones who thought Fitzpatrick's behavior was exemplary of someone under the influence of a stimulant. The medic who examined her for a matter of minutes stated that she appeared to be "high as a kite on something," an "upper." (State's Ex. 1, 49:06 – 49:22.)

Officer Bish's testimony regarding Fitzpatrick's behavior, and the video directly corroborating that testimony, support the district court's conclusion that Officer Bish reasonably suspected Fitzpatrick was under the influence of a narcotic. The district court therefore correctly determined that the subsequent DUI investigation was lawful and denied Fitzpatrick's motion to suppress.

As she did below, Fitzpatrick urges the contrary conclusion by relying on State v. Neal, 159 Idaho 919, 367 P.3d 1231 (Ct. App. 2016), and State v. Kelley, 160 Idaho 761, 379 P.3d 351 (Ct. App. 2016). (Appellant's brief, pp. 11-14.) In Neal, the Court of Appeals held that, "A nervous demeanor during an encounter with law enforcement is of limited significance in establishing the presence of reasonable suspicion because it is common for people to exhibit signs of nervousness when confronted with law enforcement regardless of criminal activity." Neal, 159 Idaho at 924, 367 P.3d at 1236. Relying on Neal and the proposition that the common nervousness that might attend interaction with law enforcement does not contribute much to reasonable suspicion, the Court of Appeals in Kelley held that the driver's "nervousness, evidenced by lack of eye contact, trembling, and pulsing carotid artery, is of limited significance in establishing the presence of reasonable suspicion." Kelley, 160 Idaho at 763, 379 P.3d at 353. According to Fitzpatrick, what Officer Bish observed and what is reflected on the video of their encounter was just "behavior indicative of nervousness" associated with interacting with law enforcement. (Appellant's brief, pp. 11, 13-14.)

The district court below specifically addressed Neal and Kelley and correctly concluded that those cases are clearly distinguishable. (R., pp. 102-04.) Both of those cases involved ordinary, common nervousness associated with interacting with law enforcement. Officer Bish testified in this case that this was not ordinary, common nervousness, but was behavior indicative of being under the influence of narcotics. (Tr., p. 16, L. 11 – p. 17, L. 17.) Moreover, Neal was an appeal by the state from an order granting a motion to suppress and, in that case, “the district court observed that the videotape of the encounter did not support the officer’s testimony regarding Neal’s anxious behavior.” Neal, 159 Idaho at 924, 367 P.3d at 1236. Here, by contrast, the district court found that the video corroborates Officer Bish’s testimony and “[t]here is clearly more going on than nervousness.” (R., p. 103.) As the district court stated, Neal and Kelley stand for the proposition that “nervousness, basic nervousness, the kind we all probably get when being pulled over and maybe sometimes a little bit more, like you say, trembling hands, that kind of thing,” is not a significant factor for purposes of reasonable suspicion. (Tr., p. 52, Ls. 14-19.) But, as the court correctly observed,

there’s got to be a continuum where nervousness gets into mania and it is [an] indicator that somebody is under the influence potentially, at least articulable suspicion they are, and it seems to me to the extent you have a line between nervous and full-on mania, and to use the vernacular “tweaking,” [Fitzpatrick] was at the far end right away.

(Tr., p. 52, L. 19 – p. 53, L. 1.) Further, as the district court recognized, “this is the exact opposite of *Neal*” where the video apparently did not substantiate the officer’s testimony regarding the defendant’s conduct. (Tr., p. 49, Ls. 1-9.) “You look at the video here, it’s not just nervous in the form of sweating and the shaking or whatever, but she can’t stop moving her limbs around, head around, can’t focus, can’t stop talking, one subject to another.” (Id.) The video reflects that Fitzpatrick is “either intoxicated on a stimulant or perhaps having a manic

event.” Id. As the video clearly shows, and as Officer Bish testified, this was not the ordinary nervousness at issue in Neal and Kelley.

Finally, Fitzpatrick suggests that Officer Bish delayed in asking her to step out of the vehicle, in conducting field sobriety tests, and in calling for a drug recognition expert, and those alleged delays “were inconsistent with the officer’s articulated basis for the continued investigation.” (Appellant’s brief, p. 14.)

To the extent that Fitzpatrick is suggesting that whether there was reasonable suspicion to detain Fitzpatrick hinges on what Officer Bish actually thought in the moment, she is mistaken as a matter of law. “Probable cause and reasonable suspicion are objective tests. Neither test depends on the individual officer’s subjective thoughts nor upon the bases previously offered by the state to justify the stop.” State v. Spies, 157 Idaho 269, 273, 335 P.3d 609, 613 (Ct. App. 2014).

But, in addition, she is mistaken factually. While there is certainly some delay in the events, the delay is associated entirely with Fitzpatrick, her failure to focus on the questions being asked her, and her failure to follow Officer Bish’s directions. Having run her information through dispatch, Officer Bish consistently but largely unsuccessfully attempted to focus Fitzpatrick and get her to answer his questions regarding whether she had used narcotics. (State’s Ex. 1, 08:02 – 28:13.) When he asked her to step out of the vehicle, she refused (State’s Ex. 1, 28:13 – 29:13), and when they removed her from the vehicle, she refused field sobriety tests (State’s Ex. 1, 31:45 – 36:49). She then claimed that there was a medical emergency, prompting Officer Bish to request an ambulance. (State’s Ex. 1, 36:49 – 37:10.) While she was being attended to by paramedics, Officer Bish directed another officer to try to arrange for a drug recognition expert because it was then clear that Fitzpatrick would not submit to field sobriety

tests. (State's Ex. 1. 48:00 – 48:40.) Officer Bish worked efficiently and diligently. Any delays were associated with Fitzpatrick's inability to focus and to her refusal to cooperate.

The district court correctly determined that Officer Bish had reasonable suspicion that Fitzpatrick was under the influence of narcotics, and so could lawfully detain her as part of a DUI investigation. The court therefore properly denied her motion to suppress.

CONCLUSION

The state respectfully requests this Court to affirm Fitzpatrick's judgement of conviction.

DATED this 16th day of February, 2021.

/s/ Andrew V. Wake
ANDREW V. WAKE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 16th day of February, 2021, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

JACOB L. WESTERFIELD
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

/s/ Andrew V. Wake
ANDREW V. WAKE
Deputy Attorney General

AVW/dd