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AT _____ O'clock _____ M
CLERK, DISTRICT COURT

Deputy

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

STATE OF IDAHO,)
)
 Plaintiff,)
)
 vs.)
)
 BRANDON DEAN KINGSLEY,)
)
 Defendant.)

Case No. **CRF 2011 17608**

**MEMORANDUM DECISION AND
ORDER DENYING DEFENDANT'S
MOTION TO SUPPRESS**

Defendant BRANDON DEAN KINGSLEY's Motion to Suppress is DENIED.
Bryant Bushling, Dep. Prosecuting Attorney, lawyer for the Plaintiff.
Sean P. Walsh, Coeur d'Alene, lawyer for Defendant Kingsley.

I. FACTUAL BACKGROUND.

On September 27, 2011, defendant Brandon Kingsley (Kingsley) was present at the home of Steven Andersen (Andersen) while North Idaho Violent Crimes Task Force members accompanied Andersen's probation officer, Marcy Black, on a "probation search" of Andersen's residence at 904 E. 2nd Avenue in Post Falls, Idaho. Andersen was on felony supervised probation and had previously been the object of two narcotics investigations in which confidential informants performed controlled buys of controlled substances from Andersen. Thus, on September 27, 2011, law enforcement knew Andersen was dealing in controlled substances. Coeur d'Alene Police Detective Mark

Todd (present at the scene in Post Falls as a member of the North Idaho Violent Crimes Task Force) testified:

The reason we were there was to talk to a known drug dealer. And I was concerned that Mr. Kingsley was a lookout in the front of the house on his phone.

October 11, 2011, Preliminary Hearing Tr., p. 4, LI. 10-13. Later, on December 5, 2011, Andersen was found guilty of delivery of a controlled substance following a one-day jury trial. *State v. Andersen*, Kootenai County Case No. CRF 2011 17607.

On September 27, 2011, when members of the task force and Andersen's probation officer arrived at Andersen's residence, Kingsley was in the driveway talking on a cell phone. Police Report, p. 2. Detective Todd saw Kingsley talking on his cell phone, was concerned he was a lookout for a known drug dealer, exited his patrol vehicle, showed Kingsley his badge, told him to get off the phone, and asked Kingsley to come over to where Detective Todd was located, where the driveway ended at the sidewalk, about twenty feet from where Kingsley was standing, near the garage attached to Andersen's residence. October 11, 2011, Preliminary Hearing Tr., p. 4, LI. 10-13; p. 4, L. 20 – p. 5. Kingsley complied, and Detective Todd asked Kingsley if he had any weapons, to which Kingsley replied "...he had some glass on him." *Id.*, p. 5, LI. 10-12. Detective Todd asked Kingsley if he could take it and Kingsley said "yes". *Id.*, LI. 13-17. Detective Todd asked Kingsley to turn around for a pat search, and Kingsley offered: "...it was in his front sweatshirt pocket." *Id.*, LI. 18-20. The item was in the front pocket of the sweatshirt, in that pocket was a pouch similar to those which hold sunglasses, and in that pouch was a clear glass pipe which Detective Todd recognized as paraphernalia. *Id.*, LI. 21-25. Detective Todd put the glass pipe on the back of a vehicle in the driveway and continued his pat search when Kingsley "volunteered" that

“he had a bindle in his left front pocket.” *Id.*, p. 6, LI. 1-9. Detective Todd then found a bag containing white crystals, and took the bag the cell phone from Kingsley. *Id.*, LI. 10 – p. 7, L. 1. According to the police report, Detective Todd located contraband on Kingsley, “a small baggy with a white crystalline substance in it and a clear glass pipe with residue in it”, and Kingsley was read *Miranda* warnings by Detective Williamson and Kingsley then advised Williamson the substance was “meth.” Police Report, p. 2. Detective Todd’s testimony at the motion to suppress on December 8, 2011, was essentially identical to his testimony at the preliminary hearing and consistent with his police report.

At the preliminary hearing, Detective Todd was not asked about officer safety, though Kingsley’s attorney asked that question of Detective Williamson. October 11, 2011, Preliminary Hearing Tr., p. 26, LI. 14-19. At the December 8, 2011, hearing, Detective Todd was not asked about officer safety.

Other pertinent facts were: it was light outside, it was about three in the afternoon (*Id.*, p. 8, LI. 1-5); Detective Todd had no prior contact with Kingsley (*Id.*, p. 8, L. 25 – p. 9, L. 6); three other officers and probation officer Marcy Black were there originally, and then others arrived “late” (*Id.*, p. 9, LI. 11-16); Detective Todd was the first out of his car and had the immediate conversation with Kingsley, the others got out of their cars parked further down the street after Detective Todd got out of his vehicle, Detective Todd had seen no other officers prior to encountering Kingsley, but Detective Todd felt Kingsley could probably see the others getting out of their car (*Id.*, p. 10, L. 1 – p. 11, L. 11); and Detective Todd was in plain clothes but had a gun holster which he was not sure was visible. *Id.*, p. 11, LI. 12-15.

On September 27, 2011, Kingsley was given a misdemeanor citation for paraphernalia. The following day, September 28, 2011, a Criminal Complaint was filed against Kingsley, charging him with possession of a controlled substance, methamphetamine. On October 11, 2011, following a preliminary hearing, an Order Holding Kingsley was issued and an Information was filed. That Order Holding required all pretrial motions be filed within forty-two days and that such motions be accompanied by a brief in support and a notice of hearing. Order Holding Defendant, p. 1. Kingsley's Motion to Suppress was timely filed (per the October 11, 2011, Order Holding) on October 31, 2011. Kingsley's Notice for Hearing thereon was filed on November 3, 2011. Contrary to the October 11, 2011, Order Holding, no brief was filed by Kingsley contemporaneous with the filing of his motion to suppress. The motion itself states only that the seizure of Kingsley was unlawful and that all statements made and evidence seized must therefore be suppressed. Motion to Suppress, p. 1. The written motion provided the Court absolutely no guidance, nothing to help prepare for the hearing or help decide the motion to suppress. Instead of timely filing a brief in support of the motion, a brief was filed by Kingsley's attorney the morning of the December 8, 2011, hearing. This is not the first occasion. See *State v. Dye*, Kootenai Co. Case No. 2011 7247, November 1, 2011, Memorandum Opinion and Order Denying Defendant's Motion to Suppress, pp. 2-3. The State's attorney followed suit by filing a brief the morning of the December 8, 2011, hearing as well. In light of the Court's docket that day, this afforded the Court little time to read these briefs prior to the hearing.

This Court heard oral argument on the motion on December 8, 2011. Prior to that hearing, the Court had familiarized itself with the file, appreciated that Kingsley was in a position to be suspected as Andersen's "lookout" and had the opportunity to read a

few cases involving “lookouts.” At the conclusion of that hearing, the Court ordered the parties to analyze the cases it had reviewed on this topic: *Yancey v. Commonwealth*, 30 Va.App. 510, 518 S.E.2d 325 (Ct.App. 1999); *El-Amin v. Commonwealth*, 269 Va. 15, 607 S.E.2d 115 (Va. 2005); *State v. Mills*, 104 N.C.App. 724, 411 S.E.2d 193 (Ct.App. 1991); *Commonwealth v. Mendes*, 46 Mass.App.Ct. 581, 708 N.E.2d 117 (Ct.App. 1999); *U.S. v. Sotelo*, WL 598606 (D.Minn. Feb. 18, 2010); *U.S. v. Del Vizo*, 918 F.2d 821 (9th Cir., 1990); and *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338 (1980).

Simultaneous briefing was submitted by the parties on December 15, 2011, at which point the Court took this matter under advisement. The Court has read the briefs submitted by the parties. The brief submitted by the State consists of nothing more than a summary of the above cases, much the way a law student would summarize cases prior to going to the class lecture. The State’s brief contains no analysis of how these decisions might apply to the facts of this case. As such, the State’s brief is of no benefit at all to the Court. The attorneys were both made aware of the fact that the Court had found and read these cases just *prior* to the December 8, 2011, hearing. It is unknown why it would be any assistance to the Court for an attorney to summarize cases the Court previously stated it had read. Again, this is not the first occasion. See *supra*, *State v. Dye*, Kootenai Co. Case No. 2011 7247, November 1, 2011, Memorandum Opinion and Order Denying Defendant’s Motion to Suppress, p. 4. What any court needs is analysis of how those cases apply to the instant facts.

II. STANDARD OF REVIEW.

In an appeal from an order denying a motion to suppress, the Court of Appeals will not disturb findings of fact supported by substantial evidence, but will freely review whether the trial court’s determination as to whether constitutional requirements were

satisfied in light of the facts. *State v. Whiteley*, 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct.App. 1993); *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct.App. 1996); *State v. Cruz*, 144 Idaho 906, 908, 174 P.3d 876, 878 (Ct.App. 2007). When evaluating the trial court's determination of voluntariness of consent given, reviewing courts will not disturb such a decision on appeal if the trial court's finding is based on reasonable inferences to be drawn from the record. *State v. Post*, 98 Idaho 834, 837, 573 P.2d 153, 156 (1978). Whether consent to a search was voluntary is a question of fact and reviewing courts accept the factual findings of a trial court unless they are clearly erroneous. *State v. McCall*, 135 Idaho 885, 886, 26 P.3d 1222, 1223 (2001). Findings are not deemed clearly erroneous when supported by substantial evidence in the record. *State v. Benson*, 133 Idaho 152, 155, 983 P.2d 225, 228 (Ct.App. 1999). At a suppression hearing, the trial court has the power to assess the credibility of witnesses, resolve factual conflicts, and draw factual inferences. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct.App. 1999).

III. ANALYSIS.

A. Search of Andersen's Residence.

The Court, having reviewed *State v. Owsley*, 128 Idaho 786, 918, P.2d 1231 (Ct.App. 1996), in preparation for the December 8, 2011, hearing, recognizes that Kingsley may have raised a challenge to the search of Andersen's home by the North Idaho Violent Crimes Task Force, pursuant to Andersen's probation officer's authority to do so. It was at the inception of that search that they encountered Kingsley in Andersen's driveway and searched Kingsley. In *Owsley*, the defendant appealed the denial of her motion to suppress, arguing the search of her home "was improperly

initiated by a telephone call to Owsley's probation officer from Officer McClure [of the Idaho Bureau of Narcotics], urging that the probation officer conduct a search of Owsley's home." 128 Idaho 786, 787, 918 P.2d 1231, 1232. The District Court's finding, that the search resulted from Owsley's probation officer's independent decision to search her home because Officer McClure only supplied information (as opposed to requesting a search), was upheld by the Court of Appeals. 128 Idaho 786, 788, 918 P.2d 1231, 1233. *Owsley* makes clear that an independent determination by the probation officer is a necessary predicate to a lawful probation search, and the probation officer may not simply act as a "stalking horse" for police. 128 Idaho 786, 787, 918 P.2d 1231, 1232, citing *Smith v. Rhay*, 419 F.2d 160 (9th Cir. 1969); *State v. Vega*, 110 Idaho 685, 718 P.2d 598 (Ct.App. 1986).

Here, the Court has no information before it regarding whether the Task Force improperly requested Andersen's probation officer, Marcy Black, perform a search rather than lawfully obtain a search warrant, or, whether the Task Force merely provided Ms. Black with information which prompted her to reach the independent decision to conduct a search. The latter scenario is proper. Weighing in favor of the former improper scenario is the fact that numerous members of the Task Force descended upon Andersen's home, where in *Owsley* only the defendant's probation officer conducted the search. However, other than that singular fact, the Court has no *evidence* before it as to *why* the Task Force did or did not opt to seek a warrant. And, as it is Kingsley's burden to raise this "stalking horse" issue, if such a basis for the motion to suppress exists, it is improper for the Court to decide such *sua sponte*.

Additionally, the search must serve the ends of probation. *State v. Gawron*, 112 Idaho 841, 736 P.2d 1295 (1987). The Court has no information before it that the

search of Andersen's residence was not related to the ends of probation. The probation officer must have reasonable grounds to believe that the probationer has violated a term of probation. *State v. Devore*, 134 Idaho 344, 347, 2 P.3d 153, 156 (Ct.App. 2000) *citing State v. Pinson*, 104 Idaho 227, 657 P.2d 1095 (Ct.App.1983). There is nothing to indicate this criteria was not met. However, "the "reasonable grounds" requirement for warrantless searches by probation or parole officers does not apply when the subject of the search has entered into a probation or parole agreement that includes a consent to warrantless searches. *Id.*, *citing State v. Gawron*, 112 Idaho 841, 843, 736 P.2d 1295, 1297 (1987); *State v. Pecor*, 132 Idaho 359, 364, 972 P.2d 737, 742 (Ct.App.1998); *State v. Peters*, 130 Idaho 960, 963, 950 P.2d 1299, 1302 (Ct.App. 1997). There is every reason to believe that reasonable searches were consented to by Andersen as a term and condition of his probation.

In any event, the Court finds no evidence has been presented other than to indicate that the law enforcement officers and probation officer Marcy Black had all the necessary authority to be at Andersen's home without a search warrant.

B. Probation Searches in General.

State v. Marshall, 149 Idaho 725, 239 P.3d 1286 (Ct.App. 2008) makes it clear that searches incident to a term and condition of probation are allowed, and that the search is not limited to only the person on probation, but can also include others present at the scene, such as Kingsley. In *Marshall*, the probationer Laurie Nelson was searched, and incident to that search, her boyfriend, Terry Lynn Marshall was searched, and methamphetamine was found on his person. This was true even though Nelson's three years probationary period had expired, because Nelson had not taken the additional step to seek out a Court order discharging her from probation.

State v. Spencer, 139 Idaho 736, 739, 85 P.3d 1135, 1138 (Ct.App. 2004)

shows that had Kingsley known Andersen was on probation, then Kingsley might have had no reasonable expectation of privacy for a search of any room on that premises, and presumably (though the issue was not addressed in *Spencer*), no reasonable expectation of privacy for a search of Kingsley's person. However, neither party developed any evidence on that issue. This Court must *assume* Kingsley did not know Andersen was on probation. *Spencer* speaks to that situation:

If the evidence established that Spencer had no knowledge that Conklin was subject to probationary search, then his expectation of privacy may have been objectively reasonable and his consent would be necessary to search his private bedroom. Likewise, had Spencer been living with Conklin *prior* to her being placed on probation, then his already established objective expectation of privacy would not have been defeated simply because Conklin, a cohabitant, was placed on probation. This latter scenario would still require that consent be obtained in order to make the search valid.

Id.

C. No Probable Cause/Reasonable Suspicion to Detain and Frisk Kingsley Simply Due to Kingsley “Possibly” Being a Lookout for Andersen.

After narrowing the issues and guiding the parties as to the applicable case law, this Court has engaged in an analysis of Kingsley's challenge of the search of his person which uncovered the methamphetamine he possessed. The police report in the case file contains few details surrounding Kingsley's arrest. The police report states only that Detective Todd located contraband on Kingsley after which Detective Williamson arrested him and read him *Miranda* warnings. Police Report, p. 2. Additional evidence regarding Detective Todd's brief encounter with Kingsley as gleaned from the preliminary hearing and from the December 8, 2011, hearing on the motion to suppress, is set forth above.

A warrantless arrest may be made where law enforcement observes an individual committing a public offense. I.C. § 19-603(1). Where probable cause for arrest exists, and an arrest and a search occur substantially simultaneously, a valid search incident to an arrest may arguably precede the actual arrest. See *State v. Johnson*, 137 Idaho 656, 662, 51 P.3d 112, 1118 (Ct.App. 2002). Probable cause, in turn, is “possession of information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong presumption that such a person is guilty.” *State v. Julian*, 129 Idaho 133, 136, 922 P.2d 1059, 1062 (1996). The United States Supreme Court has held an individual’s mere proximity to people suspected of criminal activity, or presence in a location where a search warrant is executed, is insufficient to give rise to probable cause to search that individual. *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338 (1979). *Ybarra* involved police executing a valid search warrant at a tavern, the focus of that warrant was the bartender at that tavern. In executing that warrant, police searched Ybarra and other customers who were simply present in the tavern, despite having no reason to believe Ybarra had committed, was committing, or would commit a violation of law. 444 U.S. 85, 90-91, 100 S.Ct. 338, 342. The defendant in *Ybarra* made no furtive movements and did not behave in a suspicious manner; thus, absent individualized suspicion, no probable cause to search him existed. 444 U.S. 85, 91, 100 S.Ct. 338, 342. Further, absent a reasonable belief that the defendant was presently armed and dangerous, the predicate for a pat-down *Terry* search was missing. 444 U.S. 85, 92-93, 100 S.Ct. 338, 343 (citing *Adamas v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923 (1972)).

The Court finds that Kingsley arguably found himself in a position similar to that of the defendant in *Ybarra*. There is no indication that Kingsley acted suspiciously,

made furtive movements, or raised a reasonable suspicion that he was armed and/or dangerous. Kingsley was merely present in a location suspected of criminal activity. And, unlike the facts of *Ybarra*, here, there was no valid search warrant, but there was a probation search which, if initiated by police, may be called into question itself. See *supra*.

On direct examination at hearing on Kingsley's motion to suppress, Detective Todd testified he had previously encountered situations in which individuals acted as lookouts. Detective Todd observed Kingsley talking on his cell phone and Detective Todd believed Kingsley could have been telephoning someone inside the home. At the preliminary hearing, Detective Todd testified he had no previous contact with Kingsley (October 11, 2011, Preliminary Hearing Tr., p. 9, Ll. 4-6), but at the suppression hearing, Detective Todd stated he was aware of one sale by this defendant. Kingsley's counsel noted this discrepancy for the Court at oral argument. This Court resolves that discrepancy by accepting Detective Todd's testimony at the preliminary hearing to be more accurate, as it occurred closer to the events in question as compared to the December 8, 2011, hearing on Kingsley's motion to suppress. Kingsley's counsel also noted the preliminary hearing testimony that Kingsley was not perceived as a threat to the officers who arrived at Andersen's residence. See Prelim. Tr., p. 26, Ll. 11-16.

In post-hearing briefing, Kingsley discussed each case the Court requested briefing upon, distinguishing the facts of those in which Courts refused to suppress evidence from the facts at hand. Kingsley argues:

The officers had no information to connect Kingsley to illegal activity other than Kingsley's mere presence at the residence. The State has not presented any evidence that officers believed that Kingsley participated in prior illegal activities.

Unlike *El-Amin*, there is no evidence that the time of day, group activity, or knowledge of a dangerous weapon would justify Kingsley's detention and search. Unlike *Mills*, there is no evidence that Kingsley sought to evade law enforcement or that he had previously engaged in suspicious conduct at the location. Unlike *Mendes*, there is no evidence that Kingsley arrived and acted in concert with others in pre-planned illegal activities. Unlike *Sotelo*, there is no evidence that Kingsley had previously acted in concert with Anderson [sic] in any illegal activity. Unlike *Yancey*, there is no evidence that Kingsley was acting in concert with Anderson [sic] during the time officers observed Kingsley. Unlike *Del Vizo*, the State does not have a "wealth of information gathered by the officers" to support the suspicion that Kingsley was engaged in a pattern of illegal activity.

Supplemental Brief in Support of Motion to Suppress, p. 11. Again, the State engaged in no analysis of any kind, merely summarizing these cases.

Yancey, *Mills*, *Mendes*, *Sotelo*, and *Del Vizo* each involved law enforcement having sufficient facts to give rise to probable cause for an arrest. Here, the State has presented the Court with no evidence to suggest that Kingsley was engaged in a joint enterprise with Andersen or had a suspicious demeanor, made suspicious statements, or acted suspiciously. In *Yancey v. Commonwealth*, 30 Va.App. 510, 517, 518 S.E.2d 325, 328-29 (Ct.App.Va. 1999), Yancey and her co-defendant had exhibited quite a bit of behavior consistent with trying to smuggle drugs contained in their luggage through a train station. In the instant matter the State has failed to demonstrate a connection by Kingsley to Andersen via previous personal observations by law enforcement. In *United States v. Del Vizo*, 918 F.2d 821 (9th Cir. 1990), police had previously observed Del Vizo at the residence which was part of a narcotics investigation and had previously witnessed other activity by Del Vizo consistent with drug transactions. In *United States v. Sotelo*, 2010 WL 598606 (D.Minn. 2010), the defendant was very involved in the drug transaction as he was the first to meet the confidential informant, drove another co-defendant (while being followed by the confidential informant) to a location where

cocaine was shown to the confidential informant. In *State v. Mills*, 104 N.C.App. 724, 729, 411 S.E.2d 193, 196 (N.C.App. 1991), Mills and his companion had been seen by law enforcement on five prior occasions, coming out to cars which had just turned off their headlights at an intersection known to be popular for drug transactions. In *Commonwealth v. Mendes*, 46 Mass.App.Ct. 581, 589, 708 N.E.2d 117, 124 (App.Ct.Mass. 1999), the defendant Mendes arrived at a hotel with two known drug dealers. Mendes accompanied the drug dealers to the ninth floor where the drug deal was to take place, then paced outside a hotel room in a manner consistent with a lookout. *Id.* In the present case, all Detective Todd knew was Kingsley was in the driveway of Andersen, a person he knew was selling drugs. Detective Todd did not have any other evidence connecting Kingsley to Andersen. The State has provided the Court with nothing to indicate Kingsley was a lookout, or that law enforcement had knowledge of his role as lookout upon their arrival. As stated in *Ybarra*, absent individualized suspicion, Kingsley's "mere propinquity" to Andersen's residence, where Andersen was independently suspected of criminal activity, cannot give rise to probable cause to search Kingsley. *Ybarra*, 444 U.S. 85, 91, 100 S.Ct. 338, 342.

These cases show that when certain facts are present (such as: prior observations of Kingsley acting as a lookout for Andersen, ushering an informant into the premises, or additional suspicious behavior), Detective Todd could have searched Kingsley due to his involvement with Andersen. Those facts are not present in this case. All we have is Kingsley standing on Andersen's driveway holding a cell phone with the garage door very slightly open. An individual's mere proximity to people suspected of criminal activity, or presence in a location where a search warrant is executed, is insufficient to give rise to probable cause to search that individual. *Ybarra*,

444 U.S. 85, 100 S.Ct. 338 (1979). There needs to be “something more”, and that “something more” is lacking in the present case. Thus, Kingsley’s status as a possible lookout in and of itself did not give Detective Todd probable cause to search Kingsley.

D. Other Reasons to Inquire of and Frisk Kingsley, and, If There Was a Detention of Kingsley, Reasons Such Detention Was Permissible.

When the entire brief encounter between Detective Todd and Kingsley is sequentially analyzed, the Court finds there was no illegal detention or illegal frisk of Kingsley. The Court finds if there was a detention it was permissible, and finds the detention led to a frisk which consensually turned up the pipe, and the continued pat down turned up the volunteered statement by Kingsley that he had a bindle, which led to the discovery of methamphetamine on Kingsley’s person.

As mentioned in the previous section, if Detective Todd had additional evidence linking Kingsley to Andersen, Detective Todd could have immediately searched Kingsley. Such additional evidence was lacking. However, an immediate search of Kingsley is not what happened in this case. The sequence of what did occur in the instant case is important.

In *Ybarra*, a search warrant was issued to search the premises of a tavern and to search the bartender for narcotics. 444 U.S. 85, 100 S.Ct. 338, 339, 62 L.Ed.2d 238 (1980) *Ybarra* was simply a patron of the bar, not the targeted bartender. *Id.* As the officers entered they announced their purpose and announced they would conduct a cursory search for weapons. They frisked *Ybarra* and found heroin. *Id.* The search came first. There was no discussion with *Ybarra* prior to the search. Thus, the United States Supreme Court was left with only *Ybarra*’s status as being present in a bar where a warrant was being served. The United States Supreme Court held “...a

person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.*, citing *Sibron v. New York*, 392 U.S. 40, 62-63, 88 S.Ct. 1868, 20 L.Ed.2d 917.

The sequence in the present case is much different than *Ybarra*. In the present case, the search was *not* the first thing to occur. The sequence of what happened is important as additional facts occur or are learned by the officer during the process. "[D]uring the course of the detention there may evolve suspicion of criminality different from that which prompted the stop." *State v. Sheldon*, 139 Idaho 980, 984, 88 P.3d 1220, 1224, citing *State v. Parkinson*, 135 Idaho 357, 362, 17 P.3d 301, 306 (Ct.App. 2000). The sequence of the **five** key events in the present case must be examined.

First, Detective Todd told Kingsley to get off the phone. While that is a directive by Detective Todd to Kingsley, such a directive is not a restraint on Kingsley's liberty. There is nothing about the directive "get off the phone" that would cause Kingsley to believe he was not free to leave. There is clearly not a detention at this point in time. Police have a right to approach individuals and speak to them, even if no obvious criminal activity is afoot. *State v. Jordan*, 122 Idaho 771, 839, P.2d 38, 41 (Ct.App. 1992); *State v. Zubizareta*, 122 Idaho 823, 827, 839 P.2d 1237, 1241 (Ct.App. 1992) ("...the police were authorized to approach the car and attempt to talk to Zubizareta. Zubizareta voluntarily complied with the request to roll down the window. His freedom to go about his business was not restricted at this point.) The Fourth Amendment does not proscribe all contact between police and citizens. *Terry v. Ohio*, 392 U.S. 1, 19, n. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Idaho Supreme Court has held that a brief stop of a suspicious individual to determine his identity or to maintain the status quo momentarily may be reasonable depending on the facts known to the officer at the time.

In Matter of Clayton, 113 Idaho 817, 819, 748 P.2d 401, 403 (1988). **Second**, Detective Todd “asked” Kingsley to come over to him. This is not a detention according to the Idaho Court of Appeals. A brief detention of Kingsley to determine his status was proper. *State v. Pierce*, 137 Idaho 296, 300, 47 P.3d 1266, 1270 (Ct.App. 2002). In *Pierce*, as officers approached a building believed to be a methamphetamine lab, to execute a search warrant, the officers encountered an individual they did not know (Pierce) in a driveway about twenty feet from the home. Pierce was immediately ordered by two officers (at the front of a line of officers approaching the premises), to get down on the ground and was handcuffed. 137 Idaho 296, 297, 300, 47 P.3d 1266, 1267, 1271. Ten minutes later, after the building was searched, the officers came back to Pierce and noticed he had orangish-brown stains on his hands. *Id.* Pierce was arrested for being present at a place where controlled substances were being manufactured. The Idaho Court of Appeals held that because Pierce’s connection to the premises was not known, a brief detention to determine his status was justified. 137 Idaho 296, 300, 47 P.3d 1266, 1271. The Court of Appeals specifically found the ten-minute detention to be “brief.” *Id.* In the present case, if there was a detention, the detention was less than a minute, perhaps two minutes at most. The recent Idaho Court of Appeals case, *State v. Linenberger*, 263 P.3d 145 (Ct.App. September 1, 2011), is instructive on the issue of detention and consent. In that case, police went to Linenberger’s boat based on a report of suspected drug activity. The police knocked and Linenberger came out of his boat.

The detective asked Linenberger to step to the dock so they could talk. The detective asked if he could conduct a pat-down search for weapons and Linenberger consented. Linenberger admitted he had a knife in his right pocket. Upon searching that pocket, the detective found a cylinder that he believed might contain methamphetamine. The detective

removed the cylinder and placed it on the ground. Linenberger thereafter admitted there was methamphetamine on the boat and gave consent to search the boat. Linenberger also told the detective that the cylinder contained methamphetamine. The detective searched the boat and found methamphetamine.

263 P.3d 145, 147. The Idaho Court of Appeals noted:

Linenberger also argues that, when the detective ordered him to step to the dock, Linenberger was illegally detained because the detective did not possess sufficiently reliable information that established a reasonable suspicion of criminal activity. Not all encounters between the police and citizens involve the seizure of a person. *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 1879 n. 16, 20 L.Ed.2d 889, 905 n. 16 (1968); *State v. Jordan*, 122 Idaho 771, 772, 839 P.2d 38, 39 (Ct.App.1992). Only when an officer, by means of physical force or show of authority, restrains the liberty of a citizen may a court conclude that a seizure has occurred. *State v. Fry*, 122 Idaho 100, 102, 831 P.2d 942, 944 (Ct.App.1991). A seizure does not occur simply because a police officer approaches an individual on the street or other public place, by asking if the individual is willing to answer some questions or by putting forth questions if the individual is willing to listen. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 2386, 115 L.Ed.2d 389, 398 (1991); *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 1323–24, 75 L.Ed.2d 229, 235–36 (1983). Unless and until there is a detention, there is no seizure within the meaning of the Fourth Amendment and no constitutional rights have been infringed. *Royer*, 460 U.S. at 498, 103 S.Ct. at 1324, 75 L.Ed.2d at 236–37. Even when officers have no basis for suspecting a particular individual, they may generally ask the individual questions and ask to examine identification. *Fry*, 122 Idaho at 102, 831 P.2d at 944. So long as police do not convey a message that compliance with their requests is required, the encounter is deemed consensual and no reasonable suspicion is required. *Id.*

The United States Supreme Court, in *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 509 (1980) stated:

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Accounting for all of the surrounding circumstances, the critical inquiry when determining whether a seizure has occurred is whether a reasonable person would have felt free to disregard the police, decline the

officer's request, or otherwise terminate the encounter. *State v. Page*, 140 Idaho 841, 843–44, 103 P.3d 454, 456–57 (2004).

The district court determined that the testimony of the detective and police officers was credible and that Linenberger had been asked, not ordered as Linenberger claimed, to step to the dock to talk. Further, the detective testified that neither the detective nor the two other police officers displayed weapons or physically touched Linenberger. Taking into account all of the surrounding circumstances, a reasonable person would have felt free to decline the detective's request and terminate the encounter. Therefore, the district court did not err by concluding Linenberger was not detained within the meaning of the Fourth Amendment.

263 P.3d 145, 149. In the present case, Detective Todd's telling Kingsley to get off the phone and asking him to come over and talk to him, is not a detention. There were several officers present, but, other than Detective Todd, the other officers and probation officer Marcy Black all apparently blew past Kingsley, showed absolutely no interest in Kingsley, and focused their attention on the house and Andersen. No weapons were displayed by Detective Todd. If Linenberger was not detained in his fact situation (being *told* to get off his own boat), there is simply no way Kingsley was detained in the instant case when Detective Todd *asked* Kingsley to come over to him. *Linenberger* cites to *Fry*, and the cited portion of *Fry* reads:

So long as police do not convey a message that compliance with their requests is required, the encounter is deemed "consensual" and no reasonable suspicion is required. *See, e.g., Bostick, supra*. A seizure occurs—and the fourth amendment is implicated—when an officer, by means of physical force or show of authority, has in some way restrained a citizen's liberty. *Bostick*, 501 U.S. at —, 111 S.Ct. at 2386; *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968). The critical inquiry is whether, taking into account all of the circumstances surrounding the encounter, "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 —, 111 S.Ct. at 2387, *quoting Michigan v. Chesternut*, 486 U.S. 567, 569, 108 S.Ct. 1975, 1977, 100 L.Ed.2d 565 (1988). *See also California v. Hodari*, 499 U.S. 621, —, 111 S.Ct. 1547, 1547, 113 L.Ed.2d 690 (1991).

State v. Fry, 122 Idaho 100, 102-03, 831 P.2d 942, 944-45 (Ct.App.1991). The Idaho Court of Appeals in *Linenberger* then continued:

Even assuming Linenberger was detained, an investigative detention is permissible if it is based upon specific articulable facts which justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity. *State v. Sheldon*, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct.App.2003). Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts. *Terry*, 392 U.S. at 21, 88 S.Ct. at 1879–80, 20 L.Ed.2d at 905–06; see also *Sheldon*, 139 Idaho at 983, 88 P.3d at 1223. The quantity and quality of information necessary to establish reasonable suspicion is less than that necessary to establish probable cause. *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 2416, 110 L.Ed.2d 301, 308–09 (1990). Still, reasonable suspicion requires more than a mere hunch or “inchoate and unparticularized suspicion.” *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1, 10 (1989). Whether an officer possessed reasonable suspicion is evaluated based on the totality of the circumstances known to the officer at or before the time of the stop. *United States v. Cortez*, 449 U.S. 411, 417–18, 101 S.Ct. 690, 694–95, 66 L.Ed.2d 621, 628–29 (1981); *Sheldon*, 139 Idaho at 983, 88 P.3d at 1223.

263 P.3d 145, 149-150. As mentioned above, this Court finds Kingsley was not detained.

But in an abundance of caution, in the present case, if Kingsley were detained, such detention was extremely brief and reasonable. Certainly it is more reasonable than the detention found permissible in *Pierce*. While Kingsley’s status as a potential lookout did not provide Detective Todd with a sufficient basis to immediately search or even arrest Kingsley (as discussed above), Detective Todd had specific articulable facts to justify his “suspicion” that Kingsley was engaged in criminal activity (out in front of a house of a known drug dealer, on a cell phone), and as such, was able to detain him mere seconds longer and ask him if he had any weapons. Just as in *Linenberger* (where a citizen’s tip, corroborated by independent observations of the officer, “established a reasonable suspicion of criminal activity”), as the Idaho Court of Appeals wrote: “Therefore, even assuming Linenberger was detained, his detention was justified under the Fourth

Amendment.” A temporary detention of Kingsley while the search of Andersen’s house was certainly reasonable. *Florida v. Royer*, 103 S.Ct. 1319, 1325, 460 U.S. 491, 499, 75 L.Ed.2d 229 (1983), *citing Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). If Kingsley was detained for the few seconds between when Detective Todd asked him to come over and talk and when Kingsley was asked about weapons, such detention was justified pursuant to *Pierce* and *Linenberger*. **Third**, the next thing to occur was Detective Todd asked Kingsley if Kingsley had any weapons and Kingsley stated “...he had some glass on him.” October 11, 2011, Preliminary Hearing Tr., p. 5, Ll. 10-12. It is permissible for Detective Todd to ask Kingsley if he had any weapons. Detective Todd could have asked that question based on nothing more than a “hunch”. *United States v. Trujillo*, 316 F.Supp.2d 1163, 1168, n. 4 (10th Cir. 2004), *citing United States v. Lambert*, 46 F.3d 1065, 1067 (10th Cir. 1995), *United States v. Turner*, 928 F.2d 956, 958 (10th Cir. 1991). This is the case as long as Detective Todd’s question was “...unaccompanied by any show of authority or coercion.” *Id.*, *See also, United States v. Paul*, 313 F.Supp.2d 1157, 1164 (10th Cir. 2003). This Court finds that at the time Detective Todd asked Kingsley if he had any weapons, there was no show of authority or coercion. What is not permissible at this juncture is for Detective Todd to simply frisk Kingsley absent a reasonable belief that Kingsley posed a danger to the officers present at Andersen’s residence. A *Terry* frisk or demand for any weapons on his person would likely have been improper. *Ybarra*, 44 U.S. 85, 92, 100 S.Ct. 338, 343. However, an immediate *Terry* frisk or a “demand” for weapons was not what happened. Detective Todd simply and permissibly “asked” Kingsley if he had any weapons, to which Kingsley freely responded he “...had some glass on him.” Kingsley’s response, that he “...had some glass on him” is sufficient to satisfy the “frisk” portion of the *Terry* two-step “stop and frisk” inquiry under

Terry, 391 U.S. 1, 27, 88 S.Ct. 1868, 1884. See also *State v. Babb*, 133 Idaho 890, 892, 994 P.2d 633, 635 (2000). “In our analysis of the frisk, we look to the facts known to the officers on the scene and the inferences of risk of danger reasonably drawn from the totality of those specific circumstances.” *State v. Muir*, 116 Idaho 565, 567-68, 777 P.2d 1238, 1240-41 (Ct.App. 1989). In *State v. Aguirre*, 141 Idaho 560, 112 P.3d 848, (Ct.App. 2005), the Court of Appeals wrote, “It is therefore not necessarily a Fourth Amendment violation to ask unrelated questions about drugs and weapons, or to run a drug dog around the perimeter of the vehicle.” 141 Idaho 560, 563, 112 P.3d 848, 851. Nor is there a need, up to this point for *Miranda* warnings. The *Miranda* rule applies where an individual is “in custody” or where their “freedom of action is curtailed to a degree associated with formal arrest.” *Berkemer v. McCarthy*, 468 U.S. 420, 440, 104 S.Ct. 3138, 3150 (1984) (quoting *California v. Behler*, 463 U.S. 1121, 1125, 103 S.Ct 3517, 3520 (1983)). Interrogation includes not only express questioning, but also its functional equivalent; interrogation under *Miranda* refers to “any words or actions on the part of the police... that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *State v. Person*, 140 Idaho 934, 939-40, 104 P.3d 976, 981- 82 (Ct.App. 2004) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300-02, 100 S.Ct. 1682, 1689-90 (1980)). Nothing said or asked by Detective Todd to this point was reasonably likely to elicit an incriminating response. In Idaho, the burden of showing custody rests with the defendant who seeks to exclude evidence because of a failure to administer *Miranda* warnings. *State v. James*, 148 Idaho 574, 577, 225 P.3d 1169, 1172 (2010). In *James*, the Idaho Supreme Court wrote:

Neither this Court nor the U.S. Supreme Court has ever explicitly identified which party bears the burden of proof regarding custody for purposes of *Miranda*. We join the vast majority of courts that have considered the

issue and hold that the burden of showing custody rests on the defendant seeking to exclude evidence based on a failure to administer *Miranda* warnings. (citations omitted) The rationale for this holding was described by the Maryland Court of Special Appeals as follows:

At the threshold of showing the applicability of the *Miranda* requirements, however, the burden is on the defendant to show that applicability. This is the same shift in the allocation of the burden of proof as that which is made between 1) showing the applicability of the Fourth Amendment and 2) showing the satisfaction of the Fourth Amendment. The burden has always been allocated to a defendant to show the threshold applicability of the Fourth Amendment, to show, for example, the coverage of the place, state action, that the defendant has standing to object, etc.

Smith v. State, 186 Md.App. 498, 974 A.2d 991, 1003 (Ct.Spec.App. 2009).

In *James*, the defendant moved to suppress his confession of ownership of the methamphetamine, arguing that the investigative traffic stop had evolved into a custodial interrogation such that *Miranda* warnings were required. The Idaho Court of Appeals suppressed James' admission because of several factors contributing to the coercive atmosphere: the traffic stop took place in the middle of the night on an interstate freeway and afforded little exposure to public view; James knew that when the interrogation occurred it was no longer an investigation of a traffic violation, but had become an investigation of a felony drug offense; all occupants in the vehicle had been subjected to a frisk, which is not usually done during a traffic stop, but is permissible for officer safety purposes; and the officer's interrogation technique, threatening to arrest all occupants if none admitted possession of the drugs, was more coercive than usual traffic violation questioning. *State v. James*, 2008 WL 2389490, at *3-4 (Ct.App., June 13, 2008) (reversed by 148 Idaho 574, 225 P.3d 1169 (2010)). James argued an officer's threat to arrest all occupants of an automobile if no one occupant incriminated themselves triggered a duty to give *Miranda* warnings. 148 Idaho 574, 578, 225 P.3d

1169, 1170. The Idaho Supreme Court reversed the decision of the Court of Appeals and held *Miranda* warnings were not required because James had failed to meet his burden of demonstrating his freedom of movement had been curtailed to the extent associated with formal arrest. 148 Idaho 574, 578, 225 P.3d 1169, 1173.

The Court in *Berkemer* considered a variety of factors: the short duration of the stop, the modest number of questions, and the visibility of the stop. In addition, the Court noted that, “[a]t no point during that interval was respondent informed that his detention would not be temporary.” We find that, based on the information before the district court, the factors enunciated in *Berkemer* indicate that James was not in custody. The evidence before the district court did not disclose the duration of the detention in this case nor did it reveal the extent of questioning. As to the visibility of the stop, although it was nighttime, the stop took place on Interstate 84. James was not handcuffed. Setting aside, for the moment, the effect of Deputy Sterling’s threat of arrest, it is evident that James failed to demonstrate that his freedom of movement was restrained to the degree associated with formal arrest.

Id. Based on the factors set forth in *James* and *Berkemer*, there is no conceivable way Kingsley was in custody. Kingsley has not met his burden in that regard. **Fourth**, after Kingsley stated he “...had some glass on him”, Detective Todd then *asked* if he could take it (the glass) and Kingsley said “yes”. October 11, 2011, Preliminary Hearing Tr., LI. 13-17. Detective Todd asked Kingsley to turn around for a pat search and Kingsley told him “...it was in his front sweatshirt pocket.” *Id.*, LI. 18-20. The item was in the front pocket of the sweatshirt, and in that pocket was a pouch similar to those which hold sunglasses, and in that was a clear glass pipe which Detective Todd recognized as paraphernalia. *Id.*, LI. 21-25. This is all consensual between Detective Todd and Kingsley. Even if this were not consensual, Detective Todd could have conducted a pat down search based on Kingsley’s response that he had some glass on him. This is because Kingsley is present on the property of a known drug dealer, Detective Todd suspects Kingsley might be on the phone to Andersen as a lookout, and now Kingsley

has responded he has some glass on him. In *State v. Pierce*, the Idaho Court of Appeals noted that the District Judge made a finding of fact that there was no evidence Pierce was armed or dangerous. 137 Idaho 296, 297, 47 P.3d 1266, 1267. The Idaho Court of Appeals found that didn't matter, and reversed the District Court's denial of the defendant's motion to suppress, finding: "Pierce's presence on the premises in this case posed an increased risk to the officers because, if not detained, Pierce could have gone to any of the structures located on the premises that were subject to search—the home, the barn, the stable, or the vehicles—and destroyed evidence or obtained a weapon." 137 Idaho 296, 300, 47 P.3d 1266, 1270. However, this discussion is pertinent only if the situation in the instant case had somehow turned non-consensual, and this Court finds up to this point the interaction between Detective Todd and Kingsley is entirely consensual. The Idaho Court of Appeals in *Linenberger* addressed the subject of consent in this context.

Linenberger additionally argues that the pat-down search for weapons conducted by the detective was impermissible because Linenberger did not voluntarily consent to it. A search conducted with consent that was voluntarily given is an exception to the warrant requirement of the Fourth Amendment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043–44, 36 L.Ed.2d 854, 858 (1973); *State v. Dominguez*, 137 Idaho 681, 683, 52 P.3d 325, 327 (Ct.App.2002). It is the state's burden to prove, by a preponderance of the evidence, that the consent was voluntary rather than the result of duress or coercion, direct or implied. *Schneckloth*, 412 U.S. at 222, 93 S.Ct. at 2045, 36 L.Ed.2d at 859–60; *State v. Hansen*, 138 Idaho 791, 796, 69 P.3d 1052, 1057 (2003); *Dominguez*, 137 Idaho at 683, 52 P.3d at 327; *151 *State v. Fleenor*, 133 Idaho 552, 554, 989 P.2d 784, 786 (Ct.App.1999). An individual's consent is involuntary if his or her will has been overborne and the individual's capacity for self-determination critically impaired. *Schneckloth*, 412 U.S. at 225, 93 S.Ct. at 2046–47, 36 L.Ed.2d at 861–62. In determining whether a subject's will was overborne in a particular case, the court must assess the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. *Id.* at 226, 93 S.Ct. at 2047, 36 L.Ed.2d at 862. Thus, whether consent was granted voluntarily, or was a product of coercion, is a factual

determination to be based upon the surrounding circumstances, accounting for subtly coercive police questions and the possibly vulnerable subjective state of the party granting the consent to a search. *Id.* at 229, 93 S.Ct. at 2048–49, 36 L.Ed.2d at 863–64; *Hansen*, 138 Idaho at 796, 69 P.3d at 1057; *Dominguez*, 137 Idaho at 683, 52 P.3d at 327.

The trial court is the proper forum for the careful sifting of the unique facts and circumstances of each case necessary in determining voluntariness. *Schneckloth*, 412 U.S. at 233, 93 S.Ct. at 2050–51, 36 L.Ed.2d at 866. Even though the evidence may be equivocal and somewhat in dispute, if the trial court's finding of fact is based on reasonable inferences that may be drawn from the record, it will not be disturbed on appeal. *State v. Jaborra*, 143 Idaho 94, 97, 137 P.3d 481, 484 (Ct.App.2006). In short, whether consent to a search was voluntary is a question of fact, and our standard of review requires that we accept a trial court's factual findings unless they are clearly erroneous. *Hansen*, 138 Idaho at 795, 69 P.3d at 1056; *State v. McCall*, 135 Idaho 885, 886, 26 P.3d 1222, 1223 (2001). Findings will not be deemed clearly erroneous if they are supported by substantial evidence in the record. *State v. Benson*, 133 Idaho 152, 155, 983 P.2d 225, 228 (Ct.App.1999).

Linenberger asserts that, because the message to him was clear—either cooperate with the search, go to jail, or be charged with a crime—his consent to the pat-down search was not voluntary. The district court concluded that, based on the totality of the circumstances, Linenberger's ability to give consent to search his pockets was, in no way, overborne by the detective's conduct and his capacity for self-determination was not critically impaired. This finding is supported by substantial evidence in the record that the detective, who the district court found to be credible, made no threats or promises in exchange for the consent to search. Linenberger was not handcuffed or restrained during this encounter with the detective and no guns were drawn. Therefore, the district court's finding that Linenberger's consent to the pat-down was voluntary was not clearly erroneous. Accordingly, evidence obtained as a result of the detective's legal pat-down search was admissible.

263 P.3d 145, 150-51. In the present case, “no threats or promises” were made to Kingsley “in exchange for his consent to search.” Kingsley “was not handcuffed or restrained during this encounter with the detective and no guns were drawn.” If the search in *Linenberger* was consensual, the facts of the instant case present a significantly *more* consensual situation in comparison. As mentioned above, the Idaho Court of Appeals found the detective asked Linenberger to step out of his boat and go to the dock so they could talk. 263 P.3d 145, 147. In the present case, Kingsley was

already outside, and all he was told to do was get off his cell phone and was asked to come talk to Detective Todd. In *Linenberger*, the detective asked if he could conduct a pat-down search for weapons and Linenberger consented. *Id.* In the present case, Detective Todd first *asked* Kingsley if he even had any weapons before he then asked if he had Kingsley's consent to pat down for that weapon. Linenberger admitted he had a knife in his right pocket (*Id.*) and Kingsley made a similar admission regarding the glass on his person. In *Linenberger*, upon searching that pocket, the detective found a cylinder that he believed might contain methamphetamine. *Id.* The detective removed the cylinder and placed it on the ground. *Id.* Linenberger thereafter admitted there was methamphetamine on the boat and gave consent to search the boat. *Id.* Linenberger also told the detective that the cylinder contained methamphetamine. *Id.* The detective searched the boat and found methamphetamine. *Id.* Similarly, in the present case, the pat down of Kingsley by Detective Todd continued, and then the **Fifth** thing occurred: Kingsley offered up the fact that he had a bindle on him. Detective Todd put the glass pipe on the back of a vehicle in the driveway, continued his pat search, and then Kingsley "volunteered" that "he had a bindle in his left front pocket." October 11, 2011, Preliminary Hearing Tr., p. 6, LI. 1-9. This was offered up by Kingsley without a question even being put to him by Detective Todd. After being told by Kingsley about the bindle in the left front pocket, Detective Todd then found a bag containing white crystals inside, and Detective Todd took the bag and the cell phone, from Kingsley. *Id.*, p. 6, L. 10 – p. 7, L. 1. At no time up to this point had this turned into a detention. Finally, completely absent in this case are any promises or threats made by Detective Todd to Kingsley. In *Linenberger*, the Idaho Court of Appeals wrote:

Linenberger alternatively argues that, because the detective promised that Linenberger would not go to jail or be arrested if he cooperated, Linenberger's consent to search his boat was not voluntary. The detective told Linenberger that he had been watching the boat, contacted some of the people coming out, and stated that "Nobody has to go to jail. This doesn't have to be a big deal today." While this may have been a ruse, the district court concluded, based on the detective's credible testimony, the use of the ruse did not amount to a promise or threat, was proper police conduct to put Linenberger at ease without the use of weapons or coercion, and did not overbear Linenberger's will or critically impair his capacity for self-determination. Again, no threats or promises were made in exchange for the consent to search, Linenberger was not handcuffed or restrained during this encounter with the detective, and no guns were drawn. Therefore, the district court's finding that Linenberger voluntarily consented to the detective's search of Linenberger's boat is supported by substantial evidence in the record and not clearly erroneous. As such, any evidence obtained as a result of the valid search of Linenberger's boat was admissible.

263 P.3d 145, 151-52. None of these issues are present in the instant case. Thus, if the facts in *Linenberger* are acceptable to the Idaho Court of Appeals in its reversal of the District Court in that case, then less egregious facts must be acceptable to this Court in the present case.

Another issue to consider in this case is the fact that after Detective Todd found the pipe in Kingsley's sweatshirt pocket, Detective Todd at that moment had probable cause to arrest Kingsley. However, Detective Todd did not arrest Kingsley at that moment. Instead, Detective Todd continued his consensual pat-down during which Kingsley offered up or "volunteered" that "he had a bindle in his left front pocket." October 11, 2011, Preliminary Hearing Tr., p. 6, Ll. 1-9. Detective Todd then found a bag containing white crystals inside, and took it, and the cell phone, from Kingsley. *Id.*, Ll. 10 – p. 7, L. 1. Because Detective Todd had probable cause to arrest Kingsley the moment the pipe was located, Detective Todd certainly had an *additional* reason (additional to Kingsley's consent) to continue his pat-down search of Kingsley's person.

The testimony of Detective Todd at the preliminary hearing is set forth above. At no time during the preliminary hearing did either attorney ask how long the entire encounter with Kingsley lasted...from the time Detective Todd told him to get off his phone and asked him to come talk to him, until he was arrested. Neither attorney asked Detective Todd that question at the December 8, 2011, hearing on the motion to suppress. It is clear that this entire encounter lasted probably less than one minute, at most less than two minutes. Detective Todd's entire focus was on Kingsley. Detective Todd was not involved in the entry into Andersen's house and garage. No other officer was engaged in the conversation between Detective Todd and Kingsley until Kingsley was arrested. At that time Detective Todd had Officer Williamson read Kingsley his *Miranda* warnings.

An investigative detention must be temporary and not last longer than necessary to effectuate the purpose of the stop. *State v. Ramirez*, 145 Idaho 886, 889, 187 P.3d 1261, 1264 (2008). Because there is no rigid time limit, to evaluate whether a detention has lasted longer than necessary, a court must consider the scope of the detention and the law enforcement purposes to be served along with the duration of the stop. *U.S. v. Sharpe*, 470 U.S. 675, 685-686, 105 S.Ct. 1568 (1985). When an individual is detained, the scope of detention must be carefully tailored to the underlying justification for the stop, but brief inquiries not related to the initial purpose of the stop do not necessarily violate a detainee's Fourth Amendment rights. *State v. Roe*, 140 Idaho 176, 181, 90 P.3d 926, 931 (Ct.App. 2004). A routine traffic stop may turn up suspicious circumstances that could justify an officer asking further questions unrelated to the stop. *State v. Brumfield*, 136 Idaho 913, 916, 42 P.3d 706, 709 (Ct.App. 2001). The length and scope of the initial investigatory stop may lawfully be extended where there exist objective and specific articulable facts that

justify suspicion that the detained person is, was, or will be engaged in criminal activity. *Id.*

During a lawful traffic stop, general questioning on topics unrelated to the purpose of the stop is permissible as long as it does not extend the duration of the stop. *State v.*

Parkinson, 135 Idaho 357, 363, 17 P.3d 301, 307 (Ct.App. 2000). For example, brief, general questions about drugs and weapons do not extend an otherwise lawful detention.

Id.

If there was a detention of Kingsley, it was very brief. The brevity is in and of itself a fact that indicates there was no detention. Other facts weighing in favor of there not being a detention are: Detective Todd was wearing plainclothes; it was daytime; there were other officers present, but none were engaged in the conversation between Detective Todd and Kingsley, they were instead focused on Andersen; the lack of demands or orders by Detective Todd; the cooperative nature of Kingsley in responding to Detective Todd's requests; and the complete absence of any physical restraint of Kingsley.

Those same factors show that Kingsley's consent to the pat down search, Kingsley's response to Detective Todd's limited questions, and Kingsley's unsolicited statements, were entirely voluntary. Consent, expressed through words, gestures, or other conduct, provides an exception to the warrant requirement; the burden is upon the State to prove that consent was voluntary, and not the result of duress or coercion, direct or implied. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44 (1973); *State v. Diaz*, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007); *State v. Fleenor*, 133 Idaho 552, 555, 989 P.2d 784, 787 (Ct.App. 1999). There is no requirement that law enforcement must have objectively reasonable grounds to request consent for a search, only that consent be freely given. *Schneckloth v. Bustamante*

stands for the proposition that voluntariness of consent must be proven by the State by a preponderance of evidence and is a determination that does not turn “on the presence or absence of a single controlling criterion.” *Schneckloth*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047 (1973). A voluntary decision is one that is the product of “essentially free and unconstrained choice by its maker” *Id.* at 225, 93 S.Ct. at 2046. An involuntary decision, on the other hand, is the result of duress or coercion, direct or implied. *Id.* at 218, 93 S.Ct. at 2041. To determine whether an individual’s will has been “overborne and his capacity for self-determination has been critically impaired,” a court must assess the totality of the circumstances. *Id.* at 225-26, 93 S.Ct. 2046-47. The voluntariness of the consent given is a question of fact to be determined by all surrounding circumstances. *State v. Hansen*, 138 Idaho 791, 796, 69 P.3d 1052, 1057 (2003). In a suppression hearing where voluntariness is an issue, the power to assess the credibility of witnesses, resolve conflicts in testimony, weigh the evidence, and draw factual inferences is vested in the trial court. *State v. Abeyta*, 131 Idaho 704, 708, 963 P.2d 387, 391 (Ct. App. 1998). The State has met its burden of showing Kingsley’s consent was voluntary.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, Kingsley’s Motion to Suppress must be denied.

IT IS HEREBY ORDERED that BRANDON DEAN KINGSLEY’s Motion to Suppress is DENIED.

DATED this 4th day of January, 2012

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of January, 2012 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Sean P. Walsh
Prosecuting Attorney - Bryant Bushling

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____
Deputy