DA 19-0645

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 269

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRUCE LEON LASTER,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DC 19-0222
Honorable Jessica T. Fehr, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Haley Connell Jackson, Assistant Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Roy Brown, Assistant Attorney General, Helena, Montana

Scott D. Twito, Yellowstone County Attorney, Ingrid A. Rosenquist, Deputy County Attorney, Billings, Montana

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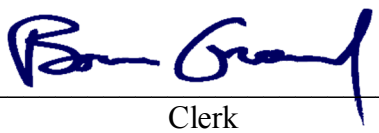

Clerk

Justice Dirk M. Sandefur delivered the Opinion of the Court.

¶1 Defendant and Appellant Bruce Leon Laster (Laster) appeals the August 2019 judgment of the Montana Thirteenth Judicial Court, Yellowstone County, denying his motion to suppress illegal drug evidence seized as a result of a protective pat-down search for weapons and in a subsequent search of his vehicle. The restated issues are:

1. *Whether the District Court erroneously concluded that the police officer lawfully subjected Laster to a pat-down search for weapons?*

2. *Whether the District Court erroneously concluded that the exclusionary rule did not apply to the illegal drug evidence seized in the warrantless pat-down and vehicle searches at issue?*

3. *Whether the District Court erroneously failed to grant defendant sufficient credit for time-served?*

Affirmed in part, reversed in part, and remanded for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On February 18, 2019, at about 11:00 p.m., a man later identified as Laster was driving with a passenger in a 2007 Cadillac DTS on a residential street in Billings, Montana, when his car became stuck in the snow. A neighborhood resident who had been watching the car called 911 and reported that there was a Cadillac stuck in the snow in front of his house and that "these guys look[] very, very spooky," with one of them "really, really spooky looking." The caller said that the car "kept going up and down the block like they were casing out vehicles and . . . houses" and that stolen vehicles had been dumped in the neighborhood in the past. As the call progressed, the caller advised that a white Ford pickup had just arrived and that an occupant was attempting to attach a chain to the Cadillac to pull it out of the snow. The caller further stated that the men in both

vehicles looked to him like "wanna-be gang bangers." The caller thus repeatedly requested that two or three officers immediately respond.

¶3 Upon receipt of the resulting dispatch report that a "vehicle casing the area" was now "stuck in a snowdrift," a Billings police officer responded to the scene. Upon arrival, the officer saw the subject vehicle, a purple Cadillac DTS, stuck in a snow drift "on the north side of the street," with the vehicle "on the sidewalk" and "partially hanging out in the street." He saw a truck on the street behind it trying to pull it out of the drift and the apparent driver of the vehicle (Laster) standing outside the vehicle watching. In response to a prosecutor's question at a subsequent hearing as to whether "there [had] been any [recent] issues with crime in that neighborhood," the officer answered in the affirmative—"predominantly[] stolen vehicles and drug related issues." He testified further that he immediately recognized the stuck Cadillac as the same vehicle often parked in the past at the Vegas Motel, a place known to police as a situs of frequent illegal drug activity in Yellowstone County. The officer testified he had previously seen "the vehicle" at the Vegas Motel "numerous times" and that it was "kind of suspicious" because "people [were] walking up to it all the time" and then "walking away." However, the officer testified unequivocally that, as he pulled up to the scene of the stuck Cadillac on the night in question, he activated his patrol car top lights and stopped because it "posed a traffic hazard."

¶4 Upon exiting his patrol car, the officer approached Laster on foot, then accompanied by two other officers who had just separately arrived on scene. The officer later testified to the following sequence of events, *inter alia*:

Direct Examination

[Prosecutor]: . . . What happened when you immediately approached [Laster]?

[Officer]: . . . I informed him that he was stuck and he agreed. . . . I [then] asked him for identification[] and . . . he said he did not have any. Then, I just had a verbal exchange of information that he . . . gave me.

. . .

[Prosecutor]: . . . [O]nce he gave you the verbal of his name [(Steve Laster)], what did you say or do?

[Officer]: . . . I asked him, "I'll do a pat search on you because we're in close proximity." He was like, "Okay." I did the pat search without any problems.[1]

[Prosecutor]: And when you did the pat search, did you feel anything?

[Officer]: Yes. . . . I believe it might [have] been in his jacket or pants pocket . . . It felt like the outside of a pipe or a loker.

[Prosecutor]: . . . [W]ere you concerned that it could possibly have been a weapon?

[Officer]: It could have been a knife.

[Prosecutor]: . . . [D]id you ask [Laster] what it was? . . .

[Officer]: Yes.

[Prosecutor]: What did he say?

[1] It is unclear on the hearing record as to whether the officer first asked for Laster's name and then conducted the pat-down search, or vice-versa. In either event, the officer's "Watchguard" dash-cam video recording indicated that Laster turned his back to the officer with his hands behind his back in a cuffed-position while the officer patted-down the exterior of Laster's coat.

[Officer]: I believe [he said] it was cigarettes and then a lighter . . . . [but] it did not feel like either of those items.[2]

[Prosecutor]: . . . [B]ased on that, did you request anything of him?

[Officer]: . . . I asked him if I could remove the object.

[Prosecutor]: . . . [W]hat was his response?

[Officer]: Yes.

[Prosecutor]: [W]hat was it[] when you removed it?

[Officer]: A [methamphetamine] loker with residue.

. . .

[Prosecutor]: . . . [W]hat was the purpose of the pat down search in this situation?

[Officer]: An officer safety issue.

. . .

[Prosecutor]: [W]as it important for you to know who you were dealing with and whether they potentially had any weapons on them as well?

[Officer]: Yes, [b]ecause I could be on scene for a long period of time.

Cross Examination

. . .

[D. Counsel]: . . . Officer . . . when you asked the defendant if he had anything in his pockets, were you interrogating him?

[Officer]: No.

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[2] In response to the prosecutor's question as to whether the item "could possibly have been a weapon," the officer answered that the item "could have been a knife." But when specifically asked whether it was apparent that it was a weapon, he testified, "I didn't know what it was for sure[,] [i]t felt like a pipe."

[D. Counsel]: Do you normally read people their Miranda rights when doing a pat down search?

[Officer]: No.

[D. Counsel]: Why not?

[Officer]: It's not relevant at the time. I want to make sure they don't reach for anything and make sure we're both safe.

[D. Counsel]: So, at the time you're doing a pat search, it is for officer safety, not as part of seeking out a criminal activity?

[Officer]: Yes.

Redirect Examination

[Prosecutor]: So at the time you're doing a pat down search, it is for officer safety, not as part of seeking out a criminal activity?

[Officer]: Yes.

Re-Cross Examination

. . .

[D. Counsel]: . . . When you did the pat down search, you thought he had a weapon?

[Officer]: I don't know if he had a weapon. That's why I do pat searches.

[D. Counsel]: But you don't do pat searches on everybody?

[Officer]: No.

[D. Counsel]: Unless you believe they may have a weapon or something dangerous in their pocket, is that correct?

[Officer]: No. If I'm going to be in close proximity to somebody, I'll do a pat search. If I'm going to be with [a person for] a period of time, I'll do a pat search. If it's a brief moment to tell a trespasser to leave an area, I will not.

¶5 Although the record is unclear as to precisely when the checks occurred in the sequence of events after the initial contact with Laster, one of the officers ran a criminal database check on the name "Steve Laster" which yielded a photograph of someone who did not appear to be the man at the scene. But a license plate check ran by one of the other officers indicated that the owner of the purple Cadillac was in fact a "Bruce Laster." The third officer advised the first that he was aware that there were two Laster brothers and that they had used each other's names in the past.

¶6 In any event, after seizing the loker (small drug pipe) with suspected methamphetamine residue as a result of the pat-down search, the first officer walked Laster back to the officer's patrol car, and after a brief discussion, asked him for consent to search the Cadillac. Laster verbally consented, and then read and signed a written consent to search form provided by the officer.[3] The officer searched the vehicle and found a scale commonly used in illegal drug distribution activity, multiple small plastic bags, a pipe, and a small plastic bag containing a white crystalline substance that appeared to be methamphetamine. The officer then placed Laster under arrest and delivered him to the Yellowstone County Detention Center for booking on the charges of criminal possession of dangerous drugs (CPDD) and criminal possession of drug paraphernalia (CPDP). At the detention center following his arrest, Laster admitted that he was in fact Bruce Laster, rather than Steve Laster as originally stated on the street. Upon confirming Laster's

[3] While neither party offered the signed consent to search form into evidence at the subsequent hearing, the officer's dash-cam WatchGuard shows the two of them exchange a document and Laster signing the exchanged document.

identity and ascertaining that he was on probation or parole, the officer contacted the Adult Probation and Parole Division (AP&P) of the Montana Department of Corrections (DOC) and learned for the first time that Laster was the subject of an outstanding AP&P warrant for his arrest.[4]

¶7 After the State formally charged him with CPDD (methamphetamine), CPDP, and obstructing a peace officer, Laster filed a motion for suppression of the evidence seized as a result of the pat-down and vehicle searches. The District Court denied the motion, however, on the stated grounds that:

(1) the officer had sufficient particularized suspicion to stop and engage Laster under the community caretaker doctrine;

(2) the ensuing pat-down search was a lawful "officer safety" search incident to the Community Caretaker stop based on the "the time of night," the "high crime area of town," the report of the occupant(s) apparently "casing" of the neighborhood; and that Laster "could have had weapons on him or in his vehicle";

(3) the community caretaker stop ripened into a criminal investigatory stop based on the discovery and seizure of the pipe with suspected methamphetamine residue as a result of the pat-down search; and

(4) the warrantless vehicle search was a lawful consent search.

The written ruling further cursorily asserted, without supporting analysis or rationale, that the inevitable discovery exception to the exclusionary rule in any event "bar[red] suppression of the drugs and drug paraphernalia removed from [Laster's] pocket."

[4] The record is unclear whether the arrest warrant was a judicial warrant or an administrative AP&P warrant and, if a judicial warrant, why it did not come to light in the officer's earlier criminal database check on the street.

¶8 Laster later pled "guilty" to CPDD and obstructing a peace officer under a written plea agreement that reserved his right to appeal the denial of his suppression motion. The District Court accordingly dismissed the CPDP charge and sentenced him on CPDD and obstructing a peace officer to a net three-year commitment to the DOC for placement in an appropriate correctional facility or program, a $1,500 fine, with recommendation for placement in the DOC START program. Neither the State's charging Information and supporting affidavit, nor Laster's change of plea colloquy, specified the particular basis of the CPDD (methamphetamine) charge, *i.e.,* whether it was the small bag of suspected methamphetamine found in the vehicle search, the suspected methamphetamine residue on the pipe found in Laster's coat pocket as a result of the pat-down search, or both. Laster timely appeals the denial of his suppression motion.

STANDARD OF REVIEW

¶9 On review of a lower court denial of a motion to suppress evidence, we review supporting findings of fact only for clear error and lower court conclusions and applications of law de novo for correctness. *State v. Olson*, 2002 MT 211, ¶ 7, 311 Mont. 270, 55 P.3d 935; *State v. Carlson*, 2000 MT 320, ¶ 14, 302 Mont. 508, 15 P.3d 893 (citing *State v. Henderson*, 1998 MT 233, ¶ 9, 291 Mont. 77, 966 P.2d 137).

DISCUSSION

¶10 *1. Whether the District Court erroneously concluded that the police officer lawfully subjected Laster to a pat-down search for weapons?*

¶11 The Fourth Amendment to the United States Constitution and Article II, Section 11 of the Montana Constitution similarly prohibit "unreasonable searches and seizures."[5] Based on the related Fourth Amendment and Article II, § 11 warrant requirement,[6] warrantless searches and seizures are *per se* unreasonable except under certain narrowly delineated exceptions. *State v. Ballinger*, 2016 MT 30, ¶ 16, 382 Mont. 193, 366 P.3d 668; *State v. Hardaway*, 2001 MT 252, ¶ 36, 307 Mont. 139, 36 P.3d 900; *Katz v. United States*, 389 U.S. 347, 358, 88 S. Ct. 507, 515 (1967). A constitutional seizure of a person occurs when a government officer "in some way" restrains a person's liberty by means of physical force or otherwise by exercise or show of authority that, under

[5] The Fourth Amendment of the United States Constitution applies to the States through the Fourteenth Amendment Due Process clause. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961). Under the Montana Constitution, individuals also have an express right to privacy which "shall not be infringed" absent "showing of a compelling state interest." Mont. Const. art. II, § 10. Where applicable together, Article II, Sections 10 and 11 provide a heightened state right to privacy, broader than provided by the Fourth and Fourteenth Amendments. *State v. Goetz*, 2008 MT 296, ¶¶ 13-14, 345 Mont. 421, 191 P.3d 489 (citing *State v. Hardaway*, 2001 MT 252, ¶¶ 32 and 35, 307 Mont. 139, 36 P.3d 900). *Accord State v. Solis*, 214 Mont. 310, 316, 693 P.2d 518, 521 (1984)). We apply Article II, Sections 10 and 11 in tandem "[w]hen analyzing search and seizure questions that specifically implicate the [Montana] right of privacy." *Hardaway*, ¶ 32. *See also State v. Smith*, 2004 MT 234, ¶¶ 9-13, 322 Mont. 466, 97 P.3d 567 (§ 10 privacy rights augments § 11 search and seizure protection); *Solis*, 214 Mont. at 319, 693 P.2d at 522 ("[t]he right to privacy is the cornerstone of" the "protection[] against unreasonable searches and seizures"). Here, Laster asserts no Montana-enhanced right to privacy. Our analysis thus focuses on the similar search and seizure protection provided under the Fourth Amendment and Article II, § 11 of the Montana Constitution.

[6] *See* U.S. Const. amend. IV ("no Warrants" for search or seizure "shall issue, but upon probable cause") and Mont. Const. art. II, § 11 ("No warrant to search any place, or seize any person or thing shall issue . . . without probable cause").

the totality of the circumstances, would cause an objectively reasonable person to believe that the person is not free to leave the officer's presence. *State v. Clayton*, 2002 MT 67, ¶ 12, 309 Mont. 215, 45 P.3d 30 (citing *United States v. Mendenhall*, 446 U.S. 544, 552-54, 100 S. Ct. 1870, 1876-77 (1980)); *State v. Roberts*, 1999 MT 59, ¶ 16, 293 Mont. 476, 977 P.2d 974; *Terry v. Ohio*, 392 U.S. 1, 16 and 19 n.16, 88 S. Ct. 1868, 1877 and 1879 n.16 (1968) ("seizure" occurs "whenever a police officer accosts an individual and restrains his freedom to walk away"—"[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen").[7] *See also State v. Bar-Jonah*, 2004 MT 344, ¶ 49, 324 Mont. 278, 102 P.3d 1229 (citing *Roberts*). Even a brief restraint of a person's liberty constitutes a constitutional seizure. *State v. Massey*, 2016 MT 316, ¶ 9, 385 Mont. 460, 385 P.3d 544; *State v. Martinez*, 2003 MT 65, ¶ 20, 314 Mont. 434, 67 P.3d 207; *State v. Kaufman*, 2002 MT 294, ¶ 14, 313 Mont. 1, 59 P.3d 1166; *State v. Reynolds*, 272 Mont. 46, 49, 899 P.2d 540, 542 (1995); *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 694-95 (1981).[8] Two recognized exceptions to the

[7] A constitutional "search" is the use of a means of examining or gathering evidence "which infringes upon a person's reasonable expectation of privacy." *State v. Carlson*, 198 Mont. 113, 119, 644 P.2d 498, 501 (1982); *accord Smith v. Maryland*, 442 U.S. 735, 739-40, 99 S. Ct. 2577, 2579-80 (1979). A search infringes upon an individual's right to privacy while a seizure "deprives the individual of dominion over his or her person or property." *State v. Loh*, 275 Mont. 460, 468, 914 P.2d 592, 597 (1996) (quoting *Horton v. California*, 496 U.S. 128, 133, 110 S. Ct. 2301, 2306 (1990)); *accord State v. Scheetz*, 286 Mont. 41, 46, 950 P.2d 722, 724 (1997) (government infringement of a reasonable expectation of privacy constitutes a search). No search or seizure occurs absent government infringement of a reasonable expectation of privacy. *Scheetz*, 286 Mont. at 46, 950 P.2d at 724.

[8] *See also* § 45-2-101(73), MCA (defining a "stop" as "the temporary detention of a person that results when a peace officer orders the person to remain in the peace officer's presence."

warrant requirement are pertinent here—the investigatory stop-and-frisk first recognized in *Terry* and the analogous community caretaker doctrine first recognized under Montana law in *State v. Lovegren*, 2002 MT 153, ¶¶ 16-25, 310 Mont. 358, 51 P.3d 471 (citing *Terry,* 392 U.S. at 13, 88 S. Ct. at 1875-76 and *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 2528 (1973)).

A. *Terry* Investigative Stop Exception.

¶12 Under the *Terry* investigatory stop exception, a law enforcement officer may briefly stop and detain a person for investigative purposes without a warrant or probable cause for an arrest if, based on *specific and articulable facts known to the officer* and rational inferences based on training or experience, the officer has an objectively reasonable particularized suspicion that an individual is engaged or about to engage in criminal activity. *State v. Elison*, 2000 MT 288, ¶ 15, 302 Mont. 228, 14 P.3d 456; *Roberts*, ¶ 12; *Reynolds*, 272 Mont. at 49-50, 899 P.2d at 542; *State v. Gopher*, 193 Mont. 189, 193-94, 631 P.2d 293, 295-96 (1981); *Cortez*, 449 U.S. at 417-18, 101 S. Ct. at 694-95; *Terry*, 392 U.S. at 16-19, 88 S. Ct. at 1877-79.[9] Relevant considerations include, *inter alia*, the quantity, substance, quality, and degree of reliability of the information known to the officer. *State v. Pratt*, 286 Mont. 156, 161, 951 P.2d 37, 40 (1997); *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 2416 (1990). The *Terry* standard does not require that an

[9] The *Terry* investigative stop exception articulated in *Terry*, *Cortez*, and *Gopher* is codified in Montana at § 46-5-401(1), MCA (1991 Mont. Laws ch. 800, § 42). *Bar-Jonah*, ¶ 42; *State v. Anderson*, 258 Mont. 510, 514-15, 853 P.2d 1245, 1247-48 (1993); Comments of Commission on Criminal Procedure §§ 20.01-20.03 (Jan. 10, 1989), File No. 88-559, in the collection of the Clerk of the Montana Supreme Court (hereinafter Commission Comments). *See also State v. Graves*, 191 Mont. 81, 87, 622 P.2d 203, 206-07 (1981).

officer's particularized suspicion be certain or ultimately correct. *See State v. Thomas*, 2008 MT 206, ¶ 10, 344 Mont. 150, 186 P.3d 864; *Henderson*, ¶ 12; *Gopher*, 193 Mont. at 192, 631 P.2d at 295; *Cortez*, 449 U.S. at 418, 101 S. Ct. at 695. It requires more, however, than a mere generalized suspicion, possibility, undeveloped hunch, or good faith belief. *Illinois v. Wardlow*, 528 U.S. 119, 123-24, 120 S. Ct. 673, 676 (2000); *Terry*, 392 U.S. at 22 and 27, 88 S. Ct. at 1880 and 1883. *See also State v. Strom*, 2014 MT 234, ¶¶ 4 and 14-17, 376 Mont. 277, 333 P.3d 218 (daytime observation of occupied vehicle legally parked alone in public-use area near oft-vandalized war memorial insufficient for particularized suspicion of criminal activity); *State v. Jarman*, 1998 MT 277, ¶¶ 14-15, 291 Mont. 391, 967 P.2d 1099 (holding that talking in phone booth on a cold night in the vicinity of a reported domestic abuse "in a high crime area" and then fleeing after officer passed by insufficient alone for particularized suspicion of criminal activity); *Reynolds*, 272 Mont. at 49-51, 899 P.2d at 542-43 (mere suspicion of "possible" traffic violation "combined with no other objective data" insufficient to justify investigatory stop); *Brown v. Texas*, 443 U.S. 47, 50-53, 99 S. Ct. 2637, 2640-41 (1979) (generalized observation that person looked suspicious in high crime "neighborhood frequented by drug users" insufficient to justify investigative stop). Whether an officer was aware of sufficient specific and articulable facts to support a reasonable particularized suspicion that an individual was engaged or about to engage in criminal activity depends upon the totality of the factual circumstances in each case. *Kaufman*, ¶ 11; *Cortez*, 449 U.S. at 417-18, 101 S. Ct. at 695; *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880.

¶13 Upon making a valid investigative stop, officers must act with reasonable diligence to quickly confirm or dispel the predicate suspicion for the stop. *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 1575 (1985). The duration and scope of an investigative stop must be carefully limited to its "underlying justification," and thus may not exceed what is reasonably necessary to confirm or dispel the predicate suspicion for the stop. *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325-26 (1983). In other words, the scope and duration of a *Terry* stop "must be strictly tied to and justified by the circumstances which rendered its initiation permissible," *i.e.*, "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 17-20, 88 S. Ct. at 1878-79 (internal punctuation and citations omitted).[10] However, assessment of the reasonableness of the duration and scope of an investigative stop must recognize that the State's compelling interest in "effective law enforcement" demands that officers in the field have reasonable "latitude" to reach, follow up on, and confirm or dispel initial suspicions of criminal activity. *State v. Sharp*, 217 Mont. 40, 47, 702 P.2d 959, 963 (1985). *Accord Michigan v. Summers*, 452 U.S. 692, 770 n.12, 101 S. Ct. 2587, 2593 (1981) ("key principle of [constitutional] reasonableness" is "the balancing of competing interests"—discussing various permissible "investigative techniques which may be [used]

[10] This principle is codified in Montana at § 46-5-403, MCA (temporary investigative stop "may not last longer than is necessary to effectuate the purpose of the stop"). *See Carlson*, ¶ 21 (citing *Royer*, 460 U.S. at 500, 103 S. Ct. at 1325, and § 46-5-403, MCA); Commission Comments, *supra*, § 20.03.

effectively in the course of a *Terry*-type stop" including request for identification and interrogation regarding the suspicious activity).

¶14 Moreover, based on additional information developed during the lawful duration and scope of the initial stop, new or broader particularized suspicion of criminal activity may develop and thus expand the permissible duration and scope of the stop beyond its initial purpose. *State v. Case*, 2007 MT 161, ¶ 34, 338 Mont. 87, 162 P.3d 849; *Carlson*, ¶ 21; *Hulse v. State*, 1998 MT 108, ¶¶ 40-42, 289 Mont. 1, 961 P.2d 75; *Sharp*, 217 Mont. at 46, 702 P.2d at 963. However, an investigative stop cannot permissibly ripen into new or broader particularized suspicion of criminal activity unless sufficient particularized suspicion of criminal activity existed at the start and continues to exist prior to the development of the additional information on which an officer relies to expand its duration or scope. *See Hulse*, ¶ 40 (upon a lawful stop the "officer's suspicions may become further aroused" and duration and scope of the stop may expand "*provided* the scope of the investigation remains within the limits created by the facts upon which the stop is predicated and the suspicion which they [subsequently] arouse"—emphasis added and internal punctuation and citation omitted); *Sharpe*, 470 U.S. at 686, 105 S. Ct. at 1575 (whether an officer unreasonably expanded the duration of an initially lawful investigative stop depends on whether the officer "diligently pursued a means of investigation . . . likely to confirm or dispel" the initial suspicion that justified the stop); *Royer*, 460 U.S. at 500, 103 S. Ct. at 1325 ("scope of the [stop] must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible"—"an investigative [stop] must . . . last no longer than is necessary to effectuate the purpose of the stop"); *Terry*, 392

U.S. at 19-20, 88 S. Ct. at 1879 ("officer's action" must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place").

B. Community Caretaker Doctrine (CCD) Exception.

¶15 The CCD derives from judicial recognition that:

> Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries or loss of life. . . . Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.
>
> . . .
>
> [P]olice . . . frequently investigate . . . [matters] in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Lovegren, ¶¶ 16-17 (quoting *Terry*, 392 U.S. at 13, 88 S. Ct. at 1875-76, and *Dombrowski*, 413 U.S. at 441, 93 S. Ct. at 2528). *See also State v. Nelson*, 2004 MT 13, ¶ 6, 319 Mont. 250, 84 P.3d 25 (police have a general duty to "investigate uncertain situations in order to ensure the public safety" apart from the enforcement of the criminal law); *Lovegren*, ¶ 20 (recognizing police duty "to investigate situations in which a citizen may be in peril or need some type of assistance from an officer").[11] The CCD thus narrowly applies only to "certain police-citizen encounters" where police become involved, "unrelated to" the

[11] *See also* § 46-1-202(17), MCA (defining "peace officer" as a person "vested by law with a duty to maintain public order and make arrests for offenses").

enforcement or prosecution of the criminal law, to check-on or aid persons who may be "in peril" or otherwise in need of some form of assistance. *State v. Marcial*, 2013 MT 242, ¶¶ 13 and 15, 371 Mont. 348, 308 P.3d 69 (internal punctuation and citations omitted); *State v. Spaulding*, 2011 MT 204, ¶¶ 18-19, 361 Mont. 445, 259 P.3d 793 (CCD applies when police initiate contact to "ensure the safety" or welfare of a citizen—"not to investigate the commission of a crime").

¶16 As with the *Terry* investigative stop exception which the CCD analogously parallels, the constitutional threshold for whether a police-citizen community caretaker contact or encounter is subject to Fourth Amendment and Article II, § 11 protection is whether the contact or encounter effects or results in a constitutional "seizure" of the citizen. *See* U.S. Const. amend. IV; Mont. Const. art. II, § 11; *Lovegren*, ¶ 24 ("a determination must be made regarding at what moment the officer 'seized' the person and thereby implicated Fourth Amendment protections"). If so, the contact or encounter is subject to constitutional search and seizure protection, otherwise not. *See Lovegren*, ¶¶ 24-25. Regardless of the purpose of the encounter or contact, a constitutional seizure occurs when an officer "in some way" restrains a person's liberty by means of physical force or otherwise by exercise or show of authority that, under the totality of the circumstances, would cause an objectively reasonable person to believe that the person is not free to leave the officer's presence. *Clayton*, ¶ 12 (citing *Mendenhall*, 446 U.S. at 552-54, 100 S. Ct. at 1876-77); *Roberts*, ¶ 16; *Terry*, 392 U.S. at 16 and 19 n.16, 88 S. Ct. at 1877 and 1879 n.16). While not every police-citizen encounter or contact rises to the level of constitutional seizure of the citizen, community caretaker encounters or contacts

by nature often do "in order for the officer to ascertain" or confirm whether the citizen is in fact in peril or otherwise in need of assistance. *Marcial*, ¶14 (internal citations omitted); *Spaulding*, ¶¶ 18-19 (citing *Terry*, 392 U.S. at 16, 88 S. Ct. at 1877). However, as with investigative stops, whether a non-law enforcement community caretaker contact or encounter rises to the level of a constitutional seizure ultimately depends on the totality of the factual circumstances in each case. *See Spaulding*, ¶¶ 19 and 29; *Cortez*, 449 U.S. at 417-18, 101 S. Ct. at 695; *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880.

¶17 Accordingly, by analogy to the *Terry* stop, a law enforcement officer may briefly stop and detain (*i.e.* constitutionally seize) a person for a non-law enforcement caretaking or welfare purpose without a warrant, probable cause for an arrest, or particularized suspicion of criminal activity if, based on *specific and articulable facts known to the officer* and resulting rational inferences based on training or experience, the officer has an objectively reasonable particularized suspicion that an individual may presently be in peril or otherwise in need of assistance. *Spaulding*, ¶¶ 18 and 21; *Lovegren*, ¶¶ 24-25.[12] In such cases, the officer may briefly detain the person to investigate and take corresponding action to mitigate the peril or otherwise assist in furtherance of the person's safety or welfare. *Spaulding*, ¶¶ 18 and 21; *Lovegren*, ¶¶ 24-25. However, a community caretaker stop must "actually involve a welfare check" and may not "be used as a pretext for an illegal search and seizure." *Spaulding*, ¶ 24. *See also State v. Reiner*, 2003 MT 243, ¶¶ 20-22, 317 Mont.

[12] By analogy, *see also Elison*, ¶ 15; *Roberts*, ¶ 12; *Reynolds*, 272 Mont. at 49-50, 899 P.2d at 542; *Gopher*, 193 Mont. at 193-94, 631 P.2d at 295-96; *Cortez*, 449 U.S. at 417-18, 101 S. Ct. at 694-95; *Terry*, 392 U.S. at 16-19, 88 S. Ct. at 1877-79.

304, 77 P.3d 210 (rejecting State's alternative characterization of a stop resulting in a DUI conviction as a CCD stop where the officer testified that he approached a vehicle parked on side of highway in response to DUI report rather than as a welfare check). But "there is no requirement that the officer's subjective purpose be solely and exclusively to conduct a welfare check" as long as the primary purpose of the stop was to conduct a welfare check or provide necessary assistance unrelated to the investigation of crime. *Spaulding*, ¶¶ 23-24; *Nelson*, ¶¶ 6-9.

¶18 Similar to the limited permissible scope and duration of a *Terry* stop, once "the officer is assured that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated," then the original constitutional justification for a CCD stop ends unless some other constitutional justification arises for prolonging the stop, such as particularized suspicion of criminal activity or probable cause for a warrantless arrest based on information that comes to light after the initial stop. *Spaulding*, ¶ 21. In other words, as with a *Terry* stop, a lawful community caretaker stop may ripen and transition into a criminal investigatory stop if, based on additional information obtained or observed during the lawful duration and scope of the initial stop, a reasonable particularized suspicion of criminal activity subsequently arises. *See State v. Wheeler*, 2006 MT 38, ¶¶ 18-27, 331 Mont. 179, 134 P.3d 38; *State v. Litschauer*, 2005 MT 331, ¶¶ 10-13, 330 Mont. 22, 126 P.3d 456.

C. *Terry* Protective Frisk/Pat-Down Search Exception.

¶19 Incident to a lawful investigatory stop based on reasonable particularized suspicion of criminal activity, an officer may conduct a limited protective pat-down search of the

"outer clothing" of the person(s) involved for weapons if, based on specific and articulable objective facts and related rational inferences, the officer also has a reasonable particularized suspicion under the totality of the circumstances that the person(s) "may be armed and presently dangerous." *Terry*, 392 U.S. at 19-22, 27, and 30-31, 88 S. Ct. at 1879-80 and 1883-85.[13] *See also State v. Jenkins*, 192 Mont. 539, 543-44, 629 P.2d 761, 764 (1981) (citing *Terry*); *State v. Graves*, 191 Mont. 81, 87, 622 P.2d 203, 206-07 (1981); *Arizona v. Johnson*, 555 U.S. 323, 330-31, 129 S. Ct. 781, 786 (2009) (recognizing that officers may order driver and any passengers out of a vehicle for protective pat-down searches even on a "routine traffic stop" on "reasonable suspicion that they may be armed and dangerous"—internal citations omitted).[14] An officer may temporarily seize any weapon discovered during the lawful scope of a protective pat-down search and, absent other legal justification, hold it for so long as necessary to provide for the safety of the officer and others nearby during the lawful duration of the stop. *See Terry*, 392 U.S. at 30-31, 88 S. Ct. at 1884-85.[15] As with the justification for the initial stop, the separate

[13] The *Terry* protective "frisk"/pat-down search stop is codified in Montana at § 46-5-401(2)(b), MCA (1991 Mont. Laws ch. 800, § 43—formerly § 46-5-402, MCA (1989)). *Bar-Jonah*, ¶ 42; *State v. Collard*, 286 Mont. 185, 193-94, 951 P.2d 56, 61-62 (1997); Commission Comments, *supra*, §§ 20.01-20.03. *See also Graves*, 191 Mont. at 87, 622 P.2d at 206-07.

[14] *See also Michigan v. Long*, 463 U.S. 1032, 1049-52, 103 S. Ct. 3469, 3481-82 (1983) (extending *Terry* frisk exception to hold that a protective search of passenger compartment of a car—limited to areas where a weapon may be accessible—is permissible during an independently lawful *Terry* stop based on reasonable particularized belief that driver was dangerous and "may gain immediate control of weapons"—citing *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880).

[15] *See also* § 46-5-403(2)(b), MCA ("[t]he officer may take possession of any object that is discovered during the course of the frisk if the officer has probable cause to believe that the object is a deadly weapon until the completion of the stop, at which time the officer shall either immediately return the object, if legally possessed, or arrest the person").

justification for the protective pat-down search requires more than mere generalized suspicion, possibility, undeveloped hunch, or good faith belief that the subject may be armed and presently dangerous. *Terry*, 392 U.S. at 22 and 27, 88 S. Ct. at 1880 and 1883. The officer need not be certain, or ultimately correct, but need only have a reasonable particularized suspicion based on objective facts and inference that the subject may be presently armed and dangerous. *Terry*, 392 U.S. at 19-22, 27, and 30-31, 88 S. Ct. at 1879-80 and 1883-85. *See also State v. Stubbs*, 270 Mont. 364, 369-73, 892 P.2d 547, 550-53 (1995) (upholding seizure of small brass drug pipe perceived by officer on *Terry* pat-down as a potential knife or derringer), *overruled on other grounds by Loh*, 275 Mont. at 471-73, 914 P.2d at 599-600. *Compare State v. Heath*, 2000 MT 94, ¶ 17, 299 Mont. 230, 999 P.2d 324 (*Terry* does not authorize "random[] 'recover[y]' [of] items from the suspect's clothing" for examination absent particularized suspicion that the felt-object was a weapon—thus impermissible on *Terry* pat-down "to simply 'recover' objects from the suspect's clothing" for examination "and then, after the fact, argue that the objects *might have* contained a weapon or were immediately apparent as contraband").

¶20 Because "[t]he sole justification" for a *Terry* pat-down search is for "the protection of the police officer and others nearby," *Terry*, 392 U.S. at 26 and 29, 88 S. Ct. at 1882 and 1884, the *Terry* frisk exception does not justify warrantless pat-down searches and seizures for evidence or contraband. *Terry*, 392 U.S. at 29, 88 S. Ct. at 1884. The protective *Terry* frisk "must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry*, 392 U.S. at 29, 88 S. Ct. at 1884. But, as a limited exception to the general rule, an officer

may seize contraband upon a protective *Terry* pat-down search if, when patting-down the subject's outer-clothing, the officer "feels an object" which, based on its "contour or mass" without further tactile manipulation, is "immediately apparent" as contraband. *Minnesota v. Dickerson*, 508 U.S. 366, 374-75 and 379, 113 S. Ct. 2130, 2136-37 and 2139 (1993) (recognizing "plain feel" exception corollary to plain-view exception). *See also Collard*, 286 Mont. at 193-94, 951 P.2d at 61-62 (applying "plain feel" exception); *Stubbs*, 270 Mont. at 369-73, 892 P.2d at 550-53 (upholding seizure of small brass drug pipe as a potential knife or derringer—distinguishing *Dickerson* based on particularized officer belief that subject item was a weapon rather than contraband).

D. Laster Stop and Frisk Incident.

¶21 Here, as articulated in its brief below, the State's originally-asserted theory was that three Billings police officers responded to a stuck-vehicle call with the "two-fold purpose" of conducting a welfare check on the occupants on a cold night and to further investigate a citizen complaint of "suspicious and concerning behavior," *i.e., possible* criminal behavior. The State explained that, upon arrival, the primary officer immediately "recognized the Cadillac as one he had" previously observed involved in apparent illegal drug activity at another location (Vegas Motel) on a different date, thus causing the officer to suspect that the vehicle may be "involved in [unspecified] criminal activity" at the subject location. The State continued that the:

> [o]fficers . . . responded to a complainant's call about a stuck vehicle and activity that the [*c*]*omplainant* found suspicious. This was more than a simple call for law enforcement to assist a stuck vehicle. The *complainant* was concerned enough about the activity . . . that he was afraid to leave his

> house to assist the individuals stuck and requested two or three officers [to] respond to the scene.

(Emphasis added.) Upon thus cursorily glossing-over the threshold requirement for particularized suspicion of criminal activity or that Laster was in apparent distress, danger, or otherwise required assistance, the State further reasoned that the protective *Terry* pat-down search was therefore similarly justified because the officer had a reasonable "belief that the Defendant might be armed" based on the late time of night, the *complainant's* "report of suspicious activity . . . [and] request[] [for] multiple officers," and the officer's recognition of the vehicle as having previously been involved in illegal drug activity. Tracking the State's theory, the District Court reasoned that:

> Based on [the primary officer's] testimony, it would appear that this is an instance where both the Community Caretake Doctrine and particularized suspicion [of criminal activity] were present and supported further investigation of the Defendant . . . . In one instance, [the primary officer] was responding to a vehicle that was stuck in the middle of the night in below-freezing temperatures. . . . [I]n addition to [the officer] having a duty to . . . respond and check on [the driver] and his [stuck] vehicle . . . , public safety would implore [the officer] to do the same. After arriving on the scene and making contact . . . , [the officer] asked to pat-search [Laster] for officer safety and then proceeded to request [his] name . . . [and driving credentials]. [The officer] testified that he had frisked the Defendant for officer safety . . . [based on] the time of night, the report of a suspicious driver potentially casing the neighborhood, . . . [and] not knowing who the Defendant was or for how long he would have contact with the Defendant.

The District Court further reasoned that, even if it disregarded the 911 call about the apparent "casing" of the neighborhood and the officer's knowledge that the Cadillac was previously involved in drug activity, the CCD "permitted [him] to engage with" Laster and then his awareness of "the neighborhood's recent issues with car thefts," and "not knowing

anything about [Laster] or if [he] could possibly have weapons on his person," justified the "pat search for officer safety."

¶22 On appeal, the State makes no attempt to support, nor even reference, its earlier reliance on the CCD as the constitutional justification for the initial stop of Laster[16] prior to the disputed pat-down search. It instead doubles-down on its assertion that the initial investigatory stop was justified because the officer had a reasonable particularized suspicion immediately upon arrival at the scene that Laster was engaged or about to be engaged in criminal activity based on the time of night, the officer's awareness that crimes related to stolen vehicles and illegal drug activity had previously occurred in the neighborhood, his recognition of the vehicle as having been previously associated with illegal drug activity at another location, and the citizen report that the occupants of the vehicle appeared to be "casing" the neighborhood. The State then again asserts that the "uncertain and suspicious situation" and the "officer safety" concern justified the immediate pat-down search of Laster for weapons due to the officer's "close proximity with [the] suspect."

(1) Validity of the Initial Laster Stop.

¶23 In *Reiner*, after 5:00 in the morning, a city police officer heard a dispatch report of a possible intoxicated person driving a particularly described vehicle southbound on the highway through Pablo, Montana. *Reiner*, ¶ 3. Shortly thereafter, the officer observed a

[16] The officer acknowledged at the subsequent suppression hearing that Laster was not free to leave or disengage with the officer.

vehicle matching that description parked on the side of the highway ten miles down the road from Pablo at a location not normally used for parking. *Reiner*, ¶ 4. The officer pulled in behind the parked vehicle, activated his top lights, and approached on foot where he found the driver "asleep or unconscious behind the wheel." *Reiner*, ¶ 5. Despite repeated knocking on the window, the man was unresponsive for several minutes before waking. *Reiner*, ¶ 5. After the man awoke, the officer briefly spoke with him and observed that his eyes were "red and glassy." *Reiner*, ¶ 5. A Montana Highway Patrol trooper later arrived, engaged the driver, and, upon administering field sobriety tests and a portable breath test, arrested him for DUI. *Reiner*, ¶¶ 6-7. On the defendant's motion to suppress the DUI evidence on district court trial de novo, the court concluded that, without more, the possible intoxicated driver report and the officer's subsequent observation of a vehicle meeting that description parked on the side of the highway were insufficient to give rise to a reasonable particularized suspicion of DUI. *Reiner*, ¶ 13. The court denied the motion to suppress, however, based on its conclusion that the initial stop was nonetheless justified under the circumstances as a CCD welfare check. *Reiner*, ¶ 13. On appeal, we agreed that the initial possible DUI report and subsequent observation of the vehicle legally parked on the side of the highway in the early morning hours were insufficient alone to give rise to a reasonable particularized suspicion of DUI. *Reiner*, ¶¶ 10-11 and 16-18. We rejected the alternative CCD theory, however, and held that the initial stop was not a valid CCD stop based on the police officer's testimony that, without reference to the driver's welfare, he stopped to investigate a possible DUI. *Reiner*, ¶¶ 20-22.

¶24 Likewise, here, the officer testified only that he responded to the scene based on a 911 dispatch regarding a citizen report that a suspicious vehicle, that had been driving up and down the street "casing" homes and vehicles in the subject area, was currently stuck in a snow drift on the street. He testified that, upon arrival on the scene, he immediately activated his emergency top lights and engaged the apparent driver on foot because he saw that the vehicle was stopped partially on the sidewalk, and partially sticking out into the street, and was thus "a traffic hazard." The State's attempt to characterize the initial encounter with police as in part a community caretaker welfare check is therefore unsupported by the record evidence. The record is devoid of any evidence that three Billings police officers separately responded to the residential neighborhood, whether in whole or in part, to conduct a welfare check or render assistance to a stuck driver on a cold winter night. Nor is there any evidence that, upon arrival and stopping, the investigating officer either inquired as to Laster's welfare or need for assistance, or saw any reason to think that he was in fact in peril or otherwise in need of assistance. It is undisputed that, upon the initial officer's arrival, Laster was already receiving assistance from a person in a white truck who was in the process of pulling his "high-centered" vehicle out of the snow with a chain. The officer did not testify to any specific fact indicating that he stopped for any purpose other than to dispense with the traffic hazard, identify the driver, and thereby assess the accuracy of the 911 caller's suspicion that the occupants of the Cadillac were casing the neighborhood. The officer testified that the officers summoned a tow-truck for the vehicle only *after* Laster was arrested for transport to the jail. Here, even more so than in *Reiner*, neither the objective record facts, nor the stated subjective intent of the officer,

support the District Court's finding and conclusion that the officer at least in part stopped and engaged Laster to check on his welfare or inquire whether he needed assistance. The District Court thus erroneously concluded that the stop and investigation of Laster was constitutionally justified as a CCD stop.

¶25 As to suspicion of criminal activity, a person's unexplained presence at night in a high crime area, or even in the vicinity of a recent crime, under generally suspicious or unclear circumstances is generally insufficient alone to support a reasonable particularized suspicion of criminal activity. *See Jarman*, ¶¶ 14-15 (holding that talking in phone booth on a cold night in the vicinity of a reported domestic abuse "in a high crime area" and then fleeing after officer passed by was insufficient alone for particularized suspicion of criminal activity); *Brown*, 443 U.S. at 50-53, 99 S. Ct. at 2640-41 (non-specific observation that person looked suspicious in "neighborhood frequented by drug users" insufficient to justify investigative stop). Here, regardless of his awareness that the subject vehicle had been previously involved in illegal drug activity at the Vegas Motel, the officer unequivocally testified that Laster was not involved in the previously observed drug activity and that he had no reason to believe that Laster or the Cadillac had been at the Vegas Motel or otherwise engaged in illegal drug activity earlier that evening. Apart from the 911 caller's suspicion that Laster and his passenger were casing the neighborhood by driving up and down the street, there is no record evidence indicating why they were driving up and down the street that night. Nor did the officer testify that he, rather than the 911 caller, actually suspected that Laster and his associate were engaged or about to be engaged in committing any drug offense or property crime. Without more particularized

indicia of criminal activity *that evening*, Laster's unexplained driving up and down a Billings street at 11:00 p.m., in a car previously associated with illegal drug activity at another location, and in an area where illegal drug activity and property crime had previously occurred were insufficient to give rise, and in fact did not give rise, to a reasonable particularized suspicion that Laster had committed or was about to commit any drug offense or property crime prior to the arrival of the officers on the scene.

¶26 We will nonetheless affirm a lower court ruling that reaches the right result even if for the wrong reason. *Marcial*, ¶ 10; *State v. Ellison*, 2012 MT 50, ¶ 8, 364 Mont. 276, 272 P.3d 646; *City of Billings v. Staebler*, 2011 MT 254, ¶ 9, 362 Mont. 231, 262 P.3d 1101. Regardless of the investigating officer's lack of any suspicion, much less a reasonable particularized suspicion based on objective facts, that Laster had committed or was about to commit a drug offense or property crime on the night in question, it is unlawful to "stop, park, or leav[e] standing" a vehicle "upon the paved or main-traveled part" of a public highway, street, or road. Sections 61-8-353(1) and 60-1-103(17), MCA. It is similarly unlawful to "stop, stand, or park" a vehicle "on a sidewalk" or, generally, to stop or park a vehicle on a roadway unless "parallel to and within 18 inches" of the curb. Sections 61-8-354(1)(a) and -355(1)-(2), MCA. Violation of any of those traffic regulations is a misdemeanor offense. Section 61-8-711(1), MCA. Here, upon arrival at the scene, the initial officer activated his top lights, stopped, and engaged Laster upon observing the subject vehicle "high-centered" in the snow, stopped partially on the sidewalk and partially sticking out into a city street, thereby creating a traffic hazard. Based on his specific and articulable observation of the location of the subject vehicle and

resulting traffic hazard, the investigating officer had sufficient particularized suspicion of various traffic offenses to justify a *Terry* investigative stop and engage Laster in regard thereto. Thus, albeit for the wrong reason, the District Court correctly concluded that the initial investigative stop of Laster was a valid *Terry* investigative stop.

(2) Validity of Ensuring Protective Pat-Down Search.

¶27 In *State v. Collard*, 286 Mont. 185, 951 P.2d 56 (1997), a Bozeman police officer was responding after midnight to a convenience store robbery that had just occurred involving a man with a knife and whom the store clerk had last seen running from the store. *Collard*, 286 Mont. at 188, 951 P.2d at 58-59. A few blocks away, the responding officer saw a vehicle leaving a trailer park "in a hurried manner" and suspected that the driver might be the robber based on the fact that the robbery had just occurred, the proximity to the store, the hurried manner in which the vehicle was leaving the area, and the fact that the vehicle was the only vehicle "moving about at that hour" of the early morning. *Collard*, 286 Mont. at 188, 951 P.2d at 59. The officer testified that when he caught up from behind and flashed his high-beam headlights to better see into it, the car quickly turned a corner and abruptly stopped. *Collard*, 286 Mont. at 188, 951 P.2d at 59. Upon stopping and approaching on foot, the officer immediately noticed that the driver was visibly sweating on the cold night, had fresh mud spatter on his sweat pants, and that his boots were wet. *Collard*, 286 Mont. at 188-89, 951 P.2d at 59. The officer then ordered the driver out of the vehicle and obtained a more detailed description from dispatch that the store clerk reported that the robber was wearing ski goggles. *Collard*, 286 Mont. at 189, 951 P.2d at 59. Based on information that the robber used a knife to rob the store, the officer patted

the man down for weapons and felt a hard object which he immediately recognized as ski goggles. *Collard*, 286 Mont. at 189, 196, 951 P.2d at 59, 63. On appeal following trial and conviction, we held that the officer had sufficient particularized suspicion, based on specific and articulable facts under the totality of the circumstances, to stop the subject vehicle and investigate whether the driver was the man who robbed the store. *Collard*, 286 Mont. at 192-93, 951 P.2d at 61. We further held that the *Terry* pat-down search was justified because the officer also had sufficient particularized suspicion that the man was armed and dangerous based on specific information that the man he stopped appeared to be the man who had just robbed the store minutes before with a knife, and might therefore be presently armed and dangerous. *Collard*, 286 Mont. at 192-94, 951 P.2d at 62.

¶28 In *State v. Pearson*, 2011 MT 55, 359 Mont. 427, 251 P.3d 152, police officers validly stopped a vehicle based on an inoperable tail light in violation of Montana law. *Pearson*, ¶ 5. Instead of just pulling over to the side of the road after the officer activated his top lights, the driver continued on and then turned into a parking lot before stopping. *Pearson*, ¶ 6. As one of the officers approached on foot, he saw the man "make furtive movements in the car," saw a "meth watch sticker" in the car known to the officers to be commonly associated with methamphetamine users, and saw the man "appear[] to stretch across the passenger seat" reaching for something, possibly a weapon. *Pearson*, ¶ 6 (internal punctuation omitted). After further discovering that the man was also on probation for a drug offense, the other officer ordered him out of the car and then patted the man down for weapons, and similarly patted-down a fanny pack observed within his reach in the passenger compartment of the vehicle. *Pearson*, ¶¶ 7-8. While the pat-down

searches revealed no apparent weapons or immediately identifiable contraband, the initial traffic stop and pat-down searches led to the plain view observation of a can of pepper spray in the car, and resulting officer suspicion that the man was thus in violation of the terms of his probation. *Pearson*, ¶¶ 8-9. An officer then asked for consent to search the vehicle and, upon obtaining the man's consent, a thorough search of the vehicle and fanny pack resulted in discovery of methamphetamine in the fanny pack. *Pearson*, ¶¶ 8-9. After the district court denied the man's motion to suppress the drug evidence in the ensuing prosecution, we affirmed its findings and conclusions that the pat-down searches of the driver and fanny pack within his reach were valid under § 46-5-401(2)(b), MCA (codified *Terry* protective weapons frisk exception), based on reasonable particularized suspicion that the man may have been reaching for a weapon. *Pearson*, ¶¶ 10 and 19.

¶29 In *Heath*, three Billings police officers responded to a report of a residential disturbance reportedly involving a man who was again harassing a woman by knocking on her door after threatening her with a gun a few days before. *Heath*, ¶ 3. Upon arrival, the first two officers, who received a particularized description of the suspect's vehicle enroute, heard a commotion at the scene, saw a vehicle matching the description attempting to leave through the alley, and radioed the third responding officer who immediately stopped the vehicle. *Heath*, ¶ 3. Two of the officers then saw one of the passengers in the vehicle "repeatedly crouching down as if placing or retrieving an item from under the seat and then sitting back upright in the seat." *Heath*, ¶ 3. At the car, one of the officers became further concerned about their safety after seeing the same man keep "leaning forward [with] his hands . . . go[ing] out of sight as he reached under the seat." *Heath*, ¶ 3. Based on the

man's suspicious behavior and the report that the driver had recently threatened the caller with a gun, the officers ordered the men out of the car and, after the passenger denied putting anything under the seat, patted them down for weapons. *Heath*, ¶ 3. During the pat-down of the driver, the officer felt something in the man's inside coat pockets and then retrieved from them a small glass drug pipe and a small leather coin purse which, upon examination, contained Valium tablets. *Heath*, ¶¶ 3, 8, and 13. An accompanying weapons search of the passenger compartment of the vehicle resulted in the seizure of two small bags which, upon examination, contained a small bag of methamphetamine and various drug paraphernalia. *Heath*, ¶ 3. The district court later denied a motion to suppress those items and, under a plea agreement reserving his right to appeal, the driver pled guilty to criminally possessing them. *Heath*, ¶ 1.

¶30 On appeal, citing *Terry*, 392 U.S. at 30, 88 S. Ct. at 1184-85, we agreed with the district court that the officers validly stopped the vehicle for investigation and then had a reasonable particularized suspicion that the occupants might be presently armed and dangerous based on the officers' awareness that the driver had previously threatened the woman with a gun and then seeing one of the occupants repeatedly crouching down and reaching under his seat. *Heath*, ¶¶ 3 and 7-11. We thus further agreed that a "carefully limited" protective weapons search was justified under the *Terry* frisk exception. *Heath*, ¶¶ 9-11 The dispositive issue then became whether the more intrusive dive into the man's pocket for retrieval of the small glass pipe and coin purse, and subsequent opening of the coin purse, exceeded the lawful scope of a protective *Terry* pat-down search for weapons. *Heath*, ¶¶ 10-18.

¶31 We first noted that *Terry* and § 46-5-401(2)(b), MCA (formerly § 46-5-402(2), MCA), authorize only a carefully limited pat-down search for weapons or something that reasonably "feels like a weapon." *Heath*, ¶ 17. We noted further that, under the related but narrow "plain feel" exception, an officer engaged in a lawful *Terry* pat-down search may similarly seize and examine anything that is *immediately apparent upon feel*, without further manipulation, as contraband or an object that reasonably feels like "something which [could] contain a weapon." *See Heath*, ¶¶ 14-17; *Collard*, 286 Mont. at 195, 951 P.2d at 63 (in re "plain feel" doctrine); and *Dickerson*, *supra* (in re "plain feel" doctrine). We emphasized, however, that:

> The perceptions resulting from the officer's pat-down define the scope of any further search or seizure. It is not permissible to simply "recover" objects from the suspect's clothing, open the items or further examine them, and then, after the fact, argue that the objects *might have* contained a weapon or were immediately apparent as contraband.

Heath, ¶ 17 (emphasis in original). We thus held that, in the manifest absence of any record evidence that the leather coin purse or small glass pipe were immediately recognizable upon pat-down feel as an apparent weapon, contraband, or something that reasonably could contain a weapon, the officer's reaches into the driver's coat pockets were not valid under the *Terry* frisk exception codified in § 46-5-401(2)(b), MCA, or related "plain feel" doctrine. *See Heath*, ¶¶ 13-18.

¶32 Here, upon lawfully stopping and engaging Laster regarding the observed traffic hazard, the officer immediately subjected him to a protective pat-down search for "officer safety." Upon Laster's acquiescent compliance, the officer then felt a hard object in his coat which he *later* testified could have been a knife. However, he did not testify that, at

the time, he thought that it could have been a weapon. He testified, rather, that it "felt like the outside of a pipe or a loker." In any event, our focus here is not on whether the officer reasonably suspected that the hard object was a knife or immediately apparent contraband, but more fundamentally, whether the pat-down search was justified in the first place on reasonable particularized suspicion, based on specific and articulable objective facts and resulting inferences, that Laster was or might have been presently armed and dangerous. In that regard, unlike in *Collard* and *Heath*, the officer did not testify that he had any reason to believe that Laster may have been armed earlier in the evening or at any time prior. Unlike in *Heath*, he did not testify to any specific facts or circumstances that caused him to actually believe that Laster might be presently armed and dangerous that night. Nor did he testify to seeing any furtive or other suspicious movement, behavior, or indication from Laster that would have in any event reasonably supported such an inference. To the contrary, when asked on re-cross whether he suspected that Laster might have a weapon, the officer candidly testified "no, [t]hat's why I do pat down searches." He testified unequivocally that the sole reason he patted Laster down was because the officer was going to be "in close proximity" with him for a while and wanted to find out if he had a weapon.

¶33 Nothing in *Terry*, its progeny, or the language of § 46-5-401(2), MCA, which codified the *Terry* weapons frisk exception, authorizes police officers to subject an otherwise validly stopped person to a pat-down search as a prudent preventative safety practice without a reasonable particularized suspicion, based on specific and articulable objective facts known to the officer and resulting inferences, that the subject may *presently* be armed and dangerous. *Ybarra v. Illinois*, 444 U.S. 85, 93-94, 100 S. Ct. 338, 343 (1979)

("[n]othing in *Terry* can be understood to allow a generalized 'cursory search for weapons'"). Simply being engaged with an unknown individual on a city street at night, in an area where drug and property crimes have previously occurred, who was inexplicably driving up and down the street in a *vehicle* previously associated with illegal drug activity is manifestly insufficient alone to constitute a reasonable particularized suspicion that the person may be presently armed and dangerous. While those facts may have been sufficient to support a *generalized* hunch, suspicion, or concern warranting further observation or inquiry while addressing the lawful initial or expanded justification for the stop, here they were insufficient alone to support a reasonable *particularized* suspicion, based on specific and articulable objective facts known to the officer, that Laster might have been presently armed and dangerous. We hold that the District Court erroneously concluded that the protective pat-down search of Laster was justified under *Terry* and § 46-5-401(2)(b), MCA, whether incident to a valid *Terry* investigative stop or analogous CCD stop.

¶34 *2. Whether the District Court erroneously concluded that the exclusionary rule did not apply to the illegal drug evidence seized in the warrantless pat-down and vehicle searches at issue?*

¶35 Under the exclusionary rule, also known as the "fruit of the poisonous tree" doctrine, evidence discovered as the result of a constitutionally invalid search or seizure is generally inadmissible against the accused in subsequent proceedings. *State v. Hilgendorf*, 2009 MT 158, ¶ 23, 350 Mont. 412, 208 P.3d 401 (citing *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 416 (1963)); *State v. Pipkin*, 1998 MT 143, ¶ 12, 289 Mont. 240, 961 P.2d 733 (citing *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961) and *United States v. Calandra*, 414 U.S. 338, 348, 94 S. Ct. 613, 620 (1974)); *Murray v. United States*, 487

U.S. 533, 536-37, 108 S. Ct. 2529, 2533 (1988) (internal citations omitted). The exclusionary rule generally applies both to evidence that is the direct product of the illegal search or seizure, and evidence "that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes 'so attenuated as to dissipate the taint.'" *Murray*, 487 U.S. at 536-37, 108 S. Ct. at 2533 (citing *Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 268 (1939); *Segura v. United States*, 468 U.S. 796, 804, 104 S. Ct. 3380, 3385 (1984); *Wong Sun*, 371 U.S. at 487-88, 83 S. Ct. at 417). The purpose of the exclusionary rule is to deter government agents from acquiring evidence via violation of constitutional rights. *State v. Courville*, 2002 MT 330, ¶ 20, 313 Mont. 218, 61 P.3d 749 (internal citations omitted). However, "[a]s with any remedial device," the exclusionary rule properly applies only in "those situations in which its remedial purpose is effectively advanced." *Illinois v. Krull*, 480 U.S. 340, 347, 107 S. Ct. 1160, 1166 (1987). *See also Davis v. United States*, 564 U.S. 229, 239-41, 131 S. Ct. 2419, 2428-29 (exclusionary rule inapplicable to invalid searches "conducted in reasonable reliance on binding precedent").

¶36 Accordingly, the exclusionary rule does not apply if the same evidence is subsequently discovered and acquired "from an independent source," or inevitably would have been, sufficiently free of the "primary taint" of the prior illegality. *In re R.P.S.*, 191 Mont. 275, 279, 623 P.2d 964, 967 (1981) (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S. Ct. 182, 183 (1920)); *Murray*, 487 U.S. at 537-43, 108 S. Ct. at 2533-36; *Wong Sun*, 371 U.S. at 487-88, 83 S. Ct. at 417. The so-called independent source and inevitable discovery exceptions are "closely related," with the inevitable discovery

exception essentially an "extrapolation from" the independent source exception. *State v. Therriault*, 2000 MT 286, ¶ 60, 302 Mont. 189, 14 P.3d 444; *Murray*, 487 U.S. at 539, 108 S. Ct. at 2534. Under both exceptions, the dispositive question of whether the asserted independent source or inevitable discovery was sufficiently free of the taint of the prior illegality is *not* simply whether the subject evidence would not have been discovered "*but for*" the prior illegality, but whether it subsequently came about, or would have, as a result of the officer's "exploitation" of the fruit of the prior illegality to facilitate the subsequent discovery or acquisition of evidence or, alternatively, "by means sufficiently distinguishable" therefrom. *Wong Sun*, 371 U.S. at 487-88, 83 S. Ct. at 417 (emphasis added—internal citation omitted); *Courville*, ¶ 21 (exclusionary rule not applicable "if the evidence is so attenuated or dissipated from" the prior illegality "such that the evidence loses its primary constitutional taint"—citing *United States v. Leon*, 486 U.S. 897, 104 S. Ct. 3405 (1984)); *Murray*, 487 U.S. at 539-42, 108 S. Ct. at 2534-35 ("the government should not profit from its illegal activity" but at the same time should not be "placed in a worse position than it would have otherwise occupied" if the prior illegality had not occurred); *Segura*, 468 U.S. at 804-05, 104 S. Ct. at 3385 (citing *Wong Sun*, 371 U.S. at 487, 83 S. Ct. at 417). *See also State v. Dickinson*, 2008 MT 159, ¶ 25, 343 Mont. 301, 184 P.3d 305 (the inevitable discovery exception applies if the subject evidence would have inevitably "been discovered without reference to" the information obtained from the prior illegality—quoting *State v. Allies*, 186 Mont. 99, 118, 606 P.2d 1043, 1053 (1979)); *State v. Dasen*, 2007 MT 87, ¶¶ 21-22, 337 Mont. 74, 155 P.3d 1282 (second search warrant application based on information obtained before the first and new information

subsequently obtained from unconnected sources not tainted by unreferenced information obtained under the prior illegal search warrant); *State v. New*, 276 Mont. 529, 535, 917 P.2d 919, 922-23 (1996) ("fruit of the poisonous tree" doctrine bars use of evidence discovered "as a result of the exploitation of" a prior illegality—internal citation omitted); *Silverthorne Lumber Co. v. United States*, 251 U.S. at 392, 40 S. Ct. at 183 (exclusionary rule not applicable "[i]f knowledge of [the subject item or information] is gained from an independent source" but knowledge gained by the prior illegality "cannot be used"). The State has the burden of proving by a preponderance of the evidence that the independent source exception or inevitable discovery exception applies to evidence tainted by prior illegality. *See State v. Ellis*, 2009 MT 192, ¶ 49, 351 Mont. 95, 210 P.3d 144 (citing *United States v. Mejia*, 69 F.3d 309 (9th Cir. 1995)). In order to prevent the exceptions from "swallowing" the exclusionary rule, "courts must take care to hold the government to its burden of proof" beyond mere "[s]peculation and assumption." *United States. v. Jones*, 72 F.3d 1324, 1334 (7th Cir. 1995). However, when the issue is properly at issue on appeal, appellate courts may properly assess the application of those exceptions "sua sponte" if the record on appeal is sufficient "to make that determination." *Dickinson*, ¶ 24. *Accord Brown v. Illinois*, 422 U.S. 590, 604, 95 S. Ct. 2254, 2262 (1975) (declining to remand for fact-finding where record on appeal was of "amply sufficient detail and depth from which the determination may be made").

¶37 Here, the State neither concedes error, nor makes any attempt to defend the District Court's cursory conclusion that the inevitable discovery exception in any event precluded application of the exclusionary rule to the pipe with suspected drug residue discovered in

Laster's coat pocket as a result of the pat-down search. However, because lower court judgments are presumed correct on appeal, we must nonetheless address Laster's assertion of error regarding the inevitable discovery doctrine. As a threshold matter, the pipe with apparent methamphetamine residue was seized as a direct result of the invalid pat-down search for weapons. The apparent basis of the District Court's inevitable discovery conclusion was an implied finding, in accordance with the State's argument below, that based on Laster's outstanding arrest warrant, a post-arrest booking inventory search at the Yellowstone County Detention Center would have inevitably revealed the pipe with suspected drug residue in any event. However, the arresting officer testified that he arrested Laster based on the drug evidence found in the pat-down and vehicle searches, and was not even aware of the arrest warrant until later when he called and spoke with the AP&P officer after delivering Laster to the jail. Laster was thus not arrested on the subsequently-discovered warrant. Nor is there any record *evidence* that he otherwise inevitably would have been arrested, much less have been subjected to a post-arrest inventory search on jail intake, regardless of the invalid pat-down search and related vehicle search. The implicit finding of fact that the pipe with apparent methamphetamine residue would have been inevitably discovered regardless of the invalid pat-down search was thus clearly erroneous. We hold that the District Court erroneously denied Laster's motion to suppress the pipe with apparent methamphetamine residue found in his coat pocket as a result of the invalid pat-down search.

¶38 Laster further asserts that the District Court also erroneously denied his motion to suppress the illegal drug and paraphernalia evidence found in the subsequent vehicle

search. While reciting in its statement of facts on appeal that Laster consented to the vehicle search, the State neither concedes error, nor makes any attempt to defend the District Court's denial of the aspect of Laster's motion seeking suppression of the fruits of the vehicle search. It instead seems to simply rely on the court's conclusion that the vehicle search was a valid consent search and, by implication, its fruit was thus not subject to suppression under the exclusionary rule. The District Court's written judgment simply found and concluded that the subsequent search of the vehicle was constitutionally valid as a consent search based on Laster's reading and signing of the consent advisory form provided by the investigating officer. The court's analysis did not address, however, Laster's assertion that the fruit of the search was nonetheless subject to suppression under the exclusionary rule as the result of the immediately prior discovery of the pipe with apparent drug residue as a result of the preceding pat-down search.[17]

¶39 As a preliminary matter, we agree with Laster that the inevitable discovery exception to the exclusionary rule does not apply to the drug evidence seized in the vehicle search under the facts and circumstances in this case. The record on appeal is simply devoid of any evidentiary fact or circumstance indicating either that the officer would have in any event requested consent to search the vehicle, or that police would have inevitably discovered the drug evidence found in the vehicle under any other recognized exception to the warrant requirement of the Fourth Amendment and Article II, § 11 of the Montana

[17] The court's finding and conclusion regarding application of the inevitable discovery exception specifically applied only to the pipe and residue found in Laster's coat pocket incident to the preceding pat-down search.

Constitution. Again, however, we will affirm a lower court judgment if it reached the correct result even if for a wrong or unarticulated reason. *See Marcial*, ¶ 10; *Ellison*, ¶ 8; *Staebler*, ¶ 9. We thus turn to the independent source exception to the exclusionary rule.

¶40 Voluntary consent to a government search or seizure is an independent exception to the warrant requirement of the Fourth Amendment and Article II, Section 11 of the Montana Constitution. *State v. Snell*, 2004 MT 269, ¶ 4, 323 Mont. 157, 99 P.3d 191; *State v. Olson*, 2002 MT 211, ¶ 20, 311 Mont. 270, 55 P.3d 935; *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043 (1973) (internal citations omitted). In contrast to the strict requirement for formal knowing, voluntary, and intelligent waivers of the self-incrimination and fair trial rights protected by the Fifth and Sixth Amendment, *see Schneckloth*, 412 U.S. at 235-48, 93 S. Ct. at 2051-58, the standard of consent applicable under the Fourth Amendment and Article II, § 11, protections against unreasonable searches and seizures is merely that a consent to a government search or seizure be voluntary in fact under the totality of the circumstances, *i.e.*, "the product of an essentially free and unconstrained choice" not influenced by express or implied police coercion or duress, however subtle. *Schneckloth*, 412 U.S. at 225-34 and 247, 93 S. Ct. at 2047-49 and 2058. *Accord State v. Deshaw*, 2012 MT 284, ¶ 29, 367 Mont. 218, 291 P.3d 561 (citing *Schneckloth*); *State v. Wetzel*, 2005 MT 154, ¶ 18, 327 Mont. 413, 114 P.3d 269; *State v. Rushton*, 264 Mont. 248, 257-58, 870 P.2d 1355, 1361 (1994) (applying *Schneckloth* Fourth Amendment voluntariness standard under Mont. Const. art. II, § 11), *overruled on other grounds by State v. Hermes*, 273 Mont. 446, 904 P.2d 587 (1995); *State v. Stemple*, 198 Mont. 409, 412-13, 646 P.2d 539, 541 (1982) (declining "to impose a stricter standard"

under the Montana Constitution). Relevant factors include, *inter alia*, the apparent characteristics of the subject (including, *inter alia*, age, apparent level of intelligence and ability to understand the request) and the nature and circumstances of the request for consent including whether police advised the subject of the right to refuse and whether the consent was the product of any express, implicit, or circumstantial duress or coercion (including, *inter alia*, whether the subject was under arrest or physically restrained, whether police had already conducted the subject or seizure search before seeking consent, and whether police stated or implied that the suspect would be detained for hours pending application for a warrant or could avoid incarceration by consenting). *See Wetzel*, ¶¶ 17-18 (internal citations omitted); *Stemple*, 198 Mont. at 412-13, 646 P.2d at 541; *Rushton*, 264 Mont. at 259, 870 P.2d at 1362; *State v. Allies*, 190 Mont. 475, 488, 621 P.2d 1080, 1087 (1980) (quoting *Schneckloth*, 412 U.S. at 229, 93 S. Ct. at 2048-49), *overruled on other grounds by State v. Cope*, 250 Mont. 387, 819 P.2d 1280 (1991)); *Schneckloth*, 412 U.S. at 226-27, 231, and 248-49, 93 S. Ct. at 2047-49 and 2059. No single factor is determinative, thus proof of a rights advisory by police is not necessarily essential or fatal to whether a consent to search or seize was voluntary in fact. *Wetzel*, ¶¶ 17-18; *Schneckloth*, 412 U.S. at 226-27, 93 S. Ct. at 2047. *See also Stemple*, 198 Mont. at 412-13, 646 P.2d at 541. Upon challenge of the voluntariness of a consent to search, the State has the burden of making an evidentiary showing, by more than mere acquiescence to police authority, that the consent was voluntary as a matter of fact under the totality of the circumstances. *Deshaw*, ¶ 29; *State v. Kim*, 239 Mont. 189, 196, 779 P.2d 512, 517 (1989),

overruled on other grounds by State v. Cope, 250 Mont. 387, 819 P.2d 1280 (1991); *Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S. Ct. 1788, 1792 (1968).

¶41 While generally sufficient to satisfy the consent exception to the warrant requirement, mere voluntariness in fact is not necessarily sufficient alone to purge a subsequent consent from the taint of a prior illegality unless the voluntary consent was sufficiently attenuated from the prior illegality. *See State v. Ribera*, 183 Mont. 1, 10, 597 P.2d 1164, 1170-71 (1979) (citing *Brown*, 422 U.S. at 598-99, 95 S. Ct. at 2259); *Murray*, 487 U.S. at 536-37, 108 S. Ct. at 2533 (in re independent source exception—citing *Nardone*, 308 U.S. at 341, 60 S. Ct. at 268); *Segura*, 468 U.S. at 804, 104 S. Ct. at 3385; *Wong Sun*, 371 U.S. at 487-88, 83 S. Ct. at 417. *See also Courville*, ¶ 21 (exclusionary rule not applicable "if the evidence is so attenuated or dissipated from" the prior illegality "such that the evidence loses i[t]s primary constitutional taint"—internal citation omitted). A voluntary consent to search is sufficiently attenuated to be cleansed of a prior illegality only if, under the totality of the circumstances, the consent was clearly the result of a free will choice rather than the officer's "exploitation" of the prior illegality. *See Brown*, 422 U.S. at 601-03, 95 S. Ct. at 2261 (subsequent voluntary consent to search of seize is sufficient to break "causal chain[] between" the consent and prior illegal search only if clearly the result of a "free will" choice not significantly "affected" by the prior illegality—citing *Wong Sun*). *See also Murray*, 487 U.S. at 539-42, 108 S. Ct. at 2534-35; *Wong Sun*, 371 U.S. at 487-88, 83 S. Ct. at 417. In addition to other relevant factors that indicate whether a consent was voluntary in fact, factors relevant to whether a subsequent consent to search was sufficiently attenuated from, or not primarily the product of police

exploitation of, the prior illegality also include whether police gave the subject a prior *Miranda* warning, the nature of the prior illegality, proximity of the prior illegality in time and place to the subsequent consent, the presence of any intervening circumstances, and any indication that police purposely or recklessly engaged in the prior illegality to facilitate further investigative opportunity or exploited it for further investigative purposes. *See Brown*, 422 U.S. at 603-04, 95 S. Ct. at 2261-62); *Wong Sun*, 371 U.S. at 486-88, 83 S. Ct. at 417. No single factor is determinative in every case. *Brown*, 422 U.S. at 603-05, 95 S. Ct. at 2261-63 (narrowly holding *Miranda* advisory was insufficient alone to cleanse the taint of an unlawful arrest on a seemingly voluntary subsequent confession). Thus, under the independent source exception to the exclusionary rule, a causal connection between the information gained in a prior illegal search or seizure and a subsequent consent search or seizure does not necessarily preclude the subsequent consent search or seizure from being an independent source sufficiently substantial and attenuated to purge the subsequent search or seizure of the taint of the prior illegality. *See Dasen*, ¶¶ 20-22; *Therriault*, ¶¶ 59-66; *Ribera*, 183 Mont. at 9-11, 597 P.2d at 1169-70; *New*, 276 Mont. at 536-37, 917 P.2d at 923-24; *Wong Sun*, 371 U.S. at 487-88, 83 S. Ct. at 417.

¶42 In *Dasen*, police searched a suspect's business under a search warrant and seized various items of evidence pertinent to a multitude of later-charged sex offenses. *Dasen*, ¶ 7-8 and 12. The district court invalidated the warrant and resulting seizures due to lack of a particular description of the items to be seized. *Dasen*, ¶¶ 12-13. Police then obtained a second warrant based on the same information which, *inter alia*, included a particular description of the items to be seized which thus described the items seized under the prior

invalid warrant. *Dasen*, ¶ 14. In affirming a district court denial of a motion to suppress the items seized in the second search as the tainted fruit of the prior invalid warrant, we held that the independent source exception precluded application of the exclusionary rule because, though both searches resulted in seizures of the same items and the initial illegal search necessitated the second lawful search, the information that established probable cause for issuance of the second warrant was the same as for the first warrant, except for the more particular description of the items to be seized. *Dasen*, ¶¶ 20-22 (citing *Murray*, 487 U.S. at 541-42, 108 S. Ct. at 2535).

¶43 In *Therriault*, a supervising officer went to the home of an adult probationer for a routine compliance check and then entered the home after getting no answer at the door. *Therriault*, ¶¶ 8-9. Upon entry he saw what he thought might be a note left for him on the kitchen counter, but which upon examination was a high school transfer application filled out in the name of a female student. *Therriault*, ¶ 10. Still focused on trying to locate the probationer for the contemplated compliance check, the officer spoke with the probationer's sister next-door who advised unprompted that she had frequently seen a young girl who had apparently been residing at the probationer's home over the past two weeks, and asked the officer about the legal age of consent to sexual relations. *Therriault*, ¶¶ 11 and 62. The officer then returned and again entered the probationer's home to further examine the high school transfer application and ascertained from the listed date of birth that the subject female student was only 14 years old. *Therriault*, ¶ 11. Later that night after the probationer had returned home, the officer returned with a deputy sheriff and, at the door, asked the probationer about the young girl, in response to which the man admitted

that a girl was presently in his basement. *Therriault*, ¶ 12. After apparently gaining lawful entry, the officers located the 14-year-old girl listed on the high school application in a basement bedroom covered in nothing but a bedsheet. *Therriault*, ¶ 12. The State later petitioned for revocation of the man's probation after a sheriff interviewed the girl and she advised that she had been staying at the probationer's home off-and-on since meeting him a few weeks before and that they had engaged in sexual intercourse on one occasion prior to the night she was discovered in his home. *Therriault*, ¶ 13. After denying a motion to suppress evidence of his contact and relationship with the girl as fruit of the two prior illegal entries into his home, the district court revoked the man's probation and ultimately resentenced him to prison. *Therriault*, ¶¶ 14-23. On appeal, we agreed with the probationer that the officer twice illegally entered and searched his home without a warrant, and that there was an "apparent causal relationship" between the information gained from those unlawful searches and the subsequent lawful discovery of the young girl in his home and her subsequent incriminating statements. *Therriault*, ¶¶ 55 and 58-59 (citing *New*, 276 Mont. at 536, 917 P.2d at 923). Based on the independent source exception, however, we held that the exclusionary rule did not apply because the "critical piece of evidence" that led to the subsequent discovery of the girl in the probationer's home and her subsequent incriminating statements was the information independently obtained from the probationer's sister—that a young girl apparently under the age of consent had been residing at his home for approximately two weeks. *Therriault*, ¶¶ 59-64 (noting *inter alia* that the evidentiary record did not clearly manifest that the discovery of the girl in the

man's home and their relationship was not the result of "exploit[ation]" of the information gained from the illegal searches).

¶44 In *New*, a sheriff's deputy, who was also aware from a pre-stop license-plate check that the vehicle owner was on probation on a prior drug distribution conviction, made an investigatory stop of the vehicle owner outside a convenience store based on the officer's preceding observation of a traffic offense. *New*, 276 Mont. at 530-31, 917 P.2d at 920. After advising that he knew the man "was on probation and subject to search," the officer "directed him to empty his pockets" on the hood of his vehicle and "also performed a quick pat-down search" resulting in discovery of "a small metal tubular container" inside the man's pants pocket. *New*, 276 Mont. at 531, 917 P.2d at 920. After opening the tubular container and finding inside "a number of small plastic bags containing a white powdery substance which [the man] claimed was cocaine," the officer placed the man under arrest and thoroughly searched his clothing to find "an after-shave box in [his] coat pocket" which upon opening contained nine pills later determined to be a controlled drug for which the man had no prescription. *New*, 276 Mont. at 531, 917 P.2d at 920. After taking the man to jail and impounding his vehicle pending a search, the officer notified the man's probation officer who directed that the man "also be arrested for violating his probation." *New*, 276 Mont. at 531, 917 P.2d at 920. In a post-arrest jailhouse interrogation, a sheriff's detective advised the man that the substance found in the small tube in the traffic stop pat-down search had tested positive for methamphetamine. *New*, 276 Mont. at 531, 917 P.2d at 920. After admitting that "he intended to sell some of the [methamphetamine] to pay his distributor and support his own habit," and that additional methamphetamine and

paraphernalia were in his vehicle, the man authorized a search of his vehicle. *New*, 276 Mont. at 531, 917 P.2d at 920.

¶45 However, upon being advised by a prosecutor not to rely on the man's consent and to contact his probation officer to find out "if he had [any] independent grounds to search the vehicle," the probation officer authorized a probation search of the vehicle based on "previously received information" that the man "was using drugs and alcohol" and his prior knowledge that the man had not submitted to court-ordered chemical dependency treatment and apparently had no fixed residence as required. *New*, 276 Mont. at 531-32, 917 P.2d at 920. Upon the subsequent search of the impounded vehicle, the sheriff's detective and probation officer found and seized drug paraphernalia and a number of baggies containing methamphetamine. *New*, 276 Mont. at 532, 917 P.2d at 920. After the State charged the man with various drug offenses based on the pat-down search, post-arrest clothing search, and subsequent vehicle search and seizures, the district court suppressed the evidence gained in the post-stop pat-down, and more intrusive post-arrest clothing search that ensued in the field, as based on unlawful warrantless searches. *New*, 276 Mont. at 532, 917 P.2d at 921. However, the court denied the motion to suppress regarding the evidence seized from the vehicle, concluding that the subsequent search of the impounded vehicle was a lawful probation search based on the probation violation information previously known to the probation officer. *New*, 276 Mont. at 532, 917 P.2d at 921. On appeal, the man asserted that the court erroneously denied the motion to suppress the results of the vehicle search because, regardless of the probation violation information previously known to the probation officer, the subject search of the vehicle would not have occurred but for the

tainted results of the initial illegal searches in the field and resulting incriminating admissions. *New*, 276 Mont. at 533-34, 917 P.2d at 922. We recognized that the information gained as a direct result of the prior illegal searches and seizures on the street (*i.e.* the drug evidence seized in the post-stop pat-down/clothing searches and incriminating post-arrest jailhouse interrogation admissions) was "an additional element supporting the [probation] search" of the vehicle. *New*, 276 Mont. at 535, 917 P.2d at 922. We noted, however, that the dispositive issue under the independent source and inevitable discovery exceptions to the exclusionary rule was whether the probation search was "the result of the *exploitation of* [the] initial illegal" searches or, rather, the result of "means sufficiently distinguishable from" the tainted information gained from the prior illegal searches. *New*, 276 Mont. at 535-36, 917 P.2d at 922-23 (emphasis added—citing *Wong Sun*, 371 U.S. at 487-88, 83 S. Ct. at 417; *Silverthorne*, 251 U.S. at 392, 40 S. Ct. at 182-83; and *Murray*, 487 U.S. at 537, 108 S. Ct. at 2533). We accordingly noted, based on the probation officer's testimony, that he had reasonable independent justification for searching the man's vehicle before speaking with the sheriff's detective, and in fact was already intending to do so "imminent[ly]" after being unable to do so before the subject investigative stop. *New*, 276 Mont. at 536-37, 917 P.2d at 923-24. Thus, despite the causal connection to the prior illegal searches, we held that the vehicle search "was not the result of the *exploitation of*" the information gained from the prior illegal searches but, rather, was primarily based on information acquired by the probation officer from independent sources. *New*, 276 Mont. at 537, 917 P.2d at 924 (emphasis added). *See similarly*, *Ribera*, 183 Mont. at 3-11, 597 P.2d at 1166-70 (holding that vehicle search authorized by

voluntary consent of absent third-party vehicle owner upon police request for consent to search based on illegal drug evidence obtained as a result of prior unlawful arrest and pat-down seizure of the driver of the vehicle was valid).

¶46 Here, the hearing record clearly manifests that, shortly after seizing the pipe with apparent methamphetamine residue from Laster's coat pocket incident to the invalid pat-down search, the investigating officer walked him back to the patrol car, briefly discussed his unspecified "suspicions," and asked Laster for consent to search his vehicle. After Laster verbally consented and signed a consent to search form, the officer searched the vehicle and found and seized a bag of apparent methamphetamine and related paraphernalia. The record is devoid of any indication that the officer sought consent to search the vehicle for any reason other than based on his discovery of the methamphetamine pipe incident to the pat-down search and his awareness that the vehicle had been previously associated with illegal drug activity. Thus, as in *Dasen*, *Therriault*, *New*, and *Ribera*, an apparent causal connection existed between the information gained from the prior illegal pat-down search and the ensuing vehicle search. However, as in those cases, the dispositive issue regarding the vehicle search is whether, under the independent source exception to the exclusionary rule, the subsequent search was the result of the *exploitation of* the information gained from the illegal pat-down search (*i.e.* the pipe with apparent methamphetamine residue) *or*, *rather*, the result of "means sufficiently distinguishable" therefrom to be purged of its taint.

¶47 In that regard, Laster did not assert, here or below, that his verbal and written consents to search were not voluntary in fact under the circumstances. Nor is there any

evidence or assertion that the officer coerced, threatened, pressured, or offered any inducement to Laster, whether expressly or implicitly. There is similarly no evidence that the officer stated or implied that he already had sufficient legal justification to search the vehicle, that Laster would be detained for some time pending application for a search warrant, or that he could avoid arrest or prosecution by consenting. While Laster nonetheless consented with manifest knowledge that he had been caught by police with a drug pipe in his pocket, was not free to leave, and, presumably, could be ultimately arrested on that basis alone, the record also clearly reflects he did not give any verbal or non-verbal indication that he did not understand the predicament he was already in, the nature or purpose of the request for consent to search, or the potential adverse consequence if the search yielded any contraband attributable to him. In that regard, there is no record indication that Laster was naïve or unsophisticated regarding the nature, operation, or consequence of the criminal justice system.[18] There is similarly no evidence that his decision to consent was uncertain, equivocal, unclear, that he was not intelligent, not capable of understanding, was under the influence of alcohol or drugs, or otherwise cognitively or developmentally impaired. The officer testified that, except for misrepresenting his name as "Steve," Laster was calm and cooperative throughout the duration of the investigative stop.

[18] The presentence investigation report of record on appeal indicates that Laster has an extensive criminal history, including prior illegal drug convictions.

¶48 Further, Laster was not yet under arrest at the time he consented to the vehicle search. In contrast to the inherently stressful and arguably coercive confines of an isolated interrogation room in the bowels of a detention center or police station, the request and decision to consent occurred in the open on a public street in a residential neighborhood in Billings. There is further no record indication that Laster was overly cold, not properly attired on a freezing cold winter night, or that he relinquished and consented just to get away or to a warm place. Under the totality of record circumstances, there is no evidentiary basis upon which to find or conclude that Laster's verbal and written consent to the vehicle search was anything other than a choice of free will, uninfluenced by coercion, threat, duress, or offer of inducement. Under the totality of the particular circumstances in this case, we hold that the District Court correctly concluded that the vehicle search was a valid warrantless search under the recognized consent exception to the warrant requirement of the Fourth Amendment and Article II, Section 11, of the Montana Constitution.

¶49 As to the "fruit of the poisonous tree" doctrine beyond the manifest voluntariness of the vehicle search, there is no evidence that the police officer purposely or recklessly conducted an illegal pat-down search for weapons in whole or in part to create, facilitate, or parlay it into an opportunity or cause for a subsequent search warrant, arrest, or lawful warrantless search. The record clearly manifests that, however ill-conceived or misinformed, the sole intent and purpose of the pat-down search was as a preventative measure based on the officer's personal safety concern due to his "close proximity" with a field contact he did not know. Despite the apparent causal connection between the illegal pat-down search and the ensuing request for consent to search the vehicle, the information

gained from the pat-down search (*i.e.* the methamphetamine pipe) did not itself provide, supplement, or contribute to the necessary legal justification for the ensuing consent search. Moreover, while the permissible scope and duration of an investigative *Terry* stop must narrowly be reasonably related to the initial or expanded constitutional justification for the stop, an incidental question about an unrelated matter, or request for consent to conduct an unrelated search, without new or expanded particularized suspicion of criminal activity neither unlawfully expands the permissible duration or scope of the independently justified stop, nor effects a new seizure of the subject, as long as the unrelated question or request itself does not substantially prolong the duration of the stop. *See Snell*, ¶¶ 16-17 ("additional justification" not required for request for unrelated consent to search incident to otherwise valid investigative traffic stop); *Royer*, 460 U.S. at 502, 103 S. Ct. at 1326-27 (officer would have been justified in asking for consent to search luggage without particularized suspicion without exceeding permissible scope of initial stop had they not substantially extended the duration and scope of the intrusion by directing him to isolated police room for additional questioning); *Johnson*, 555 U.S. at 333, 129 S. Ct. at 788 (officer inquiry into matter unrelated to justification for initial traffic stop not unreasonable as long as the unrelated inquiry does "not measurably extend the duration of the stop"); *Thomas v. Dillard*, 818 F.3d 864, 875 (9th Cir. 2016) (officer may request consent to search without cause beyond the initial justification for a stop as long as subject is free to decline). *See also State v. Clark*, 2008 MT 419, ¶¶ 24-25, 347 Mont. 354, 198 P.3d 809 (request for consent to search vehicle for weapons without particularized suspicion after initial domestic abuse concern was dispelled impermissibly exceeded scope or duration of initial stop—applying

Snell). Under the consent exception to the warrant requirement, a voluntary consent to search then provides new or expanded constitutional justification to prolong the permissible scope of the initial warrantless investigative stop for that purpose. *Clark*, ¶¶ 24-28; *Snell*, ¶ 17. *See also United States v. Brignoni-Ponce*, 422 U.S. 873, 882, 95 S. Ct. 2574, 2580 (1975) ("any further detention or search" after the initial particularized suspicion for a stop is dispelled "must be based on *consent* or" new or expanded constitutional grounds—emphasis added); *United States v. Acosta*, 363 F.3d 1141, 1145-51 (11th Cir. 2004) (subsequent consent search of house and container incident to traffic stop did not impermissibly expand scope or duration of the stop). Here, despite the apparent causal connection between the request for consent to search and the prior unlawful pat-down search, the record clearly manifests that the subsequent consent search of the vehicle, and resulting discovery of illegal drug evidence, was primarily the result of Laster's intervening free will choice, rather than the officer coercion, duress, or *exploitation of* the information gained from the prior illegal pat-down search. Under the totality of the particular circumstances in this case, the subsequent consent search of the vehicle was sufficiently distinguishable and attenuated to be free from the taint of prior illegal pat-down search. Thus, we hold that the District Court did not erroneously deny Laster's motion to suppress the drug evidence seized from his vehicle.

¶50 *3. Whether the District Court erroneously failed to grant defendant sufficient credit for time-served?*

¶51 Laster last asserts, and the State concedes, that the District Court failed to grant him sufficient credit for time served from February 19-27, 2010, in accordance with

§ 46-18-403(2), MCA. In light of our holding on Issue 2, we do not address this assertion of error.

CONCLUSION

¶52 We hold that the District erroneously denied Laster's motion to suppress the pipe with suspected methamphetamine residue found in his coat pocket as a result of the initial pat-down search. We further hold, however, that the District Court did *not* erroneously deny his to motion suppress the illegal drug and paraphernalia evidence found in the subsequent consent search of his vehicle. Due to the indiscriminate nature of the State's charging Information, supporting affidavit, and the subsequent change of plea colloquy as to the specific factual basis for the charge and resulting guilty plea, what the particular factual basis was for the CPDD conviction is unclear—whether the lawfully discovered methamphetamine seized from Laster's vehicle, the methamphetamine residue on the drug pipe found as a result of the prior unlawful pat-down search, or both.[19] We therefore reverse Laster's CPDD conviction and remand for trial or new plea in accordance with this Opinion.

/S/ DIRK M. SANDEFUR

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON

[19] It is further unclear and beyond the scope of this appeal whether the State ultimately confirmed through forensic laboratory testing that those suspected substances were in fact methamphetamine.

Justice Laurie McKinnon, dissenting.

¶53 I dissent. I see no reason to reverse on the basis that we do not know which drugs formed the basis of Laster's plea. I would, very simply, resolve this case as follows.

¶54 Upon arrival at the scene, police observed Laster's vehicle stuck in a snow drift that placed the vehicle partially on the sidewalk and partially sticking out into a city street. This was a traffic violation which authorized police to approach and investigate. While I agree there was no particularized suspicion to conduct a protective pat down search where the pipe was discovered, Laster signed a consent form allowing police to search his vehicle. In the vehicle, drugs were seized which authorized police to place Laster under arrest for criminal possession of dangerous drugs. Police would have found the pipe when they conducted a pat down following his arrest. I would conclude, therefore, that none of the drugs and paraphernalia should be suppressed and affirm Laster's conviction.

/S/ LAURIE McKINNON

Chief Justice Mike McGrath and Justice Jim Rice join in the Dissent of Justice McKinnon.

/S/ MIKE McGRATH
/S/ JIM RICE