

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CATHERIN MARIE RYMAL,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Leslie Halligan, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
GREGORY HOOD
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
Gregory.Hood@mt.gov
(406) 444-9505

**ATTORNEYS FOR DEFENDANT
AND APPELLANT**

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
P.O. Box 201401
Helena, MT 59620-1401

KIRSTEN PABST
Missoula County Attorney
JAMES McCUBBIN
Deputy County Attorney
200 West Broadway
Missoula, MT 59802

**ATTORNEYS FOR PLAINTIFF
AND APPELLEE**

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE	1
STATEMENT OF THE CASE	1
FACTS OF THE CASE	1
STANDARD OF REVIEW.....	5
SUMMARY OF THE ARGUMENT	5
ARGUMENT	5
I. When Officer Griffith demanded Ms. Rymal’s identification, he had insufficient particularized suspicion of unlawful activity to justify a seizure and no reasonable person would have felt free to stop the encounter and walk away.	5
A. Ms. Rymal was seized when Office Griffith demanded identification.	6
B. Officer Griffith did not have the requisite particularized suspicion to seize Ms. Rymal.	10
CONCLUSION	13
CERTIFICATE OF COMPLIANCE.....	15
APPENDIX.....	16

TABLE OF AUTHORITIES

Cases

<i>Brown v. Texas</i> , 443 U.S. 47 (1979).....	12
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961).....	13
<i>State v. Balinger</i> , 2016 MT 30, 382 Mont. 193, 366 P.3d 668.....	5, 6, 8, 13
<i>State v. Elison</i> , 2000 MT 288, 302 Mont. 228, 14 P.3d 456.....	10
<i>State v. Hoover</i> , 2017 MT 236, 388 Mont. 533, 402 P.3d 1224.....	10
<i>State v. Jarman</i> , 1998 MT 277, 291 Mont. 391, 967 P.2d 1099.....	12
<i>State v. Murray</i> , 2011 MT 10, 359 Mont. 123, 247 P.3d 721.....	9
<i>State v. Strom</i> , 2014 MT 234, 376 Mont. 277, 333 P.3d 218.....	6, 7, 12, 13
<i>State v. Wilson</i> , 2018 MT 268, 393 Mont. 238, 430 P.3d 77.....	10
<i>State v. Zeimer</i> , 2022 MT 96, 408 Mont. 433, 510 P.3d 100.....	13
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....	6
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980).....	7

Montana Code Annotated

§ 46-5-401	6
------------------	---

Constitutional Provisions

Mont. Const. Art. 11, § 10	6
Mont. Const. Art. 11, § 11	6
U.S. Const. amend. IV	6

STATEMENT OF THE ISSUE

Was Catherin Rymal unconstitutionally seized prior to her arrest when the officer commanded her to stop what she was doing, shined a flashlight throughout the interior of the vehicle in which she had ridden, asked her a series of escalating and intrusive questions, and demanded to see identification?

STATEMENT OF THE CASE

Catherin Rymal appeals a denied suppression motion after being seized and arrested in a parking lot for an outstanding warrant. D.C. Doc. 66, attached as Appendix A. After arrest, Ms. Rymal was transported to the hospital and subjected to a forced body cavity search. D.C. Doc. 66 at 3–4. Ms. Rymal was convicted of drug possession with intent to distribute, evidence tampering, and obstructing an officer and sentenced to two concurrent six-year deferred sentences and a concurrent six-month suspended sentence. D.C. Doc. 82, attached as Appendix B.

FACTS OF THE CASE

On the evening of January 1, 2019, Catherin Rymal was at the Montana Lil's casino on South Brooks Street in Missoula with Matthew

McCormack. Mr. McCormack drove them across the street in his car to the Fresh Market grocery store, parked legally, and went inside the store while Ms. Rymal waited in the car.

Missoula police officer John Griffith had been alerted to Mr. McCormack's approach to the grocery store by fellow officer Long, who had observed Mr. McCormack and Ms. Rymal in the parking lot of the casino. D.C. Doc. 66 at 3. Mr. McCormack's car had expired registration. D.C. Doc. 66 at 3. The officers thought Mr. McCormack and Ms. Rymal were suspicious because of the history of drug activity around Montana Lil's casino. D.C. Doc. 66 at 3.

Officer Griffith parked behind Mr. McCormack's car, got out of his patrol car and approached. D.C. Doc. 66 at 3. Ms. Rymal got out of Mr. McCormack's car simultaneously with officer Griffith's approach. D.C. Doc. 66 at 3.

Officer Griffith first, before even arriving at the car, twice commanded Ms. Rymal from a distance to stop "digging around" in the car. 6/26/20 Hrg. at 20; State's Exhibit 1 at 0:00:00 – 0:00:04¹. Upon

¹ State's Exhibit 1 is the officer mounted video taken during the seizure. Pinpoint cites refer to the elapsed time marked on the video from when the video begins in hour:minute:second format.

arriving at the car, which Ms. Rymal had already exited, Officer Griffith shined his flashlight into the interior, searching through the driver's side front and back windows and the rear window. State's Exhibit 1 at 0:00:02 – 0:00:08. Officer Griffith pointed out that the car had expired registration and Ms. Rymal responded that it was not her car. State's Exhibit 1 at 0:00:10 – 0:00:14. He then asked her what she had been doing at the casino to which Ms. Rymal looked puzzled and asked "What do you mean?" before responding quickly and simply, "Gambling." State's Exhibit 1 at 0:00:16 – 00:00:25.

Officer Griffith continued with the inquiry, explaining that the car had been parked at the casino for a while and the casino is known for drug activity. State's Exhibit 1 at 0:00:26 – 0:00:50. Ms. Rymal again explained, in response to Officer Griffith's escalating inquiries, elaborating that she and Mr. McCormack were waiting for a friend who was in an AA meeting and that she gambled a bit while waiting. State's Exhibit 1 at 0:00:32 – 0:00:50. Officer Griffith continued the inquiry by asking her who she was waiting for and Ms. Rymal gestured toward the grocery store. State's Exhibit 1 at 0:01:01. Officer Griffith then requested Ms. Rymal's identification. 6/26/20 Hrg. at 21; State's

Exhibit 1 at 0:01:06. Ms. Rymal's identification had been stolen so she gave him her name and social security number and told him that she most likely had a warrant. 6/26/20 Hrg. at 20-22. Officer Griffith then did a radio warrant check, confirmed the warrant, and arrested Ms. Rymal. D.C. Doc. 66 at 3.

Afterward, Mr. McCormack, after being arrested separately, told police that Ms. Rymal had placed methamphetamine in her vagina. D.C. Doc. 66. Police got a search warrant based on the information from Mr. McCormack, took Ms. Rymal to the hospital and subjected her to a forced body cavity search in which methamphetamine was found. D.C. Doc. 66 at 3-4.

Ms. Rymal filed a motion to suppress on the basis that Officer Griffith seized her despite lacking particularized suspicion to initiate an investigation. D.C. Doc. 27. The district court denied the motion, finding that no seizure occurred until after Ms. Rymal revealed the possible warrant. D.C. Doc. 66. Ms. Rymal timely appeals. D.C. Docs. 83, 84.

STANDARD OF REVIEW

This Court reviews denial of suppression motions “to determine whether the lower court’s findings of fact are clearly erroneous and whether the court correctly interpreted and applied the law to those facts.” *State v. Balinger*, 2016 MT 30, ¶ 12, 382 Mont. 193, 366 P.3d 668.

SUMMARY OF THE ARGUMENT

Ms. Rymal was unconstitutionally seized without the requisite particularized suspicion. The district court incorrectly concluded that no seizure had occurred when the officer commanded her to stop what she was doing, shined a flashlight throughout the interior of the vehicle in which she had ridden, asked her a series of escalating and intrusive questions, and demanded to see identification. This Court should reverse the denial of Ms. Rymal’s suppression motion.

ARGUMENT

- I. When Officer Griffith demanded Ms. Rymal’s identification, he had insufficient particularized suspicion of unlawful activity to justify a seizure and no reasonable person would have felt free to stop the encounter and walk away.**

Montanans have a right to live free from unreasonable seizures under both the Fourth Amendment of the U.S. Constitution and the Montana Constitution, Article II, Sections 10 and 11. *State v. Strom*, 2014 MT 234, ¶ 10, 376 Mont. 277, 333 P.3d 218. The authority to temporarily seize and investigate individuals without first obtaining a warrant is known as “investigatory or Terry stop[s], which allow a brief seizure of the individual that must be supported by a reasonable or particularized suspicion of criminal activity.” *Ballinger*, ¶ 16 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). Police must have particularized suspicion that a person is or has been engaged in unlawful behavior to justify initiating a warrantless investigation that could lead to arrest. Mont. Code Ann. § 46-5-401.

A. Ms. Rymal was seized when Office Griffith demanded identification.

“A person has been seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *Strom*, ¶ 10; *Ballinger*, ¶ 18 (internal quotations excluded). This seizure test applies under both the U.S. and Montana Constitutions. *Ballinger*, ¶ 18.

To determine whether a seizure has occurred using this test, this Court looks at all the factors surrounding the incident and has cited the factors laid out in *United States v. Mendenhall*, 446 U.S. 544 (1980) as a guidepost². *Strom*, ¶ 10. While the *Mendenhall* factors may be useful in some cases, however, they are only examples of circumstances that may indicate a seizure and are not exhaustive. *Strom*, ¶ 10. Ultimately, determining whether a seizure has occurred is “necessarily imprecise and will vary depending on the setting in which the conduct occurs.” *Strom*, ¶ 10.

In *Strom*, this Court held that a demand to produce identification was a seizure where the officer parked behind the suspect’s vehicle but did not activate his emergency lights, brandish a weapon, or otherwise display any of the *Mendenhall* indicia of a seizure. *Strom*, ¶ 13.

In *Ballinger*, this Court reaffirmed that a seizure occurred when an officer demanded to see identification but “made no show of force or authority; he merely used a flashlight to see better in the dark.”

² Example factors are, “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.” *Mendendhall*, 446 U.S. at 554.

Ballinger, ¶ 20. Notably, the State in *Ballinger* conceded that a seizure had occurred upon the identification demand because the suspects “would not have felt free to stop the encounter and walk away.”

Ballinger, ¶ 20.

Just as in *Strom* and *Ballinger*, Ms. Rymal was seized when the officer asked for her identification. No reasonable person would have felt free to disregard Officer Griffith’s commands under the circumstances. Officer Griffith, in uniform with a squad car parked directly behind, had already twice commanded her to stop what she was doing while he shined a flashlight peering into both front and back of the car in which she had been riding. She was alone in a large, dark, largely deserted parking lot with no means of transportation out of there. Officer Griffith told her about his suspicions of drug trafficking connected with Montana Lil’s and repeatedly questioned her about what she had been up to before demanding identification. In view of all the circumstances, simply ending the encounter and walking away was not an objectively reasonable option. Ms. Rymal had no choice but to cooperate with the officer and identify herself and reveal that she might have a warrant.

This specific set of circumstances created pressure to stay and cooperate with Officer Griffith's questioning beyond the mere inherent social pressure borne of obligation, duty, or etiquette that might cause the average reasonable person to remain because they are unsure of the officer's intentions and unsure walking away is a possible option. *See State v. Murray*, 2011 MT 10, ¶ 27, 359 Mont. 123, 247 P.3d 721 (Chief Justice McGrath concurring). Officer Griffith's actions here actually interfered with Ms. Rymal's freedom of movement when the very first thing he uttered to her was to twice command from a distance to stop "digging around" in the car. 6/26/20 Hrg. at 20; State's Exhibit 1 at 0:00:00 – 0:00:04. Officer Griffith's objective conduct here restricted Ms. Rymal's liberty from the very beginning of the interaction. Officer Griffith immediately followed the command to stop with repeated and intrusive questioning and invoked his suspicions of drug activity linked to Montana Lil's. State's Exhibit 1 at 0:00:26 – 0:01:00. Then, when Officer Griffith demanded identification, he expected Ms. Rymal to comply and produce some sort of identification. A reasonable citizen would have surmised, at the very least, that she was not free to re-enter the car, and that she was the subject of a drug investigation and that

she must now either produce a valid identification document or explain why she does not have one with her. Considering Officer Griffith's objective conduct, no reasonable person would have felt free to leave by the time he demanded identification. The district court's determination of law and fact to the contrary was wrong because it was not based on the totality of the circumstances. Ms. Rymal was seized.

B. Officer Griffith did not have the requisite particularized suspicion to seize Ms. Rymal.

Particularized suspicion is objective data from which an experienced officer can make certain inferences and a resulting suspicion that the occupant of a vehicle is or has been engaged in unlawful activity. *State v. Elison*, 2000 MT 288, ¶ 15, 302 Mont. 228, 14 P.3d 456. Particularized suspicion requires more than mere generalized suspicion or an undeveloped hunch of criminal activity. *State v. Hoover*, 2017 MT 236, ¶ 18, 388 Mont. 533, 402 P.3d 1224. To justify an investigative stop for illegal drug activity, the officer must be able to identify particularized factual details that are objectively indicative of illegal drug activity. *State v. Wilson*, 2018 MT 268, ¶¶ 34–35, 393 Mont. 238, 430 P.3d 77.

Notably, the State made no argument that there was particularized suspicion in its briefing before the district court or in its opening statement before testimony in the suppression hearing. Instead, the State argued that there was no seizure because the encounter was consensual. 7/2/19 Hrg. Tr. at 11–12.

Officer Griffith stopped Mr. McCormack's car because it had expired plates and had been at the Montana Lil's casino which the officers associate with drug activity. But Officer Griffith lacked particularized suspicion to seize Ms. Rymal. Ms. Rymal immediately let Officer Griffith know that the car was not hers and there was no other particularized, objective data indicating Ms. Rymal had been engaging in unlawful activity.

Although the car's registration sticker on the license plate had expired, Ms. Rymal was not driving the car and there is nothing in the record to suggest that Officer Griffith determined she owned the car, the car was stolen, or that the actual owner was a female that matched Ms. Rymal's description.

Regarding suspicion of drug activity, neither officer involved reported witnessing any actual drug activity while monitoring Ms.

Rymal and in response to officer questioning, Ms. Rymal simply stated that she was legally gambling in a licensed casino.

Although Officer Griffith may have been suspicious that Ms. Rymal was up to something unlawful based merely on the fact that she had been at Montana Lil's, mere presence in an area known for crime or unlawful drug activity does not establish particularized suspicion to justify an investigative stop. *Strom*, ¶¶ 14–17; *State v. Jarman*, 1998 MT 277, ¶¶ 14–15, 291 Mont. 391, 967 P.2d 1099 (citing *Brown v. Texas*, 443 U.S. 47, 50–53 (1979)).

In testimony, Officer Griffith effectively conceded there was no particularized suspicion of unlawful activity before Ms. Rymal's admission of a possible warrant:

“A. Yes. She said that she -- something to the effect of she most likely had a warrant.

Q. Okay. So up to this point, had you done anything to prevent her from walking away from you?

A. No.

Q. If she had attempted to walk away from you, what would you have done?

A. I would've let her walk away.” 6/26/20 Hrg. Tr. at 22.

The fact that Officer Griffith testified he would have let her leave clearly indicates that he did not believe particularized suspicion existed

up to the point that Ms. Rymal divulged the possible warrant³. He was right. Further, the district court noted in its order denying suppression that the State “does not argue that the officer had particularized suspicion, but instead argues that an investigatory stop never occurred here – essentially there was no seizure until she was arrested.” D.C. Doc. 66 at 4. Because Griffith did not have objective data from which an experienced officer would reasonably suspect that Ms. Rymal was or had been engaged in unlawful activity before he seized her, her detention was illegal and the district court should have granted her motion to suppress.

CONCLUSION

Evidence discovered from an unlawful seizure is inadmissible in subsequent proceedings so the evidence discovered as a result of the unlawful seizure of Ms. Rymal must be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *State v. Zeimer*, 2022 MT 96, ¶ 54, 408 Mont. 433, 510 P.3d 100. Ms. Rymal respectfully requests that this Court reverse

³ That same testimony does not affect the analysis of whether there was a seizure, however, because Officer Griffith’s subjective experience and memory of the event is not determinative of whether “a reasonable person would have believed that he was not free to leave.” *Strom*, ¶ 10; *Ballinger*, ¶ 18.

the denial of the suppression motion and remand with an order to suppress all evidence discovered as a result of the illegal seizure.

Respectfully submitted this 28th day of April, 2023.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Gregory Hood
GREGORY HOOD
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,614, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Gregory Hood
GREGORY HOOD

APPENDIX

Order Denying Motion to SuppressApp. A

Judgment.....App. B

CERTIFICATE OF SERVICE

I, Gregory Nelson Hood, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-28-2023:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Kirsten H. Pabst (Govt Attorney)
200 W. Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Electronically signed by Pamela S. Rossi on behalf of Gregory Nelson Hood
Dated: 04-28-2023