

*STATE V. HILGENDORF*<sup>1</sup>

To justify an investigative stop of an automobile, the State must show that under the totality of the circumstances at the time of the stop, sufficient objective data was available to create particularized suspicion that an “occupant of the vehicle has committed, is committing, or is about to commit an offense.”<sup>2</sup> However, the Montana Supreme Court recently held that observing occupants who were “busy moving around inside [a] vehicle” that was parked in a high crime area was sufficient to establish particularized suspicion.<sup>3</sup> The Court also held that the contents of a closed container found on the driver’s person during a warrantless search incident to arrest were admissible under the inevitable discovery doctrine.<sup>4</sup> This decision raises serious questions about the future of Montana’s exigent circumstances requirement for warrantless searches incident to arrest and also illustrates the Court’s relaxation of the particularized suspicion requirement.

On March 16, 2007, at approximately 2:00 a.m., Deputy Chris Romero observed a vehicle parked next to a business with its engine running and lights on.<sup>5</sup> The vehicle was parked in an area that had been experiencing an increase in theft and burglary.<sup>6</sup> When Romero’s headlights illuminated the rear of the vehicle a second time, the driver “immediately pulled out and quickly drove away.”<sup>7</sup> As he followed the vehicle, Romero observed the occupants moving around “as if they were trying to conceal something[,]” which prompted him to initiate a stop.<sup>8</sup>

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<sup>1</sup> *State v. Hilgendorf*, 208 P.3d 401 (Mont. 2009).

<sup>2</sup> Mont. Code Ann. § 46-5-401(1) (2009).

<sup>3</sup> *Hilgendorf*, 208 P.3d at 405.

<sup>4</sup> *Id.* at 406.

<sup>5</sup> *Id.* at 402-403.

<sup>6</sup> *Id.* at 403.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

The vehicle was occupied by Mark Hilgendorf and a passenger.<sup>9</sup> After obtaining identification from the two, Romero returned to his patrol car to check for outstanding warrants.<sup>10</sup> He was interrupted, however, when the passenger began “opening and closing the door on his side as if attempting to discard something [and causing] Romero concern for his safety.”<sup>11</sup> Romero returned to the vehicle and asked the passenger to exit.<sup>12</sup> A pat-down search of the passenger yielded a small orange container, which the passenger “promptly admitted contained drugs.”<sup>13</sup> After arresting the passenger for possession of drug paraphernalia, Romero searched Hilgendorf and discovered “an orange container identical to the one found on the passenger.”<sup>14</sup> Romero then opened the container, revealing a crystal powder, a razor blade, and marijuana.<sup>15</sup>

On March 20, 2007, the State charged Hilgendorf with two counts of criminal possession of dangerous drugs and criminal possession of drug paraphernalia.<sup>16</sup> On May 22, Hilgendorf moved the district court to suppress the drugs and drug paraphernalia, as well as any statements made by him or his passenger.<sup>17</sup> Hilgendorf contended that Romero lacked particularized suspicion to conduct the investigatory stop and had unlawfully examined the contents of the orange container without a warrant.<sup>18</sup>

On July 27, the district court denied Hilgendorf’s motion to suppress.<sup>19</sup> The court held that Romero had particularized suspicion to legally effectuate the stop and that the contents of

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<sup>9</sup> *Hilgendorf*, 208 P.3d at 403.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Hilgendorf*, 208 P.3d at 403.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

Hilgendorf's orange container would inevitably be discovered during an inventory search subsequent to his arrest.<sup>20</sup> On August 28, Hilgendorf pled guilty to all charges against him but reserved his right to appeal the court's denial of his motion.<sup>21</sup> Pursuant to his plea agreement, Hilgendorf appealed the denial of his motion to suppress.<sup>22</sup>

On appeal, Hilgendorf relied on the Court's holdings in *State v. Reynolds* and *State v. Jarman*, arguing that Romero lacked particularized suspicion under the totality of the circumstances test.<sup>23</sup> In *Reynolds*, the Court held there was no particularized suspicion when an officer observed a driver "bordering on travelling a little too fast," and who may have been unnerved by the presence of the police officer.<sup>24</sup> Hilgendorf cited *Jarman*<sup>25</sup> for the proposition "that [b]eing in a high crime area by itself could not establish particularized suspicion."<sup>26</sup>

The Court disagreed. It distinguished Hilgendorf's facts from *Reynolds* and *Jarman* by citing Romero's observation of the occupants moving around, "as if trying to conceal something in the vehicle."<sup>27</sup> Romero testified that Hilgendorf and his passenger were taking actions "a normal person wouldn't," which led him to believe "there could be something going on, like somebody committing a theft."<sup>28</sup> Although Romero's suspicions lacked specificity, the Court concluded that the occupants' odd behavior, combined with Romero's initial observations, were sufficient objective data from which he "could make inferences about the possibility of a crime and come to a resulting suspicion that a theft could be in progress."<sup>29</sup>

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<sup>20</sup> *Id.* at 405.

<sup>21</sup> *Hilgendorf*, 208 P.3d at 403.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 404–405 (citing *State v. Reynolds*, 899 P.2d 540 (Mont. 1995); *State v. Jarman*, 967 P.2d 1099 (Mont. 1998)).

<sup>24</sup> *Reynolds*, 899 P.2d at 543.

<sup>25</sup> *Jarman*, 967 P.2d at 1101.

<sup>26</sup> *Hilgendorf*, 208 P.3d at 404 (citing *Jarman*, 967 P.2d at 1101).

<sup>27</sup> *Id.* at 405.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

Under the Montana and United States Constitutions, a warrantless search is per se illegal unless accompanied by an exception such as exigent circumstances.<sup>30</sup> If the State is unable to articulate an exception, the evidence must be suppressed.<sup>31</sup> Hilgendorf argued that no such exception existed and that the arresting officers should have obtained a warrant before searching him.<sup>32</sup> As a result, Hilgendorf argued the search was illegal and the contents of the container should have been suppressed.<sup>33</sup>

The Court, however, agreed with the State's contention that the inevitable discovery doctrine applied.<sup>34</sup> The Court did not dispute that Hilgendorf would have been subjected to the standard inventory search during booking.<sup>35</sup> And because an inventory search would have revealed the contents of the container, it concluded that the inevitable discovery doctrine applied.<sup>36</sup>

In his dissent, Justice Leaphart disagreed with the majority's findings on the issue of particularized suspicion, arguing that the "totality of the circumstances confronting Officer Romero at the time of the stop did not create an objective basis for suspecting criminal activity."<sup>37</sup> Leaphart agreed with Hilgendorf's interpretations of *Reynolds* and *Jarman* and found the facts in this case "even less 'particularized' [than those in *Reynolds*,"] since Officer Romero was not responding to any specific crime report."<sup>38</sup> Leaphart concluded by emphasizing

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<sup>30</sup> *Id.* (citing *State v. Hamilton*, 67 P.3d 871, 874 (Mont. 2003)).

<sup>31</sup> *Id.* (citing *Wong Sun v. U.S.*, 371 U.S. 471, 484–485 (1963)).

<sup>32</sup> *Hilgendorf*, 208 P.3d at 405 (citing *Wong Sun*, 371 U.S. at 484–485).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 406.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 407 (citing *State v. Van Kirk*, 32 P.3d 735 (Mont. 2001)).

<sup>38</sup> *Hilgendorf*, 208 P.3d at 407.

that a “general suspicion of criminal activity” is insufficient to satisfy the particularized suspicion requirement.<sup>39</sup> Justice Nelson joined the dissent.

Prior to *Hilgendorf*, the scope of warrantless searches incident to arrest was limited to the extent necessary to ensure the officer’s safety and prevent the arrestee’s escape, unless exigent circumstances justified a more intrusive search. This limitation reflected the Court’s preference for evidence obtained through the execution of a valid search warrant. The Court’s decision in *Hilgendorf*, however, ostensibly renders ineffectual any restrictions on the scope of searches incident to arrest by establishing another avenue for the introduction of evidence. It is unclear whether the Court’s decision in *Hilgendorf* effectively abolishes the exigent circumstances requirement or whether it simply broadens the scope of the inevitable discovery doctrine in Montana.

Additionally, the liberal interpretation of particularized suspicion utilized in *Hilgendorf* indicates the Court’s willingness to relax the once rigid constraints imposed on law enforcement by the Fourth Amendment. In expanding particularized suspicion to include more generalized suspicions, the Court effectively retreats from its role as objective arbiter reconciling the interests of law enforcement with the rights of the accused.

— *Bryan Spoon*

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<sup>39</sup> *Id.*