Summary of Evidence Regarding Pre-Textual Stops by NH State Police[i]

Case/ Evidence	Year	Reason for stop of vehicle	Outcome
US v. Garcia	2014	Trooper followed a vehicle on a "hunch,"… until the vehicle's tires partially transgressed the dotted lane line and then corrected by touching the white fog line, whereupon the trooper stopped the vehicle.	Evidence suppressed.
State v. Brian Perez	2018	• Passenger seat reclined • Hands at "10" and "2" position on steering wheel • Neither the driver nor the passenger looked in his direction as they were driving • Trooper expanded duration of stop based on suspicion of drug activity.	"troopers…are specifically tasked…**to make pretextual detentions…**for very minor…driving infractions" Judge Schulman Evidence suppressed.
State v. John Hernandez	2018	• Trooper followed car and ran license plate and learned it was a rental • Car was following too close • Driver's hands were at "10" and "2" position on steering wheel • Trooper cited to nervousness for expanding scope of stop and court found, "lacking in credibility was the Trooper's reliance upon the anxiety of Hernandez (a non-Caucasian male whom he had just pulled over) as support for his belief that Hernandez was engaged in criminal activity."	Evidence suppressed.
State v. Miguel Perez	2018	• Following too close behind truck • Wheels touched line as vehicle used turn signals to pass truck • Trooper expanded duration of stop based on suspicion of drug activity.	Evidence not suppressed as officer claimed to smell marijuana after stopping vehicle though no marijuana was found.
State v. Allen	2018	• Going 68 in 55 mph zone • Took 3/10 of mile to pull over on 95 North • Trooper expanded duration of stop based on suspicion of drug activity.	Evidence suppressed because of expansion of scope of stop.

State v. Perkins	2018	A single pine shaped air freshener hung from the rearview mirror.	Unknown†
State v. Lamoureaux	2018	Car driving through a section of a rest area designated by sign for trucks	Unknown†
State v. Cotton	2018	Tires veered over the white dotted lane line twice over several miles.	Unknown†
State v. Longval	2018	Un-signaled lane change	Unknown†
State v. Ernest Jones	2017	Concord Police detained Mr. Jones, who is Black, after call of suspicious vehicle.	Evidence suppressed.
Tr. Ferry	2019	"Usually how the stop begins is with a motor vehicle infraction…whether it's speed…following too close." https://www.youtube.com/watch?v=ZygBsYtaws8	N/A

[i] At the June 26, 2020 hearing, Colonel Noyes testified that:
MR. LASCAZE: Oh, wow. Okay. So, I'm wondering. Are State Police trained to use motor vehicle stops as pretextual reasons for investigating nonmotor vehicle-related issues?
COLONEL NOYES: No.
MR. LASCAZE: Okay. So, are they specifically trained not to conduct such pretextual stops based on race?
COLONEL NOYES: Yes, and that is in our Fair and Impartial Policing Policy.
† These cases are referenced in the decision in State v. Brian Perez, which is attached.

53 F.Supp.3d 502
United States District Court, D. New Hampshire.

UNITED STATES of America, Government
v.
Miguel GARCIA, a/k/a "Migs," Robert Barter, a/k/a "Bobby," and Janelle Evans, a/k/a "Nelle," Defendants.

Case No. 14–cr–19–01/03–SM.
|
Signed Oct. 9, 2014.
|
Filed Oct. 10, 2014.

Synopsis

Background: Defendants charged with conspiracy to distribute and possession with intent to distribution heroin moved to suppress evidence obtained during search of vehicle after traffic stop.

Holdings: The District Court, Steven J. McAuliffe, J., held that:

[1] initial traffic stop was justified;

[2] police officer measurably extended the stop; and

[3] officer did not have reasonable suspicion necessary to extend the stop.

Motion granted.

West Headnotes (10)

[1] **Criminal Law** Persons entitled to object

The fact that a defendant is a passenger in a vehicle as opposed to the driver is a distinction of no consequence in context of a motion to suppress evidence, obtained from a search of the vehicle, on grounds that the evidence is the fruit of an illegal detention. U.S.C.A. Const.Amend. 4.

[2] **Automobiles** Grounds

Automobiles What is arrest or seizure; stop distinguished

Automobiles Detention, and length and character thereof

A traffic stop and detention of an automobile's occupants is a seizure under the Fourth Amendment; all such seizures must be reasonable, and police officers conducting an investigatory stop must have reasonable suspicion that criminal activity is afoot. U.S.C.A. Const.Amend. 4.

[3] **Arrest** Grounds for Stop or Investigation

Arrest Duration of detention and extent or conduct of investigation or frisk

Review of a *Terry* stop involves a two-step analysis: the court must first ascertain whether the stop was justified at its inception, and second determine whether the actions undertaken during the stop were reasonably related in scope to the stop itself unless the police had a basis for expanding their investigation. U.S.C.A. Const.Amend. 4.

[4] **Automobiles** Inquiry; license, registration, or warrant checks

An officer's inquiries into matters unrelated to the justification for a traffic stop do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop. U.S.C.A. Const.Amend. 4.

[5] **Automobiles** Grounds

Even a minor traffic violation will justify an officer in conducting a traffic stop. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[6] **Automobiles** Grounds

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Police officer's stop of vehicle on highway for crossing lane boundaries was justified at its inception, even if officer's actions in driving in vehicle's blind spot for several miles distracted the driver. U.S.C.A. Const.Amend. 4; N.H.RSA 265:24.

[7] **Automobiles** ⇐ Detention, and length and character thereof

Police officer measurably extended traffic stop by detaining vehicle for approximately 17 minutes after he issued a warning for traffic violations that served as basis for the stop, and thus was required to have reasonable suspicion of criminal activity for the extension to be constitutionally reasonable. U.S.C.A. Const.Amend. 4.

[8] **Automobiles** ⇐ Detention, and length and character thereof

A seizure justified solely by the state's interest in issuing a traffic warning ticket to a driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. U.S.C.A. Const.Amend. 4.

[9] **Automobiles** ⇐ Detention, and length and character thereof

Police officers did not have reasonable suspicion necessary to extend highway traffic stop to investigate occupants' suspected drug activity after issuing warning for traffic violations that served as basis for the stop; although two of the occupants were connected to drug activity through prior police investigations, occupants' nervousness and irritation were normal given that the officer had tailed them for several miles before pulling them over, and while one occupant's comment that they were testing the vehicle's drive shaft was odd, it was not so abnormal as to permit an inference that criminal activity was afoot. U.S.C.A. Const.Amend. 4.

[10] **Automobiles** ⇐ Detention, and length and character thereof

Nervousness is a relevant factor to be considered along with others in assessing the totality of the circumstances when determining if police officers had the reasonable suspicion necessary to extend a traffic stop. U.S.C.A. Const.Amend. 4.

Attorneys and Law Firms

***504** Terry L. Ollila, U.S. Attorney's Office, Concord, NH, for Plaintiff.

Jonathan R. Saxe, Federal Defender's Office, Concord, NH, Michael J. Iacopino, Brennan Caron Lenehan & Iacopino, Manchester, NH, for Defendants.

ORDER

STEVEN J. McAULIFFE, District Judge.

Defendants, Miguel Garcia, Robert Barter, and Janelle Evans move to suppress evidence they say was obtained during an unconstitutional search and seizure of their persons and an automobile belonging to Barter. Having considered the evidence presented at a suppression hearing, the briefs filed by the parties, and the argument of counsel, the defendants' motions to suppress evidence (document nos. 26, 27, & 28) are granted.

Findings of Fact

On August 13, 2013, New Hampshire State Police K–9 Trooper Brian Gacek ("Trooper Gacek") stopped Janelle Evans, Miguel Garcia, and Robert Barter, residents of Maine, at approximately 4:34 a.m. on Interstate 95 North near Greenland, New Hampshire. Trooper Gacek testified that he witnessed the vehicle commit two traffic lane violations.

Trooper Gacek had been sitting in a marked cruiser in a parking area to the immediate right of the Hampton toll plaza, which is fairly well lit. He testified that he was "bored" and "needed something to do" given the few cars on the road in

the early morning hours. He noticed a car registered in Maine, with what appeared to be a driver and a male passenger in the front seat, go through the toll booth. The toll booth was some 50 to 75 yards from his position. After the car paid the toll, it passed uneventfully within 10–15 feet directly in front of Trooper Gacek's cruiser. Trooper Gacek, on a hunch, [1] pulled out of the parking lot and began following the car in the adjacent travel lane. He continually maintained a position in or near the car's blind spot, to the left and rear—something he testified that he does often while on patrol.

Trooper Gacek followed the car in that position for approximately 3 miles without observing anything unusual. Then, he says, the driver, Evans, drifted the vehicle slightly across the dashed white line into Trooper Gacek's travel lane, then back as the road curved. As the road straightened out again, the car's right tires drifted over the solid white fog line on the right shoulder of the road. Based on those minor traffic infractions, which Trooper Gacek said might suggest that the driver was tired or impaired, he activated his blue lights and pulled the car over. He turned on his spotlight to illuminate the area so he could better see what was in the car. ***505** When the spotlight was turned on, a second passenger sat up in the back seat.

Trooper Gacek approached the car on the passenger side. The passenger window was open. If he had not noticed before, when the car had passed within 10–15 feet of him, Trooper Gacek could then see that the driver was a Caucasian female and the passengers were Hispanic males, at least one of whom, the front seat passenger, displayed a number of tattoos.

Trooper Gacek asked the driver for her license and registration, explaining that he had pulled her over for traffic lane violations. He saw no furtive movements, saw no weapons, smelled no alcohol or marijuana, saw no drugs, and saw nothing else that would lead him to suspect that any criminal activity might be ongoing.

Evans told Gacek that she was tired. She produced her driver's license from her purse promptly and without any difficulty. Gacek observed that Evans seemed nervous and said that her outstretched arm was shaking as she reached across the passenger to hand him her license through the open window. Evans said she did not know where the registration was. The front seat passenger, Garcia, then reached into the glove compartment and handed it to Trooper Gacek, without looking at him. Garcia had not looked at Trooper Gacek since he approached the vehicle—something Trooper Gacek found odd. Trooper Gacek testified that he also thought Garcia was nervous, because, he said, Garcia's hand was shaking to the extent that the paper registration audibly fluttered. Noticing that the car was registered to a Robert Barter, not Evans, Trooper Gacek asked Garcia for his identification. Garcia handed him a Maine driver's license, his hand still shaking according to Trooper Gacek. The backseat passenger identified himself as Robert Barter, and he also produced a Maine driver's license.

Trooper Gacek asked the occupants where they had been and where they were headed. Evans told him that they had been in Dorchester, Massachusetts, visiting Garcia's aunt who was dying of cancer and that they were headed back to Bangor, Maine, to get Garcia to work by 9:00 a.m. According to Trooper Gacek, Dorchester is a "known drug area." Barter corroborated Evans' response and added that he planned to go home to Baileyville, some 2–3 hours north of Bangor, after dropping Garcia at work. He also added that the trip to Dorchester was something of a test drive after he had replaced the car's drive shaft.

Trooper Gacek took the defendants' identification and returned to his cruiser. Gacek is a trained K–9 officer, and he had his canine partner in the cruiser. The car was pulled over at 4:34 a.m. Although Trooper Gacek testified he had already decided to issue Evans a warning for the traffic violations (by 4:47 a.m.), when he returned to the cruiser he radioed Trooper Matthew Locke for back-up assistance, based, he said, on the defendants' nervous behavior and Barter's odd (at least in Trooper Gacek's mind) statement that the trip was also a test drive. He simultaneously ran records checks on Evans, Garcia, and Barter. Trooper Gacek's initial records check disclosed that the vehicle was properly registered to Barter, that Evans held a valid driver's license, and that there were no outstanding warrants for Evans, Garcia, or Barter.

Although the initial records check revealed nothing suspicious, Trooper Gacek ran additional criminal history and police intelligence checks on the defendants by phone. He learned that Garcia had been identified in several police investigations involving drugs and firearms, and may have been affiliated with the Hell's Angels gang, and that Barter's name had been ***506** mentioned in connection with several police drug investigations. Evans had no prior criminal history, and her name apparently did not appear in any police intelligence reports.

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At that point, now 4:53 a.m., Trooper Locke arrived. Trooper Gacek gave Trooper Locke a brief explanation of what had transpired. He did not ask Trooper Locke to determine if Evans, or anyone else, was impaired by drugs or alcohol, though Trooper Locke was a certified drug recognition expert and that was ostensibly the primary reason Gacek summoned him. Before Trooper Gacek returned to Barter's car, he electronically issued Evans a warning, resolving the observed traffic lane violations for which he stopped the car. Approximately 19 minutes had passed since Trooper Gacek pulled the car over.

After issuing the warning, Trooper Gacek returned to the car and told Evans to get out. She complied. Trooper Gacek testified that he noticed no signs of possible impairment, and Trooper Locke, standing a few feet away where he could hear them talking, did not indicate to Trooper Gacek that he thought Evans was impaired in any way. Trooper Gacek told Evans he had given her a warning for the traffic violations, but he did not release her and the others to go about their business at that point. Instead, he again asked her where she had come from and where she was going. Evans reiterated her earlier explanation except she added that Barter was going to work in Bangor as well as Garcia. She told Trooper Gacek that Garcia was her boyfriend, that she had known Barter for only a couple of weeks, but that Garcia and Barter had known one another for years. At some point, Trooper Gacek asked Evans if there were drugs in the car. She denied that there were.

Trooper Gacek then ordered Garcia out of the car. Trooper Gacek patted Garcia down for weapons but found nothing. Trooper Gacek testified that "[e]verybody who gets out of a vehicle with my shift at night, we typically pat down." The pat-down apparently irritated Garcia, who seemingly was already upset by Gacek's attention since he was not the operator of the car, and the stop supposedly related to traffic infractions. Trooper Gacek testified that while he tried to talk with Garcia, Garcia shifted his weight from one foot to the other and turned his body on an angle in what Gacek characterized as "blading" or a "fight-or-flight stance." Trooper Gacek also testified that Garcia yelled that the police had no reason to talk with him because he was not driving and had not committed any lane violations. Under questioning, Garcia confirmed that they had been in Dorchester visiting his sick aunt and denied there were illegal drugs in the car.

Trooper Gacek then directed Barter to get out of the car. Trooper Gacek patted him down as well, finding nothing. Trooper Gacek again questioned Barter about where they had come from and where they were going. Barter confirmed Evans' earlier explanation that they had been in Dorchester visiting Garcia's sick aunt and were headed to Bangor. He also reiterated that he'd recently changed the drive shaft in his car. He then said that he was going to work construction with Garcia in Bangor, a slight (by Gacek's own account), but not irreconcilable, difference from his original statement that he was going home after dropping Evans and Garcia in Bangor. When Trooper Gacek asked if he always worked with Garcia, Barter responded, "Sometimes." When Trooper Gacek pressed the point—that Bangor was a 2–3 hour drive from Barter's home, Barter did not respond. He denied having drugs in the car when Trooper Gacek asked. Barter, too, shifted his weight ***507** from side to side, stood at an angle, and talked with his hands, but otherwise had a civil conversation with Trooper Gacek, and did not appear nervous.

Trooper Gacek testified that it was approximately 5:05 a.m. when he finished questioning Barter, at which time he asked Barter for consent to a search his vehicle. Barter refused consent to search, claiming that nothing illegal was in the vehicle. Trooper Gacek then advised Barter that while he was free to refuse consent, if he refused, then Trooper Gacek would run his canine partner around the car. Trooper Gacek added that if the dog alerted to the presence of narcotics, Gacek would then seize the vehicle, obtain a search warrant, and in the meantime would transport Evans, Garcia, and Barter off the highway to find their own way home. Barter again refused consent to search. Barter became more animated and loud, telling Trooper Gacek that a search was ridiculous because there was nothing in the vehicle. Trooper Gacek returned to the car, shut it off, and rolled up the windows.

Shortly thereafter Trooper Gacek retrieved his canine and walked the dog around the car twice. Gacek says the dog alerted to the front passenger wheel by scratching and reaching its head into the wheel well. The dog then moved on and became excited along both the driver and passenger side of the vehicle. The time was approximately 5:10 a.m.—some 17 minutes after he issued Evans the warning.

Trooper Gacek returned his dog to the cruiser and reapproached Garcia, Barter, and Evans. Trooper Gacek again asked Barter to consent to a search. Barter declined and contested whether the canine had positively alerted, because the drug dogs with which he was familiar sat when they smelled drugs instead of barking or scratching as Gacek's dog had done. Trooper Gacek explained to Barter that his dog was

an "active alert" canine and therefore behaved aggressively, rather than sat, when he detected the presence of narcotics. Because the dog alerted, giving rise to probable cause to believe that illegal drugs were in the car, Trooper Gacek informed all three defendants that he had no choice but to seize the car and obtain a search warrant. Trooper Gacek explained that Trooper Locke would give all three a ride off the highway so that they could arrange for a ride home. In response, Barter reluctantly consented to a search.

Trooper Locke reviewed a consent to search form with Barter. During that review Trooper Locke again advised Barter that he had the right to refuse a search of his vehicle. Barter completed and signed the form at 5:15 a.m. Forty-one minutes had elapsed since Trooper Gacek stopped the vehicle, and at least 22 minutes had elapsed since he issued the electronic warning to Evans for the traffic violations.

With Barter's written consent in hand, Trooper Gacek began to search the vehicle. In a purse belonging to Evans, Trooper Gacek found a heroin kit containing needles, Q-tips, and a strap (utilized to inhibit circulation). Under the back seat, Trooper Gacek found a black plastic bag that contained several hundred individual baggies of what was believed to be heroin. Because Trooper Gacek and Trooper Locke recovered controlled substances, Garcia, Barter, and Evans were arrested and transported separately to the Rockingham County Jail. The total time from the beginning of the traffic stop to the K–9 dog's alert was approximately 41 minutes.

The defendants were each charged with one count of conspiracy to distribute and possession with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and 846.

***508** The defendants moved to suppress the evidence as the product of an unconstitutional seizure and search. The court held a hearing on the defendants' motions on June 23, 2014.

Discussion

[1] Defendants challenge the legality of the initial traffic stop, their detention, and the search. They seek to suppress all inculpatory evidence derived from that search.[2]

[2] A traffic stop and detention of an automobile's occupants is a seizure under the Fourth Amendment. *United States v. Jones,* 700 F.3d 615, 621–22 (1st Cir.2012) (citing *Whren v. United States,* 517 U.S. 806, 809–10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)). All such seizures must be "reasonable," U.S. Const. Amend. IV, and police officers conducting an investigatory stop must have "reasonable suspicion" that criminal activity is afoot. *Jones,* 700 F.3d at 621. An officer " 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts,' justify an intrusion on a private person." *Id.* (quoting *Terry v. Ohio,* 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Officers' "hunches," unsupported by articulable facts, cannot substitute for reasonable suspicion. *Id.* (quoting *Terry,* 392 U.S. at 22, 88 S.Ct. 1868).

When deciding whether an officer had reasonable suspicion warranting a brief investigatory detention, a court looks to the facts "available to the officer at the moment of the seizure or the search." *Id.* A court then must assess the "totality of the circumstances" to see whether the officer had a particularized, objective basis for his or her suspicion. *Jones,* 700 F.3d at 621 (quoting *United States v. Arvizu,* 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); *see also United States v. Monteiro,* 447 F.3d 39, 43 (1st Cir.2006)); *United States v. McKoy,* 428 F.3d 38, 39 (1st Cir.2005).

In *United States v. Chhien,* the First Circuit described the nature of "reasonable suspicion":

> Reasonable suspicion, as the term implies, requires more than a naked hunch that a particular person may be engaged in some illicit activity. By the same token, however, reasonable suspicion does not require either probable cause or evidence of a direct connection linking the suspect to the suspected crime. Reasonable suspicion, then, is an intermediate standard—and one that defies precise definition. Its existence must be determined case by case, and that determination entails broad-based consideration of all the attendant circumstances. In mulling those circumstances, an inquiring court must balance "the nature ***509** and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." To keep this balance true, the court must make a practical, commonsense judgment based on the idiosyncracies of the case at hand.

266 F.3d 1, 6 (1st Cir.2001) (citations omitted).

Courts usually, if not always, confront Fourth Amendment questions such as those raised in this case only after law enforcement has seized inculpatory evidence and a person has been criminally charged. This is so because "freedom

from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke advance protection." *Brinegar v. United States,* 338 U.S. 160, 182, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) (Jackson, J. dissenting). Rather, "[c]ourts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." *Elkins v. United States,* 364 U.S. 206, 218, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960) (quoting *Brinegar,* 338 U.S. at 181, 69 S.Ct. 1302). "As Justice Scalia has written for the Court, 'there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.' " *United States v. Khounsavanh,* 113 F.3d 279, 285 (1st Cir.1997) (quoting *Arizona v. Hicks,* 480 U.S. 321, 329, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987)).

Our court of appeals has recognized that "[w]hat emerges from these resounding declarations is the rule that even where there are present the very great interests of society first, in adjudging the conduct of a defendant charged with the most reprehensible crimes, and, second, in disabling him, if guilty, from continuing as a menace to the peaceful existence of the rest of us, nonetheless unconstitutionally seized evidence may not be used to convict him. The safety of our society depends more upon the preservation of fundamental liberties than upon the punishment of a person whose offense we can prove only through subverting those liberties." *Berkowitz v. United States,* 340 F.2d 168, 170–171 (1st Cir.1965).

[3] Turning to the seizure at issue here, "review of a *Terry* stop involves a two-step analysis." *United States v. Mouscardy,* 722 F.3d 68, 73 (1st Cir.2013). The court must first "ascertain whether the stop was justified at its inception" and second "determine whether the actions undertaken during the stop [were] reasonably related in scope to the stop itself unless the police [had] a basis for expanding their investigation." *Id.* (internal citations and quotations omitted) (alterations in original).

[4] In the context of a traffic stop, the Supreme Court has held that the " '[t]emporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop,' ending 'when the police have no further need to control the scene.' " *United States v. Fernandez,* 600 F.3d 56, 60 (1st Cir.2010) (quoting *Arizona v. Johnson,* 555 U.S. 323, 129 S.Ct. 781, 788, 172 L.Ed.2d 694 (2009)). Further, an "officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Id.* (citations omitted).

[5] **[6]** Even a minor traffic violation, like the lane violations here, will justify an officer in conducting a traffic stop. *Topp v. Wolkowski,* 994 F.2d 45, 48 (1st Cir.1993); ***510** *United States v. Levesque,* No. 94–cr–120, 1995 U.S. Dist. LEXIS 10349, at *12 (D.N.H. July 11, 1995). In this case, the uncontradicted evidence establishes that Evans crossed over the dashed line to the left of her travel lane and then over the solid white fog line to the right. Trooper Gacek's following of Evans for some three miles in a marked cruiser while maintaining a continuous position in her blind spot is, of course, a kind of police behavior very likely to make even the most innocent driver nervous and fretful, and that tactic may well have induced a measure of distraction leading to the lane violations in this case. And Trooper Gacek's view that the lane violations might have suggested impairment or fatigue is of course substantially weakened by the more plausible explanation that his own driving tactics actually caused the driver's slight erratic operation. (One might suppose that if a private citizen followed a cruiser in that manner—if the roles were reversed—the officer would be understandably irritated and his or her operation might well be affected as well.)

Trooper Gacek, for the purpose of resolving defendants' motions, acted within the law (no party has raised an issue with respect to whether Trooper Gacek's tailing defendants with his cruiser violated any New Hampshire traffic laws). Gacek was, then, justified in concluding that, even if induced by his own driving tactics, still, Evans had committed a traffic violation, and a traffic stop was legally permissible. *See* N.H.Rev.Stat. Ann. 265:24. Consequently, the first prong of the two part test is satisfied—the initial detention of the car and its occupants was justified at its inception. [3]

[7] The government does not argue, of course, that the delay attributable to police activities after Trooper Gacek issued Evans the traffic warning was time reasonably related to the traffic stop. So, the next issue becomes whether the additional detention of approximately 17 minutes between Trooper Gacek's issuing the warning and his running the drug dog around the detained vehicle "measurably extend[ed] the duration of the stop," or, alternatively, was justified by reasonable suspicion that criminal activity was afoot.

[8] A seizure justified solely by the state's interest in issuing a traffic warning ticket to a driver "can become unlawful

if it is prolonged beyond the time reasonably required to complete that mission." *Illinois v. Caballes,* 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). In *United States v. Henderson,* for example, the court of appeals for this circuit held that extending a traffic stop for 20 minutes to run a criminal history check on a passenger in a stopped car, without any particularized reason to prolong the stop, measurably (and impermissibly) extended the duration of the stop. *United States v. Henderson,* 463 F.3d 27, 46–47 (1st Cir.2006). The court there held that the extended investigation violated the Fourth Amendment because there was "no particularized reason" to suspect that criminal ***511** activity besides the traffic violation was afoot justifying the officer to "launch into an investigation" of the passenger. *Id.; see also United States v. Boyce,* 351 F.3d 1102, 1105, 1107–11 (11th Cir.2003) (holding that a 12 minute delay to investigate a car for narcotics without reasonable suspicion for doing so was not reasonable).

[9] Precedent invoked by the government, in which traffic stops prolonged between 40 and 90 minutes were held reasonable, do not suggest otherwise. In each of those cases the critical issue was whether the additional delay was supported by reasonable suspicion, and, on the facts of each case, the courts held that it was. Here, as in *Henderson,* I find that the approximately 17 minutes Trooper Gacek prolonged the traffic stop did measurably extend the duration of the traffic stop beyond what was necessary to resolve the minor lane violations at issue. The extended stop was constitutionally reasonable, then, only if it was based upon reasonable and articulable suspicion that criminal activity was afoot.

At the suppression hearing, Trooper Gacek candidly conceded that Evans, the driver, had no trouble pulling over, and that neither her operation of the vehicle nor her interaction with him disclosed any indicia of impairment. Evans was validly licensed; no smell of alcohol or marijuana emanated from the car or its passengers; no statements made by the occupants or observations by Gacek suggested that there might be illegal drugs in that car at that time; no one in the car made any furtive or suspicious movements; no weapons were observed; the owner of the car was present; and there were no outstanding warrants for anyone in the car. Trooper Gacek testified that after he issued the traffic warning, his reasonable suspicion to detain the defendants to further question them and run his drug dog[4] was based on: (1) Evans' and Garcia's unusually nervous behavior; (2) Barter's statement that he had replaced his drive shaft and part of the purpose of the trip was to take his car for a test drive; and (3) Garcia's and Barter's apparent prior drug involvement. Those factors, taken together without more, do not constitute "specific and articulable facts" giving rise to a particularized, objective basis for Trooper Gacek's suspicion that the vehicle contained illegal drugs at that time, or that the occupants were involved in illegal drug activity.

The court of appeals has confirmed that nervousness during a traffic stop, even in a high-crime neighborhood, is not enough by itself to establish reasonable suspicion, and with good reason. *United States v. McKoy,* 428 F.3d 38, 40 (1st Cir.2005). As the court explained, "Nervousness is a common and entirely natural reaction to police presence ..." and it cautioned lower courts against admitting evidence that could lead to the "legal determination that if one commits a traffic violation in a high-crime neighborhood he will be subject to a frisk whenever he appears nervous and moves." *Id.* at 41. Similar caution should be exercised in this case, particularly given Trooper Gacek's own nervousness-inducing conduct in deliberately tailing the car in its blind spot for over three miles.

Although Trooper Gacek testified that, in his view, the defendants were more than normally nervous when they handed him their licenses and registration, that perception was undoubtedly enhanced by Trooper Gacek's own likely nervousness—it was very early in the morning, no other ***512** cars were on the road, and Trooper Gacek was stopping a car with multiple occupants, including two rough looking men whom he later learned had had some involvement with illegal drugs. Trooper Gacek's memory of the degree of manifested nervousness no doubt was colored by those circumstances, and he of course should have expected more than a modicum of nervousness given his own driving tactics.

[10] While it is true, as the government points out, that nervousness "is a relevant factor to be considered along with others in assessing the totality of the circumstances," *United States v. Mouscardy,* 722 F.3d 68, 76 (1st Cir.2013), in this case, the other factors, even combined with nervousness, do not add up to a "particularized, objective basis" to suspect the presence of illegal drugs in the car. In this circuit, extreme nervousness plus a litany of other factors—a vehicle parked in a parking lot surrounded by people loitering in a high-crime area; a driver making furtive movements as if to conceal something as an officer approached; an officer conducting a drug investigation; an officer who had seen the suspect many times before when he had not exhibited nervousness—has been found to provide reasonable suspicion for a *Terry*

stop. *United States v. Taylor,* 511 F.3d 87, 92 (1st Cir.2007). And, in the context of a domestic violence investigation, a suspect's nervousness plus his refusal to identify himself and further refusal to remove his hand from his pocket when told to do so by the police, has been held to constitute reasonable suspicion. *Mouscardy,* 722 F.3d at 75–76. In *United States v. Chaney,* the defendant exhibited a nervous demeanor and, after stating that he left his identification at home, said he could not remember what jurisdiction issued it, could not recall the last four digits of his Social Security number, and could not recall his address. *United States v. Chaney,* 584 F.3d 20, 22 (1st Cir.2009). This, the court held, in addition to the fact that his friend could only identify him as "Jake" notwithstanding her claim to have known him for five years, provided the officer with reasonable suspicion that the defendant had given a false name and that criminal activity was afoot. *Id.* at 23, 27. Those cases are all distinguishable on their facts.

The out of circuit cases cited by the government are no more helpful. For example, in *United States v. White,* in addition to the driver's nervous demeanor, he told the officer he was going home to Indiana while the rental contract stated that the rental car he was driving was due back in Las Vegas the next day. 584 F.3d 935, 942 (10th Cir.2009). That stark inconsistency gave rise to reasonable suspicion warranting continued detention after the issuance of a warning. *See id.* at 952. Similarly, in *United States v. Riley,* the defendant not only appeared nervous, but also said he did not remember what time he left the casino where he had been, or the name of the hotel where he had stayed, or what floor he had stayed on, and he lied about his criminal record. 684 F.3d 758, 763 (8th Cir.2012). The other cases cited by the government are likewise factually distinguishable from this case.

I conclude that while the defendants were certainly nervous —under the circumstances described even the most innocent and self-confident person would be expected to exhibit clear signs of nervous anxiety—their nervous manifestations were not so remarkable under the circumstances as to warrant some particular suspicion of ongoing wrongdoing, especially, again, given that Trooper Gacek likely knew that his own conduct (extended tailing) would likely induce a fair measure of nervousness in any driver or passenger subsequently pulled over. Thus, defendants' ***513** nervousness, without more, did not provide Trooper Gacek with reasonable articulable suspicion to extend the traffic stop for another 20 minutes after he issued the traffic warning fully resolving the ostensible purpose of the stop. *See McKoy,* 428 F.3d at 40–41.

On a different point, Barter's comment that he had done work on his car and that the trip also served as a test drive, while odd, is not of the sort, like those discussed in the above-cited cases, that would permit a reasonable inference that general criminal activity, or specific drug-related criminal activity, was afoot. Barter was not one of the individuals allegedly exhibiting nervousness, and nothing was offered to show that Barter's comment was either untrue or implausible. That someone of greater caution might never take a trip with a newly installed drive shaft does not mean that one who does is potentially engaged in criminal activity. Besides, Trooper Gacek fully understood that that was not the reason given for the defendants' presence on the highway—no one suggested that they were driving at 4:30 a.m. literally to test a drive shaft, and Trooper Gacek did not understand the comment in that manner, nor should it be taken in that context.

And, while both troopers testified about their perception related to so-called "blading" by Garcia and Barter, nothing described by them suggested anything but irritation on defendants' part—certainly neither defendant was said to have engaged in openly hostile or threatening behavior toward the officers, and the psychological gloss placed on their posture was neither developed nor supported by expert testimony or evidence. "Blading" did not add anything in support of articulable suspicion of drug activity.

Trooper Gacek testified that he also considered Garcia's and Barter's prior apparent involvement with illegal drugs, a fact that neither Barter nor Garcia contested or misrepresented. Those facts, even taken together with some nervousness, are simply not enough to constitute a "particularized, objective basis" for Trooper Gacek's suspicion that the car contained illegal drugs. He had a hunch—and the hunch proved correct, but he did not have reasonable and articulable suspicion of drug activity.

The Tenth Circuit has also expressly rejected the notion that a defendant's nervousness, briefly misstating where he rented his car, and his having prior drug convictions (about which he did not lie) is enough to support a reasonable and articulable suspicion of criminal activity. *United States v. Wood,* 106 F.3d 942, 946–48 (10th Cir.1997). The court in *Wood* further cautioned that if the law were such that a prior criminal record automatically gave rise to reasonable suspicion, "any person with any sort of criminal record ... could be subjected to a *Terry*-type investigative stop by a law enforcement officer at any time without the need for any other justification at all."

Id. at 948 (quotation marks and citations omitted). *Terry* does not extend that far.

During the suppression hearing, Trooper Gacek understandably and candidly testified that he is "suspicious of everything" when on duty, and he conceded that sometimes he is even "suspicious when [he doesn't] have anything to be suspicious about." That approach no doubt serves police and detective work well, but an officer's subjective suspicions and hunches are of course insufficient to justify a *Terry*-stop. More is needed: the particularized suspicion of an objectively reasonable officer. *See Whren v. United States,* 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Under that standard, given the totality of circumstances, the extended duration ***514** of the stop in this case crossed the line. While the initial stop was legally justified at its inception, the continued detention after complete resolution of the minor traffic issues until development of probable cause by means of the drug dog sniff, was unsupported by reasonable and articulable suspicion of criminal activity. [5]

In this case, once Trooper Gacek gave the driver an appropriate sanction—a warning—19 minutes into the stop, the purpose of the traffic stop was completed. The defendants should have been released. Trooper Gacek impermissibly and measurably extended the traffic stop by approximately 17 more minutes, persisting in his earlier attempts to develop reasonable suspicion before he ran his drug dog. This decision, "founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." *Mapp v. Ohio,* 367 U.S. 643, 660, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

The evidence against Evans, Garcia, and Barter seized by Troopers Gacek and Locke on August 3, 2013 must be, and is, suppressed.

Conclusion

For the reasons given, defendants' motions to suppress evidence (document nos. 26, 27, & 28) are granted.

SO ORDERED.

All Citations

53 F.Supp.3d 502, 2014 DNH 218

Footnotes

1 During the hearing, Trooper Gacek testified, among other things, that "in general, I'm suspicious of everything."

2 As a preliminary matter, Evans, Garcia, and Barter have standing to move to suppress the inculpatory evidence offered against them as the fruit of an illegal detention. "The fact that a defendant is a passenger in a vehicle as opposed to the driver is a distinction of no consequence in this context." *United States v. Kimball,* 25 F.3d 1, 5–6, n. 3 (1st Cir.1994); *see also Brendlin v. California,* 551 U.S. 249, 251, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) (holding that a passenger in a car is seized along with the driver when the car is stopped by the police and has standing to challenge the constitutionality of the stop); *United States v. Starks,* 769 F.3d 83, 89, 2014 WL 5028049, at *6 (1st Cir.2014) (confirming that a passenger has standing to challenge the constitutionality of a seizure resulting from a traffic stop); *United States v. Mosley,* 454 F.3d 249, 262–69 (3d Cir.2006) (suppressing evidence offered against a passenger illegally detained); *United States v. Jones,* 234 F.3d 234, 244 (5th Cir.2000) (suppressing evidence against the driver and the passenger of a car who were unlawfully detained after the legitimate purpose of stop was completed because the driver's consent was not sufficiently attenuated from the illegal detention to be purged), *abrogated on other grounds by United States v. Pack,* 612 F.3d 341 (5th Cir.2010).

3 Based on precedent in this circuit, it was also reasonable for Trooper Gacek to take and run Garcia's and Barter's identification. Once it became clear that Evans was not the owner of the car, Trooper Gacek had reason to ask for passenger identification to determine if either was the record owner of the car. *See United States v. Henderson,* 463 F.3d 27, 46 (1st Cir.2006) (it might be reasonable to ask for passenger identification to determine if the passenger was a licensed driver). Since obtaining identification and running criminal history checks on the driver and passengers extended the stop by only about 5 minutes, they did not unduly extend the time of the traffic stop. *See United States v. Fernandez,* 600 F.3d 56, 61–63 (1st Cir.2010); *United States v. Chaney,* 584 F.3d 20, 26 (1st Cir.2009).

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4 Trooper Gacek probably could have lawfully run the drug dog around the car during the traffic stop, so long as that activity did not extend the duration of the stop beyond the time reasonably necessary to resolve the purpose for the stop. But he did not do so. *See Caballes,* 543 U.S. at 407–09, 125 S.Ct. 834.

5 The government rightly does not rely on Barter's subsequent consent to justify the search but on the earlier development of probable cause as provided by the dog's alert. While the government is right that the alert provided probable cause to search, that begs the question whether the alert was timely. *See, e.g., United States v. Quinn,* 815 F.2d 153, 163–64 (1st Cir.1987) (Bownes, J. dissenting) (providing that the defendant's consent was not valid because its "causal connection" to the illegal detention was not broken) (citing *Florida v. Royer,* 460 U.S. 491, 503, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Dunaway v. New York,* 442 U.S. 200, 215–16, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Brown v. Illinois,* 422 U.S. 590, 605, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)); (*United States v. Ocheltree,* 622 F.2d 992, 994 (9th Cir.1980)); *United States v. Mosley,* 454 F.3d 249, 268–69 (3rd Cir.2006) (suppressing evidence causally related to an illegal traffic stop); *United States v. Jones,* 234 F.3d 234, 244 (5th Cir.2000) (suppressing evidence because consent was not sufficiently attenuated from the illegal detention to be purged of its taint), *abrogated on other grounds by United States v. Pack,* 612 F.3d 341 (5th Cir.2010); *United States v. Dortch,* 199 F.3d 193, 197, 202 (5th Cir.1999) (same), *abrogated on other grounds by United States v. Brigham,* 382 F.3d 500 (5th Cir.2004).

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STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

STATE OF NEW HAMPSHIRE
v.
BRIAN JOSEPH PEREZ

218-2018-CR-334

STATE OF NEW HAMPSHIRE
v.
JOSE MARIO MELENDEZ

218-2018-CR-335

ORDER

The matters before the court are the defendants' motions to suppress. The motions are GRANTED with respect to all evidence obtained and derived from the consent search of the motor vehicle in which the defendants were travelling. The request for the search altered the fundamental nature of the traffic stop and was not supported by reasonable and articulable suspicion.

The court apologizes to the parties for the delay in issuing this order.

I. The Stop

(A) Facts Relating To The Stop

Defendants Brian Perez and Jose Melendez were travelling from Connecticut to Maine on Interstate 95 when they were pulled over by State Trooper Michael Arteaga. Melendez was driving. Perez was the only passenger. They were travelling in a Cadillac sedan that belonged to Melendez's ex-wife. Melendez had permission to use the car.

Trooper Arteaga pulled the Melendez/Perez vehicle over at approximately 6:30 pm on a weekday in early March, 2018. Based on the calendar, the court takes judicial notice that it was dusk, just before sunset. The traffic was light. The weather was good.

Trooper Arteaga first noticed the vehicle as it was leaving the Hampton tolls. The trooper was in an unmarked cruiser, in a small parking lot, parked perpendicular to the highway. He was assigned to the State Police Mobile Enforcement Team ("MET"). The MET is tasked with detecting serious crimes on the highways, such as drug trafficking and human trafficking.

Trooper Arteaga had no prior information about Melendez, Perez, the Cadillac or anybody associated with the vehicle. Indeed, at the time Melendez and Perez drove past his cruiser, the trooper had no information from any agency about any vehicle that might be on I-95 at that time. Trooper Arteaga was simply observing traffic, waiting for either a BOLO or a suspicious vehicle.

The trooper testified that his attention was drawn to the to the Melendez/Perez vehicle because Perez, the passenger, was reclined far back in his seat, making it difficult for Arteaga to view his face from the side of the road. Arteaga found this somewhat suspicious. The court does not.

Arteaga also noticed that the driver had his hands at "ten and two" on the wheel, as drivers are trained to do. The trooper found this to be "odd" and concerning in light of his other observations. The court sees nothing "odd" about Melendez's grasp of the wheel. As the U.S. District Court recently observed in another case involving Trooper Arteaga:

> [T]he court finds it difficult to credit—and therefore to defer to—the Trooper's testimony about what facts he found suspicious, especially

> where he testified that [the defendant's] hands on the steering wheel at "ten and two" bolstered his suspicion of criminality. Drivers are taught to drive with their hands on the wheel at "ten and two." [citation omitted]. Were [the defendant's] hands in a position other than "ten and two" and in some way not visible to the Trooper, the Trooper could have used that fact to support a concern that [the defendant] was hiding his hands from the Trooper's view. . . . The bottom line here is that the Trooper's use of these kinds of neutral or innocent facts to support his suspicion of criminality draws into doubt the credibility of his reliance on other facts to support his suspicion of [the defendant's] criminal activity.

Hernandez, 2019 WL 2992045, at *8 (D.N.H. July 9, 2019).

Finally, Trooper Arteaga noted that neither the driver nor the passenger looked in his direction as they were driving. The trooper speculated that they might have been attempting to avoid being noticed by law enforcement. However, the trooper was in an unmarked cruiser, in a parking lot, off the highway, and it was dark outside. The court does not see anything noteworthy about the fact that neither Melendez nor Perez looked towards the trooper's vehicle.

The court also notes that there is a certain "heads-I-win-tales-you-lose quality" to treating the driver's and passenger's reactions to the unmarked vehicle as suspicious. Had either the driver or passenger, or both, turned to face the trooper's vehicle, he could have speculated that they appeared hypervigilant about being observed by the police. Had either looked towards the trooper and then away from the trooper, he could have speculated that they recognized him to be a police officer and then tried to blend in with traffic. What permutation does not fit the profile?[1]

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[1] See generally, U.S. v. Broomfield, 417 F.3d 654, 655 (7th Cir. 2005) (Posner, J) ("Gilding the lily, the officer testified that he was additionally suspicious because when he drove by [the defendant] in his squad car before turning around and getting out and accosting him he noticed that [he] was 'staring straight ahead.' Had [the defendant]

Continued on next page

Based on these facts, Trooper Arteaga drove onto the highway and approached the Melendez/Perez vehicle. He then ran its license plate. The plate was from Connecticut. The car was legally registered to a female although both occupants appeared to be male.

The trooper then continued to follow the Cadillac. It was going approximately 67 or 68 miles per hour in a posted 65 mph speed limit. But it continued at that speed after the posted speed limit was reduced to 50 mph. The driver also moved left two lanes, using his signals but starting them too late, after the lane changes had begun.

The trooper then turned on his blue lights and signaled for Melendez to pull over. Melendez pulled over without incident.

(B) Legal Analysis Of The Stop

When a motor vehicle is pulled over by a police officer, both the driver and any passengers are "seized" within the meaning of Part 1, Article 19 of the New Hampshire Constitution and the Fourth Amendment. State v. Hunt, 155 N.H. 465, 470 (2007); Whren v. United States, 517 U.S. 806, 809 (1996); Delaware v. Prouse, 440 U.S. 648, 653 (1979).

Continued from previous page

instead glanced around him, the officer would doubtless have testified that [he] seemed nervous or, the preferred term because of its vagueness, 'furtive.' Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited." (internal bracketing omitted)).

In order to survive constitutional scrutiny, a traffic stop must be supported by reasonable and articulable suspicion of either a motor vehicle infraction or criminal activity. State v. Hight, 146 N.H. 746, 748 (2001); see also, State v. McKinnon-Andrews, 151 N.H. 19, 25–26 (2004); Terry v. Ohio, 392 U.S. 1, 21 (1968).

In this case, the initial stop was plainly constitutional because the trooper observed two motor vehicle infractions, i.e. speeding (RSA 265:60) and making lane changes without first signaling (RSA 265:45).

* * *

While that is the end of the legal analysis for this particular stop, it is not the end of the discussion. Neither Melendez nor Perez has challenged the State Police policy under which the stop was made. Therefore, the factual record regarding that policy is sparse and the legality of that policy has not been briefed. Nonetheless, because tunnel vision is to be avoided, the court looks beyond the quotidian nature of the stop and considers the extraordinary policy behind it.

As noted above, Trooper Arteaga was assigned to the Mobile Enforcement Team which focuses its efforts on detecting felony level crimes on the highways. That assignment meant that Arteaga was not concerned with issuing tickets and warnings for minor motor vehicle violations. Rather, in the absence of reasonable suspicion from other law enforcement officers that a particular vehicle is connected with a crime, a MET trooper's job is to stop motor vehicles for objectively reasonable grounds in the hope of developing or dispelling reasonable suspicion of other, more serious crimes.

Put another way, as the court has learned from prior cases, when MET troopers are not responding to BOLOs, they are specifically tasked by the Department of Safety

to make pretextual detentions, sometimes for very minor perceived driving infractions. Thus, for example, in United States v. Garcia, 53 F. Supp. 3d 502 (D.N.H. 2014), a MET trooper, who was parked in the very same spot as Trooper Arteaga was in this case, followed a vehicle on a "hunch," and stayed within the driver's blind spot for three miles, until the vehicle's tires partially transgressed the dotted lane line and then corrected by touching the white fog line, whereupon the trooper stopped the vehicle. Garcia, 53 F. Supp. 3d at 504 (D.N.H. 2014); see also, Hernandez, 2019 WL 2992045 at *1 (Trooper Arteaga was parked near the tolls and decided to stop a vehicle that had a license plate registered to a car rental company (because he opined that rental cars are frequently used for drug trafficking), so he caught up with the vehicle and then noticed that it was speeding and travelling too close to the next vehicle, providing the trooper with objectively reasonable grounds to make the stop); State v. Perkins, 218-2018-CR-00263 (a single pine shaped air freshener hung from the rear view mirror); State v. Lamoureux, 218-2016-CR-00167 (car driving through a section of a rest area designated by sign for trucks); State v. Thurston, 218-2016-CR-00874 (left his turn signal on for approximately twelve seconds while travelling in the left lane); State v. Hach, 218-2017-CR-274 (signaled and safe change from one toll booth lane to another across solid white line); State v. Cotton, 218-2014-CR-00209 (tires veered over the white dotted lane line twice over several miles); State v. Longval, 218-2016-CR-00138 (unsignaled lane change).

When an individual stop is challenged, without reference to the policy under which the stop was made, courts cannot look beyond the pretext and must uphold the stop so long as it is supported by an objectively reasonable rationale. Whren; State v.

McBreairty, 142 N.H. 12 (1997). Put another way, "an officer's motivations are immaterial so long as there exists a valid justification for an investigatory stop." McBreairty, 142 N.H. at 15. "[T]he fact that an officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." Whren, 517 U.S. at 813.

Query, however, whether Whren and McBreairty foreclose the possibility that a sufficiently *de jure* departmental policy of detaining citizens for purely pretextual reasons could be found to be inconsistent with Fourth Amendment and Article 19 "reasonableness." Whren and McBreairty stand for the proposition that it is inappropriate and unnecessary to plumb the subjective motivations of individual officers. But what about the objective policy of the State to exploit Whren and McBreairty by deploying an entire unit to conduct what amounts to rolling spot checks based on hunches? Cf. Opinion of the Justices (Sobriety Checkpoints), 128 N.H. 14 (1986); State v. Koppel, 127 N.H. 286 (1985).

To be sure, this is an inefficient and very imperfect way to make spot checks based on hunches. As the cases cited above demonstrate, sometimes MET troopers must follow a target vehicle for miles before the driver commits an arguable driving infraction. Some target drivers will avoid the spot check altogether by driving perfectly all the way to Maine. Yet, these exceptions prove the rule: The State police have taken the shield that Whren and McBreairty extended to individual traffic stops and turned it into a sword to allow them to get as close to spot checks as possible.

When Whren was followed by Maryland v. Wilson, 519 U.S. 408 (1997), which recognized that the Fourth Amendment does not limit the right of an officer to demand a driver to get out of the car, Justice Kennedy warned that this could "put[] tens of millions of passengers at risk of arbitrary control by the police." Maryland v. Wilson, 519 U.S. at 423 (1997) (Kennedy, J, dissenting). The creation of a specialized unit designed to make pretextual stops, often followed by out-of-the-car questioning, demonstrates that Justice Kennedy's fear was well-founded. All of that said, this is an issue that has not been raised and, therefore, must wait for another day.

II. The Expansion Of The Stop

(A) Facts Relating To The Expansion Of The Stop

The driver, Melendez, pulled the car over without incident. Melendez did not have his license with him, a fact that he discovered after searching through his pockets. Melendez gave Trooper Arteaga his name, date of birth and license number (which he had memorized). The trooper ran a check on this information from his cruiser and there was nothing out of the ordinary. As best he could tell, Melendez was who he purported to be and he was a licensed driver with no warrants. The trooper did not inquire any further into Melendez's identity and he appeared to be satisfied with respect to that issue.

The passenger, Perez, gave the trooper his identification. The trooper confirmed that Perez was also a licensed driver with no warrants.

The trooper asked Perez where he and Melendez were heading. The trooper asked this question while standing at the passenger side window. Perez answered

quietly and possibly out of Melendez's hearing. Perez said that the men were headed to Augusta, Maine. He did not elaborate about their plans.

Perez obtained the vehicle's registration from the glove compartment and handed it to the trooper. The vehicle was registered to a female with a name that was not common to either the driver or the passenger. Trooper Arteaga asked Melendez to step outside the vehicle. The alternative would have been to speak with Melendez from the driver's side window, which would have left the trooper more exposed to oncoming traffic.

Trooper Arteaga then spoke with Melendez outside of the vehicle. Melendez explained that he was driving his ex-wife's car with permission. Melendez then invited the trooper to call his ex-wife. Trooper Arteaga declined to do so. However, the trooper confirmed that vehicle had not been reported stolen.

The trooper was apparently satisfied with Melendez's answers because he did not inquire any further into (a) Melendez's identity, (b) the identity of the registered owner or (c) Melendez's permission to use the vehicle. The State does not argue that the trooper had any continuing reasonable suspicion regarding those matters.

Prior to asking Melendez to get out of the vehicle, the trooper noticed three cell phones in the passenger compartment. He noted that drug traffickers sometimes use multiple cell phones. Beyond this, Trooper Arteaga did not observe anything else of evidentiary significance. He did not observe any apparent drugs, drug packaging (i.e. plastic "knots" or "tie-offs," plastic bags, etc.), paraphernalia (i.e. aluminum foil, cotton swabs, syringes or syringe covers, pipes, spoons, straws, scales, etc. etc.), masking

agents (i.e. air fresheners or heavy scents), indications of drug use (i.e. track marks, indicia of impairment, etc.) or anything else having to do with illegal drugs.

While Melendez was standing outside the car, Trooper Arteaga asked about his plans for the night. Melendez said they were headed to "Old Port," which is in Portland, not Augusta. Thus, Melendez and Perez gave the trooper conflicting information about their destination. The court takes judicial notice that Portland is approximately 55 miles away from Augusta.

Melendez explained that they were planning to meet up with girls. However, Melendez had a hard time naming any of these "girls," and nervously stated that he thought one of the girls went by the name Tanya. The trooper asked Melendez whether he planned to stay overnight. He said that he was not sure. Given the fact that Melendez would first get to Portland at approximately 8:00 pm, the inchoate nature of his stated plans was noteworthy. The trooper did not observe luggage in the passenger compartment of the Cadillac, but it was a sedan and he did not have a view of the trunk.

Trooper Arteaga then returned to the vehicle where he spoke with Perez about the pair's itinerary. This time Perez told the trooper that they were going to Old Port. When the trooper reminded Perez that he earlier said they were going to Augusta, Perez replied that they were going to Old Port and might then go to Augusta to visit Melendez's ex-wife.

Trooper Arteaga asked Perez why they were going to Old Port. Perez replied that they were going to visit girls. He did not know the girls and told the trooper that the visit to Old Port was Melendez's idea. During this conversation Perez appeared

nervous. He maintained minimal eye contact with the trooper and his shoulders were hunched.

Trooper Arteaga noted that Melendez and Perez had time to communicate with each other while the trooper was running license and registration checks in his cruiser. Therefore, he opined that the two men could have conspired to tell him that they were heading to Portland, despite Perez's earlier statement that their destination was Augusta. The trooper thought that a trip to Augusta would be suspicious because Augusta is a "known drug distribution area."

The trooper next returned to Melendez and told him that there was a "significant confliction" between his account and Perez's account of their plans. Whether the difference between the two accounts was a "significant confliction" or not is in the eye of the beholder. In any event, Melendez became nervous when he was confronted in this manner by the trooper.

The trooper than asked Melendez if Perez placed anything illegal in the vehicle. Melendez responded by saying "I hope not." The trooper responded by asking Melendez point blank whether there was anything illegal in the car. Melendez said "No."

After Melendez told Trooper Arteaga that he was not transporting contraband, the trooper asked if he could search the car for himself. When Melendez did not immediately respond, the trooper repeated the question. Melendez then said, "Yes you can search."

Trooper Arteaga then prepared a written consent to search form which both Melendez and the trooper signed. The form advised Melendez that he was not required to consent to the search. Thereafter, Trooper Arteaga searched the Cadillac.

(B) Legal Analysis Of The Expansion Of The Stop

1. Governing Law

Both the state and federal constitutions limit the scope and duration of investigative traffic stops. However, as explained below, Part 1, Article 19 provides a layer of protection that the Fourth Amendment does not.

Principles Common To Both Constitutions: Under Article 19 and the Fourth Amendment, a traffic stop "must be carefully tailored to its underlying justification . . . must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 500 (1983); see also Rodriguez v. United States, 135 S. Ct. 1609, 1614 (2015); McKinnon-Andrews, 151 N.H. at 22; State v. Michelson, 160 N.H. 270, 274 (2011).

Under both constitutions, the scope and duration of the stop can be expanded to include the investigation of any past, present, imminent or planned criminal activity, or community caretaking need, if the officer happens to stumble across reasonable and articulable suspicion for such matters. See e.g., State v. Sage, 170 N.H. 605 (2018) (stop for speeding was lawfully expanded into a DUI investigation because the officer gained reasonable and articulable suspicion of that offense); State v. Blesdell-Moore, 166 N.H. 183, 187 (2014); Mckinnon-Andrews, 151 N.H. at 25.

"Reasonable suspicion" cannot be defined with mathematical precision. Indeed, it is often defined in terms of what it is not: Reasonable suspicion is more than a hunch but less than probable cause. See, e.g., McKinnon-Andrews, 151 N.H. at 26 ("A reasonable suspicion must be more than a hunch. [citation omitted]. The articulated

facts must lead somewhere specific, not just to a general sense that this is probably a bad person who may have committed some kind of crime. [citation omitted]. The officer's suspicion must have a particularized and objective basis in order to warrant that intrusion into protected privacy rights." (internal citations and quotation marks omitted)); United State v. Sokolow, 490 U.S. 1, 7–8 (1989) ("The officer . . . must be able to articulate something more than an inchoate and unparticularized suspicion or 'hunch'."); United States v. Brown, 500 F.3d 48, 54 (1st Cir. 2007) ("While the reasonable suspicion standard requires more than a visceral hunch about the presence of illegal activity, it requires less than probable cause.").

In deciding whether this "more-than-a-hunch" standard has been met, "the court must keep in mind that a trained officer may make inferences and draw conclusions from conduct that may seem unremarkable to an untrained observer." McKinnon–Andrews, 151 N.H. at 26; see also, United States v. Cortez, 449 U.S. 411, 418 (1981) ("[T] he evidence . . . must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."). However, the phrase "training and experience" is not a talisman that divests the court of its responsibility to make an independent, fact-based determination of reasonable suspicion *vel non*.

Under both constitutions, in the absence of such new reasonable and articulable suspicion, the stop cannot be prolonged beyond its natural duration. Illinois v. Caballes, 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."); Rodriguez, 135 S. Ct. at 1612 ("We

hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures."); Arizona v. Johnson, 555 U.S. at 333; McKinnon-Andrews, 151 N.H. at 25.

The Federal Constitution's "Duration" Test: Under the federal constitution, so long as the stop is not extended beyond its inherent duration, the officer is free to inquire into unrelated matters in an effort to develop reasonable and articulable suspicion. See Arizona v. Johnson, 555 U.S. at 333 ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."); United States v. Fernandez, 600 F.3d 56, 60 (1st Cir. 2010); United States v. Chaney, 584 F.3d 20, 26 (1st Cir. 2009). Thus, under the Fourth Amendment, the scope of questioning is limited only because the duration of the stop is limited.

Also, the Fourth Amendment permits the officer to demand that the driver and all passengers step out of the vehicle for any reason, so long as the traffic stop is not prolonged beyond its natural duration. Arizona v. Johnson, 555 U.S. 323, 331 (2009); see also Pennsylvania v. Mims, 434 U.S. 106, 111 (1977):

> Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both.
>
> . . .[W]e are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car. We think this additional intrusion can only be described as *de minimis*. The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in

> the driver's seat of his car or standing alongside it. . . . What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.

Maryland v. Wilson, 519 U.S. 408, 415 (1997) ("[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop."); Hernandez, 2019 WL 2992045, at *6 (holding that Trooper Arteaga's demand that a driver exit his vehicle violated the Fourth Amendment because it prolonged the natural duration of the traffic stop since the demand was made for purely investigative purposes that were not supported by reasonable suspicion).

The State Constitution's "Fundamental Nature" Test: Under Part 1, Article 19, the scope of police questioning cannot either (a) prolong the duration of the stop or (b) "change the fundamental nature of the stop" in the absence of newly developed reasonable and articulable suspicion. Mckinnon-Andrews, 151 N.H. at 25:

> If the question is reasonably related to the purpose of the stop, no constitutional violation occurs. If the question is not reasonably related to the purpose of the stop, we must consider whether the law enforcement officer had a reasonable, articulable suspicion that would justify the question. If the question is so justified, no constitutional violation occurs. In the absence of a reasonable connection to the purpose of the stop or a reasonable, articulable suspicion, we must consider whether in light of all the circumstances and common sense, the question impermissibly prolonged the detention or changed the fundamental nature of the stop.

(emphasis added and internal bracketing removed).

Thus, for example, in Blesdell-Moore, the New Hampshire Supreme Court held that an officer transgressed Article 19 by asking a driver who was stopped for a defective taillight to stick out his tongue. This request was made to determine whether the driver's tongue was coated in a manner the officer believed could reveal recent marijuana use. The court found that there was no reasonable suspicion for such an

investigation. The court then found that, while inspecting the driver's tongue did not prolong the stop, it did change its fundamental nature:

> Although the brief inspection of the defendant's tongue did not prolong the stop, we conclude that the search altered the fundamental nature of the stop by transforming a routine traffic stop into an investigation of potential drug activity. By asking to see the defendant's tongue, the officer set out to determine whether the defendant had, in fact, consumed or was in possession of marijuana. Although a reasonable motorist may not understand that a green film on the tongue may be indicative of marijuana consumption, he would certainly recognize that the officer's request to see his tongue changed the fundamental nature of an otherwise routine traffic stop.

Blesdell-Moore, 166 N.H. at 190 (internal citation omitted).

To be sure, even under Part 1, Article 19 an officer may engage in "facially innocuous" dialog that the detainees "would not reasonably perceive as altering the fundamental nature of the stop." McKinnon-Andrews, 151 N.H. 25. Such dialog includes, as pertinent to this case, "a few prosaic questions" about the detainees' itinerary. Id., at 28-29 (Broderick, concurring).

Asking a driver or passenger to get out of the vehicle for purely investigative purposes that are unrelated to the initial reason for the traffic stop changes its fundamental nature. Therefore, Article 19 forbids an officer from asking either the driver or the passenger to exit the vehicle absent either (a) a safety concern or (b) reasonable and articulable suspicion relating to the matters to be discussed outside of the vehicle. See e.g., State v. Moore, 151 N.H. 288, 291, 78 (2004) (The ". . . objective facts were sufficient to create an independent basis for having reasonable, articulable suspicion that the [passenger] had been, was, or was about to engage in criminal activity and thus allow an expansion of the scope of the initial stop. Thus, these facts justified the

officer's request that the [passenger] exit the vehicle without violating her State constitutional rights.").

2. Application Of Governing Law To Each Stage Of The Stop That Has Been Challenged By The Defendants

The Initial Question To Perez Regarding Travel Plans: Trooper Arteaga first veered away from the initial purpose of the stop (i.e. speeding and late signaled lane changes) when he asked Perez where he was heading. However, this question neither prolonged the duration of the stop nor altered the fundamental nature of the stop. Regardless of Trooper Arteaga's ulterior purpose in asking Perez about his destination, the inquiry into his destination was the archetype of a permissible, facially innocuous question. McKinnon-Andrews, 151 N.H. at 25. It was not an expansion of the stop within the meaning of either the state or federal constitution.

The Initial Questioning Of Melendez Outside The Vehicle: The trooper next addressed the question of Melendez's identity and his permission to use the Cadillac. He asked Melendez to get out of the vehicle to speak about these matters. To the extent this expanded the stop, the expansion was well supported by both safety concerns and reasonable and articulable suspicion.

With respect to the safety concerns, the alternative would have been for the trooper to stand by the driver's side window, with his back to the highway, as other vehicles sped by at highway speeds in the dark. Although the trooper might have been protected by his cruiser, it was entirely reasonable and constitutional for him to choose to speak with Melendez in a safer location.

With respect to the topics of conversation, the trooper was entitled to ask Melendez several questions to confirm his identity because Melendez did not have his physical license with him. Further, while the vehicle had not been reported stolen, it was entirely appropriate for the trooper to ask additional questions regarding Melendez's relationship to the registered owner and his permission to use the vehicle.

While Melendez was outside of the vehicle, Trooper Arteaga asked him about his itinerary. This was done in a casual manner. Notwithstanding the trooper's hidden purpose, the questions themselves did not either prolong the stop or change its fundamental nature. Therefore, the conversation between the trooper and Melendez about how Melendez was going to Old Port to meet girls did not expand the stop.

Asking Perez About His Travel Plans For A Second Time: Thereafter, the trooper returned to Perez, for the specific purpose of interrogating him again about the pair's itinerary. The trooper once again asked Perez where they were heading. Given all of the surrounding circumstances, perhaps this question was not as facially innocuous the second time around. However, it still did not exceed the permissible scope of the stop: It neither measurably expanded the duration of the stop nor altered the fundamental nature of the stop.

The next question that Trooper Arteaga asked Perez crossed the threshold from "innocuous" and "prosaic," McKinnon, to accusatory and inquisitorial. When Perez said they were going to Old Port, the trooper confronted him by asking why he earlier said they were going to Augusta. To be sure, if questions about travel plans are permissible then some follow-up questions are as well. However, just because an officer can ask a few facially innocuous questions about a driver's itinerary does not mean that the officer

can take a deposition on the subject without altering the fundamental nature of the stop within the meaning of Article 19. See, e.g., State v. Jimenez, 420 P.3d 464, 475 (Kan. 2018) (Case-specific "circumstances dictate how a court views travel plan questioning. And courts must guard against what might be called 'mission creep' by rejecting poorly justified excuses for law enforcement actions[.] . . . [W]hen travel plan questions can be seen as having a close connection to roadway safety, they can occur without unconstitutionally extending the stop's scope." (internal citation and quotation marks omitted)); State v. Schooler, 419 P.3d 1164, 1174 (Kan. 2018) (Travel plan questioning was not relevant to a traffic infraction for a license tag obscured by snow); Lafave, 4 Search & Seizure § 9.3(d) (5th ed.) (criticizing caselaw that adopts a blanket rule authorizing questions about travel plans and itineraries); Cf. Rodriguez, 135 U.S. at 1615 (not including "travel plans" or "itinerary" in a list of the ordinary inquiries incident to a traffic stop).

In this particular case, Trooper Arteaga's confrontational question to Perez concerning the discrepancy between his initial response (i.e. "Augusta") and his later response (i.e. "Old Port") was permissible follow up. This is especially true because the trooper had a legitimate purpose in asking about travel plans in light of the fact that neither Perez nor Melendez was the registered owner of the vehicle. See, e.g., United States v. Brigham, 382 F.3d 500, 508 (5th Cir. 2004) (a greater inquiry into travel plans is within the scope of the initial stop if there is a question regarding the permissive use of the vehicle); United States v. Williams, 271 F.3d 1262, 1267 (10th Cir. 2001) (questioning regarding travel plans was within the scope of the stop because the

defendant was not the named lessee on the car rental agreement and the officer could ask questions related to his lawful possession of the vehicle).

Confronting Melendez With The "Significant Confliction" Regarding Travel Plans: After the trooper confronted Perez with the discrepancy between his initial and later statements regarding the pair's destination (i.e. "Augusta" v. "Old Port"), Perez told the trooper that they were going to Old Port to meet girls and might then go on to Augusta. The trooper then returned to Melendez and told him that there was a "significant confliction" between his account and Perez's. This was not a facially innocuous or prosaic question. It was close to a direct accusation that either Melendez or Perez had given untruthful information.

That said, for the reasons stated above, on the facts presented, the trooper had sufficient leeway to continue following up with respect to travel plans. However, immediately after asking this final follow-up question about the itinerary, the trooper changed direction and began to ask about contraband.

The Questions About Contraband And The Consent To Search: The scope of the stop was unconstitutionally expanded when Trooper Arteaga brought up the issue of contraband and then asked for permission to search. When the trooper began to ask about contraband, he expanded the stop beyond anything having to do with (a) speeding, (b) late signaled lane changes, (c) the identification of the driver and (d) the ownership and permissive use of the vehicle. This was an entirely new topic of conversation and it was completely unmoored from the initial purpose of the stop. As Blesdell-Moore demonstrates, even a single question about drugs or drug use alters the

fundamental nature of the stop. However, in this case Trooper Arteaga did more than ask a single question:

A. First he asked whether Perez put anything illegal in the vehicle.

B. Then he asked whether there was anything illegal in the vehicle.

C. Then, because Melendez denied that there was anything illegal in the vehicle, the trooper asked for permission to conduct a full blown search of the vehicle on the side of the highway.

D. Then, when Melendez did not reply, he asked again for permission to search. This was no longer a routine traffic stop for minor driving violations.

Trooper Arteaga lacked reasonable and articulable suspicion to believe that there might be contraband in the vehicle:

A. For the reasons explained above, the trooper's observations of Melendez and Perez before he pulled them over were innocuous rather than suspicious.

B. The presence of three cell phones for two passengers was noteworthy but hardly suspicious. Many people, including most prosecutors and many other government employees, carry both work and personal phones. The trooper did not ask about the extra cell phone. The trooper himself admitted at the suppression hearing that the presence of an extra cell phone, standing alone, does not amount to reasonable suspicion.

C. The discrepancies regarding travel plans were also noteworthy but not specifically indicative of drug trafficking, either standing alone or in conjunction with all of the other evidence available to the trooper. The trooper speculated that Melendez did not want to disclose Augusta as the pair's destination because Augusta is a known

drug distribution location. He further speculated that Melendez and Perez got their stories straight while he was in his cruiser. Neither of these speculative inferences is even rational:

> 1. There is nothing inherently incriminating about traveling to Augusta (and the undersigned judge travels near there several times each year, often in a vehicle registered to his wife who has a different last name). It is the capital city of Maine. Why would two men travelling in a vehicle without any indicia of drug trafficking be embarrassed to say they were headed for Augusta? Likewise, Portland is not known to be a drug free city so owning up to traveling there would not diminish the likelihood of drug trafficking.[2]

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[2]In Hernandez, Trooper Arteaga testified that all of Vermont, New Hampshire and Maine are considered drug destination areas. Hernandez, at *9. He said nothing in this case to suggest that Portland is any less a drug destination or distribution area than Augusta.

Furthermore, as anybody who ever travelled on I-95 on a busy weekend can attest, thousands of vehicles travel on a daily basis to and from drug source states (i.e. Massachusetts, Connecticut, New York, etc.) and Maine. It is absurd on its face to suggest that drug couriers make up more than a tiny fraction of drivers on I-95 heading into Maine. See United States v. Wisniewski, 358 F.Supp.2d 1074, 1093 (D. Utah 2005) ("[T]raveling on a 'drug corridor' cannot reasonably support a suspicion that the traveler is carrying contraband. To so hold would give law enforcement officers reasonable suspicion that every vehicle on every major-and many minor-thoroughfares throughout this country was transporting drugs."); United States v. White, 584 F.3d 935, 951-52 (10th Cir. 2009) ("Because law enforcement officers have offered countless cities as drug source cities and countless others as distribution cities ... the probativeness of a particular defendant's route is minimal."); United States v. Beck, 140 F.3d 1129, 1138 n. 3 (8th Cir. 1998) (citing cases recognizing that, among other places, Colorado, Texas, Florida, Arizona, the entire West Coast, New Jersey, New York City, Phoenix, Fort Lauderdale, Houston, Chicago, and Dallas are drug source cities or states).

2. Because Perez initially volunteered that the destination was Augusta, it would be odd indeed if the two men later conspired to give the trooper inconsistent accounts of their travel plans. Indeed, the fact that they gave somewhat inconsistent accounts proves that they did not get their stories straight.

Of course, there were some discrepancies about the itinerary. However, these discrepancies did not point to drug trafficking. There are a googol of legal but embarrassing or confidential purposes for a trip to Maine that a driver might want to keep from a trooper who stopped him for speeding (i.e., to meet a paramour, to travel with a same sex romantic companion, to use marijuana in Maine in compliance with that State's law, to gamble at Maine casinos, to attend a political or social gathering that might not be everybody's cup of tea, to participate in a religious service or celebration for a minority religion, to visit a relative in prison or in a psychiatric hospital, to attend criminal court, etc. etc. etc.).[3] In the absence of reasonable and articulable suspicion of some actual crime, the officer cannot continue to detain the driver and passenger in order to get to the bottom of their plans. After all, unless those plans involved a crime, they would not be the trooper's business in the first place. Furthermore, neither RSA 265:4 (disobeying an officer) nor any other New Hampshire statute requires truthful statements about immaterial matters during a traffic stop.

D. There was nothing unusual about the nervousness displayed by Melendez and Perez. Perez only displayed signs of nervousness (i.e., avoiding eye contact and

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[3]A "googol" is the number 10^{100} which is the digit one followed by one hundred zeros. It is a large number.

hunching his shoulders) when the trooper accusingly confronted him with the fact that he initially said "Augusta" and later said "Old Port." Melendez only became nervous when the trooper re-approached him and said there was a "significant confliction" between what he and Perez had said. Who wouldn't be somewhat nervous when a State Trooper made such accusations during an investigative detention on the side of the highway?

Neither man was nervous at the time of the initial stop. Melendez was not nervous when he first stepped out of the car. He was not nervous when he gave his account of travelling to Old Port to meet girls. He was not nervous when he identified himself and explained his permissive use of the vehicle. Perez was not nervous at any point before the trooper confronted him.

"Nervousness is a common and entirely natural reaction to police presence," Hernandez, at *8, quoting United States v. McKoy, 428 F.3d 38, 40 (1st Cir. 2005). Further, as the U.S. District Court noted in Hernandez, it is especially likely that a "non-Caucasian male" who has been pulled over will appear anxious.[4] Hernandez, at *8.

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[4]The U.S. District Court went out of its way to note that Hernandez was a "non-Caucasian male." Hernandez at *2. The same is true for Melendez and Perez. The federal court did not suggest—and this court certainly does not suggest—that invidious discrimination played a role in the decision to expand the traffic stop. Yet, if New Hampshire is to have a round-the-clock unit making highly discretionary pretext stops on the Interstate, and then expanding those stops in the hope of interdicting drugs and disrupting serious crimes, it is important to keep track of any patterns that might develop. See Whren, 517 U.S. at 813 (traffic stops must comply with the equal protection clause of the Fourteenth Amendment as well as the Fourth Amendment); cf. Batson v. Kentucky, 476 U.S. 79, 97 (1986) ("[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination."); United States v. Johnson, 28 F. Supp. 3d 499 (M.D.N.C. 2014) (question of fact existed

Continued on next page

Beyond the apparent discrepancies in the two men's accounts of their travel plans, there was nothing out of the ordinary. There were no indicia of past, present or planned drug use. There were no apparent objects in the vehicle even arguably connected to drugs. Traveling round trip by car between northern Connecticut and Maine is not in itself suspicious. Using a friend or relative's car with permission is not suspicious.

Without more, the sum total of all of these facts amounts to nothing more than a generalized hunch. As explained above, the reasonable suspicion standard requires more than this. Accordingly, the court finds that Trooper Arteaga unconstitutionally expanded the scope of the traffic stop when he began asking about contraband and then asked for permission to search.

The use of the written Consent To Search form was not an intervening or superseding event. To be sure, the form advised Melendez that he did not have to consent to the search. However: (A) No time had elapsed between the trooper's unconstitutional verbal request to search the vehicle and his production of the waiver form; (B) Melendez was not given the opportunity to consult with a third party, or even to consult with Perez, (C) By this point in the stop, two additional troopers and two additional cruisers had arrived, further distinguishing this investigative detention from the typical speeding stop, (D) Melendez had already been frisked (although, as the trooper admitted at the suppression hearing there was absolutely no evidence that he

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Continued from previous page

as to whether county sheriff's department discriminated against Latinos when making traffic stops); Floyd v. City of New York, 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013).

was either dangerous or armed, see, e.g., State v. Michelson, 160 N.H. 270, 272 (2010); United States v. Romain, 393 F.3d 63, 71 (1st Cir. 2004)), and (E) Melendez had been accusingly confronted by the trooper, first about the discrepancy in travel plans and later about whether there was contraband in the vehicle. The use of the government waiver form, standing alone, did not dissipate the taint from the trooper's unconstitutional expansion of the stop. Wong Sun v. United States, 371 U.S. 471, 487-488 (1963); State v. Robinson, 170 N.H. 52 57-58 (2017). Accordingly, the court finds that the search of the vehicle was fruit of the poisonous tree. Id.

The motion to suppress is, therefore, GRANTED with respect to all evidence obtained from the search of the vehicle.

October 4, 2019

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/04/2019

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

United States of America

v.

Criminal No. 18-cr-118-LM
Opinion No. 2019 DNH 109

John Hernandez

O R D E R

On March 26, 2018, a New Hampshire State Police Trooper pulled over John Hernandez after observing him commit a minor traffic violation while driving on Interstate 95. During the traffic stop, the Trooper questioned Hernandez, asked him to exit his vehicle, obtained his consent to search the vehicle, and found contraband.

Hernandez is charged with possession with intent to distribute fentanyl in violation of 21 U.S.C. § 841(a)(1). He moves to suppress all evidence seized as a result of the search of his vehicle during the traffic stop. The government objects. On May 16, 2019, the court held an evidentiary hearing on this motion. For the reasons that follow, the court grants Hernandez's motion.

BACKGROUND

On March 26, 2018, New Hampshire State Police Trooper Michael Arteaga was stationed in an unmarked cruiser near the

Hampton tolls on Interstate 95. He testified that he was monitoring northbound traffic traveling through the tolls and that he would randomly pick license plates and run them in his database. He testified that he was monitoring traffic at this location because Interstate 95 is a "known drug corridor."

At approximately 3:30 p.m., the Trooper observed a black Toyota RAV4 with Massachusetts plates drive through the cash toll lane. He observed that the lone driver was male but did not notice his ethnicity. He was able to read the vehicle's license plate number and queried it in his mobile data terminal. He learned that the vehicle was registered to "EAN Holdings," which he knows to be Enterprise Rentals. The Trooper testified that it was significant to him that the car was a rental because, based on his experience, rental cars are used for criminal activity, "specifically drug trafficking."[1] The Trooper also noted that the color listed on the registration was red, while the vehicle he observed was black. He found it "odd" that a new car would be a different color than listed on its registration. After making these observations, the Trooper

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[1] The Trooper testified that rental cars are used in drug-trafficking for three main reasons: (1) they are more "mechanically reliable . . . decreasing the chance of being stopped by law enforcement for defective equipment violation"; (2) the fact that the vehicle is registered to the rental company hides the driver's identity; and (3) rental vehicles are not subject to asset forfeiture.

pulled onto the highway to catch up to and continue to monitor the RAV4.

Observations of Tailgating

The Trooper caught up with the RAV4 approximately one and one-half miles north of the Hampton tolls. He observed the vehicle in the right-most lane, or "lane one" while he was traveling in the left-most lane, or "lane four." He estimated the RAV4's speed to be between 70 and 75 miles per hour. As he approached the vehicle from behind, the Trooper observed that the RAV4 was "right on top of the vehicle in front of it—about one car length" away. He observed this for approximately twenty to thirty seconds. He then observed the RAV4's brake lights come on in rapid succession and the vehicle slow to approximately 55 miles per hour. The Trooper slowed his cruiser to stay even with the RAV4 and moved into lane two to better observe its driver. The Trooper observed that the driver appeared stiff, had his hands on the steering wheel in "a ten and two manner" and sat far back from the steering wheel such that his body was concealed behind the door frame. At this point, the Trooper pulled directly behind the RAV4, activated his lights, and effected a traffic stop.

Trooper Approaches Car for the First Time

The Trooper approached the RAV4 on the passenger side. While approaching the car, he noticed two packages of unopened rubber bands next to some car cleaning supplies on the floor behind the driver's seat. The Trooper then made contact with the driver, Hernandez, and asked for his license and registration. At this point, the Trooper could observe that Hernandez is a non-Caucasian male. Hernandez provided his license and the vehicle registration without issue, told the Trooper it was a rental car, and handed him the rental agreement. The Trooper testified that Hernandez appeared stiff and anxious. Hernandez inquired why he had been pulled over. The Trooper replied that Hernandez had been following the vehicle in front of him too closely and that his car was described on the registration as red, when it was black. Hernandez appeared to calm down after hearing this explanation.

The Trooper did not further question Hernandez about his tailgating or issue him a citation for that traffic violation at this point, or at any other point throughout the stop. Instead, the Trooper inquired about where Hernandez was headed. The Trooper testified that his inquiries about Hernandez's itinerary were not related to the traffic violation. Rather, the Trooper inquired about Hernandez's itinerary because he suspected that

Hernandez was engaged in criminal activity—drug trafficking—and he wished to further investigate his suspicion.[2]

The Trooper testified that when he first asked Hernandez about his destination Hernandez was "extremely stand-offish," his "demeanor was cold," and he gave "quick one-word answers." During this exchange, Hernandez told the Trooper to "look him up" and that he had never been arrested. Hernandez also asked the Trooper whether he knew him. Hernandez said that the Trooper looked just like one of his customers at Pep Boys in Salem where he works. The Trooper replied that he had never been to Pep Boys.

The Trooper continued to press Hernandez about his destination. Hernandez explained that he was traveling to the Kittery Outlets off exit three in Maine. The Trooper testified that he knows the Kittery Outlets to be a location where drug transactions occur. The two men then discussed what Hernandez intended to purchase at the Outlets. Hernandez stated that he intended to shop for Hollister jeans. At some point during this conversation, they also discussed the rental car. Hernandez explained that he had rented the car that same day, March 26,

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[2] To the Trooper's credit, he candidly conceded that he had "something in mind other than the traffic violation" when he decided to stop Hernandez. The Trooper further conceded that once he began asking Hernandez about his travel plans, all his questions were designed to investigate his suspicion that Hernandez was engaged in criminal activity.

because he had recently repainted his own vehicle. The Trooper estimated that this conversation, which began when he first approached the vehicle, lasted between two and four minutes.

Trooper Returns to Cruiser

The Trooper then returned to his cruiser. He ran a license and warrant check and learned that Hernandez had a valid Massachusetts license and had no outstanding warrants. He also examined the rental agreement, making two notable observations. First, the rental agreement listed the color of the car as black, Gov't Exh. 2, while the registration listed it as red. The Trooper dismissed the color discrepancy as a mistake on the part of the Massachusetts DMV. Second, he noticed that the rental agreement was dated as beginning on March 22, not March 26.[3] The Trooper did not contact Enterprise Rentals to investigate this discrepancy. Nor did he ever ask Hernandez about this discrepancy. Finally, the Trooper conducted a brief Google search of the Kittery Outlets. He learned that there is no Hollister store at the Kittery Outlets, and they were observing "winter hours," closing at 6 p.m.

[3] As it turned out, Hernandez reserved the car with Enterprise on March 22, but picked up the car on March 26. The Trooper conceded that Hernandez may have said he "picked [the car] up" on March 26, and that the Trooper may have presumed that Hernandez said he rented it that day.

Trooper Approaches the Car a Second Time

The Trooper then approached Hernandez's car a second time, this time on the driver's side, and asked Hernandez to exit the car to speak with him further. The Trooper testified that he wanted to continue his conversation with Hernandez because he "was suspicious that [Hernandez] was potentially engaged in criminal activity based upon everything [he] had observed up to [that] point."

Hernandez complied. The two men moved to the rear of the RAV4 towards the passenger side such that they were positioned between the RAV4 and the Trooper's cruiser. Once outside his vehicle, Hernandez became increasingly anxious and exhibited a "bladed" stance.

Pat-down Search

The Trooper observed a large bulge in Hernandez's front jean pocket. He asked Hernandez for consent to conduct a pat-down search for weapons. Hernandez agreed. As a result of the pat down, the Trooper determined that the bulge was a large wad of cash, that Hernandez explained was "just under" a $1,000. The Trooper also found a small flip phone, which Hernandez described as his "other phone."

The Trooper again asked Hernandez what he intended to shop for at the Outlets. Hernandez reiterated that he was planning

to shop for Hollister jeans and added that he was also looking for Nike shoes. The Trooper then told Hernandez that he had looked it up and there was no Hollister store at the Outlets. The Trooper testified that, at this point, Hernandez became increasingly anxious and stated that he was being harassed. The Trooper continued to press Hernandez about the fact that no Hollister store existed at the Outlets.[4]

Trooper Receives Consent to Search

The Trooper then inquired whether there was anything illegal in the car and Hernandez said no. The Trooper then asked whether there were any drugs in the car. Hernandez responded that he does not do drugs. The Trooper asked if he could search the car and Hernandez said yes. At this point, approximately thirteen to fifteen minutes had elapsed since the

[4] The Trooper testified that he found it suspicious that Hernandez would be traveling to a store at the Outlets (i.e., Hollister) that the Trooper discovered did not exist. The evidence on this point was hardly conclusive, however. The Trooper testified on direct that Hernandez intended to shop at a Hollister store. On cross, however, the Trooper clarified that Hernandez said that he was looking for Hollister jeans and that the Trooper "believe[d]" that Hernandez said he was going to the Hollister store. The Trooper further testified that, based on his personal experience of buying Hollister jeans, they can only be purchased at a Hollister store. The Trooper's police report states only that Hernandez said he intended to purchase Hollister jeans. Doc. no. 15-1 at 4.

Trooper returned to his cruiser to run Hernandez's license and registration.

Around this same time, Trooper Matthew Locke arrived to the scene. Trooper Locke stood with Hernandez while Trooper Arteaga prepared a consent-to-search form. The total time that had elapsed from the moment Trooper Arteaga observed Hernandez drive through the tolls until he generated the consent-to-search form was approximately twenty-three minutes. Trooper Arteaga reviewed the form with Hernandez and Hernandez signed it. Trooper Arteaga then searched the RAV4. He discovered approximately 400 grams of suspected fentanyl in the center console. He then arrested Hernandez. Hernandez was subsequently indicted on one count of possession with intent to distribute fentanyl.

DISCUSSION

Hernandez moves to suppress all evidence seized as a result of the March 26 traffic stop. He contends that his Fourth Amendment rights were violated because: (1) the initial traffic stop was not supported by probable cause that a traffic violation had occurred; and (2) even if the initial stop was justified, the Trooper impermissibly extended the traffic stop without reasonable suspicion that Hernandez was engaged in criminal activity. Hernandez argues that the evidence

subsequently found in his vehicle should be suppressed as fruit of the poisonous tree of the unlawful stop and extended detention.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. The temporary detention of individuals by police during a traffic stop constitutes a seizure under the Fourth Amendment. See Whren v. United States, 517 U.S. 806, 810 (1996). To ensure that all such seizures satisfy the Fourth Amendment's reasonableness requirement, the court must engage in a two-step inquiry. United States v. Mouscardy, 722 F.3d 68, 73 (1st Cir. 2013). First, the court must determine whether the seizure was justified at its inception. Id. Second, the court must examine whether the "actions undertaken during the stop were reasonably related in scope to the stop itself unless the police had a basis for expanding their investigation." Id. (internal quotation marks and brackets omitted). Where, as here, the defendant challenges the constitutionality of a warrantless seizure undertaken based on reasonable suspicion, the government bears the burden of proving that the seizure was sufficiently limited in its scope and duration. See Florida v. Royer, 460 U.S. 491, 500 (1983); United States v. Acosta-Colon, 157 F.3d 9, 14 (1st Cir. 1998).

I. Initial Traffic Stop

A traffic stop is reasonable and properly justified at its inception if the officer has "probable cause to believe that a traffic violation has occurred." Whren, 517 U.S. at 810; United States v. McGregor, 650 F.3d 813, 820 (1st Cir. 2011). "Probable cause exists when police officers, relying on reasonably trustworthy facts and circumstances, have information upon which a reasonably prudent person would believe the suspect had committed or was committing a crime." United States v. Pontoo, 666 F.3d 20, 31 (1st Cir. 2011) (internal quotation marks omitted). Courts in the First Circuit have held that even minor traffic violations can justify a traffic stop. See, e.g., United States v. Dunbar, 553 F.3d 48, 55-56 (1st Cir. 2009) (holding initial stop justified based on officer's observation and video showing defendant's vehicle following another car too closely); United States v. Garcia, 53 F. Supp. 3d 502, 509-10 (D.N.H. 2014) (finding initial traffic stop justified based on officer's observation that vehicle in which defendant was passenger crossed once over dashed line and once over solid fog line).

The Trooper testified that he stopped Hernandez based on his observation that Hernandez was following the vehicle in front of him too closely in violation of New Hampshire Revised Statutes Annotated ("RSA") § 265:25. RSA 265:25, I, provides:

"The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the way."

The Trooper testified that he caught up to Hernandez's car about one and one-half miles north of the tolls. He testified credibly that he observed Hernandez's car "right on top of the vehicle in front of him about one car length" away for a period of twenty to thirty seconds. Hernandez's car and the vehicle in front of him were traveling at a high rate of speed at that time: 70 to 75 miles per hour. Given the high speed at which the vehicles were traveling on a major highway, it was reasonable for the Trooper to conclude that Hernandez was following the vehicle in front of him "more closely than is reasonable and prudent." RSA 265:25, I. The court finds that the Trooper had probable cause to believe that Hernandez had committed a traffic violation. Thus, the court finds the traffic stop justified at its inception.

II. <u>Extension of the Traffic Stop</u>

The next question, however, is whether the scope of the traffic stop exceeded its mission. "[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that

warranted the stop and to attend to related safety concerns." Rodriguez v. United States, 135 S. Ct. 1609, 1614 (2015) (internal quotation marks and citations omitted). Because the purpose of the stop is addressing the traffic violation, the stop may "last no longer than is necessary to effectuate that purpose." Id. (internal quotation marks and brackets omitted). Accordingly, police authority for the seizure expires "when tasks tied to the traffic infraction are—or reasonably should have been—completed." Id.; see also Illinois v. Caballes, 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.").

An officer's "mission" during a traffic stop may also include "ordinary inquiries incident to the traffic stop." Rodriguez, 135 S. Ct. at 1615 (internal quotation marks and brackets omitted). Such inquiries typically "involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." Id. These checks are permissible because they "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." Id.

Rodriguez teaches that in the absence of reasonable suspicion of criminal activity or actions taken to ensure officer safety, further investigation unrelated to the purpose of the stop is unlawful if it "prolongs—i.e., adds time to—the stop." Id. at 1616 (internal quotation marks omitted). Unrelated investigations are permissible only if they do not prolong the stop. Id. at 1615. For example, in Caballes, the Supreme Court held that an officer's drug dog sniff of defendant's vehicle did not prolong the stop and was therefore reasonable because it was conducted while another officer wrote the defendant a ticket for a traffic violation. Caballes, 543 U.S. at 406, 409.

In Rodriguez, the officer effectuated a traffic stop based on a minor traffic violation, asked the defendant and his passenger about their travel plans, checked both the driver's and passenger's licenses, and then issued the driver a warning. Rodriguez, 135 S. Ct. at 1613. After returning their papers and issuing the warning, the officer instructed defendant and his passenger to exit the vehicle, had a second officer come to the scene, and then walked his drug dog around defendant's vehicle, extending the stop by seven or eight minutes. Id. The Court held that the officer's conduct prolonged the duration of the stop beyond that needed to resolve the traffic violation and therefore remanded for a determination of whether the officer

had reasonable suspicion justifying the extension of the stop. Id. at 1616-17.

Given this legal landscape, the relevant inquiries here are threefold: (1) were the Trooper's actions reasonably related in scope to the purpose or "mission" of the stop; (2) if not, did those actions "prolong—i.e., add time to—the stop"; and (3) if yes, was the additional time supported by reasonable suspicion of criminal activity? Rodriguez, 135 S. Ct. at 1614-16; Mouscardy, 722 F.3d at 73.

A. Were the Trooper's Actions Reasonably Related to the Purpose or Mission of the Stop?

The purpose or mission of this stop is undisputed: the Trooper pulled Hernandez over for tailgating. The bulk of the Trooper's questions during his first interaction with Hernandez were reasonably related to the initial stop or amounted to routine questions about Hernandez's itinerary. See Dunbar, 553 F.3d at 56 (holding that officer's questioning about itinerary did not exceed scope of stop for traffic violation when there was no indication officer's questions "rose beyond the routine").[5] The Trooper first asked for Hernandez's license and

[5] The Trooper conceded that he suspected Hernandez of involvement in drug trafficking before he even initiated the stop. The Trooper's subjective beliefs, however, are not relevant. See Whren, 517 U.S. at 813; McGregor, 650 F.3d at 822. The court must assess and weigh the evidence from an objective standpoint. See Whren, 517 U.S. at 813.

registration, which Hernandez provided—along with the rental car agreement. The Trooper also explained to Hernandez the reason he had pulled Hernandez over. The Trooper then asked Hernandez where he was headed and made some small talk with him, during which time Hernandez informed the Trooper that he had never been arrested and that the Trooper could confirm that by "look[ing] him up." The Trooper asked further questions about Hernandez's shopping itinerary and pressed Hernandez on precisely what he intended to purchase at the Kittery Outlets.

The Trooper returned to his cruiser and ran Hernandez's license and registration and confirmed that Hernandez had a valid license and no warrants for his arrest. The Trooper also examined the rental agreement and conducted a Google search for a Hollister store at the Kittery Outlets.[6]

At this point, the "tasks tied to the traffic infraction [were]—or reasonably should have been—completed." Rodriguez, 135 S. Ct. at 1614. The Trooper should have, upon his return to Hernandez's car, returned the license, registration, and rental agreement, and either issued Hernandez a citation/warning for the traffic violation or sent him on his way. The Trooper did

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[6] It is not clear that the Trooper's Google search prolonged the stop. The Trooper testified the search was "brief" and there was no evidence to suggest the Google search required the Trooper to remain in the cruiser any longer than it took for him to complete the license and registration checks.

not do that, however. Instead, the Trooper continued to detain Hernandez and ultimately asked Hernandez to exit his car. Once Hernandez was out of his car, the Trooper noticed a bulge in his pocket and proceeded to do a pat-down search. The bulge turned out to be a wad of cash, which fact added substance to—what at that point—was a mere hunch on the Trooper's part that Hernandez was engaged in drug trafficking. See United States v. Chhien, 266 F.3d 1, 8 (1st Cir. 2001) (officer's suspicions "understandably escalated" after learning that defendant was carrying $2,000 in cash). Thus, viewing the circumstances as they unfolded, the Trooper's request that Hernandez exit the car to continue speaking with him was not reasonably related to the mission of the stop. Under these circumstances, that request was designed to advance the Trooper's investigation of suspected criminal activity. Cf. Rodriguez, 135 S. Ct. at 1615 (explaining that dog sniff cannot fairly be characterized as part of officer's traffic mission because it is a measure aimed at detecting evidence of criminal wrongdoing).

B. Did the Trooper's Unrelated Conduct Prolong the Stop?

The court finds that the Trooper's request for Hernandez to exit his car prolonged the stop. As explained above, when the Trooper returned to Hernandez's car, the "tasks tied to the traffic infraction [were]—or reasonably should have been—

completed." Rodriguez, 135 S. Ct. at 1614. Instead of issuing a warning or a citation and sending Hernandez on his way, the Trooper asked Hernandez out of his car and moved him to the rear of the car to continue his investigation. There can be no dispute, then, that the Trooper's request that Hernandez exit his car added time, however brief, to the stop. See id. at 1615. Thus, the stop survives Fourth Amendment scrutiny only if the request to exit the car and speak further with the Trooper was either supported by reasonable suspicion of criminal activity or related to officer safety. See id. at 1616-17. That is the final prong of the analysis.

C. Was the Request that Hernandez Exit His Car Supported by Reasonable Suspicion?

The government does not contend that the Trooper's request for Hernandez to exit his car was related to officer safety.[7]

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[7] The court acknowledges, as the government points out, that the Supreme Court has held that an officer may order the driver or a passenger out of a lawfully stopped car as a matter of course in the interest of officer safety, without reasonable suspicion that the person poses a safety risk. See Maryland v. Wilson, 519 U.S. 408, 414-15 (1997); Pennsylvania v. Mimms, 434 U.S. 106, 110-11 (1977). However, the Trooper's request that Hernandez exit the vehicle was not made as a matter of course during their initial interaction. Cf. Mimms, 434 U.S. at 107. Rather, the Trooper employed the request to initiate a further conversation, i.e., an investigation, after the tasks tied to the traffic stop were or reasonably should have been resolved. The court would reach the same result here if, instead of asking Hernandez out of the vehicle, the Trooper had returned to the car and begun questioning Hernandez again while he remained in his car.

Rather, the government argues that the request was supported by reasonable and articulable suspicion of criminal conduct. Doc. no. 15 at 9-10. To establish reasonable suspicion, the government "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, justify an intrusion on a private person." United States v. Jones, 700 F.3d 615, 621 (1st Cir. 2012) (internal quotation marks omitted). Reasonable suspicion requires something more than a "naked hunch that a particular person may be engaged in some illicit activity," but something less than probable cause that a person has committed a crime. Chhien, 266 F.3d at 6.

In assessing whether an officer had reasonable suspicion, the court may not engage in a "divide-and-conquer analysis" that scrutinizes each factor in isolation. United States v. Arvizu, 534 U.S. 266, 274 (2002). Rather, the court must consider the "totality of the circumstances of each case to see whether the detaining officer ha[d] a particularized and objective basis for suspecting legal wrongdoing." Id. at 273 (internal quotation marks omitted). This totality consists of "the facts available to the officer at the moment of the seizure or search." Jones, 700 F.3d at 621 (internal quotation marks omitted).

In considering the totality of the circumstances, the court should examine the basis for the traffic stop as well as what the officer observed moment by moment as the stop unfolded. See

Chhien, 266 F.3d at 6. The First Circuit has said that the reasonable suspicion analysis "entails a measurable degree of deference to the perceptions of experienced law enforcement officers." United States v. Dion, 859 F.3d 114, 124 (1st Cir. 2017) (internal quotation marks and citations omitted). While showing deference to law enforcement, the court's inquiry must remain objective. See Dunbar, 553 F.3d at 55. The court's focus is not the officer's subjective beliefs or intentions, but, rather, "what a reasonable officer in his [or her] position would have thought." United States v. Espinoza, 490 F.3d 41, 47 (1st Cir. 2007).

The government points to numerous facts to support the Trooper's suspicion—at the time he requested Hernandez exit the car—that criminal activity was afoot. The court lists those facts below.

Facts observed before the stop

- Hernandez was driving a rental car, and, rental cars are "utilized for criminal activities, specifically drug trafficking"

- Hernandez was driving north on Interstate 95, a "known drug corridor"

- Hernandez had followed the car in front of him too closely for twenty to thirty seconds

- When the Trooper pulled even with Hernandez, Hernandez had his hands on the steering wheel in a "ten and two" position, appeared "stiff," and was leaning far back from

the steering wheel such that his profile was not visible due to the door frame

Facts observed after the stop but before the request to exit the car

- There were two unopened packages of rubber bands next to car cleaning supplies in the back seat
- Hernandez was initially "standoffish" and gave "one-word answers" to the Trooper's questions about his itinerary
- Hernandez said he had no arrest record and that the Trooper could "look him up" and asked the Trooper if he knew him from work
- Hernandez appeared "excessively nervous"
- Hernandez was traveling to the shopping outlets in Kittery, Maine, a "location . . . where drug transactions do occur"
- Hernandez said he was going shopping to buy Hollister jeans, but the Trooper discovered that there is no Hollister store at the Kittery Outlets
- The rental agreement appeared to contradict Hernandez's statement about the date on which he rented the car

To determine whether the Trooper had a "particularized and objective basis for suspecting legal wrongdoing," the court must consider these circumstances in their "totality." Arvizu, 534 U.S. at 273 (internal quotation marks omitted).

In support of reasonable suspicion, the government and the Trooper relied heavily on the fact that Hernandez appeared nervous once he was aware of the Trooper's presence on the highway and then throughout their interaction. The Trooper's testimony on this point was inconsistent and lacking in

objective facts to support such an observation. The Trooper testified that once he had pulled his cruiser alongside Hernandez's car, he "noticed [Hernandez's] overall posture was stiff and that he had his hands on the steering wheel in a ten and two manner and his body was concealed by the door frame or the B pillar." The court finds it implausible that the Trooper could observe that Hernandez's "overall posture" was "stiff" while Hernandez's body was also "concealed by the door frame." Moreover, even if the court were to credit this testimony, the Trooper offered no objective evidence that Hernandez changed his behavior due to the Trooper's presence.[8]

Later, the Trooper testified that when he first initiated contact with Hernandez he appeared "very stiff" and "anxious." The Trooper then explained that Hernandez appeared to "calm down" after learning that he had been stopped for tailgating. The Trooper also testified that Hernandez's overall demeanor was "stiff" and "nervous" at several later points during their interaction: when they were discussing whether the Trooper knew Hernandez and when they discussed the Kittery Outlets and what Hernandez intended to buy there. On re-cross-examination, the

[8] The Trooper did not testify about Hernandez's posture at the time he saw Hernandez pass through the tolls or at any time before the Trooper pulled alongside him.

Trooper altered his testimony, describing Hernandez as "excessively nervous."

The court does not find this testimony particularly credible. The Trooper did not clarify at what point Hernandez became nervous again after he had calmed down upon learning the reason for the stop. Further, other than describing Hernandez as "stiff," the Trooper did not offer any objective indications of Hernandez's nervousness, such as sweating, shaking, fumbling paperwork, or failure to make eye contact. There was no credible evidence that Hernandez's behavior rose above the level of nervousness exhibited by the average person stopped by the police. See United States v. McKoy, 428 F.3d 38, 40 (1st Cir. 2005) ("Nervousness is a common and entirely natural reaction to police presence. . . .").

The government also relied heavily on the Trooper's testimony that Hernandez exhibited certain "suspicious" behaviors. The court finds that some aspects of this testimony strain credulity. First, the Trooper testified that it was suspicious that, when he pulled alongside Hernandez, Hernandez had his hands on the steering wheel in a "ten and two manner" while concealing his body behind the doorframe. Viewed from the perspective of an objectively reasonable officer, there is nothing suspicious about a driver placing his hands at "ten and two" on the steering wheel. See United States v. Dukes, 257 F.

App'x 855, 856 n.1 (6th Cir. 2007) (observing that defendant's "law-abiding behavior" of sitting rigidly with her hands "in the ten-and-two position" and failing to look at the police as she drove by "cannot be the basis of either probable cause or reasonable suspicion").

Second, the Trooper described Hernandez as initially acting standoffish and giving quick answers, which gave the Trooper the impression that Hernandez wanted to hurry the interaction along. Viewed objectively, a reasonable officer would not find this suspicious, especially given that Hernandez is a member of a racial minority and may have had mixed experiences with the police in the past. Cf. Illinois v. Wardlow, 528 U.S. 119, 132 (2000) (Stevens, J. concurring in part and dissenting in part) (observing that, especially among minorities, flight may not indicate guilt but, rather, the minority's belief "that contact with the police can itself be dangerous"). Similarly, Hernandez's attestation that he had no arrest record and his attempts to start a conversation about Pep Boys may have been intended to combat any negative stereotypes he expected the Trooper might hold.

In short, the court finds it difficult to credit—and therefore to defer to—the Trooper's testimony about what facts he found suspicious, especially where he testified that Hernandez's hands on the steering wheel at "ten and two"

bolstered his suspicion of criminality. Drivers are taught to drive with their hands on the wheel at "ten and two." See United States v. Peters, No. 1:11-cr-00085-JMS-KPF, 2012 WL 1120665, at *8 (W.D. Ind. Apr. 3, 2012) (observing that "ten and two" position is "commonly taught in many driver's education courses"). Were Hernandez's hands in a position other than "ten and two" and in some way not visible to the Trooper, the Trooper could have used that fact to support a concern that Hernandez was hiding his hands from the Trooper's view. Similarly lacking in credibility was the Trooper's reliance upon the anxiety of Hernandez (a non-Caucasian male whom he had just pulled over) as support for his belief that Hernandez was engaged in criminal activity. In these times, it makes as much sense for a Trooper to be suspicious about a driver who appears perfectly calm after being pulled over, particularly where the driver is a non-Caucasian male. The bottom line here is that the Trooper's use of these kinds of neutral or innocent facts to support his suspicion of criminality draws into doubt the credibility of his reliance on other facts to support his suspicion of Hernandez's criminal activity.

The totality of the remaining facts, objectively viewed, describes a considerable number of people traveling on our nation's highways for perfectly legitimate reasons. The Supreme Court has recognized that reasonable suspicion may rest on

factors that are individually consistent with "innocent travel" but collectively amount to reasonable suspicion. United States v. Sokolow, 490 U.S. 1, 9 (1989). Consistent with this principle, the Fourth and Eleventh Circuits apply the rule that, in order to support reasonable suspicion that criminal activity is afoot, the facts viewed in their totality must "serve to eliminate a substantial portion of innocent travelers." United States v. Williams, 808 F.3d 238, 246 (4th Cir. 2015) (internal quotation marks omitted); United States v. Boyce, 351 F.3d 1102, 1109 (11th Cir. 2003). As stated by the Tenth Circuit: "Although the nature of the totality of the circumstances test makes it possible for individually innocuous factors to add up to reasonable suspicion, it is impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation." United States v. Wood, 106 F.3d 942, 948 (10th Cir. 1997) (internal quotation marks omitted). The Eighth Circuit has stated much the same:

> While we are mindful that conduct which would be wholly innocent to the untrained observer might acquire significance when viewed by an agent who is familiar with the practices of drug smugglers and the methods used to avoid detection, it is impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation.

United States v. Beck, 140 F.3d 1129, 1137 (8th Cir. 1998) (internal quotation marks, citations, and ellipsis omitted).

Prior to asking Hernandez to exit the car, the Trooper observed insufficient facts to establish articulable and reasonable suspicion that Hernandez was engaged in criminal conduct. The facts relied upon by the government to establish reasonable suspicion of criminality at that point in time do not distinguish Hernandez from an innocent traveler. First, with respect to the reason for the stop, the Trooper testified that hundreds of cars every day travel within a car length of the car in front of them for short periods of time. Thus, at the outset, Hernandez was guilty of doing something the Trooper had seen hundreds of times every day. The Trooper conceded that millions of people drive rental cars for perfectly legal reasons. The Trooper also admitted that many people—including innocent travelers—change their behavior after seeing a police cruiser, often by stiffening up or becoming nervous.

Regarding Hernandez's travel route, the Trooper testified that Interstate 95 is a "known drug corridor" and that he knows the Kittery Outlets specifically to be used for drug transactions. But he also testified that Interstate 95 is an "extremely busy highway," that all of Vermont, New Hampshire, and Maine are considered drug destination areas, and that drug transactions occur at various locations throughout these states.

See United States v. White, 584 F.3d 935, 951-52 (10th Cir. 2009) ("Because law enforcement officers have offered countless cities as drug source cities and countless others as distribution cities . . . the probativeness of a particular defendant's route is minimal."); Beck, 140 F.3d at 1138 n.3 (collecting cases identifying various states and major cities as "source" locations). Even when viewed together, these facts do not distinguish Hernandez from innocent travelers and are therefore weak facts in favor of reasonable suspicion.

The government relies on three additional factors in support of reasonable suspicion: the presence of two unopened bags of rubber bands; Hernandez's apparent intent to shop for Hollister jeans although there is no Hollister store at the Kittery Outlets; and Hernandez's apparent inconsistent statement about when he rented the car. First, with respect to the rubber bands, the Trooper testified that rubber bands are often used after drug transactions to bundle cash. Here, however, the rubber bands were found in the back of the car next to cleaning supplies. The Trooper conceded that this combination was not suspicious or indicative of drug trafficking. Rubber bands would more powerfully indicate drug trafficking when paired with other tools of the trade (e.g. baggies or a scale) or other facts suggesting the presence or use of drugs (e.g. an odor of marijuana or signs of impairment). Without more to tie the

rubber bands to criminality, it seems an unreasonable inference that these two unopened bags of rubber bands in this rental car were used, or destined to be used, for drug trafficking.

Second, with respect to the Hollister jeans, Hernandez consistently stated that he was going to the Kittery Outlets to buy Hollister jeans; his story did not change. And he was on a direct route to his stated destination. Had Hernandez changed his story or been inconsistent as to his itinerary, the Trooper's suspicions would have been more credible. But the evidence that Hollister jeans can only be purchased at a Hollister store came from the Trooper's own anecdotal experience of shopping at Hollister. Hernandez's shopping plans did not in any way indicate criminality. Cases where a defendant's inconsistent statements support reasonable suspicion rest on far more than what was present here. Cf. Dion, 859 F.3d at 125-26, 128 (finding reasonable suspicion when defendant with Colorado plates and an Arizona license was stopped in Kansas and stated he was returning from a cross-country road trip to visit his CPA in Pennsylvania); Wood, 106 F.3d at 947 (observing that defendant's misstatement of city where he rented car could support reasonable suspicion if it suggested he was trying to conceal fact that he had been in a known source state).

Likewise, the apparent inconsistency between Hernandez's statement about when he retrieved the car and the date on the

rental agreement does not further the drug-trafficking theory or indicate criminal activity generally. At most, this inconsistency would indicate to a reasonable officer that Hernandez might have lied about when he rented the vehicle. But to what end? There is no reasonable inference to be drawn, on these facts, that Hernandez lied about when he rented the vehicle to obscure some aspect of his drug-trafficking scheme.[9]

Importantly, the Trooper also learned several facts before he asked Hernandez to step out of the car that actually should have dispelled some of his concerns. The Trooper quickly resolved the "odd" color inconsistency: based on the fact that the rental agreement stated the car color as black, the Trooper reasonably concluded that the registration mistakenly listed the color as red. He also learned that Hernandez had a valid license and no outstanding warrants. Notably absent from the Trooper's observations were any signs of impairment, smell of

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[9] Relying on United States v. Wright, 582 F.3d 199, 213 (1st Cir. 2009), the government argues that the inconsistency between Hernandez's statement that he rented the vehicle that day and the date on the rental agreement constituted an "ambiguity" that the Trooper was entitled to follow-up on and clarify. Assuming for the sake of argument that Wright supports that proposition, this court must follow the law as more recently prescribed in Rodriguez: that the police must have reasonable suspicion, not merely some unresolved ambiguity, in order to justify prolonging the stop beyond those inquiries reasonably related to the purpose of the stop. See Rodriguez, 135 S. Ct. at 1616.

alcohol or marijuana, or any furtive movements, indicating that Hernandez might be trying to conceal contraband.

The totality of the circumstances occurring prior to the Trooper's request for Hernandez to exit the car, viewed from the perspective of a reasonable officer, does not provide a particularized and objective basis for reasonable suspicion that Hernandez was involved in drug-trafficking. See Reid v. Georgia, 448 U.S. 438, 441 (1980) (holding that arriving to airport early in morning, when law enforcement presence is diminished, from known drug-source city with minimal luggage was insufficient to support reasonable suspicion); Boyce, 351 F.3d at 1109 (holding no reasonable suspicion supported extension of stop when defendant was driving rental car on widely used interstate known as a drug corridor and planned to return his rental car late because those facts "would likely apply to a considerable number of those traveling for perfectly legitimate purposes" (internal quotation marks omitted)); Williams, 808 F.3d at 247, 252-53 (same result when defendant was traveling in rental car on known drug corridor late at night, his stated travel plans were inconsistent with duration of rental agreement, and he made apparently inconsistent statements about his address); see also Garcia, 53 F. Supp. 3d at 511 (finding no reasonable suspicion supporting extension of traffic stop based on facts including driver's and defendant's unusually nervous

behavior and defendant's and other passenger's history of drug involvement).

The extension of the stop to the point when the Trooper asked Hernandez to exit the car violated the Fourth Amendment and was unlawful. If the opposite were true, the vast majority of travelers on our nation's highways would be subject to extended detention during a routine traffic stop. Cf. Reid, 448 U.S. at 441 (holding facts insufficient to support reasonable suspicion because they "describe[d] a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude" those facts could justify a seizure).

D. Summary

In sum, the teaching of Rodriguez is clear: the Fourth Amendment requires officers to end a traffic stop once its mission is—or reasonably should be—over. Rodriguez, 135 S. Ct. at 1614. Here, a driver was stopped for following another car too closely. The Trooper conceded that he witnessed "hundreds" of that same traffic violation every day. The Trooper did not ask the driver why he was tailgating, or questions designed to determine whether he might be distracted or impaired, or whether there might be some other reason for the traffic violation. The driver had a valid license and no outstanding warrants.

Objectively, there was no reason for the Trooper to prolong this minor traffic violation stop to the point that the Trooper requested the driver to exit his car. Had the Trooper been concerned about the driver's impairment, or his own safety, such a request would have been reasonable. The request would also have been reasonable in the presence of a fact—in addition to the rubber bands—that pointed toward criminality: odor of marijuana or alcohol; visible sign of drug use; presence of drug paraphernalia; attempt to conceal items inside the car from view; an outstanding arrest warrant; a suspended license, etc. Although an incriminating fact (i.e., the wad of cash in his pocket) developed after the driver exited the car and walked behind the car, the Trooper was not aware of that fact when he asked the driver to exit the car.

This stop should have ended once the Trooper learned that the driver's license was valid and there were no outstanding warrants. The Trooper should have returned to the car merely to give the driver his papers and communicate the result of the stop (i.e., a violation, warning, or nothing). By prolonging the stop beyond that point and asking the driver to exit his car to further investigate, the Trooper violated the Fourth Amendment. The court therefore concludes that the government has not met its burden of showing that the seizure here was

sufficiently limited in its nature and duration. See Royer, 460 U.S. at 500; Acosta-Colon, 157 F.3d at 14.

III. Fruit of the Poisonous Tree

The court concludes that the Trooper's request for Hernandez to exit the car extended the stop and violated the Fourth Amendment. But the question remains whether the drugs the Trooper subsequently recovered from Hernandez's car must be suppressed.

The Fourth Amendment's prohibition on unreasonable searches and seizures "is enforced through the exclusionary rule, which excludes evidence seized in violation of the Fourth Amendment." United States v. Camacho, 661 F.3d 718, 724 (1st Cir. 2011). "Evidence obtained during a search may be tainted by the illegality of an earlier Fourth Amendment violation, so as to render such evidence inadmissible as 'fruit of the poisonous tree.'" Id. at 728 (internal quotation marks omitted). Specifically, a defendant's consent to search may be invalidated if it "bears a sufficiently close relationship to the underlying illegality." United States v. Smith, 919 F.3d 1, 11 (1st Cir. 2019) (internal quotation marks and brackets omitted). The government bears the burden of showing that the causal connection between the illegal act and the defendant's consent was broken and that the evidence is therefore admissible. See

Brown v. Illinois, 422 U.S. 590, 604 (1975); see also e.g., United States v. Alvarez-Manzo, 570 F.3d 1070, 1077 (8th Cir. 2009) ("[T]o purge the taint, i.e. prevent the application of the 'fruit of the poisonous tree' doctrine, the government bears the burden of demonstrating that the voluntary consent was an independent, lawful cause of the search.").

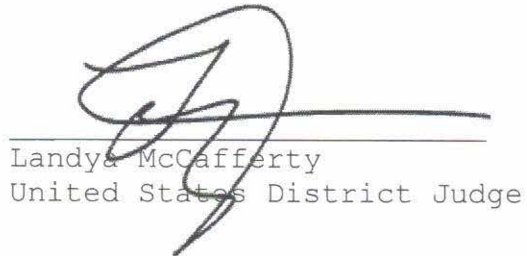
Despite bearing the burden on this issue, the government makes no attempt to show that any causal connection between the unlawfully extended stop and Hernandez's subsequent consent to search the vehicle was severed. Instead, the government argues only that Hernandez's consent was voluntary, doc. no. 15 at 11, which is a distinct issue from whether the consent was tainted by the prior unlawful detention. See Smith, 919 F.3d at 11-14 (addressing taint and voluntariness of consent separately). Because the government has failed to meet its burden on this issue, the court finds that the evidence obtained as a result of the consent search is "fruit of the poisonous tree" and must be suppressed. See Alvarez-Manzo, 570 F.3d at 1077-78 (upholding district court's suppression of evidence when government made no attempt to show that taint of prior constitutional violations had been purged prior to his consent to search); United States v. Reeves, 524 F.3d 1161, 1170-71 (10th Cir. 2008) (reversing district court's denial of motion to suppress when government

completely failed to address whether taint of unlawful arrest had been purged prior to consent).

CONCLUSION

For the foregoing reasons, Hernandez's motion to suppress the evidence obtained as a result of the search of his vehicle during the traffic stop, doc. no. 14, is granted.

SO ORDERED.



Landya McCafferty
United States District Judge

July 9, 2019

cc: Charles J. Keefe, Esq.
Charles L. Rombeau, Esq.
U.S. Probation
U.S. Marshal