

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28288

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

BREE BARRY,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
2nd JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE SUSAN M. SABERS
Circuit Court Judge

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JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to SDCL 15-26A-3(2).

STATEMENT OF LEGAL ISSUES

DID THE TRIAL COURT ERR IN SUPPRESSING MARIJUANA FOUND DURING A SEARCH OF A DRUG COURIER'S RENTED CAR ON THE GROUND THAT THE OFFICER HAD UNDULY PROLONGED THE TRAFFIC STOP WITHOUT REASONABLE SUSPICION OF DRUG ACTIVITY?

Rodriguez v. United States, 135 S.Ct. 1609 (2015)

State v. Littlebrave, 2009 SD 104, 776 N.W.2d 85

State v. Kenyon, 2002 SD 11, 51 N.W.2d 269

United States v. Walton, 827 F.3d 682 (7th Cir. 2016)

The trial court suppressed the evidence as incident to a traffic stop prolonged past the time necessary to issue a citation.

PRELIMINARY STATEMENT

The dashboard camera video of the stop, encounter and arrest will be cited as VIDEO followed by a reference to the corresponding time signature. The suppression hearing transcript will be cited as TRANSCRIPT followed by a reference to the corresponding page/line. The trial court's findings of fact and conclusions of law, and the transcript of the suppression hearing, are attached in the APPENDIX hereto.

STATEMENT OF THE CASE

Bree Barry was charged with multiple counts of possessing marijuana with the intent to distribute. She moved to suppress the drugs discovered in her vehicle as incident to a search lacking in a reasonable suspicion to prolong the predicate traffic stop beyond the

time necessary to issue a citation for speeding. The trial court granted the motion. The state now takes an intermediate appeal.

STATEMENT OF FACTS

On December 2, 2016, at approximately 9:26 a.m., Highway Patrol Trooper Joshua Olson clocked a black Hyundai SUV driving nine miles over the speed limit on a stretch of interstate just west of Sioux Falls. Olson pulled the vehicle over. It bore a Colorado license plate. The driver, Bree Barry, appeared nervous; her hand shook as she handed Olson her license. TRANSCRIPT at 8/20.

The video shows Barry in the front seat of Olson's unit explaining that she had flown to Colorado from her home in Wisconsin about 10 days earlier to be with her brother while he participated in a "Spaulding clinical," an FDA trial of an Alzheimer's treatment drug. VIDEO at 9:28:12.ⁱ See CHART 2: VIDEO CHRONOLOGY, Endnote i. Barry laughs for no apparent reason. VIDEO at 9:29:05. The video shows Olson typing on his computer running the license plate. VIDEO at 9:29:01.

The Hyundai came up as registered to a Colorado car rental agency and rented in the name of a person other than Barry. Barry explains that her brother's girlfriend had rented the car for her because she does not have a credit card – which did not explain why Barry needed to rent a car in the first place rather than fly back home. VIDEO at 9:29:35; TRANSCRIPT at 7/24, 8/1. From his drug interdiction training and experience, Olson knew that marijuana distributors in Colorado often fly

drug mules in and provide them a car to drive product back to illegal markets in other states. TRANSCRIPT at 8/12.

When Olson asks why Barry needed to go to Colorado to be with her brother if he had a girlfriend who could be with him during the “Spaulding clinical,” Barry stammers out an unconvincing explanation, laughs nervously, cuts her explanation short and changes the subject. VIDEO at 9:29:46, 9:29:51; TRANSCRIPT at 8/12. Olson is seen continually typing on his computer. VIDEO at 9:30:16.

Olson informs Barry that he intends to drop the speeding citation down to 5 over, which ordinarily eases the ordinary nervousness ordinary people feel during a traffic stop . . . but not Barry’s. VIDEO at 9:30:16; TRANSCRIPT at 9/18. Barry’s nervousness persisted.

Less than four minutes from the time of the stop and three minutes from the time Barry entered his vehicle, Olson is seen propping Barry’s driver’s license up against his computer screen in preparation for running a criminal history/warrant check. VIDEO at 9:30:36. Meanwhile, Barry is rambling about her travel itinerary as Olson types. VIDEO at 9:30:51, 9:31:44.

Olson then asks if Barry “has had issues” with the law. VIDEO at 9:31:44; TRANSCRIPT 10/13. Four minutes into her encounter with Olson inside his vehicle, Barry admits that she is a recovering heroin addict who had worked off drug charges in Wisconsin doing confidential informant work for law enforcement. VIDEO at 9:31:44; TRANSCRIPT

10/18. Barry lets out more nervous laughter. VIDEO at 9:31:57, 9:32:21.

Olson asks Barry if there is anything in her vehicle that he should be concerned about, such as weapons or drugs. VIDEO at 9:32:57. Barry answers with an emphatic “No.” Olson continues typing on his computer. VIDEO at 9:32:57.

Olson asks Barry if she knows about “drug sniffing canines” used in South Dakota and asks her if a drug dog would alert to anything in her vehicle if he were to walk the dog around the exterior of her vehicle. VIDEO at 9:33:23. Barry says “No, it’s alright” and shrugs her left shoulder as though giving consent. VIDEO at 9:33:23.

Olson remarks that Barry appears “extremely nervous” to him and questions if she is being 100% honest with him. VIDEO at 9:33:35. Olson asks if Barry brought “a little something back with her” from Colorado. Barry says she has nothing. VIDEO at 9:33:43. Olson asks if he would find anything if he searched the vehicle and Barry says he would “not find anything, I promise.” VIDEO at 9:33:53. Olson asks if it would be OK to search her vehicle. VIDEO at 9:24:03. Barry emphatically says “No,” but says she is refusing only because she is majoring in criminal justice and knows her rights. VIDEO at 9:24:03.

Olson appears confused because he thought Barry had just consented to an exterior canine pass. VIDEO at 9:34:32. Barry explains that, no, she was speaking hypothetically, meaning that “if you were to

do it, like it would be fine, there wouldn't be anything" – not that she was consenting. VIDEO at 9:34:32. Olson continues processing the stop on his computer. VIDEO at 9:34:45-9:35:20. Olson asks "What would you say if I told you that I had information that you were transporting drugs?" VIDEO at 9:35:21. Barry appears nervous. VIDEO at 9:35:21.

Olson is seen examining Barry's driver's license, a beep is heard as though he has scanned a code on it into his computer. VIDEO at 9:35:33-9:35:41. As Olson is preparing to write up the ticket, he detects a faint odor of burnt marijuana on Barry's clothing. TRANSCRIPT at 13/22. Because of the marijuana odor, Olson initiates eye nystagmus testing. VIDEO at 9:36:07; TRANSCRIPT 29/20, 30/1. Olson asks if Barry had used marijuana in Colorado. Barry responds "Yes. Absolutely. You don't get to do that anywhere else." VIDEO at 9:37:32; TRANSCRIPT 11/18.

Olson asks Barry if she had used marijuana that morning. She denies any use that day and raises her arm up to sniff her clothing. VIDEO at 9:38:28. Olson radioes for a canine. VIDEO at 9:38:52. Olson asks Barry if she used marijuana while in the clothes she is wearing and Barry responded "Do I smell like it?" VIDEO at 9:39:44. Olson tells her "Yeah," and Barry lifts her arm again to sniff her clothing. VIDEO at 9:39:44.

Olson then has Barry perform a partial alphabet sobriety test. VIDEO at 9:40:12. He again tells her he is detecting a faint whiff of

marijuana from her and asks her to be honest with him about whether she brought any drugs back with her from Colorado. VIDEO at 9:41:12. Barry responds that she “enjoyed [her] time in Colorado” but she did not bring drugs back with her. VIDEO at 9:41:33. Olson asks Barry for her phone number as he continues processing her speeding ticket on his computer. VIDEO at 9:41:43. He is then advised by radio that a K-9 unit is *en route* to his location. VIDEO at 9:41:51. When Olson tells Barry he needs a few minutes because a canine unit is on the way, Barry nods her head in apparent agreement to wait. VIDEO at 9:42:22. She asks if a canine search takes long and Olson tells her no. VIDEO at 9:42:22. Barry shrugs her shoulder and nods her head affirmatively in apparent consent to wait for the search.

Approximately five minutes of general conversation follows while Olson continues processing the stop and waiting for the K-9 unit’s arrival. VIDEO at 9:42:52-9:47:05. Olson is heard re-asking Barry for her phone number because he had accidentally deleted the ticket he was in the process of writing. VIDEO at 9:47:08.

Olson was not finished processing the ticket before the K-9 officer arrived. Olson is heard explaining to the K-9 officer that Barry had come from Colorado, admitted to using marijuana while there, appeared extremely nervous, and smelled of burnt marijuana. VIDEO at 9:51:12. When Barry protests that she appears nervous, Olson states that he

could see her carotid artery pulsing from where he was seated. VIDEO at 9:51:12.

The drug dog alerts to drugs in the Hyundai. Olson advises Barry that he is going to search the vehicle, tells her he likes to give people one last opportunity to tell the truth, and asks “Is there anything in the car?” Barry responds “No.” VIDEO at 9:55:02.

Inside the Hyundai was a large, locked graphite suitcase. Barry tells the K-9 officer that it contained “souvenirs” but she did not have a key. VIDEO at 9:56:39. Olson cracks open the suitcase enough to see something like marijuana wrapped in plastic inside. He handcuffs Barry and places her in the back seat of the police vehicle and closes the door. VIDEO at 10:01:20. While Olson and the K-9 officer stand outside conferring, Barry, alone in the vehicle, is heard on video to say “That’s a lot of fuckin’ marijuana. Great.” VIDEO at 10:02:16.

ARGUMENT

The state appeals from the trial court’s suppression of the marijuana contained in the suitcase Barry was transporting in her rented Hyundai. In its bench ruling ordering the suppression, the trial court remarked that it had “never received a speeding ticket this slowly.” TRANSCRIPT at 34/15. Without identifying at what point “the stop should have been concluded,” the trial court stated that “the stop was elongated multiple times.” TRANSCRIPT at 34/13-16. The trial court assumed that Olson had not detected the odor of marijuana emanating

from Barry's person before he verbalized it 13 minutes into the stop, though the officer testified that he had detected the marijuana odor before he verbalized it – somewhere around the 9 or 10 minute mark. TRANSCRIPT at 34/17, 13/22, 29/20, 30/1. The trial court found that the marijuana odor was not grounds to suspect criminal activity given Barry's "admission as to legal use in the State of Colorado."

TRANSCRIPT at 36/2. The trial court stated it did not view the facts that Barry's hand was shaking when she handed Olson her license or that she was "displaying nervousness at a traffic stop" as "evidence of drug dealing activity or drug transporting activity." TRANSCRIPT at 35/13. The trial court ruled "there was [not] enough [for reasonable suspicion], even when viewed cumulatively, to wait this out for the drug dog." TRANSCRIPT at 35/14.

The trial court erred by (1) not accounting for or giving due weight to all of the indicia of drug courier activity known or revealed to Olson during the stop, (2) finding that the stop had been prolonged, (3) finding (if it was prolonged) that Olson lacked reasonable suspicion to do so, and (4) analyzing the stop from the subjective perspectives of the trial court's personal experiences with traffic enforcement and Barry's innocent explanations of suspicion factors rather than objectively from the perspective of the investigating officer.

Per *Rodriguez v. United States*, 135 S.Ct. 1609, 1614 (2015), authority for a traffic stop "ends when tasks tied to the infraction are – or

reasonably should have been – completed.” Any evidence obtained during a period “exceed[ing] the time needed to handle the matter for which the stop was made . . . violates the Constitution’s shield against unreasonable seizures” and may be suppressed. *Rodriguez*, 135 S.Ct. at 1612.

The United States Supreme Court has specifically rejected any “hard and fast time limit” regarding traffic stops. *State v. Kenyon*, 2002 SD 11, ¶ 20, 51 N.W.2d 269, 275. Reasonable suspicion to justify extending a traffic stop is examined under an objective test; the facts justifying suspicion are measured “as a totality and in light of the officer’s experience.” *Ballard*, 2000 SD 134 at ¶ 13, 617 N.W.2d at 841. “Although the government bears the burden of proving the reasonableness of an officer’s suspicion, reasonable suspicion is not, and is not meant to be, an onerous standard.” *United States v. Kitchell*, 653 F.3d 1206, 1219 (10th Cir. 2011). “The officer's observations and experience, the location, and the underlying circumstances need only reasonably support ‘a commonsense inference’ that additional criminal activity is occurring or about to occur” to constitute reasonable suspicion. *Kenyon*, 2002 SD 111 at ¶ 18, 651 N.W.2d at 274.

Determinations of reasonable suspicion are reviewed *de novo* on appeal. *State v. Ballard*, 2000 SD 134, ¶ 9, 617 N.W.2d 837, 840. A court’s findings of fact are affirmed unless this court is “left with a definite and firm conviction that a mistake was made.” *Ballard*, 2000 SD

134 at ¶ 9, 617 N.W.2d at 840. The application of legal standards to the facts is a question of law reviewed *de novo*. *Ballard*, 2000 SD 134 at ¶ 9, 617 N.W.2d at 840.

Here, Olson’s suspicion reasonably rested on nine recognized indicia of drug activity that were known or revealed to him within 11 minutes of effecting the stop: travel from a known drug source state,¹ nervousness,² one-way air travel,³ third-party rental vehicle,⁴ inconsistent story,⁵

¹ *State v. Littlebrave*, 2009 SD 104, ¶ 19, 776 N.W.2d 85, 92 (Washington considered drug source state); *State v. Kenyon*, 2002 SD 11, ¶ 17, 51 N.W.2d 269, 274 (defendant traveling in “a known drug corridor for methamphetamine traffic”); *State v. Akuba*, 2004 SD 94, ¶ 2, 686 N.W.2d 406, 409 (rental car from source state of Oregon); *United States v. Trejo*, 2015 WL 4392845, *7 (D.Ct.S.D.)(travel from a “source state” like Colorado a factor in suspicion calculus); *United States v. Sanford*, 806 F.3d 954, 956 (7th Cir. 2015)(defendant’s traveling in a “known drug corridor”); *United States v. Walton*, 827 F.3d 682 (7th Cir. 2016)(defendant traveling from Colorado); *United States v. Beasley*, 180 F.Supp.3d 836, 839 (D.Ct.Kan. 2016)(origin of package from Colorado an indicia of suspicion).

² *Littlebrave*, 2009 SD 104 at ¶ 3, 776 N.W.2d at 87 (defendant’s “shook nervously”); *Kenyon*, 2002 SD 11, ¶ 17, 51 N.W.2d at 274 (nervous behavior justified reasonable suspicion); *State v. Ballard*, 2000 SD 134, ¶ 14, 617 N.W.2d 837, 841 (“nervous behavior” justified prolongation of stop); *Akuba*, 2004 SD 94 at ¶ 6, 686 N.W.2d at 410 (“nervousness increased” at mention of drug dog); *Sanford*, 806 F.3d at 956 (vehicle occupants were “nervous and evasive”); *Trejo*, 2015 WL 4392845 at *6 (“nervous, evasive behavior is a factor in determining reasonable suspicion”); *Walton*, 827 F.3d at 684 (vehicle passenger “extremely nervous”); *United States v. Walker*, 840 F.3d 477, 482 (8th Cir. 2016)(odor of marijuana combined with nervousness established probable cause for search of vehicle); *United States v. Pettit*, 785 F.3d 1374, 1380 (10th Cir. 2015)(defendant’s arm shook when he handed his license to officer and was “moving nervously”); *United States v. Shafer*, 608 F.3d 1056, 1063 (8th Cir. 2010)(defendant’s “hands were shaking and she appeared nervous”).

³ *Littlebrave*, 2009 SD 104 at ¶ 19, 776 N.W.2d at 92 (one-way return flight to drug source state of Washington); *Walton*, 827 F.3d at 684 (one-way flight to drug source state of Colorado); *Pettit*, 785 F.3d at 1380 (one-way air travel to California to pick up car belonging to a “friend”).

persistent nervousness after being informed that the officer would only be issuing a reduced citation,⁶ drug offense history,⁷ search refusal,⁸ and marijuana odor or admitted use.⁹ As illustrated in Chart 1, just four or

⁴ *Littlebrave*, 2009 SD 104 at ¶ 5, 776 N.W.2d at 88 (defendant driving vehicle rented to passenger), citing *United States v. Brigham*, 382 F.3d 500507 (5th Cir. 2004)(car rental agreement in name of 50-year-old female suspicious when no female was in the vehicle); *Sanford*, 806 F.3d at 956 (neither driver nor passengers of car named in rental agreement); *Walton*, 827 F.3d at 687 (drug couriers prefer to rent SUVs for the larger areas available to conceal contraband); *United States v. Murillo-Salgado*, 854 F.3d 407, 416 (8th Cir. 2017)(inadequate explanation for renting truck to drive from California to North Carolina grounds for suspicion); *United States v. Fadiga*, 858 F.3d 1061, 1062 (7th Cir. 2017)(suspicion aroused by driver of vehicle rented to “a friend”); *Pettit*, 785 F.3d at 1382 (defendant driving “a vehicle registered to an absent third party”).

⁵ *Littlebrave*, 2009 SD 104 at ¶ 6, 776 N.W.2d at 88 (inconsistency re: purpose of trip); *Kenyon*, 2002 SD 11, ¶ 20, 51 N.W.2d at 275 (defendant’s “inconsistent account of his destination” suspicions); *State v. Hanson*, 1999 SD 9, ¶ 4, 588 N.W.2d 885, 889 (inconsistent stories between driver and passengers factor in probable cause analysis); *Trejo*, 2015 WL 4392845 at *6 (“inconsistent stories” are “factors in the suspicion calculus”); *Murillo-Salgado*, 854 F.3d at 415 (conflicting responses between driver and passenger regarding purpose of trip and who was paying for rental vehicle); *Walton*, 827 F.3d at 688 (inconsistency in stories between driver and passenger regarding prior traffic stop “indicated criminal activity”); *Sanford*, 806 F.3d at 959 (defendant’s history of drug arrests “made a compelling case to wait for the dog”); *Fadiga*, 858 F.3d at 1062 (inconsistent reports about who owned vehicle and destination).

⁶ *Trejo*, 2015 WL 4392845 at *5 (carotid artery and chest visibly thumping even after being informed that officer was only issuing a warning); *Walton*, 827 F.3d at 688 (nervousness persisted even after being informed that officer would only issue a warning).

⁷ *Murillo-Salgado*, 854 F.3d at 412, 416 (defendant’s history of drug offenses a factor in reasonable suspicion); *Walton*, 827 F.3d at 686 (defendant’s history of drug trafficking offense relevant to reasonable suspicion); *Pettit*, 785 F.3d at 1380 (defendant’s record of arrests for drug offenses factor in reasonable suspicion); *Kenyon*, 2002 SD 11, ¶ 9, 51 N.W.2d at 272 (defendant had prior arrests for marijuana possession).

⁸ *Trejo*, 2015 WL 4392845 at *5 (defendant “insisted there were no drugs or additional cash in the vehicle, but refused to consent to search of the same”).

five of these nine indicia are cumulatively sufficient under apposite case law to constitute reasonable suspicion:

CHART 1: SUSPICION FACTORS

	1	2	3	4	5	6	7	8	9
Barry	* CO	*	*	*	*	*	*	*	*
Littlebrave 16M	* WA	*	*	*	*				
Akuba 10M	* OR	*							
Kenyon 25M	* IA	*			*		*		*
Ballard		*							
Hanson					*				*
Trejo 40M	* CO	*			*	*		*	*
Woods 38M					*				*
Smith									*
Walker		*							*
Murillo 20M				*	*		*		
Walton 22M	* CO	*	*	*	*	*	*		
Sanford	*	*		*			*		
Fadiga 30M				*	*				
Pettit 26M		*	*				*		
Beasley	* CO								
Shafer		*			*				*
Wright									*

1. Source City/State
2. Nervous
3. One-Way Air Travel
4. 3rd Party Vehicle Rental
5. Inconsistent Story

6. Persistent Nervousness
7. Drug Offense History
8. Search Refusal
9. Drug Odor/Admitted Use

⁹ *United States v. Wright*, 844 F.3d 759, 762 (8th Cir. 2016)(odor of burnt marijuana on defendant's person alone sufficient to detain); *United States v. McCoy*, 200 F.3d 582 (8th Cir. 2000)(detection of odor of burnt marijuana on defendant's person while running computer checks reasonable suspicion); *State v. Iverson*, 2009 SD 48, ¶ 18, 768 N.W.2d 534, 539 (odor of contraband sufficient for reasonable suspicion to investigate possible wrongdoing); *Kenyon*, 2002 SD 11, ¶ 9, 51 N.W.2d at 272 (passenger admitted to methamphetamine use earlier in evening); *Walker*, 840 F.3d at 483 (odor of burnt marijuana highly probative of probable cause to search); *United States v. Woods*, 829 F.3d 675, 677 (8th Cir. 2016)(inconsistent story and marijuana odor supported reasonable suspicion); *Shafer*, 608 F.3d at 1063 (odor of marijuana supported further investigation).

For example, in *State v. Littlebrave*, 2009 SD 104, 776 N.W.2d 85, this court found that the indicia of one-way air travel to a source state and return travel in a third-party rental vehicle, nervousness, inconsistent story, and odor of a drug masking agent were sufficient indicia of suspicion of drug activity to warrant investigation beyond the 16 minutes required to process the original traffic stop.

Likewise, in *United States v. Walton*, 827 F.3d 682 (7th Cir. 2016), the court found that the indicia of one-way air travel to Colorado and return travel in a rented SUV, persistent nervousness, inconsistent stories from the driver and passenger, and the driver's criminal history of drug trafficking offenses were sufficient indicia of suspicion to warrant prolonging the stop past the 22 minutes that it took to write the ticket for the predicate traffic offense.

Again in *United States v. Sanford*, 806 F.3d 954 (7th Cir. 2015), the court found reasonable suspicion with only four indicia present: travel from a source state, nervousness, third-party rental vehicle and a history of drug offenses. *United States v. Murillo-Salgado*, 854 F.3d 407 (8th Cir. 2017)(three indicia).

Here seven of the nine indicia of suspicion noted in *Littlebrave*, *Walton* and *Sanford* were known or revealed to Olson within 5 minutes of stopping Barry's vehicle and all nine within 11 minutes:

MINUTE 1: Car licensed in the drug source state of Colorado.

VIDEO at 9:26:48. Barry was shaking and nervous. TRANSCRIPT at 8/20.

MINUTE 2: One-way air travel to Colorado. VIDEO at 9:28:34; TRANSCRIPT 7/19.

MINUTE 3: Return travel in a car rented in name of third party. VIDEO 9:29:35. Nervous and silent when asked about inconsistency in story that brother needed Barry there during “Spaulding trial” when brother had girlfriend to be with him. VIDEO at 9:29:46; TRANSCRIPT 8/12.

MINUTE 4: Persistent nervousness after Olson informs Barry he would be issuing a reduced ticket. TRANSCRIPT at 9/18.

MINUTE 5: Olson learns that Barry has prior drug offense history. VIDEO at 9:31:44.

MINUTE 6: Nervous laughter. VIDEO at 9:31:57, 9:32:21.

MINUTE 7: Olson tells Barry she appears “extremely nervous.” VIDEO at 9:33:35.

MINUTE 8: Barry refuses search. VIDEO at 9:34:18.

MINUTE 9: Olson detects faint marijuana odor on Barry’s person as he starts to write up ticket. TRANSCRIPT at 13/22.

MINUTE 10: Olson initiates field sobriety tests as a result of detecting marijuana odor. TRANSCRIPT at 29/20, 30/1.

MINUTE 11: Barry admits to using marijuana while in Colorado.

VIDEO at 9:37:32.

Comparing the timing of the disclosures of these indicia of drug activity to the activity on the video reveals that Olson had reasonable suspicion that Barry was engaged in criminal conduct well before he completed his processing of the traffic stop.

In Minutes 2 and 3, Olson appears to be running the license plate and registration on the vehicle based on the questions he asks about Barry's travel itinerary. In Minutes 4 and 5, Olson appears to be running Barry's criminal history based on questions he asks about whether she has had "issues" with the law. Also in Minute 4, Olson is seen preparing to run Barry's driver's license. By the time Barry discloses her heroin addiction and drug convictions in Minute 5, Olson's suspicion of drug activity was reasonable under *Littlebrave*, *Walton* and *Sanford*. In Minutes 5-8, Olson is seen continually working on the computer while asking Barry questions pertinent to the history of drug use just revealed to him. *Littlebrave*, 2009 SD 104 at ¶ 13, 776 N.W.2d at 90. At about the time Olson is seen handling Barry's license in preparation for writing a citation (Minute 9) and Olson's initiation of field sobriety testing (Minute 10), Olson detects a faint odor of marijuana on Barry's clothing. "[T]he detection of the odor of marijuana on a person justifies the

expansion of a traffic stop.” *United States v. Lindner*, 759 F.Supp.2d 1133, 1139 (D.Ct.S.D. 2010).

Allowing for the time required to run the plate on Barry’s vehicle (Minute 2), make permissible, routine inquiries into Barry’s travel itinerary (Minute 3),¹⁰ run a check on Barry’s criminal history (Minute 5),¹¹ ask permissible questions raised by Barry’s drug history (Minutes 7-8),¹² run Barry’s driver’s license and type up a citation (Minute 9), one struggles to see where the stop “should have been concluded” before the 9 minute mark. TRANSCRIPT 34/16. *Littlebrave*, 2009 SD 104 at ¶ 14, 776 N.W.2d at 90 (routine traffic stop questions consuming first 16 minutes did not unconstitutionally prolong detention). The stop of Barry’s vehicle certainly was not “elongated multiple times” in the space of only 9 minutes. TRANSCRIPT at 34/13. Rather, as in *Kenyon*, “[b]y

¹⁰ *Akuba*, 2004 SD 94 at ¶ 20, 686 N.W.2d at 415 (routine questioning on subjects like place of origin, destination, employment and the purpose of the trip permitted); *Littlebrave*, 2009 SD 104 at ¶ 13, 776 N.W.2d at 90 (“routine questions” and questions unrelated to original purpose of the stop permitted); *Trejo*, 2015 WL 4392845 at *4 (officer may ask questions during and unrelated to stop).

¹¹ *Murillo-Salgado*, 854 F.3d at 415 (officers may detain driver while “complet[ing] a number of the routine but somewhat time-consuming tasks related to the traffic violation,” including computerized checks of identification, vehicle registration, insurance, criminal history and preparation of ticket or warning); *Pettit*, 785 F.3d at 1379 (officer may run “requisite computer checks” during a routine traffic stop); *Sanford*, 806 F.3d at 956 (computer check of criminal history reasonable as it takes little time and may reveal outstanding arrest warrants).

¹² *Littlebrave*, 2009 SD 104 at ¶ 13, 776 N.W.2d at 90 (officer permitted to ask follow-up questions concerning indicia of suspicion which develop during routine traffic stop).

the time he completed his computer check of [Barry, Olson] had already developed reasonable suspicion.”

Even assuming that Barry’s admission to “legally” using marijuana in Colorado (Minute 11) fell outside the time required to complete the original traffic stop, Olson had reasonable grounds to prolong the stop as early as Minute 5 but no later than Minute 9. If the trial court’s encounters with traffic enforcement lasted less than 9 minutes (TRANSCRIPT at 34/15), it is probably because it has never been pulled over in a rented SUV on the return leg of a one-way flight to a drug source state.

And if Barry’s admission to “legal use [of marijuana] in the State of Colorado” (TRANSCRIPT at 36/2) fell within the time required to complete the traffic stop, it did not in any way mitigate suspicion that she may have used again that morning in South Dakota or brought marijuana back with her from Colorado.¹³ If anything, Barry’s admission to marijuana use two days earlier was independent probable cause to arrest her for violation of SDCL 22-42-15 and search her vehicle incident to that arrest. *United States v. Fadiga*, 858 F.3d 1061, 1063 (7th Cir. 2017)(no prolongation of stop when officer had independent grounds to detain driver who was not authorized by rental contract to drive vehicle).

¹³ *Kenyon*, 2002 SD 111 at ¶ 18, 651 N.W.2d at 274 (innocent facts, when considered together, can give rise to reasonable suspicion); *Trejo*, 2015 WL 4392845 at *6 (innocent acts may, in combination with other facts, give rise to reasonable suspicion).

CONCLUSION

Even before *Rodriguez*, the law and practice in South Dakota was that “an investigatory detention ‘should last no longer than is necessary to effectuate the purpose of the stop’ *unless* the officer has reasonable suspicion that additional criminal activity is afoot.” *Littlebrave*, 2009 SD 104 at ¶ 16, 776 N.W.2d at 91 (emphasis in original). This case does not even implicate – let alone push the envelope of – *Rodriguez* or *Littlebrave* because the video reveals that Olson had reasonable suspicion to detain Barry before he finished processing the stop. *State v. Akuba*, 2004 SD 94, ¶ 24, 686 N.W.2d 406, 417.

Thus, the trial court clearly erred in finding any prolongation of the stop or lack of reasonable suspicion to do so. The trial court also erred as a matter of law in failing to account for and give due weight to *all* the of the indicia of suspicion present during the subject stop and in analyzing the stop subjectively from the perspectives of the court’s dissimilar experiences with traffic stops and Barry’s “innocent” spin on the odor of marijuana on her clothing. Objectively, Barry’s “legal” marijuana use in Colorado did not vitiate suspicion of continuing drug activity in South Dakota, such as possession by ingestion, subsequent use in South Dakota, or bringing back some Colorado product as a

“souvenir.” Accordingly, this court should reverse the trial court’s order suppressing the suitcase full of marijuana found in Barry’s car.

Dated this 6th day of September 2017.

Respectfully submitted,

MARTY J. JACKLEY
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i CHART 2: BARRY TRAFFIC STOP VIDEO CHRONOLOGY cross-referenced to TRANSCRIPT

MINUTE 1: 9:26:48-9:27:48

9:26:48 – Stop effected.

MINUTE 2: 9:27:48-9:28:48

9:27:50 – Barry enters patrol vehicle.

9:28:12 – Barry explains on way to home in Wisconsin after visit to Colorado to keep brother company during Spaulding clinical.

9:28:34 – Barry says she flew to Colorado. TRANSCRIPT 7/19

9:28:41 – Barry says she was in Colorado about 10 days.

MINUTE 3: 9:28:48-9:29:48

9:29:01 – Olson typing on keyboard/screen activity visible.

9:29:05 – Barry laughs.

9:29:35 – Barry visited brother’s girlfriend in Centennial, says brother’s girlfriend rented car because she does not have a credit card.

TRANSCRIPT 7/24, 8/1. Fits drug mule profile. TRANSCRIPT 10/4, 12/18.

9:29:46 – Barry appears nervous when Olson mentions brother had girlfriend with him. TRANSCRIPT 8/12.

MINUTE 4: 9:29:48-9:30:48

9:29:51 – Barry laughs.

9:30:16 – Olson says he will drop it down to 5 over. Screen activity on computer.

TRANSCRIPT 9/18 – Barry remained nervous after being informed Olson would drop ticket to 5 over.

9:30:30 – Barry says she just got on road, stayed at hotel 60 miles before stop.

9:30:36 – Olson props license up on laptop. Appears to start running license from screen activity. TRANSCRIPT 12/21, 20/8. **RUNNING LICENSE**

MINUTE 5: 9:30:48-9:31:48

9:30:51 – Barry says she made only one stop, drove 11 hours day before.

9:31:26 – Barry yawns.

9:31:36 – Olson seen typing on keyboard/screen activity. **WARRANT CHECK/CRIMINAL HISTORY**

9:31:44 – Screen activity. Trooper checks Barry's record and asks about if she "has had issues" before. TRANSCRIPT 10/13. Barry says she is a recovering heroin addict and has worked as a CI. TRANSCRIPT 10/18. Olson ran warrant check. TRANSCRIPT 20/11.

MINUTE 6: 9:31:48-9:32:48

9:31:57 – Barry laughs.

9:32:21 – Barry laughs.

9:32:35 – Olson seen working computer.

MINUTE 7: 9:32:48-9:33:48

9:32:57 – Olson asks if Barry has anything in her vehicle he needs to be concerned about, such as weapons. Barry says "No." Olson still working computer.

9:33:09 – Olson asks about drugs – cocaine, heroin, methamphetamine, marijuana.

9:33:23 – Olson asks if she knows about “drug sniffing canines” in South Dakota and asks if they had a K-9 check the vehicle would it alert to anything in the vehicle. Barry says “No, it’s alright” and shrugs shoulder. Appears nervous. Appears to consent to exterior sniff by canine.

9:33:35 – Olson tells Barry she appears extremely nervous and does not appear to being 100% honest with him.

9:33:43 – Olson asks Barry if she brought a little something back with her. Barry says she has nothing.

MINUTE 8: 9:33:48-9:34:48

9:33:53 – Olson asks if he would find anything if he searched the vehicle. Barry says he would “not find anything at all, I promise.”

9:34:03 – Olson asks Barry if it would be OK to search vehicle. Barry says “No.” Appears nervous.

9:34:18 – Barry says declining search only because she knows her rights from school. Appears nervous, laughs.

9:34:32 – Olson says he believed she had consented to exterior sniff by canine and Barry says “No, did I?”

9:34:42 – Barry explains that she meant that “if you were to do it, like it would be fine, there wouldn’t be anything, that’s what I meant,” not that it would be fine for them to do it.

9:34:45-9:34:48 – Olson seen working computer.

MINUTE 9: 9:34:48-9:35:48

9:34:48-9:35:20 – Olson seen working computer.

9:35:21 – Olson asks Barry “What you would say if I told you that I had information that you were transporting drugs?” Barry appears nervous.

9:35:33-9:35:41 – Olson handles driver’s license. Beep heard. Appears to be examining or scanning driver license. **WORKING ON TICKET**

TRANSCRIPT 13/22 – Olson smelled marijuana on Barry at about the same time he started working on ticket.

MINUTE 10: 9:35:48-9:36:48

TRANSCRIPT 29/20, 30/1 – Olson smelled burnt marijuana right about the time he initiated field sobriety tests.

9:36:07 – Olson initiates nystagmus testing.

MINUTE 11: 9:36:48-9:37:48

9:37:32 – Olson asks if Barry used marijuana in Colorado, Barry says “Yes. Absolutely. You don’t get to do that anywhere else.” TRANSCRIPT 11/18.

MINUTE 12: 9:37:48-9:38:48

9:37:56 – Olson asks last time she used. Barry says day before yesterday.

9:38:00 – Olson working computer.

9:38:28 – Olson asks if Barry used marijuana that morning. Barry denies. Barry said she got straight on the road without even showering. Barry raises arm up to sniff her clothing.

TRANSCRIPT 14/1 – Olson smelled marijuana on Barry before he called for K-9.

MINUTE 13: 9:38:48-9:39:48

9:38:52 – Olson initiates request for K-9.

9:39:30 – Olson affirms request, identifies location at mile marker on I-90.

9:39:44 – Olson asks Barry “Did you use in those clothes?” Barry says “Do I smell like it?” Olson says “Yeah.” Barry sniffs her arm. TRANSCRIPT 13/10.

MINUTE 14: 9:39:48-9:40:48

9:40:12 – Olson initiates alphabet/numerical tests.

MINUTE 15: 9:40:48-9:41:48

9:41:12 - Olson says he is getting faint whiffs of burnt marijuana from her. TRANSCRIPT 13/10. Says he wants Barry to be honest with him and she says she is being honest “I’m really being honest, I promise you.”

9:41:33 – Barry says she “enjoyed [her] time in Colorado” but she did not bring anything back.

9:41:43 – Olson requests phone number for ticket. Screen activity.

MINUTE 16: 9:41:48-9:42:48

9:41:51 – Olson informed K-9 *en route* to him.

9:42:22 – Olson tells Barry he needs a few minutes because a K-9 is on the way. Barry nods head in apparent agreement to wait. Barry asks if K-9 search takes long. Olson says no. Barry shrugs shoulders and nods head affirmatively appearing to consent to wait and to search.

MINUTES 17-20: 9:42:48-9:46:48

9:42:52-9:47:05 – General conversation re: criminal justice system.
Olson working computer/screen activity visible.

9:46:02 – Barry's brother also recovering heroin addict.

MINUTES 21-24: 9:46:48-9:50:48

9:47:08 – Olson re-asks for phone number because he accidentally deleted that ticket.

9:47:09- 9:50:48 – Olson seen retyping ticket. **RE-WORKING TICKET**

MINUTE 25: 9:50:48-9:51:48

9:50:48-9:51:05 – Olson seen retyping ticket.

9:51:06 – K-9 arrives.

9:51:12 – Olson explains to K-9 handler than Barry came from Colorado, appears extremely nervous (Barry denies, Olson says carotid artery is pulsating right now), admits to using while there, mentions faint odor of burnt marijuana on Barry.

MINUTES 26-28: 9:51:48-9:54:48

9:51:20-9:54:40 – K-9 search.

9:54:42 – Olson says when K-9 sits, usually indicates alert to odor.

MINUTE 29: 9:54:48-9:55:48

9:55:02 – K-9 handler says K-9 alerted. Advises Barry they are going to search the vehicle. Tells Barry he likes to give people one last opportunity to tell the truth. K-9 handler asks "Is there anything in the car?" Barry responds "No."

MINUTE 30: 9:55:48-9:56:48

9:56:39 – Olson searches vehicle. Barry informs K-9 handler that there is a suitcase in her vehicle containing "souvenirs" that has a lock on it and she does not have the key.

MINUTE 31: 9:56:48-9:57:48

9:57:34 – Olson removes large graphite suitcase from rear hatch of car.

MINUTE 32: 10:00:48-10:01:48

10:01:20 – Barry cuffed and placed in back seat of patrol car.

MINUTE 33: 10:01:48-10:02:48

10:02:16 – Barry: "That's a lot of fuckin' marijuana. Great."

CERTIFICATE OF COMPLIANCE

1. I certify that appellee's brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in proportional 12 point type. Appellee's brief contains 5,890 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Paul S. Swedlund
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of September 2017 a true and correct copy of the foregoing brief was served via e-mail on Christian Ruud at cruud@minnehahacounty.org.

Paul S. Swedlund
Assistant Attorney General

APPENDIX

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STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

CRI. 16-8845

Plaintiff,

vs.

BREE BARRY

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER SUPPRESSING EVIDENCE**

Defendant.

The above-entitled matter came on for hearing on April 20, 2017, on Defendant's Motion to Suppress Evidence before the Honorable Susan M. Sabers. Defendant Bree Barry (Defendant) appeared in person and through her attorney Christian Ruud; the State appeared through Deputy State's Attorney Mandi Mowery. The Court, having heard and considered the evidence and arguments of the parties, makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On December 2, 2016 at approximately 9:26 a.m., Trooper Joshua Olson with the South Dakota Highway Patrol observed Defendant's vehicle traveling on Interstate 90 in Minnehaha County, South Dakota at 89 miles per hour in an 80 miles per hour zone.
2. The trooper testified that as Defendant passed his location, she "took a long look" at him, which the trooper testified he believed was an indicator of criminal activity.
3. The trooper testified that he never observed Defendant's vehicle weaving or swerving, nor did he observe any indicators of intoxication, odors of intoxicants, or any drug-related paraphernalia.
4. The Court has reviewed the video recording of the trooper's interaction with Defendant.
5. The trooper initiated a traffic stop of Defendant's vehicle.
6. While at the side of Defendant's vehicle, the trooper did not detect the odor of marijuana or any other intoxicants.

7. In his testimony before this Court, the trooper claimed that Defendant acted "nervous" throughout his encounter with her. The trooper testified that he saw her hand shaking while he was speaking with her. The trooper testified that he observed Defendant's carotid artery visibly pulsating, although on cross-examination the trooper admitted that he had no training in vascular medicine or in determining whether a pulsating neck artery is indicative of nervousness. The trooper further testified that he observed what he characterized as a "fake or forced laugh" by Defendant, although admitted that he had never met Defendant before and was not familiar with how Defendant normally sounded when she laughs.
8. After examining Defendant's driver's license, the trooper asked Defendant come back to his patrol vehicle. She did so. The trooper then ran a license check on Defendant, conducted a warrant check, ran her registration, and inspected her paperwork. After completing these checks and satisfying himself that there was no cause for concern as to those checks, the trooper told Defendant that he was going to reduce the speeding ticket so the violation was for five miles over the speed limit instead of nine, as a courtesy to her.
9. Approximately six minutes after initially stopping Defendant, after conducting the various warrant and license checks and telling Defendant he was reducing the ticket amount, the trooper then began questioning Defendant as to what she was transporting inside the vehicle.
10. The purpose of the stop was the investigation of a speeding offense. At that point, the purpose of the stop was effectuated, but the trooper extended the stop. The issue is whether there was reasonable suspicion to do so.
11. The trooper continued to question her about her trip, family, and other matters unrelated to the speeding offense for which she was stopped, and for which he cited her.
12. The trooper continued to question Defendant about the contents of the vehicle and asked repeatedly for consent to search the vehicle. Defendant denied consent to search.
13. The trooper then asked Defendant "what would you say if I told you we had information that you were transporting drugs in this vehicle?" Defendant appeared confused, and the trooper admitted he was "just asking a hypothetical."

14. Despite observing no indications that Defendant was under the influence of drugs or alcohol, the trooper began performing standard field sobriety tests on Defendant, including extended visual testing in his vehicle.
15. The trooper asked Defendant if she had used marijuana while visiting Colorado, and Defendant admitted to having used marijuana approximately two days prior.
16. Approximately thirteen minutes after initially stopping Defendant, the trooper used his radio to inquire whether a police service dog was available. While waiting for a response, the trooper continued conducting standard field sobriety tests, despite observing no indicators of impairment.
17. Approximately fourteen minutes after stopping Defendant, the trooper stated for the first time that he was getting "faint whiffs" of "burnt" marijuana from Defendant's person.
18. Defendant responded that she was wearing a jacket that she had worn in Colorado while smoking marijuana, and that she had not yet washed it.
19. Approximately three minutes after his initial radio inquiry, a full 16 minutes after the initial stop, the trooper received confirmation that a police service dog was available and en route to his location.
20. Approximately ten minutes after the radio inquiry, during which lapse of time no further investigation was performed by the trooper, the police service dog unit arrived--roughly 26 minutes after the stop.
21. The police service dog indicated on the vehicle, and during a subsequent search of the vehicle, officers located marijuana and drug paraphernalia.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter of this action.
2. The Fourth Amendment of the United States Constitution and Article VI, Section 11 of the South Dakota Constitution protect citizens from unreasonable searches and seizures. U.S. Constitution, Amendment IV; South Dakota Constitution, Article VI, Section 11.
3. A law enforcement officer must have reasonable suspicion of criminal activity to stop an automobile, and such suspicion must not be the product of mere whim, caprice or idle curiosity, but must be based upon specific articulable facts which taken together with

rational inferences from those facts, reasonably warrant the intrusion. Terry v. Ohio, 392 U.S. 1 (1968); State v. Chavez, 668 N.W.2d 89 (S.D. 2003).

4. Trooper Olson had reasonable suspicion to justify his original stop of Defendant's vehicle, based upon the observation that Defendant was traveling in excess of the posted speed limit.
5. The officer's actions during a stop must be "reasonably related in scope to the circumstances that justified the interference in the first place." State v. Amick, 831 N.W.2d 59, 63 (S.D. 2013). "The 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 initial stop and to attend to related safety concerns." Rodriguez v. U.S., 135 S. Ct. 1609, 1614 (2015) (citations omitted).
6. During an otherwise lawful stop, a trooper may conduct certain unrelated checks, including checking the "driver's license, determining whether there are any outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance," without the reasonable suspicion ordinarily demanded to justify stopping an individual. Rodriguez, 135 S. Ct. at 1614-15.
7. Trooper Olson conducted a stop on Defendant's vehicle to address a speeding violation. The trooper conducted these unrelated document checks before informing Defendant he was reducing the violation amount.
8. Following these checks, the trooper's original "mission" was completed—the driving infraction had been dealt with, and related safety concerns had been attended to.
9. The trooper had concluded that Defendant was who she claimed to be and had no active warrants.
10. The trooper's continued questioning and use of the drug dog lacked the same close connection to roadway safety as did his initial stop and inquiries, and as such a dog sniff was not fairly characterized as part of the trooper's mission in the present case.
11. Any investigative detention "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." Illinois v. Caballes, 543 U.S. 405, 407 (2005). "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." Rodriguez, 135 S. Ct. at 1612.

12. Only when an officer develops a reasonable, articulable suspicion that criminal activity is afoot does the officer have justification for a greater intrusion unrelated to the initial traffic offense. State v. Cummins, 920F.2d 498, 502 (8th Cir. 1990).
13. This stop was prolonged beyond the time required to complete that mission and was, therefore, unlawful. On these facts, the officer lacked sufficient justification for a greater intrusion.
14. When determining the presence of reasonable suspicion, a suspect's nervousness has limited significance. U.S. v. Jones, 269 F.3d 919, 928 (8th Cir. 2001). "Because the government repeatedly relies on nervousness as a basis for reasonable suspicion, it must be treated with caution." Id. at 929 (citations omitted).
15. The Defendant's act of yawning and giggling, when viewed as part of the totality of the circumstances surrounding the stop, do not give rise to a suspicion of criminal behavior on these facts to justify the continued questioning or elongated stop to which Defendant was subjected.
16. The fact that Defendant gave the trooper a "long look" while driving past his vehicle or that she appeared nervous during the stop did not give rise to a reasonable suspicion of criminal behavior. Neither Defendant's shaking hand, nor her alleged nervousness, was sufficient to give rise to a reasonable suspicion of criminal behavior on these facts.
17. The trooper lacked a particularized and objective basis for suspecting criminal behavior under the totality of the circumstances presented here. The cumulative effect of the non-criminal, legal conduct observed here, whether yawning, giggling, or looking, did not give rise to the level of reasonable suspicion of criminal behavior. See generally State v. Walter, 2015 S.D. 37, 864 N.W.2d 779, 785.
18. The trooper did not smell the "faint" odor of "burnt" marijuana until after he had already unlawfully extended the duration of the initial stop. Likewise, Defendant's admission to having used marijuana two days prior also came after the stop had been unlawfully extended.
19. Trooper Olson lacked reasonable suspicion of criminal activity to continue to detain Defendant after completing the original mission of the stop – the issuance of a speeding ticket. Trooper Olson further lacked reasonable suspicion to extend the stop to conduct standard field sobriety tests, or to call for a drug dog.

20. The stop at issue was unnecessarily extended multiple times. There were numerous times when the initial stop should have been reasonably concluded, but it was not.
21. Because the trooper lacked reasonable suspicion necessary to continue to detain Defendant, the subsequent discovery of incriminating evidence was also unlawful and that evidence must be suppressed. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).
22. Any Finding of Fact that is more properly a Conclusion of Law shall be deemed so, and any Conclusion of Law that is more properly a Finding of Fact shall be deemed so.
23. The Findings and Conclusions proposed by the parties, not expressly incorporated above, are hereby refused.

ORDER

It is HEREBY ORDERED that Defendant's Motion to Suppress Evidence is GRANTED.

Dated this 24th day of May, 2017.



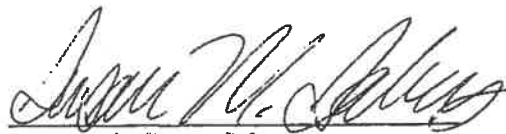
ATTEST:

Angelia M. Gries, Clerk

BY: 

Deputy

BY THE COURT:



Honorable Susan Sabers
Circuit Court Judge



STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

CRI. 16-8845

Plaintiff,

vs.

NOTICE OF ENTRY OF ORDER

Bree Barry

Defendant.

TO: AARON MCGOWAN, STATE'S ATTORNEY, MANDI MOWERY, DEPUTY
STATE'S ATTORNEY, AND TO WHOM IT MAY CONCERN:

YOU WILL PLEASE TAKE NOTICE that Findings of Fact, Conclusions of Law, and
Order Suppressing Evidence, dated March 24, 2017, in the above entitled case was entered by
the Court and filed with the Clerk on the 25th day of May, 2017, and that attached hereto is a true
and correct copy thereof.

Dated this 5th day of June, 2017.

/s/Christian Ruud
Attorney for Defendant

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF MINNEHAHA) :SS
SECOND JUDICIAL CIRCUIT

3 -----
4 STATE OF SOUTH DAKOTA,) CRI. 16-8845
5 Plaintiff,)
6 vs.) SUPPRESSION HEARING
7 BREE BARRY)
8 Defendant.)
9 -----

10 BEFORE: THE HONORABLE SUSAN SABERS, Circuit Judge, at
11 Sioux Falls, South Dakota, on the 20th of April, 2017.
12 -----

13 APPEARANCES: Mandi Mowery
14 Minnehaha County State's Attorney's Office
15 Sioux Falls, South Dakota

16 Appearing on behalf of the plaintiff;

17 Christian Ruud
18 Minnehaha County Public Defender's Office
19 Sioux Falls, South Dakota

20 Appearing on behalf of the defendant.
21
22
23
24
25

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1 THE COURT: We are on the record in the matter of Bree
2 Barry, criminal number 16-8845. Mandi Mowery for the State;
3 Christian Ruud for Ms. Barry, who is personally present and
4 out of custody. Here today for a suppression hearing based
5 on a motion filed by the Defense. At this time, Ms. Mowery,
6 you may begin to call your first witness.

7 MS. MOWERY: State calls Trooper Olson.

8 **TROOPER JOSH OLSON**

9 Called as a witness, having been first duly sworn, testified
10 as follows:

11 Q (By MS. MOWERY) Please state your name and spell your
12 name for the record.

13 A Josh Olson. J-O-S-H, and O-L-S-O-N.

14 Q How are you employed?

15 A South Dakota Highway Patrol.

16 Q How long have you been so employed?

17 A For about 15 years.

18 Q What sort of training and education did you receive to
19 become a trooper?

20 A Prior to becoming a South Dakota State Trooper I was a
21 law enforcement officer in Montana, went through Montana Law
22 Enforcement Academy, as well as the South Dakota Law
23 Enforcement Academy and/or the South Dakota Highway Patrol
24 Trooper Academy. And since then I have been to other
25 specialized trainings as well.

1 Q And do some of those specialized trainings include
2 narcotics trainings?

3 A Yes, ma'am.

4 Q Tell us some of the information that you received
5 through those trainings.

6 A Just some of the trainings I have been to include, you
7 know, criminal patrol, drug interdiction, drug
8 identification, and just identifying keys and indicators on
9 stops, identifying criminal activity.

10 Q Were you on duty and so employed as a trooper on
11 December 2nd of 2016?

12 A Yes, I was.

13 Q On that particular date did you end up having contact
14 with Bree Barry?

15 A Yes, I did.

16 Q Do you see Ms. Barry in the courtroom today?

17 A I do.

18 Q Can you identify her by where she is seated and what
19 she is wearing?

20 A At the defendant's table with a tan shirt on.

21 MS. MOWERY: May the record reflect that Trooper Olson
22 has identified Ms. Barry.

23 THE COURT: So noted.

24 Q (BY MS. MOWERY) Trooper, where did you have contact
25 with Ms. Barry on December 2nd?

- 1 A Approximately mile marker 392 on I90.
- 2 Q And that's in Minnehaha County?
- 3 A Yes, ma'am.
- 4 Q About what time of did you have contact with her?
- 5 A Early morning, I guess, morning at around 9:26, I
- 6 believe.
- 7 Q Why did you have contact with her there?
- 8 A Stopped her for speeding.
- 9 Q Which direction of I90 were you on?
- 10 A I was sitting stationary and observing or watching
- 11 eastbound traffic.
- 12 Q So she was proceeding eastbound then, is that what you
- 13 are telling us?
- 14 A Yep.
- 15 Q Were you just in the median at that point in time?
- 16 A Yes, ma'am.
- 17 Q At that point in time what was the traffic like on I90?
- 18 A Light.
- 19 Q So when you saw her vehicle approaching did you make
- 20 any initial observations about her or her vehicle at that
- 21 time?
- 22 A Um, it appeared her vehicle to be speeding and as she
- 23 passed my location she took a long look at me as she passed
- 24 my location in the median.
- 25 Q And so at that point then did you pull in behind her to

1 perform a traffic stop on her vehicle?

2 A Yes, I did.

3 Q How did the traffic stop go as she pulled to the side?

4 A I approached the vehicle on the passenger side, made
5 contact with her, talked briefly at the vehicle about where
6 she was coming from and her speed.

7 Q Was there anyone else in the vehicle with her.

8 A There was not.

9 Q What did she have to tell you about where she was
10 coming from and speed?

11 A Said she was coming from Denver and then I believe she
12 indicated she was doing nine over.

13 Q And did you continue to speak to her there at the
14 passenger side window of her vehicle or did you bring her
15 back to your patrol car?

16 MR. RUUD: Objection, leading.

17 THE COURT: Sustained as to leading.

18 Q (BY MS. MOWERY) Where did you take Ms. Bree as you were
19 talking to her at the patrol -- at her passenger side
20 window?

21 A After I asked her for her driver's license I brought
22 her back to my patrol vehicle.

23 Q And where did she have a seat in your patrol vehicle?

24 A In the passenger seat.

25 Q What occurred during that time period, the interaction

1 you had with her?

2 A Just had conversation about her trip, about the
3 violation, um, and ran through -- I started running --
4 inspecting her paperwork, and running registration and
5 driver's license checks.

6 Q So let's start off with what she told you about her
7 trip, what was that?

8 A I asked her what her purpose was and she indicated that
9 she was visiting Colorado for her brother he had done a some
10 sort of a study, spaulding study. And she said that she
11 went down there to be with him after the study was done.

12 Q Did she tell you where she was traveling from to get to
13 Colorado?

14 A Not specifically. I asked her how she got to Colorado,
15 though.

16 Q What was her response to that?

17 A She asked me the same question, how did I get to
18 Colorado, or something to effect, and she indicated that she
19 flew down there.

20 Q What did you find out about the car that she was
21 driving when you stopped her?

22 A The vehicle was rented out of -- I asked her about
23 that -- Centennial, Colorado. And, um, the vehicle was
24 third-party rental, so somebody rented the vehicle for her.

25 Q Did she indicate to you who that was?

1 A I don't recall the name, but she said it was her
2 brother's girlfriend.

3 Q And you had just testified that she said she went out
4 to be with her brother; is that correct?

5 A Correct.

6 Q What did she say about having to be out with her
7 brother?

8 A She mentioned that her mother had wanted her to go out
9 and be with him because of the study. After she mentioned
10 that his girlfriend was there I mentioned to her that
11 basically pointed out that her brother did have somebody
12 there with him.

13 Q How did she respond to that when you pointed that out?

14 A She got quiet and then changed the story or changed the
15 subject.

16 Q While you are having this conversation with her what
17 did you notice about her physical appearance and demeanor?

18 A Um, I noticed that her nervousness was continuing
19 because when she handed me her driver's license out of the
20 vehicle her hand was shaking. When I brought her back to
21 the vehicle and had her sitting next to me I noticed her
22 carotid artery was pulsating while I was talking to her.
23 And then at one point in time I also noticed that her neck
24 and face was becoming flushed as well.

25 Q As a trooper do you have interaction with people who

1 are nervous on a daily basis?

2 A Yes.

3 Q Would you -- how would you describe the nervousness
4 that Ms. Barry exhibited as nervousness that you would see
5 on a daily basis?

6 A Um, usually with people there are times initially when
7 they are nervous when we stop them, but usually the innocent
8 motoring public, once they find out that they are just
9 getting a citation or a warning, usually that nervousness
10 subsides.

11 Q Were you able to tell her that? About the citation I
12 mean.

13 A Yes.

14 Q What did you tell her about the citation?

15 A I told her I would be issuing a citation and I would
16 drop it down to five over.

17 Q Did that change her nervous behavior or alleviate it?

18 A Her nervousness continued.

19 Q Trooper, you have specialized training in narcotics and
20 drug interdiction, correct?

21 A Correct.

22 Q So, when you're hearing this information provided to
23 you somebody is flying to Colorado, driving back in a
24 third-party rental, what additional knowledge do you have as
25 a trooper in regards to that?

1 A Based on my training and experience and some of the
2 bulletins we see, I know it's common for organizations to
3 basically pay somebody to come to Denver and to pay
4 somebody, set them up with a vehicle, and have them drive
5 back wherever their destination is.

6 Q So, did you begin to ask Ms. Barry a specifically about
7 narcotics?

8 A Yes, I did.

9 Q Can you describe what her responses were when you
10 started asking her about specific narcotics?

11 A I guess I didn't ask specifically right away about
12 narcotics. I asked her when I was running her driver's
13 license I asked her if she'd ever been in trouble before.

14 Q What was her response to that?

15 A She indicated that she had been in trouble for -- or
16 had been a heroin addict and had gotten in trouble, I think
17 she told me about four years prior, and had done some CI
18 work for that charge.

19 Q What does CI indicate to you?

20 A Under cover basically. Confidential informant.

21 Q Did she follow up then with any additional information?

22 A She added that she was a criminal justice -- she was
23 going to school for criminal justice and psychology.

24 Q What was her physical demeanor as she's explaining this
25 to you?

1 A There were times when I noticed she would have a, like,
2 forced or fake laugh is how I took it. There were also
3 times that she would yawn. And I see that quite often with
4 people that are very nervous, they do like a fake yawn. And
5 again, the carotid artery was continuing to pulsate
6 throughout the stop.

7 Q Having heard that she recently been in Colorado, did
8 you ask her if she had engaged in any narcotics use?

9 MR. RUUD: Objection, leading.

10 THE COURT: Sustained.

11 Q (By MS. MOWERY) Did you speak to Ms. Barry about being
12 in Colorado?

13 A Yes.

14 Q Was there any narcotics use that she indicated to you?

15 A Yes.

16 Q Can you tell us what that was?

17 A She indicated that she was using marijuana while she
18 was in Colorado.

19 Q Were you able to pinpoint the time period she was in
20 Colorado?

21 A As far as what she told me?

22 Q Yes.

23 A She told me that she had used two days prior to me
24 stopping her.

25 Q Did you ask her about the travel that brought her to

1 I90 on that particular day?

2 MR. RUUD: Objection, leading.

3 THE COURT: Sustained.

4 Q (BY MS. MOWERY) How did she say she got to I90 on
5 December 2nd?

6 A She said that she drove directly from Denver to
7 wherever she stayed. She indicated it was 60 miles prior to
8 me stopping her and she said that she drove straight to
9 South Dakota.

10 Q Did she indicate to you whether or not there were any
11 stops along the way?

12 A The only stop she said that she took was the one the
13 night prior or the night before I stopped her. And she said
14 that was going to be the only stop she was going to make,
15 other than fuel.

16 Q As you are hearing all this, what is running through
17 your mind as a trooper?

18 A I was -- I found it odd that she would fly down to
19 Denver, Colorado and rent a vehicle and drive back without
20 doing anything other than driving.

21 Q You mention that you ran a status check on her driver's
22 license?

23 A Yes.

24 Q Was that going on at the same time that these other
25 questions were occurring?

1 A Yes.

2 Q How did you do that when you run those checks?

3 A On my computer.

4 Q Is that within your patrol car?

5 A Yes.

6 Q So, as you are hearing this information, how do you
7 proceed with Ms. Barry?

8 A Um, as far as once I talked about the drug use?

9 Q Yes.

10 A I told her that I was smelling the faint odor of burnt
11 marijuana coming from her person and I told her I was
12 calling for a police service dog to do a check of the
13 vehicle.

14 THE COURT: Is this chronologically accurate so that we
15 have this entire conversation you have detailed and now he
16 smells the marijuana? Because the timing of the smell is
17 important to the Court and I am taking this as a
18 chronological experience moving forward.

19 MS. MOWERY: I'll clarify with the trooper.

20 Q (BY MS. MOWERY) Trooper, at what point did you smell
21 the odor of marijuana emanating from Ms. Barry?

22 A I believe it was when I started working on the
23 citation. I don't remember the exact time. We'd have to
24 refer to the video on that.

25 Q Was it before or after you called for the drug dog?

- 1 A It was before I called for the drug dog.
- 2 Q Once you called for the drug dog, how did you do that?
- 3 A Used my radio.
- 4 Q And did you get a response back in regards to whether
- 5 or not a drug dog was available?
- 6 A Yes, ma'am.
- 7 Q What was that response?
- 8 A They said one was available and was on his way.
- 9 Q While you were waiting for the drug dog to arrive, did
- 10 you do any more tests with Ms. Barry?
- 11 A Couple inside field sobriety exercises. I did the
- 12 number count, alphabet I believe.
- 13 Q Why did you do those?
- 14 A Just to make sure she wasn't impaired at that time.
- 15 Q What was the result of those tests?
- 16 A I didn't observe any indicators of impairment.
- 17 Q And then after you finished with that was there a
- 18 period of time that you were waiting for the drug dog to
- 19 arrive?
- 20 A Yes.
- 21 Q Approximately how long was that wait?
- 22 A Ten minutes, I believe. Ten to twelve minutes.
- 23 Q Okay. And once the dog arrived, what happened then?
- 24 A Had a brief conversation with Officer Butler and then
- 25 he ran his PSD around the vehicle.

1 Q When you say PSD, what do you mean by that?

2 A Police service dog.

3 Q Did that dog eventually indicate?

4 A Yes.

5 Q Was the car searched?

6 A Yes, it was.

7 Q What, if anything, was found in the car?

8 A Large amount of marijuana, some THC shatter, some
9 smaller amounts of marijuana, some smaller packaging, and
10 some edibles.

11 Q Was your patrol car equipped with a video camera on
12 December 2nd?

13 A Yes, it was.

14 Q Was it functioning properly?

15 A Yes, it was.

16 Q Showing you what's been marked as State's Exhibit 1; do
17 you recognize State's Exhibit 1?

18 A Yes.

19 Q How so?

20 A It's the CD for State versus Bree Barry.

21 Q That's the patrol video from your patrol car from
22 December 2nd of 2016?

23 A Correct.

24 Q Is it fair and accurate copy of that patrol video?

25 A I believe so.

1 MS. MOWERY: State would offer State's Exhibit Number
2 1.

3 MR. RUUD: No objection.

4 THE COURT: It's received.

5 (State's Exhibit Number 1 received into evidence.)

6 MS. MOWERY: Judge, we would ask to publish at this
7 time.

8 THE COURT: Okay.

9 (State's Exhibit Number 1 was published at this time and
10 the following testimony was had during the playing of the
11 exhibit.)

12 Q (BY MS. MOWERY) Trooper, from this point until the K9
13 arrives, what happens?

14 A Just small talk between Bree and I.

15 Q About how long is that?

16 A I think it was about ten minutes.

17 THE COURT: For the record, we are at 9:42.39.

18 MS. MOWERY: Then I would propose we stop here unless
19 the Court would like to watch that.

20 THE COURT: The ten minutes?

21 MS. MOWERY: Yes.

22 MR. RUUD: I think I guess I would argue that it's --
23 if the Court's going to review the video later on, I think
24 that's okay. Otherwise, I would argue that it's important
25 for the Court to see it.

1 THE COURT: We'll keep it running.

2 MR. RUUD: I would note and maybe this isn't the same
3 copy, but as far as the time -- my time, I don't know if it
4 was because of the new recording system, like a hi-def thing
5 you guys have in your cars, but on my computer the time was
6 not accurate. It kept on pausing and skipping ahead. I'm
7 not sure if -- what's going on.

8 THE COURT: Could you see the time, Christian?

9 MR. RUUD: I could see the time, but this doesn't seem
10 to be doing it, but this ticking clock on the copy that I
11 had would stop and stop and it was just off on the copy I
12 had, but it doesn't appear to be doing it now.

13 (State's Exhibit 1 continued to be published and the
14 following proceedings were had at its conclusion.)

15 MS. MOWERY: We are stopping at 9:52.17 and the PSD
16 officer had just arrived.

17 Q (BY MS. MOWERY) Trooper, this was all in Minnehaha
18 County

19 A Yes, ma'am.

20 MS. MOWERY: Thank you. Nothing further.

21 THE COURT: Mr. Ruud.

22 MR. RUUD: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 Q (By MR. RUUD) Just briefly. Trooper Olson, when you
25 were observing the vehicle you didn't see Ms. Barry swerving

1 in anyway, correct?

2 A No.

3 Q You didn't notice any weaving?

4 A No, I did not.

5 Q On the video, after the lights were activated, Ms. Bree
6 looks like -- uses her blinker to pull onto a shoulder; is
7 that correct?

8 A Yes, sir.

9 Q When he pulled onto the shoulder she didn't jerk the
10 car over too suddenly?

11 A No, sir.

12 Q And you approached the passenger side, correct?

13 A That's correct.

14 Q And approaching the vehicle and speaking through the
15 passenger side window to the driver, correct?

16 A That is correct.

17 Q And while she was seated in her vehicle you did not
18 notice or observe the odor of intoxicants, correct?

19 A No, I did not.

20 Q And you didn't notice any bloodshot, watery eyes,
21 correct?

22 A No, sir.

23 Q No glassy pupils?

24 A No, sir.

25 Q Her pupils weren't dilated?

- 1 A No.
- 2 Q She wasn't grinding her teeth?
- 3 A No, sir.
- 4 Q You didn't see her breathing heavily?
- 5 A Not at that time, no.
- 6 Q You didn't see any green or raised bumps on her tongue?
- 7 A No, sir.
- 8 Q As you were observing the vehicle you did not notice
- 9 any other paraphernalia, correct?
- 10 A No, sir.
- 11 Q You didn't see spoons?
- 12 A No, sir.
- 13 Q Baggies?
- 14 A No, sir.
- 15 Q Straws?
- 16 A Nope.
- 17 Q Rolling papers?
- 18 A No, sir.
- 19 Q Roach clips?
- 20 A No, sir.
- 21 Q And as you had her come back to the vehicle you did not
- 22 notice any slow movement on her part, correct?
- 23 A No, sir.
- 24 Q Notice she had no difficulty walking?
- 25 A No, sir.

- 1 Q She didn't appear to lack coordination?
- 2 A No.
- 3 Q She wasn't -- she didn't appear confused?
- 4 A No, sir.
- 5 Q In your patrol vehicle you ran a license check on Bree,
- 6 correct?
- 7 A That's correct.
- 8 Q And there were no issues there from that?
- 9 A Correct.
- 10 Q And ran a warrant check on Bree; is that correct?
- 11 A Correct.
- 12 Q She didn't have any outstanding warrants, correct?
- 13 A No, sir.
- 14 Q And you ran and you checked her insurance, correct?
- 15 A I never checked the insurance. Just -- I looked at the
- 16 rental agreement.
- 17 Q Okay. And then you told Bree you were reducing it to
- 18 five over, correct?
- 19 A That's correct.
- 20 Q That is the ticket -- and I assume that means, correct
- 21 me if I'm wrong, reducing it to a five -- or five over speed
- 22 limit instead of nine?
- 23 A That's correct.
- 24 Q Okay. And then after you tell her about the speeding
- 25 ticket, you asked her about her past, correct?

- 1 A Um, when I was going to run her driver's license check,
2 yes.
- 3 Q That was after you told her what the speeding ticket
4 was going to be, correct?
- 5 A Yes, sir.
- 6 Q And she admitted she was a previous addict, correct?
- 7 A That is correct.
- 8 Q And then you asked her what she was transporting in the
9 vehicle, correct?
- 10 A Correct.
- 11 Q And you brought up the idea of a drug dog search,
12 correct?
- 13 A That's correct.
- 14 Q And you observed her acting nervous, correct?
- 15 A Yes, sir.
- 16 Q Due to her carotid artery visibly pulsating?
- 17 A More than just that.
- 18 Q But that was certainly one of the things that you noted
19 to her nervousness, correct?
- 20 A Yes, sir.
- 21 Q You were reading off -- or have a paper looks like.
22 Can tell us what that, is that your --
- 23 A Yes. That's my case report.
- 24 Q Would that be the same as the primary narrative?
- 25 A Yes, sir.

- 1 Q Those reports -- you are trying to complete those
2 reports through your -- you are trained on how to take those
3 reports, correct?
- 4 A Correct.
- 5 Q You are trained to complete those reports truthfully,
6 correct?
- 7 A Correct.
- 8 Q Accurately?
- 9 A Yes, sir.
- 10 Q Completely?
- 11 A Yes, sir.
- 12 Q And so that's what you did here, correct?
- 13 A Yes, sir.
- 14 Q This report is truthful, correct?
- 15 A Yes, sir.
- 16 Q Accurate?
- 17 A Yes, sir.
- 18 Q Complete?
- 19 A Yes, sir.
- 20 Q And in this primary narrative on the sixth paragraph
21 down, sentence begins, "During our conversation," do you see
22 that?
- 23 A Yes, sir.
- 24 Q It states, "During our conversation I observed she was
25 extremely nervous. Evident from her carotid artery visibly

1 pulsating."

2 A That is correct.

3 Q That is what you wrote?

4 A Yes, sir.

5 Q And you consider that a sign of nervousness, correct?

6 A In this case, as it continued throughout the stop, yes,
7 that's one thing that I looked at.

8 Q Okay. Now, you did not notice her carotid artery
9 visibly pulsating while you were at her vehicle, correct?

10 A No, sir.

11 THE COURT: So that is correct?

12 A Correct.

13 Q (BY MR. RUUD) At her car you were on the passenger
14 side, right?

15 A Correct.

16 Q And so, her right side?

17 A Correct.

18 Q And you didn't see the pulsating carotid artery at that
19 time?

20 A Not at that time.

21 Q And in your car she's on the passenger side of your
22 vehicle, correct?

23 A Correct.

24 Q And you are on her left side?

25 A Correct.

- 1 Q And now you can see the carotid artery pulsating?
- 2 A Yes, sir.
- 3 Q What side of the neck is the carotid artery on? Left
- 4 or --
- 5 A You would be able to see it on both sides.
- 6 Q You are not a doctor, correct?
- 7 A Correct.
- 8 Q You have no specific training in vascular medicine?
- 9 A No, sir.
- 10 Q Do you have any specialized training in whether
- 11 pulsating artery of the neck is indicative of nervousness?
- 12 A Just based on my experience and what I have seen, when
- 13 it's that pronounced.
- 14 Q Sure. But do you have any specialized training in
- 15 whether pulsating artery of the neck is indicative of
- 16 nervousness?
- 17 A I guess not any specific training, no.
- 18 Q Okay. Now, after noticing Bree was nervous you asked
- 19 if she was transporting anything else in her vehicle,
- 20 correct?
- 21 A Correct.
- 22 Q You asked her if she was transporting heroin?
- 23 A I believe I went through all the drugs, correct.
- 24 Q Right. She said no to heroin?
- 25 A Yes.

- 1 Q You asked if she was transporting cocaine?
- 2 A Yes, sir.
- 3 Q She said no?
- 4 A Yes, sir.
- 5 Q And you asked if she was transporting methamphetamine?
- 6 A Yes, sir.
- 7 Q And she said no?
- 8 A Yes.
- 9 Q You asked if she was transporting marijuana?
- 10 A Yes, sir.
- 11 Q She said no?
- 12 A Yes.
- 13 Q You asked for consent to run a drug dog around the
- 14 vehicle, correct?
- 15 A Yes, I did.
- 16 Q She denied consent?
- 17 A That's correct.
- 18 Q And you asked if I were to search the vehicle would I
- 19 find anything, correct?
- 20 A That is correct.
- 21 Q And she said you will not find anything at all?
- 22 A That's correct.
- 23 Q You asked again for permission to search at that point,
- 24 correct?
- 25 A Yes, sir.

1 Q And she said no?

2 A Correct.

3 Q At one point you stated to her, "What if I told you I
4 had information you were transporting drugs in the vehicle,"
5 correct?

6 A Correct.

7 Q And you had no such information, correct?

8 A No.

9 Q You called this -- I believe on the video you call this
10 just asking a hypothetical, correct?

11 A That's correct.

12 Q That's a hypothetical question that you were asking
13 her?

14 A Yes, sir.

15 Q Okay. After noticing Bree was nervous and questioning
16 her about the presence of narcotics in the vehicle,
17 questioning her about her consent to search, and asking her
18 about the hypothetical about having information that she was
19 transporting drugs, after that that's when you began to
20 perform standard field sobriety tests, correct?

21 A That is correct.

22 Q And this is when Bree admitted using marijuana in
23 Colorado?

24 A Correct.

25 Q And it was after this admission you first radioed to

- 1 inquire whether a police search dog was available, correct?
- 2 A Ask that question again.
- 3 Q It was after this admission you first radioed to
- 4 inquire whether a police service dog was available; isn't
- 5 that correct?
- 6 A That is correct.
- 7 Q While waiting for an answer you had Bree perform some
- 8 standard field sobriety tests, correct?
- 9 A That's correct.
- 10 Q She did the number count?
- 11 A Yes.
- 12 Q She did it forward, correct?
- 13 A Yes, sir.
- 14 Q And she did it no issues?
- 15 A Yes, sir.
- 16 Q And then she did it backwards, correct?
- 17 A Correct.
- 18 Q And she did it with no issues?
- 19 A Yes.
- 20 Q And you had her do the alphabet test?
- 21 A Correct.
- 22 Q She did that with no issues?
- 23 A Yes.
- 24 Q And it was after she performed that you received
- 25 confirmation on the radio that a police service dog was

1 en route, correct?

2 A Yes, sir.

3 Q After getting that information you did not conduct any
4 more standard field sobriety tests, correct?

5 A No, I did not.

6 MR. RUUD: I have no further questions.

7 THE COURT: Ms. Mowery, follow-up.

8 REDIRECT EXAMINATION

9 Q (BY MS. MOWERY) Trooper Olson, were there narcotics
10 indicators?

11 A Yes.

12 Q When do those narcotics indicators start?

13 A As far as --

14 Q With your contact with Ms. Barry, when did you start
15 noticing them?

16 A As far as the nervousness?

17 Q Any of the indicators.

18 A The first thing I noticed, um, when the vehicle was in
19 motion, her taking a long look at me, getting the vehicle
20 stopped. When I was up at the vehicle I asked for her
21 license and her hand was shaking. When I brought her back
22 to the vehicle, that nervousness continued. I observed her
23 carotid artery pulsating. When asked certain questions she
24 would have a fake or forced laugh. There were times that
25 she would yawn, which I took as nervousness. She admitted

1 that she had just woke up and just started driving 60 miles
2 prior. And then as I continued on after doing some of the
3 checks I ran through field sobriety tests, at that point I
4 started to smell the faint odor of burnt marijuana coming
5 from her person. And also, I found it interesting that she
6 flew to Denver, Colorado and then was driving back instead
7 of round-trip flight.

8 Q Was it just one indicator that caused you to call for
9 the narcotics dog?

10 A No, it was not. It was several.

11 Q Thank you.

12 MS. MOWERY: No further questions.

13 THE COURT: Mr. Ruud.

14 RECROSS EXAMINATION

15 Q (BY MR. RUUD) I believe you just testified that it was
16 after you performed the -- began performing standard field
17 sobriety tests, that you began to get a faint whiff of burnt
18 marijuana?

19 A No, it was -- I don't recall exactly where I started to
20 smell the faint odor. It was right about that time that I
21 was doing the field sobriety tests, so right prior to so if
22 that was --

23 Q So, just prior to the time you started doing the
24 standard field sobriety tests is when you got a faint odor
25 of marijuana?

1 A Correct.

2 Q The long look that she gave you when she passed you,
3 that you stated was an indication of drug use?

4 A Indicator of criminal activity is what I would classify
5 that as.

6 Q Indicator of criminal activity. Referring you, again,
7 to your primary narrative, looking at the first paragraph, I
8 don't see any indication in there that you had noted that as
9 a indicator of criminal activity; is that correct?

10 A That's correct.

11 Q Not in your initial report?

12 A Correct.

13 Q And obviously, you have never met Ms. Barry before,
14 correct?

15 A Correct.

16 THE COURT: Mr. Ruud, it's not his report she gave him
17 this extended look or it's not in his report that he
18 suspected that to be a sign of criminal activity.

19 MR. RUUD: I'll confirm.

20 Q (BY MR. RUUD) It's not your report that she gave you
21 this long look as she passed you, correct?

22 A Correct.

23 Q And it's also not in your report that long look
24 indicated to you criminal activity, correct?

25 A Correct.

1 Q And you are not familiar with how Ms. Barry sounds
2 normally when she laughs, correct?

3 A Correct.

4 MR. RUUD: I have nothing further.

5 THE COURT: Ms. Mowery.

6 MS. MOWERY: Nothing else. Thank you.

7 THE COURT: Okay. Thank you, Trooper, you are excused.

8 Any additional witnesses, Ms. Mowery?

9 MS. MOWERY: The State would rest.

10 THE COURT: Mr. Ruud.

11 MR. RUUD: No witnesses, Your Honor.

12 THE COURT: Either side want to make argument in
13 addition to the briefs that they previously submitted?

14 MS. MOWERY: I have no additional argument beyond the
15 brief, Judge.

16 THE COURT: Okay. Mr. Ruud.

17 MR. RUUD: I would just briefly, Your Honor, I would
18 note obviously Ms. Barry was stopped for speeding at the
19 time with no indication of any impairment. There was no
20 odor of drugs until later, there was no furtive movements.
21 I would argue the stop was extended well past the time to
22 perform the traffic stop, conduct the necessary checks. I
23 think there was numerous points during the encounter where
24 it should have ended, could have ended. I think the trooper
25 lacked the reasonable suspicion to continue to detain Bree

1 in order to repeatedly question about the presence of drugs
2 and repeatedly ask for and be denied consent to search.

3 Apparently she appeared nervous, but after telling her
4 what the ticket was going to be at that point, all the
5 information it sounds like that the trooper had was her
6 travel plans and her nervousness.

7 I know that he talked about her possibly changing her
8 story regarding her brother's girlfriend, stated that after
9 he asked her about the girlfriend she got quiet. On the
10 video you can cheerily hear her saying something along the
11 lines of, Well, they don't really live together, he's her
12 girlfriend, they don't live together.

13 I think he lacked reasonable suspicion to continue to
14 detain Bree in order to conduct standard field sobriety
15 tests. No noticeable signs of impairment, either physically
16 or with her driving. Nevertheless, he detained her to
17 conduct standard field sobriety tests and lacked reasonable
18 suspicion to detain Bree until the arrival of the drug dog,
19 which took ten minutes after he first requested one. Ten
20 minutes where no more investigation occurred or essentially
21 was just two people sitting in a car doing nothing.

22 I think the evidence, the video, the testimony, the
23 countless attempts to get her to consent to a search,
24 countless attempts to get her to admit she had something in
25 her vehicle, the use of a hypothetical, which seems to be

1 another word here for a lie, saying that someone reported
2 her, show that what it is is a fishing expedition or an
3 attempt to get around Bree's constitutional right to
4 withhold consent to search. I think the officer kept her
5 there disingenuously and extended the length of the time
6 until the eventual-delayed arrival of the drug dog.

7 This is a violation of *Rodriguez*, as well as the
8 Constitution of the United States and South Dakota. I would
9 ask the Court to respectfully grant this motion to suppress.

10 THE COURT: Do you want to respond to that?

11 MS. MOWERY: Judge, I agree that *Rodriguez* is the
12 applicable case law. The court was clear that the stops
13 cannot be extended even a small amount unless there is
14 reasonable suspicion. Trooper Olson explained that he has
15 specialized training in narcotics, drug interdiction, and he
16 listed any number of indicators that he saw from the very
17 beginning of the stop until the conclusion of the stop that
18 were indicative to him of narcotics use. He definitely had
19 reasonable suspicion to prolong the stop to allow for the
20 drug dog to arrive. So I would ask the Court to deny the
21 motion.

22 COURT'S RULING

23 THE COURT: Ms. Barry, I want to say a few things to
24 you: As a recovering heroin addict, it is amazing to me
25 that you would dabble in marijuana, whether it's legal in

1 Colorado or not. It is amazing to me that you would risk
2 any drug involvement whatsoever if you understand your prior
3 addiction. It is amazing to me that you would cross state
4 lines with chunks of marijuana and go back to your school in
5 criminal justice. Inappropriate is not a strong enough word
6 to describe what you did here. If this is the course you
7 choose, I anticipate it will fully catch up with you. These
8 are felony level charges. It is much more than that
9 decision making on your part.

10 I am granting the motion to suppress as filed by the
11 defense. Mr. Ruud, you are going to owe me findings and
12 conclusions. I do agree with the Defense that the stop was
13 unnecessarily elongated multiple times. I have personally
14 received speeding tickets and I have never received a
15 speeding ticket this slowly. There were multiple times when
16 the stop should have concluded, it did not. By my count we
17 were more than 14 minutes into the interview before the
18 faint smell of burnt marijuana was referenced. The first
19 and only time it was referenced before the drug dog arrives.
20 So, to me it appears that the trooper was simply killing
21 time, biting time.

22 Little things like the nystagmus test, he went back and
23 forth, I think, 10 or 12 times. I think any person not
24 suffering from drug use effects sooner or later is going to
25 fail that test if you give it to them 10 or 12 times.

1 Everything seemed to be drawn out for the purpose of
2 continuing the interview.

3 I think a fair reading of *Rodríguez* of the United
4 States Supreme Court level says they can't do this. This
5 was too long and too much based on a stop for speeding. I
6 cannot find that giving trooper a look as a car passes a
7 trooper to be evidence of criminal behavior. I think I have
8 personally looked at every single trooper I have ever passed
9 in my career and I have not been engaging in criminal
10 behavior, nor do I find the fact a shaking hand, displaying
11 nervousness at a traffic stop by a highway patrol trooper is
12 evidence of drug dealing activity or drug transporting
13 activity.

14 I do not find there was enough, even when viewed
15 cumulatively, to wait this out for the drug dog. I believe
16 the stop was necessarily elongated and that Trooper Olson
17 lacked the reasonable suspicion to call for the drug dog.
18 In the end his hunch was absolutely right. He nailed it.
19 But his stop and continued detention of Ms. Barry had to be
20 more than simply a hunch under the Supreme Court case law in
21 *Rodriguez*. That is binding upon this Court and must be
22 followed when I look at the language.

23 I think it's at least somewhat important he smelled a
24 faint smell of burnt marijuana. He did not smell marijuana
25 in the vehicle as he approached and talked to the passenger

1 side. And given her admission as to legal use in the State
2 of Colorado which permits the smoking of marijuana, I can't
3 even find that on these facts that rises to the level of
4 suspected criminal activity. Because his inquiries lacked
5 the same close connection to roadway safety, as do the
6 ordinary inquiries, a dog sniff was not fairly characterized
7 as part of his traffic mission in this position. And I
8 found that it lacked reasonable suspicion.

9 I find that he did not have the reasonable articulable
10 suspicion that she was involved in criminal activity that
11 was otherwise unrelated to the traffic violation for which
12 she is stopped. Motion to suppress is granted.

13 Mr. Ruud, is that enough to give me findings and
14 conclusions?

15 MR. RUUD: I believe so, Your Honor.

16 THE COURT: I would like the timing of the stop to the
17 reference to marijuana, I estimated it at 14 minutes,
18 specifically included within the findings. I also want it
19 noted when he eventually calls to inquire about the
20 availability of a PSD.

21 MS. Mowery, anything by way of follow-up?

22 MS. MOWERY: No.

23 THE COURT: Mr. Ruud.

24 MR. RUUD: No, Your Honor.

25 THE COURT: Okay. We'll be in recess on that matter.

1 (Court proceedings adjourned in this matter.)

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1 STATE OF SOUTH DAKOTA)
2 COUNTY OF MINNEHAHA) :SS

4 CERTIFICATE OF REPORTER

5
6 I, JENNA SECHSER, Official Court Reporter, Notary
7 Public in and for the State of South Dakota, hereby certify
8 that I was present for and reported the proceedings as
9 described on page 1 herein, and that this transcript
10 contains a true and correct record of the proceedings so
11 had.

12 To all of which I have hereunto set my hand this 5th
13 day of May, 2017.

14
15 _____
16 JENNA SECHSER
17 Official Court Reporter
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 28288

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

vs.

BREE MURPHY BARRY,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HONORABLE SUSAN SABERS
Circuit Court Judge

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Petition for Permission to Appeal Filed on June 15, 2017

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

Nos. 28288

vs.

BREE MURPHY BARRY,

Defendant and Appellee.

PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as "SR." The transcript of the Suppression Hearing held April 20, 2017, is referred to as "SH." The Circuit Court's Findings of Fact will be referred to as "FOF," Conclusions of Law as "COL," and Order Suppressing Evidence as "Order." The State's initial brief, filed on September 6, 2017, is referred to as "SB." Findings and Fact and Conclusions of Law will be followed by the designated number. All other references will be followed by the appropriate page number. The patrol car's video of the traffic stop and arrest of Bree Barry is referred to as "Ex. 1" followed by the corresponding time designation. Defendant and Appellee, Bree Barry, is

referred to as “Barry.”

JURISDICTIONAL STATEMENT

The State appeals the Circuit Court’s Findings of Fact, Conclusions of Law, and Order Suppressing Evidence entered on May 25, 2017. SR 60. Notice of Entry of Order was filed on June 5, 2017. SR 66. The State filed a Petition for Permission to Appeal on June 15, 2017. *See* SR 89. The Court’s Order Granting Petition for Allowance of Appeal from Intermediate Order was filed on July 13, 2017. SR 89. This Court has jurisdiction over the appeal pursuant to SDCL 15-26A-3(6).

STATEMENT OF LEGAL ISSUE

- I. WHETHER THE CIRCUIT COURT ERRED IN RULING THE OFFICER DETOURED FROM THE MISSION OF THE TRAFFIC STOP TO PURSUE AN UNRELATED INVESTIGATION IN THE ABSENCE OF REASONABLE SUSPICION OF CRIMINAL ACTIVITY, AND UNLAWFULLY EXTENDED BARRY’S DETENTION IN VIOLATION OF THE FOURTH AMENDMENT.

The Circuit Court ruled that the officer impermissibly extended the stop by questioning Barry on unrelated topics and performing field sobriety tests.

Rodriguez v. U.S., 135 S.Ct. 1609 (2015)

U.S. v. Beck, 140 F.3d 1129 (8th Cir. 1998)

U.S. v. Peralez, 526 F.3d 1115 (8th Cir. 2008)

In re Pardee, 872 N.W.2d 384 (Iowa 2015)

STATEMENT OF CASE

On December 15, 2016, the Minnehaha County Grand Jury returned a four count Indictment charging Barry with the following:

Count 1 – Possession of a Controlled Drug or Substance, on or about December 2, 2016, in violation of SDCL 22-42-5;

Count 2 – Possession with Intent to Distribute 1 LB. or More of Marijuana, on or about December 2, 2016, in violation of SDCL 22-42-7;

Count 3 – Possession of 1 LB. to 10 LBS. of Marijuana, on or about December 2, 2016, in violation of SDCL 22-42-6;

Count 4 – Possession with Intent to Distribute I and II Drugs, on or about December 2, 2016, in violation of SDCL 22-42-2;

Count 5 – Possession of Drug Paraphernalia, on or about December 2, 2016, in violation of SDCL 22-42A-3;

Count 6 – Speeding on Interstate, on or about December 2, 2016, in violation of SDCL 32-25-7.

SR 9.

On February 10, 2017, Barry filed a Motion to Suppress Evidence asking the Circuit Court to suppress the evidence obtained by the officers as a result of the search of Barry's vehicle. SR 15. Barry contended the search was the product of an unconstitutional extension of the traffic stop. SR 15; *See generally* SH. The Suppression Hearing was held April 20, 2017. SH. The Circuit Court granted Barry's motion. SH 35-36. The Circuit Court ruled that Trooper Olson unlawfully extended the duration of the traffic stop beyond the point it reasonably should have been concluded by conducting an investigation wholly unrelated to the mission of the stop without having the necessary reasonable suspicion of

criminal activity. *See generally* FOF, COL; SH 33-36. The Court found that Trooper Olson's continued questioning of Barry about drugs in the vehicle, the repeated requests for consent to search her vehicle, the conducting of field sobriety tests, as well as the call for a drug dog were all unjustified under the circumstances and added time to the stop in violation of the Fourth Amendment. COL 15, 19; SR 64. The State now appeals the Circuit Court's order suppressing the evidence.

STATEMENT OF FACTS

On the morning of December 2, 2016, Trooper Joshua Olson was on duty and parked in his patrol vehicle in the median of Interstate 90 in Minnehaha County observing eastbound traffic. SH 4-5. At approximately 9:25 a.m., Trooper Olson observed a female, Barry, driving a black Hyundai sport utility vehicle with Colorado license plates pass by on the interstate. SH 5; *See* Ex. 1 at 9:25:53. According to Olson, the vehicle appeared "to be speeding and as she passed my location she took a long look at me." SH 5. The "long look," in Olson's view, was an "[i]ndicator of criminal activity."¹ SH 30. Olson caught up to the vehicle and performed a traffic stop. Ex. 1 at 9:25:53 – 9:26:48.

Apart from the speeding infraction, Barry's driving was unremarkable. Ex. 1 at 9:26:23 – 9:26:48. Olson observed no indicators of impaired driving, such as weaving or swerving, when he initiated the stop. SH 17-18. When Olson activated his lights, Barry promptly used her right turn signal and pulled over to

¹ Olson admitted on cross-examination that he did not document Barry's alleged "long look" in his police report. SH 30.

the shoulder of the interstate. SH 18; Ex. 1 at 9:26:23 – 9:26:48. Olson approached the vehicle and spoke with Barry from the passenger side window. SH 18; Ex. 1 at 9:26:50 – 9:27:00. The trooper asked Barry where she was coming from and inquired about her speed, and Barry responded that she was coming from Denver and acknowledged she had been driving nine miles per hour over the speed limit. Barry provided Olson her driver's license at the trooper's request. SH 8; Ex. 1 at 9:27:10 – 9:27:15. According to Olson, when Barry handed over her driver's license he noticed her hand was shaking, which he considered to be a sign of nervousness. SH 8.

While standing outside the open front passenger door, Olson did not smell the odor of any drugs or other intoxicants coming from the vehicle. SH 18. Olson conceded that Barry exhibited no signs of being intoxicated, such as having bloodshot or watery eyes, glassy pupils, or grinding her teeth. SH 18-19. Olson did not observe any items in the vehicle indicative of drug use, such as any baggies, rolling papers, spoons, straws or other drug paraphernalia. SH 19. Nor did Olson claim to observe any other items in the vehicle potentially indicative of drug possession, such as the presence of large quantities of air fresheners, fabric dryer sheets, or other masking agents. *See generally* SH. After their brief discussion, Olson had Barry accompany him to his patrol vehicle.² SH 6, 19. Barry had no trouble walking and there were no indicators of intoxication

² As Barry exited her vehicle, Olson peered through the back passenger side window of the Hyundai.

in her movements. SH 19-20; Ex. 1 at 9:27:33 – 9:27:48.

Olson and Barry entered the patrol vehicle at approximately 9:27:53 a.m. Ex. 1 at 9:27:53. Almost immediately, Olson inquired into Barry's travel plans. Ex. 1 at 9:28:00. Barry explained that she had traveled to Colorado to be with her brother who was participating in an FDA Spaulding Clinical trial to research an Alzheimer's treatment medication. Ex. 1 at 9:28:00 – 9:28:26; 9:28:50 – 9:28:54. Olson asked Barry how she got out to Colorado, and Barry stated she had flown. Ex. 1 at 9:28:30 – 9:28:36. The trooper then asked how long Barry was in Colorado, and she responded, "About ten days." Ex. 1 at 9:28:38 – 9:28:41. Barry explained that her brother had to have "someone with him for three days after the clinical" to make sure he was ok. Ex. 1 at 9:28:41 – 9:28:50. Barry stated her brother "was lucky he didn't go blind or anything." Ex. 1 at 9:28:41 – 9:28:41. She explained that her grandmother has Alzheimer's and her brother "gets fourteen grand for doing it and then that was his way of explaining to my mother that it was a good thing." Ex. 1 at 9:28:56 – 9:29:06.

Next, Olson asked Barry what she did in Plymouth, Wisconsin. Ex. 1 at 9:29:10 – 9:29:12. Barry told Olson she recruited for International Motorsports Association and worked at Sargento Cheese. Ex. 1 at 9:29:12 – 9:29:18. Olson inquired as to where Barry had rented the Hyundai, and she responded that the vehicle was rented in Centennial, in the southern part of the Denver metro area. Ex. 1 at 9:29:23 – 9:29:30. Barry explained to Olson that her brother's girlfriend's name was on the rental agreement because Barry did not have a credit or debit

card to rent the vehicle by herself. Ex. 1 at 9:29:30 – 9:29:37. In an attempt to point out a perceived inconsistency in Barry’s explanation for traveling to Denver, Olson said, “So he did have a girlfriend with him then.” Ex. 1 at 9:29:38 – 9:29:42; SH 8. According to Olson, upon hearing this statement Barry “got quiet and then changed the story or changed the subject.” SH 8. However, the patrol car video reveals Barry responded to Olson’s statement by saying “they don’t live together or anything.” Ex. 1 at 9:29:44 – 9:29:47; *see* SH 32. Olson did not follow up with any additional questions to Barry on the subject.

Olson informed Barry he was dropping the speeding ticket to five miles per hour over the limit. Ex. 1 at 9:30:12 – 9:30:21. Barry told Olson she had just started on the road and that she had stayed at a hotel about sixty miles from where they were sitting. Ex. 1 at 9:30:26 – 9:30:32. Olson then asked Barry how many stops she had made along the way, and Barry said “just one.” Ex. 1 at 9:30:42 – 9:30:45. Barry said she had driven eleven hours the previous day and planned to drive the final nine hours to Wisconsin that day. Ex. 1 at 9:30:45 – 9:30:53. Olson asked what Barry’s mom did in Wisconsin, and Barry stated that her mom was retired now but used to work as a manager at Biolife Plasma Services. Ex. 1 at 9:30:58 – 9:31:05. Next, Olson asked Barry if she had ever been in trouble before, and Barry responded that she was a recovering heroin addict, and that she had committed a burglary about four years ago.³ Ex. 1 at 9:31:34 –

³ The State references Barry having prior drug charges. SB 3. However, this appears to be incorrect. Although Barry indicated she was a recovering heroin

9:31:42; *see* SH 10. Barry told Olson she worked as a confidential informant for law enforcement after being charged, and indicated she had turned her life around and was currently majoring in criminal justice and psychology. Ex. 1 at 9:31:51 – 9:31:56. She also indicated she had received a seat belt ticket the previous summer. Ex. 1 at 9:32:02 – 9:32:07.

By this point in the stop, Olson had run a check of Barry's driver's license, conducted a warrant check, inspected her paperwork and everything checked out fine.⁴ Ex. 1 at 9:26:48 - 9:32:02. Olson had obtained all of the necessary information related to the purpose of the stop, any safety concerns had been attended to, and the only task remaining was the issuance of the speeding ticket. At that point, however, Olson's inquiries changed course. For the next roughly nine minutes Olson questioned Barry about whether she was transporting drugs in her vehicle, requested consent to search the vehicle and ran Barry through field sobriety tests. Ex. 1 at 9:32:12 - 9:41:20. Olson's questions, and Barry's answers, were as follows:

Olson: What all are you transporting in the vehicle today?

Barry: Just my suitcase, duffle bag, shoes.

Olson: So they give you leave at work for something like that?

Barry: Ya, um, I actually had two weeks of vacation saved up, because I got hired on at Sargento, so right off the bat after your first year you get one week, after your second year

addict, there does not appear to be anything in the record indicating Barry has prior drug charges. Nor is there anything in the record to suggest Barry had a history of drug trafficking offenses.

⁴ This is consistent the State's proposed timeline. *See* SB 19-20 (Chart 2)

you get two weeks. But then you have to finish them out before January. It was kind of perfect timing.

Olson: Anything in the vehicle I need to be concerned about, such as weapons?

Barry: Oh, no, I'm a lover not a fighter.

Olson: Transporting anything crazy like we talked about, any cocaine in the vehicle?

Barry: Oh, no.

Olson: Heroin?

Barry: No.

Olson: Methamphetamine?

Barry: No.

Olson: How about Marijuana, hash, [inaudible]?

Barry: No.

Olson: I don't know if you know in this state we utilize drug safety canines, if we were going to have one do an exterior sniff of your vehicle [inaudible]

Barry: (shaking her head no) No, that's alright. [inaudible].

Olson: You're extremely nervous and it appears like you're not being a hundred percent honest with me.

Barry: I'm not nervous.

Olson: Is there some, do you got, did you bring a little?

Barry: I don't have anything. I have nothing.

Olson: Is everything in the vehicle yours?

Barry: Yes.

Olson: So if I were to search the vehicle today would I find anything in there?

Barry: You would not find anything at all. I promise.

Olson: So it's ok if we search the vehicle today?

Barry: No.

Olson: K.

Barry: But that's . . . because you. . .

Olson: What.

Barry: Only cuz I know my rights now because of school and I just [inaudible].

Olson: Right.

Olson: I'm not . . . if you . . . if you have a small amount of marijuana or paraphernalia . . .

Barry: I really don't. I really don't. I'm literally just trying to get home.

Olson: Ok. But you said it would be ok if we did an exterior sniff with our canine?

Barry: (Confused tone) No? Did I?

Olson: Well yeah you did. You said that'd be fine.

Barry: Oh, I'm sorry.

Olson: You said that'd be fine.

Barry: Oh I thought that you said that if you were to do it, like, it would be fine there wouldn't be anything, that's what I thought you meant.

Ex. 1 at 9:32:12 - 9:34:46. From 9:34:46 - 9:35:22 of the video, Olson does not ask

Barry any questions and quietly taps on his computer. Then, the following

exchange occurs:

Olson: What would you say if I told you I had information that you were transporting drugs in this vehicle?

Barry: That would be a lie.

Barry: How would that be possible if you don't mind me asking?

Olson: I'm just asking a hypothetical.

Ex. 1 at 9:35:22 – 9:35:49.

From there, despite not having observed any signs that Barry may be intoxicated, SH 14, 18-20,⁵ Trooper Olson began conducting field sobriety tests.⁶

Ex. 1 at 9:36:06 – 9:37:31. During the roughly seven and a half minute time period after Olson told Barry he was reducing her speeding ticket, Ex. 1 at 9:30:12 – 9:37:31, virtually all of Trooper Olson's questions were unrelated to the purpose of the traffic stop, and most of these questions were specifically aimed at investigating Barry for drug related activity. Olson transitioned directly from the drug questioning to the field sobriety tests. During this same time period, it does not appear that Olson had begun working on the speeding citation.⁷

⁵ When asked by the prosecutor why he conducted field sobriety tests, Olson said, "Just to make sure she wasn't impaired at the time." SH 14. On cross-examination, Olson admitted that he did not observe any signs that Barry was intoxicated. SH 18-20; *see* FOF 14.

⁶ The Circuit Court found that the Trooper lacked reasonable suspicion to extend the stop to conduct field sobriety tests. SH 34. The Circuit Court also noted at the suppression hearing that the trooper's actions in conducting the tests appeared to be aimed at merely drawing out and continuing the interview. SH 35.

⁷ It is noteworthy that from 9:33:36 – 9:35:09, the patrol car video in Exhibit 1 shows that Olson has only one hand on the keyboard to his computer while he is

In his testimony at the suppression hearing, Olson claimed that Barry acted “nervous” throughout the duration of the stop. According to Olson, there were times he noticed Barry had a “forced or fake laugh is how I took it. There were also times that she would yawn.” SH 11. On cross-examination, Olson admitted he had never met Barry before and was not familiar with how Barry normally sounded when she laughed. SH 31. Olson also testified that he observed Barry’s carotid artery visibly pulsating, SH 11, although on cross-examination he admitted having no specialized training in vascular medicine or in recognizing whether a pulsating artery in the neck is indicative of nervousness. SH 24.

Olson further testified that people are ordinarily nervous when he stops them, “but usually the innocent motoring public, once they find out that they are just getting a citation or a warning, usually that nervousness subsides.” SH 9. According to Olson, Barry’s nervousness continued after he informed her she would just be receiving a citation. SH 9. The patrol car video reveals that after Olson told Barry he would give her a reduced ticket, he continuously questioned Barry about having drugs in her vehicle, repeatedly sought consent to search the

continuously questioning Barry about drugs. Otherwise, during the investigative questioning, Olson can be seen occasionally tapping on the keyboard. Ex. 1 at 9:30:12 – 9:36:06. Olson also did not have his hands on the keyboard while conducting field sobriety tests. Ex. 1 at 9:36:06 – 9:37:31. No questions were asked or statements made related to information pertaining to the speeding citation during this time.

vehicle, and attempted to mislead Barry to believe he had information that she was carrying drugs in her vehicle. Ex. 1 at 9:30:12 - 9:37:31.

After completing two visual tests, Ex. 1 at 9:36:06 – 9:37:31, Olson asked Barry if “by chance” she had used marijuana in Colorado. Ex. 1 at 9:37:33 – 9:37:35. Barry said “yes,” and noted that she didn’t “get to do that anywhere else.”⁸ Ex. 1 at 9:37:35 – 9:37:43. Barry indicated she had used two days earlier. Ex.1 at 9:37:53 – 9:38:07. Olson asked, “You didn’t use any this morning?” Barry said “no.” Ex. 1 9:38:22 – 9:38:28. Seconds later, Olson called out on his radio to see if a canine was available to conduct a sniff of Barry’s vehicle. Ex. 1 at 9:38:41 – 9:38:55. Olson then asked Barry if she had smoked in the clothes she was wearing, and Barry asked “Do I smell like it?” Olson answered “yes,” and Barry responded, “I don’t know, I haven’t showered in two days, I left yesterday. I wore this sweater all week basically because it’s freezing out there.” Ex. 1 at 9:39:44 – 9:39:54. Olson then had Barry do the alphabet and number counting field sobriety tests. Ex. 1 at 9:40:10 – 9:41:05; SH 27. Barry passed all the tests. SH 27. Olson mentioned again that he was getting “faint whiffs” of the “burnt marijuana, and asked Barry to be honest with him. Ex. 1 at 9:41:09 – 9:41:18. In response, Barry says “I am really being honest, I promise you.” Ex. 1 at 9:41:18 – 9:41:20. He then asks Barry for her phone number, Ex. 1 at 9:41:38 – 9:41:40,

⁸ The trial court found that Trooper Olson had unnecessarily extended the stop beyond the point it should have reasonably concluded prior to Barry’s admission, at 9:37:38, of legally smoking marijuana when she was in Colorado. COL 18; SR 64.

which appears to be the first question Olson had asked related to processing the speeding citation from the time he told Barry he was going to reduce her ticket. See Ex. 1 at 9:30:12 – 9:41:40.

At 9:41:50, Olson received confirmation that a K-9 unit was on its way. Ex. 1 at 9:41:50 – 9:41:52. Over the next several minutes, Olson and Barry waited for the canine unit to arrive. Ex. 1 at 9:43:53 – 9:51:06. Olson and Barry discussed their opinions on issues with the criminal justice system. Ex. 1 at 9:43:55 – 9:47:00. During most of this conversation, Olson has either one hand or no hands on the keyboard to his computer. Ex. 1 at 9:43:55 – 9:47:00. At one point, Olson asks Barry for her phone number again because he accidentally “deleted that ticket.” Ex. 1 at 9:47:00. The K-9 officer arrived approximately ten minutes after receiving confirmation that the unit was on its way. Ex. 1 at 9:51:10.

The dog performed a sniff of the exterior of the vehicle and alerted for drugs. Ex. 1 at 9:53:25 – 9:54:25. Olson searched the Hyundai and located marijuana. Ex. 1 at 9:55:28 – 10:00:08. Barry was arrested and charged with the counts in the indictment.

STANDARD OF REVIEW

“A motion to suppress for an alleged violation of a constitutionally protected right raises a question of law, requiring de novo review.” *State v. Lee*, 2017 S.D. 28, ¶ 5, 896 N.W.2d 281, 283 (quoting *State v. Hess*, 2004 S.D. 60, ¶ 9, 680 N.W.2d 314, 319). The Court reviews “findings of fact under the clearly erroneous standard.” *State v. Hess*, 2004 S.D. 60, ¶ 9, 680 N.W.2d 314, 319.

“Once the facts have been determined, however, the application of a legal standard to those facts is a question of law reviewed de novo.” *State v. Ballard*, 2000 S.D. 134, ¶ 9, 617 N.W.2d 837, 840 (quoting *State v. Hirning*, 1999 SD 53, ¶ 8, 592 N.W.2d 600, 603).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN FINDING THE OFFICER UNLAWFULLY ADDED TIME TO THE STOP BY CONDUCTING A DRUG INTERDICTION INVESTIGATION IN THE ABSENCE OF REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

The Fourth Amendment of the United States Constitution and [Article VI, § 11](#), of the South Dakota Constitution protect an individual's right to be free from unreasonable searches and seizures. A stop of a vehicle constitutes a seizure within the meaning of the Fourth Amendment “even though the purpose of the stop is limited and the detention is brief.” *State v. Krebs*, 504 N.W. 2d 580, 584 (S.D. 1993) (citation omitted); see *State v. Littlebrave*, 2009 SD 104, ¶ 11, 776 N.W.2d 85, 89 (stating the reasonableness of an investigatory detention is analyzed under *Terry v. Ohio*, 392 U.S. 1 (1968)). Once a lawful traffic stop is initiated, an officer is “entitled to conduct an investigation reasonably related in scope to the circumstances that justified the interference in the first place.” *State v. Ballard*, 2000 SD 134, ¶ 11, 617 N.W.2d 837, 841 (citation omitted). “An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” *Ballard*, 2000 SD 134, ¶ 11, 617 N.W.2d at 841 (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)).

The United States Supreme Court's decision in *Rodriguez v. U.S.* controls the analysis in this case. 135 S.Ct. 1609 (2015). In *Rodriguez*, the Court clarified "the tolerable duration of police inquiries in the traffic-stop context." 135 S.Ct. at 1614. There, a police officer conducted a traffic stop of the defendant's vehicle for briefly veering onto the shoulder of the highway. *Id.* at 1612. The officer obtained the driver's license, registration, and proof of insurance and completed a records check on the driver and sole passenger. *Id.* at 1613. After writing a warning ticket for the traffic violation, the officer asked for consent to walk his dog around the vehicle. *Id.* The driver refused. *Id.* The officer then ordered the occupants out of the vehicle and conducted the dog sniff, and the dog alerted to the presence of drugs. *Id.* The time between the completion of the warning ticket and the dog's alert was approximately seven or eight minutes. *Id.*

Although both the District Court and Eighth Circuit Court of Appeals upheld the dog sniff, finding the seven or eight minute delay was an "acceptable *de minimis* intrusion on Rodriguez's personal liberty," *Id.* at 1614 (citation omitted), the Supreme Court reversed and held that law enforcement had unconstitutionally prolonged the traffic stop. *Id.* at 1614-17. As the Court explained, "[a] seizure for a traffic violation justifies a police investigation *of that violation.*" *Id.* at 1614 (emphasis added). "Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate th[at] purpose." *Id.* "Authority for the seizure thus ends when tasks tied to the traffic infraction are — or reasonably should have been — completed." *Id.* (emphasis added).

Thus, by adding seven or eight minutes to Rodriguez's detention for the purpose of a drug investigation, the Court held, the stop was unconstitutionally prolonged unless the officer had reasonable suspicion of criminal activity apart from the traffic violation. *Id.* at 1616.

The Rodriguez Court focused on the "purpose" or "mission" of a traffic stop as providing the parameters by which the scope and duration of a lawful roadside detention is measured. *Id.* at 1614. "Like a *Terry* stop, the 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 attend to related safety concerns." *Id.* (citations omitted). The Court explained that, in addition to writing out the traffic ticket, "an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.'" *Id.* at 1615 (quoting *Caballes*, 543 U.S., at 408). "Typically such inquiries 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.* (citations omitted). These inquiries are aimed at accomplishing the same goal as the issuance of a traffic citation: "ensuring that vehicles on the road are operated safely and responsibly." *Id.* (citation omitted). The second part of the mission, officer safety, stems from the realization that "[t]raffic stops are 'especially fraught with danger to police officers.'" *Id.* at 1616 (citing *Johnson* 555 U.S. at 330). Therefore, "certain negligibly burdensome precautions," such as a warrant or criminal record check, may need to be taken by an officer to ensure his safety,

and ordinarily fall within the scope of the mission of the stop. *Id.* (citing *U.S. v. Holt*, 264 F.3d 1215, 1221-22 (C.A. 10 2001)).

By contrast, “measure[s] aimed at detecting evidence of ordinary criminal wrongdoing,” such as the dog sniff in *Rodriguez*, “cannot be “fairly characterized as part of the officer’s traffic mission.” *Id.* at 1615. Because on-scene investigation into other criminal activity “detours from” the mission of the stop, an officer cannot waste any time – not even a *de minimis* amount of time – pursuing these unrelated investigations in the absence of reasonable suspicion. *Id.* at 1616. “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.” *Rodriguez*, 135 S.Ct. at 1612.

In the present case, the trooper pulled Barry over for speeding. Ex. 1 at 9:26:23 – 9:26:48. Less than six minutes into the stop, Ex. 1 at 9:26:23 - 9:32:12, and about four minutes after Barry accompanied Olson to his patrol vehicle, Ex. 1 at 9:27:53 – 9:32:12, Olson had run a check of Barry’s driver’s license, conducted a warrant check, inspected her paperwork and everything checked out fine.⁹ Ex. 1 at 9:26:48 - 9:32:02. Olson had obtained all of the necessary information related to the purpose of the stop, any safety concerns had been attended to, and the only remaining task related to the mission of the stop was the issuance of the speeding ticket. At that point, however, Olson’s inquiries detoured from the mission of the

⁹ This is consistent the State’s proposed timeline. See SB 19-20 (Chart 2).

stop. For the next approximately nine minutes, Olson continuously questioned Barry about whether she was transporting drugs in her vehicle, requested consent to search the vehicle and ran Barry through field sobriety tests despite not having observed any signs of intoxication. Ex. 1 at 9:32:12 - 9:41:20. Olson employed tactics such as asking Barry “what would you say if I told you we had information that you were transporting drugs in this vehicle?” When Barry became confused and questioned how that could be possible, Olson admitted the question was just a “hypothetical.” After five and a half minutes of the trooper’s drug interdiction investigation had passed, Ex. 1 at 9:32:12 – 9:37:43, about eleven minutes into the stop, Ex. 1 at 9:26:23 – 9:37:43, Barry admitted that she had legally smoked marijuana in Colorado two days earlier. Only after eliciting this admission did the trooper call for a K-9 to come to the scene. Ex. 1 at 9:38:41 – 9:38:55. After almost eight minutes of the trooper’s drug related inquiries, Ex. 1 at 9:39:48, and more than thirteen minutes into the stop, after his attempts at getting Barry to consent to a search of the vehicle had proven unsuccessful, the trooper claimed to smell a “very faint odor of marijuana” coming from Barry’s person. After receiving confirmation that a K-9 unit was on its way, Olson and Barry waited another nine and a half minutes for the unit to arrive. Ex. 1 at 9:41:50 - 9:51:10. The dog performed a sniff of the exterior of the vehicle approximately twenty seven minutes into the stop. Ex. 1 at 9:26:23 - 9:53:25.

Meanwhile, the trooper dawdled through the completion of the speeding ticket and consciously drew out the investigation as he tried to fish for

information to provide him with reasonable suspicion and justify a dog sniff. As the circuit court noted, “[e]verything seemed to be drawn out for the purpose of continuing the interview.” SH 35. The video in Exhibit 1 establishes that as Olson continuously questioned Barry and ran her through field sobriety tests, the completion of the citation was put on hold. No questions were asked, nor statements made, by the trooper related to the speeding citation over an approximately nine minute period while he pursued the unrelated investigation. Ex. 1 at 9:32:12 – 9:41:20. The trooper eventually asked Barry for her phone number approximately fifteen minutes into the stop, Ex. 1 at 9:26:23 – 9:41:36, and then asked for it again about twenty minutes into the stop, Ex. 1 at 9:26:23 – 9:47:00, because the trooper claimed he had “accidentally deleted the ticket.” According to the video, it does not appear that Olson ever completed the speeding ticket prior to the dog sniff and subsequent search of the vehicle, more than thirty minutes after the stop was initiated. Ex. 1 at 9:26:48 – 10:00:08. *See People v. Pulling*, 393 Ill.Dec. 670, 34 N.E.3d 1198, 1201 (Ill.App.Ct.2015) (trooper indicates that the task of writing a speeding ticket generally took between three and five minutes); *U.S. v. Cornejo*, 196 F. Supp. 3d 1137, 1153 (E.D. Cal. 2016) (finding eight minutes was an unreasonably long amount of time to complete a written warning citation); *In re Pardee*, 872 N.W2d 384, 396 (Iowa 2015) (finding a “ten-to-twelve-minute estimate overstates the amount of time a simple traffic stop would have required”).

Trooper Olson’s investigation into drug related activity was impermissible

under the constitution whether it added five minutes or thirty minutes to the stop. The *Rodriguez* Court specifically rejected the argument “that an officer may ‘incrementally’ prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances.” 135 S.Ct at 1616. Rather, the Court found that even a *de minimis* intrusion on an individual’s personal liberty violates the Constitution. *Id.* As the Court explained, “[t]he reasonableness of a seizure . . . depends on what the police in fact do.” An officer must always be “reasonably diligent.” *Id.* “If an officer can complete traffic-based inquiries expeditiously, then that is the amount of ‘time reasonably required to complete [the stop’s] mission.” *Id.* (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)); see *State v. McFadden*, No. 16-1184, 2017 WL 4315047, at *5 (Iowa Ct. App. September 27, 2017) (finding the officer’s detour from the mission of the stop was unlawful under *Rodriguez* even though the questions caused only a four minute delay); *U.S. v. Ward*, No. 16-cr-00485-JST-1, 2017 WL 1549474, at *5 (N.D. Cal. May 1, 2017) (finding officer’s unrelated questions lasting a “few minutes” unlawful under *Rodriguez*).

Further, that Trooper Olson did not in fact complete the speeding ticket prior to the time he pursued an investigation into other criminal activity is immaterial. The Court in *Rodriguez* stated that “[t]he critical question . . . is not whether the dog sniff occurs before or after the officer issues a ticket . . . but

whether conducting the sniff ‘prolongs’ – i.e., adds time to – ‘the stop.’” 135 S.Ct at 1616. *See Cornejo*, 196 F. Supp. 3d 1137 at 1153 (holding an officer’s “questioning on unrelated topics and calibrated delay in filling out the warning citation, as well as the subsequent K-9 sniff of the rental car, added time to the traffic stop”); *U.S. v Evans*, 786 F.3d 779 (9th Cir. 2015) (officer’s unrelated ex-felon registration check of defendant lasting eight minutes prior to the issuance of warning ticket violated the Fourth Amendment).

In *People v. Pulling*, the Illinois Appellate Court found that the officer “unlawfully prolonged the duration of the stop when he interrupted his traffic citation preparation to conduct a free-air sniff based on an unparticularized suspicion of criminal activity.” 393 Ill.Dec. 670, 34 N.E.3d 1198, 1201 (Ill.App.Ct.2015). There, the defendant was stopped by the trooper for speeding. *Id.* at 1199. Approximately four minutes into the stop, the trooper had run all of the necessary record checks tied to the traffic stop and had all of the information needed to complete the tickets. *Id.* Rather than diligently complete the tickets, however, the trooper interrupted the process to further question the driver and passenger about their travel plans. *Id.* at 1200. When the vehicle occupant’s stories raised inconsistencies, the trooper performed a dog sniff. *Id.* at 1200. Despite the entire stop lasting fifteen minutes, the court held that the officer’s detour from the purpose of the stop to conduct unrelated activities had prolonged the stop in violation of the Fourth Amendment. *Id.* at 1202.

In *U.S. v. Peralez*, a pre-*Rodriguez* case, the Eighth Circuit found that the

trooper's "'blended process' of conducting a drug interdiction investigation during the course of a run-of-the-mill traffic stop violated the Fourth Amendment." 526 F.3d 1115, 1120 (8th Cir. 2008). There, the trooper performed a traffic stop of a vehicle for a license plate violation. *Id.* at 1117. Three minutes into the stop, the trooper told the defendant he would receive a warning ticket. *Id.* at 1119. The Court stated that "[w]hile routine tasks remained after that determination, "[o]nce an officer has decided to permit a routine traffic offender to depart with a ticket, a warning, or an all clear, the Fourth Amendment applies to limit any subsequent detention or search." *Id.* at 1120. Rather than diligently complete the citation, however, over the next thirteen minutes the trooper "interspers[ed] drug interdiction questions with the routine processing of a traffic stop arising from an obstructed license plate." *Id.* During that timeframe, "the questions unrelated to the traffic violation constituted the bulk of the interaction between the trooper and the van's occupants." *Id.* at 1121. Thus, the Court held the stop violated the defendant's Fourth Amendment rights because "the trooper's focus on non-routine questions prolonged the stop 'beyond the time reasonably required' to complete its purpose." *Id.*

Like the officers in *Pulling* and *Peralez*, Trooper Olson unlawfully extended what should have been a short traffic stop by investigating matters unrelated to the mission of the stop without having reasonable suspicion of criminal activity. Similar to those cases, approximately four minutes into the stop, Olson told Barry he would be issuing her a reduced speeding ticket. Ex. 1 at

9:26:23 – 9:30:21. As in *Perez*, from there the trooper's questions were almost entirely focused on matters unrelated to the traffic stop. Approximately six minutes into the stop, Ex. 1 at 9:26:23 – 9:32:12, and about four minutes after Barry accompanied Olson to his patrol vehicle, Ex. 1 at 9:27:53 – 9:32:12, the trooper had conducted all of the necessary checks related to the mission of the stop, and the only task remaining was the completion of the citation. Rather than diligently write out the speeding ticket, the trooper detoured from the mission of the stop over the next approximately nine minutes to conduct a drug interdiction investigation. Ex. 1 at 9:32:12 – 9:41:20. By continuously questioning Barry about drugs, seeking consent to search the vehicle and conducting field sobriety tests, the trooper extended the time necessary to complete the citation, and in doing so, violated Barry's constitutional rights.

A. The Officer Lacked Reasonable Suspicion of Criminal Activity when the Stop was Unnecessarily Extended to Pursue Matters Unrelated to the Mission of the Stop.

Because the duration of the stop was extended by the trooper on matters unrelated to the traffic stop, the seizure was unlawful unless Olson had an objectively reasonable suspicion of criminal activity at the point in which he investigated these matters unrelated to the mission of the traffic stop.

An officer must possess reasonable suspicion that criminal activity exists apart from the initial traffic violation to justify extending the scope of a traffic stop. *State v. Ballard*, 2000 SD 134, ¶¶ 12-13, 617 N.W.2d 837, 841. Reasonable suspicion that criminal activity exists must be based on “specific and articulable

facts which taken together with rational inferences from those facts, reasonably warrant the intrusion.” *State v. Akuba*, 2004 S.D. 94, ¶ 15, 686 N.W.2d 406, 413 (citations omitted). “[I]n making a reasonable suspicion determination, [the Court] must [l]ook at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing.” *State v. Herren*, 2010 S.D. 101, ¶ 8, 792 N.W.2d 551, 554 (quoting *State v. Bergee*, 2008 S.D. 67, ¶ 10, 792 N.W.2d 911, 914). “The officer’s reasonable suspicion cannot be . . . just a mere hunch or based on circumstances which describe a very large category of presumably innocent travelers.” *U.S. v. Jones*, 269 F.3d 919, 927 (8th Cir. 2001) (citing *Reid v. Georgia*, 448 U.S. 438, 441 (1980)).

The Court must make its “own legal assessment of the evidence to decide under the Fourth Amendment whether the officer’s actions were ‘objectively reasonable.’” *Littlebrave*, 2009 S.D. 104, ¶ 18, 776 N.W.2d at 92 (quoting *State v. Chavez*, 2003 SD 93, ¶ 49, 668 N.W.2d 89, 103 (Konenkamp, J., concurring)). The Court is not constrained by the circuit court’s legal conclusions. *Id.* “Equally important, [the Court] is not bound by a police officer’s subjective rationale.” *Id.*

(i) *Barry’s Admission of Prior Use/Faint Odor of Marijuana*

As an initial matter, the State takes issue with the circuit’s court’s finding of when during the stop Trooper Olson purportedly smelled “a very faint odor of marijuana” coming from Barry’s person. A significant part of the State’s timeline argument relies on the assertion that Trooper Olson smelled the “faint odor” on

Barry prior to when the circuit court found that it occurred – at approximately the fourteen minute mark of the video in Exhibit 1, or at about 9:39:48. The State argues the trooper first smelled the “faint odor” at the nine minute mark of the stop, or 9:35:48.¹⁰ Ex. 1. SB 5, 14. The State also alleges that Olson smelled the “faint odor” at the ten minute mark in the stop, as well as at the twelve minute mark. *See* SB 21-22 (Chart 2).

However, as the judge of the credibility of the witnesses at the hearing, the circuit court did not clearly error in finding that the trooper had not smelled the “faint odor” until he mentioned as much in the video. Olson gave varying and inconsistent testimony about when during the stop he had smelled the “faint odor” coming from Barry’s person. SH 13, 29-30. When he was asked on direct-examination at what point he had first smelled the marijuana, Olson stated, “I believe it was when I started working on the citation. I don’t remember the exact time. We’d have to refer to the video on that.” SH 13. Olson then stated that he smelled the odor before he called for the dog sniff. SH 13-14. On redirect, Olson testified that “after doing some of the checks I ran through field sobriety tests, at that point I started to smell the faint odor of burnt marijuana coming from her person.” SH 29. On recross, Olson was asked by defense counsel to confirm his prior testimony that he smelled the “faint odor” after he began doing field

¹⁰ The State asserts that “[b]ecause of the marijuana odor, Olson initiates eye nystagmus testing.” SB 5 (Citing SH 13). However, nothing in the record or Olson’s testimony establishes that the reason he conducted field sobriety tests was because he smelled the odor of marijuana.

sobriety tests, and Olson testified as follows:

No, it was – I don't recall exactly where I started to smell the faint odor. It was right about that time that I was doing the field sobriety tests, so right prior to so if that was –

SH 29. Olson then reversed course and said he smelled the “faint odor” before the field sobriety tests. SH 29-30. In light of Olson's inconsistent testimony, and his initial admission that he had not smelled the odor until after he had begun field sobriety tests, the Circuit Court found the point at which the trooper first smelled any “faint whiffs” of “burnt” marijuana was at approximately the fourteen minute mark of video, Ex. 1 at 9:39:48, the point at which Olson first mentioned to Barry that he smelled it.¹¹ Judge Sabers also expressed doubt concerning the validity of Olson's claim of smelling the “faint odor” of marijuana in making her ruling:

By my count we were more than 14 minutes into the interview before the faint smell of burnt marijuana was referenced. The first and only time it was referenced before the drug dog arrives. So, to me it appears that the trooper was simply killing time, bi[d]ing time.

SH 34.

Therefore, the circuit court's finding was not clearly erroneous.

Accordingly, neither Barry's admission to smoking marijuana two days earlier, at 9:37:32, nor the purported “faint odor,” at 9:39:48, factor into this Court's

¹¹ At that point in the video, Olson had already conducted the first two nystagmus field sobriety tests, Ex. 1 at 9:36:06 – 9:37:31, but he had not yet conducted the alphabet and number tests.

reasonable suspicion determination. Ex. 1; *see* COL 18.

The State raises a number of other factors which it alleges gives rise to reasonable suspicion.

(ii) Drug Source State

The State lists Barry's travel from the state of Colorado, a purported "source state" for drugs, as an indicia of reasonable suspicion. This factor should be accorded extremely little weight in the reasonable suspicion calculus. In *U.S. v. Beck*, the Eighth Circuit addressed the "drug source" argument in regards to the State of California. 140 F.3d 1129, 1137-38 (8th Cir. 1998). The Court observed:

Because millions of law-abiding Americans reside in California and travel, mere residency in and travel from the State of California means the officer's "source state" factor must be considered in this context. Innumerable other Americans travel to that state or through there for pleasure or lawful business. Clearly, the vast number of individuals coming from that state must relegate this factor to a relatively insignificant role.

Id. at 1138.

Millions of law-abiding Americans live and travel from Colorado, and millions of people travel to that state for business or pleasure. Trooper Olson did not testify that a vehicle coming from Colorado was any more likely to contain drugs than vehicles coming from Wyoming, California, Texas or Arizona. *See U.S. v. Salzano*, 158 F.3d 1107, 1114 (10th Cir. 1998) (noting the government offered no evidence to show that vehicles traveling from other states were less likely to be carrying drugs). Further, Barry was consistent in stating, and never tried to conceal the fact, that she was traveling from Colorado where her brother

lived. *See Id.* (noting that travel from a “source state” is not supportive of reasonable suspicion unless the detainee is attempting to conceal the fact). Thus, this Court should “relegate this factor to a relatively insignificant role.” *Beck*, 140 F.3d at 1138.

(iii) Travel Arrangements

Next, the State claims Barry’s decision to fly out to Denver and drive back after her ten-day stay was evidence supporting the trooper’s reasonable suspicion. However, under the facts of this case there was nothing inherently suspicious about Barry’s use of a rental vehicle to travel back home to Wisconsin, even if it was rented by a third person. *See Beck*, 140 F.3d at 1137 (holding “there was nothing inherently suspicious in Beck’s use of a rental vehicle, even though rented by a third person, to travel”). Further, there is nothing criminal about flying to another state to visit a family member for ten days and renting a car to drive back home. *See U.S. v. Wood*, 106 F.3d 942, 947 (10th Cir. 1997). (finding a one-way flight to California for two-week vacation and renting a car to drive back to Kansas were “not the sort of unusual plans which give rise to reasonable suspicion of criminal activity”).

At the suppression hearing, Trooper Olson testified that he “found it odd that she would fly down to Denver, Colorado and rent a vehicle to drive back without doing anything other than driving.” However, he never asked Barry why she decided to drive home. If Olson thought Barry’s decision to drive home was odd, he could have asked Barry about it in order to verify or dispel his

suspicion in a short period of time. By leaving the question unanswered, Olson left his suspicions unquenched.

Barry's travel plans were not the sort of unusual travel plans which serve as a basis to support reasonable suspicion. Barry's travel decisions add very little, if any, value to the Court's analysis.

(iv) Nervousness

When determining the presence of reasonable suspicion, a suspect's nervousness has limited significance. *U.S. v. Jones*, 269 F.3d 919, 928 (8th Cir. 2001). "It is certainly not uncommon for most citizens – whether innocent or guilty – to exhibit signs of nervousness when confronted by a law enforcement officer." *Wood*, 106 F.3d at 948. "Because the government repeatedly relies on nervousness as a basis for reasonable suspicion, it must be treated with caution." *Jones*, 269 F.3d at 929 (quotation and citation omitted); *See Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (describing traffic stops as potentially "unsettling" and having the capacity to provoke "substantial anxiety").

In the present case, such caution is warranted. At the suppression hearing, Olson claimed that Barry acted "nervous" throughout the duration of the stop. According to Olson, there were times he noticed Barry had a "forced or fake laugh is how I took it. There were also times that she would yawn." SH 11. On cross-examination, Olson admitted he had never met Barry before and was not familiar with how Barry normally sounded when she laughed. SH 31. Olson also testified that he observed Barry's carotid artery visibly pulsating, SH 11,

although he admitted having no specialized training in recognizing whether a pulsating artery in the neck is indicative of nervousness. SH 24.

Olson further testified that people are ordinarily nervous when he stops them, “but usually the innocent motoring public, once they find out that they are just getting a citation or a warning, usually that nervousness subsides.” SH 9.

According to Olson, Barry’s nervousness continued after he informed her she would just be receiving a citation. SH 9. However, the patrol car video reveals that after Olson told Barry he would give her a reduced ticket, he continuously questioned Barry about having drugs in her vehicle, repeatedly sought consent to search the vehicle, and attempted to mislead Barry to believe he had information that she was carrying drugs in her vehicle. Ex. 1 at 9:30:12 - 9:37:31.

It defies logic to expect a detained individual’s nervousness to subside when she is told she will be receiving a reduced speeding ticket, if right after informing her of the fact the officer conducts an interrogation of the individual about the presence of drugs in her vehicle, and even implies to her that he has been informed by someone that she is carrying drugs. *See* Ex. 1 9:30:12 – 9:41:20. If Barry’s alleged nervousness persisted, it was only because the trooper extended the stop to conduct an unconstitutional interrogation.

The video of the traffic stop serves to refute the assertion that Barry was unusually nervous. Ex. 1. To the contrary, Barry was well spoken, appeared relatively calm, and even made small talk with the officer as they waited for the dog to arrive. The circuit court did not err in finding the alleged nervousness

insignificant. This factor adds very little, if any, support to a finding of reasonable suspicion.

(v) Trooper's Disbelief of Barry's Reason for Trip

Barry's alleged "inconsistent story" adds no value to the analysis because there was nothing objectively inconsistent about Barry's story, and any subjective disbelief the trooper had about her explanation was never followed up on to confirm or dispel the trooper's subjective suspicion.

During the stop, when Olson inquired about her travel plans, Barry explained that she had gone out to Colorado to be with her brother who was participating in an FDA Spaulding Clinical trial to research an Alzheimer's treatment medication. Ex. 1 at 9:28:00 – 9:28:26; 9:28:50 – 9:28:54. Barry explained that her brother had to have "someone with him for three days after the clinical" to make sure he was ok. Ex. 1 at 9:28:41 – 9:28:50. Barry stated her brother "was lucky he didn't go blind or anything." Ex. 1 at 9:28:41 – 9:28:41. When Barry explained to Olson why her brother's girlfriend's name was on the rental agreement, Olson said, "So he did have a girlfriend with him then." Ex. 1 at 9:29:30 – 9:29:42; SH 8. According to Olson, upon hearing this statement Barry "got quiet and then changed the story or changed the subject." SH 8. However, the patrol car video reveals Barry responded to Olson's statement by saying "they don't live together or anything." Ex. 1 at 9:29:44 – 9:29:47; see SH 32.

Barry's response to the officer's question made sense in light of her explanation for being in Colorado. If her brother did not live with his girlfriend,

and the girlfriend worked for a living, and if Barry's brother needed someone to be with him on a near constant basis, then it made sense that her brother required her presence. However, Olson did not follow up with any additional questions to Barry in order to confirm or dispel his subjective suspicion, such as to ask whether the girlfriend was employed and unavailable to watch over Barry's brother for several days, or to ask about how many hours a day Barry was required to be with her brother while he was going through the clinical trial. At the risk of receiving a reasonable explanation, Olson chose to keep those questions unanswered.

Because Barry's explanations for being in Colorado were objectively consistent, this factor adds no value to the Court's analysis.

(vi) Drug offense History

Next, the State claims Barry's "Drug Offense History" represents an indicia of reasonable suspicion. First, the term misconstrues the evidence. While Barry did tell Olson that she used to be a heroin addict and committed a burglary four years prior before turning her life around, there was no evidence presented by the State to confirm or deny her admission. SH 10. Trooper Olson did not testify about what her criminal background check turned up. SH 10. Regardless, the fact that a person admits to committing a crime four years prior is generally not indicative that a crime is currently being committed. *See Jones*, 269 F.3d at 928 (finding no connection between inconsistent answers about prior theft offenses and suspicion of narcotics trafficking); *see U.S. v. Sandoval*, 29 F.3d 537, 542 (10th

Cir. 1994) (finding “knowledge of a person’s prior criminal involvement (to say nothing of a mere arrest) is alone insufficient to give rise to the requisite reasonable suspicion”). Accordingly, this factor adds minimal value to the reasonable suspicion calculus.

(vii) Search Refusal

Finally, the State lists Barry’s refusal to grant the trooper consent to search her vehicle as a factor supporting reasonable suspicion. The State cites one unreported case to support this proposition. SB 11. But as the Tenth Circuit aptly observed: “it should go without saying that consideration of such a refusal would violate the Fourth Amendment.” *U.S. v. Santos*, 403 F.3d 1120, 1126-27 (10th Cir. 2005) (quoting *U.S. v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997). “The failure to consent to a search cannot form any part of the basis for reasonable suspicion.” *Wood*, 106 F.3d at 946.

The State cites this Court’s decision in *State v. Littlebrave*, 2009 SD 104, 776 N.W.2d 85 as support for the argument that Trooper Olson had reasonable suspicion to detour from the mission of the stop. SB 13. However, the present case is distinguishable. For example, whereas the officer who initiated the stop in *Littlebrave* noticed a “strong odor of a soap or chemical” masking agent when he approached the defendant’s vehicle, and the vehicle looked lived-in with duffle bags in the back, *Id.* at 87, Trooper Olson observed no indicators of potential drug possession or ingestion in Barry’s vehicle or on her person when he initiated the stop. SH 17-20. Also, in *Littlebrave* the two parents in the vehicle

gave unequivocally different stories to the trooper about the purpose and duration of their trip. The father, the defendant, told the officer that they were driving to New York “to pray for a sick friend,” and said they were returning Wednesday. *Id.* The mother denied that anyone in New York was sick, and indicated they were returning Friday. *Id.* at 88. “[A]nd the children had been traveling for an extremely long period of time, yet they were ‘destined to be flown back to Washington at a time’ that neither parent could match. *Id.* at 92. No such inconsistency existed in Barry’s responses to the trooper. Moreover, in *Littlebrave* the parents were driving “a rental car on a one-way trip only to purchase five one-way plane tickets to return after only one day. In this case, there was no such unusual timing factor associated with Barry’s travel. The evidence supporting reasonable suspicion in *Littlebrave*, therefore, was much stronger than the evidence in this case.

The present case is more akin to *U.S. v. Beck*, 140 F.3d 1129 (8th Cir. 1998). There, the Eighth Circuit considered seven factors which the government alleged established reasonable suspicion. *Id.* at 1137. Five of those seven factors are the same or similar to the ones being raised in this case. They were: (1) the trip was made from a “drug source state to a drug demand state; (2) an absent third party had rented the car driven by the defendant; (3) the vehicle had a California license plate; (4) garbage and fast food bags were on the floor of the car; (5) there was no visible luggage in the vehicle; (6) the defendant driver had a nervous demeanor; and (7) the officer disbelieved the driver’s explanation for the trip. *Id.*

The Eighth Circuit concluded those factors did not provide reasonable suspicion to extend the detention. *Id.* at 1139-40; *see also In re Pardee*, 872 N.W.2d 384 (Iowa 2015) (finding eight factors raised by state did not amount to reasonable suspicion); *U.S. v. Salzano*, 158 F.3d 1107, 1114 (10th Cir. 1998) (holding six factors were insufficient to establish reasonable); *U.S. v. Cornejo*, 196 F. Supp. 3d 1137, 1153 (E.D. Cal. 2016) (finding seven factors did not establish reasonable suspicion).

In this case, there were also a number facts that should have served to dispel the trooper's suspicion of criminal activity in the early stages of the stop. "Officers may not turn a blind eye to facts that undermine reasonable suspicion." *Duffie v. City of Lincoln*, 834 F.3d 877, 883 (8th Cir. 2016). Olson observed no indicators of intoxication on Barry's person, nor any indicators of drug possession when he made contact with her vehicle. SH 17-20. Once inside the patrol vehicle, the officer ran driver's license and warrant checks. SH 20. Barry's driver's license was valid and she had no outstanding warrants. SH 20.

Under certain circumstances, it is possible that a combination of innocuous factors may add up to reasonable suspicion. Here, however, the subjective factors offered by the State, viewed both individually and cumulatively, do not "eliminate a substantial portion of innocent travelers." *U.S. v. Williams*, 808 F.3d 238, 251 (4th Cir. 2015). Rather, they are "so innocent or susceptible to varying interpretations as to be innocuous." *U.S. v. Hight*, 127 F.Supp.3d 1126, 1134 (D. Colo. 2015) (quoting *Salzano*, 158 F.3d at 1113). And

“[r]eliance on the mantra ‘totality of the circumstances’ cannot metamorphose these facts into reasonable suspicion.” *Wood*, 10 F.3d at 948.

If the trooper did eventually elicit enough information from Barry to establish reasonable suspicion during the traffic stop, he did so only by drawing out the initial stop beyond the time reasonably necessary to issue the speeding ticket, and thus, only as a result of Barry’s illegal detention. *See Pardee*, 872 N.W2d at 397 (finding information obtained by the officer after the stop had “already been prolonged past its permissible length violated *Rodriguez* and the Fourth Amendment”).

“While it would be tempting when officers’ conduct uncovers contraband, such as a substantial quantity of drugs, to allow the end to justify the means, the court ‘must resist such temptation.’” *U.S. v. Cornejo*, 196 F.Supp.3d 1137, (E.D. Cal. 2016) (quoting *U.S. v. Richardson*, 385 F.3d 625, 631 (6th Cir. 2004)).

Because the trooper unlawfully extended the traffic stop in the absence of reasonable suspicion, the subsequent discovery of incriminating evidence was also unlawful and that evidence must be suppressed. *Wong Sun v. U.S.*, 371 U.S. 471, 487-88 (1963).

CONCLUSION

On December 2, 2016, when Trooper Olson observed Barry pass by on the interstate in a speeding vehicle with Colorado plates, he had a mission. Unfortunately, his true mission differed from his constitutionally mandated mission. A drug interdiction officer, Olson’s subjective suspicions were on high

alert. So much so, that when he saw Barry pass by and give him a “long look,” he believed criminal activity was afoot. SH 30. Although he observed no indicators of intoxication on Barry or signs of drug possession in her vehicle, he took Barry’s travel plans and destination, purported “nervousness,” and her admission to committing a crime four years prior and turned the stop into a full-fledged drug interdiction investigation early in the stop. After telling Barry she would be receiving a speeding ticket, the trooper’s mission detoured. Olson questioned Barry about having drugs in her vehicle, repeatedly requested consent to search, and conducted field sobriety tests, while dawdling over the ticket and delaying the stop in an attempt to fish for information to establish reasonable suspicion. Eleven minutes into the stop, when Barry admitted to smoking marijuana two days earlier, Olson called for a dog sniff. Shortly thereafter, the trooper coincidentally claimed to smell a “very faint odor” of marijuana on Barry, after twelve minutes of being in the same vehicle together. They waited another ten minutes for the dog to arrive and a sniff was performed. The speeding ticket was not completed in that time.

Trooper Olson lacked the particularized and objective facts to establish reasonable suspicion and turn a routine traffic stop into a drug interdiction investigation. The trooper unlawfully extended what should have been a short traffic stop by investigating matters unrelated to the mission of the stop without having reasonable suspicion of criminal activity. In doing so, he violated Barry’s Fourth Amendment rights.

REQUEST FOR ORAL ARGUMENT

The attorney for the Appellee, Bree Barry, respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted this 27th day of November, 2017.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 9,870 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2007.

Dated this 27th day of November, 2017.

/s/ Beau J. Blouin
Beau J. Blouin
Attorney for Appellant

APPENDIX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
SUPPRESSING EVIDENCE

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APPENDIX

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

SUPPRESSING EVIDENCE

A1

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

BREE BARRY

Defendant.

CRI. 16-8845

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER SUPPRESSING EVIDENCE**

The above-entitled matter came on for hearing on April 20, 2017, on Defendant's Motion to Suppress Evidence before the Honorable Susan M. Sabers. Defendant Bree Barry (Defendant) appeared in person and through her attorney Christian Ruud; the State appeared through Deputy State's Attorney Mandi Mowery. The Court, having heard and considered the evidence and arguments of the parties, makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On December 2, 2016 at approximately 9:26 a.m., Trooper Joshua Olson with the South Dakota Highway Patrol observed Defendant's vehicle traveling on Interstate 90 in Minnehaha County, South Dakota at 89 miles per hour in an 80 miles per hour zone.
2. The trooper testified that as Defendant passed his location, she "took a long look" at him, which the trooper testified he believed was an indicator of criminal activity.
3. The trooper testified that he never observed Defendant's vehicle weaving or swerving, nor did he observe any indicators of intoxication, odors of intoxicants, or any drug-related paraphernalia.
4. The Court has reviewed the video recording of the trooper's interaction with Defendant.
5. The trooper initiated a traffic stop of Defendant's vehicle.
6. While at the side of Defendant's vehicle, the trooper did not detect the odor of marijuana or any other intoxicants.

7. In his testimony before this Court, the trooper claimed that Defendant acted "nervous" throughout his encounter with her. The trooper testified that he saw her hand shaking while he was speaking with her. The trooper testified that he observed Defendant's carotid artery visibly pulsating, although on cross-examination the trooper admitted that he had no training in vascular medicine or in determining whether a pulsating neck artery is indicative of nervousness. The trooper further testified that he observed what he characterized as a "fake or forced laugh" by Defendant, although admitted that he had never met Defendant before and was not familiar with how Defendant normally sounded when she laughs.
8. After examining Defendant's driver's license, the trooper asked Defendant come back to his patrol vehicle. She did so. The trooper then ran a license check on Defendant, conducted a warrant check, ran her registration, and inspected her paperwork. After completing these checks and satisfying himself that there was no cause for concern as to those checks, the trooper told Defendant that he was going to reduce the speeding ticket so the violation was for five miles over the speed limit instead of nine, as a courtesy to her.
9. Approximately six minutes after initially stopping Defendant, after conducting the various warrant and license checks and telling Defendant he was reducing the ticket amount, the trooper then began questioning Defendant as to what she was transporting inside the vehicle.
10. The purpose of the stop was the investigation of a speeding offense. At that point, the purpose of the stop was effectuated, but the trooper extended the stop. The issue is whether there was reasonable suspicion to do so.
11. The trooper continued to question her about her trip, family, and other matters unrelated to the speeding offense for which she was stopped, and for which he cited her.
12. The trooper continued to question Defendant about the contents of the vehicle and asked repeatedly for consent to search the vehicle. Defendant denied consent to search.
13. The trooper then asked Defendant "what would you say if I told you we had information that you were transporting drugs in this vehicle?" Defendant appeared confused, and the trooper admitted he was "just asking a hypothetical."

14. Despite observing no indications that Defendant was under the influence of drugs or alcohol, the trooper began performing standard field sobriety tests on Defendant, including extended visual testing in his vehicle.
15. The trooper asked Defendant if she had used marijuana while visiting Colorado, and Defendant admitted to having used marijuana approximately two days prior.
16. Approximately thirteen minutes after initially stopping Defendant, the trooper used his radio to inquire whether a police service dog was available. While waiting for a response, the trooper continued conducting standard field sobriety tests, despite observing no indicators of impairment.
17. Approximately fourteen minutes after stopping Defendant, the trooper stated for the first time that he was getting "faint whiffs" of "burnt" marijuana from Defendant's person.
18. Defendant responded that she was wearing a jacket that she had worn in Colorado while smoking marijuana, and that she had not yet washed it.
19. Approximately three minutes after his initial radio inquiry, a full 16 minutes after the initial stop, the trooper received confirmation that a police service dog was available and en route to his location.
20. Approximately ten minutes after the radio inquiry, during which lapse of time no further investigation was performed by the trooper, the police service dog unit arrived--roughly 26 minutes after the stop.
21. The police service dog indicated on the vehicle, and during a subsequent search of the vehicle, officers located marijuana and drug paraphernalia.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter of this action.
2. The Fourth Amendment of the United States Constitution and Article VI, Section 11 of the South Dakota Constitution protect citizens from unreasonable searches and seizures. U.S. Constitution, Amendment IV; South Dakota Constitution, Article VI, Section 11.
3. A law enforcement officer must have reasonable suspicion of criminal activity to stop an automobile, and such suspicion must not be the product of mere whim, caprice or idle curiosity, but must be based upon specific articulable facts which taken together with

rational inferences from those facts, reasonably warrant the intrusion. Terry v. Ohio, 392 U.S. 1 (1968); State v. Chavez, 668 N.W.2d 89 (S.D. 2003).

4. Trooper Olson had reasonable suspicion to justify his original stop of Defendant's vehicle, based upon the observation that Defendant was traveling in excess of the posted speed limit.
5. The officer's actions during a stop must be "reasonably related in scope to the circumstances that justified the interference in the first place." State v. Amick, 831 N.W.2d 59, 63 (S.D. 2013). "The 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 initial stop and to attend to related safety concerns." Rodriguez v. U.S., 135 S. Ct. 1609, 1614 (2015) (citations omitted).
6. During an otherwise lawful stop, a trooper may conduct certain unrelated checks, including checking the "driver's license, determining whether there are any outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance," without the reasonable suspicion ordinarily demanded to justify stopping an individual. Rodriguez, 135 S. Ct. at 1614-15.
7. Trooper Olson conducted a stop on Defendant's vehicle to address a speeding violation. The trooper conducted these unrelated document checks before informing Defendant he was reducing the violation amount.
8. Following these checks, the trooper's original "mission" was completed—the driving infraction had been dealt with, and related safety concerns had been attended to.
9. The trooper had concluded that Defendant was who she claimed to be and had no active warrants.
10. The trooper's continued questioning and use of the drug dog lacked the same close connection to roadway safety as did his initial stop and inquiries, and as such a dog sniff was not fairly characterized as part of the trooper's mission in the present case.
11. Any investigative detention "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." Illinois v. Caballes, 543 U.S. 405, 407 (2005). "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." Rodriguez, 135 S. Ct. at 1612.

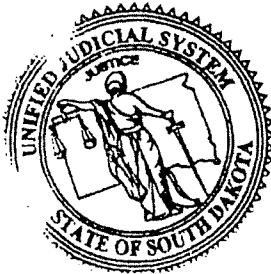
12. Only when an officer develops a reasonable, articulable suspicion that criminal activity is afoot does the officer have justification for a greater intrusion unrelated to the initial traffic offense. State v. Cummins, 920F.2d 498, 502 (8th Cir. 1990).
13. This stop was prolonged beyond the time required to complete that mission and was, therefore, unlawful. On these facts, the officer lacked sufficient justification for a greater intrusion.
14. When determining the presence of reasonable suspicion, a suspect's nervousness has limited significance. U.S. v. Jones, 269 F.3d 919, 928 (8th Cir. 2001). "Because the government repeatedly relies on nervousness as a basis for reasonable suspicion, it must be treated with caution." Id. at 929 (citations omitted).
15. The Defendant's act of yawning and giggling, when viewed as part of the totality of the circumstances surrounding the stop, do not give rise to a suspicion of criminal behavior on these facts to justify the continued questioning or elongated stop to which Defendant was subjected.
16. The fact that Defendant gave the trooper a "long look" while driving past his vehicle or that she appeared nervous during the stop did not give rise to a reasonable suspicion of criminal behavior. Neither Defendant's shaking hand, nor her alleged nervousness, was sufficient to give rise to a reasonable suspicion of criminal behavior on these facts.
17. The trooper lacked a particularized and objective basis for suspecting criminal behavior under the totality of the circumstances presented here. The cumulative effect of the non-criminal, legal conduct observed here, whether yawning, giggling, or looking, did not give rise to the level of reasonable suspicion of criminal behavior. See generally State v. Walter, 2015 S.D. 37, 864 N.W.2d 779, 785.
18. The trooper did not smell the "faint" odor of "burnt" marijuana until after he had already unlawfully extended the duration of the initial stop. Likewise, Defendant's admission to having used marijuana two days prior also came after the stop had been unlawfully extended.
19. Trooper Olson lacked reasonable suspicion of criminal activity to continue to detain Defendant after completing the original mission of the stop – the issuance of a speeding ticket. Trooper Olson further lacked reasonable suspicion to extend the stop to conduct standard field sobriety tests, or to call for a drug dog.

20. The stop at issue was unnecessarily extended multiple times. There were numerous times when the initial stop should have been reasonably concluded, but it was not.
21. Because the trooper lacked reasonable suspicion necessary to continue to detain Defendant, the subsequent discovery of incriminating evidence was also unlawful and that evidence must be suppressed. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).
22. Any Finding of Fact that is more properly a Conclusion of Law shall be deemed so, and any Conclusion of Law that is more properly a Finding of Fact shall be deemed so.
23. The Findings and Conclusions proposed by the parties, not expressly incorporated above, are hereby refused.

ORDER

It is HEREBY ORDERED that Defendant's Motion to Suppress Evidence is GRANTED.

Dated this 24th day of May, 2017.



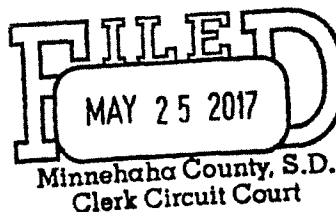
ATTEST:
Angelia M. Gries, Clerk

BY: [Signature]
Deputy

BY THE COURT:

[Signature]

Honorable Susan Sabers
Circuit Court Judge



CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Appellee's Brief were electronically served upon:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28288

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

BREE BARRY,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
2nd JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE SUSAN M. SABERS
Circuit Court Judge

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Order Authorizing Intermediate Appeal Entered July 14, 2017

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ARGUMENT

The state files this reply in support of its appeal from the trial court's suppression of a suitcase full of marijuana found in defendant Barry's vehicle during a routine traffic stop.

Barry's responsive strategy "review[s] each [suspicion] factor individually and then discount[s] each one as having a potentially innocent or innocuous explanation." *United States v. Salzano*, 158 F.3d 1107, 1116 (10th Cir. 1998). However, "[t]here is no place in th[e] reasonable suspicion] analysis for a 'divide-and-conquer' approach that would isolate each cited factor and disregard it if a court could conceive of [an] innocent explanation." *United States v. Dortch*, 868 F.3d 674, 680 (8th Cir. 2017), quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Here, nine accepted suspicion factors were known or revealed to Olson within 11 minutes of effecting the stop: travel from a known drug source state,¹ nervousness,² one-way air travel,³ third-party rental vehicle,⁴

¹ *United States v. Lopez-Guzman*, 246 F.Supp.2d 1155 (D.Kan. 2003); *United States v. White*, 42 F.3d 457 (8th Cir. 1994); *United States v. Flores*, 359 F.Supp.2d 871 (D.Ariz. 2005); *United States v. Douglas*, 195 Fed.Appx. 780 (10th Cir. 2006); *United States v. Lopez*, 304 Fed.Appx. 82 (3rd Cir. 2008); *United States v. Melendez*, 505 Fed.Appx. 233 (4th Cir. 2013); *United States v. Valdez*, 147 Fed.Appx. 591 (6th Cir. 2005); *United States v. Gallardo*, 495 F.3d 982 (8th Cir. 2007).

² *United States v. Dion*, 859 F.3d 114 (1st Cir. 2017); *United States v. Chaney*, 584 F.3d 20 (1st Cir. 2009); *United States v. Thompson*, 772 F.3d 752 (3rd Cir. 2014); *United States v. Cohen*, 593 Fed.Appx. 196 (4th Cir. 2014); *United States v. McBride*, 635 F.3d 879 (7th Cir. 2011); *United States v. Anguiano*, 795 F.3d 873 (8th Cir. 2015); *United States v. Mendoza*, 817 F.3d 695 (10th Cir. 2016).

inconsistent story,⁵ persistent nervousness after being informed that the officer would only be issuing a reduced citation,⁶ drug offense history,⁷ search refusal,⁸ and marijuana odor or admitted use.⁹

³ *United States v. Briasco*, 640 F.3d 857 (8th Cir. 2011); *United States v. McCarty*, 612 F.3d 1020 (8th Cir. 2010); *United States v. Melendez*, 505 Fed.Appx. 233 (4th Cir. 2013); *United States v. Wolfe*, 370 Fed.Appx. 549 (5th Cir. 2010); *United States v. Karam*, 496 F.3d 1157 (10th Cir. 2007).

⁴ *United States v. Winters*, 782 F.3d 289 (6th Cir. 2015); *United States v. Walton*, 827 F.3d 682 (7th Cir. 2016); *United States v. Roberts*, 492 F.Supp.2d 771 (S.D. Ohio 2005); *United States v. Molina*, 351 F.Supp.2d 1164 (D.Kan. 2004); *Commonwealth v. Kemp*, 961 A.2d 1247 (Pa. 2008); *United States v. Ma*, 254 Fed.Appx. 752 (10th Cir. 2007).

⁵ *United States v. Davis*, 620 Fed.Appx. 295 (5th Cir. 2015); *United States v. Ervin*, 469 Fed.Appx. 374 (5th Cir. 2012); *United States v. Garrido*, 467 F.3d 971 (6th Cir. 2006); *United States v. Anguiano*, 795 F.3d 873 (8th Cir. 2015); *United States v. Simpson*, 609 F.3d 1140 (10th Cir. 2010); *United States v. Holt*, 777 F.3d 1234 (11th Cir. 2015); *United States v. Hernandez*, 418 F.3d 1206 (11th Cir. 2005).

⁶ *United States v. Simpson*, 609 F.3d 1140 (10th Cir. 2010); *United States v. Ramos-Rivera*, 64 Fed.Appx. 153 (10th Cir. 2003); *Courtney v. Oklahoma ex rel., Dept. of Public Safety*, 722 F.3d 1216 (10th Cir. 2013).

⁷ *United States v. Robinson*, 529 Fed.Appx. 134 (3rd Cir. 2013); *United States v. Rogers*, 387 F.3d 925 (7th Cir. 2004); *United States v. Douglas*, 195 Fed.Appx. 780 (10th Cir. 2006); *United States v. Simpson*, 609 F.3d 1140 (10th Cir. 2010); *United States v. Goss*, 256 Fed.Appx. 122 (9th Cir. 2007); *United States v. Davis*, 636 F.3d 1281 (10th Cir. 2011); *United States v. White*, 584 F.3d 935 (10th Cir. 2009).

⁸ *United States v. Whitney*, 391 Fed.Appx. 277 (4th Cir. 2010); *United States v. Jones*, 296 Fed.Appx. 473 (6th Cir. 2008); *United States v. Duenas*, 331 Fed.Appx. 576 (10th Cir. 2009); *State v. Meyers*, 100 So.3d 938 (La.App.4th 2012); *United States v. Williams*, 403 F.3d 1203, 1206 (10th Cir. 2005) (“Although refusal to consent [to search] may not augment factors supporting reasonable suspicion, neither does it negate those observations made prior to the refusal”).

⁹ *United States v. West*, 371 Fed.Appx. 625 (6th Cir. 2010); *United States v. Wilson*, 355 Fed.Appx. 49 (7th Cir. 2009); *United States v. Collins*, 650 F.Supp.2d 527 (S.D.W.Va. 2009); *United States v. Cunningham*, 51 Fed.Appx. 986 (7th Cir. 2002); *United States v. Stein*, 694 F.Supp.2d 1231 (D.Kan. 2010); *United States v. Stanclie*, 184 F.Supp.3d 1249 (N.D.Okla. 2016); *Patterson v. State*, 958 N.E.2d 478 (Ind.Ct.App. 2011); *State v.*

Barry faults Olson for not questioning her further in regard to certain suspicion factors – one-way travel itinerary, third-party rental vehicle, inconsistent story, drug offense history, *etc.* – in order to “verify or dispel his suspicions” but, in failing to do so, had “left his suspicions unquenched.” RESPONSE BRIEF at 29-30. Barry asserts that an officer “may not turn a blind eye to facts that undermine reasonable suspicion.” RESPONSE BRIEF at 36. While it is true that an officer may not turn a blind eye to “objective information” that may “quickly dispel[] the reasonable suspicion of a violation,”¹⁰ there is no rule prohibiting Olson from turning a deaf ear to more of Barry’s lies. As stated in *United States v. Williams*, 403 F.3d 1203, 1206 (10th Cir. 2005), Barry’s “offered explanations for the suspicious circumstances [would be] immaterial. A law enforcement officer may rely on his training and experience without inquiring of a defendant as to innocent explanations.”

Indeed, Barry’s insistence that Olson should have prolonged the stop while she spun more lies is rich considering that her brief insinuates that the basic questioning Olson *did* perform impermissibly prolonged the stop. RESPONSE BRIEF at 21, 23. According to Barry, Olson “unlawfully extended what should have been a short traffic stop by

Chinn, 94 So.3d 838 (La.App.5th 2012); *State v. Farris*, 849 N.E.2d 985 (Ohio 2006); *Fisher v. State*, 481 S.W.3d 403 (Tex.App. 2015).

¹⁰ *State v. Bonacker*, 2013 SD 3, 825 N.W.2d 916 (citing suspicion of an expired license plate or driving with a suspended license, without operational taillights or without protective gear as examples of objectively verifiable information that an officer should confirm or dispel early in a stop).

investigating matters unrelated to the mission of the stop.” RESPONSE BRIEF at 23. According to Barry, “even a *de minimis* intrusion on an individual’s personal liberty violates the constitution,” and the acceptable duration of a stop is measured in terms of the time it takes an officer to “complete traffic-based inquiries expeditiously.” RESPONSE BRIEF at 21. Yet in the next breath Barry criticizes Olson for not asking *more* questions. Contrary to Barry’s insinuation, “[a]n 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.” *Arizona v. Johnson*, 555 U.S. 323, 333 (2009).¹¹

It is hard to see how Olson’s questioning measurably extended the subject stop when sufficient suspicion factors – 7 total – were known or revealed to Olson within 5 minutes of stopping Barry’s vehicle (and eight within 9 minutes and nine within 11 minutes) . . . all before Olson completed his processing of the stop. This is in contrast to Barry’s cited cases:

¹¹ *United States v. Pointer*, 159 Fed.Appx. 565, 566 (8th Cir. 2005)(questioning driver about unrelated matters is “not a *per se* Fourth Amendment violation”); *United States v. Burrows*, 564 Fed.Appx. 486, 490 (11th Cir. 2014)(officer permitted to inquire into unrelated areas during the time it takes to process a traffic citation); *United States v. Brigham*, 382 F.3d 500, 508 (5th Cir. 2004)(“reject[ing] any notion that a police officer’s questioning, *even on a subject unrelated to the purpose of a routine traffic stop*, is itself a Fourth Amendment violation”)(emphasis in original).

- *United States v. Cornejo*, 196 F.Supp.3d 1137, 1152 (E.D.Cal. 2016), where the officer did not begin filling out the written warning citation while he questioned the defendant for ten minutes;
- *People v. Pulling*, 34 N.E.3d 1198, 1201 (Ill.App.3rd 2015), where the officer suspended writing the ticket to conduct the search;
- *United States v. Peralez*, 526 F.3d 1115, 1121 (8th Cir. 2007), where the officer's intermittent suspension of processing the stop, and delay in the routine step of running a passenger's identification until ten minutes after advising the defendant that he would receive a warning, more than doubled the duration of the stop; and
- *In re Pardee*, 872 N.W.2d 384, 397 (Iowa 2015), where the officer conducted unrelated questioning for at least five minutes before initiating a criminal background check.

See also *United States v. Wendfeldt*, 58 F.Supp.3d 1124, 1131 (D.Nev. 2014)(officer permitted to ask unrelated questions during processing of stop).

Other than a bald accusation of “dawdling,” Barry’s brief does not point to anything in the video showing Olson “dawdling” in the first 5 minutes of the stop. During Minutes 1-3 Olson is seen and heard questioning Barry about her travel itinerary and suspicious rental car arrangement while simultaneously processing the license and registration check on his computer. During Minute 4 Olson is

conducting a permissible criminal background check, which leads to Barry's admission to a drug offense history in Minute 5. *United States v. Gunnell*, 775 F.3d 1079, 1083 (8th Cir. 2015)(motorist may be detained while officer completes a number of routine but somewhat time-consuming computerized checks of the vehicle's registration, the driver's license and criminal history, as well as the preparation of a citation or warning). Here, by Minute 5, reasonable suspicion was complete. While officers may not unnecessarily extend a traffic stop, neither are they required to sprint through the process as though in a race against some invisible stopwatch. Reasonable necessity, not haste, is the touchstone of the analysis. *Rodriguez v. United States*, 135 S.Ct. 1609, 1614, 1616 (2015).

Barry over-relies on *United States v. Beck*, 140 F.3d 1129 (8th Cir. 1998). In *Beck* the court ruled that an officer could not detain a motorist after he had finished processing the stop and after he had told the motorist he was "free to go." *Beck*, 140 F.3d at 1134-35. Here, Olson had *not* finished processing the stop or told Barry she was "free to go" before his suspicions metastasized. *United States v. Booker*, 269 F.3d 930, 932 (8th Cir. 2001)(*Beck* inapposite where officer developed reasonable suspicion during check on whether motorist's license valid); *United States v. Ward*, 484 F.3d 1059, 1061 (8th Cir. 2007)(*Beck* inapposite where trooper had not finished writing warning ticket before he checked VIN and questioned passenger).

And, unlike Beck, Barry admitted to the highly probative suspicion factor of a prior history of drug offenses, gave a puzzling explanation for the reason for and logistics of her trip, and continued to display nervousness (visible pulsing of carotid artery) throughout the stop. *United States v. Fuse*, 391 P.3d 924, 930 (8th Cir. 2005)(Beck inapposite in light of additional suspicion factors of drug history, extreme nervousness and masking agent); *United States v. Lebrun*, 261 F.3d 731, 734 (8th Cir. 2001)(Beck inapposite in light of additional suspicion factors of exceptional nervousness and inconsistent answers about details of trip); *United States v. Riley*, 684 F.3d 758, 764 (8th Cir. 2012)(Beck inapposite in light of additional suspicion factors of criminal drug history, nervousness and vague travel itinerary).

To the extent *Beck* rests on the premise that it is “impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration,” that bit of 20-year-old dicta is clearly out of step with established jurisprudence. *Beck*, 140 F.3d at 1137. The United States Supreme Court has held that factors consistent with innocent travel can indeed combine to form reasonable suspicion. *United States v. Sokolow*, 490 U.S. 1, 10 (1989). This court has likewise held that innocent facts considered together can give rise to reasonable suspicion. *State v. Kenyon*, 2002 SD 111, ¶ 18, 651 N.W.2d 269, 274. *Beck*’s tepid application of this established rule explains why Westlaw has yellow-flagged the case due to frequent **NEGATIVE** citing references by the 8th

Circuit Court of Appeals itself in subsequent cases. WESTLAW *BECK* CITING REFERENCES, Appendix at 001.

CONCLUSION

“A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.” *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985). This proposition is borne out here by the trial court’s innocent spin on suspicion factors and assertion that the stop of Barry’s vehicle was “elongated multiple times” in the space of only a few minutes. TRANSCRIPT at 34/13. Because Olson’s suspicions were reasonable within 5 minutes of effecting the subject stop, the trial court’s order suppressing the marijuana from Barry’s vehicle must be reversed.

Dated this 5th day of December 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that appellee's brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in proportional 12 point type. Appellee's brief contains 2,104 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Paul S. Swedlund
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of December 2017 a true and correct copy of the foregoing reply brief was served via e-mail on Christian Ruud at cruud@minnehahacounty.org.

Paul S. Swedlund
Assistant Attorney General

APPENDIX

Westlaw *Beck* Citing References




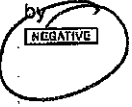

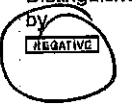

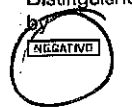



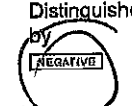

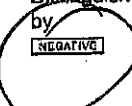

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





































Citing References (100)

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by 	1. U.S. v. Riley ¶¶ 684 F.3d 758, 763+ , 8th Cir.(Mo.) CRIMINAL JUSTICE - Investigatory Stop. Police officer had reasonable suspicion to detain motorist following traffic stop in order to search vehicle for drugs.	July 13, 2012	Case		10 11 F.3d
Distinguished by 	2. U.S. v. Lebrun ¶¶ 261 F.3d 731, 734+ , 8th Cir.(Mo.) CRIMINAL JUSTICE - Investigatory Stop. Officer had reasonable suspicion to hold occupants pending drug dog sniff of vehicle.	Aug. 15, 2001	Case		13 14 15 F.3d
Examined by	3. U.S. v. Yang ¶¶ 345 F.3d 650, 657+ , 8th Cir.(Iowa) CRIMINAL JUSTICE - Searches and Seizures. Driver's consent to search purged taint of allegedly illegal detention after traffic stop was over.	Sep. 30, 2003	Case		13 F.3d
Examined by	4. U.S. v. Jones ¶¶ 269 F.3d 919, 924+ , 8th Cir.(Mo.) CRIMINAL JUSTICE - Investigatory Stop. Driver's behavior did not justify further investigative detention at conclusion of traffic stop.	Oct. 15, 2001	Case		8 9 15 F.3d
Examined by	5. U.S. v. Yang ¶¶ 2002 WL 31972353, *11+ , N.D.Iowa This matter is before the court on the motion (Doc. No. 18) of the defendant Kou Yang to suppress evidence. Yang was indicted on October 23, 2001, on one count of possession of...	June 19, 2002	Case		10 12 13 F.3d
Examined by	6. United States v. Bailey ¶¶ 2017 WL 3701612, *4+ , D.Neb. This matter is before the Court on Defendant Sara Bailey's Motion to Suppress (Filing No. 25). Ms. Bailey is charged in a One Count Indictment with Interstate Travel or...	July 17, 2017	Case		10 13 15 F.3d
Examined by	7. De La Rosa v. White ¶¶ 2015 WL 5535734, *3+ , D.Neb. The plaintiff in this case, Raul De La Rosa, alleges that his Fourth Amendment rights were violated by the defendant, Mark White, a Trooper employed by the Nebraska State Patrol,...	Sep. 18, 2015	Case		12 13 F.3d
Examined by	8. U.S. v. Kirkpatrick ¶¶ 5 F.Supp.2d 1045, 1047+ , D.Neb. Defendant was indicted on one count of possession of a firearm with defaced serial number and one count of being a felon in possession of a firearm. On motion to suppress, the...	May 07, 1998	Case		8 12 F.3d










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Treatment	Title	Date	Type	Depth	Headnote(s)
Examined by	9. U.S. v. Rodriguez-Arreola ¶ 217 F.Supp.2d 962, 971+ , D.S.D. CRIMINAL JUSTICE - Investigatory Stop. Trooper had no reasonable suspicion justifying immigration status questions at traffic stop.	Dec. 22, 2000	Case	 12 13 14 F.3d	
Examined by	10. Laime v. State ¶ 43 S.W.3d 216, 222+ , Ark.App. CRIMINAL JUSTICE - Investigatory Stop. Motorist's demeanor did not support investigatory detention after traffic stop.	May 02, 2001	Case	 12 13 16 F.3d	
Examined by	11. State v. Anderson ¶ 605 N.W.2d 124, 131+ , Neb. CRIMINAL JUSTICE - Appeals. Improperly admitted evidence is considered in evaluating sufficiency for purposes of remand or dismissal.	Jan. 21, 2000	Case	 8 12 14 F.3d	
Distinguished by 	12. U.S. v. Jaime-Perez ¶ 2014 WL 5176641, *12+ , D.Minn. This matter is before the undersigned United States District Judge for a ruling on Defendant's Objection [Docket No. 38] to Magistrate Judge Tony N. Leung's September 19, 2014...	Oct. 14, 2014	Case	 14 15 F.3d	
Distinguished by 	13. U.S. v. Grant ¶ 696 F.3d 780, 786+ , 8th Cir.(Neb.) CRIMINAL JUSTICE - Searches and Seizures. Reasonable person in defendant's position would not have felt compelled to allow drug-sniffing dog to check his vehicle.	Oct. 18, 2012	Case	 9 F.3d	
Distinguished by 	14. State v. Howard ¶ 803 N.W.2d 450, 461+ , Neb. CRIMINAL JUSTICE - Searches and Seizures. Officer had probable cause to search defendants' vehicle.	Sep. 23, 2011	Case	 11 F.3d	
Distinguished by 	15. U.S. v. \$107,840.00 in U.S. Currency ¶ 784 F.Supp.2d 1109, 1117+ , S.D.Iowa CRIMINAL JUSTICE - Forfeitures. Government showed substantial connection between \$107,840 in cash and drug offense, as required to support forfeiture.	Apr. 29, 2011	Case	 9 F.3d	
Distinguished by 	16. U.S. v. Coney ¶ 456 F.3d 850, 859+ , 8th Cir.(Neb.) CRIMINAL JUSTICE - Searches and Seizures. Passenger voluntarily consented to a search of van following valid traffic stop.	Aug. 04, 2006	Case	 8 9 F.3d	
Distinguished by 	17. U.S. v. Maltas ¶ 403 F.3d 550, 555+ , 8th Cir.(N.D.) CRIMINAL JUSTICE - Investigatory Stop. Investigative detention of nearly three hours in remote area was not excessive.	Apr. 07, 2005	Case	 13 F.3d	

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Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by 	18. U.S. v. Fuse  391 F.3d 924, 927+, 8th Cir.(Mo.) CRIMINAL JUSTICE - Investigatory Stop. Officer had reasonable suspicion of illegal activity sufficient to justify continued detention of defendant after traffic stop.	Dec. 10, 2004	Case	  	14 15 F.3d
Distinguished by 	19. U.S. v. Gregory  302 F.3d 805, 809+, 8th Cir.(Ark.) CRIMINAL JUSTICE - Searches and Seizures. Statute provided probable cause to justify traffic stop, even if unconstitutionally vague.	Sep. 09, 2002	Case	  	12 F.3d
Distinguished by 	20. Laime v. State 80 S.W.3d 464, 475+, Ark. CRIMINAL JUSTICE - Searches and Seizures. Search warrant affidavit established probable cause to search defendant's vehicle for drugs.	Dec. 06, 2001	Case	  	12 13 F.3d
Distinguished by 	21. U.S. v. Morgan 270 F.3d 625, 630+, 8th Cir.(Neb.) CRIMINAL JUSTICE - Investigatory Stop. Trooper did not impermissibly detain speeding van's passenger in asking her opinion about "war on drugs."	Oct. 16, 2001	Case	  	12 13 F.3d
Distinguished by 	22. U.S. v. Booker  269 F.3d 930, 931+, 8th Cir.(Iowa) CRIMINAL JUSTICE - Searches and Seizures. Officer had probable cause to search vehicle for drugs.	Oct. 15, 2001	Case	  	12 16 F.3d
Distinguished by 	23. U.S. v. Pulliam 265 F.3d 736, 739+, 8th Cir.(Ark.) CRIMINAL JUSTICE - Traffic Stops. Contradictory statements established suspicion necessary to further detain motorist.	Sep. 12, 2001	Case	  	9 16 F.3d
Discussed by	24. U.S. v. Rodriguez-Arreola  270 F.3d 611, 620+, 8th Cir.(S.D.) CRIMINAL JUSTICE - Investigatory Stop. Officer could question defendant regarding his alienage during traffic stop.	Oct. 12, 2001	Case	  	12 F.3d
Discussed by	25. U.S. v. Demilla  2013 WL 6244192, *4+, E.D.Ark. Defendant Raymond Demilla filed a motion to suppress evidence obtained as a result of a traffic stop and search he contends was illegal (Dkt. No. 61). Defendant Jerome Derrick...	Dec. 03, 2013	Case	  	12 15 F.3d
Discussed by	26. U.S. v. Rivera  2008 WL 2397518, *4+, E.D.Ark. Pending is Defendant's Motion to Suppress Physical Evidence (Doc. No. 21). The has Prosecution responded (Doc. No. 25). After a hearing on April 24, 2008, Defendant submitted a...	June 11, 2008	Case	  	3 12 13 F.3d

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Treatment	Title	Date	Type	Depth	Headnote(s)
Discussed by	27. United States v. Huerta 2010 WL 11534330, *5+, S.D.Iowa Before the Court is a Second Motion to Suppress (Clerk's No. 59) that was joined by Joshua Huerta ("Defendant") on January 13, 2010 (Clerk's No. 64). The Government filed a...	Apr. 02, 2010	Case		12 F.3d
Discussed by	28. U.S. v. Branch 2005 WL 6219361, *4+, D.Md. Now pending are several motions filed by Michael Branch, Jr., the defendant in this criminal case. He is charged in counts One and Two of the superseding indictment with...	Nov. 29, 2005	Case		12 13 F.3d
Discussed by	29. U.S. v. Cloud JJ 2007 WL 128939, *3+, D.Minn. This matter is before the Court on defendant's motions to suppress certain evidence and statements in violation of the Fourth and Fifth Amendments of the United States...	Jan. 16, 2007	Case		13 F.3d
Discussed by	30. United States v. Chaney 192 F.Supp.3d 992, 1008+, E.D.Mo. Background: Defendant was charged with four counts of aggravated identity theft and one count of possession of 15 or more counterfeit access devices. The government moved to...	June 20, 2016	Case		9 15 F.3d
Discussed by	31. Parris v. Huttie 2007 WL 2434058, *7+, W.D.Mo. Plaintiff filed suit in the Circuit Court of Jackson County, Missouri on December 29, 2005, against defendants Justin Huttie, James Muhlbauer, the Board of Police Commissioners,...	Aug. 21, 2007	Case		12 14 F.3d
Discussed by	32. U.S. v. Maltais JJ 295 F.Supp.2d 1077, 1084+, D.N.D. CRIMINAL JUSTICE - Investigatory Stop. Stop and detention of driver lasted no longer than was reasonably necessary.	Dec. 16, 2003	Case		8 F.3d
Discussed by	33. United States v. Steele JJ 2017 WL 5565213, *6+, D.Neb. This matter is before the Court on the Findings and Recommendation (F&R), ECF No. 45, issued by Magistrate Judge Michael D. Nelson. The Magistrate Judge recommended that the Motion...	Nov. 20, 2017	Case		10 13 F.3d
Discussed by	34. United States v. Avalos JJ 2017 WL 1050102, *5+, D.Neb. Defendants Victor Avalos and Carolina Lara have moved to suppress all evidence obtained during a vehicle search conducted on February 13, 2016, all evidence obtained as fruit of...	Mar. 20, 2017	Case		10 F.3d
Discussed by	35. United States v. Johnson JJ 2017 WL 933044, *5+, D.Neb. This matter is before the Court on the oral and written Findings and Recommendation and Order (Filing Nos. 51, 53) of the magistrate judge recommending the Court deny (1)...	Mar. 09, 2017	Case		10 12 13 F.3d

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Treatment	Title	Date	Type	Depth	Headnote(s)
Discussed by	36. United States v. Nabavi ¶¶ 2017 WL 1207877, *6+, D.Neb. Defendants Isabel Mallar and Rahman Nabavi have moved to suppress all evidence obtained during a vehicle search conducted on January 15, 2016, all evidence obtained as fruit of the...	Feb. 13, 2017	Case	900 900 900	10 F.3d
Discussed by	37. U.S. v. Englehart ¶¶ 110 F.Supp.3d 920, 923+, D.Neb. CRIMINAL JUSTICE - Searches and Seizures. Officer did not have reasonable suspicion to extend traffic stop.	May 22, 2015	Case	900 900 900	9 11 13 F.3d
Discussed by	38. U.S. v. Alvarez-Manzo ¶¶ 625 F.Supp.2d 832, 841+, D.Neb. CRIMINAL JUSTICE - Searches and Seizures. Officers did not have reasonable and articulable suspicion of criminal activity, so as to justify seizure checked luggage.	July 03, 2008	Case	900 900 900	13 F.3d
Discussed by	39. U.S. v. Rodriguez ¶¶ 2008 WL 2401494, *5+, D.Neb. This matter is before me on a report and recommendation by Magistrate Judge Piester, recommending that the defendants' motions to suppress be granted. No statement of objections...	June 10, 2008	Case	900 900 900	13 F.3d
Discussed by	40. U.S. v. Santana-Aguirre ¶¶ 2007 WL 1959217, *3+, D.Neb. This matter is before the court on the defendant's objection, Filing No. 56, to the report and recommendation (R & R), of the magistrate, Filing No. 55. Defendant filed a motion to...	June 29, 2007	Case	900 900 900	10 F.3d
Discussed by	41. U.S. v. Escobar ¶¶ 2003 WL 22709272, *5+, D.Neb. The defendants are charged with conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1) and with possession with intent to distribute cocaine in...	Nov. 18, 2003	Case	900 900 900	—
Discussed by	42. U.S. v. Townsend ¶¶ 138 F.Supp.2d 968, 975+, S.D.Ohio CRIMINAL JUSTICE - Searches and Seizures. Troopers lacked reasonable suspicion to detain driver.	Dec. 05, 2000	Case	900 900 900	12 F.3d
Discussed by	43. UNITED STATES OF AMERICA Plaintiff, v. THOMAS RAYMOND MCCLELLAND Defendant. ¶¶ 2017 WL 5158682, *3+, D.S.D. Pending before the Court is Defendant's Motion to Suppress, Doc. 31, seeking to suppress all tangible evidence seized from Defendant's vehicle following a traffic stop for speeding...	Nov. 06, 2017	Case	900 900 900	10 12 15 F.3d
Discussed by	44. U.S. v. Mendoza-Carrillo ¶¶ 107 F.Supp.2d 1098, 1103+, D.S.D. CRIMINAL JUSTICE - Investigatory Stop. Detention of vehicle's passenger following traffic stop was not valid investigatory stop.	Aug. 01, 2000	Case	900 900 900	12 16 F.3d














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Treatment	Title	Date	Type	Depth	Headnote(s)
Discussed by	45. In re Pardee ¶¶ 872 N.W.2d 384, 394+ , Iowa CRIMINAL JUSTICE - Investigatory Stop. Detention of motor-vehicle occupants for approximately 25 minutes unreasonably prolonged traffic stop in violation of Fourth Amendment.	Dec. 11, 2015	Case		13 F.3d
Discussed by	46. State v. Bergmann 633 N.W.2d 328, 336+ , Iowa CRIMINAL JUSTICE - Searches and Seizures. Officer had reasonable suspicion to pat down defendant for weapons.	Sep. 06, 2001	Case		12 13 F.3d
Discussed by	47. State v. Hanrahan ¶¶ 838 N.W.2d 868, 868+ , Iowa App. We must decide whether the district court properly denied a motion to suppress evidence obtained during the search of a vehicle. An Iowa State trooper who was part of a criminal...	Aug. 07, 2013	Case		10 12 13 F.3d
Discussed by	48. State v. Fields ¶¶ 662 N.W.2d 242, 246+ , N.D. CRIMINAL JUSTICE - Drugs. Police officer lacked reasonable and articulable suspicion to continue detention of defendant.	June 03, 2003	Case		13 15 F.3d
Declined to Extend by 	49. U.S. v. Ward ¶¶ 484 F.3d 1059, 1061+ , 8th Cir.(Neb.) CRIMINAL JUSTICE - Investigatory Stop. The length of the defendant's detention following a traffic stop was reasonable.	Apr. 26, 2007	Case		6 F.3d
Distinguished by 	50. United States v. Heald 165 F.Supp.3d 765, 775+ , W.D.Ark. Background: Defendant, who was charged with possession with intent to distribute methamphetamine, possession of a firearm in furtherance of a drug trafficking crime, and being a...	Feb. 25, 2016	Case		10 F.3d
Distinguished by 	51. Acosta v. State 429 S.W.3d 621, 626 , Tex.Crim.App. CRIMINAL JUSTICE - Racketeering. Evidence was sufficient to support conviction for money laundering.	May 07, 2014	Case		—
Distinguished by 	52. U.S. v. Goldenshtein ¶¶ 2011 WL 1321573, *10 , N.D.Ga. Igor Goldenshtein ("Goldenshtein") and Edward Akseirod ("Akseirod"), are charged in a two-count indictment with conspiracy and possession with intent to distribute less than...	Feb. 22, 2011	Case		14 F.3d
Distinguished by 	53. U.S. v. Linkous 285 F.3d 716, 720 , 8th Cir.(Ark.) CRIMINAL JUSTICE - Searches and Seizures. Officer had reasonable suspicion to expand scope of traffic stop.	Apr. 05, 2002	Case		—

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Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by NEGATIVE	54. U.S. v. Heir 107 F.Supp.2d 1088, 1090, D.Neb. CRIMINAL JUSTICE - Searches and Seizures. Canine sniff did not provide probable cause for search of vehicle.	Aug. 01, 2000	Case		—
Cited by	55. U.S. v. Newland 246 Fed.Appx. 180, 197+, 4th Cir.(Md.) CRIMINAL JUSTICE - Investigatory Stop. Trooper had reasonable suspicion of serious criminal activity to justify continued detention of defendant pending arrival of canine unit.	June 06, 2007	Case		13 F.3d
Cited by	56. U.S. v. Foreman 369 F.3d 776, 794, 4th Cir.(Va.) CRIMINAL JUSTICE - Searches and Seizures. Reasonable suspicion supported drug dog sniff after motorist refused to consent to search.	June 04, 2004	Case		12 F.3d
Cited by	57. De La Rosa v. White 852 F.3d 740, 745+, 8th Cir.(Neb.) CIVIL RIGHTS - Immunity. State trooper had arguable reasonable suspicion of interstate drug trafficking, warranting 50-minute extension of traffic stop to summon drug dog, and thus...	Mar. 27, 2017	Case		3 F.3d
Cited by	58. United States v. Rodriguez 834 F.3d 937, 942, 8th Cir.(Neb.) CRIMINAL JUSTICE - Searches and Seizures. Evidence gained from entering defendant's residence was admissible pursuant to good faith exception to exclusionary rule.	Aug. 25, 2016	Case		2 F.3d
Cited by	59. United States v. Zamora-Garcia 831 F.3d 979, 985, 8th Cir.(Ark.) CRIMINAL JUSTICE - Searches and Seizures. Officers had probable cause to drill into floor of trunk of defendant's vehicle to search for drugs.	Aug. 02, 2016	Case		12 F.3d
Cited by	60. U.S. v. Cotton 782 F.3d 392, 396, 8th Cir.(Minn.) CRIMINAL JUSTICE - Investigatory Stop. Police had reasonable suspicion to stop defendant while outside apartment building.	Apr. 06, 2015	Case		10 F.3d
Cited by	61. U.S. v. Hastings 685 F.3d 724, 728, 8th Cir.(Minn.) CRIMINAL JUSTICE - Searches and Seizures. Plain-view doctrine allowed seizure of rifle found in vehicle.	July 17, 2012	Case		10 15 F.3d
Cited by	62. U.S. v. Manes 603 F.3d 451, 456, 8th Cir.(Ark.) CRIMINAL JUSTICE - Searches and Seizures. Informant's tip provided reasonable suspicion to make investigatory stop of maroon truck.	May 10, 2010	Case		10 F.3d

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Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	63. U.S. v. Mohamed 600 F.3d 1000, 1004 , 8th Cir.(Mo.) CRIMINAL JUSTICE - Searches and Seizures. Trooper did not unreasonably extend driver's seizure by prolonging seizure by five minutes to conduct canine search.	Apr. 13, 2010	Case	 9 F.3d	
Cited by	64. U.S. v. Lyons  486 F.3d 367, 371 , 8th Cir.(Neb.) CRIMINAL JUSTICE - Searches and Seizures. Drug dog's search of vehicle was not rendered illegal by fact that vehicle's windows were open.	May 16, 2007	Case	 12 F.3d	
Cited by	65. U.S. v. Vera 457 F.3d 831, 837 , 8th Cir.(Neb.) CRIMINAL JUSTICE - Searches and Seizures. Officer did not seize passenger when he approached car and asked whether passenger would exit vehicle and enter patrol car.	Aug. 09, 2006	Case	 1 F.3d	
Cited by	66. U.S. v. Blaylock  421 F.3d 758, 768 , 8th Cir.(Minn.) CRIMINAL JUSTICE - Jury. Batson challenge to government's peremptory strike of a prospective juror was properly denied.	Aug. 31, 2005	Case	 —	
Cited by	67. U.S. v. Ehrmann  421 F.3d 774, 780 , 8th Cir.(Minn.) CRIMINAL JUSTICE - Searches and Seizures. officer had reasonable suspicion sufficient to justify continued detention of motorist after traffic stop was completed.	Aug. 31, 2005	Case	 —	
Cited by	68. U.S. v. Guerrero 374 F.3d 584, 590+ , 8th Cir.(Iowa) CRIMINAL JUSTICE - Searches and Seizures. Search of defendant's vehicle was illegal, requiring suppression of cocaine.	July 02, 2004	Case	 10 15 F.3d	
Cited by	69. U.S. v. Logan  362 F.3d 530, 534 , 8th Cir.(Mo.) CRIMINAL JUSTICE - Searches and Seizures. Detective articulated objectively reasonable suspicion needed to justify canine sniff of package.	Mar. 30, 2004	Case	 —	
Cited by	70. U.S. v. Crossland 301 F.3d 907, 911 , 8th Cir.(Ark.) CRIMINAL JUSTICE - Arrest. Officers had probable cause to arrest suspect in possession of large amount of iodine and phosphorus.	Aug. 15, 2002	Case	 3 F.3d	
Cited by	71. Wilson v. Evans 18 Fed.Appx. 442, 443 , 8th Cir.(Iowa) CIVIL RIGHTS - Arrest and Detention. Section 1983 plaintiff failed to establish that police stops were racially motivated.	Sep. 04, 2001	Case	 9 F.3d	