IN THE TENTH JUDICIAL DISTRICT
DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS,

Plaintiff,

vs. Case No. 09CR1563

JOHN C. DOE,

Defendant.

MOTION TO SUPPRESS

COMES NOW Defendant, John C. Doe, by and through his attorney, Paul D. Cramm, and moves this Court for its order suppressing evidence illegally obtained during the course of the police investigation of the above referenced matter. In support of his motion, the Defendant states and alleges as follows:

FACTUAL BACKGROUND

1. At approximately 8:48 p.m. on May 8, 200*, Johnson County Sheriff's Deputy Smith was on patrol on southbound I-35 at mile marker 206 in Johnson County, Kansas. While on patrol, Deputy Smith reports that he observed a red Chevrolet Cavalier pass his marked patrol vehicle with a GPS navigation device mounted in the lower left corner of the windshield in a manner that "could substantially obstruct the driver's view." Deputy Smith reports that after passing his patrol vehicle, the driver of the red Cavalier threw a lit cigarette out the driver's side window.

2. Based on the foregoing observations, Deputy Smith initiated a traffic stop at mile marker 206.6 of southbound I-35. The driver of the red Cavalier responded appropriately and pulled to the shoulder of the road. Smith reports that the driver and sole occupant of the vehicle,

Defendant John Doe, identified himself with a valid Kansas driver's license. Smith informed Doe that the basis for the traffic stop was Smith's observation of Doe throwing the lit cigarette out the window. Smith reports that "Doe acknowledged that he had thrown a cigarette out the window and he apologized for doing so."

3. Smith asked Doe to exit his vehicle and to accompany Smith back to the patrol vehicle while Smith performed a computer records check and issued the traffic citation. Smith reports that the computer check indicated a criminal history for Doe which included theft and misdemeanor possession of drugs. Smith questioned Doe about his prior criminal history and reports that Doe mentioned the prior theft charge, but did not mention anything about a prior narcotics charge. Deputy Smith then questioned Doe about his travel plans. Doe told Smith that he was traveling from Lenexa to Liberal, Kansas to celebrate Mother's day with his family. Smith ultimately elected to issue only a verbal warning for the littering offense and suggested that Doe find an alternate location for the GPS device. Smith then returned Doe's driver's license and told Doe that he was free to go.

4. Doe exited Smith's patrol vehicle and walked back to his red Cavalier. However, before Doe was able to reach the driver's side door and re-enter his vehicle, *Smith had exited the patrol car and called out to Doe to return for further questions*. Doe returned to the rear of his vehicle where Smith informed Doe that one of his duties was to ensure that there were "no drugs, illegal weapons, or open containers of alcohol traveling on the highway." Smith proceeded to ask Doe "if there was anything illegal in his car" to which Doe answered "No." Smith then asked specifically about individual types of illegal contraband: "Any marijuana; any methamphetamines; any open containers of alcohol; any guns that shouldn't be there?" Doe denied possession of any of these specifically enumerated items.

5. Following this interrogation, and apparently unsatisfied with Mr. Doe's denial of the presence of any contraband in his vehicle, Deputy Smith asked Doe specifically: "Do you mind if I search your car?" Obviously uncomfortable with this request, Mr. Doe pauses and replies: "Ahhhh … if … if … if …" Deputy Smith then interrupts Doe and interjects: "I noticed that there are some pieces missing off of, like the console, and stuff, and a lot of times people like to hide stuff up in there." Smith then repeated: "Do you mind if I search you car?" Doe makes another equivocating response regarding the length of his trip to Liberal. Smith again interrupts Doe, directing him to stand with the backing officer at the patrol vehicle during the search.

6. During the course of the search, Deputy Smith discovered cigarette rolling papers, a small glass pipe containing what Smith identified as burned marijuana residue, and a 'grinder' containing less than a gram of leafy substance identified as marijuana. Smith stipulates that: "No other contraband was found in the car or on Doe's person." Based on the discovery of said contraband, Deputy Smith "had Doe sit in the front seat of [his] patrol car and … advised [Doe] of his Miranda rights." Smith questioned Doe about the contraband and reports that "he further agreed to allow me to return to his home and consented to a search of the residence." The search of the residence was also fruitful for contraband.

7. Of note, at no time prior to Smith' search of Doe's vehicle did Smith observe any contraband in "plain view." At no time did Smith identify the odor of burned marijuana emanating from the vehicle or on Mr. Doe's person. At no time did Smith identify the odor of consumed alcohol in the vehicle or on Doe's breath. Smith identifies and articulates absolutely no "probable cause" indicators of any kind associated with the subject traffic stop.

ARGUMENTS AND AUTHORITIES

8. Under the Fourth and Fourteenth Amendments to the United States Constitution, a search conducted without a warrant is "*per se* unreasonable... subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967). Upon the hearing of a motion to suppress evidence, the State bears the burden of proving to the trial court the lawfulness of the search and seizure. *Mincey v. Arizona*, 437, U.S. 385, 390-91, 98 S.Ct. 2408, 2412-13 (1978); *State v. Schur*, 217 Kan. 741, 743, 538 P.2d 689 (1975). See also K.S.A. §22-3216(2); *State v. Houze*, 23 Kan.App. 2d 336, 337, 930 P.2d 620, rev. denied 261 Kan. 1088 (1997).

I. Deputy Smith Improperly Extended the Duration of the Investigative Detention Beyond the Scope of the Circumstances Initially Justifying the Stop.

9. The Kansas Supreme Court has determined that, although an ordinary traffic stop is more analogous to an investigative detention than a custodial arrest, "[a] traffic stop is a seizure within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention quite brief." *State of Kansas v. Victor Mitchell*, 265 Kan. 238, 960 P.2d 200 (1998). See also: *Berkemer v. McCarty*, 468 U.S. 420, 439, 82 L. Ed. 2d 317, 104 S.Ct. 3138 (1984). Therefore, analysis of such stops is based upon the principles pertaining to investigative detentions set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

10. A traffic stop may not extend beyond the time reasonably required to complete its initial purpose. During the course of an ordinary traffic stop, once "the driver has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way without being subject to further delay by police for additional questioning." *United States v.*

Guzman, 864 F.2d 1512, 1519 (10th Cir. 1988) (Overruled on other grounds). See also: *Muehler v. Mena*, 544 U.S. 93, 101, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005); *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1258 (10th Cir. 2006). Continued detention is appropriate only if the officer develops a reasonable suspicion of criminal activity during the course of the initial traffic stop, or the driver provides *valid* consent to the continued encounter. See: *United States v. Rosborough*, 366 F.3d 1145, 1148 (10th Cir. 2004); *United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000).

11. To determine the reasonableness of an investigative detention, Kansas courts make a dual inquiry, asking first "whether the officer's action was justified at its inception," and second "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *State v. Epperson*, 237 Kan. 707, 712, 703 P.2d 761. 767 (1985). See also: *United States v. Botero-Ospina*, 71 F.3d 783, 786 (10th Cir. 1995). This dual inquiry supports the ruling of the United States Supreme Court that "an investigative detention must last no longer than is necessary to effectuate the purpose of the stop, and the scope of the detention must be carefully tailored to its underlying justification." *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319 (1983). Moreover, the Kansas Supreme Court has held conclusively that 10th Circuit Federal case law allowing questioning beyond the scope of the initial justification for law enforcement contact is limited to circumstances involving the execution of a valid warrant and does not apply to *Terry* encounters or traffic stops. See: *State v. Smith*, 286 Kan. 402, 184 P.3d 890, (2008).

12. Of particular note to the case at bar,"[a] seizure that is justified *solely by the interest in issuing a warning ticket to the driver* can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Illinois v. Caballes*, 543 U.S. 405, 407,

125 S. Ct. 834, 160 L. Ed. 2d 842 (2005). (Emphasis added.) Thus, any additional questioning that extends the time of detention beyond that necessary to complete the purpose of the initial traffic stop requires adequate justification. See *Alcaraz-Arellano*, 441 F.3d at 1258.

13. The specific facts and circumstances involved in *Mitchell*, supra, are particularly analogous to the case at bar. In *Mitchell*, the Defendant was stopped for traveling 59 mph in a 45 mph zone. While waiting for information from the dispatcher regarding Mitchell's driver's license, the officer began questioning Mitchell about matters *wholly unrelated to the traffic stop*. Specifically, the officer asked Mitchell if he had ever been arrested and if he had any prior involvement with illegal drugs. When Mitchell admitted to smoking marijuana in the past, the officer asked if he still smoked marijuana. Mitchell denied current drug use and the officer proceeded to ask if Mitchell was presently transporting any illegal drugs. Upon Mitchell's denial, the officer requested permission to search Mitchell's truck. Mitchell refused to give the officer permission to search the truck. The police officer then informed Mitchell that he would call for the drug-sniffing dog and that if the dog made a positive indication on the truck, the officer would search with or without Mitchell's consent. At that point, Mitchell admitted to having some marijuana joints in the truck and agreed to retrieve them for the officer. The officer took possession of the alleged marijuana, informed Mitchell of his rights per *Miranda* and searched the truck. Mitchell was charged with felony possession of marijuana.

14. Mitchell moved to suppress the marijuana and all statements made during the stop. At the conclusion of the suppression hearing, the district court granted Mitchell's motion to suppress. The Kansas Court of Appeals upheld the district court's decision to suppress the illegally obtained evidence and statements. Of particular importance to the Court's decision was the fact that after the officer had sufficient information to issue the traffic citation, *he continued*

to question Mitchell about matters wholly unrelated to the initial purpose for stop and improperly extended the duration of the investigative detention.

15. In support of its decision, the Kansas Court of Appeals relied upon *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1982). In that case, after concluding Guzman's license and registration were in order, the Officer did not write a traffic citation or issue a warning. Rather, the officer began questioning Guzman about the details of his travel plans, where he was coming from, where he was going and his intended purpose for the trip. The encounter ultimately resulted in an evidentiary search of Mr. Guzman's vehicle that was fruitful for contraband. The *Guzman* court stated that "an officer conducting a routine stop may request a driver's license and vehicle registration, run a computer check and issue a citation. [However], when the driver has produced a valid license and proof that he is entitled to operate the car, *he must be allowed to proceed on his way without being subject to further delay by police for additional questioning*." (Emphasis Added) *Guzman*, 864 F.2d at 1519.

16. In the case at bar, according to Deputy Smith' own narrative report, his *initial* interest in Mr. Doe was based on his observation of a GPS navigation device mounted in the lower left corner of the windshield in a manner that "could substantially obstruct the driver's view." Deputy Smith also reports that he observed Doe throw a cigarette butt out of his window. Pursuant to the "dual inquiry" analysis set forth in *Epperson*, although Smith' action in initiating the traffic stop may have been justified at its inception, Smith' continued questioning of Mr. Doe about matters wholly unrelated to the initial purpose of the traffic stop *impermissibly extended the scope and duration of the detention well beyond the circumstances which justified the interference at its inception*.

17. The fact that Smith handed Mr.Doe his driver's license and told him *pro forma* that he was "free to leave" is negated by Smith' deliberate continued questioning. Pursuant to the rule set forth in *Guzman* and *Mitchell*, supra, as soon as Deputy Smith returned Doe's license and issued a "verbal warning" for the littering infraction, Doe should have been "allowed to proceed on his way *without being subject to further delay by police for additional questioning*."

II. The Defendant's Alleged 'Consent' Herein was Invald and Tainted by the Unlawful Detention.

18. Where the justification for an evidentiary search is premised upon the defendant's alleged "consent" to said search, the government bears the burden of establishing that the consent was voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973). In addition, the government also bears the burden of establishing that the search was conducted within the scope of the consent. *United States v. Ibarra*, 965 F. 2d 1354, 1356 (5th Cir. 1992). It is also well-settled that "[w]hen consent to search is preceded by a Fourth Amendment violation, the State, in addition to proving the voluntariness of the consent, *must also establish a break in the causal connection between the illegality and the evidence thereby obtained*." (Emphasis added) *State v. Schmitter*, 23 Kan. App. 2d 547 at 556 (1997), citing *U.S. v. Melendez-Garcia*, supra.

19. Although no single factor is dispositive, the Supreme Court has provided three factors that are especially relevant to determining whether consent is tainted by a preceding illegal search or seizure: "1) the temporal proximity between the police illegality and the consent to search; 2) the presence of intervening circumstances; and particularly 3) the purpose and flagrancy of the official misconduct." *Brown v. Illinois*, 422 U.S. 590, 603-04, 45 L. Ed. 2d 416, 95 S. Ct. 2254 (1975)). Application of the three factor Brown analysis to the facts of the subject

case clearly establishes that Mr. Doe's alleged 'consent' herein was invalid and tainted by the unlawful detention.

1. Temporal Proximity.

20. Assuming *arguendo* that Deputy Smith initial basis for the stop was, in fact, his observation of Mr. Doe's GPS device placed in a manner that could partially occlude the windshield and his observation of Mr. Doe throwing a cigarette out the window, then Smith was justified in detaining Doe only for the amount of time necessary to issue a citation or a warning for said infractions. As set forth *supra*., the detention herein became illegal when Deputy Smith *prolonged* the detention beyond the point at which he reasonably could have issued a citation or warning and allowed Mr. Doe to "be on his way." Deputy Smith requested permission to search almost *immediately* after handing Defendant Does license and registration to him, but *before* Mr. Doe had even re-entered his vehicle. The 10th Circuit Court of Appeals has consistently held that "consent is not voluntary when in such close temporal proximity to an illegal [detention]." *United States v. Gregory*, 79 F.3d 973, 979-80 (10th Cir. 1996) (citing *McSwain*, 29 F.3d at 563 (holding that consent was not voluntary when obtained 'only a few minutes' after the illegal seizure)). See also: *United States v. Fernandez*, 18 F.3d 874, 883 (10th Cir. 1994) (holding that consent was not voluntary when 'only moments' elapsed between illegal detention and seizure); and *United States v. Maez*, 872 F.2d 1444, 1455 (10th Cir. 1989) (holding that taint of illegal seizure was not purged *even when consent form was signed 45 minutes after illegal detention*).

2. Intervening Circumstances.

21. The government may assert that when Deputy Smith returned Doe's identification, the subsequent interaction became a consensual encounter, which attenuated the taint of the illegal detention. In evaluating whether an encounter with law enforcement has

become consensual, Courts apply an objective standard. "An encounter is consensual when a reasonable person would believe he was free to leave or disregard the officer's request for information." *United States v. Manjarrez*, 348 F.3d 881, 885-86 (10th Cir. 2003). Of particular importance to this Court's analysis, in *United States v. Gregory*, supra., the 10th Circuit Court of Appeals held that "in applying the second factor in *Brown*, *we look only from the defendant's perspective* in determining whether any intervening event occurred which isolates the defendant from the coercive effects of the original illegal stop so as to render his subsequent consent voluntary in fact." 79 F.3d at 980 (emphasis added). "For consent obtained subsequent to an illegal detention to be voluntary in fact, there must be proof of facts or events which ensure that the consent provided by the defendant is truly voluntary and not the fruit of the illegal stop. The facts or events must create a *discontinuity* between the illegal stop and the consent such that the original illegality is weakened and attenuated." *Id*.

22. Although the 10th Circuit Court of Appeals has established a bright-line rule that an encounter following a traffic stop is not consensual *unless* the driver's documents have been returned to him, a finding that said documents *were* returned does not provide a corollary bright line determination of consent. Return of the driver's documentation alone is not independently sufficient to demonstrate that an encounter has become consensual. See: *United States v. Bustillos-Munoz*, 235 F.3d 505, 515 (10th Cir. 2000). "Although not prerequisites, in determining whether consent is voluntary when given following the return of defendants' documents, we look at such factors as whether the officer informed the defendant that he was free to leave the scene or that he could refuse to give consent." *Gregory*, 79 F.3d at 979. See also: *Florida v. Bostick*, 501 U.S. 429, 432, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991) (stating that informing a defendant of his right to refuse consent is a factor "particularly worth noting");

United States v. Mendenhall, 446 U.S. 544, 558, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980) (noting that verbal advisement to defendant that she could decline consent was "especially significant").

23. In the case at bar, immediately after Deputy Smith returned Mr. Doe's identification documents, and before Mr. Doe had actually re-entered his vehicle Deputy Smith steps out from his patrol car, hurries toward Doe, and calls out to him verbally to stop and return to the rear of Doe's vehicle. As recorded on the video of the stop, *less than three seconds elapse between Smith' return of Doe's license and his request for Doe to step to the rear of his car for further questioning.* Smith informed Doe that one of his "*duties*" was to ensure that there were "no drugs, illegal weapons, or open containers of alcohol traveling on the highway." Deliberate use of the officious terms "duty" and "ensure" subtly communicated to Doe that Smith' continuing detention was mandatory.

24. Smith proceeded to ask Doe "if there was anything illegal in his car" to which Doe answered "No." Smith then asked specifically about individual types of illegal contraband: "Any marijuana; any methamphetamines; any open containers of alcohol; any guns that shouldn't be there?" Although Doe independently responded to and unequivocally denied the presence of *any* such contraband items, the conversation continued, culminating in Deputy Smith' request to search Doe's car. From the perspective of the Defendant, there was no definitive or legitimate intervening event or circumstance to indicate that the continuation of the same line of inquiry that ultimately led to the request to search was no longer part of the initial traffic stop. Thus, there were no "intervening circumstances" as contemplated by the second factor of the Brown analysis sufficient to purge the taint of the unlawful detention.

3. Purpose and Flagrancy of Official Misconduct

25. Although Deputy Smith was arguably initially justified in stopping the Defendant based on his observation of traffic infractions, his conduct after electing to issue only a "verbal warning" was not justified, specifically: (a) his continued detention of the defendant in the absence of any independent "reasonable suspicion" of illegal activity; (b) his "re-approaching" Doe and calling out for Doe to return to the rear of his car before Doe had even re-entered the vehicle; and (c) his repetitive questioning about whether Doe was carrying various kinds of contraband. Here, Defendant Doe's driver's license, temporary automobile registration and liability insurance were all current and valid. Upon review of said documents, Deputy Smith elected not to issue any citation whatsoever and issued only a verbal warning. Thus, Smith' behavior suggests that he improperly detained the Defendant "with a quality of purposefulness, embarking on a fishing expedition in the hope that something might turn up" as denounced by the Court in *McSwain*, 29 F.3d at 563. Based on the foregoing analysis of the factors set forth in *Brown*, and under the totality of the circumstances, there was insufficient attenuation or break in the causal connection between the illegal detention and the alleged "consent" such that the Defendant's consent herein was tainted by the immediately preceding Fourth Amendment violation.

26. *State v. Garcia,* 250 Kan. 310 (1992) is directly analogous to the facts of the case at bar. In *Garcia*, the Kansas Supreme Court upheld the district court's suppression of evidence discovered during a 'consent' search and statements the defendant made after an officer had initiated a traffic stop, issued a warning ticket and ostensibly released the defendant from custody. The officer initially stopped the defendant after observing him fail to signal a lane change. During the course of the stop, the officer ordered the defendant to collect his registration

and proof of insurance and accompany him back to the patrol car. The officer issued a warning ticket and told the defendant that he was free to leave. However, as the defendant attempted to return to his car, the officer asked the defendant if he would consent to a search of his vehicle. The officer ultimately obtained the defendant's verbal and written 'consent' to search and discovered marijuana in the trunk of the defendant's car. The defendant filed a motion to suppress all evidence obtained pursuant to that search.

27. Although the district court found that the initial justification for the stop was valid, the court ruled that the continued seizure of the defendant was improper because (1) the officer did not have a reasonable and articulable suspicion of a crime being or having been committed; and (2) *the scope and duration of the seizure of the defendant exceeded that justified by the initial stop*. The district court ruled that the second, continuing detention that followed issuance of the warning citation was unlawful; that the defendant's subsequent consent to the search was not voluntary; and that the defendant's oral statements during the car stop and in subsequent interviews were inadmissible because the evidence was tainted by the unlawful detention and illegal search of the vehicle. 250 Kan. at 315-317. On appeal, the Kansas Supreme Court upheld ruling of the district court.

28. The United States Court of Appeals reached a consistent conclusion in its analysis of the analogous case *United States v. McSwain*, 29 F.3d 558 (10th Cir. 1994). In *McSwain*, a Utah Highway Patrolman stopped a vehicle that had neither front nor rear license plates. Although the vehicle did appear to have a temporary license displayed on the inside of the rear window, the Patrolman was unable to read the information on the temporary license due to what appeared to be reflective tape across the tag. There were no other traffic violations at issue justifying the Patrolman's decision to stop the vehicle and detain its occupants. Upon stopping

the vehicle to investigate the validity of the temporary license, the patrolman determined that the license was, in fact, valid. The reflective tape was a device implemented by the state of Colorado to prevent alteration of the expiration date.

29. After determining that the temporary license was valid, the Patrolman leaned down into the vehicle, resting his arm across the open window and continued to question the occupants of the vehicle about the origin of the automobile and their travel itinerary. Eventually, the Patrolman obtained consent to search the vehicle, resulting in the discovery of the contraband. McSwain filed a motion to suppress the evidence obtained in the search. The 10th Circuit Court of Appeals reversed the Trial Court's denial of McSwain's suppression motion. The Court reasoned that the sole purpose for the stop was to investigate the validity of the temporary license. Once the Patrolman determined that the license was in fact valid, the justification for the stop was satisfied. The extended investigative detention of McSwain and his passenger exceeded the scope of the initial justification for the stop.

30. Additionally, the Court addressed the issue of McSwain's purported 'voluntary' consent to search the automobile. The Court found that McSwain's consent did not purge the "taint" of the unlawful detention. The Court based its conclusion on the three factors articulated in *Brown v. Illinois*, and *United States v. Melendez-Garcia*, supra: "the temporal proximity of the illegal detention and the consent, any intervening circumstances, and the purpose and flagrancy of the officer's unlawful conduct." The Court also considered whether there was a break in the causal connection between the unlawful detention and the consent.

31. Based on the foregoing analysis, the *McSwain* Court determined that there was no break in the causal connection between the unlawful detention and the consent to search. Additionally, the Court expressed concern with the Patrolman's failure to inform McSwain that

he was free to leave the scene or that he was not obligated to consent to the search. Although not absolutely necessary to establish consent, the Court found that the failure of the patrolman to provide this information was an important factor in the decision to reverse the Trial Court's denial of McSwain's suppression motion.

32. In the case at bar, Smith' illegal, continued detention of Doe after issuing the verbal warning immediately preceded the purported 'consent' to search. There were no 'intervening circumstances' separating the events. Clearly, Deputy Smith' sole 'purpose' was to conduct an evidentiary search wholly unsupported by articulable reasonable suspicion and wholly unrelated to the initial purpose of the stop.

33. Further, in *McSwain*, the defendant was seated in the driver's seat of his vehicle at the time the officer obtained the invalid 'consent' to search. The Court determined that, even in such a position of relative security, McSwain could not reasonably feel free to deny the officer's request to search. Here, Deputy Smith called out to Doe before Doe had re-entered his vehicle. Smith directed Doe to *step to the back of the car* before obtaining Doe's 'consent' to search. Further, Doe was in the presence of 2 uniformed officers that had arrived in separate patrol cars. In contrast to the facts of *McSwain*, Mr. Doe simply did not have the relative sense of security one would naturally derive from being seated in the driver's seat of his vehicle with an unobstructed path of travel at the time of the request to search.

34. The foregoing rule of law was recently applied and upheld by the 10th Circuit Court of Appeals in *United States v. Edgerton*, 438 F.3d 1043 (10th Cir. 2006). There, Kansas Highway Patrol Officers observed a white Mercedes-Benz that did not have a license plate in its rear brackets, but displayed a plate-sized temporary registration tag in the rear window. The

trooper was unable to read the state of origin or the numbers of the tag from a distance of "four to five car lengths," so he initiated a traffic stop of the vehicle for an alleged tag violation.

35. The vehicle promptly pulled over, whereupon the trooper approached the vehicle on foot and informed the defendant he had stopped her vehicle to make sure the temporary registration tag was valid. He asked for the defendant's license and registration, which she provided, and returned to his patrol car. During the trooper's initial encounter with the defendant, his partner inspected the rear end of the vehicle with his flashlight, dropping to his knees at one point to examine the vehicle's underbelly. Back in the patrol car, the officers conversed while they prepared a warning ticket for a violation of § 8-133 of the Kansas Vehicle Code. Upon returning the defendant's license and registration and handing her the warning ticket, the trooper asked and received Defendant's permission to search the vehicle's trunk. Once inside the trunk, the troopers discovered cocaine in a secret compartment in the back wall separating the vehicle's trunk from its back seat.

36. The *Edgerton* Court concluded that the initial stop of the defendant's vehicle constituted a permissible investigative detention of limited scope consistent with the Fourth Amendment. The Court found that a vehicle's apparent failure to display some form of visible license plate/registration tag, temporary or permanent, gives rise to a reasonable suspicion that its driver might be violating "any one of the multitude of applicable traffic and equipment regulations of the jurisdiction." (quoting *United States v. DeGasso*, 369 F.3d 1139, 1143 (10th Cir. 2004)). However, relying heavily on *United States v. McSwain*, supra., the *Edgerton* Court held that the troopers unlawfully extended the duration of the stop and the detention of the defendant beyond its limited scope once he identified the posting in the rear window of the vehicle to be a valid Colorado temporary registration tag.

37. The *Edgerton* Court held: "Once Trooper Dean was able to read the Colorado tag and deem it unremarkable, any suspicion that Defendant had violated §8-133 dissipated because the tag was in 'in a place and position to be clearly visible.' At that point, *McSwain* instructs us for better or worse that Trooper Dean, as a matter of courtesy, should have explained to Defendant the reason for the initial stop *and then allowed her to continue on her way without requiring her to produce her license and registration*." See *McSwain*, 29 F.3d at 562." *Id*.

38. The consistency between the facts of *Edgerton* and the case at bar are remarkable. Here, the sole basis for Deputy Smith' initial stop of the Defendant's vehicle was his observation of a partially obstructed windshield and a littering infraction. The Defendant had committed no moving violations or traffic infractions of any kind and Smith reports no other basis for the stop. Based on the limited basis supporting Deputy Smith' initial contact with the Defendant, the legitimate scope and duration of the stop was limited to that reasonably necessary to issue either a citation or a warning for littering and to advise Doe to relocate his GPS device. Once these limited objectives were accomplished, Smith was obligated to allow the Defendant to proceed on his way without being subject to continued detention and questioning on subjects unrelated to the initial basis for the stop.

39. Of particular importance in the case at bar, Mr. Doe made every attempt to assert his right to be free from the continued seizure of his person and improper search of his vehicle. Upon Deputy Smith' initial inquiry as to weapons or contraband in the car, *which only occurred after issuing the warning and completing the initial purpose of the traffic stop*, Doe unequivocally denied the presence of any such items. Upon continued inquiry as to possession of specific items, Doe again denied having any such items in his vehicle. When Deputy Smith initially requested permission to search, Doe, hesitated and equivocated in response, stating:

"Ahhhh … if … if … if …" *Only upon Smith' persistent interrogation and explanation about the need for the search* did Mr. Doe finally relent to Smith' demands. Thus, the search at issue in the case at bar cannot be properly characterized as a valid 'consent' search as it was a ***relent*** search.

40. The Kansas Supreme Court recently addressed the issue of request for consent to search beyond the scope of a traffic stop in *State v. Smith*, 286 Kan. 402, 184 P.3d 890 (2008). There, law enforcement initiated a traffic stop after observing a vehicle to have a broken tail light. During the course of the stop, officers determined that the vehicle's license tag was expired and that the license plate did not match the vehicle. Defendant Smith stepped out of the vehicle and sat down on the curb as police spoke with the driver. A back-up officer arrived on the scene and recognized defendant Smith. Based on information received sometime before the subject traffic stop, the back-up officer suspected Smith possessed drugs. The officer approached Smith, asked how she was doing and then asked if he could look inside her purse. Smith consented, and inside her purse, the officer discovered a bag containing methamphetamine. The officer arrested Smith and took her to the police station. At the police station, officers discovered further incriminating evidence in Smith's possession, including drug paraphernalia. Smith also made incriminating statements.

41. The district court found that Smith had been lawfully seized but the questions Officer Gale asked her at the beginning of the encounter *exceeded the scope of the stop and were improper*. The district court also found that Smith's consent was given during the seizure and there was not a "sufficient attenuation of a seizure to justify the search." Therefore, the district court granted Smith's motion to suppress and subsequently granted the State's request for permission to file an interlocutory appeal.

42. The Court of Appeals reversed the district court's suppression of evidence. With regard to the backing officer's questioning of Smith about matters unrelated to the taillight, the Court of Appeals stated: "Prior to the case of *Muehler v. Mena,* 544 U.S. 93, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005), this would have rendered the seizure illegal because such questioning was unrelated to the purpose of the traffic stop and fell outside of the permissible scope of a *Terry*-based detention." However, the panel concluded *Mena* permits officers to question a person during a lawful detention about matters unrelated to the reason for the detention. Therefore, the panel found Gale could question Smith about matters unrelated to the purpose of the stop, *i.e.*, the broken taillight, so long as the questions did not increase the duration of the stop. Finding that Smith offered nothing to indicate she was forced or coerced in any manner to permit law enforcement to search her purse, the Court of Appeals held that Smith's consent provided the legal basis for the search.

43. In reversing the Court of Appeals decision, the Supreme Court held conclusively that *Mena* and other 10th Circuit Federal case law allowing questioning beyond the scope of the initial justification for law enforcement contact is limited to circumstances involving the execution of a valid warrant and does not apply to *Terry* encounters or traffic stops. The Court stated:

> "[W]e are not persuaded that *Mena* can be read as an alteration or abandonment of the rules regarding the limited scope of a *Terry* stop. Consequently, we hold that the Court of Appeals erred in ruling that *Mena* allows law enforcement officers to expand the scope of a traffic stop to include a search not related to the purpose of the stop, *even if a detainee has given permission for the search*. Rather, we continue to adhere to our longstanding rule that consensual searches during the period of a detention for a traffic stop are invalid under the Fourth Amendment to the United States Constitution and § 15 of the Kansas Constitution Bill of Rights. The district court correctly applied these precedents and concluded the request and subsequent search of Smith exceeded the scope of the purpose of her detention." *Smith* at: 286 Kan. 419.

IV. Deputy Smith Did Not Have Sufficient "Probable Cause" to Search the Vehicle Absent the Defendant's Invalid Consent.

44. The Defendant stipulates that under limited circumstances, it is permissible for an officer to detain a driver for further questioning beyond that related to the traffic initial stop "if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring." *United States v. Hunnicutt*, 135 F.3d 1345, 1349 (10th Cir. 1998). "Reasonable suspicion is a minimal level of objective justification which the officers can articulate, as distinct from an inchoate and unparticularized suspicion or hunch." *United States v. Valles*, 292 F.3d 678, 680 (10th Cir. 2002). The distinction is pivotal, as "an unparticularized suspicion or hunch does not create reasonable suspicion to search." *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 1585-6 (1989) citing *United States v. Delgado*, 466 U.S. 210, 217, 104 S.Ct. 1758, 1763 (1984). (Emphasis added). Reviewing courts making reasonable-suspicion determinations "must look 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." *United States v. Arvizu*, 534 U.S. 266, 273, 151 L. Ed. 2d 740, 122 S. Ct. 744 (2002).

45. In his written narrative report of the subject arrest, Deputy Smith notes observing none of the following well-established, legitimate probable cause indicators: odor of consumed alcohol; odor of burned marijuana; contraband items in plain view; appearance and demeanor consistent with impairment by alcohol or drugs; red, bloodshot watery eyes; slurred speech; difficulty communicating; lack of coordination; inconsistent travel plans. Moreover, Smith makes no indication of even generalized "nervousness" on the part of Mr. Doe during the subject traffic stop. The 10th Circuit Court of Appeals analyzed an officer's reliance on generalized "nervousness" as a probable cause indicator in *United States v. Fernandez*, supra., 18 F.3d at 879. There, the Court stated: "We have repeatedly held that nervousness is of limited

significance in determining reasonable suspicion and that the government's repetitive reliance on the nervousness of either the driver or passenger as a basis for reasonable suspicion in all cases of this kind must be treated with caution." Similarly, in *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997), the Court stated: "It is certainly not uncommon for most citizens - whether innocent or guilty - to exhibit signs of nervousness when confronted by a law enforcement officer." Thus, "courts should discount the detaining officer's reliance on the detainee's nervousness." *Id*.

46. Smith reports that the computer check indicated a criminal history for Doe which included theft and *misdemeanor* possession of drugs. Smith questioned Doe about his prior criminal history and reports that Doe mentioned the prior theft charge, but did not mention anything about a prior narcotics charge. Federal law is clear that facts related to a subject's criminal *history* cannot provide valid "probable cause" to detain the subject or to conduct an evidentiary search. *U.S. v. Childs*, 256 F.3d 559 (7th Cir. 2001). Specifically, the *Childs* court acknowledged that a subject's criminal record "is an aspect of his status, which is unalterable, whether he is committing a crime at the time his vehicle is stopped or not. Whether he possessed drugs three days ago or one year ago, or never, cannot reasonably show that he possesses drugs today--not unless some other factor related to the defendant's circumstances today can buttress his criminal past."

47. Deputy Smith does ultimately report having observed damage to a piece of interior trim in Mr. Doe's vehicle. Specifically, Smith is heard on the field video associated with this stop saying to Doe: "I noticed that there are some pieces missing off of, like the console, and stuff, and a lot of times people like to hide stuff up in there." Doe was driving an older Chevrolet Cavalier model car which could have sustained incidental damage to the interior by

countless means of ordinary "wear and tear." Of note, Smith discovered absolutely no contraband whatsoever adjacent to the damaged portion of the console. Moreover, in the abject absence of any specific probable cause indicators of criminal activity set forth *supra*, suspicion associated with a crack in the interior trim of a vehicle constitutes the very type of "inchoate and unparticularized suspicion or hunch that does not create reasonable suspicion to search" as set forth in *United States v. Valles* and *United States v. Sokolow*, supra.

V. Any and All Statements Made by Doe and Any and All Contraband Discovered at Doe's Residence are Inadmissible as Violative of *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963).

48. Upon discovery of the contraband at issue herein, Deputy Smith ultimately cajoled Mr. Doe into allowing a team of officers to search his residence in Lenexa. The sole basis for support of this subsequent search of Doe's residence is "consent" as there was absolutely no valid probable cause to support search of the residence. This search simply cannot be supported by Mr. Doe's "consent" as said consent flowed directly from the vehicle search which was itself wholly improper. Similarly, this search cannot be supported by "probable cause" stemming from the contraband found in Doe's vehicle, as that evidence is tainted and inadmissible. Thus, any inculpatory statements made by Doe following the search of his vehicle as well as any contraband discovered during the search of his residence should be excluded from evidence herein, as "fruit of the poisonous tree" pursuant to *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963). This result is wholly consistent with the ruling of the Kansas Supreme Court in *Smith*, supra.

CONCLUSION

49. In the case at bar, Deputy Smith improperly extended the duration of the investigative detention beyond the scope of the circumstances initially justifying the stop. Upon issuing the 'verbal warning,' and in the absence of any articulable reasonable suspicion of criminal activity, Smith should have allowed Mr. Doe to proceed on his way *without being subject to further delay by police for additional questioning*. Further, Mr. Doe did not voluntarily consent to the search of his vehicle. To the contrary, he made every attempt to politely *withhold* said consent. Only after continued and relentless questioning by Deputy Smith on wholly unrelated issues, *which occurred after issuing the verbal warning and completing the initial purpose of the traffic stop,* did Mr. Doe finally relent to the request to search his vehicle. There was no temporal break in the causal connection between the illegality and the evidence thereby obtained. The detention and search herein being unlawful, the evidence and subsequent statements at the scene and subsequent 'consent' to search Doe's residence are inadmissible as fruit of the poisonous tree pursuant to the exclusionary rule as set forth *Wong Sun v. United States,* supra.

WHEREFORE, for the above and foregoing reasons, the Defendant respectfully requests that this Court issue an order suppressing all illegally obtained evidence from these proceedings.

Respectfully submitted,

BY _____

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CERTIFICATE OF SERVICE

I certify that on this ____ of _____, 200* a copy of the above and foregoing was hand delivered to: Assistant District Attorney Jane Doe, Johnson County District Attorney's Office, P.O. Box 728, Olathe, KS 66051, Clerk's Box #317.

BY _____
Paul D. Cramm
Attorney for Defendant