No. 10-104795-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

ADAM C. GREER
Defendant-Appellant

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
HONORABLE JAMES FRANKLIN DAVIS, DISTRICT JUDGE
DISTRICT COURT CASE NO. 09CR1563

NATURE OF THE CASE

A Johnson County Sheriff's Deputy initiated a traffic stop of the Defendant for an ordinary traffic infraction. At the conclusion of the traffic stop, the deputy requested permission to search the Defendant's vehicle. The deputy believes the Defendant gave valid consent to search. The Defendant believes that he did not give valid consent to search. The deputy concedes that he did not have sufficient "probable cause" to search the vehicle absent the Defendant's purported "consent" to said search. Prior to trial, the Defendant filed a Motion to Suppress Evidence challenging: 1) the extension of the scope and duration of the traffic stop; and 2) the validity of the purported "consent" to search. The Court denied Defendant's Motion to Suppress and found the Defendant guilty of a single count of possession of drug paraphernalia at the conclusion of a bench trial.

STATEMENT OF ISSUES TO BE DECIDED ON APPEAL

Did the Trial Court Improperly Deny Defendant's Motion to Suppress Evidence and Improperly Admit Evidence at Defendant's Trial?

STATEMENT OF FACTS

1. At approximately 8:48 p.m. on May 8, 2009, Johnson County Sheriff's Deputy Burns was on patrol on southbound I-35 in Johnson County, Kansas. (Volume II, Page 4) While on patrol, Deputy Burns 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 obstruct the driver's view." (Id.) Deputy Burns reports that after passing his patrol vehicle, the driver of the red Cavalier threw a lit cigarette out the driver's side window. (Id.)

2. Based on the foregoing observations, Deputy Burns initiated a traffic stop of the subject vehicle. (Id.) The driver of the red Cavalier responded appropriately and pulled to the shoulder of the road. (Id.) The driver and sole occupant of the vehicle, Defendant Adam Greer, identified himself with a valid Kansas driver's license. (Volume III, page 5.) Burns informed Greer that the basis for the traffic stop was Burn's observation of Greer throwing the lit cigarette out the window. (Volume II, page 5) Burns testified that "Greer acknowledged that he had thrown a cigarette out the window and he apologized for doing so." (Volume III, page 9)

3. Burns asked Greer to exit his vehicle and to accompany Burns back to the patrol vehicle while Burns performed a computer records check and issued the traffic citation. (Volume II, page 5) Burns testified that the computer check indicated a criminal history for Greer which included theft and misdemeanor possession of drugs. (Volume II, pages 5-6) Burns questioned Greer about his prior criminal history and

testified that Greer mentioned the prior theft charge, but did not mention anything about a prior narcotics charge. (Volume II, page 6; Volume III, page 10) Deputy Burns then questioned Greer about his travel plans. (Volume II, page 11-12) Greer told Burns that he was traveling from Lenexa to Liberal, Kansas to celebrate Mother's Day with his family. (Volume II, page 12; Volume III, page 20) Burns ultimately elected to issue only a verbal warning for the littering offense and suggested that Greer find an alternate location for the GPS device. (Volume III, page 9-10) Burns then returned Greer's driver's license and told Greer that he was free to go. (Volume II, page 7; Volume III, page 10)

4. Greer exited Burn's patrol vehicle and walked back to his red Cavalier. (Volume II, pages 7-8) However, before Greer was able to reach the driver's side door and re-enter his vehicle, *Burns had exited the patrol car and called out to Greer to return for further questions*. (Id.) Burns stipulated that he had to call out to Greer at least twice and possibly 3 times before Greer turned around and acknowledged Burns. (Volume III, pages 22-23) On cross-examination, Burns admitted that he had made the decision to extend the detention of the Defendant when the Defendant had failed to verbally disclose his prior misdemeanor conviction for marijuana possession. (Volume II, page 14-15)

5. Greer returned to the rear of his vehicle where Burns informed Greer that one of his "duties" was to ensure that there was "nothing illegal on the highway." (Volume II, page 8, 17) Burns proceeded to ask Greer if there was anything illegal in his car to which Greer answered "No." (Volume II, page 17) Burns then asked specifically if Greer had: 'marijuana; weapons; other drugs; alcohol; or other contraband in his

vehicle. (Id.) Greer denied possession of any of these specifically enumerated items. (Volume II, pages 17-18)

6. Following this interrogation, and apparently unsatisfied with Mr. Greer's denial of the presence of any contraband in his vehicle, Deputy Burns asked Greer specifically: "Do you mind if I search your car?" (Volume III page 23) Obviously uncomfortable with this request, Mr. Greer paused and replied: "Ahhhh … if … if … if …" (Volume II, page 18; Volume III, page 24) Deputy Burns then interrupted Greer and interjected: "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." (Volume III, page 25) Burns repeated: "Do you mind if I search you car?" (Volume II, page 19) Greer then made another equivocating response regarding the length of his trip to Liberal. (Volume II, pages 18-19; Volume III, page 25-26) Burns acknowledged that in response to the second request for permission to search, he could not recall "if he [*Greer*] was trying to put anything out there other than kind of stammering something." (Volume II, page 19, Volume III, page 27) Notwithstanding, Burns proceeded with the search. (Id.)

7. During the course of the search, Deputy Burns discovered cigarette rolling papers, a small glass pipe containing what Burns identified as burned marijuana residue, and a 'grinder' containing less than a gram of leafy substance identified as marijuana. (Volume II, page 9, Volume III, page 12) Based on the discovery of said contraband, Deputy Burns had Greer sit in the front seat of the patrol car and advised Greer of his *Miranda* rights. (Volume II, page 9) Burns questioned Greer about the contraband and reports that Greer ultimately allowed Burns to return to Greer's home and consented to a

search of the residence. (Volume III, pages 15-16) The search of the residence was also fruitful for contraband. (Volume III, page 16-17).

8. Of note, at no time prior to Burns' search of Greer's vehicle did Burns observe any contraband in "plain view." (Volume II, page 12; Volume III, page 21) At no time did Burns identify the odor of burned marijuana emanating from the vehicle or on Mr. Greer's person. (Id.) At no time did Burns identify the odor of consumed alcohol in the vehicle or on Greer's breath. (Volume II, page 12) Burns' stipulated that he lacked valid 'probable cause' to search Greer's vehicle, absent Greer's purported 'consent' to said search. (Volume II, pages 12-13; Volume III, pages 19-21)

STANDARD OF REVIEW

9. When reviewing a trial court's denial of a defendant's motion to suppress evidence, appellate courts review the factual underpinnings using a 'substantial competent evidence' standard. But the ultimate legal conclusion drawn from such facts is a question of law subject to de novo review. See: *State v. Jones*, 279 Kan. 71, 73, 106 P.3d 1 (2005); *State v. Porting*, 281 Kan. 320, 324, 130 P.3d 1173 (2006).

ARGUMENTS AND AUTHORITIES

I. The Trial Court Improperly Denied Defendant's Motion to Suppress Evidence and Improperly Admitted Evidence at Defendant's Trial.

10. 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).

A. Deputy Burns Improperly Extended the Duration of the Investigative Detention Beyond the Scope of the Circumstances Initially Justifying the Stop.

11. 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).

12. 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).

13. 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).

14. 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.

15. The specific facts and circumstances involved in *Mitchell*, supra., are distinctly analogous to the case at bar. In *Mitchell*, the Defendant was stopped for speeding. 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, and Mitchell refused. 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.

16. 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.

17. 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.

18. In the case at bar, Deputy Burns' testified that his *initial* interest in Mr. Greer 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 Burns also testified that he observed Greer throw a cigarette butt out of his window. Pursuant to the "dual inquiry" analysis set forth in *Epperson*, although Burns' action in initiating the traffic stop may have been justified at its inception, Burns' continued questioning of Mr. Greer 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*.

19. The fact that Burns handed Mr. Greer his driver's license and told him *pro forma* that he was "free to leave" is negated by Burns' repeated calling out to Greer to stop before Greer had even reached the driver's door of his vehicle; Burns directing Greer to return to the rear of his vehicle; and Burns' deliberate continued questioning of Greer about matters wholly unrelated to the stop. Pursuant to the rule set forth in *Guzman* and *Mitchell*, supra, as soon as Deputy Burns returned Greer's license and issued a "verbal warning" for the littering infraction, Greer should have been 'allowed to proceed on his way *without being subject to further delay by police for additional questioning*.'

B. The Defendant's Alleged 'Consent' Herein was Invalid and Tainted by the Unlawful Extension of the Scope and Duration of the Initial Detention.

20. 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.

21. 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 detention, 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. Greer's alleged 'consent' herein was invalid and tainted by the unlawful detention.

1. Temporal Proximity.

22. Assuming *arguendo* that Deputy Burns initial basis for the stop was his observation of: 1) Mr. Greer's GPS device placed in a manner that could partially occlude the windshield; and 2) Mr. Greer throwing a cigarette out the window, then Burns was justified in detaining Greer 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 Burns *prolonged* the detention beyond the point at which he reasonably could have issued a citation or warning and allowed Mr. Greer to "be on his way." Deputy Burns requested permission to search almost *immediately* after handing Defendant Greer's license and registration to him, but ***before*** Mr. Greer 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.

23. The government may assert that when Deputy Burns returned Greer's identification, the subsequent interaction became a consensual encounter. 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*.

24. 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 valid 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").

25. In the case at bar, immediately after Deputy Burns returned Mr. Greer's identification documents, but ***before*** Mr. Greer had actually re-entered his vehicle Deputy Burns stepped out from his patrol car, hurried toward Greer, and called out to him verbally to stop and return to the rear of the vehicle. As recorded on the video of the stop, *less than three seconds elapse between Burns' return of Greer's license and his request for Greer to step to the rear of his car for further questioning.* Moreover, when Greer did not immediately respond and continued toward his car, Burns called out again in an effort to get Greer to stop. Finally, Greer stopped and turned after Burns' third attempt to summon him. Burns then directed Greer (who was standing at the driver's door of his vehicle) to return to the rear of his car. Burns informed Greer 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" clearly communicated that Burns' official business was not complete and effectively communicated to Greer that the continued detention was mandatory.

26. Burns proceeded to ask Greer "if there was anything illegal in his car" to which Greer answered "No." Burns 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 Greer unequivocally denied the presence of ***any*** such contraband items, the conversation continued, culminating in Deputy Burns' request to search Greer'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. Moreover, Burns' deliberate use of the officious terms "duty" and "ensure" clearly communicated to Greer that the continued detention was mandatory.

3. Purpose and Flagrancy of Official Misconduct

27. Of paramount importance to this Court's review of the continued detention at issue is Burns' stipulation during cross examination that he lacked valid 'probable cause' to search Greer's vehicle, absent Greer's purported 'consent' to said search. (Volume II, pages 12-13; Volume III, pages 19-21) Equally important is Burns' stipulation that he had made the decision to extend the detention of the Defendant when the Defendant had failed to verbally disclose his prior misdemeanor conviction for marijuana possession. (Volume II, page 14-15) 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. See: *U.S. v. Childs*, 256 F.3d 559 (7th Cir. 2001). Here, Defendant Greer's driver's license, automobile registration and liability insurance were all current and valid. Upon review of said documents, Deputy Burns elected not to issue any citation and issued only a verbal warning. Thus, Burns' behavior suggests that he improperly detained Mr. Greer "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 Defendant's alleged "consent" such that said consent was tainted and invalid.

28. *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 directed the defendant to 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.

29. 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 the ruling of the district court.

30. 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.

31. 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.

32. 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*, supra and *United States v. Melendez-Garcia,* 28 F.3d 1046 (1994): "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.

33. 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.

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

35. 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 Burns called out to Greer repeatedly before Greer had re-entered his vehicle. Burns then directed Greer to *step to the back of the car* effectively restricting his freedom of movement before obtaining Greer's 'consent' to search. Further, Greer was in the presence of 2 uniformed officers that had arrived in separate patrol cars. The arrival of backing officers is yet another factor that would confirm to a reasonable person that the traffic stop had not terminated. In contrast to the facts of *McSwain*, Mr. Greer 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.

36. 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.

37. 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.

38. 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 or registration tag, whether 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.

39. 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*.

40. The consistency between the facts of *Edgerton* and the case at bar are remarkable. Here, the sole basis for Deputy Burns' initial stop of the Defendant's vehicle was his observation of a partially obstructed windshield and a littering infraction. The Defendant had committed no other moving violations or traffic infractions of any kind and Burns reports no other basis for the stop. Based on the limited basis supporting Deputy Burns' 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 Greer to relocate his GPS device. Once these limited objectives were accomplished, Burns 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.

41. Of particular importance in the case at bar, Mr. Greer 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 Burns' 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,* Greer unequivocally denied the presence of any such items. Upon continued inquiry as to possession of specific items, Greer again denied having any such items in his vehicle. When Deputy Burns initially requested permission to search, Greer, hesitated and equivocated in response, stating: "Ahhhh … if … if … if …" *Only upon Burns' persistent interrogation and explanation about the need for the search* did Mr. Greer finally relent to Burns' 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.

42. 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.

43. 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.

44. 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 that the backing officer 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.

45. In reversing the Court of Appeals decision, the Supreme Court held <u>conclusively</u> 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.

C. Absent the Defendant's Invalid "Consent" Deputy Burns Did Not Have Sufficient Independent "Probable Cause" to Search the Vehicle.

46. 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).

47. In his testimony at both the hearing on Defendant Greer's Motion to Suppress Evidence and again at trial, Deputy Burns confirmed that he had observed 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; or inconsistent travel plans. (Volume II, pages 12-13; Volume III, pages 19-21) Moreover, Burns made no indication of even generalized "nervousness" on the part of Mr. Greer 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., 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 … courts should discount the detaining officer's reliance on the detainee's nervousness." *Id.*

48. Burns testified that the computer check indicated a criminal history for Greer which included theft and *misdemeanor* possession of drugs. Burns questioned

Greer about his prior criminal history and reports that Greer mentioned the prior theft charge, but did not mention anything about a prior narcotics charge. On cross-examination, *Burns admitted that he had made the decision to extend the detention of the Defendant when the Defendant had failed to verbally disclose his prior misdemeanor conviction for marijuana possession*. (Volume II, page 14-15) 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." Id.

49. Deputy Burns did testify to having observed damage to a piece of interior trim in Mr. Greer's vehicle. Specifically, Burns is heard on the field video associated with this stop saying to Greer: "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." Greer 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." However, *Burns also testified that the damage he observed was consistent with the age and general condition of the vehicle.* (Volume III, page 21) Of note, Burns 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.

D. Greer's Purported "Consent" to Search was Neither Free nor Unequivocal.

50. The State has the burden of establishing the scope and voluntariness of the consent to search. For consent to be valid, two conditions must be met: "(1) There must be clear and positive testimony that consent was unequivocal, specific, and freely given; and (2) the consent must have been given without duress or coercion, express or implied." See *United States v. Guerrero*, 472 F.3d 784, 789-90 (10th Cir. 2007); *State v. Moore*, 283 Kan. 344, 360, 154 P.3d 1 (2007). Voluntariness is a question of fact that must be decided in light of the totality of the circumstances. *State v. Jones*, 279 Kan. 71, 77, 106 P.3d 1 (2005). Ordinarily, appellate review of a district court's decision regarding the voluntariness of a defendant's consent to search is guided by the substantial competent evidence standard. Id. When the district court does not make any findings regarding the voluntariness of consent, Appellate Courts will review the question by applying a de novo standard. Id.

51. After Deputy Burns issued Mr. Greer a written warning for littering, Greer exited Burn's patrol vehicle and walked back to his red Cavalier. However, before Greer was able to reach the driver's side door and re-enter his vehicle, *Burns exited the patrol car and called out to Greer to return for further questions*. (Volume II, page 15; Volume III, pages 22-23) Burns directed Greer to stand at the rear of his vehicle where Burns informed Greer that one of his "duties" was to "look for drugs and other contraband."

Burns proceeded to ask Greer if he had 'anything illegal' in his car, to which Greer answered "No." (Volume III, page 17) Burns then asked specifically about individual types of illegal contraband: "marijuana; weapons; drugs; or alcohol." (Volume III, pages17-18) Greer denied possession of any of these specifically enumerated items. (Id.)

52. Apparently unsatisfied with Mr. Greer's denial of the presence of any contraband in his vehicle, Deputy Burns asked Greer specifically: "Do you mind if I search your car?" (Volume II, page 23; Volume III, page 18) Obviously uncomfortable with this request, Mr. Greer is heard on the audio recording of the subject interaction stating: "Ahhhh … if … if … if …" (Volume II, page 24; Volume III, page 18) At trial, Burns described Greer's response to the request for permission to search as "stammering." (Volume III, page 18) Burns testified that he deliberately interrupted Mr. Greer because Greer was hesitating and "stammering." (Volume III, page 18) Burns testified at the hearing on Defendant's Motion to Suppress Evidence that Greer's 'stammering' response was "neither clear nor unequivocal permission to search the vehicle." (Volume III, page 24) Deputy Burns then interrupted Greer and interjected: "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." (Volume III, page 25) Burns then repeated: "Do you mind if I search you car?" Greer is heard on the audio recording of the subject interaction offering another equivocating response regarding the length of his trip to Liberal. (Id.) Burns ***again*** interrupts Greer, directing him to stand with the backing officer at the patrol vehicle during the search. On direct inquiry, Burns conceded that he did not recall any point at which Greer gave verbal permission to search the vehicle. (Volume II, page 19)

53. Of dispositive importance to this Court's decision is the fact that Deputy Burns *himself* used the word "stammering" to describe Greer's response to Burns' initial request for permission to search (Volume II, page 18). Moreover, Burns himself conceded that Greer's "stammering" response provided "*neither clear nor unequivocal consent to search the vehicle*." (Volume III, page 24) Clearly, said response cannot be characterized as 'unequivocal, specific, and freely given consent' offered 'without duress or coercion, express or implied' as required by *United States v. Guerrero,* supra. "Stammering" by its very nature and plain definition is "equivocation." Thus "stammering" cannot be deemed an "unequivocal" response. The search herein was not a "consent search," it was a "*relent*" search. Burns simply continued his persistent requests for permission to search Mr. Greer's vehicle until Greer 'relented' to Burn's requests.

E. *State v. Cushinberry* is Not applicable to the Issues Raised Herein.

54. In denying Defendant's Motion to Suppress Evidence, the District Court made reference to the unpublished decision in *State v. Cushinberry,* 92 P.3d 613 (2004). Specifically, the District Court stated in its ruling:

> "… the law is, as I understand, court of appeals in *State v. Cushinberry* that's the decision, either you have reasonable suspicion, not probable cause, reasonable suspicion to request the search. If you do not have reasonable suspicion to request a search, do you have a valid consensual search, in that they indicated it was not required that the officer state to the defendant that you are free to go." (Volume II, page 29)

The District Court concluded: "The point simply is under *State v. Cushinberry* that the request for the search was the probable cause of this consensual encounter between the officer and Mr. Greer." Id.

55. In *State v. Cushinberry,* a Johnson County Sheriff's Deputy had clocked defendant Cushinberry driving 82 miles per hour in a 70 mile per hour zone. As the

deputy was pulling Cushinberry's vehicle over, he observed the passenger engaged in what he characterized as furtive movements. A computer check revealed that Cushinberry's license had been suspended since 1998, but Cushinberry's passenger had a valid driver's license such that he could lawfully drive the vehicle. The deputy issued the appropriate citations and then told Cushinberry he was free to go.

56. As Cushinberry was walking towards the passenger-side door of his vehicle, the deputy asked if he had anything illegal in the vehicle. Cushinberry responded that he did not. The deputy then asked Cushinberry for permission to search the vehicle *and Cushinberry agreed*. During the search, the deputy found several items of drug-related contraband.

57. Prior to trial, the district court heard and denied Cushinberry's Motion to Suppress Evidence. Following bench trial, Cushinberry appealed his conviction and the district court's ruling on his suppression motion. However, both in his motion and on appeal, Cushinberry limited his arguments to the following 2 issues: 1) whether the deputy had 'reasonable suspicion' to detain Cushinberry after the initial stop had ended; and 2) did his consent to search the vehicle purge the taint of the purported illegal detention. *At no time did Cushinberry raise and at no time did either court address the issue of the voluntariness or validity of his consent to the requested search.*

58. With regard to Cushinberry's argument – *and the district court's erroneous ruling* – that an officer must have valid reasonable suspicion to request consent to search, this Court correctly ruled: "[T]he trial court's contention that reasonable suspicion is required to request consent is contradictory to our case law." *State v. Cushinberry*, 92 P.3d 613 (2004). However, this Court ultimately upheld trial court's

denial of Cushinberry's Motion to Suppress, finding "… there is no evidence that Deputy Rutherford coerced Cushinberry to consent to search of his vehicle." Id. Again, the issue of coercion – overt or implied – was never raised by Cushinberry and not addressed in this Court's opinion. Because Defendant Greer has at no time advanced the proposition that 'reasonable suspicion' is a prerequisite to a request for consent to search and because Defendant Greer specifically raised the issue of voluntariness of consent, the *Cushinberry* decision is not 'on point' with the issues raised in the case at bar.

F. Any and All Statements Made by Greer and Any and All Contraband Discovered at Greer's Residence are Inadmissible as "Fruit of the Poisonous Tree".

59. At the conclusion of the search of Greer's vehicle, Deputy Burns ultimately cajoled Mr. Greer into allowing a team of officers to search his residence in Lenexa. The sole basis for support of this subsequent search of Greer'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. Greer'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 Greer's vehicle, as that evidence is tainted and inadmissible. Thus, any inculpatory statements made by Greer 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

60. In the case at bar, Deputy Burns 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, Burns should have allowed Mr. Greer to proceed on his way *without being subject to further delay by police for additional questioning*. After telling Greer *pro forma* that he was 'free to leave' – but before Greer had reached the driver's side door of his vehicle, Burns called out repeatedly to Greer. Burns directed Greer to return to the rear of the vehicle and explained the part of his official 'duty' was to 'ensure' that no vehicles on the roadway were transporting contraband. The temporal proximity of this exchange along with the use of directive and officious language led Greer to believe that he was not free to disregard Burn's directives and be on his way.

61. Further, Mr. Greer did not voluntarily consent to the search of his vehicle. To the contrary, he made every attempt to politely *withhold* consent. Deputy Burns *himself* used the word "stammering" to describe Greer's response to Burns' initial request for permission to search and conceded that Greer's "stammering" response provided "*neither clear nor unequivocal consent to search the vehicle*." Only after continued and relentless questioning did Mr. Greer 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 Greer's residence are inadmissible as fruit of the poisonous tree pursuant to the exclusionary rule as set forth *Wong Sun v. United States,* supra.

Respectfully Submitted,

_____

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CERTIFICATE OF SERVICE

I certify that on this ____ day of February, 2011, five true and correct copies of the foregoing Brief of Appellant were delivered via Hand Delivery to:

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100 North Kansas Avenue
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I certify that on this ____ day of February, 2011, one true and correct copy of the foregoing Brief of Appellant was delivered via United States Mail, First Class postage prepaid to:

Attorney General Derek Schmidt
Kansas Judicial Center, 2nd Floor
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