

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC 87081
)	
OSCAR B. SANCHEZ,)	
)	
Appellant.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF SALINE COUNTY, MISSOURI
15TH JUDICIAL CIRCUIT, DIVISION 4
THE HONORABLE DENNIS A. ROLF, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

On December 10, 2003, following a Saline County bench trial, Appellant Oscar Sanchez was convicted of the class A felony of trafficking in the first degree, §195.222, and the class C felony of possession of a controlled substance, §195.202.¹ The Honorable Dennis A. Rolf found Sanchez to be a persistent offender and sentenced him to thirty years in the Department of Corrections for the trafficking charge and a consecutive fifteen years for the possession. Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Western District. Article V, §3, Mo. Const. (as amended 1982); §477.070. That Court granted the Respondent's application for transfer after an opinion, so this Court now has jurisdiction. Article V, §§3 and 10, Mo. Const. (as amended 1982) and Rule 83.02.

¹ All statutory references will be to the Revised Statutes of Missouri, 2000, unless otherwise indicated.

STATEMENT OF FACTS

On July 9, 2003, Appellant Oscar Sanchez was indicted for trafficking in the first degree and possession of a controlled substance (L.F. 6-7).² The indictment alleged that Sanchez, acting either alone or in concert with another person, attempted to deliver more than 30 kilograms of marijuana to St. Louis, and that he also possessed methamphetamine (L.F. 6-7). Sanchez filed a motion to suppress evidence and a hearing was conducted (L.F. 11-12).

At the hearing, Trooper Russell Seaton of the Missouri Highway Patrol testified he was working in Saline County on July 5, 2003 (Tr. 6-7, 9). He and Trooper Swartz were pulled over on the eastbound side of Interstate 70, and Seaton was out of his patrol car when he noticed a white Pontiac Grand Am drive by (Tr. 12-3, 61-2). The car was in the right-hand lane of Interstate 70 heading eastbound (Tr. 12). Seaton testified there was nothing in particular that drew his attention to the car and he did not notice any traffic violations, but after it passed he got into his car and got back on the interstate (Tr. 13, 61-2). Seaton testified he did not enter the highway for the purpose of pulling over the Grand Am (Tr. 14).

² The record on appeal consists of a legal file (L.F.) and a transcript (Tr.).

Once he was back on the interstate, the white car was “quite a ways” ahead of Seaton and he could not observe any traffic violations (Tr. 63). But he sped up and closed in on the car (Tr. 64). It was still in the right lane and it was following a tractor-trailer at about 68 or 69 miles an hour (Tr. 14). The car stayed behind the tractor-trailer at a distance of one and a half to two car lengths (Tr. 14). Seaton thought it was “odd” that the Grand Am did not pass the tractor-trailer because there was no other traffic around (Tr. 14-5). So, he pulled the car over for following another vehicle too closely (Tr. 15). It was approximately 11:30 a.m. when he pulled the car over (Tr. 70).

The car had a Montana license plate (Tr. 74). Seaton approached the passenger side and saw a man and a woman in the car (Tr. 22-3). He testified he told the occupants why he stopped them and asked the woman for her driver’s license and insurance (Tr. 24). When the driver handed him the paperwork, he noticed her hands were trembling, so he asked her to step out of the car (Tr. 24). He testified he asked her to get out of the car because he could not hear her and also because he was not sure if she was

the victim of a crime or if she and her passenger had committed a crime (Tr. 68).³

Once the driver exited the car, Seaton asked her where she was going, whether the car was hers, and who she was with (Tr. 25). The driver answered that she was going to her aunt's house in St. Louis and that her passenger was her friend Anthony, but she did not know his last name (Tr. 25, 28). She was not sure where they were going in St. Louis and became "fidgety" during the questioning (Tr. 26). Her level of nervousness was out of the ordinary (Tr. 28). When asked how she was going to get in touch with her aunt, the driver said she was going to call her and that the number was somewhere in her car (Tr. 74-5).

At 11:32 a.m., two minutes after stopping the car, Seaton called Corporal Swartz (Tr. 71). Seaton was aware that Swartz had a drug dog in his car, but testified that he did not call for the drug dog (Tr. 71). He called Swartz because the driver did not know the passenger's last name and because she seemed excessively nervous (Tr. 71).

Seaton asked the driver to step back to his car while he went up to speak with the passenger (Tr. 29). The passenger identified himself as _____

³ Seaton also testified that it was not unusual for a driver to be nervous during a traffic stop (Tr. 67).

Anthony Lopez (Tr. 29).⁴ Sanchez gave Seaton an ID and said the driver was his girlfriend and that he had known her a long time (Tr. 30). The ID was in the name of Antonio Lopez (Tr. 32). Seaton testified that he was suspicious of the ID and thought it might be fake, but that the information given by Sanchez was fairly consistent with that given by the driver (Tr. 30-1). Sanchez said he was going to St. Louis to see a friend, but did not know where in St. Louis they were going (Tr. 32-3). He was not sure how long they were going to stay (Tr. 33).

Seaton and the driver got into Seaton's patrol car (Tr. 35). The driver was Tara Hencz and she had a Montana driver's license (Tr. 35). Seaton again asked Hencz if she knew the passenger's last name and she did not (Tr. 35). Seaton testified that Hencz sat very straight in the car and he could see her pulse beating down in her abdomen (Tr. 36). Seaton said her anxiety level continued to climb (Tr. 36).

The officer ran a computer check on Hencz and it showed that her vehicle was properly registered and she had a valid driver's license (Tr. 38-9). He checked the ID card given to him by Sanchez, and the card came

⁴ After the passenger's arrest, Seaton discovered that his name was not Anthony Lopez, but Oscar Sanchez (Tr. 59-60). The passenger will be referred to as Oscar Sanchez from this point forward.

back as having no driving record associated with it (Tr. 39). So, the officer asked for a criminal history record and for an inquiry through the El Paso Intelligence Center (Tr. 39).

Swartz arrived about ten minutes into the stop and began asking Sanchez questions (Tr. 41). Afterward, Seaton and Swartz “compared notes” about the statements given by Hencz and Sanchez and noticed several “discrepancies” (Tr. 42). Hencz said she and Sanchez were friends, but Sanchez called Hencz his “girlfriend” (Tr. 42). Hencz said Sanchez was staying in a hotel “for a week or two”, while Sanchez said that he was living with Hencz and had been there five or six months (Tr. 42).⁵ Hencz said she was employed as a housekeeper, but Sanchez said she was a bartender (Tr. 42). Hencz said they stayed the night in Kansas City, arriving at the hotel late and getting on the road early, but Sanchez said that while they were in Kansas City they went to Oceans of Fun (Tr. 43). These “inconsistencies” heightened Seaton’s suspicions (Tr. 43). In addition, Seaton testified that Interstate-70 is “a documented established drug thoroughfare”, and that St. Louis is a known destination city for narcotics (Tr. 44).

⁵ In State’s Exhibit 5, a videotape of the arrest, Hencz can be heard telling Seaton that Sanchez sometimes stays with her (Ex. 5, 11:55:19).

Seaton entered a warning for Hencz for following too closely (Tr. 46). He testified he “handed her all of her paperwork back, including her driver’s license, her registration, and the passenger’s ID card, and told her that she was free to go, have a safe trip, and things of that nature.” (Tr. 47). Essentially, he told her, “good-bye” (Tr. 83). This was approximately 35 or 40 minutes after the initial stop (Tr. 47).

As Hencz was walking back to her car, Seaton got out of his car and asked if he could talk to her (Tr. 47). He testified that nothing changed between the time he told her she was free to go and when he got out of his car to talk to her (Tr. 84, 86). He characterized the subsequent events as “a consensual encounter” and emphasized that he “didn’t detain her” (Tr. 84). He testified that when he asked if he could ask her a few questions, she came back to him saying “sure”, and did not say she wanted to leave (Tr. 85). He also testified that Hencz was free to leave at that point, but her car was not (Tr. 85-6).

Seaton asked Hencz if she was aware of a drug problem in the United States, and she said, “Yes, definitely” (Tr. 47). Seaton testified that he asked her if she was aware that people transport narcotics across the country every day in all types of vehicles, and she said, “No, I didn’t” (Tr. 48). Seaton testified that at his question, Hencz got goose bumps on her

shoulders, arms and body, despite the 100 degree temperature that day (Tr. 48). He told her that he was not accusing her of any wrongdoing, but was asking her permission and consent to search her vehicle for drugs, weapons, large quantities of money, or anything illegal (Tr. 48). Hencz refused consent saying, "I don't think there's any reason for that" (Tr. 48). Seaton then asked Hencz, "Could you just stand here for a minute?" (Tr. 90). He testified he did not detain Hencz, but merely asked her if she would stand there (Tr. 89, 90).

Seaton left Hencz and asked Sanchez to step out of the car (Tr. 48). Seaton testified he was "extremely concerned that there was criminal activity afoot" and asked Sanchez to exit the car for officer safety (Tr. 48-9). Sanchez complied and gave Seaton permission to search his person for weapons (Tr. 49). Then Seaton told Swartz that Hencz had refused consent (Tr. 90) and asked him to use his canine to walk around the car and do a canine-sniff (Tr. 49-50).

The dog alerted on the car near the trunk (Tr. 52). Seaton searched the trunk and found three large bundles of marijuana wrapped in plastic (Tr. 55). In the car's back seat, he found a bag of methamphetamine, two electronic scales, marijuana, and four rounds of 9-millimeter ammunition (Tr. 55). Under the front passenger seat was a fully-loaded, high-point, 9-

millimeter pistol equipped with a laser sight (Tr. 55-6). Both Hencz and Sanchez were arrested (Tr. 56).

Corporal Gary Swartz also testified at the suppression hearing, and his testimony was consistent with Seaton's testimony (Tr. 93-112). Several weeks after the hearing, the trial court issued a written order denying the motion to suppress (L.F. 16-21). Sanchez waived his right to a jury trial (L.F. 15) and the case proceeded to trial before the Honorable Dennis A. Rolf (Tr. 124). Prior to trial, Sanchez renewed his motion to suppress (Tr. 135). He argued that after the officer told Hencz she was free to leave, he unlawfully detained her and Sanchez (Tr. 136). The court took the motion up with the trial (Tr. 144).

Tara Hencz testified for the State at trial (Tr. 146). Hencz lives in Montana where she has lived her whole life, 23 years (Tr. 147). She has relatives in Missouri, but none in St. Louis (Tr. 147). She met Sanchez in Montana in May 2003, and knew him as "Anthony" (Tr. 148). Her ex-boyfriend, a drug dealer, introduced them, and Sanchez was her ex-boyfriend's dealer (Tr. 149, 152-3). The next time Hencz met Sanchez was about two weeks before they were arrested (Tr. 154). She met with him because she needed to make some money (Tr. 156). Hencz and Sanchez

planned a trip to Minnesota to deliver marijuana, but Hencz did not know how much marijuana there was or where it would be delivered (Tr. 154-6).

Hencz and Sanchez made the trip from Montana to Minnesota at the end of June (Tr. 159). On or near July 2, 2003, they left Minnesota to travel to Kansas City and then to St. Louis to sell marijuana (Tr. 177-8, 179).

Hencz testified they stayed two nights in Kansas City (Tr. 187) and went to Worlds of Fun (Tr. 189). They left for St. Louis on July 5th at around 11:00 a.m. and were stopped by the highway patrol around 11:30 (Tr. 192-3).

Hencz testified that she got more nervous as the stop progressed (Tr. 207). She testified that the officers told her Sanchez's answers to their questions and she agreed that his answers were inconsistent with hers (Tr. 207). Hencz pleaded guilty to the class B felony of possession of marijuana with the intent to distribute on October 28, 2003, and there was no plea offer involving her testimony at Sanchez's trial (Tr. 214-5).

On cross-examination, Hencz testified that as she drove down the highway she saw the trooper out of his car on the side of the road (Tr. 217-8). She testified she drove one or two miles and then noticed that he was speeding up behind her (Tr. 218). She pulled over when he turned on his lights (Tr. 218).

Hencz testified that she heard the trooper call in her license and registration information and heard the response come back on the radio confirming her identity and that her car was legal (Tr. 219). After that, the officer called in Sanchez's ID and asked Sanchez questions (Tr. 220). The officer also continued asking Hencz questions, which made her more nervous (Tr. 233). Finally, the officer gave her a warning and told her she was free to leave (Tr. 220).

She got out of his car and walked toward her car, then the officer stopped her (Tr. 220). She did not feel free to leave and did not think that she could have ignored the officer and kept on walking (Tr. 221). The officer did not say why he was stopping her, but asked her questions and asked if he could search her car (Tr. 221). The fact that the officer stopped her a second time after telling her she could leave made her very nervous (Tr. 233). When she refused her consent for a search, the officer took her over to his car and asked her to stand next to it (Tr. 222). Hencz testified that the officer then took Sanchez out of her car and put him in a patrol car (Tr. 222). Hencz testified that she was not free to leave (Tr. 222). She saw the dog being brought up to her car to sniff it (Tr. 222).

Trooper Seaton also testified for the State (Tr. 236). In addition to the testimony he gave at the suppression hearing, Seaton testified that the

identification card given to him by Sanchez was very suspicious (Tr. 259). He said that the picture on the card was raised and was unusually high and the typing appeared to be off-center and covered portions of the main print on the card (Tr. 259). The lamination was different than what the officer normally sees and there was no hologram (Tr. 259). The edges of the card were rounded and uneven (Tr. 259). Seaton testified that it appeared that someone cut the card with scissors, placed the photograph on it, typed it out on a typewriter, and had it laminated (Tr. 259). He was very suspicious that it was fake (Tr. 260).

He was also suspicious that the name on the card was “Antonio” but that Hencz called him “Anthony” (Tr. 260). Additionally, Sanchez first told the officer he was going to St. Louis to visit a friend, but then said he was going to visit Hencz’s aunt (Tr. 261). Seaton testified that he completed the license and vehicle registration check of Hencz within ten minutes of pulling her over (Tr. 301, 304). But he continued detaining her an additional 30 minutes to check Sanchez’s ID because he did not think it was an official state identification (Tr. 302, 306, 308). Seaton admitted that he “didn’t pay attention to the specific wording” that was on the back of the ID (Tr. 307-8). The back of the card said “This identification card is

issued to the holder for identification purposes only” and “This identification is not issued by any government agency” (Tr. 307).

The check on Sanchez’s identification card came back and the information on the ID card was “on file” (Tr. 273). Seaton was still suspicious of what was going on with the car and the occupants, but could not pinpoint exactly what was going on, so he told Hencz that she was free to go (Tr. 273-4). As she walked back to her car and reached the rear left quarter panel, Seaton got out of his patrol car and asked if he could ask her a couple of questions (Tr. 274). He testified that he did not “stop” Hencz, but merely called her name, and she stopped (Tr. 310-11). Hencz came back to him and he moved them away from the line of traffic (Tr. 274). Seaton testified that Hencz was free to leave, but her car was not (Tr. 311-12). He believed he had reasonable grounds to hold her vehicle (Tr. 312). Seaton testified, “She could have left had she asked to at the time if she had asked to be taken to a phone, to a car, or something. I can’t tell you what exactly would have happened because it did not happen.” (Tr. 312).

After he asked her some questions, he noticed that she became visibly shaken again (Tr. 275). The officer still was unable to pinpoint what was going on and was trying to confirm suspicions that he had (Tr. 275). He asked Hencz for consent to search her car and she refused, so he

asked Swartz to use his canine to sniff the vehicle (Tr. 276). Seaton testified that this all happened after he completed the traffic stop (Tr. 313).

Corporal Gary Swartz testified at trial that he was suspicious of the ID card (Tr. 326) and thought the passengers' stories were inconsistent (Tr. 331). He did not read the back of the ID card (Tr. 339). After reading it at trial, he agreed that the writing on the back of the card made it pretty clear that it was not a state ID (Tr. 339).

Darian Attebery of the Highway Patrol Crime Lab testified that she is a chemist and tested physical evidence submitted in this case (Tr. 342-3). One of the items submitted for testing turned out to be 1.48 grams of methamphetamine (Tr. 344-5). Sanchez objected to the admission of this evidence based on his motion to suppress (Tr. 347-8). The objection was overruled and a continuing objection was allowed (Tr. 348). Attebery testified she also tested several other items and the results were that they contained 26.537 pounds, 26.350 pounds, and 26.79 pounds of marijuana (Tr. 348-350).

Sanchez filed a motion for judgment of acquittal at the close of the State's evidence, and it was denied (Tr. 354). The court then took up the motion to suppress (Tr. 355). It stated that the reasonable suspicion in this case, and the facts giving rise to the reasonable suspicion, arose from the

onset of the stop (Tr. 355). The court said that the inconsistencies in the passengers' statements gave the trooper reasonable suspicion to continue his investigation, even though the reason for the stop ended and Hencz was released and allowed to walk toward her car (Tr. 356).

Sanchez's motion for judgment of acquittal at the close of all evidence was also denied (Tr. 356, 359). The court made a finding beyond a reasonable doubt that Sanchez is a prior and persistent offender (Tr. 361). It also found him guilty beyond a reasonable doubt of trafficking in the first degree and possession of a controlled substance, methamphetamine (Tr. 365). Sanchez was sentenced on January 26, 2004, to thirty years in the Department of Corrections on count one and 15 years consecutive on count two (L.F. 29-31, Tr. 392). Notice of Appeal was filed January 28, 2004 and this appeal follows (L.F. 32-5).

POINT RELIED ON

The trial court clearly erred in overruling Sanchez’s motion to suppress and in admitting the evidence found during the search of Hencz’s car, because the search violated Sanchez’s right to be free from unlawful search and seizure guaranteed by the 4th Amendment to the United States Constitution and Article I, §15 of the Missouri Constitution, in that 1) there was no reasonable suspicion to support a dog sniff of Hencz’s car, and 2) once Seaton ran computer checks on Hencz and Sanchez, finding nothing wrong, and gave Hencz a warning for a traffic violation, telling her that she was “free to go”, the purpose of the traffic stop was complete and any search thereafter required new and articulable suspicion that a crime had been committed. Thus, the continued detention of Hencz and Sanchez while a drug dog sniffed and officers searched Hencz’s car was illegal because nothing changed from the time Hencz was told she was free to leave and the search of her car.

State v. Granado, 148 S.W.3d 309 (Mo. banc 2004);

State v. Barks, 128 S.W.3d 513 (Mo. banc 2004);

Illinois v. Caballes, 125 S.Ct. 834 (2005);

State v. Slavin, 944 S.W.2d 314 (Mo. App. W.D. 1997);

United States Constitution, 4th Amendment; and
Missouri Constitution, Article I, §15.

ARGUMENT

The trial court clearly erred in overruling Sanchez’s motion to suppress and in admitting the evidence found during the search of Hencz’s car, because the search violated Sanchez’s right to be free from unlawful search and seizure guaranteed by the 4th Amendment to the United States Constitution and Article I, §15 of the Missouri Constitution, in that 1) there was no reasonable suspicion to support a dog sniff of Hencz’s car, and 2) once Seaton ran computer checks on Hencz and Sanchez, finding nothing wrong, and gave Hencz a warning for a traffic violation, telling her that she was “free to go”, the purpose of the traffic stop was complete and any search thereafter required new and articulable suspicion that a crime had been committed. Thus, the continued detention of Hencz and Sanchez while a drug dog sniffed and officers searched Hencz’s car was illegal because nothing changed from the time Hencz was told she was free to leave and the search of her car.

Question Presented

Once an officer completes a traffic stop and tells the driver she is “free to go”, may he immediately detain her a second time, ask for her consent to search her car, and when consent is refused, conduct a dog sniff of the car?

Standard of Review

A trial court's ruling on a motion to suppress is reviewed to determine whether there is sufficient evidence to support the ruling based on the complete record before the trial court. ***State v. Woolfolk***, 3 S.W.3d 823, 828 (Mo. App. W.D. 1999). The ruling is only reversed if it is clearly erroneous, and the facts are viewed in the light most favorable to the ruling. ***State v. Granado***, 148 S.W.3d 309, 311 (Mo. banc 2004). The issue of whether the Fourth Amendment was violated is a legal question and is reviewed *de novo*. ***State v. Mendoza***, 75 S.W.3d 842, 845 (Mo. App. S.D. 2002).

Facts

On July 5, 2003, Tara Hencz was driving a white Pontiac Grand Am from Montana to St. Louis and Oscar Sanchez, Appellant, was her passenger (Tr. 157, 162 177, L.F. 6-7). Trooper Russell Seaton was working in Saline County that day, and he was pulled over on the eastbound side of Interstate 70 talking to Trooper Swartz about going to eat (Tr. 6-7, 9, 12-13, 61-62, 106). Seaton was not in his car when he noticed a white Pontiac Grand Am drive by (Tr. 12-13, 61-62). The car was in the right-hand lane of Interstate 70 heading eastbound , and had very dark-tinted windows such that Seaton could not see into the vehicle at all (Tr. 12, 16). Seaton

testified there was nothing in particular that drew his attention to the car and he did not notice any traffic violations, but after it passed he got into his car and got back on the interstate (Tr. 13, 61-2). Seaton testified he did not enter the highway for the purpose of pulling over the Grand Am (Tr. 14).⁶

Once Seaton was back on the interstate, the white car was “quite a ways” ahead of him (Tr. 63). At that distance, he could not observe the car committing any traffic violations (Tr. 63). He sped up and “closed in” on the car, but still observed no traffic violations (Tr. 64). The car was in the right lane and it was following a tractor-trailer at about 68 or 69 miles an hour (Tr. 14). The car stayed behind the tractor-trailer at a distance of one and a half to two car lengths (Tr. 14). Seaton thought it was “odd” that the

⁶ Swartz testified that when Seaton got on the highway, he stayed on the shoulder to finish up paperwork from a traffic stop, and then went east to the next overpass and “prepared” to make a stop for lunch (Tr. 106-07). The overpass where Swartz waited was about a mile or a mile and a half away from where Seaton had pulled Hencz’s car over; Swartz could see Seaton down the road on the shoulder (Tr. 99). He and Seaton had talked about going to lunch, but had not yet planned where they were going (Tr. 107).

Grand Am did not pass the tractor-trailer because there was no other traffic around (Tr. 14-5). So, he pulled the car over for following another vehicle too closely (Tr. 15). It was approximately 11:30 a.m. when he pulled the car over (Tr. 70).

The car had a Montana license plate (Tr. 74). Seaton approached the passenger side and saw a man and a woman in the car; the man was immediately recognizable as Hispanic (Tr. 22-3, 74). Seaton testified that he told the passengers why he stopped them and asked the woman, Hencz, for her driver's license and insurance (Tr. 24). When she handed him the paperwork, he noticed her hands were trembling, so he asked her to step out of the car (Tr. 24). He testified that he asked her to get out of the car because he could not hear her (Tr. 68). But he also had her get out of the car because he noticed that her hands were shaking and he thought she might be the victim of a crime or that she and her passenger might have committed a crime (Tr. 68).

Seaton asked Hencz where she was going, whether the car was hers, and who she was with (Tr. 25). She replied that the car was hers and that she was headed to her aunt's house in St. Louis with her friend Anthony⁷

⁷ The passenger, Anthony, was later determined to be Appellant, Oscar Sanchez, and will be referred to as "Sanchez" (Tr. 31).

(Tr. 25). Seaton asked where in St. Louis she was going, but Hencz did not know (Tr. 25-6). She was going to call her aunt when she got closer to St. Louis, and the number was in her car (Tr. 74-5).

Seaton testified that Hencz became fidgety, adjusting her shirt (Tr. 26). He asked Hencz for Sanchez's last name, but she did not know it (Tr. 28). Seaton then asked Hencz the nature of her relationship with Sanchez and she replied that he was just a friend (Tr. 28). About this time, Seaton called Swartz to the scene (Tr. 71). He then directed Hencz to stand near the passenger door of his patrol car while he went up to speak with Sanchez (Tr. 29). Seaton testified that Hencz's nervousness made him suspicious that "something wasn't exactly right" and he was trying to clarify whether the vehicle was stolen, someone in the vehicle was a victim of a crime or whether there was "something going on more than what meets the eye" (Tr. 33).

Seaton asked Sanchez for his name and Sanchez replied, "Anthony Lopez" (Tr. 29). He asked Sanchez about Hencz and how long he had known her, and Sanchez replied that Hencz was his girlfriend and he had known her a long time (Tr. 30). Seaton found this information to be consistent with what he was told by Hencz (Tr. 30). Sanchez handed Seaton an Arizona identification card and Seaton testified he was

“immediately suspicious” of the card (Tr. 30). Seaton asked Sanchez where they were going, and Sanchez said they were going to see a friend in St. Louis (Tr. 32). Seaton asked Sanchez how long they were going to be in St. Louis, but Sanchez did not know (Tr. 33). Seaton returned to the patrol car and began questioning Hencz about Sanchez (Tr. 34). He thought that since she did not know his last name, she was “trying to cover, you know, does she know that that’s not actually who that is” (Tr. 34).

Seaton again asked Hencz if she knew her passenger’s last name and she did not (Tr. 35). So, he ran a computer check on her license and registration (Tr. 38-9). The results of the computer check showed that the vehicle was properly registered and the license was valid (Tr. 39). The check was completed within the first 10 minutes of the stop (Tr. 301, 304), but Seaton detained her an additional 30 minutes to check Sanchez’s ID because he did not think it was an official state identification (Tr. 302, 306, 308). Seaton admitted that he “didn’t pay attention to the specific wording” that was on the back of the ID (Tr. 307-8). The back of the card said “This identification card is issued to the holder for identification purposes only” and “This identification is not issued by any government agency” (Tr. 307).

About the time Seaton confirmed the validity of Hencz's license and registration, Swartz arrived and began asking Sanchez questions (Tr. 41). He asked Sanchez the nature of his relationship with Hencz, where he lived, how long he lived there, and what Hencz did for a living (Tr. 42). The check on Sanchez's identification card came back and the information on the ID card was "on file" (Tr. 273), but there was no driving record associated with it (Tr. 39). So, Seaton detained Hencz and Sanchez longer and asked for a criminal history record and for an inquiry through the El Paso Intelligence Center (Tr. 39).⁸

Seaton and Swartz "compared notes," and Seaton's suspicions were heightened that there was "criminal activity going on" (Tr. 42-43). Seaton testified that the fact they were traveling eastbound on Interstate 70, "which is a known and a documented established drug thoroughfare" added "another piece to the puzzle" (Tr. 44).⁹

⁸ Appellant can find nothing in the record revealing the results of these second computer checks.

⁹ "There is nothing inherently suspect about traveling west to east on Interstate 70. Missouri courts have not taken judicial notice of any notorious drug activity on that route, as they have on Interstate 44." **State v. Slavin**, 944 S.W.2d 314, 320 (Mo. App. W.D. 1997).

Seaton was still suspicious of what was going on with the car and the occupants, but could not pinpoint exactly what was going on, so he returned Hencz's license and registration "and told her that she was free to go, have a safe trip, and things of that nature" (Tr. 47, 273-4). As she walked back to her car and reached the rear left quarter panel, Seaton got out of his patrol car and asked if he could ask her a couple of questions (Tr. 274). He testified that he did not "stop" Hencz, but merely called her name, and she stopped (Tr. 310-11). Hencz came back to him and he moved them away from the line of traffic (Tr. 274). Seaton testified that Hencz was free to leave, but her car was not (Tr. 311-12). He believed he had reasonable grounds to hold her vehicle (Tr. 312).

Hencz testified that she did not feel free to leave and did not think that she could have ignored the officer and kept on walking (Tr. 221). The officer did not say why he was stopping her, but asked her questions and asked if he could search her car (Tr. 221). Seaton testified that after he asked her some questions, he noticed that she became visibly shaken again (Tr. 275). Hencz testified that the fact that the officer stopped her a second time after telling her she could leave made her very nervous (Tr. 233).

The officer still was unable to pinpoint what was going on and was trying to confirm suspicions that he had (Tr. 275). He asked Hencz for

consent to search her car and she refused (Tr. 276). When she refused her consent for a search, the officer took Hencz over to his car and asked her if she could, “just wait right here for one second” (Tr. 92, 222). Then he took Sanchez out of Hencz’s car and put him in a patrol car (Tr. 92, 222). Hencz testified that she was not free to leave (Tr. 222). Seaton asked Swartz to have his dog sniff Hencz’s car (Tr. 92, 222), and admitted that this all happened after he had already completed the traffic stop (Tr. 313).

Argument

A traffic stop for the violation of state law is a justifiable seizure under the Fourth Amendment. ***State v. Bradshaw***, 99 S.W.3d 73, 77 (Mo. App. E.D. 2003). During the stop, an officer may request a driver’s license and vehicle registration, run a computer check, and issue a citation. ***Id.*** As long as the officer is running the records check, he may continue to conduct a reasonable investigation of the traffic violation by conversing with the driver. ***State v. Watkins***, 73 S.W. 3d 881 (Mo. App. E.D. 2002). But he may not inquire about unrelated issues unless there are specific facts causing him to believe another crime is being committed. ***State v. Slavin***, 944 S.W.2d 314, 318 (Mo. App. W.D. 1999).

An officer must point to specific, articulable facts which together create reasonable suspicion that the person seized is engaged in criminal

activity. **Terry v. Ohio**, 88 S.Ct. 1868, 1880 (1968); **State v. Riddle**, 843 S.W.2d 385, 386-7 (Mo. App. E.D. 1992). The officer's suspicions of criminal activity must be objectively reasonable. **State v. Slavin**, 944 S.W.2d 314, 318 (Mo. App. W.D. 1997). Before even speaking to Hencz or her passenger, Seaton was suspicious that something illegal was taking place. He testified that he thought Hencz might be the victim of a crime or that she and Sanchez might have committed a crime because her hands were trembling when she handed him her license (Tr. 68). But Seaton also admitted that it would not be unusual for a driver to be nervous after seeing an officer speed up to catch her and then pull her over (Tr. 67). Also, before even beginning a records check of Hencz's license, Seaton questioned Sanchez and called for backup from an officer with a drug dog (Tr. 29, 71).

No Reasonable Suspicion During the Stop

Seaton testified he was suspicious, but could not pinpoint exactly what was going on (Tr. 273).¹⁰ Suspicious alone are not enough to further detain a driver after a traffic stop is completed. **U.S. v. Garcia**, 23 F.3d 1331, 1334 (8th Cir. 1994), **State v. Barks**, 128 S.W.3d 513, 517 (Mo. banc

¹⁰ Seaton was very careful not to refer to his suspicions as "hunches" (Tr. 310).

2004). In order to detain the driver further, an officer must be able to point to specific, articulable facts that create a reasonable suspicion the person is engaged in *criminal activity*. **Riddle**, 843 S.W.2d at 386-7.

Seaton testified that the following factors heightened his suspicions that “there was criminal activity going on” (Tr. 43):

1. Hencz’s nervousness was “out of the ordinary” (Tr. 28). She sat very rigidly in his car and looked straight ahead (Tr. 36). He could see her pulse beating in her lower abdomen (Tr. 36);

2. Hencz said she was going to visit her aunt Kathy, but did not know her aunt’s telephone number (Tr. 36);

3. Hencz did not know Sanchez’s last name (Tr. 35). She said that she and Sanchez were just friends, while Sanchez called Hencz his girlfriend (Tr. 42);

4. Hencz said that Sanchez was staying in a hotel, and thought he had been there for just a week or two, but Sanchez told Seaton that he was staying with Hencz (Tr. 42);

5. Hencz told Seaton she was a housekeeper, but Sanchez said she was a bartender (Tr. 42).

6. Hencz told Seaton that in Kansas City, they got to the hotel late and went straight to bed, but Sanchez said they went to Oceans of Fun (Tr. 42-43).

7. Seaton testified that Sanchez's identification was suspicious because it did not look like an official state ID (Tr. 306).

The question is whether these factors would cause an objective officer to have reasonable suspicion that another crime was being committed. Unless there is reasonable suspicion of another crime, Seaton's continued detention of Hencz beyond the purpose of the stop is unreasonable. **Riddle**, 843 S.W.2d at 387.

Seaton said he was suspicious because Hencz's nervousness was out of the ordinary in that she sat rigidly in his car, stared straight ahead, and he could see her pulse beating in her stomach. But Seaton admitted that getting pulled over would make a person nervous, especially when the officer had sped up to catch her (Tr. 67). And although the officer testified about Hencz's nervousness, there was no evidence from either officer that Sanchez was nervous at all. In **State v. Joyce**, 885 S.W.2d 751 (Mo. App. S.D. 1994), the nervous driver was described as out of breath, his hands were shaking, and he was talking loudly and rapidly. In **State v. Watkins**, 73 S.W.3d 881 (Mo. App. E.D. 2002), the driver had a very dry mouth,

stammered over his words, would not look the officer in the eye, was not very coherent, and it was obvious to the officer that there was something on the driver's mind. In this case, there was nothing outstanding about Seaton's description of Hencz's nervousness. Hencz also told Seaton that it had been a while since she had been pulled over, so it was not unreasonable for her to be nervous (Ex. 5, 11:31).

Seaton stated that Hencz not knowing her aunt's phone number contributed to his suspicions (Tr. 36). Hencz told Seaton that she had the number in her car, but Seaton did not ask Hencz or Sanchez to provide him with the number. It is not unreasonable to believe that Hencz, who was from Montana, would not have her aunt's phone number memorized, or that she would call her for further directions once she got closer to St. Louis (Tr. 74-75).¹¹ Sanchez also told the officer that they were going to St. Louis (Tr. 32). When asked exactly where in St. Louis they were going, Sanchez responded, "I don't know. Ask her." (Tr. 32-33). Considering that they were visiting Hencz's aunt, the response was not suspicious, and it was not inconsistent with Hencz's response.

¹¹ Hencz told Seaton that this was her first time visiting her aunt in St. Louis (Ex. 5, 11:57).

Seaton thought it was suspicious that Hencz did not know Sanchez's last name, and that she called Sanchez a "friend" while Sanchez called her a "girlfriend" (Tr. 35, 42). But Seaton admitted at the suppression hearing that the terms "friend" and "girlfriend" were not inconsistent (Tr. 30-1). He was suspicious that Hencz said Sanchez lived in a hotel when Sanchez said he lived with Hencz (Tr.42). But the evidence at trial conflicted with Seaton's recollection of Hencz's response. In State's Exhibit 5, a videotape of the arrest, Hencz can be heard telling Seaton that Sanchez sometimes stays with her (Ex. 5, 11:55:19).

Seaton testified that Hencz and Sanchez both told him that they stayed in Kansas City the previous night, but Hencz said they went right to bed while Sanchez said they went to Oceans of Fun (Tr. 42-3). Seaton did not questions Hencz about this any further, so there is no evidence that Hencz *denied* going to Oceans of Fun, she just did not mention it in her initial response. Seaton's testimony that Hencz was nervous could reasonably explain her not mentioning such an insignificant detail. But Hencz and Sanchez were consistent in the overall description of their trip: they spent the night in Kansas City, and were heading to St. Louis to visit someone.

Finally, Seaton was suspicious of Sanchez's identification because it did not look like a valid ID card (Tr. 306). He admitted, however, that he did not thoroughly examine the back of the card, which said, "This identification is not issued by any government agency" (Tr. 307-8). But even more compelling was the fact that Seaton ran three computer checks on Sanchez's ID: the first computer check that came back as having no driving record associated with the identification card (Tr. 39), and then a criminal history record check and an inquiry through the El Paso Intelligence Center (Tr. 39). Presumably, if those record checks had resulted in any evidence of criminal activity, it would have been presented as evidence in this case, but there is no such evidence in the record.

There were no suspicious items or smells in the car. Most importantly, Seaton was not able to articulate how the small discrepancies in some of Hencz's and Sanchez's responses were indicative of criminal activity. He testified that he was still suspicious when he let Hencz go, but he could not pinpoint what was going on (Tr. 273). Without making a connection of how the facts were objectively and reasonably suspicious of *criminal* activity, Seaton's continued detention of Hencz and Sanchez was illegal. **Barks**, 128 S.W.3d at 517.

No Reasonable Suspicion After the Stop

Even if Seaton did have reasonable suspicions while investigating the traffic violation, those suspicions were exhausted and dispelled during the stop. Seaton testified that eventually, there was no other legal reason for him to detain Hencz, so he told her she was free to go and ended the traffic stop (Tr. 273, 313). Once he released her after being unable to confirm his suspicions during the stop, Seaton could no longer reasonably justify the detention of Hencz and Sanchez without new facts creating reasonable suspicion. ***State v. Granado***, 148 S.W.3d 309 (Mo. banc 2004); ***Barks***, 128 S.W.3d at 517 (once the original purpose of a traffic stop is completed, an officer may not further detain the driver without articulable facts supporting a reasonable suspicion of criminal activity).

In ***Granado***, the driver, Jose Granado, was stopped for a traffic violation and was extremely nervous while seated in the patrol car. ***Id.*** at 310. While waiting for a computer check of his license, Granado told the officer that he and his passenger were traveling to Memphis, Michigan to work on a house. ***Id.*** Granado rented the truck he was driving and would drive it back to Texas alone, while his passenger planned to take a bus back to Texas. ***Id.*** The officer approached the passenger in the truck to get the registration information. ***Id.*** The passenger told him they were

driving to Capac, Michigan, and that they would be returning to Texas later in the week. **Id.**

The officer finished his computer check on both men, wrote Granado a warning for crossing the center line, and told Granado he was “free to go”. **Id.** Granado got out of the patrol car and started to walk back to his truck, but just before he reached it, the officer stepped out of his car, pointed out the discrepancies in the two men’s statements, and asked for permission to search the truck. **Id.** Granado refused and the officer called a K-9 unit. **Id.** When the dog arrived, it indicated there were drugs in the bed of the truck. **Id.** at 311. It was searched and approximately 36 pounds of marijuana were found. **Id.**

On appeal, this Court reversed Granado’s conviction. **Id.** at 313. This Court found that the purpose of the stop, to investigate a traffic violation, was satisfied as soon as Granado was told he “was free to go” and stepped out of the patrol car. **Id.** at 311. The officer himself acknowledged that the purpose of his original stop was accomplished at that time. **Id.** at 312. And since Granado did nothing to create reasonable suspicion that he was committing a crime when he walked back to his truck, the officer was required to allow Granado to proceed without further questioning. **Id.** at 311-12. This Court indicated that it *might* have

approved the officer's search of Granado's truck if it had been done prior to the officer giving Granado a written warning and telling him he was free to go.¹² *Id.* at 312. But since the officer had already completed the purpose of the stop when the search was done, the additional detention of Granado and his passenger was unlawful. *Id.* at 312-13.

Here, as in ***Granado***, the officer also admitted that the traffic stop was over when he stopped Hencz a second time and asked to search her car (Tr. 313). He admitted that nothing happened from the time he told Hencz she was free to go and the time he got out of his car to detain her a second time (Tr. 84). From the first moments of the stop, Seaton thought "something wasn't exactly right" and there was "something going on more than what meets the eye" (Tr. 33). He was also "immediately suspicious" of Sanchez's identification (Tr. 30). But after detaining Hencz and Sanchez for forty minutes to investigate their identification (Tr. 302), Hencz's license and registration came back as valid and Sanchez's ID was found to be "on file" (Tr. 41). Seaton had no other choice but to let them go.

¹² This Court may have had reservations about whether the facts would have supported a reasonable suspicion that Granado was engaged in criminal activity. ***Granado***, 148 S.W.3d at 311-12.

Without a new and independent basis for suspicion, Seaton had to end his investigation in accordance with *Terry*.¹³ *State v. Rodriguez*, 904 S.W.2d 531, 536 (Mo. App. S.D. 1995). A routine traffic stop may not last indefinitely. *State v. Woolfolk*, 3 S.W.3d at 828. It may only last for the time necessary for the officer to conduct a reasonable investigation of the traffic violation. *Id.* Once a stop extends beyond the time necessary to effect its initial purpose, it loses its lawful character unless new facts giving rise to reasonable suspicion are found during the period of lawful seizure. *State v. Slavin*, 944 S.W.2d at 318. When Hencz exited Seaton's patrol car, he immediately called her back (Tr. 310). From this point forward, Hencz and her passenger, Sanchez, were illegally detained.¹⁴

Illinois v. Caballes

This Court's decision in *Granado* is consistent with a recent United States Supreme Court ruling dealing with drug dog sniffs during a traffic stop. In *Illinois v. Caballes*, defendant Caballes was stopped by State Trooper Gillette for speeding. 125 S.Ct. 834, 835 (2005). When Gillette

¹³ *Terry v. Ohio*, 88 S.Ct. 1868 (1968).

¹⁴ A passenger may challenge his unlawful detention and seek to suppress evidence as the fruit of his illegal detention. *State v. Martin*, 79 S.W.3d at 917, *United States v. Green*, 275 F.3d 694, 699 (8th Cir. 2001).

radioed the police dispatcher to report the stop, a second trooper, Graham, heard the transmission and immediately went to the scene with his drug dog. **Id.** While Gillette had Caballes in the patrol car writing him a warning ticket, Graham walked his dog around Caballes's car, and the dog alerted at the trunk. **Id.** Marijuana was found in the trunk, Caballes was arrested, and the entire incident lasted less than ten minutes. **Id.**

The Court held that while a lawful traffic-related seizure can become unlawful if it is prolonged beyond the time reasonably required to address that traffic offense, that was not the case for Caballes. **Id.** at 837. Since the dog sniff took place while Gillette was still resolving the traffic situation, the sniff was lawful.¹⁵ **Id.** However, the Court acknowledged that if the traffic stop had been unreasonably prolonged in order to conduct the sniff, Caballes would have been unlawfully detained. **Id.**

In **Granado**, this Court reached a consistent result. This Court stated that the sniff of Granado's car might have been lawful if the officer had conducted it before completing the traffic stop. **Granado**, 148 S.W.3d at 312. But since the traffic stop was finished, the officer had no right to further detain Granado without specific, articulable facts developed while

¹⁵ The Court addressed the legality of the dog sniff in light of Caballes's right to privacy, but that discussion is not relevant here.

Granado returned to his truck which would justify detaining him and asking him further questions.¹⁶ **Id.** In the case before this Court, a second trooper arrived with his drug dog ten minutes into the forty-minute stop (Tr. 41). But the dog did not sniff the car until after the original purpose of the stop was resolved (Tr. 313). Seaton's second detention of Hencz and Sanchez for the purpose of conducting the dog sniff was unlawful in view of the principles set forth in **Caballes**, **Granado**, **Barks**, the 4th Amendment to the United States Constitution, and Article I, §15 of the Missouri Constitution.

Hencz Did Not Consent to Further Detention

If an officer does not have reasonable suspicion to further detain a driver at the completion of a traffic stop, he may continue to question the driver only if the encounter is consensual. **State v. Martin**, 79 S.W.3d 912, 916 (Mo. App. E.D. 2002). But an officer may not involuntarily detain a driver under the guise of simply engaging in a voluntary conversation. **State v. Barks**, 128 S.W.3d at 517. An encounter is consensual only if a

¹⁶ Relying on **Granado**, the Eastern District Court of Appeals reached the same conclusion in **State v. Dickerson**, 2005 WL 1349158 (Mo. App. E.D., May 24, 2005) (after traffic stop concluded, there must be new factual predicate for reasonable suspicion to support search).

reasonable person would feel free to disregard the police and go about his business. ***State v. Martin***, 79 S.W.3d at 916.

Hencz was held 30 minutes beyond the computer check of her license and registration (Tr. 301, 302, 304).¹⁷ When she was finally released, she made it only to the rear left quarter panel of her car before Seaton got out of his car and asked to speak with her (Tr. 274). At trial, Seaton insisted he did not detain Hencz and that it was “a consensual encounter” (Tr. 84). But Hencz testified she did not feel like she was free to leave or that she could have ignored the officer (Tr. 221). If Hencz did not consent to the questioning, her and Sanchez’s detention by Seaton was unlawful. ***State v. Slavin***, 944 S.W.2d at 318.

And even a consensual police-citizen encounter may lose its consensual characteristic later if the officer conveys the message that compliance with his requests is required. ***State v. Solt***, 48 S.W.3d 677, 682 (Mo. App. S.D. 2001). When Hencz turned back to Seaton, he “moved us to the right corner, away from the line of traffic” (Tr. 274). He asked her if she knew there was a drug problem in the United States and whether she

¹⁷ The stop occurred at 11:30 (Tr. 301). Hencz’s license and registration were verified at approximately 11:40 (Tr. 304). But the stop lasted approximately 40 minutes total (Tr. 302).

was aware people transport drugs cross-country in automobiles (Tr. 274-5). He asked her consent to search her vehicle, and when she refused consent, he told her to stand by the front passenger window of his patrol car (Tr. 222). He then removed Sanchez from the car and placed him in another patrol car before initiating the dog sniff (Tr. 222). Hencz testified that at that point, she was clearly not free to leave (Tr. 222). Her testimony is relevant to this Court's determination of whether it was a consensual encounter. See **Barks**, 128 S.W.3d at 517. As observed in **U.S. v. Garcia**, *supra*, a second stop is often inherently more intrusive and coercive than the first. 23 F.3d at 1335 n. 2.

The analysis of consensual encounters found in **Granado** is applicable here. In that case, Granado and his passenger were pulled over on a rural highway in the middle of a cold January night. **Granado**, 148 S.W.3d at 312. They were both from Texas, were surrounded by open fields, and were informed that their truck and all of their personal possessions were being detained indefinitely. **Id.** This Court found that a reasonable person in that same situation would not have felt free to leave. **Id.**

Tara Hencz testified that she was from Montana and had lived there her whole life (Tr. 147). There was evidence that it was over 100 degrees

outside (Tr. 275), and that Hencz was pulled over on the shoulder of Interstate 70 at approximately the 70/71 mile marker in Saline County (Tr. 9, 12, 244-245). Hencz testified that after Seaton told her she was free to leave, she got out of his car and walked toward hers (Tr. 220). When he stopped her after verifying her information, it made her “very nervous” and she did not feel free to leave (Tr. 233, 221). Seaton testified that she was free to leave, but her car was not (Tr. 85-86). He agreed that they were in a potentially dangerous situation out on the interstate and that Hencz could have been hit by a car (Tr. 88). He testified, “She could have left had she asked to at the time if she had asked to be taken to a phone, to a car, or something” (Tr. 312). After Hencz refused consent to search, Seaton asked her to stand by his car and she felt that she was clearly not free to leave (Tr. 222).

It is common sense that a motorist who is stopped by a law enforcement officer is going to be very reluctant to leave the scene until it is perfectly clear that she is free to do so. ***Berkemer v. McCarty***, 104 S.Ct. 3138, 3148 n. 25 (1984), ***State v. Taber***, 73 S.W.3d 699, 706 (Mo. App. W.D. 2002). Despite Seaton’s characterization of the situation (Tr. 84), this was not a consensual encounter.

Summary

The evidence found during the search of Hencz's car is tainted because it was found during the illegal detention of Hencz and Sanchez. **Granado**, *supra*; **Wong Sun v. United States**, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). As a passenger, Sanchez is permitted to challenge his unlawful detention and to seek suppression of this evidence as the fruit of his illegal detention. **State v. Martin**, 79 S.W.3d at 917, **United States v. Green**, 275 F.3d 694, 699 (8th Cir. 2001). The trial court erred when it overruled Sanchez's motion to suppress and when it overruled his objections to the evidence when it was presented at trial. Sanchez's convictions should be reversed and his case remanded for a new trial without the illegally-seized evidence. **State v. Kinkead**, 983 S.W.2d 518 (Mo. banc 1998).

CONCLUSION

The trial court should have suppressed the evidence found in Hencz's car because it was the product of an illegal detention and search. Because of the trial court's error, Sanchez's convictions should be reversed and his case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Margaret M. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font, which is no smaller than Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 9,707 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using McAfee VirusScan Enterprise 7.1.0, which was updated in September, 2005. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 16th day of September, 2005, to Shaun Mackelprang, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Margaret M. Johnston

APPENDIX

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