

No. SC90978

*In the
Supreme Court of Missouri*

STATE OF MISSOURI,

Respondent,

v.

JACOB WALDRUP,

Appellant.

**Appeal from Clay County Circuit Court
Seventh Judicial Circuit
The Honorable David Chamberlain, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Jacob Waldrup, Jr. (“Defendant”) was found guilty in Clay County Circuit Court of possession of crack cocaine. He was sentenced as a prior and persistent offender to 12 years of imprisonment.

Defendant's conviction was reversed by the Western District Court of Appeals in *State v. Waldrup*, No. WD70318 (Mo. App. W.D. June 1, 2010).¹ This Court sustained Respondent's application for transfer on August 31, 2010. Therefore, jurisdiction lies in this Court. MO. CONST. art. V, § 10; Supreme Court Rule 83.04.

¹ The Court of Appeals' original opinion was issued on April 27, 2010. The court modified its opinion on its own motion on June 1, 2010.

STATEMENT OF FACTS

Defendant was charged in Clay County Circuit Court with possession of cocaine (§ 195.202, RSMo 2000)² (L.F. 34-35). Prior to trial, Defendant filed a motion to suppress the cocaine and any testimony relating to its recovery (L.F. 21-26). After an evidentiary hearing, the Honorable David P. Chamberlain overruled Defendant's motion to suppress (Tr. 84-85). On September 8-9, 2008, Defendant was tried by a jury before Judge Chamberlain (L.F. 4-5).

Defendant's sole point on appeal is that the trial court erred in overruling his motion to suppress the cocaine and cocaine-related testimony and in admitting the evidence at trial. App. Br. at 21-31. When reviewing a trial court's ruling on a motion to suppress, this Court considers the evidence presented at the pre-trial hearing, as well as any additional evidence presented at trial. *State v. Edwards*, 116 S.W.3d 511, 530 (Mo. banc 2003). The evidence and reasonable inferences therefrom must be viewed in the light most favorable to the trial court's ruling. *State v. Deck*, 303 S.W.3d 527, 544 (Mo. banc 2010).

Viewed in the light most favorable to the trial court's ruling, the evidence presented at the evidentiary hearing and at trial showed:

On November 9, 2006, Missouri Highway Patrol Troopers Seth Isringhausen and Greg Primm were conducting a driver's license checkpoint at the Parvin Road exit ramp off Interstate 35 in Clay County (Tr. 12, 55-56, 212, 253). The area surrounding the Parvin Road exit had been identified as having particularly high rates of traffic accidents and

² Further statutory references are to RSMo 2000, unless otherwise noted.

unlicensed drivers (Tr. 28, 213; St. Ex. 2). Acting under established policy, the troopers (and the other officers working the checkpoint) stopped every vehicle exiting the interstate to ensure that the driver had a valid license (Tr. 35, 213, 253-55; St. Ex. 2).

At some point between 3:30 and 4:00 p.m., a blue Chevy Camaro merged onto the Parvin Road exit ramp (Tr. 13, 56-57, 214-15, 256). As the Camaro approached the checkpoint, Trooper Primm noticed that Defendant, the front-seat passenger, was staring at the officers with his mouth agape and eyes wide open, as if he was worried about the presence of law enforcement (Tr. 57, 256-57). Troopers Primm and Isringhausen saw Defendant lean forward toward the floorboard of the car, apparently reaching for something or stuffing something down around his feet (Tr. 19, 61, 218, 262). The troopers were concerned that Defendant might have been reaching for, or concealing, a weapon or other contraband that “he may not want a law enforcement officer to see” (Tr. 13-14, 37, 57, 215, 257-58). The troopers conferred briefly and decided that Primm would check Defendant while Isringhausen addressed the driver (Tr. 14, 58, 215-16, 258).

When the vehicle stopped, Trooper Isringhausen approached the driver and asked to see his license (Tr. 15, 216-17). When Isringhausen checked the driver’s information, he discovered that his license was suspended (Tr. 16, 217). Isringhausen issued the driver a citation (Tr. 16, 217).

Meanwhile, Trooper Primm had Defendant step out of the car (Tr. 17, 58-59, 217, 259). The trooper frisked Defendant for weapons; none were found (Tr. 17, 58-59, 259-61). Defendant carried no identification, but he told Primm his name, date of birth, and social security number (Tr. 18, 59, 261). Primm passed the information to Isringhausen, who ran it

through dispatch (Tr. 18, 59-60, 217-18, 236, 261). The dispatcher informed the troopers that Defendant had several outstanding arrest warrants (Tr. 18, 61, 218, 262). The troopers placed Defendant under arrest (Tr. 19, 61, 218, 262).

Following Defendant's arrest, Trooper Isringhausen searched Defendant (Tr. 19, 219, 263). He found \$365 in cash tucked into Defendant's right sock (Tr. 20, 220, 264). And in Defendant's right shoe, concealed between the cushion and sole, Isringhausen discovered a plastic baggie containing a rock of crack cocaine (Tr. 20, 68-69, 220-21, 264).³ Isringhausen placed Defendant in his patrol car and took him to the Clay County jail (Tr. 21, 62, 227, 266). The entire incident, from the time the troopers first saw the Camaro to the time Defendant was taken to jail, lasted between ten and fifteen minutes (Tr. 272).

When they arrived at the jail, Trooper Isringhausen booked Defendant and read him his rights (Tr. 22-23, 227-28). Isringhausen asked Defendant what had been in the shoe (Tr. 25, 228-29). Defendant said that he thought it was cocaine (Tr. 25, 229). Defendant admitted that he had been using cocaine earlier that day (Tr. 25-26, 229). He said he also had PCP and insulin in his system (Tr. 25). As Defendant said to the trooper, he had been using drugs "all morning long, getting high . . . time flies when you're high" (Tr. 229).

The only evidence presented by the defense at trial was Defendant's own testimony (Tr. 312-32). Defendant admitted that he had been stopped and searched by police at the checkpoint on November 9 (Tr. 313-14). He testified that when the car approached the

³ A lab technician testified at trial that the crack rock recovered from Defendant's shoe contained 1.45 grams of cocaine base (Tr. 286).

checkpoint, he had just woken up, and scrambled to put on his shoes (Tr. 316-17). He claimed that he did not know where the “white rock” came from (Tr. 322). Defendant conceded that he had prior convictions for burglary, sale of cocaine, and possession of cocaine, marijuana, and PCP, but denied that he used cocaine (Tr. 322-24, 328). He told the jury, “I sold cocaine for a living. I ingest PCP for recreational drug use” (Tr. 328).

After hearing all the evidence, the jury found Defendant guilty of possession of cocaine (Tr. 369). Defendant was sentenced as a prior and persistent offender to a 12-year term of imprisonment (Tr. 383).

ARGUMENT

The trial court did not clearly err in overruling Defendant's motion to suppress the cocaine and cocaine-related testimony or in admitting the evidence at trial.

Defendant argues that the trial court clearly erred in overruling his motion to suppress and his objections at trial to the admission of the cocaine found in Defendant's shoe and to testimony from the State's witnesses relating to the cocaine. App. Sub. Br. at 21-37. He contends that his detention was unreasonable because it was unrelated to the purported purpose of the stop—to check driver's licenses. App. Sub. Br. at 23-29. Defendant claims that the troopers had no valid reason to check his identifying information, and thus his subsequent arrest was unlawful and the evidence discovered during the incident search was inadmissible. App. Sub. Br. at 30-37.

Defendant's argument fails for at least two independent reasons. First, he misunderstands the reason for his brief, roadside detention. The troopers frisked Defendant for weapons and checked his information not as part of the driver's-license checkpoint, but because Defendant's behavior as he approached the checkpoint caused the troopers to reasonably suspect that Defendant might be armed or involved in other criminal activity. In light of Defendant's suspicious behavior, the investigatory stop that followed, including Defendant's brief detention while the troopers checked his identification through their dispatcher, was reasonable. After the troopers discovered that Defendant was wanted on outstanding warrants, he was lawfully arrested. The cocaine was found on Defendant during a search incident to that arrest. Because no constitutional violation occurred, the trial court had no basis to exclude the evidence.

Second, assuming *arguendo* that the troopers acted unreasonably in briefly detaining Defendant to investigate their suspicions, the seizure of the cocaine in Defendant's shoe was nevertheless admissible because the discovery of the drugs was attenuated from the initial detention by the valid warrants upon which Defendant was arrested. Under these circumstances, the exclusionary rule did not bar the admission of the evidence seized incident to Defendant's arrest. Defendant's point should be denied.

A. Standard of Review

"A trial court's ruling on a motion to suppress will be reversed on appeal only if it is clearly erroneous." *State v. Sund*, 215 S.W.3d 719, 723 (Mo. banc 2007). This Court must defer to the trial court's factual findings and credibility determinations and consider all evidence and reasonable inferences in the light most favorable to the trial court's ruling. *Id.* If the trial court's ruling is plausible in light of the entire record, this Court may not reverse even if it is convinced that, had it been sitting as trier of fact, it would have weighed the evidence differently. *State v. Milliorn*, 794 S.W.2d 181, 184 (Mo. banc 1990). "Whether conduct violates the Fourth Amendment is an issue of law that this Court reviews *de novo*." *Sund*, 215 S.W.3d at 723.

B. Analysis

1. The troopers did not violate the Fourth Amendment in briefly detaining Defendant to investigate their reasonable suspicions that Defendant was armed or otherwise involved in criminal activity.

The Fourth Amendment to the United States Constitution protects persons from unreasonable searches and seizures. *State v. Oliver*, 293 S.W.3d 437, 442 (Mo. banc 2009);

U.S. CONST. amend. IV.⁴ “As a general rule, warrantless seizures are unreasonable and, thus, unconstitutional.” *State v. Pike*, 162 S.W.3d 464, 472 (Mo. banc 2005). But where law-enforcement officers have “reasonable suspicion” based on “specific, articulable facts” that illegal activity has occurred or is occurring, the officers may conduct a brief investigative stop without running afoul of the Fourth Amendment. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

“The existence of reasonable suspicion is determined objectively.” *Id.* “The ‘individualized suspicion’ that will justify the minimally intrusive ‘*Terry*’ stop is present when ‘a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.’” *State v. Mack*, 66 S.W.3d 706, 709 (Mo. banc 2002). A reviewing court must consider the totality of the circumstances, taking into consideration the collective information possessed by all officers connected to the stop. *State v. Goff*, 129 S.W.3d 857, 863 (Mo. banc 2004).

a. *The brief investigatory stop of Defendant was supported by reasonable suspicion.*

In this case, the vehicle in which Defendant was riding was stopped as part of a routine driver’s-license checkpoint (Tr. 14, 58, 216, 258). Defendant conceded at trial that the stop itself was lawful (Tr. 72). He argues, however, that the troopers acted beyond the

⁴ Article I, section 15 of the Missouri Constitution provides the same guarantee against unreasonable searches and seizures as the United States Constitution and is interpreted coextensively. *Oliver*, 293 S.W.3d at 442; *see* MO. CONST. art. I, § 15.

scope of the checkpoint stop when they frisked him for weapons and checked his identifying information. App. Sub. Br. at 23-32.

But, as Defendant acknowledges, law enforcement officers may investigate “beyond the scope of the stop” if they have an “objectively reasonable suspicion” that the individual being investigated is involved in criminal activity. App. Sub. Br. at 27 (citing *State v. Maginnis*, 150 S.W.3d 117, 120-21 (Mo. App. W.D. 2004)); *see also State v. Woods*, 284 S.W.3d 630, 635 (Mo. App. W.D. 2009). Here, Defendant’s behavior as his vehicle approached the checkpoint was indicative of criminal activity or danger to the troopers, justifying the brief follow-up investigation.

First, as Defendant neared the checkpoint, Troopers Isringhausen and Primm saw Defendant lean forward, either “reaching for something or stuffing something down around his feet” (Tr. 13, 57, 215, 257). Both troopers were concerned that Defendant might have been reaching for a weapon or another item that he wanted to keep hidden from law enforcement (Tr. 13-14, 57, 215, 257-58). Defendant’s furtive movements, suggesting an effort to conceal a weapon or other contraband, justified a brief detention to allow the troopers to investigate. *See State v. Deck*, 994 S.W.2d 527, 535-36 (Mo. banc 1999) (police had reasonable suspicion to support *Terry* stop where defendant reached down toward passenger side of his vehicle when officer approached); *State v. Lanear*, 805 S.W.2d 713, 717 (Mo. App. W.D. 1991) (officer had reasonable suspicion for *Terry* stop where defendants sitting in vehicle “made furtive movements which led the officer to believe that they were hiding something or going down to get something”); *State v. Hunter*, 783 S.W.2d 493, 495 (Mo. App. W.D. 1990) (officer had reasonable suspicion to justify investigatory

stop where passenger ducked out of sight in an apparent effort to hide something under his seat when officer turned on his “take-down” lights).

Defendant’s act in reaching down toward his feet was particularly suspicious given the circumstances. The troopers testified that Defendant’s behavior was unusual—typically people approaching a law-enforcement checkpoint remain sitting up and belted in (Tr. 13, 57, 215, 257). “What might be considered ‘unremarkable’ behavior in one particular location and context may be deemed ‘quite unusual’ in another.” *State v. Hawkins*, 137 S.W.3d 549, 559 (Mo. App. W.D. 2004) (citing *United States v. Arvizu*, 534 U.S. 266, 276 (2002)). The officers were entitled to rely on their experience in concluding that Defendant’s behavior was unusual for individuals approaching a checkpoint and in deciding to conduct a further investigation.

The officers could reasonably have believed that Defendant panicked when he saw the checkpoint ahead and concealed contraband near his feet to avoid being caught with it. It is well-settled in Missouri that an individual’s attempt to avoid a checkpoint altogether supports a reasonable suspicion that he is involved in criminal activity and will justify an investigatory stop. *See Mack*, 66 S.W.3d at 709 (officers had reasonable suspicion to conduct investigatory stop where vehicle suddenly exited the highway in an effort to avoid a “ruse” checkpoint ahead); *Woods*, 284 S.W.3d at 736 (driver’s “evasive action” in anticipation of upcoming checkpoint supported reasonable suspicion of criminal activity). A passenger’s sudden movement toward the floorboard of a vehicle approaching a checkpoint is no less suspicious. An officer observing such an act may reasonably suspect that the

passenger possesses something that he does not want law enforcement to find. A brief investigation in such circumstances is not unreasonable.

Finally, Defendant's apparent nervousness in approaching the checkpoint further supported the troopers' reasonable suspicion that he was involved in criminal activity. While "nervousness alone cannot provide reasonable suspicion" for an individual's detention, it may be considered as one factor in the totality of the circumstances. *State v. Bizovi*, 129 S.W.3d 429, 432 (Mo. App. E.D. 2004). Here, Trooper Primm observed that when Defendant neared the checkpoint, his eyes widened and his mouth hung open, apparently concerned at the presence of law enforcement (Tr. 57, 256-57). This "concerned" reaction immediately preceded Defendant's move toward the floor (Tr. 57, 256-57). Any reasonable officer would have suspected, seeing this behavior, that Defendant was trying to hide something. Under these circumstances, the troopers did not act unreasonably in asking Defendant to step out of the car for a brief investigation.

Defendant relies on *Maginnis*, in which the Western District held that an officer's roadside investigation of a driver and passenger exceeded the scope of the traffic stop. 150 S.W.3d at 122. In *Maginnis*, a state trooper stopped the defendant's car for minor traffic violations. *Id.* at 118. When the trooper approached the car, he took the defendant's driver's license and then had the defendant accompany the trooper to his patrol car. *Id.* The trooper asked the defendant a series of questions about his destination, his employer, and his passenger, none of which related to the speeding or lane violations the trooper had witnessed. *Id.* After the trooper was finished questioning the defendant, he went back to the defendant's car to question the passenger, who provided inconsistent information as to their intended

destination. *Id.* The trooper went back to the defendant and questioned him about his registration, insurance, and his luggage. *Id.* at 119. The trooper told the defendant that the conflicting information made him uneasy. *Id.* According to the trooper, the defendant was “overly apologetic” and became anxious when confronted with the inconsistent stories. *Id.* The defendant refused to consent to a search of his vehicle, so the trooper took his drug dog around to sniff the car. *Id.* The dog “indicated” on the trunk. *Id.* A subsequent search of the car revealed substantial quantities of marijuana and methamphetamine. *Id.* at 120.

On appeal, the defendant argued that “the officer’s questioning went far beyond the purpose of the traffic stop” and that “the officer did not have objective, reasonable suspicion of further criminal activity to justify detaining” the defendant and conducting a “drug-dog sniff” of the vehicle. *Id.* The Western District found that the trooper’s interrogation of the two travelers “was not at all about traffic violations, but rather was about the officer’s desire to obtain the opportunity to flush out any possible drug activity.” *Id.* at 121. The Court believed that the trooper essentially engaged in a “fishing expedition” in which he intended to “question the travelers until articulable suspicion developed.” *Id.* at 122. The court emphasized that “[a]t the time the officer launched the unrelated questioning, it was still a routine traffic stop with no articulable ground for suspicion.” *Id.* Under these circumstances, the court held that the defendant’s detention violated the Fourth Amendment. *Id.*

Defendant’s case is squarely distinguishable from *Maginnis*. In this case, the troopers had a reasonable, articulable suspicion *before* the traffic stop occurred that Defendant was involved in criminal activity. While the license checkpoint justified the vehicle stop, the

troopers' brief investigation of Defendant was motivated by their observations of Defendant's behavior as he approached the checkpoint. Thus, the troopers in Defendant's case did not "fish" for an articulable suspicion by asking a series of questions unrelated to the stop. Instead, they already had a reasonable suspicion and investigated accordingly.

The scope of their investigation was also reasonably limited. Unlike the trooper in *Maginnis*, whose numerous questions bore no relation to any observations he made prior to the stop, the troopers in this case limited their investigation of defendant to a pat-down for weapons and an identification check. This limited investigation was appropriate given the circumstances.

Defendant also complains that he and his driver were treated "selectively" in that the troopers ran checks on their identifying information, whereas generally the troopers simply waved drivers through after looking at their licenses. App. Sub. Br. at 28-30. But this argument ignores that the troopers' justification for the more-thorough investigation was not the license check, but was instead Defendant's suspicious behavior as the car approached the checkpoint. *See Woods*, 284 S.W.3d at 638 (officers' investigation need not be limited to traffic violations where they had reasonable suspicion at the outset that the defendant was involved in criminal activity beyond the traffic offenses). Under the circumstances, the troopers were justified in detaining Defendant for just a few minutes to check for weapons and run his identification.

b. The computer check of Defendant's identifying information was a reasonable part of the valid investigatory stop.

Once the troopers determined that a brief investigatory stop was necessary in light of Defendant's behavior, they acted reasonably in requesting his identifying information and running it through their computer. Generally, an officer conducting a *Terry* stop "may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *see also Hiibel v. Sixth Judicial District Court of Humboldt County*, 542 U.S. 177, 186 (2004) ("[I]t is well-established that an officer may ask a suspect to identify himself in the course of a *Terry* stop.")

The permissibility of a law-enforcement practice in the context of a search or seizure "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Under this standard, once an investigating officer obtains identifying information from a suspect, it is not unreasonable, and thus does not violate the Fourth Amendment, for the officer to hold the suspect for a short period of time to check the identification against computer records or with the dispatcher.

It is minimally intrusive for investigators to briefly hold a suspect while they check his identification. The identification check does not involve a search of the suspect or his vehicle—all that is required is that the suspect wait while his information is processed. The temporary interference with an individual's "free passage" on the roadway, unaccompanied by a search, is only a minor intrusion. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 557-61 (1976) (holding that border-patrol checkpoints at which motorists were stopped and questioned as to residency were minimally intrusive).

Moreover, the amount of time necessary to verify identification is not so long that it creates an unreasonable imposition. The troopers testified in this case that the time required to receive a response to an identification check varies from “immediately to a few minutes,” depending on whether the radio is available and on how many outstanding warrants turn up (Tr. 61-62, 246-47). Defendant’s identification check took a bit longer than usual because he had active warrants from several jurisdictions, all of which had to be verified (Tr. 246-47). Even so, the check took less than ten minutes (Tr. 61). Missouri courts have routinely held that investigative delays of ten minutes or much longer are not unreasonable where there is no evidence that the investigators intentionally prolonged the investigation. *See e.g. Woods*, 284 S.W.3d at 637-38 (27-minute detention during which investigator ran computer checks and waited for drug-sniffing dog was not unreasonable).

Weighed against the minimal intrusion of the identification check is the strong governmental interest in identifying individuals who are suspected of criminal activity. In *Hiibel*, the United States Supreme Court stressed the importance of checking identification in conducting an investigatory stop:

Obtaining a suspect’s name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere.

542 U.S. at 186. “To preclude police from ascertaining the identity of their suspects would often prevent officers from fully investigating criminal behavior.” *United States v. Christian*, 356 F.3d 1103, 1106-07 (9th Cir. 2004).

Here, while Trooper Isringhausen checked the driver’s information and issued him a citation for driving with a suspended license, Trooper Primm frisked Defendant for weapons and obtained his name, date of birth, and social security number (Tr. 17-18, 58-59, 217, 259, 261). As soon as Isringhausen finished with the driver, he checked Defendant’s information via his radio (Tr. 18, 59-60, 217-18, 236, 261). When the troopers discovered that Defendant was wanted on outstanding warrants, they placed him under arrest (Tr. 19, 61, 218, 262). The less-than-10-minute detention was minimally intrusive and allowed the officers to safely and expeditiously verify Defendant’s identity and determine that he was wanted for other offenses.

Defendant argues that after Trooper Primm frisked Defendant for weapons and found nothing, the troopers no longer had any basis to further detain him. App. Sub. Br. at 30-32. Thus, Defendant contends, the troopers violated his constitutional rights by holding him a few minutes longer while the dispatcher checked his identification. App. Br. at 32, 35-37.

But Defendant’s argument overlooks both the scope of a *Terry* frisk and the facts underlying his detention in this case. Under certain circumstances, where an investigating “officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,’ he may conduct a limited protective search for concealed weapons.” *Adams v. Williams*, 407 U.S. 143, 146 (1972) (quoting *Terry*, 392 U.S. at 24). The protective frisk is extremely

limited in scope; “[i]f the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.” *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993). “The purpose of this limited search is not to discover evidence of crime, but to allow the officer to *pursue his investigation* without fear of violence.” *Id.* (emphasis added).

In this case, the troopers were justified in believing that Defendant was armed and dangerous when he arrived at the checkpoint—both troopers testified that they saw Defendant reach toward his feet as if concealing or reaching for a weapon (Tr. 13-14, 37, 57, 215, 257-58). Therefore, the frisk was lawfully conducted to protect the safety of the troopers and those around them.

But the troopers were not required to release Defendant immediately upon completing the frisk. Based on Defendant’s furtive movements and panicked expression as he approached the checkpoint, the troopers were suspicious that Defendant might have hidden a weapon or other contraband on his person or in the vehicle (Tr. 13-14, 37, 57, 215, 257-58). The protective frisk partially alleviated the troopers’ concerns; it revealed that Defendant was not carrying a concealed weapon. But further inquiry was warranted to determine whether Defendant had other contraband on his person or had a weapon or other illegal items in the car. The protective frisk enabled the troopers to conduct their investigation in safety, but it did not *end* the investigation.

It cannot be that law-enforcement officers, having stopped an individual based upon reasonable suspicion that he is involved in criminal activity, would be constitutionally forbidden from finding out who that individual is. The brief period that it takes to obtain a

suspect's identifying information and check that information through the computer or the dispatcher imposes a negligible burden on the suspect and is fundamental to any criminal investigation. The troopers did not act unreasonably in asking for Defendant's information and in holding Defendant for a few minutes while they checked his identification through the dispatcher.

c. The cocaine in Defendant's shoe was discovered and seized pursuant to a search incident to a lawful arrest.

Defendant was lawfully arrested upon the troopers' discovery that he had outstanding warrants (Tr. 19, 61, 218, 262); *see State v. Craig*, 759 S.W.2d 377, 380 (Mo. App. S.D. 1988) (an officer may lawfully arrest a suspect upon receiving radio confirmation that the suspect is wanted on an outstanding warrant). "A valid custodial arrest of a suspect authorizes, without more, a search incident to arrest." *State v. Blair*, 691 S.W.2d 259, 261 (Mo. banc 1985). Here, the troopers searched Defendant incident to his arrest and discovered a rock of crack cocaine in his shoe (Tr. 20, 68-69, 220-21, 264). The cocaine was thus seized pursuant to a valid search incident to a lawful arrest. The trial court did not clearly err in overruling Defendant's motion to suppress the cocaine and related testimony.

2. Even if Defendant was initially detained unlawfully, the cocaine seized following Defendant's arrest was admissible because the causal connection between the unlawful detention and the discovery of the drugs was attenuated by the valid warrants upon which Defendant was ultimately arrested.

This Court need not decide whether Defendant was lawfully detained by the troopers during the traffic stop because, even if Defendant's initial detention was unlawful, the

troopers' discovery of outstanding warrants for Defendant's arrest was an intervening circumstance sufficient to attenuate the causal connection between the initial stop and the seizure of the drugs. Because the drugs were not the "fruit" of any illegal seizure, the exclusionary rule did not apply.

Generally, evidence obtained as a direct result of an unlawful search or seizure is considered "fruit of the poisonous tree" and is inadmissible at trial. *See e.g. Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963). But the application of the exclusionary rule is not automatic. *See Herring v. United States*, 129 S.Ct. 695, 699-700, 704 (2009) ("[E]xclusion has always been our last resort, not our first impulse."). Instead, "[w]hether the exclusionary sanction is appropriately imposed in a particular case . . . is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Hudson v. Michigan*, 547 U.S. 586, 591-92 (2006) (citations omitted). Evidence will not be considered "fruit of the poisonous tree" simply because it would not have come to light *but for* the illegal actions of the police; the proper question is "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* (quoting *Wong Sun*, 371 U.S. at 487-88).

In cases where challenged evidence has been acquired after an initial Fourth Amendment violation, "the question before the court is whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the

primary illegality.” *United States v. Crews*, 445 U.S. 463, 471 (1980). To evaluate whether the seizure of evidence is sufficiently “attenuated” to dissipate the taint of an initial Fourth Amendment violation, Missouri courts apply the three-factor test set forth by the United States Supreme Court in *Brown v. Illinois*, 422 U.S. 590 (1975). *State v. Miller*, 894 S.W.2d 649, 655 (Mo. banc 1995). The courts consider: (1) the temporal proximity of the illegality and the evidence obtained; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *See id.* (citing *Brown*, 422 U.S. at 603-04).

Applying the three-factor *Brown* test, courts across the country have consistently held that, in the absence of purposeful or flagrant police misconduct, the discovery of an outstanding arrest warrant prior to a search incident to arrest attenuates the taint of an antecedent unlawful traffic stop. *People v. Brendlin*, 195 P.3d 1074 (Cal. 2008); *State v. Martin*, 179 P.3d 457 (Kan. 2008); *Cox v. State*, 916 A.2d 311 (Md. 2007); *State v. Frierson*, 926 So.2d 1139 (Fla. 2006); *United States v. Simpson*, 439 F.3d 490 (8th Cir. 2006); *Jacobs v. State*, 128 P.3d 1085 (Okla. Crim. App. 2006); *McBath v. State*, 108 P.3d 241 (Alaska 2005); *State v. Page*, 103 P.3d 454 (Idaho 2004); *State v. Hill*, 725 So.2d 1282 (La. 1998); *United States v. Green*, 111 F.3d 515 (7th Cir. 1997).⁵ In each of these cases, all of which

⁵ A number of other jurisdictions, including Missouri’s Western District Court of Appeals, have reached the same conclusion without explicitly applying the *Brown* factors. *See State v. Lamaster*, 652 S.W.2d 885 (Mo. App. W.D. 1983); *State v. Thompson*, 438 N.W.2d 131 (Neb. 1989); *People v. Hillyard*, 589 P.2d 939 (Colo. 1979); *State v. Rothenberger*, 440 P.2d 184 (Wash. 1968); *State v. Dempster*, 434 P.2d 746 (Or. 1967).

involved facts similar to those presented by the case at bar, the courts concluded that the balance of the *Brown* factors weighed in favor of allowing the admission of evidence seized during a search incident to arrest that was founded upon a valid warrant, despite an initially unlawful seizure by law enforcement.

For example, in *Brendlin*, the defendant was unlawfully seized during a traffic stop. 195 P.3d at 1078. During the stop, a law-enforcement officer obtained the defendant's identification and ran a warrant check, which revealed an outstanding warrant for the defendant's arrest. *Id.* The officer searched the defendant incident to the arrest and found drugs and other contraband. *Id.* at 1077. The defendant filed a motion to suppress the evidence, which was rejected by the trial court. *Id.*

On appeal, the defendant argued that the evidence found during the search incident to arrest should have been suppressed as fruit of the unlawful stop. *Id.* The California Supreme Court disagreed. *Id.* at 1078-81. The Court recognized the "chorus of cases" from other jurisdictions applying the attenuation doctrine to uphold the admission of evidence obtained in similar circumstances. *Id.* at 1076, 1078-81. Guided by the earlier cases, the Court applied each of the *Brown* factors in turn. *Id.* at 1078-81.

First, the court noted that, as is often the case, only a few minutes elapsed between the unlawful traffic stop and the search incident to arrest that uncovered the challenged evidence. *Id.* at 1079. But the court observed that *Brown's* "temporal proximity factor" is of minimal importance when the "intervening circumstance" is an arrest warrant because, unlike cases where an illegal seizure might compel a suspect to flee, consent to a search, or confess to a crime, the warrant exists independently and cannot be said to have arisen from exploitation

of the illegality. *Id.* at 1079-80 (citing *Green*, 111 F.3d at 522; *Simpson*, 439 F.3d at 495). For that reason, courts “have all but unanimously concluded that, in this kind of situation, this first *Brown* factor is outweighed by the others.” *Brendlin*, 195 P.3d at 1080 (quoting *McBath*, 108 P.3d at 248).

Second, the court examined the intervening circumstance itself—the valid arrest warrant. *Brendlin*, 195 P.3d at 1080. The court observed that “the case law uniformly holds that an arrest under a valid outstanding warrant—and a search incident to that arrest—is an intervening circumstance that tends to dissipate the taint caused by an illegal traffic stop.” *Id.* A warrant, the court explained, is “not reasonably subject to interpretation or abuse” and supplies a legal authorization to arrest a suspect independent of the circumstances leading to the initial traffic stop. *Id.* In *Brendlin*, the search that uncovered the challenged evidence was not conducted until after the officer had confirmed the existence of the outstanding warrant. *Id.* Thus, the court concluded, the challenged evidence was the fruit of the outstanding warrant and was not obtained through exploitation of the unlawful traffic stop. *Id.*

The court then turned to the third *Brown* factor—the “flagrancy and purposefulness of the police misconduct.” *Brendlin*, 195 P.3d at 1080. The court deemed this factor “the most important,” as “it is directly tied to the purpose of the exclusionary rule—deterring police misconduct.” *Id.* (citing *Simpson*, 439 F.3d at 496). The court rejected the defendant’s argument that the officer’s conduct was “flagrant” simply because he had stopped the defendant without reasonable suspicion. *Brendlin*, 195 P.3d at 1080. The court explained that “a mere mistake with respect to the enforcement of our traffic laws does not establish

that the traffic stop was pretextual or in bad faith.” *Id.* (citing *Frierson*, 926 So.2d at 1144; *Cox*, 916 A.2d at 321). The court noted that although the prosecution had since conceded that the officer had insufficient cause to detain the defendant, the “insufficiency” was not so obvious as to make one question the officer’s good faith in pursuing the investigation. *Brendlin*, 195 P.3d at 1080-81.

Balancing the three *Brown* factors, the *Brendlin* court concluded that, under the circumstances, “the outstanding warrant sufficiently attenuated the connection between the unlawful traffic stop and the subsequent discovery of the drug paraphernalia.” *Id.* at 1081.

a. *The balance of the Brown factors in Defendant's case weighs in favor of attenuation.*

Defendant's case is indistinguishable in any relevant respect from *Brendlin* and the other cases cited above. Like in each of those cases, an application of the *Brown* factors to Defendant's case shows that the discovery of outstanding warrants after the allegedly unlawful detention, but *before* Defendant was arrested and searched, was a sufficiently powerful intervening circumstance so as to attenuate the causal connection between the initial stop and the seizure of the crack cocaine in Defendant's shoe.

The first *Brown* factor, "the temporal proximity of the illegality and the evidence obtained," weighs in favor of suppression⁶ because only a few minutes passed between Defendant's seizure and the search incident to arrest which uncovered the drugs (Tr. 272). But this factor receives minimal weight where the intervening circumstance—in this case the discovery of outstanding arrest warrants—does not involve a voluntary act by the suspect and thus cannot be explained as an exploitation of the illegal seizure (unlike, for example, a consent to search, which could conceivably be coerced by the seizure). *See e.g. Brendlin*, 195 P.3d at 1080.

⁶ This analysis, of course, assumes for the sake of argument that the brief investigative detention of Defendant was unlawful. For the reasons stated in Part C.1., the State maintains that Defendant's detention was, in fact, supported by reasonable suspicion and was lawfully conducted.

The second *Brown* factor, in contrast, weighs heavily in favor of admissibility. During the brief traffic stop, the troopers ran Defendant's name through their dispatcher and discovered that he had several outstanding arrest warrants (Tr. 18, 61, 218, 262). The troopers arrested Defendant on the basis of these warrants, and only *after* that arrest was Defendant searched (Tr. 19, 61, 218-19, 262-63). As is evident from the cases cited above, a valid arrest warrant, premised on facts independent of the circumstances of the allegedly unlawful stop, has repeatedly and consistently been held to be an extraordinary intervening circumstance that dissipates the taint associated with an illegal initial seizure. *See e.g. Brendlin*, 195 P.3d at 1078-81 (and cases discussed therein).

Defendant might argue that the evidence was the fruit of the unlawful seizure because he never would have been identified but for the initial stop, and but for his identification the outstanding warrants would not have been discovered. The same argument was made in *Hill*—the defendant claimed that but for the illegal stop, the police never would have learned his name, and thus would not have discovered the outstanding arrest warrants. 725 So.2d at 1287. The Louisiana Supreme Court rejected this argument, reasoning that “to rely on this single causal link in making a decision to suppress evidence would be directly contrary to the dictates of the United States Supreme Court because a per se ‘but for’ causation test has been specifically rejected as a basis for a decision to suppress evidence.” *Id.*; *see also McBath*, 108 P.3d at 246 (same); *Jacobs*, 128 P.3d at 1088-89 (same). The analysis in *Hill*, *McBath*, and *Jacobs* is consistent with the United States Supreme Court's reaffirmation in *Hudson* that evidence will not be considered “fruit of the poisonous tree” “simply because it would not have come to light but for the illegal actions of the police.” 547 U.S. at 592. It may be

true that the troopers would not have discovered Defendant's warrants "but for" his initial detention. Nevertheless, the causal link between the stop and the arrest was broken by the discovery of the warrants, which provided an independent basis for the arrest and search incident thereto.

The third *Brown* factor—the purposefulness and flagrancy of police misconduct—also weighs in favor of attenuation and admissibility. Here, the troopers detained Defendant after they saw him react with shock at the traffic checkpoint and then reach toward the floorboard of his vehicle, as if to hide a weapon or other contraband from sight (Tr. 19, 61, 218, 256-57, 262). They were concerned that Defendant might be involved in criminal activity and stopped him briefly to investigate their suspicions (Tr. 13-14, 37, 57-58, 215-16, 257-58). There is nothing in the record to suggest that the troopers acted in bad faith in detaining Defendant. Even if this Court believes that the troopers lacked reasonable suspicion, under the circumstances, to detain Defendant and check his identification, the mere fact that the stop is later determined to be invalid "does not mean that [the troopers'] conduct was flagrant." *Cox*, 916 A.2d at 323. Indeed, if officers' conduct was considered "flagrant" simply because they made an illegal stop, the *Brown* test would be unnecessary because it is employed to evaluate attenuation assuming that an illegal stop has occurred.

In Defendant's case, like in each of the cases cited above, the balance of the *Brown* factors demonstrates that the discovery of the arrest warrants was a sufficient intervening circumstance to attenuate any taint from the allegedly illegal stop. Defendant's arrest, and the seizure of the drugs during the search incident to arrest, were fruits of the valid arrest

warrants, not of the illegal search. Therefore, the evidence was properly admitted at Defendant's trial.

b. The societal costs of applying the exclusionary rule in cases like Defendant's outweigh any deterrence benefits.

In applying the three *Brown* factors, several courts have noted the need to evaluate these factors "in light of the policies underlying the Fourth Amendment and the exclusionary rule." *McBath*, 108 P.3d at 248; *Hill*, 725 So.2d at 1284. As the United States Supreme Court held in *Hudson*, "the exclusionary rule has never been applied except 'where its deterrence benefits outweigh its substantial social costs.'" 547 U.S. at 594 (citing *Pennsylvania Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 363 (1998)). In this case, if this Court adopts a rule mandating the exclusion of evidence seized during a search incident to an arrest on a valid warrant simply because an antecedent initial stop was unlawful, the costs to society will outweigh any deterrence benefits.

The most obvious cost, of course, is the "grave adverse consequence that exclusion of relevant incriminating evidence always entails (*viz.*, the risk of releasing dangerous criminals into society)." *Hudson*, 547 U.S. at 595. This cost may be especially pronounced in circumstances like these, where the existence of an outstanding arrest warrant on an unrelated matter suggests that the suspect may be a repeat offender.

Moreover, holding that an arrest on a valid warrant is unlawful simply because it followed an illegal stop would, in effect, invalidate that warrant and force law-enforcement officers to look the other way if they stumble upon a fugitive during an unlawful stop. In *Green*, the Seventh Circuit found this possibility unsettling: "It would be startling to suggest

that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of ‘Olly, Olly, Oxen Free.’” 111 F.3d at 521. In *Rothenberger*, the Washington Supreme Court characterized such a scenario as “ridiculous” and “indescribably silly,” finding it inconceivable that an officer, having unlawfully detained two suspects and then discovered that they were wanted on arrest warrants, would be forced to “touch his hat and say, ‘Gentlemen, be on your way. I am sorry to have unlawfully detained you.’” 440 P.2d at 186.

The United States Supreme Court addressed a similar situation in *Segura v. United States*, 468 U.S. 796 (1984). In *Segura*, the police unlawfully entered an apartment and stayed there to preserve evidence while colleagues obtained a search warrant for the apartment. *Id.* at 798. The Supreme Court held that even though the initial entry into the apartment was illegal, the evidence that was ultimately gathered from the apartment was admissible because it was seized on the authority of the warrant, which was obtained based on information unrelated to the unlawful entry. *Id.* at 799. The defendants protested that the evidence would never have been discovered if the officers had not made the illegal entry because their colleagues would have moved or destroyed it. *Id.* at 816. The Court concluded that even if this was true, it would not “extend the exclusionary rule, which already exacts an enormous price from society and our system of justice, to further ‘protect’ criminal activity.” *Id.* The Court found that the suggestion that there was a “‘constitutional right’ to destroy evidence” “defies both logic and common sense.” *Id.*

Defendant’s contention that his arrest was unlawful despite the valid arrest warrant because the initial detention was illegal fails for the same reason. Just as there is no

constitutional right to destroy evidence, there is no constitutional right for a fugitive to evade arrest when a valid, independent arrest warrant has been issued. A contrary rule would compound the already significant societal costs inherent in the application of the exclusionary rule.

While the costs of adopting a rule excluding evidence in cases like Defendant's are significant, the deterrence benefits are minimal. The most obvious argument against admitting evidence seized in circumstances like these is that law-enforcement officers may have an incentive to stop passersby at random, obtain identification, and run warrant checks, hoping that they will catch a fugitive and then be able to search for contraband. But this is unlikely to happen for myriad reasons.

First, if it appeared that officers truly were seizing individuals for no purpose other than to fish for warrants, rather than on a good-faith belief that they had reasonable suspicion justifying a *Terry* stop, then, under the third *Brown* factor, the police misconduct would be identified as "purposeful" or "flagrant" and any evidence gathered would be suppressed. *See Brendlin*, 195 P.3d at 1081 ("Where the seizure is flagrantly or knowingly unconstitutional or is otherwise undertaken as a fishing expedition, the third *Brown* factor will make it unlikely that the [State] would be able to demonstrate an attenuation of the taint of the initial unlawful seizure.").

Second, it should not be assumed that law-enforcement officers will "routinely and purposely violate the law as a matter of course." *Segura*, 468 U.S. at 812. Over the past several decades, police forces have increased their professionalism and improved training, emphasizing the protection of constitutional guarantees. *Hudson*, 547 U.S. at 598-99.

Internal discipline among law-enforcement organizations will, in itself, deter police misconduct, as failure to abide by the guidelines “can limit successful careers.” *Id.* at 599. In addition to the possibility of professional sanctions if an officer decides to purposely detain someone illegally, the officer risks exposure to civil liability under 42 U.S.C. § 1983. *Segura*, 468 U.S. at 812.

Finally, the unlawful detention of an individual as an excuse to fish for warrants would, in most cases, be an enormous waste of time and could even be counterproductive. “It is only in the unusual case where the police, after a questionable stop, discover that an occupant is wanted on an arrest warrant that the intervening circumstances exception will apply.” *Green*, 111 F.3d at 523. And if an officer discovers any evidence during an unlawful stop where no outstanding warrant is found, that evidence is likely to be inadmissible. *Segura*, 468 U.S. at 812.

Society’s interest in the execution of valid arrest warrants and the apprehension of fugitives outweighs whatever minimal deterrent effect a rule would have that suppresses evidence seized in circumstances like those posed by Defendant’s case. The exclusionary rule does not and should not apply in this case. The trial court did not clearly err in overruling Defendant’s motion to suppress.

CONCLUSION

The trial court did not commit reversible error in this case. Defendant's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 8,502 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 29th day of October, 2010, to:

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APPENDIX

Judgment..... A1