

THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI

Respondent

vs.

KERSTIN SUND

Appellant

No. SC 87747

Appeal from the Circuit Court of Saint Louis County
The Honorable Steven Goldman, Judge

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This is an appeal from the final judgment in a criminal case. The State of Missouri charged Kerstin Sund with drug trafficking in the second degree. A jury found her guilty. The Circuit Court sentenced Ms Sund to five years' incarceration, suspended the execution of the sentence, and placed her on probation for a period of five years. The court ordered Ms Sund to serve ninety days of shock jail time as a condition of her probation.

Ms Sund appealed to the Court of Appeals for the Eastern District from the judgment of conviction. This appeal does not involve the validity of a treaty or statute of the United States, a statute or provision of the Constitution of this state, or title to any state office, nor is it a case in which the punishment of death has been ordered. As provided in Article 5, Sections 3 and 15, of the Missouri Constitution, as amended, the Missouri Court of Appeals, Eastern District, was vested with initial jurisdiction of this appeal.

The Court of Appeals affirmed the judgment of the Circuit Court. One judge dissented from that decision. Pursuant to MO. R. CIV. P. 83.02, the Court of Appeals transferred the case to this Court at the time of decision because of its general interest.

STATEMENT OF FACTS

Officer William J. Knittel, Jr., has served as a full time police officer in Eureka, Missouri, since October 1998. Tr. at 20. On the evening of February 27, 2003, Officer Knittel was patrolling Interstate 44 for moving violations. Tr. at 9. At 10:45 p.m., he was following a dark blue Chrysler Concorde in the center lane and observed the driver's-side tires touch the dashed white line separating one lane of traffic from another. Tr. at 9-10, 23.

Officer Knittel activated his patrol car's emergency equipment, and the Chrysler pulled over to the shoulder. Tr. at 10. As he walked toward the vehicle he observed that it was occupied by two women. Tr. at 10-11. He informed them of the traffic offense and asked the driver for her license and the vehicle's registration. Tr. at 11-12. The driver's license had been issued to Ms Sund by the State of Virginia. Tr. at 11. The registration was a vehicle rental agreement that had been issued to the passenger, Khalila Wolfe, in Las Vegas, Nevada. Tr. at 11.

Officer Knittel asked whether Ms Sund had been drinking or falling asleep at the wheel. She said that she had not. Tr. at 28. He did not detect the odor of alcohol on her breath and did not observe any unusual conduct on the part of the passenger. Tr. at 29.

To determine whether Ms Sund had been operating the vehicle in an impaired condition, Officer Knittel believed he needed to engage her in further conversation. Tr. at 31. He began by asking the women where they were coming from. Tr. at 30. They responded that they started in Nevada and went sightseeing in New Mexico before taking Interstate 44 to their present location. Tr. at 30. He then asked them whether they had

been paying attention to any of the bad weather advisories in the states they drove through. Tr. at 30. Both women agreed that they had traveled through bad weather. Tr. at 30. At this point, Officer Knittel was satisfied that Ms Sund had not been operating the vehicle while intoxicated or in a sleep stage. Tr. at 31-32.

Officer Knittel had no fear for his own safety, and he left both women in their car. Tr. at 35. He returned to his patrol car with Ms Sund's license and the rental agreement. Tr. at 35, 287. A computer check of her driving status established that Ms Sund's license was valid and that her record was clean. Tr. at 12-13. At this time Officer Knittel "made the determination that [he] was going to only issue [Ms Sund] a warning" and "had completed [his] traffic stop investigation." Tr. at 37.

Rather than write the warning ticket, Officer Knittel walked back to the Chrysler. Tr. at 37. He asked Ms Wolfe for her driver's license and told Ms Sund to follow him back to his vehicle. Tr. at 42.

Once they were seated in the patrol car, Officer Knittel informed Ms Sund that he was going to give her a "warning ticket" and began writing the ticket. Tr. at 13, 42-43. This took "no longer than a minute." Tr. at 43. He also ran a computer check of Ms Wolfe's driver's license. Tr. at 43. In "no longer than two minutes," the computer check reported that her record was clean. Tr. at 43. Officer Knittel also filled out a racial profile form which took about a minute to complete. Tr. at 56.

Officer Knittel asked Ms Sund a series of questions while she was in his patrol car. Tr. at 58. As he later acknowledged, none of these questions were relevant to his investigation of the traffic offense. Tr. at 47. He asked how she got to Nevada. Tr. at 44-

45. Ms Sund replied that she flew to Las Vegas and met Ms Wolfe. Tr. at 45. Ms Sund also indicated that she was a citizen of Sweden and in the United States on a visa. Tr. at 45. In response to Officer Knittel's inquiry regarding their destination, she responded that they were going to attend a friend's wedding in Indiana. Tr. at 45. She was going to pick out the flowers and Ms Wolfe was going to style the bride's hair. Tr. at 45. Ms Sund indicated that the wedding was not going to take place "for a while." Tr. at 14. Officer Knittel asked how she was going to get home after the wedding, and Ms Sund answered that she thought she would fly home from Indiana. Tr. at 46. He inquired whether Ms Wolfe planned to drive back to Nevada, and Ms Sund replied that she thought Ms Wolfe would surrender the car in Indiana and fly back as well. Tr. at 46-47. Finally, Officer Knittel asked whether Ms Sund was employed, and she stated that she worked as a model. Tr. at 47.

Although Officer Knittel had now completed his paperwork, he did not give Ms Sund her ticket. Tr. at 58. He told her to remain in his vehicle, exited the patrol car, and walked toward Ms Wolfe, who had remained in the passenger seat of the Chrysler. Tr. at 58-60. He returned Ms Wolfe's driver's license and the rental agreement. Tr. at 291. He also questioned her about their travel plans, and she stated that she and Ms Sund were going to Indiana. Tr. at 291.

Officer Knittel then motioned for Ms Sund to exit his patrol car and walk toward him. Tr. at 292. She obeyed. Tr. at 292. Officer Knittel handed her the warning ticket and her driver's license and advised her to "be careful." Tr. at 16, 60-62. He did not advise her that she was free to go.

After receiving the ticket and her driver's license, Ms Sund began to walk away from Officer Knittel. Tr. 62. Before she could enter the car, Officer Knittel employed what he agreed was a police tactic designed to withstand Fourth Amendment scrutiny. Tr. at 64, 70. Although he had observed no criminal conduct and had no reasonable suspicion of criminal activity, Officer Knittel asked Ms Sund if he could search the vehicle.¹ Tr. at 62-63. She said that he could. Tr. at 16. Officer Knittel then walked over to the passenger compartment and asked Ms Wolfe to open the trunk by hitting the trunk release button in the vehicle. Tr. at 16-17. She asked "what's going on?" Officer Knittel responded: "Miss Sund gave me permission to search the vehicle, and I believe Miss Sund also had lied to me." Tr. at 17. He added that "the interstate highways are used to conceal drugs, weapons, people and other illegal things." Tr. at 17. At the suppression hearing Officer Knittel said his representation to Ms Wolfe that Ms Sund had lied to him was "pure speculation." Tr. at 65-66.

Although Officer Knittel claimed that he had consent from both women, the trunk remained closed, and he did not attempt to open the trunk himself. Tr. at 66-67. Officer

¹ Officer Knittel testified that he intentionally chose not to ask Ms Sund if he could search the vehicle while she was sitting in his patrol car because "the Fourth Amendment [requires] an entirely different level of analysis as to consent when one is clearly seized and in the custody of law enforcement." Tr. at 63-64. Instead he tried "to create a truly consensual encounter, which is not subject to the same Fourth Amendment scrutiny as when one is in custody." Tr. at 64.

Knittel then issued a “directive” to open the trunk so that he could search the car. Tr. at 68. When the trunk was still not opened, he resorted to another police tactic “designed to produce a consent.” Tr. at 70. He offered a choice: “[E]ither I search it or a dog can do it.” Tr. at 69. According to Officer Knittel, this meant “if they didn’t consent, they would wait . . . till the canine unit arrived, whenever that may be.” Tr. at 70. Consent to search the vehicle was then given and the trunk was opened. Tr. at 71.

Officer Knittel searched the trunk and found a suitcase containing approximately seventy pounds of marijuana. Tr. at 19, 342. He advised Ms Sund and Ms Wolfe that they were under arrest for drug trafficking. Tr. at 18-19. A grand jury in St. Louis County subsequently indicted both women for the class B felony of drug trafficking in the second degree. L.F. at 12.

Ms Sund filed a motion to suppress evidence seized in the search of the vehicle and any testimony or statements she made while in custody. L.F. at 15. She alleged that the search and seizure violated her rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10, 15, and 18(a) of Article I of the Missouri Constitution. L.F. at 15-17.

Officer Knittel testified regarding his suspicion at the suppression hearing and at trial. At the hearing, Officer Knittel testified that an ordinary traffic stop lasts between ten and fifteen minutes and that the stop in question lasted between fifteen and twenty

minutes. Tr. at 72. Officer Knittel also testified that he became “a little bit suspicious”² when Ms Sund told him that the wedding was not happening immediately. Tr. at 14. According to Officer Knittel, “I believed if you were going to do someone’s hair, you would do it the day of the wedding.” Tr. at 14. Officer Knittel acknowledged that he had no other basis for reasonable suspicion of criminal activity “besides the hairdo issue.”³ Tr. at 62.

During cross-examination Officer Knittel agreed that if a bride wanted to explore several hairdo options, she might do so well in advance of her wedding. Tr. at 49-50. He acknowledged that such an explanation was “reasonable and plausible” and that he had “never thought of it that way.” Tr. at 50, 53. Had he considered this, his concern regarding the hairdos “would not have existed at all.” Tr. at 53. At Ms Sund’s trial, Officer Knittel no longer talked about having a suspicion of criminal activity but only a suspicion that “something was afoot” and that “[s]omething wasn’t right.” Tr. at 292-93.

In denying the motion to dismiss, the court stated that the motion involved “close issues.” Tr. at 78. With respect to the legality of Ms Sund’s detention, the trial court found that the length of the stop was not inordinate because it was “in the range of what [the officer] would normally do for a stop like this.” Tr. at 76. The court also found

² Seven months later when he testified at Ms Sund’s trial, Officer Knittel said he felt that it was “very odd” to “do someone’s hair if the wedding wasn’t for a while.” Tr. at 291.

³ Officer Knittel later acknowledged that he had “no reasonable suspicion of any criminal activity.” Tr. at 65-66.

Officer Knittel’s suspicion that Ms Sund was lying to him based on the hairdo issue justified his conduct in detaining and questioning her further. Tr. at 75. The court reasoned that Officer Knittel “actually thought . . . it was a lie” and did not discover until later that his opinion—that “there would be no reason to do the hair now if the wedding wasn’t going to be then”—was unreasonable. Tr. at 75.

The trial court also found that the women voluntarily consented to the search of the vehicle before Officer Knittel mentioned bringing a canine unit. Tr. at 76. When Officer Knittel indicated that he “could get the canine unit” neither of the women explicitly withdrew their consent. Tr. at 78. Acknowledging that there was “some confusion about the canine unit,” the trial court stated that “[i]t’s my impression that the officer didn’t intend to keep these people here until the canine unit came.” Tr. at 87. In response to defense counsel’s assertion that Officer Knittel testified that he used the canine unit as “a tactic designed to get consent,” the court stated:

What [Officer Knittel] said is he wasn’t going to bring the dogs there. He said some people don’t want people—they could have personal items in there they don’t want some stranger going through. So all he cares about is whether there’s drugs there. So if the dog comes, that’s another option he’d give them. That’s what he testified to. I don’t believe he was detaining them for that purpose or that they would have thought that.

Tr. at 87-88.

At trial defense counsel objected to the State’s introduction of the evidence procured in the search of the vehicle. Tr. at 294-95. The trial court overruled the

objection and the evidence was admitted. Tr. at 295. The jury subsequently found Ms Sund guilty of drug trafficking in the second degree. Tr. at 563-64.

Ms Sund filed a motion for judgment of acquittal notwithstanding the verdict or for new trial in which she renewed her objection to the introduction of the evidence obtained in the search of the vehicle. L.F. at 39, 42. The trial court denied the motion. L.F. at 45. The trial court sentenced her to a term of imprisonment of five years, suspended execution of the sentence based on her background, and placed her on probation for five years.⁴ Tr. at 572. The court ordered Ms Sund to serve 90 days in jail as a special condition of her probation. Tr. at 572.

Ms Sund appeals from the trial court's judgment and sentence. L.F. at 49.

⁴ Ms Sund waived her right to be sentenced by the jury. Tr. at 567-68.

POINT RELIED ON

I.

The trial court erred in denying Ms Sund's motion to suppress evidence and overruling her objection to the admission of the evidence because the State obtained the evidence through an unlawful search and seizure in that (1) Officer Knittel unlawfully detained Ms Sund longer than necessary to complete the traffic stop by questioning her regarding matters unrelated to the traffic violation without having any reasonable, articulable grounds for suspicion of criminal activity; (2) Officer Knittel unlawfully detained Ms Sund after the completion of the traffic stop without having created a consensual encounter; and (3) any consent to search the vehicle was tainted by the unlawful detention and was not freely and voluntarily given.

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

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

State v. Miller, 894 S.W.2d 649 (Mo. 1995)

State v. Woolfolk, 3 S.W.3d 823 (Mo.App. W.D.1999)

ARGUMENT

I.

The trial court erred in denying Ms Sund's motion to suppress evidence and overruling her objection to the admission of the evidence because the State obtained the evidence through an unlawful search and seizure in that (1) Officer Knittel unlawfully detained Ms Sund longer than necessary to complete the traffic stop by questioning her regarding matters unrelated to the traffic violation without having any reasonable, articulable grounds for suspicion of criminal activity; (2) Officer Knittel unlawfully detained Ms Sund after the completion of the traffic stop without having created a consensual encounter; and (3) any consent to search the vehicle was tainted by the unlawful detention and was not freely and voluntarily given.

Standard of Review: In reviewing the trial court's ruling on a motion to suppress, an appellate court views the facts and any reasonable inferences therefrom in the light most favorable to the decision and disregards any contrary evidence and inferences. *State v. Weddle*, 18 S.W.3d 389, 391 (Mo.App. E.D.2000). The appellate court gives deference to the trial court's factual findings and credibility determinations and reviews only to determine if they are clearly erroneous, but reviews questions of law *de novo*. *Id.* at 391-92. The question of whether the historical facts add up to reasonable suspicion is reviewed *de novo*. *Id.* at 392.

The trial court erred in denying Ms Sund’s motion to suppress because the evidence subject to that motion had been obtained by means of an illegal seizure followed by an unlawful search of the vehicle.

A. The Seizure

The Fourth Amendment to the United States Constitution guarantees that individuals will not be subjected to unreasonable searches and seizures.⁵ U.S. CONST. AMEND. IV; *State v. Barks*, 128 S.W.3d 513, 516 (Mo. 2004). A “seizure” occurs under the Fourth Amendment “whenever a police officer accosts an individual and restrains his freedom to walk way.” *Terry v. Ohio*, 392 U.S. 1, 16 (1968). There is a “seizure” if “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *State v. Werner*, 9 S.W.3d 590, 600 (Mo. 2000).

Brief investigative detentions are permissible under the Fourth Amendment “if the officer has a reasonable suspicion, based on specific and articulable facts, that the person is involved in criminal activity.” *Terry*, 392 U.S. at 21. The lawfulness of the seizure and

⁵ Although Ms Sund is a citizen of Sweden, she is entitled to the protections afforded by the Fourth Amendment because she is living in the United States on a visa. Tr. at 45; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). And even though Ms Sund will be deported based on her conviction, *see* 8 U.S.C. §§ 1227(a)(2)(B) & 1228(b)(5) (2005), she is nevertheless entitled to claim this Constitutional protection. *Cf.* *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-97 (1953).

search depends on “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* at 20.

A routine traffic stop based upon the violation of state traffic laws is a justifiable seizure under the Fourth Amendment “so long as the police are doing no more than they are legally permitted and objectively authorized to do.” *Barks*, 128 S.W.3d at 516. An investigative detention “may only last for the time necessary for the officer to conduct a reasonable investigation of the traffic violation.” *Id.* If the detention “extends beyond the time reasonably necessary to effect its initial purpose, the seizure may lose its lawful character.” *State v. Bradshaw*, 99 S.W.3d 73, 77 (Mo.App. E.D.2003).

An officer conducting a routine traffic stop may request a driver’s license and vehicle registration, run a computer check, and issue a citation. *Bradshaw*, 99 S.W.3d at 77. Thereafter, absent “an objectively reasonable suspicion” that the defendant was “involved in criminal activity based on specific, articulable facts,” the driver must be “permitted to go.” *Barks*, 128 S.W.3d at 517. The officer’s reasonable suspicion “must arise within the parameters of the traffic stop itself.” *Id.* (quoting *State v. Woolfolk*, 3 S.W.3d 823, 829 (Mo.App. W.D.1999)). “Suspicious based upon answers to questions asked after the stop is completed are irrelevant to the determination of whether specific, articulable facts supported a reasonable suspicion of criminal activity and provided a justification for further questioning once the traffic stop was completed.” *Id.*

“[A] *Terry* stop is an extraordinary occurrence which is justified when the State carries the burden of proving that justification.” *State v. Miller*, 894 S.W.2d 649, 654

(Mo. 1995). At a suppression hearing, “the State bears both the burden of producing evidence and the risk of nonpersuasion to show by a preponderance of the evidence that the motion should be overruled.” *Weddle*, 18 S.W.3d at 391. The state failed to satisfy its burden of proof in this case. The record establishes that Ms Sund’s detention constituted an illegal seizure because (1) the stop lasted longer than necessary to effectuate its initial purpose and (2) Officer Knittel did not have a reasonable suspicion that Ms Sund was engaged in criminal activity that could justify prolonging the traffic stop. Accordingly, the trial court erred in denying the motion to suppress.

1. The seizure was unlawful because Officer Knittel detained Ms Sund beyond the time necessary to investigate the traffic offense

In analyzing the legality of Ms Sund’s detention, the trial court erroneously focused on whether the length of the stop was within a normal range and concluded that the stop had not been inordinately long. Tr. at 76. The correct standard is whether the traffic stop took longer than “the time necessary for the officer to conduct a reasonable investigation of the traffic violation.” *Barks*, 128 S.W.3d at 516. Therefore, the proper consideration is the length of time required for the particular detention, rather than some average or generic period. If conducting an investigation of a particular traffic stop requires fifteen or twenty minutes more than an average stop, the detention would not be declared unlawful as long as the circumstances indicate that the additional time was necessary to complete a reasonable investigation. *Barks*, 128 S.W.3d at 516-17.

However, once the officer concludes his or her investigation—however long that may take—the officer must promptly issue a warning or ticket and let the motorist go on his or

her way. *Id.* The approach mandated in *Barks* promotes efficiency and reflects a careful balancing of the interests of public safety and the right to be free from unreasonable searches and seizures.

Officer Knittel detained Ms Sund beyond the time necessary to investigate the traffic infraction and to issue a citation. After running a computer check on her driver's license and determining that her record was clean, Officer Knittel testified that he decided to issue Ms Sund a warning ticket. Tr. at 12-13, 37. Although he considered his investigation of the traffic stop complete, Officer Knittel chose not to write the warning ticket so that Ms Sund could go on her way. Tr. at 39, 41. Instead, he ordered her back to his patrol car and proceeded to question her. Tr. at 58. Officer Knittel admitted that the questioning was irrelevant to his investigation of the traffic offense, and the questioning lasted much longer than the one minute required to write the ticket. Tr. at 47-48.

Officer Knittel's further detention of Ms Sund to question her after he completed his investigation was unlawful. It is well established that "[a]n investigative detention may not last any longer than is necessary to effectuate the purpose of the stop and that '[t]he scope of the detention must be carefully tailored to its underlying justification.'" *Weddle*, 18 S.W.3d at 394 (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). Once Officer Knittel completed the investigation, he could not legally detain Ms Sund longer than necessary to issue the ticket. *Id.*

It is inconsistent with the Fourth Amendment to allow a police officer to prolong a traffic stop by delaying the processing or dispensing of the ticket. The evidence supports one of the following inferences: (1) Officer Knittel prepared the ticket in approximately

one minute and held it while questioning Ms Sund, or (2) Officer Knittel's questioning of Ms Sund delayed his completion of the ticket and prolonged her detention. The delay in issuing the ticket under either scenario renders Ms Sund's continued detention unlawful as she was detained longer than necessary to effectuate the purpose of the stop.⁶ *Weddle*, 18 S.W.3d at 396. *See, e.g., Sparks v. State*, 842 So.2d 876, 877 (Fla. Dist. Ct. App. 2003) (holding that officer's failure to give completed citation to driver stopped for defective headlight during twenty minute wait for canine unit to arrive constituted an illegal detention).

2. The seizure was unlawful because Officer Knittel had no objectively reasonable suspicion to detain Ms Sund after the traffic stop had been completed and the encounter was not consensual

Officer Knittel testified that he suspected Ms Sund was involved in unspecified criminal activity based on her response to a question that was unrelated to his investigation. Asked where she and Ms Wolfe were headed, Ms Sund answered that they were going to Indiana to visit a friend who was getting married some time later and that Ms Wolfe was going to help the bride style her hair for the wedding. Tr. at 45. He thought that it was "very odd" that they would be going to do the bride's hair when the

⁶ This case is distinguishable from most other traffic stop cases because the investigation of the traffic offense was complete. If Officer Knittel had still been actively investigating the offense when he questioned Ms Sund, the questioning may have been justified as part of a reasonable investigation of the traffic offense.

wedding was not taking place immediately: “[I]f you were going to do someone’s hair, you would do it the day of the wedding.” Tr. at 14, 291.

The trial court found that Officer Knittel was justified in extending Ms Sund’s detention because he “actually thought” she was lying to him. Tr. at 75. The trial court’s decision is erroneous because it applied the wrong standard. It is irrelevant what Officer Knittel “actually thought” at the time of the detention. The determination of whether his suspicion was reasonable is objective and “not based upon his state of mind at the time the challenged action was taken.” *State v. Slavin*, 944 S.W.2d 314, 318 (Mo.App. W.D.1997). “Hunches and suspicions, even if acted on in good faith, are not enough to warrant a search or seizure.” *Weddle*, 18 S.W.3d at 394.

In order to detain Ms Sund for reasons unrelated to the traffic stop, her conduct had to arouse “an objectively reasonable suspicion that [she] was involved in criminal activity based on specific, articulable facts.” *Barks*, 128 S.W.3d at 517. Officer Knittel did not suggest what type of criminal activity he suspected Ms Sund was engaged in based on her statement about the hairdos. He just sensed that she was lying to him. Tr. at 51. At trial, Officer Knittel did not refer to criminal activity at all, and simply stated that he believed “something was afoot” and that “[s]omething wasn’t right.” Tr. at 292-93.

Even if Officer Knittel honestly believed that Ms Sund had lied to him, this is a far cry from what is legally required—the ability to articulate a specific factual basis which establishes a reasonable suspicion that Ms Sund was involved in criminal activity. *Barks*, 128 S.W.3d at 517. A reasonable person would not be alarmed to hear that two women driving over 1,500 miles to assist a friend prepare for her wedding might arrive in

advance of the wedding and that one of them planned to assist the bride in styling her hair for the occasion. Under these circumstances, it was not reasonable to conclude that Ms Sund and Ms Wolfe were engaged in criminal activity simply because the wedding was not taking place promptly after their arrival.

Officer Knittel admitted as much when he was cross-examined regarding the reasonableness of his suspicion. He agreed that a bride might want to explore several hairdo options well in advance of her wedding and that he “never thought of it that way.” Tr. at 49-50, 53. Had he considered this “reasonable and plausible” explanation, Officer Knittel testified that he would not have had any concern over Ms Sund’s statement. Tr. at 50, 53. Thus, Officer Knittel’s own testimony establishes that his suspicion was not objectively reasonable.

Even if Officer Knittel developed a reasonable suspicion during the traffic stop, this could not justify continuing to detain Ms Sund after he had handed Ms Sund the warning ticket and told her to be careful. Once the initial traffic stop is completed, any search “require[s] new and articulable suspicion that [the defendant has] committed a crime.” *State v. Granado*, 148 S.W.3d 309, 311 (Mo. 2004). Instead of allowing Ms Sund to leave, Officer Knittel stopped her as she was walking back to her car and, without informing her that she was free to go, asked if he could search the vehicle and its contents. In *Granado*, this Court rejected the state’s argument that a driver’s suspicious conduct during a traffic stop authorized his detention after a traffic citation had been issued for the purpose of searching the vehicle:

If the search request occurred prior to handing Granado the written warning and telling him that he was free to go, the Court might agree [with the State's position]; however, he did not do so. . . . No specific, articulable facts developed between the time Granado got out of the patrol car and returned to his truck that justifies detaining Granado to ask him further questions.

Id. See also State v. Sanchez, 178 S.W.3d 549, 555-56 (Mo.App. W.D.2005) (holding that continuing detention after issuing traffic citation is unconstitutional absent “some additional specific, articulable facts arising between the time the driver was released and the time the law enforcement officer asked further questions to justify continued detention”); *State v. Dickerson*, 172 S.W.3d 818, 820-21 (Mo.App. E.D.2005) (citing *Granado* for the proposition that an automobile search conducted after “the time reasonably necessary” to effect the traffic stop is unconstitutional unless there is a “new factual predicate for reasonable suspicion found during the period of lawful seizure that would support the search”).

Like the patrolman in *Granado*, Officer Knittel witnessed nothing that would support a suspicion of criminal activity in the moment between cautioning Ms Sund to drive safely and requesting permission to search the vehicle. Officer Knittel testified that after advising Ms Sund to be careful, he observed no criminal conduct and that his further questioning was not based on reasonable suspicion of criminal activity. Tr. 62-63. His continued detention of Ms Sund thus was illegal. The trial court erred in not suppressing the evidence seized during the search of the vehicle.

3. The encounter after the traffic stop was not consensual

While conceding that Officer Knittel had no reasonable suspicion to detain Ms Sund after issuing the warning ticket and telling her to be careful,⁷ the state maintains that the subsequent interaction between the policeman and Ms Sund was consensual. This argument should be rejected. Where a law enforcement officer does not have reasonable suspicion to further detain a driver at the completion of a traffic stop, “the officer may question the driver if the encounter has turned into a consensual one.” *Granado*, 148 S.W.3d at 311. An encounter is consensual “[s]o long as a reasonable person would feel free ‘to disregard the police and go about his business.’” *State v. Martin*, 79 S.W.3d 912, 916 (Mo.App. E.D.2002) (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). There is no litmus test for distinguishing a consensual encounter from a seizure. *State v. Taber*, 73 S.W.3d 699, 705 (Mo.App. W.D.2002). Courts consider the “all of the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.” *Granado*, 148 S.W.3d at 311. An officer, however, may not “detain a driver without reasonable suspicion under the guise of simply engaging in a voluntary conversation.” *Id.*; *Barks*, 128 S.W.3d at 517; *Dickerson*, 172 S.W.3d at 820-21.

⁷ In its brief filed in the Court of Appeals, the State acknowledges that “Officer Knittel did not have reasonable suspicion to further detain appellant” at this point. Resp. Br. at 29 n.19 (filed in Case No. ED 85721).

The circumstances present in this case do not support a finding that there was a consensual encounter. The traffic stop occurred on a cold February night on the shoulder of Interstate 44. The initial stop was involuntary. Officer Knittel activated the emergency equipment on his patrol car, and Ms Sund, acceding to this show of authority, pulled her vehicle to the side of the highway and stopped. Ms Sund and Ms Wolfe were in unfamiliar territory. Neither was a Missouri resident, and Ms Sund was a citizen of Sweden. Officer Knittel had Ms Sund sit his patrol car and questioned her. After issuing the warning ticket, the police officer did not tell Ms Sund that she was free to go. Instead, he asked her if he could search the vehicle, lectured her and Ms Wolfe about how the interstate highways are used to transport drugs, accused Ms Sund of lying to him, and announced that he would detain the women until a canine unit arrived to search the car if they refused to open the trunk. Under the circumstances, there was insufficient evidence that Ms Sund would have believed that she was free to disengage from Officer Knittel and disregard his request to search the vehicle.⁸

On similar facts, this Court concluded in *Granado* that an encounter between a driver and a police officer was not consensual. 148 S.W.3d at 311. The court discounted the officer's testimony that Granado "was still free to go" when he requested to search the vehicle and held that a reasonable person would not have felt free to leave:

⁸ Even if the encounter was initially consensual, which the record refutes and Ms Sund denies, the ensuing refusal to cooperate with Officer Knittel demonstrates that the encounter ceased to be voluntary.

Granado and his passenger, both from Texas, were pulled over by a police officer on the side of a rural Missouri highway in the middle of a cold January night. Neither party was wearing a jacket, and they were surrounded by nothing but open fields. They were informed that their truck and all of their personal possessions were being detained for an indefinite period of time.

Id. Based on these circumstances, which bear remarkable similarity to those in the instant case, this Court concluded that the encounter between Granado and the officer was not consensual.

In *Dickerson*, the officer completed the traffic stop and asked the driver and passenger if they had anything illegal in the car. 172 S.W.3d at 820. The Court of Appeals noted that an officer “may not detain a driver following a traffic stop without reasonable suspicion under the guise of simply engaging in a voluntary conversation.” *Id.* (citing *Barks*, 128 S.W.3d at 517). The court found that “[t]his is precisely what happened,” and held that the trial court erred in not suppressing the marijuana seized during the subsequent search of the vehicle. *Id.* at 820-21. The facts in this case are even stronger. Officer Knittel testified that “to create a truly consensual encounter” he waited until he believed Ms Sund was no longer seized before asking whether he could search the vehicle. Tr. 63-64. To spring his trap, Officer Knittel had to delay Ms Sund with exactly the sort of artificial voluntary conversation condemned in *Barks*, *Granado*, *Dickerson*, and several other cases.

Moreover, it is widely recognized that individuals who are stopped for traffic violations are reluctant to leave the scene without permission. In this respect, the *Taber* court observed:

Common sense tells us that, as a rule, a motorist who is involuntarily stopped by a law enforcement officer, for whatever reason, is going to be very reluctant to leave the scene until it is perfectly clear that he or she is free to do so. “Certainly few motorists would feel free . . . to leave the scene of a traffic stop without being told they might do so.” *Berkemer v. McCarty*, 468 U.S. 420, 436, 104 S. Ct. 3138, 3148, 82 L.Ed.2d 317, 332 (1984). To leave the scene of a traffic stop without express permission would risk being pursued and stopped again.

73 S.W.3d at 706. Here, Officer Knittel resumed his questioning after Ms Sund had turned away and was trying to leave. A reasonable person in Ms Sund’s position would not have believed that she could disregard what appeared to be lawful request, hop in her car, hit the gas, and leave the police officer standing in the dust.

Because Officer Knittel unlawfully detained Ms Sund after the completion of the traffic stop, the evidence ultimately obtained should have been excluded as fruit of the poisonous tree. *Miller*, 894 S.W.2d at 654-56. Evidence is considered fruit of the poisonous tree where its seizure directly results from an illegal search or seizure. *Id.* at 654. Because the discovery of the marijuana in the vehicle’s trunk and Ms Sund’s custodial statements were obtained as a direct result of Officer Knittel’s unlawful detention of Ms Sund, the evidence was fruit of the poisonous tree subject to suppression.

Martin, 79 S.W.3d at 917; *Taber*, 73 S.W.3d at 707. The trial court erred in denying Ms Sund's motion to suppress.

B. The Search

As Officer Knittel had no probable cause or reasonable suspicion justifying a search of the automobile, the search was illegal. *State v. Young*, 425 S.W.2d 177, 182 (Mo. 1968). Accordingly, evidence obtained from the search must be excluded as fruit of the poisonous tree. *Miller*, 894 S.W.2d at 654.

1. Ms Sund has standing to challenge the search

The state argued in the Court of Appeals that Ms Sund lacked standing to challenge the search of the vehicle because she was not listed as an authorized driver on the rental agreement. That argument should be rejected because the search violated Ms Sund's expectation of privacy and thus her rights under the federal and state constitutions.

Ms Sund has standing to challenge the search if she had "a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). An expectation of privacy is legitimate if it is one that society recognizes as reasonable. *Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990). While the Missouri Court of Appeals has indicated that an individual must have a property or possessory interest in the vehicle, *see, e.g., State v. Toolen*, 945 S.W.2d 629, 631-32 (Mo.App. E.D.1997), no Missouri case previously has held that an individual driving a rental vehicle in the presence of the renter and with the renter's consent lacks standing to challenge a search. This Court has never before addressed this issue.

Courts in other jurisdictions have held that a driver not listed in the rental agreement has a legitimate expectation of privacy in the rental car and may challenge a search on Fourth Amendment grounds. *See, e.g., United States v. Best*, 135 F.3d 1223, 1225 (8th Cir. 1998) (holding that if authorized renter “granted Best permission to use the automobile, Best would have a privacy interest giving rise to standing”); *United States v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006) (holding that “an unauthorized driver who received permission to use a rental car and has joint authority over the car may challenge the search to the same extent as the authorized renter”); *Parker v. State*, 182 S.W.3d 923 (Tex.Cr.App. 2006) (holding that “society would recognize as reasonable [driver’s] expectation of privacy in the use of his girlfriend’s rental car with her permission even though he was not listed as an authorized driver on the rental agreement”).

The bright-line approach adopted by the Missouri Court of Appeals—that an individual who is not listed as an authorized driver has no standing to challenge a search—has been criticized by other courts. In *United States v. Thomas*, the Ninth Circuit held that “possessory or ownership interest” should not be defined narrowly. 447 F.3d at 1197-98. According to the court, a driver who is not listed on a rental agreement may challenge a search “upon a showing of ‘joint control’ or ‘common authority’ over the property searched.” *Id.* at 1198. If the driver had the renter’s permission to use the vehicle, the *Thomas* court held that the driver has standing to challenge the search. *Id.* at 1199. The Sixth Circuit refused to adopt a bright-line approach because “[s]uch a rigid test is inappropriate, given that we must determine whether [the defendant] had a legitimate expectation of privacy which was reasonable in light of all the surrounding

circumstances.” *United States v. Smith*, 263 F.3d 571, 586 (6th Cir. 2001). This Court should hold that Ms Sund may challenge the search since she had permission to drive the rental vehicle. *See Rakas*, 439 U.S. at 143 (stating that “arcane distinctions developed in property and tort law . . . ought not . . . control” the reasonableness of an expectation of privacy).

2. *The search was unlawful*

Whether a search based on consent is lawful depends on whether the consent was freely and voluntarily given. *State v. Woolfolk*, 3 S.W.3d 823, 831 (Mo.App. W.D.1999). “[I]f consent is given without coercion, the subsequent search is not prohibited by the Fourth and Fourteenth Amendments. . . . On the other hand, consent is invalid if it is the product of duress or coercion, either express or implied.” *Id.* Because warrantless searches are presumed unreasonable, the state bears the burden of proving that consent was voluntary. *Weddle*, 18 S.W.3d at 396.

When the consent follows an illegal stop, the state’s burden is heavier. *Miller*, 894 S.W.2d at 655 n.7. To satisfy its burden, the state must demonstrate that “(1) the consent was voluntary and (2) whether it has sufficient independence from the prior illegality to purge the taint of that illegality.” *Weddle*, 18 S.W.3d at 396 (internal quotations omitted).

a. *Consent was not voluntary*

Consent is invalid if it is the product of duress or coercion, either express or implied. *Weddle*, 18 S.W.3d at 396. The voluntariness of consent is determined by examining “the totality of the circumstances and assessing whether an objective observer

would conclude the person made a free and unconstrained choice to consent.” *Id.*

Whether an individual knew she had a right to refuse consent “is a factor to be taken into account.” *State v. Reese*, 625 S.W.2d 130, 132 (Mo. 1981). While an officer does not have to tell a motorist that he is free to go, that option must be apparent to the motorist from the circumstances. *State v. Shoults*, 159 S.W.3d 441, 446 (Mo.App. E.D.2005). If reasonable persons in the defendant’s position would believe they were under detention, and not feel free to leave, then the encounter is not consensual. *Woolfolk*, 3 S.W.3d at 831. Individuals who initially consent to a search may terminate their consent at any time. *State v. Hayes*, 51 S.W.3d 190, 193 (Mo.App. W.D.2001). “When consent is withdrawn, an officer must cease the search absent a warrant or probable cause.” *Id.* at 194. *See also State v. Howes*, 150 S.W.3d 139, 143 (Mo.App. E.D.2004).

Although Ms Sund initially consented to the search, her consent was not voluntary in the first instance and her subsequent actions demonstrated that she withdrew that consent. She did not open the trunk. Ms Wolfe also did not open the trunk when Officer Knittel asked her to do so. When the trunk remained closed, Officer Knittel issued a directive to open the trunk. Still, neither woman opened the trunk. That Ms Sund and Ms Wolfe could have opened the trunk but disobeyed Officer Knittel’s command to do so establishes that any consent to the search had been withdrawn.

When neither woman would open the trunk, Officer Knittel announced that he could bring a dog to search the vehicle. Tr. at 69. According to Officer Knittel, this meant “if they didn’t consent, they would wait . . . till the canine unit arrived, whenever

that may be.” Tr. at 70. At this point, consent was given and the trunk was opened. Tr. at 71.

In *Woolfolk*, the court examined the voluntariness of consent obtained after the police officer informed the driver that he would call a canine unit to search the vehicle if the driver did not accede to the search. 3 S.W.3d at 832. The court held that such a tactic effectively detains a driver and any consent procured by that threat is “merely a submission to lawful authority”:

While the officer may not have an obligation to affirmatively tell a driver he is free to go, where, as here, he tells the driver that his only two options are to allow a search or to wait for a canine unit, he has effectively told the driver he is not free to go. As a result, a reasonable person in [the driver’s] position would not have felt free to leave.

Id.

As in *Woolfolk*, Officer Knittel did not inform Ms Sund or Ms Wolfe that they were free to go. His threat to have a canine unit search the vehicle if the women did not allow him to search the vehicle rendered subsequent consent involuntary and a mere submission to lawful authority.⁹ In addition, that Officer Knittel never advised Ms Sund or Ms Wolfe that they had a right to refuse the search weighs against a finding that the

⁹ Even if Ms Sund was not unlawfully detained, the trunk was not opened until Officer Knittel threatened to call the canine unit. Such consent is not voluntary and cannot justify the subsequent search of the vehicle. *Woolfolk*, 3 S.W.3d at 832.

consent was voluntary. “Whether or not a person has been informed of his right to discontinue the encounter or not consent to a search” is a factor “in determining whether a seizure has occurred or consent is voluntary.” *State v. Talbert*, 873 S.W.2d 321, 325 n.3 (Mo.App. S.D.1994) (citing *Florida v. Bostick*, 501 U.S. 429 (1991)); *see also Weddle*, 18 S.W.3d at 396 (citing officer’s failure to advise defendant that he had a right to refuse to consent as a factor weighing against application of attenuation doctrine). As discussed above, a reasonable person in Ms Sund’s position would not have believed she was free to leave. The state failed to meet its burden of proving that Ms Sund’s consent was voluntary.

b. Consent was tainted by unlawful detention

Since Ms Sund’s detention was unlawful, the state also must prove that the consent was not tainted by her illegal detention after the completion of the traffic stop. *Miller*, 894 S.W.2d at 655; *Weddle*, 18 S.W.3d at 396; *United States v. Perkins*, 348 F.3d 965, 971 (11th Cir. 2003) (holding that where consent to search a vehicle is the product of an unlawful detention, it is “tainted by illegality and [is] ineffective to justify the search”). Under the attenuation doctrine, courts examine three factors to determine whether the consent is sufficiently independent from the prior illegality: (1) the temporal proximity of the illegality and the consent, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. *Miller*, 894 S.W.2d at 655. Each of these factors weighs heavily against a finding of attenuation.

- Temporal Proximity

Officer Knittel obtained consent to search the vehicle shortly after Ms Sund's unlawful detention.¹⁰ In *Weddle*, the court concluded that the defendant's consent was tainted where consent was obtained two to three minutes after the illegal detention and the defendant was not advised of his right to refuse consent. 18 S.W.3d at 396. *See also Miller*, 894 S.W.2d at 655-56 (finding "no significant temporal distance between illegal stop and [driver's] consent" where "only moments, or at most minutes, separated [driver's] consent to search and the illegal stop"); *Florida v. Royer*, 460 U.S. at 507-08 (concluding that consent was tainted when obtained minutes after illegal detention). *Cf. Brown v. Illinois*, 422 U.S. 590, 604-05 (1975) (concluding that defendant's statement made less than two hours after illegal arrest was fruit of poisonous tree). This factor supports a finding that Ms Sund's consent was tainted by the illegal seizure.

- Intervening Circumstances

There were no intervening circumstances that purged the taint of the illegal seizure. *Miller*, 894 S.W.2d at 656 n. 9 (identifying several intervening circumstances

¹⁰ This is true whether Ms Sund was illegally detained due to Officer Knittel's delay in issuing the warning or his questioning of Ms Sund after he issued the warning ticket. In the former, the consent was obtained within a matter of a few minutes after the unlawful detention; in the latter, the consent was given seconds after Ms Sund was illegally detained.

that weigh in favor of attenuation, such as the defendant's consultation with an attorney). This factor weighs against applying the attenuation doctrine.

- Purpose and Flagrancy of the Official Misconduct

Officer Knittel acknowledged that he developed an array of tactics designed to procure the opportunity to search a detainee's vehicle without triggering Fourth Amendment scrutiny. He testified that one of his tactics is to avoid asking for permission to search a vehicle while the driver is "seized and in the custody of law enforcement." Tr. at 63-64. Instead, he tries "to create a truly consensual encounter, which is not subject to the same Fourth Amendment scrutiny as when one is in custody," by waiting to request consent until after the driver has exited his vehicle. Tr. at 64. Officer Knittel uses this tactic routinely, and he employed it against Ms Sund in this case. Tr. at 64.

Another tactic Officer Knittel employs to obtain the opportunity to search a vehicle is to threaten to call a canine unit to search a vehicle when a driver refuses to consent. Tr. at 69-70. He agreed that this tactic is "designed and phrased in such a way to produce consent." Tr. at 70. He employed the tactic against the women in this case, and it "did what [he] wanted to accomplish." Tr. at 71.

Officer Knittel's use of these tactics illustrates how, through his knowledge of search and seizure law, he can manipulate a traffic stop to obtain "consent" from less knowledgeable motorists. His testimony regarding the use of these tactics in this case evidences his determination to search Ms Sund's vehicle. The prohibition on detaining a motorist without reasonable suspicion of criminal activity under the guise of engaging in

voluntary conversation would seem to outlaw the use of these tactics. *See, e.g., Granado*, 148 S.W.3d at 311. This factor weighs against the application of the attenuation doctrine.

The State failed to carry its burden of demonstrating that Ms Sund's consent to the search was voluntary and not tainted by the illegal seizure. Accordingly, the trial court erred in denying her motion to suppress and in admitting the seized evidence at trial.

CONCLUSION

The judgment of conviction should be reversed for the reasons set forth herein.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c), this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 8,914 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft Word 2003. The undersigned counsel further certifies that the accompanying compact disk has been scanned and was found to be virus free pursuant to Rule 84.06(g).

CERTIFICATE OF SERVICE

I certify that two hard copies of this brief and one copy of the brief on a floppy disk filed pursuant to Rule 84.06 were served on counsel identified below via U.S. Mail, postage prepaid, on August 1, 2006:

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APPENDIX

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