

No. 87747

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

KERSTIN SUND,

Appellant.

**Appeal from the Circuit Court of Saint Louis County, Missouri
21st Judicial Circuit, Division 12
The Honorable Steven H. Goldman, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction of trafficking in the second degree, § 195.223.7, RSMo Cum. Supp. 2004, obtained in the Circuit Court of St. Louis County, the Honorable Steven H. Goldman presiding. For that offense, appellant was sentenced to serve five years in the Missouri Department of Corrections. Execution of the sentence was suspended, however, and appellant was placed on probation and ordered to serve 90 days shock incarceration in the county jail. The Court of Appeals, Eastern District, affirmed appellant's conviction and sentence (one judge dissented), but because the case involved a question of general interest, the Court also transferred the case to this Court. Thus, this Court has jurisdiction. MO. CONST., Art. V, § 10.

STATEMENT OF FACTS

Appellant, Kerstin Sund, was charged by indictment with trafficking in the second degree, § 195.223.7, RSMo Cum. Supp. 2004 (L.F. 12-13). After a trial by jury, she was found guilty of the charged offense (Tr. 564). Viewed in the light most favorable to the verdict, the facts were as follows:

In February 2003, appellant agreed to fly to Arizona and assist her friend, Khalila Wolfe, in driving a car from Arizona to New York (Tr. 311, 439-440). Appellant and Wolfe were very close friends (Tr. 433). Wolfe was planning to deliver a shipment of marijuana from Arizona to Ohio (or perhaps Indiana – appellant made varying statements) (Tr. 313, 494-495).¹ Wolfe offered to pay appellant some money if she would assist in the delivery, and she told appellant that a man would call her and give her information about a plane ticket (Tr. 311-313, 442-443).

According to plan, an unidentified man called appellant and gave her the flight and

¹ Although not shown by direct evidence (and although appellant consistently tried to minimize her involvement in the crime, and denied that Wolfe had initially told her about the marijuana (*see* Tr. 441)), rational jurors could have inferred from other circumstances (e.g., the agreement that appellant would be paid for her assistance and appellant's knowledge that the packages of marijuana only contained marijuana), both that Wolfe told appellant about the marijuana delivery from the beginning and that appellant was lying in an attempt to cover her wrongdoing.

ticket information (a ticket had been purchased for appellant) (Tr. 312, 443). Then, on February 26, 2003, appellant flew from New York to Arizona and met up with Wolfe at a Super 8 Motel (Tr. 313). At the hotel, Wolfe informed appellant that they would be driving a shipment of marijuana to Ohio (Tr. 313-314).² Two men – one unidentified and one identified as Bradley Bowe – placed bags of marijuana in the trunk of the rented car among appellant and Wolfe’s bags (Tr. 297-299, 313, 460-461). Wolfe and appellant then left the motel and started their drive across the country (Tr. 464-465). They drove continuously and apparently traded off driving (Tr. 465).³

The next day, as they were driving through the city limits of Eureka, Missouri, at about 10:45 p.m., Police Officer William Knittel stopped them for a traffic violation (Tr. 285-286). Officer Knittel had seen the car drift onto the dividing line between the lanes and then pull back into the center lane, and fearing that the driver’s illegal lane usage might have been from intoxication or sleeping at the wheel, he activated his emergency lights and pulled

² Appellant later told the police that when Wolfe told her about the delivery of the marijuana at the hotel, she “assumed it was innocent enough, that she would go along and do it, drive the vehicle” (Tr. 314). At trial, appellant testified that Wolfe and the others had used deception and scare tactics to compel her compliance (Tr. 459-469).

³ That they traded off driving can be inferred both from the amount of time it would have taken to travel the long distance and from the fact that appellant was driving when they were eventually pulled over in Eureka, Missouri.

over the vehicle (Tr. 285-286). Appellant was driving (Tr. 287). Officer Knittel performed a routine traffic stop⁴ and ultimately decided to issue a warning to appellant (Tr. 287-292).

Officer Knittel returned appellant's driver's license, issued the warning, and told appellant to "be careful" (Tr. 292). Appellant, who had been asked to sit in the officer's vehicle during the traffic stop, then walked back toward her vehicle; Officer Knittel remained behind (Tr. 292). As she walked back to her vehicle, however, Officer Knittel asked if he could search the vehicle and its contents (Tr. 292).⁵ Appellant said "sure" (Tr. 293, 472).

Officer Knittel then approached Wolfe and asked Wolfe to open the trunk (Tr. 293). Wolfe asked why he wanted her to open the trunk, and Officer Knittel explained that appellant had given him permission to search the vehicle and its contents (Tr. 293). Officer Knittel then asked for Wolfe's permission to search, and after additional hesitation, Wolfe granted Knittel permission to search (Tr. 293).⁶ Wolfe then opened the trunk (Tr. 294).

⁴ In his point on appeal, appellant argues that the traffic stop exceeded the bounds of a permissible traffic stop. To avoid repetition, additional facts related to the stop will be set forth below.

⁵ Officer Knittel, in light of certain events during the traffic stop, had a lingering suspicion that something was not right (Tr. 293).

⁶ Wolfe questioned why the officer wanted to search, and the officer explained that the interstates are often used to transport drugs and other illegal items (Tr. 293, 341). Officer Knittel also explained that if Wolfe would prefer that he not personally look through her things that he could bring a canine unit to the car (Tr. 342).

When the trunk opened, Officer Knittel smelled a very strong odor of raw marijuana (Tr. 297). He looked inside the trunk and saw a partially unzipped duffel bag that contained a brick of marijuana wrapped in clear plastic wrap (Tr. 297). The marijuana was in plain view (Tr. 297). Officer Knittel then arrested appellant and Wolfe, and seized four packages of marijuana (Tr. 299). Appellant asked Officer Knittel what was “going to happen,” and Officer Knittel advised her of the *Miranda* warnings (Tr. 305-306). Then, after another officer had arrived on the scene to assist Officer Knittel, appellant stated (in response to an inquiry by the second officer) that “it’s just all marijuana” (Tr. 306).

At the police station, appellant was again advised of the *Miranda* warnings, and she made additional statements (Tr. 307-314). She told the police that she had gone to Arizona to help Wolfe drive the car back to New York City (Tr. 312). She admitted, however, that she had known about the marijuana before leaving the motel where she had met Wolfe (Tr. 313). Later weighing and testing revealed that the packages contained 66.5 pounds (or 30.16 kilograms) of marijuana (Tr. 410-412, 414).⁷

At trial, which was held August 23 through August 25, 2004, appellant testified, and she offered the testimony of her fiancé, William Meyer (Tr. 421, 430). Meyer testified about appellant’s good character (Tr. 422-427). Appellant claimed that she had not known about the marijuana before flying to Arizona, and she claimed that Wolfe and the others had used

⁷ Under § 195.223.7.(1), RSMo Cum. Supp. 2004, thirty kilograms of marijuana is the threshold amount for a class B felony.

deception and scare tactics to compel her compliance in the criminal enterprise (Tr. 459-469). Appellant also admitted, however, that she knew about the marijuana as they were leaving Phoenix, Arizona; that she cooperated with Wolfe in lying to Officer Knittel when first pulled over; that she did not mention certain exculpatory details (i.e., the scare tactics used by Wolfe and others) in her written statement to the police; and that she had continued on with Wolfe to Indianapolis after her arrest and release (Tr. 493-496, 499, 511).

The jury found appellant guilty of trafficking in the second degree (Tr. 564), and appellant waived jury sentencing (Tr. 566-568). On January 14, 2005, the trial court imposed a term of five years, suspended execution of that sentence, placed appellant on probation, and ordered appellant to serve 90 days shock incarceration in the county jail (Tr. 572).

The Court of Appeals, Eastern District, affirmed appellant's conviction and sentence. *State v. Sund*, No. ED85721, slip op. at 8 (Mo.App. E.D. June 6, 2006). One judge dissented, however, and the case was ordered transferred "because of its general interest." *Id.*

ARGUMENT

I.

Because appellant was not unlawfully detained during the routine traffic stop that took place in this case, and because appellant voluntarily consented to the search of the vehicle that she was driving (after the traffic stop had concluded), the trial court did not err in admitting evidence obtained pursuant to the search of the vehicle.

Appellant contends that the trial court erred in admitting evidence seized during a search of the vehicle that she was driving (App.Sub.Br. 16). She argues that the seizure and subsequent search was unlawful “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” (App.Sub.Br. 16).

A. Preservation

Prior to trial, appellant filed a motion to suppress the evidence that was seized during a search of the vehicle that she was driving (L.F. 15). The motion contained non-specific allegations that there was an “unlawful search and seizure” and that the “search and seizure were made without authority, not based upon probable cause and without reasonable suspicion” (L.F. 15-16). The motion did not allege that the officer had seized or detained

appellant beyond the permissible scope of the lawful traffic stop (or allege that the traffic stop had been unduly lengthened by unnecessary questions not related to the traffic stop), and it did not allege that appellant's consent was involuntary (L.F. 15-17).⁸

Unlawful search and seizure claims must be specifically raised by a motion to suppress evidence before trial. *State v. Galazin*, 58 S.W.3d 500, 504-505 (Mo. banc 2001). A claim must be specific so that the basis of the claim will be known, giving the state a fair chance to respond and the trial court a fair opportunity to rule on the claim. *Id.* at 505. Failure to include specific allegations in the motion to suppress renders a claim unpreserved for appellate review. *Id.*; see *State v. Goff*, 129 S.W.3d 857, 862 (Mo. banc 2004) (where allegations at trial did not include claim that the *Terry* stop was made without reasonable suspicion, that claim was not preserved for appeal).

Here, because appellant's motion to suppress did not include the specific theories that appellant has raised on appeal, the claim was not properly preserved for appellate review. Accordingly, review, if any, is limited to plain error review. *Id.*

B. The Standard of Review

1. Plain error

Plain errors affecting substantial rights may be considered in the discretion of the court if it appears on the face of the record that the alleged error so substantially affected

⁸ These theories were argued, however, at the conclusion of the suppression hearing and included in appellant's motion for new trial (Tr. 81-86; L.F. 42).

defendant's rights that a miscarriage of justice or manifest injustice would occur if the error were not corrected. *State v. Mayes*, 63 S.W.3d 615, 624 (Mo. banc 2001). Whether manifest injustice occurred depends on the facts and circumstances of the particular case, and the defendant bears the burden of establishing manifest injustice amounting to plain error. *Id.*

2. Preserved error

If this Court determines that appellant adequately preserved this issue (in light of the arguments he made at the conclusion of the motion to suppress and in his motion for new trial), then review is for abuse of discretion. The trial court has broad discretion to admit or exclude evidence, and the appellate court will reverse only upon a showing of an abuse of discretion. *State v. Simmons*, 944 S.W.2d 165, 178 (Mo. banc 1997). A trial court abuses its discretion when a ruling is “clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration[.]” *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997).

3. Review of Ruling on Motion to Suppress

When reviewing the admission of evidence that was the subject of a motion to suppress, this Court must also examine the trial court's ruling on the motion to suppress. Appellate review of a trial court's ruling on a motion to suppress is limited to a determination of whether the trial court's ruling is supported by sufficient evidence from the record as a whole. *State v. McFall*, 991 S.W.2d 671, 673 (Mo.App. W.D. 1999). In reviewing a trial court's order on a motion to suppress, the reviewing court considers all facts and reasonable inferences in the light most favorable to the challenged order. *Id.* The appellate court must

defer to the trial court's determination as to the credibility of witnesses. *Id.* The fact that there is evidence from which the trial court could have arrived at a contrary conclusion is immaterial. *State v. Lytle*, 715 S.W.2d 910, 915-916 (Mo. banc 1986).

Additionally, “[w]hen reviewing the trial court’s overruling of a motion to suppress, this Court considers the evidence presented at both the suppression hearing and at trial to determine whether sufficient evidence exists in the record to support the trial court’s ruling.” *State v. Pike*, 162 S.W.3d 464, 472 (Mo. banc 2005). The reviewing court gives deference to the trial court’s factual findings but reviews questions of law *de novo*. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998).

C. Appellant had no Reasonable Expectation of Privacy in the Vehicle

It must first be noted that appellant – due to her lack of any reasonable expectation of privacy in the vehicle – cannot challenge the actual search of the vehicle. A person may only avail herself of a Fourth Amendment protection if she had a legitimate expectation of privacy in the place or thing searched. *State v. Sullivan*, 935 S.W.2d 747, 755 (Mo.App. S.D. 1996); *see Rakas v. Illinois*, 439 U.S. 128, 148-149 (1978). “A person does not have a legitimate expectation of privacy in a car where it is shown only that he is in possession of the car by being the driver of that car.” *State v. Toolen*, 945 S.W.2d 629, 632 (Mo.App. E.D. 1997) (the car was rented by a third person, and the defendant was not a driver on the rental agreement); *see also State v. Shoults*, 159 S.W.3d 441, 445 (Mo.App. E.D. 2005) (passenger who did not own vehicle did not have an expectation of privacy entitling him to assert a Fourth Amendment challenge to the search of the vehicle); *State v. Sullivan*, 935 S.W.2d at 755;

State v. Martin, 892 S.W.2d 348, 352 (Mo.App. W.D. 1995); *State v. Kovach*, 839 S.W.2d 303, 308 (Mo. App. S.D. 1992).

Here, to the extent that appellant is challenging the allegedly unlawful search of the vehicle, appellant did not assert or establish at trial any legitimate expectation of privacy in the trunk of the vehicle. Appellant was not the owner of the car, she was not the renter of the car, and she specifically disclaimed any expectation of privacy in the trunk of the vehicle when she testified that she had never even looked in the trunk prior to the search conducted by Officer Knittel. In short, because appellant had no legitimate expectation of privacy in the vehicle, the search of the vehicle and the seizure of the marijuana did not violate appellant's Fourth Amendment rights. *State v. Toolen*, 945 S.W.2d at 632; *State v. Sullivan*, 935 S.W.2d at 755; *State v. Kovach*, 839 S.W.2d at 308-309; *see also United States v. Wellons*, 32 F.3d 117, 119 (4th Cir. 1994) (driver of rented vehicle that is not listed on the agreement does not have a legitimate expectation of privacy in the vehicle); *United States v. Boruff*, 909 F.2d 111, 117 (5th Cir.1990) (same); *United States v. Roper*, 918 F.2d 885, 887-888 (10th Cir.1990) (same).

Appellant cites various cases for the proposition 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” (App.Sub.Br. 30-31). But the various cases appellant relies on – which have recognized that such drivers might have a legitimate expectation of privacy under certain circumstances – are not binding precedent. And even if they were binding, they are distinguishable. In *United States v. Best*, 135 F.3d 1223, 1225 (8th Cir.

1998), for example, the evidence showed that the defendant had told the officer that the person listed on the rental agreement (the defendant's friend) had rented the car for the defendant. The trial court had not made a determination whether the defendant had permission from the renter to drive the rented car; thus, the court remanded for a hearing on that issue, indicating that if the defendant had permission from the renter to drive the vehicle, then the defendant would have standing to contest the search of the car. *Id.* Here, by contrast, while appellant might have had "permission" to drive the vehicle, appellant claimed that she had been forced to transport the marijuana (without any foreknowledge, through the use of scare tactics and intimidation), and she specifically denied any privacy interest in the trunk (*see* Tr. 459-469, 472). Thus, unlike the defendant in *Best*, who may have been driving a car with the permission of a friend who had rented the car for him, appellant never asserted that she was driving the car with the type of "permission" contemplated in *Best*, and under circumstances that gave her a reasonable expectation of privacy in the trunk. To the contrary, according to appellant, she was driving the car under duress, without any control over the contents of the trunk.

These were not circumstances that society would recognize as giving rise to a reasonable expectation of privacy; rather, society would expect appellant – under the circumstances she described – to welcome intrusion by law enforcement. By contrast, cases that have found that such drivers might have a legitimate expectation of privacy, have cited very different circumstances as giving rise to that expectation. *See United States v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006) (holding that a driver who has permission from the

renter can challenge the search, but finding, in the end, that there was no evidence that the defendant in that case had permission); *United States v. Smith*, 263 F.3d 517, 586 (6th Cir. 2001) (finding that the defendant had a legitimate expectation of privacy because he had made arrangements with the rental company to rent the vehicle, the defendant's wife had then rented the vehicle, and the defendant's wife had given the defendant permission to drive the vehicle); *Parker v. State*, 182 S.W.3d 923, 927 (Tex. Crim. App. 2006) (defendant had girlfriend's express permission to drive her rental car). In short, because appellant never claimed that she had a reasonable expectation of privacy in the vehicle, and because the appellant failed to prove that she had any reasonable expectation of privacy in the vehicle, appellant cannot challenge the actual search of the vehicle.⁹

D. The Seizure of Appellant's Person was Reasonable

Appellant can, of course, challenge the initial seizure of her person, if illegal (and any illegal seizure thereafter). *State v. Shoults*, 159 S.W.3d at 445; *see also Berkemer v. McCarty*, 468 U.S. 420, 436-437 (1984) ("we have long acknowledged that 'stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of [the Fourth] Amendmen[t], even though the purpose of the stop is limited and the resulting detention quite brief.'") (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)).

"The Fourth Amendment guarantees '[t]he right of the people to be secure in their

⁹ As will be discussed below, even if appellant *did* have a reasonable expectation of privacy in the trunk of the vehicle, the search was lawful because appellant consented.

persons, houses, papers, and effects, against unreasonable searches and seizures.’” *Whren v. United States*, 517 U.S. 806, 809 (1996). “Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’ within the meaning of this provision.” *Id.* at 809-810. “An automobile stop is thus subject to the constitutional imperative that it not be ‘unreasonable’ under the circumstances.” *Id.* at 810; *see generally Illinois v. Caballes*, 542 U.S. 405, 407 (2005) (“A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.”).

1. The initial seizure of appellant’s person was reasonable

The initial traffic stop in this case was prompted by Officer Knittel’s observing an improper lane usage – a violation prohibited by § 304.015.5.(1), RSMo 2000 (Tr. 9-10, 285-286). Knittel’s observation occurred at 10:45 p.m., and it prompted some concern that the driver of the vehicle (appellant) might be intoxicated or sleeping at the wheel (Tr. 26, 28, 285). The traffic violation and Officer Knittel’s concomitant concerns were a valid basis for stopping the vehicle, and appellant does not argue otherwise. *See Whren v. United States*, 517 U.S. at 809 (“As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”); *United States v. Ozbirn*, 189 F.3d 1194, 1197-1199 (10th Cir. 1999) (finding both probable cause to believe that officer had viewed an improper lane usage and reasonable suspicion that the driver was impaired or sleepy); *see also State v. Pike*, 162 S.W.3d at 473 (“A traffic violation, however,

is not required to create reasonable suspicion to justify a stop; justification may be based on erratic or unusual operation.”); *State v. McIntosh*, 159 S.W.3d 505, 507-508 (Mo.App. S.D. 2005) (“Appellant’s operation of his vehicle, however brief, without headlights at 2:30 a.m.[, in violation of §§ 307.040 and 307.020.(9), RSMo 2000] justified the stop”); *State v. Mendoza*, 75 S.W.3d 842, 845-846 (Mo.App. S.D. 2002) (discussing cases in which “unusual operation” justified a stop).

2. The length of the traffic stop was reasonable

While she does not contest the initial stop of the vehicle, appellant argues that the *length* of the traffic stop was unreasonable due to various actions taken by Officer Knittel during the stop (App.Br. 17-22). The trial court disagreed, concluding: “Just again to summarize, it’s the Court’s finding that the detention [during the traffic stop] was not too long to begin with. It was within the range that the officer said he would do a traffic ticket” (Tr. 86). A review of the record reveals that the trial court did not clearly err, and that the length of the traffic stop was reasonable under the circumstances.

Once appellant had pulled over, Officer Knittel approached the vehicle and asked for appellant’s license, proof of insurance and vehicle registration (Tr. 11, 286). Knittel also asked a series of questions to ascertain whether appellant had been drinking or sleeping at the wheel (Tr. 28, 30-32). Knittel specifically asked if appellant had been drinking or sleeping, and he asked about where they had come from and the bad weather that they must have encountered on their way (Officer Knittel was aware of recent reports of bad weather) (Tr. 28, 30-32). These questions were designed, at least in part, to ascertain (through

observation of appellant and consideration of her answers) whether appellant was impaired or sleepy (Tr. 31-32).¹⁰

These initial questions were reasonable questions that were well within the scope of the traffic stop. “A reasonable investigation may include requesting the driver to sit in the patrol car, questioning the driver about his destination, and obtaining the driver’s license, registration and insurance information.” *State v. Hoyt*, 75 S.W.3d 879, 883 (Mo.App. W.D. 2002); *State v. Woolfolk*, 3 S.W.3d 823, 828 (Mo.App. W.D. 1999). Additionally, where an officer suspects that a driver might be driving while impaired, it is reasonable to ask questions that are designed to either confirm or dispel that suspicion. As the United States Supreme Court stated in *Berkemer v. McCarty*:

Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose “observations lead him reasonably to suspect” that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to “investigate the circumstances that

¹⁰ Officer Knittel acknowledged that his questions also had the additional purpose of checking appellant’s story (Tr. 34). But that additional purpose did not erase the reasonableness of the questions under the circumstances. In determining whether a person might be impaired, an officer should not be expected to simply accept a person’s denials; rather an officer should be allowed to ask questions that give the officer an opportunity to observe the person’s demeanor and ability to engage in unimpaired conversation.

provoke suspicion.” “[T]he stop and inquiry must be ‘reasonably related in scope to the justification for their initiation.’ “ Typically, this means that the officer 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. at 439 (footnote and citations omitted); *see generally State v. Maginnis*, 150 S.W.3d 117, 122 (Mo.App. W.D. 2004) (holding that because there was no reason to suspect intoxication, the officer should not have extended the traffic stop to ask questions unrelated to the traffic stop). Here, consistent with these principles, Officer Knittel asked a moderate number of questions and quickly dispelled his suspicion that appellant might be driving while impaired in some fashion. He did not unreasonably extend the traffic stop with such questions.

Satisfied that appellant was not impaired or sleeping at the wheel, Officer Knittel went back to his vehicle (with appellant’s Virginia driver’s license and the car rental agreement) to conduct the remainder of the traffic stop (Tr. 31-32, 35). While in his vehicle, Knittel checked appellant’s driver’s license and it came back valid (Tr. 12). He also reviewed the car rental agreement and discovered that the car had not been rented by appellant (Tr. 36). This was a concern, but assuming that the renter was probably the passenger, Knittel returned to the stopped vehicle and asked for the passenger’s driver’s license (Tr. 37, 42). The passenger, Khalila Wolfe, gave Knittel her license (Tr. 42).

Knittel then asked appellant to join him in his patrol car, and, once they had returned

to the patrol vehicle, Knittel informed her that he was going to issue a warning (Tr. 12-13). While they were in the patrol vehicle, Knittel also ran a computer check to see if appellant had any warrants for her arrest (he had some concern that appellant was not lawfully possessing the vehicle) (Tr. 13). He found none (Tr. 13). The name on the car rental agreement matched the name on Wolfe's license, and Knittel ran a computer check on Wolfe (Tr. 43, 288). The computer check of Wolfe also came back "clean" (Tr. 43, 289). Knittel also ran a check on the rental car's license plate registration (Tr. 289). And, near the conclusion of the traffic stop, Knittel filled out the warning ticket and a racial-profiling form that he had to fill out as part of the stop (Tr. 42, 56).

As Knittel conducted these various aspects of the traffic stop, he engaged appellant in conversation and asked her about some of the details of her trip, including how she got to Nevada (the rental car had a Nevada plate) and where she was heading (Tr. 13, 44-47). Appellant told the officer that she was going to Indiana to see a friend who was getting married, that she was going to help her friend pick out flowers, and that Wolfe was going to do their friend's hair for the wedding (Tr. 13-14, 290).¹¹ As they continued to converse, however, appellant said that the wedding was not going to take place for a while (Tr. 14, 49, 290). This later comment seemed inconsistent with appellant's previous statement that Wolfe

¹¹ The conversation also revealed that appellant did not know how she was going to get home from Indiana, and that appellant thought she would probably fly home from there (Tr. 46). Appellant also told Knittel about her employment (Tr. 47).

was going to do their friend's hair for the wedding, and Knittel suspected that appellant was lying (Tr. 49, 51, 291). All of this conversation or questioning occurred while Knittel was running computer checks (on the licenses and the vehicle's license plate registration) and filling out the necessary paperwork for the traffic stop (Tr. 46, 48, 56, 289).¹²

From the foregoing, it is evident that the length of the traffic stop to that point was reasonable. When Knittel first returned to his car with appellant's license and the car rental agreement, his actions were consistent with a routine traffic stop. There is no evidence that he took an inordinate amount of time in checking the validity of appellant's driver's license and the validity of the car rental agreement (the documentation that he had received in lieu of a vehicle registration). To the contrary, it appears that he promptly checked the validity of the license and promptly determined that the car had not been rented to appellant. The latter circumstance, of course, created concern because the absence of appellant's name on the rental agreement could have meant many things, some of which were criminal (e.g. that the car was stolen). It was, therefore, incumbent upon Officer Knittel (and reasonable) to ascertain whether appellant was lawfully in possession of the vehicle. Thus, when Officer

¹² Appellant points out that Officer Knittel admitted that the questioning took longer than the minute it took to fill out the warning ticket (App.Sub.Br. 20, citing Tr. 47-48). Appellant fails to mention, however, that Officer Knittel also stated that the questioning occurred while he was still waiting for the computer check, among other things, to be completed (*see* Tr. 48, 56, 289).

Knittel returned to the stopped vehicle and asked for the passenger's license, he did not unreasonably lengthen the traffic stop.

Officer Knittel's asking appellant to accompany him to his patrol vehicle (after obtaining Wolfe's license) was also reasonable. It is well settled that an officer may ask a driver to sit in his or her vehicle. *State v. Barks*, 128 S.W.3d 513, 517 (Mo. banc 2004); *State v. Shoults*, 159 S.W.3d at 445-446; *State v. Woolfolk*, 3 S.W.3d at 828. Moreover, the reasonableness of having appellant in the patrol vehicle was even greater than usual, because here, in light of the rental agreement that did not list appellant as the renter, it was possible that appellant was not lawfully in possession of the vehicle.

Appellant argues that Knittel's asking her to come back to the patrol vehicle was unreasonable because Knittel could have just written out the warning ticket and let her go (App.Sub.Br. 20).¹³ To support this argument, appellant points out that he elicited from Officer Knittel on cross-examination that his investigation of the traffic offense – the improper lane usage – was “complete” once he decided to issue the warning (App.Sub.Br.

¹³ Appellant's approach, both at trial and on appeal, has been to suggest that Officer Knittel acted unreasonably because he might have been able to shorten the traffic stop if he had acted differently at certain points during the stop. But the Fourth Amendment does not require any set formula in carrying out a traffic stop (i.e., it does not require officers to act with robotic precision in asking questions or in determining how much time to spend on any particular part of the traffic stop); rather, it merely requires that the officer act reasonably.

20, citing Tr. 39, 41). But this argument ignores the fact that Officer Knittel had not yet (1) ascertained whether appellant was lawfully possessing the car, (2) finished checking for warrants, (3) run a computer check on Wolfe's license, and (4) checked the vehicle's registration. The traffic stop, therefore, was not complete, and Officer Knittel did not unreasonably detain appellant to complete it.

The time necessary to ascertain whether appellant was lawfully in possession of a car that was not hers (and that had not been rented to her), to run computer checks (both on drivers' licenses and the vehicle's license plates), to fill out the necessary paperwork, and to fill out the warning ticket was also reasonable. Indeed, it well settled that "[d]uring a routine traffic stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation." *State v. Bradshaw*, 99 S.W.3d 73, 77 (Mo.App. E.D. 2003). In other words, while the investigation of the initial traffic violation is part of a traffic stop, a reasonable stop does not conclude until the officer has taken various other steps, including, but not limited to, the ultimate issuance of a citation (or warning).

Here there was no evidence that Knittel took an undue amount of time in completing these aspects of the traffic stop. Additionally, when Officer Knittel simultaneously engaged appellant in conversation about the purpose of her trip and her destination, these questions, too, were reasonable (i.e., they did not unreasonably extend the stop), because they were asked during the time required to complete reasonable computer checks and necessary paperwork (including the warning ticket itself). *See Muehler v. Mena*, 544 U.S. 93, 100-101 (2005) (questioning about an unrelated subject is not a seizure, and it is not unlawful unless

it unreasonably prolongs a detention and results in an “additional seizure”); *see also State v. Barks*, 128 S.W.3d at 517 (“A reasonable investigation of a traffic violation may include ‘asking for the driver’s license and registration, requesting the driver to sit in the patrol car, and asking the driver about his destination and purpose.’ “); *United States v. Gregory*, 302 F.3d 805, 809 (8th Cir. 2002) (officer’s actions were “indisputably reasonable,” because “[t]he Fourth Amendment grants an officer conducting a routine traffic stop latitude to check the driver’s identification and vehicle registration, ask the driver to step out of his vehicle and over to the patrol car, inquire into the driver’s destination and purpose for the trip, and ‘undertake similar questioning of the vehicle’s occupants to verify the information provided by the driver.’ ”).

Appellant argues, however, that the questioning in the patrol vehicle tends to prove that Officer Knittel unreasonably prolonged the traffic stop (App.Sub.Br. 20-21). He argues that the evidence shows either “(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” (App.Sub.Br. 20-21). But neither of these conclusions is warranted.

Officer Knittel did not fill out the warning in one minute and then simply hold it while he questioned appellant; rather, as set forth above, he completed various other aspects of the traffic stop, e.g., checking the vehicle’s license plate registration. Nor does it appear that the questioning hindered Officer Knittel from carrying out any aspect of the traffic stop in an expeditious manner. To the contrary, there was evidence that the entire traffic stop lasted

only fifteen minutes (Tr. 72).¹⁴ What this means in practical terms is that appellant was only in the officer's vehicle for several minutes, and that Officer Knittel promptly completed all of the various aspects of the stop.

As set forth above, the stop began with Officer Knittel pulling over appellant. Officer Knittel then approached the vehicle, asked for appellant's licence and other pertinent papers, and engaged in the brief questioning outlined above (to ascertain whether appellant was intoxicated or sleeping at the wheel). It is reasonable to conclude that this took a minute or two to accomplish. Officer Knittel then returned to his vehicle, ran a computer check on appellant's Virginia driver's license and reviewed the rental agreement. The evidence showed that this could have taken as long as four minutes (Tr. 36). Thus, to that point, five or six minutes had elapsed. Officer Knittel then returned to appellant's vehicle, requested Wolfe's license (in light of what he had learned from the rental agreement), and asked appellant to return to his vehicle. To that point, it is reasonable to conclude that about six minutes had elapsed.

Once appellant and Officer Knittel were in the patrol vehicle, Knittel ran a check of Wolfe's license. This, again, would have taken as long as four minutes (*see* Tr. 36). Officer

¹⁴ Officer Knittel testified that the stop lasted fifteen to twenty minutes, and that it was a stop of average length; thus, the trial court had a basis for concluding that the stop was merely fifteen minutes long or, as the trial stated, "the length of the stop was not inordinate . . . this one might have taken fifteen [minutes] or slightly less than twenty" (Tr. 76).

Knittel also ran a check on the rental car's license plate registration. This, too, could have taken as long as four minutes. Thus, in simply verifying that appellant and Wolfe were lawfully in possession of the rental car, seven or eight minutes could have easily elapsed. It was, of course, during this time that Officer Knittel engaged appellant in conversation and took a minute or two to fill out the warning ticket and the racial profiling form that he had to fill out as part of the stop. In short, the several minutes that elapsed while in the patrol vehicle were reasonable, and it cannot be said that it was Officer Knittel's questioning that prolonged the stop.

When Knittel had completed the warning ticket, he got out of his patrol vehicle and went to the rental car to return Wolfe's license (Tr. 58, 60). Knittel briefly talked to Wolfe about the rental agreement, asked Wolfe where they were going (Wolfe said "Indiana"), returned Wolfe's license, and then motioned for appellant to get out of the patrol vehicle (Tr. 60-61). It is reasonable to infer that this could have taken about a minute. Knittel then returned appellant's driver's license and other papers, gave appellant the warning ticket, and told appellant to "be careful" (Tr. 61-62). Appellant then turned and walked toward the rental vehicle; the traffic stop was complete, and appellant was free to go (Tr. 61, 292) Again, the entire traffic stop had lasted about fifteen minutes, or, in other words, it was a routine stop of average length (Tr. 72).

From the foregoing it is evident that Officer Knittel did not unreasonably detain appellant during the traffic stop. Having appellant wait in the vehicle while he returned Wolfe's license and spoke with her briefly was not unreasonable. Indeed, although Knittel

had determined that appellant and Wolfe's possession of the rental car was lawful (and although he had no other indication of criminal activity), Knittel had reason to believe that appellant had lied to him during their conversation in the patrol vehicle (Tr. 49, 51, 291).¹⁵ His belief or "hunch" that something was not right was probably not grounds to engage in any prolonged detention of appellant (e.g., to obtain the assistance of a canine unit), but it certainly made reasonable his briefly talking to Wolfe, his other detainee, out of appellant's presence (if only to ascertain that everything was all right).¹⁶ Moreover, an officer can reasonably question the other occupants of a vehicle to verify information provided by the driver. *United States v. Gregory*, 302 F.3d at 809 ("The Fourth Amendment grants an officer conducting a routine traffic stop latitude to check the driver's identification and vehicle registration, ask the driver to step out of his vehicle and over to the patrol car, inquire into the driver's destination and purpose for the trip, and 'undertake similar questioning of the vehicle's occupants to verify the information provided by the driver.'").

¹⁵ The fact that there was an allegedly innocent explanation for what appeared to be an inconsistency in appellant's story (*see* App.Sub.Br. 23) is irrelevant. What matters is the objective fact (the apparent inconsistency in appellant's story) that existed at the time Officer Knittel became suspicious of the lie. Additionally, it must be noted that Knittel ultimately *did not* detain appellant based on this belief; rather, he ended the traffic stop and then asked appellant for consent, as will be discussed below (Tr. 16, 61-64, 292-293).

¹⁶ Appellant admitted at trial that she had lied to Knittel (Tr. 470-471).

Additionally, the continued “seizure” of appellant’s person at that point (when Knittel was talking to Wolfe) was not unreasonable, for even if Officer Knittel had *not* directed appellant to wait in the patrol vehicle (and had given her the warning ticket immediately after he finished writing it), appellant still would have had to wait for Officer Knittel to talk to Wolfe and return Wolfe’s license. Appellant presumably would not have simply driven away without allowing Wolfe to get her license back; thus, appellant’s continued “seizure” at that point was wholly incidental to the remainder of the traffic stop (as it pertained to Wolfe). The traffic stop, inasmuch as it involved Wolfe (the renter of the vehicle), simply was not over until Knittel also finished his interaction with Wolfe. Additionally, even if appellant should not have been detained by further conversation with Wolfe (which respondent does not concede), any unwarranted seizure at that point was wholly *de minimis*. *See generally United States v. Linkous*, 285 F.3d 716, 721 (8th Cir. 2002) (a seven-minute delay after the conclusion of the traffic stop to allow a dog sniff did not violate the Fourth Amendment, because any intrusion was *de minimis*).

In short, the approximately fifteen (or even close to twenty) minutes that appellant was detained was reasonable under the Fourth Amendment. Officer Knittel’s actions were wholly consistent with a routine traffic stop, and he did not unreasonably detain appellant for the period of time necessary to complete the stop. The Fourth Amendment does not require that a traffic stop proceed like a timed event where each and every action is allowable only within certain robotic specifications. To the contrary, the Fourth Amendment requires merely that people not be subjected “unreasonable” searches and seizures. Thus, it has often been

observed that “[t]he touchstone of our analysis under the Fourth Amendment is always ‘the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security[.]’ ” *Maryland v. Wilson*, 519 U.S. 408, 411 (1997). And, here, Officer Knittel’s actions were reasonable.

E. Appellant Voluntarily Consented to the Search After the Traffic Stop

1. The encounter after the traffic stop was consensual

Citing *State v. Granado*, 148 S.W.3d 309 (Mo. banc 2004); *State v. Sanchez*, 178 S.W.3d 549 (Mo.App. W.D. 2005); and *State v. Dickerson*, 172 S.W.3d 818 (Mo.App. E.D. 2005), appellant next argues that after the traffic stop was completed, any additional seizure “require[s] new and articulable suspicion that [the defendant has committed a crime]” (App.Sub.Br. 23). But appellant’s reliance on those cases for that proposition is misplaced, for Officer Knittel did not detain appellant based on a reasonable suspicion that criminal activity was afoot (i.e., Knittel did not continue the traffic stop with a *Terry* stop). Rather, Knittel sent appellant on her way, and then he sought to obtain her consent to search as part of a voluntary encounter. And, as this Court has recognized, further questioning during a consensual encounter is permissible. *See State v. Granado*, 148 S.W.3d at 312 (“Even if 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. So long as the person is free to leave, the officer can talk to him and is free to ask whether he has contraband on his person, or in his car, or in his residence.”); *State v. Shoults*, 159 S.W.3d at 446.

Of course, as this Court explained in *Granado*: “This does not mean that an officer is free to involuntarily detain a driver without reasonable suspicion under the guise of simply engaging in a voluntary conversation.” 148 S.W.3d at 312. To determine whether an encounter was consensual or not, “A court must consider all 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.” *Id.*

Here, the trial court, in ruling on appellant’s motion to suppress, determined that the encounter after the traffic stop was consensual. The trial court stated:

there’s another case here, *State v. Martin*, at 79 S.W.3d 912, where the opinion sets out the law that even if 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. So long as a reasonable person would feel free to disregard the police and go about his business, it’s consensual.

That’s what the Court feels happened here.

(Tr. 87). The trial court did not clearly err in this determination.

As the record shows, the traffic stop in this case was complete once Officer Knittel gave appellant the warning and returned her license (this occurred after Knittel had also returned Wolfe’s personal documents to her). At that point, as the record shows, appellant was free to go and she in fact turned and walked away from Officer Knittel and toward her

vehicle (Tr. 16, 292). Then, as appellant walked away, Knittel asked, “may I search your vehicle and all the contents in it” (Tr. 16, 292). Appellant turned and said, “Yes, sure” (Tr. 16, 64, 293, 472). With regard to her consent, appellant freely admitted at trial that she had consented to the search of the vehicle (Tr. 472). She offered no testimony that her consent had been involuntary, that she had felt unable to refuse, that she had felt that she was not free to leave, or that she had withdrawn her consent (Tr. 472).

Accordingly, under the circumstances of this case, the trial court did not clearly err in determining that the interaction after the traffic stop was consensual. “Although no litmus test exists for determining whether continued questioning is consensual or constitutes a seizure of the person questioned, our courts have found guidance in *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, *reh’g denied*, 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1138 (1980)[.]” *State v. Shoults*, 159 S.W.3d at 446. “*Mendenhall* held there may be a seizure of the person when there is the ‘threatening presence’ of multiple officers, if the officer displayed a weapon, whether the officer touched the suspect, or if the officer used ‘language or tone of voice indicating that compliance with the officer’s request might be compelled.’ “ *Id.* “An officer does not need to inform a suspect that he or she is free to leave the scene in order for the encounter to become consensual.” *Id.* “However, that option must be apparent from the circumstances.” *Id.*

Here, at the conclusion of the traffic stop, there was no threatening presence of multiple officers (there was only one officer), the officer did not display his weapon (*see* Tr. 12-13), the officer did not touch appellant, and the officer did not use language or a tone of

voice indicating that compliance with the officer's request would be compelled (*see* Tr. 18). In fact, to the contrary, Officer Knittel had returned all of appellant's things, told her to "be careful," and allowed her to walk away. He then asked a single question, using non-authoritative terms ("may I search"), to which appellant immediately responded by granting consent to search the vehicle.¹⁷ A reasonable person in these circumstances would have known that she or he was free to go when this question was asked, and, accordingly, the trial court did not clearly err in determining that this subsequent encounter was consensual. *See id.* (a consensual encounter occurred where one of three officers was standing outside car with driver, and the officer did not display her weapon, touch the driver, or use coercive language or tone of voice).

Appellant claims otherwise, and he asserts that "After issuing the warning ticket, the police officer did not tell Ms Sund that she was free to go" (App.Sub.Br. 26). He also asserts that "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" (App.Sub.Br. 26). But these assertions are not accurate.

¹⁷ While appellant's consent was not necessarily to permit the search (inasmuch as appellant had no reasonable expectation of privacy in the vehicle), it showed that she had consented to the prolonged detention, i.e., it showed that the encounter after the traffic stop was consensual.

As the record shows, Knittel effectively informed appellant that she was free to leave with his actions: he returned all of her personal items, issued a warning, told her to “be careful,” and sent her on her way (Tr. 16, 292). It was then, as appellant walked away (and when the traffic stop was clearly over), that Knittel posed a single question and obtained appellant’s immediate consent to search the vehicle and prolong the encounter (Tr. 16, 64, 293, 472). There was no lecture about drug trafficking before appellant consented, there was no accusation of lying, and there was no threat to detain the vehicle until a canine unit could be brought to the scene. To the contrary, appellant simply responded, “Yes, sure” (Tr. 16, 64, 293, 472).¹⁸ Again, under these circumstances, where appellant had already been allowed to leave, a reasonable person would have known that she or he was free to decline the officer’s request and continue on her way.

Citing *State v. Granado*, *State v. Dickerson*, and *State v. Barks*, appellant argues that the encounter after the traffic stop was not consensual (App.Sub.Br. 26-27). But appellant’s reliance upon those cases is misplaced, for in each of those cases, the totality of the circumstances showed that the subsequent encounter was not consensual. In *Granado*, for example, at the conclusion of the traffic stop, the defendant was told that he was free to go. 148 S.W.3d at 310. The defendant exited the patrol car and walked back to his vehicle, but

¹⁸ It is, of course, true, that Knittel made various statements to Wolfe, when Wolfe balked at opening the trunk, but these later statements simply had no effect upon appellant’s prior consent.

just before the defendant reached his truck, the police officer stepped out of his patrol car, informed the defendant of discrepancies in his and his cousin's statements, and asked for permission to search the truck and its contents. *Id.* Consent was denied. *Id.* The officer "said that that was fine, that was Granado's right, that the vehicle could not be moved, and that a K-9 unit would be called to come do a sniff of the vehicle." *Id.* The officer "also said that although Granado was still free to go, he could wait in the patrol car during the search." *Id.* The officer also asked Granado's cousin for permission to search the vehicle, but Granado's cousin deferred to Granado. *Id.* Eventually, the K-9 unit arrived, and drugs were found in the vehicle. *Id.* On appeal, under these facts, this Court determined that the detention after the traffic stop had not been a consensual encounter. *Id.* at 313.

But the facts of the present case are quite different. Here, when the officer asked for consent, he did not first advise appellant that there were discrepancies between her and Wolfe's statements (a circumstance that would have informed a reasonable person that the officer was expecting some sort of explanation). Additionally, unlike the defendant in *Granado*, who *did not* give the officer consent to search his vehicle, appellant readily and immediately granted consent. Thus, unlike the defendant in *Granado*, appellant was not subjected to an indefinite detention after she refused to consent. Indeed, appellant readily gave her consent without any pressure or additional detention.¹⁹ *Cf. State v. Sanchez*, 178

¹⁹ It cannot be said that Knittel's single question was an "additional seizure" under the Fourth Amendment, for, ordinarily, " . . . mere police questioning does not constitute a

S.W.3d at 552 (officer renewed questioning after conclusion of the traffic stop, the driver refused consent, the officer told the driver to “stand here for a minute,” the officer then questioned the defendant (who was a passenger), the defendant would not consent to a search of his possessions, the officer told the defendant to “Stay right here for me,” and the officer then used a drug dog to detect and ultimately find drugs); *State v. Dickerson*, 172 S.W.3d at 819 (After the traffic stop had ended, and after appellant and the driver started to get back in their car, the officer renewed questioning by asking them if they had anything illegal in the car. The men said they had nothing illegal and they would not consent to a search of the vehicle. The officer then walked a drug dog around the car and ultimately found marijuana in the trunk.); *State v. Barks*, 128 S.W.3d at 514-517 (after giving the traffic citation to the driver, the officer prolonged the detention by standing by the driver’s window, questioning the driver at length, and, after only limited and reluctant cooperation, eventually discovered

seizure.’ ” *See Muehler v. Mena*, 544 U.S. at 100-101 (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). But even if Knittel’s single question is deemed an “additional seizure,” any seizure in the moment it took appellant to grant her consent was a wholly *de minimis* intrusion that should not give rise to the application of the exclusionary rule. *See United States v. Linkous*, 285 F.3d at 721 (a seven-minute delay after the conclusion of the traffic stop to allow a dog sniff did not violate the Fourth Amendment, because any intrusion was *de minimis*); *see generally Maryland v. Wilson*, 519 U.S. at 412-413 (the additional seizure of ordering a passenger out of a stopped car is *de minimis*).

contraband); *State v. Woolfolk*, 3 S.W.3d at 830 (after the trooper issued a warning to the driver, the trooper prolonged the detention by questioning the driver, and, after several minutes of the driver's refusals and questions, and after threatening to detain the driver until a canine unit could arrive, the trooper obtained the driver's consent to search his vehicle); *cf. also State v. Taber*, 73 S.W.3d 699, 701-703 (Mo.App. W.D. 2002) (after the officer discovered that there was no basis for the initial traffic stop, the officer nevertheless prolonged the detention by requesting the driver's licence and registration and carrying out a full-blown traffic stop that resulted in an arrest and the discovery of contraband).

Appellant characterizes Knittel's actions in this case as a "trap." He argues:

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 this 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

(App.Sub.Br. 27). But appellant's characterization of Knittel's actions should be rejected for two reasons: first, it attempts to characterize Knittel as acting in bad faith, when, in fact, it is apparent that Knittel was striving to lawfully carry out his duties; and second, it effectively ignores the fact that this Court has acknowledged that a consensual encounter can follow a traffic stop.

Of course, as indicated above, an officer cannot create an "artificial" consensual encounter; rather, the subsequent encounter must, in fact, be consensual. In other words,

following a valid traffic stop, if the state can prove that a subsequent encounter was, in fact, consensual, then it cannot be said that the defendant was illegally seized. And that is what the state did here: it proved that Officer Knittel released appellant at the conclusion of a lawful traffic stop, and that Officer Knittel then engaged appellant in a consensual encounter. It simply is not an improper tactic to create a “truly consensual encounter.”²⁰

2. Appellant’s consent was voluntary

As stated above, the trial court also concluded that appellant’s consent was voluntary (Tr. 86-87). This, too, was not clearly erroneous. “If the person has not been unlawfully seized, an officer may ask for permission to search; if consent is given without coercion, the subsequent search is not prohibited by the Fourth and Fourteenth Amendments.” *State v. Shoults*, 159 S.W.3d at 446. “The state has the burden of showing that consent was freely and voluntarily given.” *Id.* “It does not satisfy this burden merely by showing submission to lawful authority.” *Id.* “ ‘Consent is freely and voluntarily given if, considering the totality of all the surrounding circumstances, . . . the objective observer would conclude that the person giving consent made a free and unconstrained choice to do so.’ “ *Id.*

²⁰ Notably, under the facts of this case, it appears that the termination of the traffic stop (and the initiation of a consensual encounter) may have been the only lawful option that Officer Knittel had (inasmuch as he did not have reasonable suspicion to prolong the stop). Thus, regardless of whether Officer Knittel believed this action to be a “tactic,” it was lawful conduct under the Fourth Amendment.

“This determination involves a consideration of ‘a number of factors including, but not limited to, the number of officers present, the degree to which they emphasized their authority, whether weapons were displayed, whether the person was already in custody, whether there was any fraud on the part of the officers, and the evidence of what was said and done by the person consenting.’ “ *Id.* “The officer is not required to tell the suspect he or she can refuse to give consent to search.” *Id.*

Here, as discussed above, the initial seizure (the traffic stop) was lawful. After the traffic stop had been completed, appellant was given her things and allowed to walk away toward her vehicle. Officer Knittel was the only officer present, he did not emphasize his authority, he did not display his weapon, and he did not use any fraud to obtain appellant’s consent. Instead, as appellant walked away, Officer Knittel simply asked if he could search the vehicle and its contents. Appellant, who testified at trial and did not suggest in any fashion that she had felt coerced, responded by saying, “Yes, sure.” These facts support the trial court’s ruling that appellant’s consent was voluntary.

Appellant does not dispute these basic facts surrounding the consent, but she argues that “Although [she] initially consented to the search, her consent was not voluntary in the first instance and her subsequent actions demonstrated that she withdrew that consent (App.Sub.Br. 32). She points out that she did not open the trunk, that Wolfe did not immediately open the trunk, and that Wolfe only opened the trunk after Officer Knittel stated that he could have a drug dog come to the scene (App.Sub.Br. 32).

But appellant’s arguments are not well taken. Appellant was never asked to open the

trunk, and she never withdrew her consent to the search of the car or trunk. As the record shows, appellant readily granted her consent before Officer Knittel ever asked that the trunk be opened (Tr. 16, 293, 472). Then, when Knittel asked appellant to ask Wolfe to open the trunk, appellant readily complied (Tr. 293, 336, 472). It was at that point that *Wolfe* (not appellant) hesitated before opening the trunk and asked Officer Knittel what was going on and why he wanted to look in the trunk (Tr. 17, 65, 293). It was also then that Officer Knittel told Wolfe that if she did not want him to go through her things personally, that he could have a drug dog come and sniff (Tr. 17, 69, 342). Wolfe then opened the trunk (Tr. 294).

As is evident, appellant never once indicated by word or deed that she had withdrawn her consent. To the contrary, she readily agreed to the search and readily asked Wolfe to open the trunk. To the extent that Wolfe's subsequent hesitation might have indicated that *she* did not want to consent to the search of the trunk, Wolfe's hesitation is irrelevant. Only appellant's consent mattered, and appellant cannot now avail herself of some other person's attempt to protect that other person's Fourth Amendment rights.²¹

Lastly, appellant argues that her consent was "tainted by her prior unlawful detention" (App.Sub.Br. 34). But inasmuch as the traffic stop was lawful, appellant's arguments are not

²¹ Citing *Woolfolk*, appellant argues that Officer Knittel's threat of bringing a canine unit coerced her consent (App.Sub.Br. 33). But this argument is premised upon a misstatement of the facts. As set forth above, the comment about bringing a canine was made to Wolfe, well after appellant had consented to a search of the vehicle.

well taken. This point should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, the signature block, and appendix, contains 10,891 words (as determined by WordPerfect 9 software);

(2) That the floppy disk filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

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