No. SC87081

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

OSCAR BARRERAS SANCHEZ
a.k.a. ANTONIO LOPEZ,

Appellant.

Appeal from the Circuit Court of Saline County, Missouri
15th Judicial Circuit, Division 4
Honorable Dennis A. Rolf, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from convictions for drug trafficking in the first degree, ' 195.222, RSMo 2000, and possession of a controlled substance, ' 195.202, RSMo 2000, for which appellant was sentenced as a persistent offender to consecutive terms of thirty years and fifteen years, respectively, in the custody of the Department of Corrections. This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction lies in the Missouri Court of Appeals, Western District. Article V, ' 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Oscar Barreras Sanchez, was charged by indictment with first-degree drug trafficking and possession of a controlled substance (L.F. 6-7). A substitute indictment was later filed charging appellant as a persistent offender (L.F. 22-24). Following a waiver of jury trial by appellant, this cause went to bench trial on December 10, 2003, in the Circuit Court of Saline County, the Honorable Dennis A. Rolf presiding (L.F. 4, 15; Tr. 124).

The sufficiency of the evidence is not at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: In May 2003, Tara Hencz, appellant=s accomplice, met appellant at her boyfriend=s house in Montana (Tr. 148-149). Her boyfriend was a drug dealer, and appellant was his drug supplier (Tr. 152-153). Soon thereafter, Hencz needed to make some money, so appellant agreed to pay her to drive her car to help him transport marijuana from Montana to Minnesota (Tr. 154-157). In June 2003, they traveled from Montana to Minneapolis, following an associate of appellant, Jade Raitt, who carried three suitcases, each containing a bundle of compressed marijuana, in his vehicle (Tr. 157-163). They went to Raitt=s mother=s house in Minneapolis for three days (Tr. 163). At the house, Hencz saw not only the three bundles of marijuana, but also another bundle of marijuana and a bag of methamphetamine that appellant was carrying in a duffel bag (Tr. 172-175, 195-196).

After the three days, appellant decided that he and Hencz would take the marijuana to St. Louis to be sold, as he had contacts in St. Louis (Tr. 178-179, 193-194).

Appellant loaded all of the marijuana and the methamphetamine into Hencz=s car (Tr. 180, 183-184). The two traveled from Minneapolis to Kansas City on July 2, but decided to wait until after the Fourth of July to deliver the drugs to St. Louis (Tr. 185-189). While in Kansas City, they agreed to say that they were going to St. Louis to visit Hencz=s aunt, even though she had no aunt in St. Louis, if they were pulled over (Tr. 147, 194). The two left for St. Louis on July 5, 2003 (Tr. 194-195).

At around 11:30 a.m. on July 5, Missouri State Highway Patrol Trooper Russell Seaton was standing on the shoulder of eastbound I-70 in Saline County speaking with Highway Patrol Corporal Gary Swartz when Hencz=s white 1993 Pontiac Grand Am drove by (Tr. 242, 323). The car was not violating any law at the time, and Seaton only noticed it because traffic was light and it was the only car around at that time (Tr. 242-243). He simply noticed it was a white car with black tinted windows (Tr. 243). Soon thereafter, Seaton got into his patrol car and resumed patrolling (Tr. 243). He eventually caught up to the Grand Am, which was now following a tractor-trailer at a dangerously close distance of not more than two car lengths, even though there was no other traffic around the two vehicles (Tr. 243-244). After the Grand Am followed the tractor-trailer at that distance for more than a quarter mile, Seaton activated his emergency equipment and stopped the car for following too closely (Tr. 194-195, 244-246).

Seaton approached the car on the passenger=s side and spoke with Hencz, the driver, who produced her Montana license, insurance, and registration paperwork (Tr. 250-251). He noticed that she was very nervous, and her hands were visibly trembling at

that time, which was not common for people who are typically pulled over for a traffic offense (Tr. 251, 256). He asked her to step back to the rear of the car, where he spoke to her about the purpose for her trip and about appellant (Tr. 252-255). Hencz said she was going to St. Louis to visit her aunt, which was not true, and identified appellant as A[m]y friend Anthony@ (Tr. 202, 254-256). She could not provide a last name for appellant, nor could she say where her aunt lived or where in St. Louis she was going (Tr. 255-256). Hencz=s level of nervousness remained higher than that for a Anormal average everyday citizen,@ as she was visibly shaking and her voice was shaking (Tr. 256). The level of nervousness continued to rise throughout the duration of the stop, which was also Aabsolutely@ unusual (Tr. 256). Hencz was nervous because of the marijuana in the car (Tr. 203-206). Seaton became suspicious, as Hencz had traveled such a long distance without knowing where she was going or the last name of her passenger, which was Aodd@ and Asignificant@ to him (Tr. 257).

Seaton then went to the passenger side of the car again and asked appellant=s name (Tr. 257). Appellant said his name was Antonio Lopez and gave Seaton an AArizona identification card@ (Tr. 258). Seaton was familiar with identification from all over the country, and several things about the purported identification, including the raised and unevenly placed picture, typeset where it was not supposed to be, unusual lamination, the lack of a holograph, and uneven rounded edges, made Seaton believe the identification was a fake (Tr. 259-260). Seaton asked appellant where they were going, and appellant said they were going to St. Louis to visit a friend, then quickly changed that

to say they were visiting Hencz=s aunt (Tr. 261). Appellant also could not say where in St. Louis they were heading (Tr. 261). Due to the false identification card and inconsistent stories, Seaton became more suspicious (Tr. 263-265).

Seaton and Hencz went to the patrol car, where Seaton ran a computer check on Hencz and on appellant=s false identification (Tr. 266-267). While doing so, Seaton asked Hencz more questions about her trip, which Hencz was very evasive in answering (Tr. 267). She said she had not spoken to her aunt in several days and did not know her phone number, but claimed that it was Ain the car somewhere,@ which was a lie (Tr. 203, 267). She said she was just friends with appellant, which was inconsistent with information given by appellant (Tr. 268).

At that point, Seaton contacted Swartz to come to the scene for backup (Tr. 269, 323). Swartz arrived within minutes, and Seaton advised him of the inconsistent stories and showed him the identification card, which Swartz also believed was fake (Tr. 269, 325-326). The two talked briefly to Hencz again, then Swartz went to speak with appellant (Tr.269-270). Swartz asked appellant if the identification was fake, and appellant replied that he had been using it for two years (Tr. 328). Appellant also told Swartz that he had been living in Montana for five months, that Hencz was his girlfriend and that he had been living with her (Tr. 328). He said that the two had been in Kansas City and had gone to Oceans of Fun (which he called AOceans and Stuff@) and were now on their way to St. Louis (Tr. 328). Swartz then spoke with Hencz, who said appellant had only been in Montana for 1-2 weeks and that she did not know where he had been

staying while there (Tr. 330). Hencz continued to grow more nervous: she became very rigid and tense, she started hugging herself, and her heart pounded so fast that her abdomen actually moved with the pulse (Tr. 272).

Eventually, Seaton was advised that the information contained on the identification cards was on file, so Seaton told Hencz that she was free to go (Tr. 273). She walked back to her car, reaching the rear left-quarter panel when Seaton got out of his car and asked her if he could ask her a couple more questions (Tr. 274). Hencz said Asure@ and came back to the front of the patrol car (Tr. 274). He asked if she was aware of the drug problem in the country, and she said yes (Tr. 274-275). He then asked if she knew people transported narcotics across the country everyday in all types of vehicles (Tr. 275). She said, ANo, I didn=t,@ breaking out in goose bumps when she answered, even though it was over 100 degrees outside (Tr. 275). Seaton then said he was not accusing her of any wrongdoing, but he was suspicious, and asked for consent to search the car for anything illegal (Tr. 276). She did not give consent to search (Tr. 276). Seaton then asked Swartz to use Yote, the drug detection dog that he handled, to sniff the vehicle (Tr. 276, 320, 333-334). Swartz took Yote around the car, and Yote signaled on the right hand side of the trunk by scratching, biting, and clawing on it (Tr. 277). Based on the indication, Seaton advised Hencz that he was going to search the car and retrieved the keys from the ignition (Tr. 279).

Upon opening the trunk, Seaton saw the three suitcases containing the bundles of marijuana (Tr. 166-171, 280). Seaton opened one of the bags and found the large

bundle of marijuana wrapped in plastic wrap (Tr. 281). Seaton found similar bundles in each of the suitcases (Tr. 282). The troopers then arrested Hencz and appellant, and had the car towed to a tow yard, following the car there to finish the search (Tr. 282-283).

During the rest of the search, the troopers found the other bundle of marijuana and the methamphetamine, as well as two electronic gram scales, baggies, and a small bag containing four rounds of 9-mm ammunition and an empty magazine , in appellant=s duffel bag (Tr. 172-175, 195-196, 285-291). A black 9-mm high-point pistol was found underneath the front passenger seat (Tr. 291-292). Upon finding the pistol, Seaton searched appellant for weapons, telling appellant that he wanted to make sure he did not have a gun and that he Awanted to go home that night@ (Tr. 293-294). Appellant replied, AYou=re going to go home@ (Tr. 294).

After appellant and Hencz were taken to the jail, appellant was fingerprinted, and Seaton faxed the prints to the FBI=s fingerprint identification unit (Tr. 294). The FBI used the prints to discover appellant=s real name (Tr. 295).

Testing on the substances found in the car revealed they were indeed marijuana and methamphetamine (Tr. 346, 350-351). The marijuana from each of the bundles found in the three suitcases weighed about 12 kilograms each, for a total of around 36 kilograms, and the methamphetamine weighed 1.48 grams (Tr. 344, 348-349).

Appellant presented no evidence in his defense (Tr. 356).

At the close of the evidence and arguments of counsel, appellant was found guilty on both charges (Tr. 365). The court sentenced appellant as a persistent offender to

consecutive terms of thirty years and fifteen years, respectively, in the custody of the Department of Corrections (L.F. 29-30; Tr. 392). This appeal follows.

ARGUMENT

The trial court did not err in overruling appellant=s motion to suppress and in admitting evidence of marijuana and methamphetamine found in the search of the car in which appellant was a passenger because the search was not based on an illegal detention in that objectively reasonable suspicion arose during the investigation of the traffic offense for which appellant=s accomplice Tara Hencz had been pulled over which justified the continued detention of Hencz and appellant and the trooper=s statement that Hencz was Afree to go@ after giving her a warning for the traffic offense did not prevent the trooper from acting on the objectively reasonable suspicion arising during the traffic stop.

Further, even if the trial court could not solely rely on facts discovered prior to the purported end of the traffic stop, reversal was not required, as an additional factor justifying reasonable suspicion arose during the subsequent consensual encounter between Hencz and the trooper, and any infringement on appellant=s liberty from the troopers conducting a constitutionally-permissible drug dog sniff was *de minimis*.

Appellant claims that the trial court erred in overruling his motion to suppress and in

admitting the evidence found in the search of the car following the dog sniff because the sniff was conducted during an illegal seizure (App.Br. 21). First, appellant argues that the troopers had no reasonable suspicion arising during the stop to extend the

investigation to conduct the dog sniff (App.Br. 30-35). Second, appellant argues that, even if there was reasonable suspicion, Athose suspicions were exhausted and dispelled during the stop,@ as Hencz was told she was free to go, thus ending the detention, and there was not a Anew and independent basis@ for new reasonable suspicion justifying another detention (App.Br. 36).

A. Facts

Appellant filed a pretrial motion to suppress the evidence found in the search of Hencz=s car, claiming, *inter alia*, that the search was the result of an illegal detention (L.F. 11-12). A hearing was held on the motion, at which Trooper Seaton and Corporal Swartz testified (Tr. 6-111).[1] The trial court set out findings denying the motion, finding that the troopers had reasonable suspicion to extend the stop, and that the subsequent dog sniff provided probable cause (L.F. 16-21). Appellant renewed his motion prior to trial, and the court considered the matter with the evidence at trial (Tr. 135-144). At the close of the evidence, the trial court again overruled the motion, finding that reasonable suspicion arose from the onset of the stop and justified an extended detention (Tr. 354-

[1]The substance of this testimony was nearly identical to that given at trial, which is set out in detail in respondent=s Statement of Facts, supra. In light of the duplicative nature of the testimony, respondent will not set out the substance of the entire testimony again, but will cite to such facts from both the hearing and trial as necessary to support respondent=s argument.

356).

B. Standard of Review

In reviewing the trial court=s ruling on a motion to suppress, the appellate court is limited to determining whether the trial court=s ruling was supported by substantial evidence. State v. Edwards, 116 S.W.3d 511, 530 (Mo. banc), cert. denied 540 U.S. 1186 (2003). All evidence elicited at both the suppression hearing and trial, and the reasonable inferences rising therefrom, are to be viewed in the light most favorable to the trial court=s ruling. Id. The appellate court defers to the trial court=s finding of facts and credibility determinations, and reviews questions of law *de novo*. State v. Rousan, 961 S.W.2d 831, 845 (Mo. banc), cert. denied 524 U.S. 961 (1998). The trial court=s determination on a motion to suppress will only be reversed if clearly erroneous. Id. AIf the ruling is plausible, in light of the entire record, an appellate court will not reverse, even if convinced that it would have weighed the evidence differently.@ City of Springfield v. Hampton, 150 S.W.3d 322, 325 (Mo.App., S.D. 2004), citing State v. Milliorn, 794 S.W.2d 181, 184 (Mo. banc 1990).

C. Analysis

1. Reasonable Suspicion Was Obtained During the Investigation of the Traffic Offense

a. Initial Traffic Stop Proper

The stop of a motor vehicle and detention of its occupants is a seizure for purposes of the Fourth Amendment. State v. Logan, 914 S.W.2d 806, 808 (Mo. App., W.D. 1995). However, there is a sufficient basis for such a stop where the officer has

an articulable suspicion that the driver has committed or is committing a traffic offense. State v. England, 92 S.W.3d 335, 339 (Mo. App., W.D. 2002). A routine traffic stop is based upon violation of state traffic laws is a justifiable seizure under the Fourth Amendment. Id. Further, a traffic stop may be justified by observation of conduct which may not itself constitute a traffic violation but merely an unusual operation. State v. Peterson, 964 S.W.2d 854, 856 (Mo.App., S.D. 1998); State v. Bunts, 867 S.W.2d 277, 280 (Mo.App., S.D. 1993). Here, Seaton observed Hencz following the tractor-trailer too closely, a violation of state law as well as unusual operation in light of the fact that no other traffic was around the two vehicles on the highway (Tr. 15, 243-244). ' 304.017, RSMo 2000. Therefore, the initial stop of the car was proper.

Once Trooper Seaton justifiably stopped appellant for a traffic offense, he was permitted to detain the vehicle to conduct to reasonable investigation of that offense. State v. Hoyt, 75 S.W.3d 879, 883 (Mo. App., W.D. 2002). A reasonable investigation of a traffic offense may include requesting the driver to sit in the patrol car, questioning the driver about her destination, and obtaining the driver=s license, registration, and insurance information. Id. An officer may also check the identification of a passenger and investigate that identification, such as checking for outstanding warrants. State v. Stacy. 121 S.W.3d 328, 332 (Mo.App., W.D. 2003). All of these things are exactly what Seaton did in this investigation**C**he retrieved Hencz=s license, registration, and insurance information, as well as appellant=s identification, had Hencz come back to the patrol car to examine her about her trip, and checked not only her driving record, but checked

appellant=s Aidentification@ for a driving record, which did not exist, and for a criminal history (Tr. 24-39). Thus, his initial investigation of the traffic offense was proper.

b. Further Detention was Justified By Reasonable Suspicion

Once the investigation of a traffic stop is concluded, the detainee must be allowed to proceed unless specific, articulable facts, obtained during the time necessary to investigate the stop, create an objectively reasonable suspicion that the individual is involved in criminal activity. State v. Barks, 128 S.W.3d 513, 517 (Mo. banc 2004); State v. Watkins, 73 S.W.3d 881, 883 (Mo. App., E.D. 2002); State v. Day, 87 S.W.3d 51, 54 (Mo.App., S.D. 2002); Hoyt, 75 S.W.3d at 883. Here, the troopers obtained several specific articulable facts that gave rise to objectively reasonable suspicion of criminal activity. First, Hencz and appellant made several inconsistent or otherwise unusual statements about their trip and their relationship. Hencz had said that she and appellant were Ajust friends,@ whereas appellant said she was his girlfriend (Tr. 28, 30, 42, 268). Hencz said that appellant had been in Montana for a week or two and had been staying in a hotel, while appellant said he had been there for five months and was living with Hencz (Tr. 42, 328). Hencz said that she was a housekeeper, while appellant said she was a bartender (Tr. 42). Hencz said that they had made no stops in Kansas City, arriving the night before, going straight to bed, then getting up and leaving for St. Louis, while appellant said they went to Oceans of Fun in Kansas City (Tr. 42-43, 328). Appellant originally said that they were going to St. Louis to visit his friend, which conflicted with Hencz=s story about visiting an aunt, but then contradicted himself to

agree with Hencz=s story (Tr. 25, 32, 261). Seaton also found it unusual that appellant and Hencz would be on such a long trip together but that she did not know his last name, and that neither knew where in St. Louis they were going to meet Hencz=s aunt (Tr. 25-26, 32-33, 255-256). Logan, 914 S.W.2d at 809; United States v. Pulliam, 265 F.3d 736, 740 (8th Cir. 2001)(AContradictory statements establish the reasonable suspicion necessary to detain a motorist further[.]@); see United States v. Sowers, 136 F.3d 24, 27 (1st Cir 1998)(nervousness and contradictory statements by driver and passenger justified extended detention). Appellant argues that these inconsistent statements were also subject to non-suspicious explanations and could be viewed as consistent (App.Br. 33-35). This argument, however, flies in the face of the standard of review, which accepts only those facts and inferences favorable to the trial court=s ruling. Edwards, 116 S.W.3d at 530. Because the statements by Hencz and appellant were inconsistent and otherwise unusual, the statements supported the finding of reasonable suspicion.

Second, appellant used an apparently false identification card when asked for his identification. Both Seaton and Swartz testified that they were familiar with Arizona identification cards and that this card, which was Avery cheap@ with Aflimsy, flimsy laminate,@ did not appear authentic**C**there was a raised and unevenly placed picture, typeset where it was not supposed to be, unusual lamination, no holograph, and uneven rounded edges which made the license appear like it had made on a computer and cut out with scissors (Tr. 30-31, 259-260, 325-326). The use of a false identification is evidence of a purpose to frustrate the investigation by police. State v. Burnett, 970

S.W.2d 412, 415 (Mo.App., W.D. 1997). Therefore, the false identification also supported the finding of reasonable suspicion.

Third, Hencz=s profound nervousness supported the finding of reasonable suspicion Admittedly, mere nervousness alone does not give rise to reasonable suspicion. State v. Woolfolk, 3 S.W.3d 823, 829 (Mo. App., W.D. 1999). However, nervousness, especially when it is so severe as to cause such things as shaking hands, moving in the seat, and a cracking voice, can lead to reasonable suspicion when coupled with other factors. Day, 87 S.W.3d at 55; Bunts, 867 S.W.2d at 280. The extent and significance of nervousness is for the trial court to determine. State v. Bizovi, 129 S.W.3d 429, 432 (Mo.App., E.D. 2004).

Here, Seaton specifically testified that Hencz=s nervousness was far more unusual than the typical level of nervousness shown by the thousands of people he had pulled over for traffic offenses in his 8**2** years of experience**C**at first, she was fidgety and trembling, then later became very rigid, hugging herself (Tr. 26-27, 36, 251-256, 272). Her heart was pounding so severely that her abdomen actually was moving with the pulse (Tr. 36, 272). Further, Seaton testified that it was common for people=s anxiety level to drop considerably during a routine traffic stop, but Hencz=s anxiety level continued to rise throughout the stop (Tr. 27). Again, while appellant attempts to argue a different inference from the nervousness**C**that this was just the nervousness associated with being pulled over (App.Br. 32-33)**C**that argument is meritless, as: 1) it was completely contradicted by Seaton=s testimony, and 2) it views the evidence in the light most

favorable to appellant, not to the trial court=s ruling. Edwards, 116 S.W.3d at 530. Clearly, Hencz=s profound nervousness, atypical from the nervousness experienced by those pulled over who are not committing criminal acts other than the traffic offense leading to the stop, when coupled with the inconsistent statements and false identification, supported the extension of the traffic stop based on reasonable suspicion.

In addition to these three factors supporting reasonable suspicion, the court also believed testimony that I-70 was a Adocumented drug thoroughfare@ and that St. Louis was a known destination city in the drug trade, further supporting reasonable suspicion (Tr. 44; L.F. 20). Missouri courts have found such facts relevant toward the determination of reasonable suspicion. State v. Burkhardt, 795 S.W.2d 399, 405 (Mo. banc 1990); Day, 87 S.W.3d at 51. Because a totality of the circumstances supported the trial court=s finding that the troopers had an objectively reasonable suspicion, arising during the time necessary to investigate the traffic stop, sufficient to extend the stop to investigate the suspected criminal activity, the trial court=s ruling was plausible in light of the record. Hampton, 150 S.W.3d at 325. Therefore, the trial court did not clearly err in finding that there was reasonable suspicion of criminal activity to extend the traffic stop and conduct further investigation.

2. The AEnd@ of the Traffic Stop Did Not Prevent Continued Detention to Investigate Additional Criminal Activity

a. State v. Granado

Appellant contends that, once Seaton told Hencz that she was free to go, the traffic

stop was over, and that Seaton could not further detain Hencz and appellant based on the reasonable suspicion he had obtained during the traffic stop, but needed some new facts arising after that point to create a new reasonable suspicion (App.Br. 36-39). Appellant=s primary and almost sole legal support for this claim is this Court=s opinion in State v. Granado, 148 S.W.3d 309 (Mo. banc 2004). To the extent that Granado supports appellant=s argument, this Court should reexamine Granado as to this issue, as appellant=s interpretation of Granado conflicts on several underlying issues with other opinions by this and other Missouri Courts, as well as with federal courts that have examined this issue of federal constitutional law.

In Granado, a highway patrolman pulled Granado and his passenger over for weaving on an interstate highway. Granado, 148 S.W.3d at 310. During the investigation of the traffic offense, Granado was Aextremely nervous@ and he and the passenger made inconsistent statements about their trip. Id. After giving Granado a warning for crossing the centerline, the trooper returned his paperwork told him he was free to go. Id. Granado got out of the patrol car and started back towards his vehicle when the trooper got out of the car, Ainformed Granado of the discrepancies@ in the statements, and asked for permission to search the vehicle, which Granado denied. Id. The trooper told Granado that that was his right and that Granado was still free to go, but that the car could not be moved until a K-9 unit arrived to sniff the vehicle. Id. The passenger was also asked to get out of the vehicle Id. The K-9 unit arrived and conducted a drug sniff, leading to the discover of about 36 pounds of marijuana. Id. at

311.

This Court, in a per curiam opinion which incorporated parts of the Southern District Court of Appeals= opinion below, first found that the purpose of the traffic stop was completed at the point the trooper told Granado he was free to go and that no further detention was permitted, as the record did not show that Granado was Aengaged in criminal activity ***beyond the traffic stop***,@ as all that occurred after that point was Granado walking back to his truck and then refusing allow a search of the truck. Id. at 310 n. 1, 311-312 (emphasis added). The trooper had acknowledged that Ahis purpose was accomplished at the time he finished the investigation into the traffic stop.@ Id. at 312.

This Court cited the rule in Barks that the facts that justified reasonable suspicion can only arise during the time of the traffic stop itself, not from questions asked after the stop. Id., citing Barks, 128 S.W.3d at 517. This Court then briefly addressed the State=s argument that the facts arising during the traffic stop justified the continued detention as follows:

> The State argues that the patrolman had the right to search Granado's vehicle based on his suspicious behavior during the traffic stop and the possible inconsistencies in his and his passenger's statements. 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;

however, he did not do so.

Granado, 148 S.W.3d at 312. The Court then went on to reiterate that no new facts arose from the time of the trooper saying Granado was free to go and the trooper stopping Granado to ask more questions. Id. This Court cited no precedent for this conclusion, just as the Southern District failed to do below, which is relevant, as this Court=s language appeared almost verbatim in the Southern District=s earlier opinion. See State v. Granado, SD25378, 2004 WL 1447651, *5 (Mo.App., S.D. June 29, 2004).[2] To explain this conclusion of the Southern District, the case of Granado=s passenger, State v. Davalos, 128 S.W.3d 143 (Mo.App., S.D. 2004), is instructive. In Davalos, the Southern District addressed the argument that the inconsistent statements justified the further detention as follows:

> The inconsistencies that Stewart testified to included Granado=s need to return to work at different dates, the origin of the rental vehicle, how Defendant would return to Dallas, and their destination in Michigan; however, if these

[2]Respondent does not cite the Southern District=s opinion as precedent, as this Court=s subsequent opinion on transfer negated any precedential value, but only to provide context and assist in the understanding of the origin of appellant=s interpretation of Granado. A copy of the Southern District=s opinion is included in Respondent=s appendix.

> inconsistencies were the basis for his reasonable suspicion of criminal activity, it would seem that Stewart would not have told Granado he was free to leave after the initial stop. ***It appears that Stewart decided that reasonable suspicion of criminal activity existed only after his request for a consensual search was denied.***

Davalos, 128 S.W.3d at 148 (emphasis added). Thus, it is apparent that the Southern District=s reason for finding that the words Afree to go@ prevented the consideration of the facts found during stop in determining reasonable suspicion came from consideration of the trooper=s subjective determination of suspicion, not an objection assessment of whether the articulable facts from the stop amounted to reasonable suspicion. Without any legal basis being contained in Granado for its ruling, that subjective determination must have been the Southern District=s rationale for its similar finding in Granado, which then became part of this Court=s ruling through the adoption of the Southern District=s language. Granado, 2004 WL 1447651 at *5; Granado, 148 S.W.3d at 312. It is this ruling on which appellant rests his argument that Trooper Seaton could not rely on the reasonable suspicion obtained during the investigation of the traffic offense to further detain Hencz and appellant once he told Hencz she was free to go (App.Br. 36-39).

b. Reasonable Suspicion Arose During the Traffic Stop

Granado does not support appellant=s position as he claims. First, Granado made no determination that reasonable suspicion did not arise during the traffic stop, only

focusing its attention on whether reasonable suspicion arose from the facts occurring after the end of the traffic investigation. Granado, 148 S.W.3d at 311-312. But that focus centered on the wrong point in time of the traffic investigation. As this Court has held, when a traffic stop is made for the violation of a traffic offense, the period of detention may be extended beyond that reasonably necessary to investigate the offense if facts arise ***during the traffic stop*** creating an objectively reasonable suspicion of criminal activity. Barks, 128 S.W.3d at 517. Barks states that the reasonable suspicion permitting an extended detention arises:

> ***within the parameters of the traffic stop itself***; suspicions 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.***

Barks, 128 S.W.3d at 517**,** quoting Woolfolk, 3 S.W.3d at 829 (emphasis added). This passage makes clear that the reasonable suspicion must arise during the time and in the context of the investigation of the traffic stop (which it did in this case) and that the reasonable suspicion justifies further detention after the completion of the stop. Therefore, in assessing the facts obtained during the traffic investigation, and not after the purported end of that investigation, Trooper Seaton=s further detention of Hencz was justified by the fact arising during the traffic stop. As such, the trial court=s ruling was

consistent with Barks and previous Fourth Amendment precedent governing when the facts necessary to extend a traffic stop must be discovered.

c. Statement that a Driver is AFree to Go@ is Constitutionally Irrelevant

Further, appellant=s reliance on Seaton=s statement that Hencz was free to go to terminate consideration of facts gathered during the traffic offense investigation is inappropriate, as that statement is constitutionally irrelevant. First, as shown above, any rule that an officer=s statement that a driver is free to go prevents the consideration of facts obtained during the investigation by definition must be based on the officer=s subjective consideration of the facts and assessment that reasonable suspicion does not exist. But that is not the standard under the Fourth Amendment. The ***subjective intent*** of the investigating officer does not invalidate the action taken by that officer as long as the circumstances ***objectively justify*** the action, as subjective intentions play no role in Fourth Amendment analysis. Ohio v. Robinette, 519 U.S. 33, 38, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996); Whren v. United States, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Thus, Seaton=s statement that Hencz was free to go, while potentially probative of the irrelevant issue of whether Seaton believed there was reasonable suspicion, could not have invalidated the facts supporting an objective determination of reasonable suspicion, which existed in this case.

Further, Seaton=s statement that Hencz was free to go was constitutionally irrelevant because a statement that a driver is free to go after a traffic investigation does not negate consideration of the facts obtained during that investigation in determining

whether reasonable suspicion existed. Law enforcement officers may make an investigatory traffic stop based on reasonable suspicion of any criminal activity. Terry v. Ohio, 392 U.S. 1, 20-23, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); United States v. Hensley, 469 U.S. 221, 226, 105 S.Ct. 675, 83 L.Ed.2 d 604 (1985); State v. Miller, 894 S.W.2d 649, 652 (Mo. banc 1995). Nothing in the law requires that detention based on reasonable suspicion be made at the same time as the traffic stop which gave rise to additional facts leading to the reasonable suspicion. Here, even if the investigation of the initial traffic offense was concluded prior to the detention for the sniff, nothing prevented Seaton from extending or even re-initiating the detention based on the reasonable suspicion obtained during the investigation of the traffic offense, as he had obtained reasonable suspicion that Hencz, appellant, or both were engaged in criminal conduct. That Trooper Seaton elected to try to use a less intrusive means to search the vehicle**C**attempting to obtain the valid consent of the driver by advising the driver that she was free to go**C**does not negate the fact that reasonable suspicion existed to justify the continued (or re-initiated) detention before that consent was sought.

This conclusion has been reached by the three federal circuit courts which have considered this issue. This issue appears to have first been considered by the Tenth Circuit Court of Appeals in United States v. Williams, 217 F.3d 1262 (10th Cir. 2001). In Williams, the officer investigated a traffic offense and discovered facts creating reasonable suspicion. Id. at 1264-1270. After obtaining those facts, the officer returned the driver=s documents and said something to the effect of, AThanks a lot. We=ll be

seeing you,@ but then asked for consent to asked a few additional questions, which was granted. Id. at 1265. The officer asked some questions, then asked for consent to search, which was refused. Id. The officer then detained the driver for fifteen minutes for a dog sniff to be conducted, which resulted in the discovery of large bales of marijuana. Id. On appeal, the driver made the same claim appellant raises here: that the officer telling the defendant he was free to go Anullified any of the suspicion that developed throughout the stop.@ Id. at 1270-71. The Tenth Circuit rejected this claim, finding that, while a statement that a driver is free to go Aassumes paramount importance when we analyze whether an encounter between a citizen and a law enforcement officer is consensual,@ such a statement Abears ***no significance*** in our determination of whether the officer had reasonable suspicion to detain@ the driver. Id. at 1271. The court, noting that it could find no case requiring that facts obtained prior to telling the driver he was free to go be ignored, based its reasoning on the fact that the officer=s subjective intention had no relevance in the determination of reasonable suspicion, and that whether the officer had never intended to release the driver or changed his mind after speaking with the driver some more Adoes not alter our analysis if the officer already had sufficient reasonable suspicion to detain [the driver] for the purpose of the canine drug search.@ Id.

Following Williams, two other federal circuit courts have also held that an officer=s indication that the defendant was free to go does not negate objectively reasonable suspicion obtained during a traffic stop. United States v. Fuse, 391 F.3d 924, 928-29

(8th Cir. 2004); United States v. Foreman, 369 F.3d 776, 782-84 (4th Cir. 2004). In Fuse, the Eighth Circuit stated:

> AWe find the Tenth Circuit=s opinion in Williams persuasive and conclude the termination of a traffic stop does not effectively erase the objectively reasonable suspicions developed by a police officer during the traffic stop.@

Fuse, 391 F.3d at 929. Likewise, in Foreman, the Fourth Circuit also noted the lack of any authority to the contrary and cited Williams positively, stating that the trial court Ashould have examined all of the circumstances surrounding [the driver]=s encounter with [the trooper] in determining whether there was reasonable suspicion for the drug dog sniff.@

Respondent recognizes that the holdings of the federal courts lower than the United States Supreme Court are not generally binding on Missouri state courts. See Futrell v. State, 667 S.W.2d 404, 407 (Mo. banc 1984). Where the opinions of other jurisdictions, however, analyze the Fourth Amendment consistent with federal precedents that Missouri courts do follow, those opinions are persuasive. State v. Schmutz, 100 S.W.3d 876, 881 n. 4 (Mo.App., S.D. 2003), citing State v. Werner, 9 S.W.3d 590, 595 (Mo. banc 2000). And with regard to the Fourth Amendment, Missouri courts have consistently followed the United States Supreme Court=s opinions and consistently interpreted Missouri=s Constitution to provide an identical right. See State v. Pike, 162 S.W.3d 464, 472 (Mo. banc 2005); State v. Damask, 936 S.W.2d 565, 570 (Mo. banc

1996); State v. Jones, 865 S.W.2d 658, 660 (Mo. banc 1993).[3] Therefore, this Court should not accept appellant=s interpretation of Granado, as it conflicts with federal constitutional authority on this issue. Further, should this Court conlcude that appellant has properly represented the rule in Granado, this Court should reconsider Granado in light of the foregoing, as such a reading of Granado is simply not consistent with established precedent permitting a trial court to consider all facts discovered during a lawful traffic stop which justify a finding of reasonable suspicion.

In short, because objectively reasonable suspicion arose during the investigation of the traffic offense, thus justifying the continued detention of Hencz and appellant for the dog sniff which provided probable cause to search the trunk of the car, and because Trooper Seaton=s statement that Hencz was free to go did not negate that reasonable suspicion, the trial court did not clearly err in admitting the evidence found in the search.

3. Even if Trooper Seaton Could Not Rely Only on Facts Gathered Before Telling Hencz She was Free to Go, Reversal is Not Required

[3]Even statements by this Court which state this rule differently refer back to these cases on this principle. See, e.g., State v. Rushing, 935 S.W.2d 30, 34 (Mo. banc 1996)(the federal and state constitutional protections are Acoextensive@).

a. Consensual Encounter

Even if this Court were to find that appellant has properly relied on his interpretation of the rule in Granado and that Granado correctly interprets the protection provided by the Fourth Amendment, appellant is still not entitled to relief. First, Granado is not directly on point in this case because this case features a significant factual distinction from Granado. In this case, unlike in Granado, an additional fact leading to a finding of reasonable suspicion arose prior to Seaton detaining appellant for the purpose of conducting the dog sniff. Following the return of Hencz=s paperwork and telling her she was free to go, Seaton engaged in a consensual conversation with Hencz, and during that conversation, her already abnormally high level of nervousness elevated even more at the mention of illegal drugs, causing the physiological reaction of breaking out into Agoose bumps@ (Tr. 274-275). Despite appellant=s contention to the contrary, this conversation occurred during a consensual encounter (App.Br. 41-44). Further questioning following the conclusion of the traffic stop is permissible if the encounter has become consensual. State v. Shoults, 159 S.W.3d 441, 446 (Mo.App., E.D. 2005); Day, 87 S.W.3d at 56. Such an encounter is consensual if, under the circumstances, a reasonable person would feel free to leave. Day, 87 S.W.3d at 51. While the Court looks at all the circumstances and there is no litmus test to determine voluntariness, among the factors to be considered are the threatening presence of other officers, the officer displaying a weapon, the physical touching of the driver by the officer, and use of language or tone of voice by the officer indicating that compliance with the request was

required. Shoults, 159 S.W.3d at 446; State v. Rowe, 67 S.W.3d 649, 655 (Mo.App., W.D. 2002). So long as the reasonable driver would feel free to leave, an officer can talk to the driver and may ask whether the driver has contraband on his or her person or in his car or residence. Barks, 128 S.W.3d at 517.

Here, the facts show that a reasonable person in Hencz position would have believed she was free to leave. Trooper Seaton displayed no weapon nor used any physical force in his request to speak further with Hencz**C**Hencz was actually walking towards her car when she stopped and turned to reply to Seaton=s question (Tr. 47, 274). There was only one other officer present at the scene, which could hardly be considered a Athreatening presence@ (Tr. 40). Further, Seaton=s question was not a command requiring obedience, but a respectful request**C**AMs. Hencz, can I talk to you@**C**the non-authoritative nature of which is shown by Hencz=s casual reply of Asure@ (Tr. 47, 274). Therefore, the facts surrounding this questioning show that this encounter, up until Hencz denied consent to search the car, was consensual.

During this consensual encounter, unlike in Granado, Hencz displayed a heightened sense of nervousness, which Seaton described as being Avisibly shaken@ and causing goose bumps in 100 degree heat, when Seaton mentioned illegal drugs and drug trafficking (Tr. 47-48, 274-275). Again, while mere nervousness alone may not justify a finding of reasonable suspicion, this nervousness was neither Amere@ nor Aalone@**C**Seaton had already testified that this nervousness was far greater than that he had typically seen for traffic violators in his vast experience, and this nervousness, when

placed in the context of the other facts Seaton had observed previously, would have led to a finding of reasonable suspicion, even if the earlier facts alone had not been sufficient (Tr. 38, 255-256). Day, 87 S.W.3d at 55; Bunts, 867 S.W.2d at 280. As the extent and significance of nervousness is for the trial court to determine, this new and extreme nervousness supported a finding of reasonable suspicion. Bizovi, 129 S.W.3d at 432. While Granado may hold that facts obtained during the stop must be ignored once the driver is free to go if nothing happens subsequent to that point to raise suspicion, that rule would not apply here, where additional facts showing reasonable suspicion did occur during the period after the traffic investigation and provide further support for those earlier facts in establishing reasonable suspicion. Therefore, Hencz=s additional nervousness at the mention of illegal drugs observed during the consensual encounter further justified the brief detention necessary to conduct the dog sniff.

b. De minimis Infringement

Further, any period of detention needed to conduct the dog sniff of the car did not result in a Fourth Amendment violation requiring reversal because the effect of that brief detention on appellant=s rights under the Fourth Amendment was *de minimis*. The United States Supreme Court has acknowledged that there is no relief available under the Fourth Amendment where the seizure is *de minimis*. United States v. Jacobsen, 466 U.S. 109, 125-126, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). The Eighth Circuit Court of Appeals has repeatedly held that a brief delay in allowing a motorist to proceed at the end of a traffic stop for the purpose of conducting a drug dog sniff is *de minimis* and does not

result in a Fourth Amendment violation. United States v. Gregory, 302 F.3d 805, 810 (8th Cir. 2002); United States v. Linkous, 285 F.3d 716, 721 (8th Cir. 2002); United States v. $404,950.00 in U.S. Currency, 182 F.3d 643, 649 (8th Cir. 1999), cert. denied 528 U.S. 1161 (2000). The rationale for such a rule came from two sources: first, the strong government interest in Ainterdicting the flow of illegal drugs along the nation=s highways,@ which it compared to the strong government interest in officer safety to justify the *de minimis* intrusion of having a stopped motorist exit his vehicle; and second, the fact that a drug dog sniff Ais so unintrusive as to not be a search[.]@ $404,950.00 in U.S. Currency, 182 F.3d at 649. The fact that the United States Supreme Court has recently reaffirmed that a drug dog sniff is not a search and can be conducted by officers without any finding of cause or suspicion further strengthens the Eighth Circuit=s rationale. Illinois v. Caballes, ___ U.S. ___, 125 S.Ct. 834, 838, 160 L.Ed.2d 842 (2005).

In this case, the delay necessary to conduct the dog sniff once the consensual encounter between Hencz and Seaton ended was minimal**C**the dog was already on the scene when Hencz denied consent to search, and the only other action taken prior to the sniff was to remove appellant from the car, which is also constitutionally permissible as a *de minimis* intrusion on appellant=s rights (Tr. 48-49). Maryland v. Wilson, 519 U.S. 408, 410-15, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997). Thus, the delay caused by the constitutionally-permitted dog sniff was *de minimis*. Therefore, this Court should follow the lead of the Eighth Circuit and find that there was no Fourth Amendment violation from

this *de minimis* detention for the purpose of conducting the dog sniff.

In light of the foregoing, appellant=s sole point on appeal should fail.

CONCLUSION

In view of the foregoing, the respondent submits that appellant=s convictions and sentences 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 contains 8492 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 31st day of October, 2004, to:

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APPENDIX

Sentence and Judgment.....A-1

Order.....A-4

State v. Granado, SD25378, 2004 WL 1447651 (Mo.App., S.D. June 29, 2004)..A-10