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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46524-2018
Plaintiff-Respondent,)	
)	JEROME COUNTY NO. CR27-18-655
v.)	
)	
JOSHUA D. DEWITT,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF JEROME**

HONORABLE JOHN K. BUTLER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Joshua Dewitt appeals from the district court's order denying his motion to suppress drug evidence obtained after an officer prolonged a traffic stop to conduct unrelated investigations, in violation of Mr. Dewitt's Fourth Amendment rights. Mr. Dewitt argues on appeal that the officer detoured from the mission of the traffic stop, extending his detention, by making unrelated inquiries into his travel history, then his prescription medications, and finally, by deploying a drug dog, without reasonable suspicion that Mr. Dewitt was engaged in criminal activity. Suppression of all evidence should have been granted.

Alternatively, Mr. Dewitt argues that his post-*Miranda* statements to the officer should be suppressed because those statements were obtained in response to questioning after Mr. Dewitt had invoked his right to counsel, in violation of his Fifth Amendment rights.

Statement of the Facts and Course of Proceedings

The following facts were established at the suppression hearing.¹

Officer Michael Marrott was patrolling I-84 in Jerome County, and noticed a blue Chrysler, with Illinois plates, make two lane changes without displaying a signal for the requisite five seconds. (5/29/18 Tr., p.6, L.15 – p.7, L.14.) Mr. Dewitt was driving that car alone, and he pulled over when the officer activated his lights. (5/29/18 Tr., p.6, L.15 – p.7, L.14.) Officer Marrott pulled in behind Mr. Dewitt and got out of his patrol car, walked up to Mr. Dewitt's

¹ The district court took judicial notice of the May 29, 2018 preliminary hearing transcript (hereinafter "5/29/18 Tr."), and admitted Officer Marrott's bodycam video (hereinafter "Exhibit A") (See 7/16/2018 Tr., p.6, Ls.18, Ls.1-23.) Officer Marrott additionally testified at the suppression hearing. (7/16/2018 Tr., p.6, L.1 – p.38, L.3.)

front passenger window, and he immediately identified himself as an officer with the state police and a K-9 handler.² (Ex.A, 11:31:45-50.) The officer then took a few seconds to explain the traffic lane-change-signal violation he had observed and the related safety concerns. (Ex.A. 11:31:55—32:15.)

After explaining the traffic violation, but *before* requesting Mr. Dewitt's driver's license and registration, Officer Marrott took approximately forty-five seconds to question Mr. Dewitt about his travel. (Ex,A., 11:32:20 – 11:33:04; 7/16/18 Tr., p.27, Ls.8-22.) The officer asked Mr. Dewitt where he was coming from that day and where he was headed. (Ex.A, 11:32:20 - 11:32:47; 7/16/18 Tr., p.27, Ls.8-22.) The Officer asked him where his home was, and confirmed Mr. Dewitt had said Pekin, Illinois; the officer then asked how long Mr. Dewitt had been out here. (Ex.A, 11:32:47 - 11:33:02.) Officer Marrott was unable to relate his request for travel information to the traffic violation, but testified that the travel question was “a standard question” he asked everyone. (7/16/18 Tr., p.27, Ls.16-17.)

Then, after Mr. Dewitt had answered the officer's travel questions, Officer Marrott asked Mr. Dewitt, “Do you have your driver's license with you?” (Ex.11:33:04) (*see also* 7/16/18 Tr., p.27, Ls.8-20.)³ As Mr. Dewitt was retrieving the license, the officer continued questioning Mr. Dewitt. He asked Mr. Dewitt if he had any weapons in the car. (Ex.A., 11:33:10 – 11:33:13.) Then the officer asked whether he had “anything illegal, anything you shouldn't have.” (Ex.A, 11:33:16.) Mr. Dewitt answered no to both questions. (Ex.A., 11:33:10 – 11:33:16.)

² Officer Marrott had called for a backup officer sometime before making contact with Mr. Dewitt. (R., p.32 n.2.)

³ Officer Marrott confirmed in his testimony that he had asked Mr. Dewitt about his travel after explaining the reason for the traffic stop, but *before* asking Mr. Dewitt for his driver's license and registration.

Immediately following Mr. Dewitt's answers, Officer Marrott engaged Mr. Dewitt in a line of direct questioning exclusively about drugs. He stated to Mr. Dewitt, "I am a K-9 handler. So, when I ask you, 'Do you have anything illegal,' let me just ask you a couple questions about that. Okay? Do you have any methamphetamine?" "Any cocaine?" "Any heroine?" "Any marijuana?" (See Ex.A, 11:33:32 - 33:44.) And Mr. Dewitt answered "No." (See Ex.A, 11:33:32 - 33:44.)

The officer then asked Mr. Dewitt if he had "prescription pills, anything like that?" (Ex.A, 11:33:45) In response to this question, Mr. Dewitt indicated he had prescription pills; and the officer then asked, "are they prescribed to you?" (Ex.A, 11:33:45-11:34:05.) In response to this questioning, and as shown by the video and confirmed by Officer Marrott's subsequent testimony, Mr. Dewitt "stopped what he was doing" and retrieved the pill bottle from the glove box, and then "handed it to the officer" to examine. (Ex.A, 11:33:45-11:34:05; 7/17/18 Tr., p.29, Ls.1-4.) The officer observed it was amphetamine legally prescribed for Mr. Dewitt. (7/17/18 Tr., p.30, Ls.20-22.)

After examining the pill bottle and returning it to Mr. Dewitt, Officer Marrott took the driver's license and other documents from Mr. Dewitt and examined them, then noted that the registration he had been handed had expired the previous year. (11:34:07-11:34:44.) Officer Marrott waited briefly while Mr. Dewitt continued to look for a current registration, and during that wait, asked Mr. Dewitt how long it took to travel from Pekin to Twin Falls, and Mr. Dewitt answered that it took him about twenty-eight hours. (Ex.A, 11:34:45.) Officer Marrott walked

back to his patrol car with the driver's license and other⁴ vehicle documentation in hand and told Mr. Dewitt if he found a current vehicle registration, to waive it at him. (Ex.A, 11:36:05-12.)

Once back in his patrol car, Officer Marrott called in the driver's information to dispatch. (Ex.A, 11:36:25 – 11:30:0). The officer then ran a google maps search on the travel reported by Mr. Dewitt (Pekin, Illinois to Twin Falls), which showed a travel time of twenty-two hours, which was six hours less than Mr. Dewitt's answer. (Ex.A, 11:40:08.) Officer Marrott then told dispatch that based on this time discrepancy, and his observations of Mr. Dewitt back at the car, he had "reasonable suspicion" to believe Mr. Dewitt was involved in criminal activity; Officer Marrott did not wait for dispatch to return information, nor did he conduct any further tasks related to the traffic violation. (*See generally*, Ex.A, 11:40:08.) Officer Marrott left his patrol car and made the same announcement to Mr. Dewitt, telling Mr. Dewitt he was now being detained due to reasonable suspicion of drug activity. (Ex.A, 11:40:40 – 11:40:35.) He had Mr. Dewitt step out of the car and requested permission to search him; then he told Mr. Dewitt he was going to run his drug dog around his car. (Ex.A, 11:40:35 – 11:43:30.)

Officer Marrott then took time to run his drug dog around Mr. Dewitt's car. (Ex.A, 11:44:38 – 11:46:15.) According to the officer's later testimony, the dog's behaviors indicated the presence of drugs in Mr. Dewitt's car. (*See R.*, p.133.) Based on the dog's response, Officer Marrott searched the trunk of Mr. Dewitt's car and discovered duffle bags containing multiple packages of marijuana. (*R.*, p.133.)

Upon finding the marijuana Officer Marrott told Mr. Dewitt he was under arrest and read his *Miranda* rights. (Ex.A, 11:47:35 –11:48:16) Officer Marrott then faced Mr. Dewitt and said,

⁴ Officer Marrott testified he took the Mr. Dewitt's insurance paper (7/16/18 Tr., p.20, Ls.8-15); the video indicates the officer took the expired registration (Ex.A, 11:34:07-11:35:00.)

“So, let’s talk. You work with me, and I’ll work with you the best I can.” (Ex.A, 11:48:20-411:48:45)

Officer Marrott gave Mr. Dewitt a choice, stating:

Hey I can work with you. I’ve got my narcotics team that can work with you. We can help you out. If you’re willing to work and talk. But if you’re just going to sit here and be quiet, I mean, that is your right, don’t get me wrong, but if you don’t want to work, then we have no other option than to book you as is. Okay. [As the officer and Mr. Dewitt are facing each other] So, I know you’re not getting this from Idaho. Okay. And if you are, tell me – you’ve got a valuable piece of information – you may be sleeping in your own bed tonight [in audible] if you work with me, we can get you on your way and get you working, alright? But, you got to be truthful and you got to be honest with me.”

(Ex.A, 11:49:46)

Officer Marrott stopped talking and stood still, looking at Mr. Dewitt and waited for his response. Mr. Dewitt looked down, and, after a ten-second pause, raised his head and looked back at the officer and stated, “Without my lawyer” and then shook his head side to side. (Ex.A, 11:49:46 – 11:49:57.) The officer then said, “Okay,” and tapped him on the chest and prepared to search Mr. Dewitt’s clothing; he also told Mr. Dewitt they would be calling for another officer to transport him, since Officer Marrott’s patrol vehicle was occupied by his dog. (Ex.A, 11:49:58- 11:50:12.)

As Officer Marrott started searching through Mr. Dewitt’s clothing, however, the officer asked, “how much you got on you?” and asked how much the drugs would sell for in Illinois; Mr. Dewitt responded by providing incriminating statements and resumed talking with the officer. (11:51:25.) The officer continued asking about Mr. Dewitt’s drug activities, and Mr. Dewitt continued making incriminating statements. (Ex.A, 11:54:20 –12:00:00.)

Based on the evidence obtained during the stop and investigation, the State charged Mr. Dewitt with trafficking in marijuana. (R., pp.8-13.) Mr. Dewitt filed a motion to suppress and a supporting memorandum. (R., pp.87, 97.)

Mr. Dewitt's motion sought suppression on three grounds. First, he claimed that Officer Marrott violated his Fourth Amendment rights, as set forth in *Rodriguez v United States*, 575 U.S. ___, 135 S.Ct. 1609, 1614 (2015), and *State v. Linze*, 161 Idaho 605, 607 (2016), by unlawfully prolonging the traffic stop without reasonable suspicion of that Mr. Dewitt was engaged in any crime. (R., pp.101-03.) He asserted the officer deviated from the purpose of the traffic stop, unlawfully extending that stop, by making inquiries that were *unrelated* to the mission of the traffic stop in three specific instances: (1) by questioning Mr. Dewitt regarding his travel, *before* ever asking him for his driver's license and vehicle information; (2) by interrupting the legitimate tasks related to the traffic stop to investigate Mr. Dewitt's possession of prescription medications, including having Mr. Dewitt retrieve the pill bottle and answer questions about that medication; and (3) when the officer completely abandoned the original purpose of the traffic stop to conduct a drug investigation based on observations that did not give rise to reasonable suspicion of drug or other criminal activity. (R., pp.101-03.)

Second, Mr. Dewitt claimed that Officer Marrott violated his Fourth Amendment rights by searching the trunk of his vehicle without probable cause, arguing that Officer Marrott's interpretation of the drug dog's behaviors was insufficient to provide probable cause to believe the trunk of the car contained drugs. (R., pp.103-04.)

Third, Mr. Dewitt claimed that Officer Marrott violated his Fifth Amendment right by continuing to question him after he had invoked his right to counsel.

The State filed a brief in opposition that did not respond to Mr. Dewitt's claim that the officer deviated from the mission of the traffic stop, unlawfully extending the detention, by making inquiries about Mr. Dewitt's travel before asking for his driver's license and investigating his possession of prescription medications. (R., pp.116-21.) Indeed, the State did not even acknowledge the application of *Rodriguez* and *Linze* regarding these claims. (*See generally*, R., pp.116-21.) The State instead argued only that, by the time Officer Marrott conducted the dog sniff, the officer had sufficient facts to justify a reasonable suspicion. (R., pp.116-21.)

The district court denied Mr. Dewitt's motion to suppress. (R., pp.130-40.) However, like the State, the district court did not address Mr. Dewitt's initial claims of unconstitutional prolonging; it did not decide whether the officer had unlawfully extended the stop with his inquiries about travel, or by interrupting traffic safety-related tasks to investigate Mr. Dewitt's prescription drugs. (*See generally* R., pp.130-38.) Rather, the district court framed the issue as whether the officer had unlawfully extended the traffic stop by deploying the drug dog, and if so, whether such an extension of time was justified by reasonable suspicion. (R., pp.134-38.)

As to this question, the district court found no unlawful prolonging because the duration of the stop, with the drug investigation, was "typical" of other traffic stops conducted by Officer Marrott, because Officer Marrott was "waiting for a return from dispatch on Dewitt's information," and because "Dewitt had still not provide Marrott with a valid vehicle registration." (R., p.137.) The district court alternatively found that if the traffic stop had been extended, the extension was justified by Officer Marrott's reasonable suspicion that Mr. Dewitt was engaged in criminal activity. (R., p.137.)

The district court also concluded that the drug dog's behavior provided Officer Marrott probable cause to search Mr. Marrott's car, and therefore denied suppression of the evidence found in the trunk. (R., pp.132-48.) Regarding Mr. Dewitt's Fifth Amendment claim, the district court concluded that Mr. Dewitt's statements, "without my lawyer" and shaking his head, made in response to the officer's request to talk and help him, was ambiguous, and not a clear unequivocal request for counsel. (R., p.145.)

Following the denial of his suppression motion, Mr. Dewitt entered a conditional plea of guilty to marijuana trafficking, reserving his right to appeal the district court's decision. (1/10/19 Tr., p.48, Ls.17-125.) The district court imposed a sentence of seven years, with two-years fixed. (R., p.163.) Mr. Miller filed a timely Notice of Appeal. (R., p.170.)

ISSUE

Did the district court err when it denied Mr. Dewitt's motion to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. Dewitt's Motion To Suppress

A. Introduction

Mr. Dewitt asserts, as he did in the district court, that Officer Marrott violated his Fourth Amendment rights by conducting investigations unrelated to the mission of the traffic stop, and without reasonable suspicion, thereby unlawfully prolonging his detention. Officer Marrott also violated Mr. Dewitt's Fifth Amendment rights by continuing with questioning after Mr. Dewitt had invoked his right to counsel. Suppression should have been granted.

B. Standard Of Review

This Court defers to the district court's factual findings unless clearly erroneous, but freely reviews whether the facts surrounding the search and seizure satisfy constitutional requirements. *State v. Downing*, 163 Idaho 26, 29 (2017). This Court defers to the district court's factual findings absent a showing that the findings are clearly erroneous. *Id.* However, where the appellate court has exactly the same evidence before it as was considered by the district court, the appellate court does not extend the usual deference to the district court's evaluation of the evidence. "Under these limited circumstances, the appellate court's role is to freely review the evidence and weigh the evidence in the same manner as the trial court would do." *State v. Lankford*, 162 Idaho 477, 492 (2017).

C. Officer Marrott Unlawfully Prolonged The Traffic Stop In Violation Of Mr. Dewitt's Fourth Amendment Rights

The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Evidence obtained in violation of

Fourth Amendment protections is subject to the exclusionary rule, which requires the suppression of both primary evidence obtained as a direct result of an illegal search or seizure, and evidence later discovered and found to be derivative of an illegality, that is, “fruit of the poisonous tree.” See *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963); *State v. Guzman*, 122 Idaho 981, 988-98 (1992).

“The seizure of a vehicle’s occupants in order to investigate a traffic violation is a ‘reasonable seizure’ under the Fourth Amendment so long as the seizing officer had reasonable suspicion that a violation had occurred.” *Linze*, 161 Idaho at 608 (quoting *Rodriguez v. United States*, 575 U.S. ___, 135 S.Ct. 1609, 1614 (2015)). “A seizure justified only by a police-observed traffic violation ... becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of the traffic stop.” *Rodriguez*, 575 U.S. ___, 135 S.Ct. 1609, 1612 (2015).

As to the tasks related to “the mission of the traffic stop,” the U.S. Supreme Court has stated:

Beyond determining whether to issue a traffic ticket, an officer’s mission includes “ordinary inquiries incident to [the traffic] stop.” Typically such inquiries involve checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly.

Rodriguez, 575 U.S. ___, 135 S.Ct. at 1614.

The Fourth Amendment also tolerates “certain *unrelated* investigations that [do] not lengthen the roadside detention.” *Rodriguez*, 575 U.S. at ___, 135 S.Ct. at 1614. These “unrelated investigations” include questioning, and dog sniffs. *Id.* “An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. But ... he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.” *Id.*

A “police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.” *Id.*, at 1612. Additional tasks, unrelated to the mission of the traffic stop, that extend the duration of the seizure violate the Fourth Amendment, even if the intrusion is otherwise deemed “*de minimis.*” *Id.*

Ultimately, however, if an officer makes *unrelated* inquiries or investigations, the officer “will inevitably lengthen the time” of the traffic stop, *see Linze*, 161 Idaho at 608; unless the added time is justified by its *own* reasonable suspicion, the prolonging violates the Fourth Amendment. *Rodriguez*, 575 U.S. ___, 135 S.Ct. at 1616; *Linze*, 161 Idaho at 608. “This rule is both broad and inflexible. It applies to *all* extensions of traffic stops including those that could reasonably be considered *de minimis.*” *Linze*, 161 Idaho at 608 (citing *Rodriguez*, 575 U.S. ___, 135 S.Ct. at 1615-16 (emphasis added)).

The burden is on the State to demonstrate that the seizure it seeks to justify was sufficiently limited both in scope, *and duration.* *State v. Parkinson*, 135 Idaho 357, 361-62 (Ct. App. 2000) (citing *Florida v. Royer*, 460 U.S. 491, 499-500 (1983)).

1. Officer Marrott’s Unrelated Travel Inquiries, Made Prior To Requesting Mr. Dewitt’s Driver’s License and Registration, Unlawfully Extended The Detention

The district court erroneously concluded there was no unlawful extension of the traffic stop. (*See R.*, p.138.) The district court’s conclusion ignores the undisputed testimony and video evidence establishing that, in the initial minutes of the traffic stop investigation, *after* Officer Marrott finished advising Mr. Dewitt of the reason for the traffic stop, but *before* the officer had asked Mr. Dewitt if he had a license, registration, or insurance, Officer Marrott took time to ask Mr. Dewitt a series of questions seeking information about Mr. Dewitt’s travel. (Ex.A, 11:32:20 -11:32:47; 7/16/18 Tr., p.27, Ls.8-22.) While such inquiries may generally be permissible during

a traffic stop, Officer Marrott's questioning was unrelated to the mission of the traffic stop, and pursuant to *Rodriguez*, permissible *only* to the extent it did not prolong the stop. 575 U.S. ___, 135 S.Ct. at 1615-16.

The undisputed evidence establishes that Officer Marrott took approximately forty-five seconds to question Mr. Dewitt about his travel. (Ex.A., 11:32:20 – 11:33:04; 7/16/18 Tr., p.27, Ls.8-22.) During that period, Officer Marrott asked Mr. Dewitt where he was coming from that day and where he was headed; where was "home" and how long had he been "out here." (Ex.A., 11:32:20 -11:32:47; 7/16/18 Tr., p.27, Ls.8-22.) When asked how his request for travel information was relevant to the purpose of the traffic stop, Officer Marrott testified only that it was "a standard question" he asked everyone. (7/16/18 Tr., p.27, Ls.16-17.)

Officer Marrott's testimony and the video evidence confirm that Officer Marrott's route and travel inquiries were made after he had explained the reason for the stop and related traffic safety concerns, but *before* the officer ever asked Mr. Dewitt whether he had a driver's license and before the officer asked him to produce any vehicle information. (Ex.11:33:04; *see also* 7/16/18 Tr., p.27, Ls.8-20.)

Notwithstanding this clear and undisputed evidence the district court erroneously found that "Marrott asked Dewitt for his driver's license, proof of insurance, and vehicle registration" (R., p.132, finding #4), and that "While waiting for Dewitt to produce the requested documents, Marrott asked several standard questions about the origin and destination of Dewitt's trip." (R., p.132, finding #5.) To the extent the district court's factual findings conflict with the undisputed evidence establishing that Officer Marrott made unrelated travel inquiries *prior to* requesting Mr. Dewitt's documentation, the district court's factual findings are clearly erroneous and cannot stand.

Contrary to the district court's factual findings and legal conclusions, Officer Marrott unlawfully extended Mr. Dewitt's detention, violating his Fourth Amendment rights. The State failed to constitutionally justify the unrelated inquiry. Suppression should have been granted.

2. Officer Marrott's Questioning Into Mr. Dewitt's Possession Of Illegal And Prescription Drugs Was Unrelated To The Mission Of The Traffic Stop And Unlawfully Prolonged The Detention

Officer Marrott additionally violated Mr. Dewitt's Fourth Amendment rights when the officer deviated from the traffic safety-related tasks in order to conduct an *unrelated* investigation of the prescription medications that Mr. Dewitt possessed. Although this interruption was a basis of Mr. Dewitt's claim (R., p.101), the district court's factual findings are erroneous because they fail to even mention these critical facts, referring instead only generally to the fact that the officer asked questions about controlled substances and fail to mention that the officer took time to investigate Mr. Dewitt's medications. (R., p.132, #5.)

The officer asked Mr. Dewitt if he had "prescription pills, anything like that?" (11:33:45) In response to this question, Mr. Dewitt indicated he had prescription pills; and the officer then asked, "are they prescribed to you?" (Ex.A, 11:33:45-11:34:05.) In response to this questioning – and as shown by the video and confirmed by Officer Marrott's subsequent testimony, Mr. Dewitt "stopped what he was doing" and retrieved the pill bottle from the glove box, and then "handed it to the officer" to examine. (Ex.A, 11:33:45-11:34:05; 7/17/18 Tr., p.29, Ls.1-4.) The officer observed it was amphetamine legally prescribed for Mr. Dewitt and then returned it to Mr. Dewitt. (7/17/18 Tr., p.30, Ls.20-22.)

Because the officer's investigation into Mr. Dewitt's prescription medication was not related to the mission of the traffic stop as defined by *Rodriguez*, and because the investigation resulted in a deviation of from the purpose of the traffic stop, and because the State failed to

demonstrate the unrelated investigation was justified by its own reasonable suspicion, the district court erred by concluding there was no unlawful extension of the stop. Suppression on this basis should have been granted.

3. Officer Marrott's Unrelated Task Of Deploying His Drug Dog Unlawfully Extended The Detention Because The Officer Lack Objective Facts To Justify A Reasonable Suspicion

Suppression should also have been granted because Officer Marrott abandoned original purpose of the traffic stop to conduct a drug investigation without reasonable suspicion. The district court erroneously concluded that Officer Marrott's conduct in taking time to deploy his drug dog did not unlawfully extend the traffic stop. (R., pp.134-37.) The district court concluded that the dog sniff did not prolong the stop, and alternatively that even if the dog sniff prolonged the traffic stop, the extension was justified by the officer's reasonable suspicion. Both conclusions are erroneous.

a. The District Court Erred By Concluding That The Dog Sniff Did Not Extend The Traffic Stop

The district court offered several reasons for concluding there was no extension of the traffic stop. First, the district concluded that, because the stop in fact took no longer than a "typical" traffic stop, there was no unconstitutional prolonging. (R., pp.137-38.) This conclusion rests on a legal premise that there is a set "reasonable amount of time" for each stop, and that premise was explicitly rejected by the U.S. Supreme Court in *Rodriguez*, and the Idaho Supreme Court in *Linze*, which hold that an officer must always be diligent. See *Linze*, 161 Idaho at 609. The district court's reason conflicts with controlling precedent which holds that any deviation from the original purpose of the traffic stop "will inevitably lengthen" the detention. *Linze*, 161 Idaho at 608.

The district court also concluded that deploying the drug dog did not extend the traffic stop because Officer Marrott was “waiting for a return from dispatch on Dewitt’s information,” and because “Dewitt had still not provided Marrott with a valid vehicle registration.” (R., p.137.) The district court’s findings and conclusions are unsupported by the record and are contrary to controlling precedent. By the time Officer Marrott decided to deploy his drug dog, he was neither waiting for a license-check return from dispatch nor allowing Mr. Dewitt to continue looking for his vehicle documents; rather, Officer Marrott had explicitly and unequivocally abandoned the purpose of the traffic stop, right after he performed the google map search and discovered the discrepancy in the travel times report by Mr. Dewitt.

The video shows clearly that, after discovering the travel time discrepancy, Officer Marrott told dispatch that he had “reasonable suspicion” to believe Mr. Dewitt was involved in criminal activity, and Officer Marrott left his patrol car and made the same announcement to Mr. Dewitt, telling Mr. Dewitt he was now being detained due to reasonable suspicion of drug activity. (Ex.A, 11:40:40 – 11:40:35.) He had Mr. Dewitt step out of the car and requested permission to search him; then he told Mr. Dewitt he was going to run his drug dog around his car. (Ex.A, 11:40:35 – 11:43:30.) Officer Marrott did not wait for dispatch to return information, nor did he conduct any further tasks related to the traffic violation. (*See generally*, Ex.A, 11:40:08.) Nor did the State present any evidence to show that the tasks tied to the mission of the traffic stop had been transferred to any other officer. (*See generally*, 7/16/18 Tr.) The district court’s conclusion that conducting the dog sniff did not extend the stop was legally and factually erroneous.

b. Officer Marrott's Observations Did Not Give Rise To Reasonable Suspicion

An officer's observations and events succeeding the initial stop may permit extending the length and scope of a traffic stop, but *only* if there exist objective and specific articulable facts that provide the constitutionally-required level of "reasonable suspicion" to justify an investigative detention. An investigative detention is permissible *only* if it is based upon specific articulable facts which justify suspicion "that the detained person is, has been, or is about to be engaged in criminal activity." *Florida v. Royer*, 460 U.S. 491, 499-500 (1983). The quantity and quality of information necessary to establish reasonable suspicion is less than that necessary to establish probable cause. *Alabama v. White*, 496 U.S. 325, 330 (1990) Still, reasonable suspicion requires more than a mere hunch. *Id.* at 329. Whether an officer possessed reasonable suspicion is evaluated based on the totality of the circumstances known to the officer at or before the time of the detention. *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Kelly*, 160 Idaho 761, 763 (Ct. App. 2016). "Reasonable suspicion depends on the factual and practical considerations of everyday life." *Naverette v. California*, 572 U.S. 393, 402 (2014).

As explained below, the behaviors and items observed by the officer, even in their aggregate, were not indicative of drug activity or any other criminal conduct and therefore did not justify extending the stop to conduct a drug investigation.

Officer Marrott indicated that his suspicion was reasonable based on several factors. He indicated first that Mr. Dewitt was extremely nervous. (*See* 7/16/18 Tr., p.17, L.7 – p.21, L.18.) However, courts have made clear that "a nervous demeanor during an encounter with law enforcement is of limited significance in establishing the presence of reasonable suspicion because it is common for people to exhibit signs of nervousness when confronted with law enforcement regardless of criminal activity. *State v. Neal*, 159 Idaho 919, 924 (Ct. App. 2016);

State v. Zuniga, 143 Idaho 431, 435 (Ct. App. 2006), *State v. Gibson*, 141 Idaho 277, 285-86 (Ct. App. 2005). In the present case the signs of nervousness Officer Marrott observed are also attributable to the amount of caffeine and legally-prescribed amphetamine in Mr. Dewitt's system. (See 7/16/18 Tr., p.17, L.7 – p.21, L.18.) This factor does not add to the totality of the circumstances, however, because Officer was aware that Mr. Dewitt was prescribed amphetamine. (See 7/16/18 Tr., p.17, L.7 – p.21, L.18.) Officer Marrott also claims that the vehicle having a single key in the ignition was a sign, based on his training and experience, of drug activity.⁵ (See 7/16/18 Tr., p.17, L.7 – p.21, L.18.) Thousands of drivers wisely have only one car key in the ignition and this factor does not add to reasonable suspicion. Additionally, Officer Marrott claimed he had suspicion because Mr. Dewitt "didn't know where he was coming from." This is not true and is belied by the record; Mr. Dewitt stated only that he did not remember whether the name of the town where he visited was called Twin Falls or Twin Plains. (See 7/16/18 Tr., p.17, L.7 – p.21, L.18.) This type of uncertainty on the part of an out-of-state motorist does not add to any reasonable suspicion of criminal activity.

Without additional facts suggestive of drug activity or other criminal activity, these facts are insufficient to justify prolonging the stop so that the officer can conduct a new drug investigation. To hold otherwise would allow the traffic stops of the countless thousands of long-distance travelers to result in drug investigations and prolonged detentions, and as such is incompatible with the Fourth Amendment's requirement of reasonableness. *Cf. State v. Kelly*, 160 Idaho 761, 763 (Ct. App. 2016) (concluding that using the interstate freeway, despite the fact that it is used by individuals engaged in a host of criminal activity, "cannot give rise to a

⁵ There was no claim, nor evidence to support a claim, that Officer Marrott reasonably suspected Mr. Dewitt was driving under the influence.

reasonable suspicion to search a vehicle as it would subject thousands of innocent travelers to an invasion of their privacy for no more reason than the use of the road.”)

D. Mr. Dewitt Clearly And Unequivocally Invoked His Right To Counsel And Officer Marrott’s Continued Questioning Violated Mr. Dewitt’s Fifth Amendment Rights

In response to Officer Marrott’s post-*Miranda* request that Mr. Dewitt talk instead of sitting silent, Mr. Dewitt stated “without my attorney” and shook his head side to side. Mr. Dewitt’s verbal and nonverbal statements clearly and unequivocally invoked his right to counsel. The district court erred when it conclude that Mr. Dewitt’s statements were ambiguous and could have meant something else, and the statements obtained by Officer Marrott, after he resumed questioning, should have been suppressed.

If the right to counsel has been invoked, the police may not reinitiate interrogation of the detainee in the absence of an attorney. *Minnick v. Mississippi*, 498 U.S. 146, 153–54 (1990). “A suspect must unambiguously request counsel in order to invoke his Fifth Amendment right to counsel—he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *State v. Adamcik*, 152 Idaho 445, 451 (2012) (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)). “Where an individual asserts his right to counsel, the interrogation must cease until counsel has been made available to him, or until he himself “initiates further communication, exchanges, or conversations with the police.” *Edwards v. Arizona*, 451 U.S. 477, 485 (1981). The standard for determining whether a detainee has invoked the right to counsel is an *objective* one; his statements must be “sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Adamcik*, 152 Idaho at 470 (quoting *Davis*, 512 U.S. at 459).

In this case, Mr. Dewitt's verbal and nonverbal statements unambiguously invoked his right to counsel, and his desire to remain silent without his attorney present. The invocation of the right is made clear from the context in which it was made; Officer Marrott had just invited Mr. Dewitt to speak and gave Mr. Dewitt an ultimatum::

We can help you out. If you're willing to work and talk. But if you're just going to sit here and be quiet, I mean, that is your right, don't get me wrong, but if you don't want to work, then we have no other option than to book you as is. Okay. [Officer Marrott and Mr. Dewitt face each other] So, I know you're not getting this from Idaho. Okay. And if you are, tell me – you've got a valuable piece of information – you may be sleeping in your own bed tonight [in audible] if you work with me, we can get you on your way and get you working, alright? But, you got to be truthful and you got to be honest with me."

(Ex.A, 11:49:46 (emphasis added).)

Then Officer Marrott stopped talking and waited for his response. (Ex.A, 11:49-46 - 11:49:57.) Mr. Dewitt looked down, took a ten-second pause and then raised his head and looked at the officer and stated, "without my lawyer," then shook his head side-to-side. (11:49-46 - 11:49:57.)

In their context, Mr. Dewitt's verbal and nonverbal statements demonstrate his clear and unequivocal invocation of the right to counsel. Officer Marrott's subsequent questioning of Mr. Dewitt violated that right. Suppression of Mr. Dewitt's statements should therefore have been granted.

CONCLUSION

Mr. Dewitt respectfully asks that this Court reverse the district court's order denying suppression, vacate his judgment of conviction for marijuana trafficking, and remand his case to the district court for further proceedings and to allow Mr. Dewitt to withdraw his guilty plea.

DATED this 20th day of June, 2019.

/s/ Kimberly A. Coster
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of June, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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/s/ Evan A. Smith

EVAN A. SMITH
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KAC/eas