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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION ONE

STATE OF KANSAS,

Plaintiff,

v.

[REDACTED]

Defendant.

CASE NO. 06-CR-2026

MEMORANDUM DECISION AND ORDER

The above matter is before the Court on [REDACTED]'s Motion to Suppress. After careful consideration, the Court grants the motion.

FINDINGS OF FACT

1. In November 2006, Deputy Tracey Trammel was an experienced law enforcement officer, working in the area of criminal interdiction.
2. On November 8, 2006, just after midnight, Deputy Trammel observed [REDACTED] traveling in excess of the posted speed limit near interstate 70's east tollgate in Topeka, Kansas.
3. Deputy Trammel initiated a stop of [REDACTED]'s vehicle. Upon stopping the vehicle,

- Deputy Trammel observed [REDACTED] put on a baseball cap.
4. Deputy Trammel approached [REDACTED]'s vehicle and asked [REDACTED] for his license and registration. At that time, Deputy Trammel noted that [REDACTED] had pulled the baseball cap down low over his eyes.
 5. While engaging [REDACTED] in casual conversation, Deputy Trammel learned that [REDACTED] was traveling in a rental car from California to Arkansas to retrieve a few personal items and to visit for a little while and would then return to California.
 6. A driving trip from Topeka, Kansas, to Arkansas can reasonably be made in approximately 4.5 hours. A driving trip from Arkansas to California can reasonably be made in 2 days. A car rental agreement can usually be extended by making a phone call to the car rental agency.
 7. Deputy Trammel observed a backpack and a guitar in the back seat. The officer also observed a canine traveling in the front passenger seat. The canine was not aggressive and did not appear to be uncomfortable in the front passenger seat.
 8. Deputy Trammel noted that [REDACTED] appeared to be overly nervous: his hands were shaking; he was breathing heavy; and he was avoiding eye contact. Deputy Trammel also interpreted [REDACTED]'s prior act of putting on the baseball cap as a sign of nervousness.
 9. Deputy Trammel ran [REDACTED]'s license and learned that it was valid.
 10. Deputy Trammel also looked over [REDACTED]'s car rental agreement and learned that Jernegan had rented the car for 10 days. Deputy Trammel noted that it was the 4th

day of the 10-day rental agreement. Deputy Trammel assumed that it would take [REDACTED] another full day to get to Arkansas following the stop and that it would take him 3 to 4 days to drive back to California. Based on these assumptions, Deputy Trammel concluded that [REDACTED] would not have time to visit in Arkansas.

11. Deputy Trammel wrote Jernegan a warning ticket for the traffic violation and returned [REDACTED]'s documentation to him. Deputy Trammel believed, however, that he had reasonable suspicion to further detain [REDACTED] based on the following factors: (1) [REDACTED]'s act of putting on a baseball cap after dark; (2) [REDACTED]'s other signs of nervousness; (3) [REDACTED]'s stated travel plans, which Deputy Trammel believed seemed inconsistent with [REDACTED]'s car rental agreement; and (4) [REDACTED]'s backpack and guitar in the back seat, which Deputy Trammel believed restricted [REDACTED]'s dog to the front passenger seat.
12. After returning [REDACTED]'s documentation, Deputy Trammel asked [REDACTED] whether he could search the vehicle. [REDACTED] denied consent to search.
13. Deputy Trammel informed [REDACTED] that he was going to deploy his canine partner around the vehicle. Deputy Trammel detained [REDACTED] and called for a back officer to assist him. Within approximately 12 minutes, the back officer arrived.
14. When [REDACTED] exited the vehicle for the canine search, Deputy Trammel observed a can of deodorizer in the vehicle. Deputy Trammel also noted that [REDACTED]'s nervousness had not dissipated after receiving the written warning.

15. Deputy Trammel deployed the drug dog around the vehicle, and the canine indicated on the rear of the vehicle.
16. Deputy Trammel found 55.25 pounds of marijuana in the trunk and 2.5 pounds of marijuana in [REDACTED]'s backpack in the back seat. Deputy Trammel also found \$1,911 of U.S. currency on [REDACTED]'s person and a two-way radio inside the vehicle.
17. The State charged [REDACTED] with three drug-related charges in violation of K.S.A. 65-4163(a)(3), K.S.A. 79-5208, and K.S.A. 65-4152(a)(3).
18. On July 17, 2007, [REDACTED] filed the instant motion to suppress, and an evidentiary hearing was held on the motion on July 26, 2007.
19. At the evidentiary hearing on his motion to suppress, [REDACTED] explained that he had put on his baseball cap when stopped by Deputy Trammel because he wanted to look presentable. [REDACTED] testified that on his way to Arkansas, he had stopped in Colorado to visit friends; however, he had planned to spend only 2.5 days driving back to California after leaving Arkansas because he was not going to stop for any visits on the way home. [REDACTED] further stated that after the stop, his trip to Fayetteville would have only required 4.5 more hours of driving. [REDACTED] indicated that if necessary, he would have extended the car rental agreement. Finally, [REDACTED] testified that his dog preferred to ride in the front seat, but that there was plenty of room for his dog to ride in the back seat also.

CONCLUSIONS OF LAW

Under the Fourth Amendment to the United States Constitution, people have the right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Section 15 of the Kansas Constitution Bill of Rights provides the same protection as the Fourth Amendment. *State v. Anderson*, 281 Kan. 896, 901, 136 P.3d 406 (2006). The State bears the burden of proof for a suppression motion. It must prove to the Court the lawfulness of the search and seizure. *State v. Porting*, 281 Kan. 320, 324, 130 P.3d 1173 (2006).

██████████ argues that the officer’s extension of the traffic stop was not lawful because the extension was not consensual nor was reasonable suspicion developed during the stop. The State contends that Deputy Trammel possessed a reasonable and articulable suspicion of criminal activity to justify ██████████’s further detention following completion of the traffic stop and the search of Jernegan’s vehicle.

A routine traffic stop is a seizure under the Fourth Amendment. *State v. DeMarco*, 263 Kan. 727, 733, 952 P.2d 1276 (1998). “The scope and duration of a seizure must be strictly tied to and justified by the circumstances which rendered its initiation proper. [Citation omitted.]” 263 Kan. at 733-34 (quoting *State v. Damm*, 246 Kan. 220, 224, 787 P.2d 1185 [1990]). Our Supreme Court has explained the permissible procedure for a routine traffic stop:

“A law enforcement officer conducting a routine traffic stop may request a driver’s license and vehicle registration, run a computer check,

and issue a citation. When the driver has produced a valid license and proof that he or she is entitled to operate the car, the driver must be allowed to proceed on his or her way, without being subject to further delay by the officer for additional questioning.' [Citation omitted.]" *State v. Moore*, 283 Kan. 344, 351, 154 P.3d 1 (2007).

However, a driver may be further detained after completion of a routine traffic stop if the encounter becomes consensual or if during the traffic stop, the officer gains a reasonable and articulable suspicion that the driver is engaged in illegal activity. 283 Kan. at 351, 354. Here, the stop did not become a voluntary encounter. The State does not allege that the detention was consensual. Rather, the State attempts to demonstrate that the detention was lawful by arguing that during the routine traffic stop, the officer gained reasonable and articulable suspicion that [REDACTED] was engaged in illegal activity.

Reasonable suspicion is based on the totality of the circumstances and is viewed from the law enforcement officer's understanding of the circumstances. A court must judge the officer's conduct in light of common sense and ordinary human experience. Rather than pigeonholing each purported fact as either consistent with innocent behavior or as manifestly suspicious, a court must determine whether, under the totality of the circumstances, the detention was justified. A court must make this determination by giving deference to a trained law enforcement officer's ability to distinguish between innocent circumstances and suspicious circumstances. *Moore*, 283 Kan. at 354. A case-by-case evaluation is required to determine whether reasonable suspicion exists. 283 Kan. at 359.

The United States Supreme Court has provided the following instruction on reasonable suspicion:

“While ‘reasonable suspicion’ is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the *Fourth Amendment* requires at least a minimal level of objective justification [Citation omitted.] The officer must be able to articulate more than an ‘inchoate and unparticularized suspicion or ‘hunch’” of criminal activity. [Citation omitted.]” *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 120 S. Ct. 673 (2000).

The State relies heavily on *Moore* in this case. In *Moore*, the officer testified at the suppression hearing that he became suspicious that the defendant was engaged in illegal activity based on the following five factors: (1) the defendant’s severe nervousness, (2) the odor of dryer sheets or fabric softener in the defendant’s car, (3) the defendant’s travel route from Las Vegas to Maryland, (4) the minimal amount of spare clothing the defendant had brought along on his trip, and (5) the fact that the defendant was not the registered owner of the vehicle. 283 Kan. at 355.

On appeal of the trial court’s denial of the defendant’s motion to suppress, our Supreme Court acknowledged that the defendant’s extreme nervousness coupled with the fact that the defendant was driving a car not registered to him across the country and back were factors for the officer to consider, although they were not necessarily strong factors. 283 Kan. at 358-59. However, the court noted that the possibility of reasonable suspicion was increased because the defendant was traveling across the country with little clothing

and the officer had detected the odor of dryer sheets in the car. Finally, the court recognized the officer's level of experience in drug interdiction cases. The court concluded that the officer's testimony, coupled with his capabilities, established that reasonable suspicion existed to extend the traffic stop. 283 Kan. at 359.

In reaching its decision, the *Moore* court discussed its earlier decision in *DeMarco*. 283 Kan. at 355, 358. In *DeMarco*, the officer listed eight factors as the basis for his suspicion that the defendants were transporting drugs: (1) DeMarco's escalating nervousness; (2) the defendants' cross-country travel plans from a city known as a source for drugs; (3) the defendants' indirect travel route; (4) the fact that the defendants were traveling in a rental car; (5) the defendants' travel route on interstate 70, a known drug trafficking route; (6) the fact that the rental car was scheduled to be returned in 3 days; (7) the defendants' inconsistent stories about how DeMarco had reached California; and (8) the defendants' criminal histories. 263 Kan. at 730.

Discussing the role nervousness plays in the reasonable suspicion inquiry, the *DeMarco* court stated: "It is certainly not uncommon for most citizens—whether innocent or guilty—to exhibit signs of nervousness when confronted by a law enforcement officer. [Citations omitted.]" 263 Kan. at 736 (quoting *United States v. Wood*, 106 F.3d 942, 948 [10th Cir. 1997]). The court further observed that nervousness alone cannot justify a driver's further detention. 263 Kan. at 737. After discussing the other factors relied upon by the officer, the court concluded that the evidence had been properly suppressed by the trial court based on a lack of reasonable suspicion. 263 Kan. at 738-

41.

██████ argues that *State v. Chapman*, 23 Kan. App. 2d 999, 939 P.2d 950 (1997), is controlling. In *Chapman*, the officer believed he had developed reasonable suspicion of drug activity to extend a routine traffic stop. The factors upon which the officer based his suspicion included the following: (1) the defendant's extreme nervousness, heavy breathing, and avoiding eye contact; (2) a hotel business card on the car floorboard with a phone number handwritten on it; (3) the fact that the defendant was traveling from Phoenix, Arizona, with no visible sign of luggage or other personal items in the car; and (4) the defendant's arguable inability to inform the officer of the vehicle owner's name. 23 Kan. App. 2d at 1000.

In considering whether the factors relied upon by the officer amounted to reasonable suspicion for the defendant's detention, the *Chapman* court noted that the officer was highly trained and experienced in drug interdiction. 23 Kan. App. 2d at 1004. The court then explained the following: "Even though reasonable suspicion may be founded upon factors consistent with innocent travel, [citation omitted], '[s]ome facts must be outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous.' [Citations omitted.]" 23 Kan. App. 2d at 1009.

The *Chapman* court concluded that a majority of the factors relied upon by the officer could be explained by normal nervousness and cautioned that "'nervousness is of limited significance in determining reasonable suspicion'" because it is not uncommon for most citizens, whether guilty or innocent, to show signs of nervousness during a

police encounter. 23 Kan. App. 2d at 1009 (quoting *United States v. Fernandez*, 18 F.3d 874, 879 [10th Cir. 1994]). Furthermore, the court recognized that the officer had no prior acquaintance with the defendant that would enable the officer to judge whether the defendant's behavior during the traffic stop was unusual from the defendant's normal behavior. 23 Kan. App. 2d at 1009-10.

After considering the nervousness factors, the *Chapman* court dismissed the remaining factors as facially innocuous, stating:

“Although the nature of the totality of the circumstances test makes it possible for individually innocuous factors to add up to reasonable suspicion, it is ‘impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation.’ [Citation omitted.]” 23 Kan. App. 2d at 1010-11.

The *Chapman* court concluded that the officer did not have reasonable suspicion to detain the defendant following the conclusion of the traffic stop. 23 Kan. App. 2d at 1010.

Here, Deputy Trammel testified that he concluded there was reasonable suspicion to believe ██████ was engaged in criminal activity based on the following four factors: (1) upon being pulled over after dark, ██████ put on a baseball cap and pulled it down low over his eyes and avoided making eye contact; (2) ██████ appeared overly nervous because his hands were shaking and because he was breathing heavily; (3) ██████'s stated travel plans seemed inconsistent with his car rental agreement; and (4) ██████ had a backpack and a guitar in the back seat, which appeared to restrict his canine travel

companion to the front passenger seat.

Factors (1) and (2) can be addressed together. Deputy Trammel testified that he interpreted ██████'s act of putting on the baseball cap and pulling it down low over his eyes as a sign of nervousness. Deputy Trammel also testified that ██████ avoided making eye contact, was breathing heavily, and had shaking hands. Overall, Deputy Trammel characterized ██████'s demeanor as overly nervous. Our appellate courts, however, have established that nervousness is a normal reaction for a citizen when approached by law enforcement, despite whether the person is guilty or innocent; therefore, nervousness is of limited significance. Moreover, Deputy Trammel admitted that he did not have a prior acquaintance with ██████, so Deputy Trammel had no basis to judge whether ██████'s behavior during the stop was unusual compared to his normal behavior. See *DeMarco*, 263 Kan. at 736; *Chapman*, 23 Kan. App. 2d at 1009.

Under factor (3), Deputy Trammel believed that ██████'s stated travel plans seemed inconsistent with his car rental agreement. Specifically, Deputy Trammel noted that at the time of the stop, it was the 4th day of a 10-day car rental. During the stop, ██████ had told Deputy Trammel that he was headed to Arkansas from California and that he was planning on visiting in Arkansas for a little while before returning to California. Deputy Trammel assumed that it would take ██████ another full day to get to Arkansas following the stop and that it would take him 3 to 4 days to drive back to California. Based on these assumptions, Deputy Trammel concluded that ██████ would not have time to visit in Arkansas, which raised Deputy Trammel's suspicions.

However, Deputy Trammel admitted that it was possible to extend a car rental agreement with a phone call to the rental agency. Furthermore, the drive from Topeka, Kansas, to Arkansas can reasonably be made in approximately 4.5 hours and the drive from Arkansas to California can reasonably be made in 2 days. With 4.5 more driving hours to Arkansas, ██████████ would have arrived on the 4th day of his 10-day car rental, and with a 2 day return trip ahead of him, ██████████ would have needed to leave Arkansas on the 8th or 9th day of his trip. This would have allowed ██████████ to spend approximately 4 days visiting in Arkansas. In the alternative, ██████████ could have extended his car rental agreement. Therefore, the Court concludes that ██████████'s stated travel plans at the time of the stop and his car rental agreement were not so inconsistent as to provide a suspicious circumstance.

Under factor (4), Deputy Trammel's suspicions were raised because ██████████ had a backpack and a guitar in the back seat and a dog traveling with him in the front passenger seat. Deputy Trammel believed it would be more comfortable for the dog to be able to ride in the back seat but noted that there was no room in the back seat due to ██████████'s personal items occupying the space in the back seat. However, Deputy Trammel admitted that the dog did not look uncomfortable in the front seat and was not aggressive. The fact that ██████████ kept his backpack and guitar in the back seat and his dog in the front seat can hardly indicate drug trafficking. It is perfectly innocent for a person's dog to ride in the front passenger seat. In many instances, the dog may prefer to ride in the seat next to his or her owner. Therefore, the Court determines that this factor

can be dismissed as innocent.

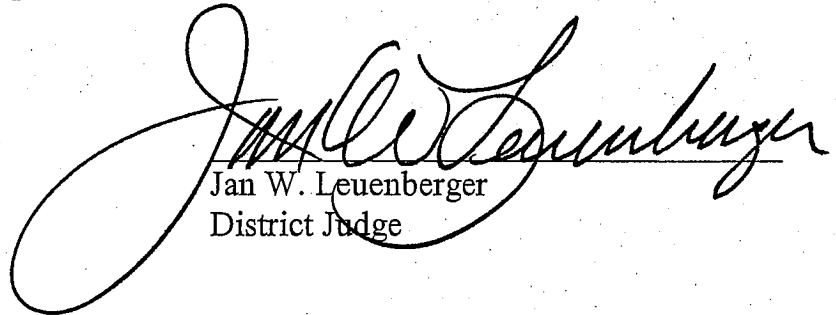
At this point, the Court will briefly discuss two other factors mentioned by the officer. Deputy Trammel testified that [REDACTED]'s nervousness did not dissipate after he handed back Jernegan's documents and gave [REDACTED] a warning, which concluded the original, justified stop. However, the Court notes that [REDACTED]'s continued nervousness is not a factor for the Court to consider in the reasonable suspicion analysis because reasonable suspicion to extend the detention past the conclusion of the original traffic stop must have arisen prior to the conclusion of the original traffic stop. See *United States v. Kaguras*, 183 Fed. Appx. 783, 788 (10th Cir. 2006) (determining that observations made after the mission of the original, justified stop have been fulfilled cannot be used to bootstrap reasonable suspicion). Deputy Trammel also testified that he noticed a can of deodorizer in [REDACTED]'s car when [REDACTED] stepped out of the car for the canine search. The Court notes that Deputy Trammel noticed the can of deodorizer after the conclusion of the original traffic stop. As a result, the Court also cannot consider the can of deodorizer as a factor in the reasonable suspicion analysis. See 183 Fed. Appx. at 788.

While nervousness *combined with other suspicious factors* may lead to reasonable suspicion (*DeMarco*, 263 Kan. at 737), here, Deputy Trammel pointed to no other factors that were suspicious. Nervousness alone is insufficient to justify a defendant's further detention after the original purpose of a traffic stop has been fulfilled. 263 Kan. at 737-38. After considering the totality of the circumstances, the Court concludes that Deputy

Trammel did not have reasonable suspicion to detain [REDACTED] following the completion of the traffic stop. Because Deputy Trammel's detention of [REDACTED] after the completion of the traffic stop was not consensual and was not based on reasonable suspicion, the evidence of narcotics discovered during the detention was tainted by the unlawfulness of the detention and must be suppressed.

For the foregoing reasons, [REDACTED]'s motion to suppress evidence is granted. This memorandum decision and order shall serve as the journal entry of judgment. No further journal entry is required.

Dated this 4th day of October, 2007.

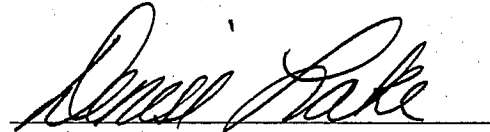

Jan W. Leuenberger
District Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in a pick-up bin this 4TH day of October 2007, to the following:

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