IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

United States of America, Plaintiff, vs. Cheng Kong Yang and Vikkie See Vue Lor, Defendants.	)	Case No. 3:18-cr-111 **REPORT AND RECOMMENDATION ON MOTIONS TO SUPPRESS**

Cheng Kong Yang and Vikkie See Vue Lor—husband and wife—are charged with drug conspiracy crimes. Both move to suppress evidence obtained during a March 4, 2018 vehicle search. They contend (1) law enforcement officers unlawfully prolonged a traffic stop and expanded the scope of the stop without reasonable suspicion of criminal activity unrelated to a traffic violation, and (2) Lor's consent to search the vehicle and a canine sniff of the vehicle were the fruit of an illegal expansion of the traffic stop. (Doc. 35; Doc. 41). Additionally, if the motion to suppress is granted, Lor moves for dismissal of the indictment. (Doc. 35).

This court held an evidentiary hearing on August 27, 2019.[1] At the hearing, the United States presented testimony of one witness—North Dakota Highway Patrol Trooper Gabriel Irvis. Neither Yang nor Lor called witnesses. With his pre-hearing brief, Yang filed two exhibits: (1) a dash-camera recording of events surrounding the traffic stop and search, and (2) an audio recording of a hearing on a motion to suppress in a state court case in which Yang was charged prior to his indictment in this case. (Doc.

[1] A transcript of the hearing is filed at Doc. 79. Additionally, an audio recording of the hearing is accessible through the court's computer network.

43).[2] At the state court hearing, three witnesses testified: Trooper Irvis, Trooper Kristjan Helgoe—a canine trooper who was involved in the vehicle search—and Lor.[3] Other exhibits in evidence are the two troopers' reports, (Doc. 42-1, pp. 3-6), a copy of a traffic warning issued to Lor, id. at 7, a log of contacts between the two troopers via a Computer Aided Dispatch system (CAD), (Doc. 70-1), and a copy of a Google Maps image showing three possible routes between Sacramento, California, and Minneapolis, Minnesota, (Doc. 36-1).

At the August 27, 2019 hearing, the United States confirmed it does not challenge the standing of Yang—who was a passenger in the vehicle—to bring this motion. (Doc. 79, p. 7).

Each of the parties filed pre-hearing briefs, (Doc. 36, Doc. 42, Doc. 56), and Yang filed a reply to the government's responsive brief, (Doc. 57). At the conclusion of the hearing, all parties agreed post-hearing briefing was not necessary.

Summary of Recommendation

Determining whether the traffic stop was illegally prolonged requires a fact-intensive inquiry, and the facts of this case present a close question. Trooper Irvis contacted a canine unit less than a minute after he initially spoke to Lor, and in this court's opinion, he prolonged the traffic stop to wait for arrival of a canine unit in the absence of reasonable suspicion of criminal activity unrelated to a traffic violation. The

[2] The dash-camera recording and the audio of the state court hearing were conventionally filed on a CD. The state court hearing was conducted over portions of two days. The court notes the first approximate ten minutes of recording of the second day are of a proceeding in an unrelated case.

[3] It appears state charges were not brought against Lor.

United States has not met its burden to prove the traffic stop complied with the Fourth Amendment.

But, if the district judge concludes the traffic stop was not illegally prolonged, the evidence should not be suppressed because Lor freely gave oral and written consent to the vehicle search and a consensual search is not subject to Fourth Amendment scrutiny.

Hearing Evidence

The following summary incorporates testimony at the August 27, 2019 hearing, testimony at the state court hearing, and all exhibits in evidence.

On March 4, 2018, Trooper Irvis was in a stationary position facing westbound in the median of Interstate 94, just west of the city limits of Fargo, North Dakota. Trooper Irvis was in a marked Highway Patrol vehicle on a concrete pad which had been installed for road construction purposes. Lor and Yang were driving eastbound in a rented Toyota Yaris bearing California license plates, with Lor as the driver and Yang as a passenger.

Trooper Irvis testified he observed the Lor/Yang vehicle following too closely behind the vehicle in front of it and pulled onto eastbound I-94 to catch up with the Lor/Yang vehicle. At the point Trooper Irvis first observed the vehicle, the speed limit transitioned from 75 mph to 65 mph and the speed limit further decreased to 55 mph shortly thereafter. Trooper Irvis testified he did not know the vehicle's speed when he first observed it. (Doc. 79, pp. 85-86). Trooper Irvis testified that by the time he caught up to it, the Lor/Yang vehicle had slowed "drastically" to 40 to 45 mph in the 55 mph zone, which he considered a signal the driver was aware he had left his stationary

location. Trooper Irvis testified he drove parallel to the Lor/Yang vehicle for a time and when he did so, neither the driver nor the passenger looked at him and Lor was very "rigid" in the driver's seat. Id. at 10.

Trooper Irvis testified he reduced his speed to let the Lor/Yang vehicle pull ahead, then accelerated again to parallel the vehicle a second time. Id. at 33-34, 58. He testified his second paralleling of the vehicle lasted approximately twenty-five seconds, Lor again did not look at him, and he observed Lor did not look at Yang but talked to him out of the corner of her mouth. Id. at 35. He considered Lor's actions an indication she was aware of his presence. Id. at 36. Trooper Irvis described paralleling a vehicle as a procedure he uses "all the time" to look for vehicle occupants' furtive movements, anything in plain sight, or anything that stands out. Id. at 12.[4] Trooper Irvis acknowledged he knew from the moment he pulled off the concrete pad that he was going to stop the Lor/Yang vehicle. Id. at 32.

After paralleling the Lor/Yang vehicle the second time, Trooper Irvis activated the lightbar on his patrol vehicle to initiate a traffic stop. Trooper Irvis testified that when he activated the lightbar, the dash camera began recording audio and video but the system also automatically recorded the preceding thirty seconds of video without audio. Id. at 31. The dash-camera recording began during the second time Trooper Irvis paralleled the vehicle, but the Lor/Yang vehicle is not visible on the recording while Trooper Irvis was driving beside it.

[4] Later in his testimony, Trooper Irvis identified air fresheners in rental cars as something that stands out to him. (Doc. 79, p. 56).

Trooper Irvis testified the Lor/Yang vehicle stopped approximately thirty seconds after he activated the lightbar, which he considered "a little lengthy" since he believed Lor was aware of his presence prior to activation of the lightbar. Id. at 13. On cross exam, he acknowledged Lor had pulled over shortly after clearing the Veterans Boulevard entrance ramp to I-94, id. at 38, but he also described a "giant shoulder before that entrance ramp" that "easily could have been utilized" to pull over sooner, id. at 62. The dash-camera recording shows the Lor/Yang vehicle's brake lights came on briefly near the entrance ramp and its right turn signal was activated shortly after clearing the entrance ramp.

Lor's state court testimony about events prior to the stop varied from that of Trooper Irvis in some respects. She testified she was not following too closely to the vehicle in front of her, she saw the patrol vehicle make a U-turn in the highway median, but the patrol vehicle was never "right beside" her vehicle. She denied slowing considerably in response to seeing the patrol vehicle and testified she was driving 55 mph the entire time. She said she had been singing and not talking to Yang out of the corner of her mouth. She testified she had not stopped sooner after the patrol vehicle's lightbar was activated because she did not want to stop on the entrance ramp.

Trooper Irvis walked to the driver side of the Lor/Yang vehicle after it stopped and activated his body microphone as he did so. He told Lor he would issue a warning for following another vehicle too closely and asked her to come to the patrol vehicle. Almost immediately—within thirty-three seconds—after Lor was in the patrol vehicle, Trooper Irvis used the CAD system to contact Trooper Helgoe, a narcotics detection canine handler, to ask for his assistance. Id. at 90. When Trooper Helgoe asked the

reason for the request, Trooper Irvis responded, "free air," which he testified refers to the "deployment of a narcotic [canine] around the vehicle within the scope of a traffic stop." Id. at 26-27, 74. Trooper Irvis testified he requested Trooper Helgoe's assistance based on "pre-stop indicators," id. at 75, and Trooper Irvis identified the drastic slowing of the vehicle, Lor not looking at him as he paralleled the vehicle, and Lor's rigid posture as "pre-stop indicators."

Trooper Irvis described the routine process used for issuing a traffic warning. He enters vehicle license plate information and driver's license information in the CAD system, and receives returns on the vehicle registration and driver's license data. He then enters the same vehicle and driver's license information into another data system—ARIES. In the ARIES system, he selects the type of traffic violation and can then print a traffic warning. Trooper Irvis testified he had some difficulty getting a return on Lor's driver's license information because her driver's license showed two middle names. Id. at 18. He testified he was "multitasking" while entering the data into CAD and AIRES, asking various questions of Lor as he entered the data. He testified that while he questioned Lor he could see her heart "beating out of her chest" and that she tapped her right fingers on her right leg, which he considered nervous behaviors. Id. at 19.

Trooper Irvis questioned Lor for approximately 8 ½ minutes prior to arrival of the canine unit. During those 8 ½ minutes, Trooper Irvis' questions included: (1) the origin, destination, and purpose of her trip; (2) the identity of her passenger, her relationship to him, where the two had met, and the length of their marriage; (3) the size of Chico, California, where Lor reported she had met her husband, and the weather

there; (4) her employment, her husband's employment and the length and nature of his employment; (5) how long she had known the friend she reported they were traveling to visit in Minneapolis; (6) Lor's height, eye color, and hair color (all of which were entered on the warning form Trooper Irvis issued); and (7) Lor's race (which was not entered on the warning form).

When he inquired about her employment, Lor told Trooper Irvis she was not employed because she had no one to care for her children; Trooper Irvis testified he noted there were no children in the vehicle so someone had to be caring for the children at that time, leading him to question Lor's statements about her employment status. Id.

Lor told Trooper Irvis she and Yang were traveling from Sacramento to Minneapolis. While he was questioning Lor, Trooper Irvis checked Google Maps and noted the most direct route of travel from Sacramento to Minneapolis was not through North Dakota. A Google Maps image in evidence identifies three possible routes from Sacramento to Minneapolis, with the I-94 route through North Dakota being 53 miles and one hour longer than the shortest route. (Doc. 36-1). When he questioned her about their route, Lor responded they chose the I-94 route because she wanted to see the mountains of Montana and they intended to return to California via I-90. Trooper Irvis testified varying a route of travel can be an indication of criminal activity. (Doc. 79, p. 23). Trooper Irvis also described what he considered to be "inappropriate laughter" when he asked Lor her hair color and she commented about having changed her hair color. Id. at 21. Lor's state court testimony about Trooper Irvis' questioning of her did not differ from Trooper Irvis' testimony in any significant way.

After Trooper Helgoe arrived, the two troopers conferred. Trooper Irvis relayed to Trooper Helgoe his opinion that the vehicle was "way off course" on a route from Sacramento to Minneapolis, that he could see Lor's heart beating through her shirt, and that in Lor's responses to several of his questions about employment and relationships, "everything's two years." Trooper Irvis advised Trooper Helgoe that he was typing up the warning "right now," that he thought "for sure" there was reasonable suspicion, and that he would ask Lor "some drug questions real quick."

After conferring with Trooper Helgoe, Trooper Irvis returned to his patrol vehicle, told Lor he "noticed a couple of things with [her] story," and asked additional questions. When he asked about her responses to several questions being "two years," Lor said she had met Yang two years earlier, she had moved to Sacramento after meeting him, and the friend they were going to visit was someone she met through Yang.

When Trooper Irvis propounded "drug questions" to her, Lor responded in the negative to each of his questions, though he testified the inflection of Lor's voice "changed drastically" when he asked about transporting marijuana. Id. at 26. In his written report, Trooper Irvis described Lor's response to the question about transporting marijuana as having been in "a much higher pitch than the other times she said no." (Doc. 42-1, p. 3). In its review of the dash-camera recording, this court identified a slight change in inflection of Lor's voice in responding to the question about transporting marijuana.

Trooper Irvis asked for Lor's consent to search the vehicle, which she granted. Trooper Irvis printed a consent form and read it to her, and Lor signed the consent

form. In her state court testimony, Lor acknowledged that she gave consent to the search, that Trooper Irvis told her she could either agree to or deny consent to the search, and that she knew whether to give consent was her choice. She further testified Trooper Irvis printed the traffic warning at the same time he printed the consent form.

While Trooper Irvis asked the second group of questions of Lor—the drug interdiction questions—Trooper Helgoe questioned Yang, who had remained in the Lor/Yang vehicle. At the state court hearing, Trooper Helgoe testified Yang's body movements indicated Yang was nervous when talking to him and it was uncommon for a person to be nervous in similar circumstances. Trooper Helgoe testified Yang told him they were traveling to Minneapolis for his uncle's funeral, and gave Trooper Helgoe his uncle's name. Trooper Helgoe further testified Yang answered his cell phone while he was speaking to him and spoke in a different language during the call, but he perceived Yang was confirming the name of his uncle with the other party on the call. Trooper Helgoe also testified he observed an air freshener in the vehicle, which he considered unusual because rental vehicles are usually newer vehicles, and he described air fresheners as often used to attempt to mask odors of controlled substances.

Trooper Irvis testified about his conclusion that the totality of the circumstances gave reason to search the vehicle:

> Nothing was adding up here. You know, the -- the pre-stop indicators I testified to earlier; her nervous behavior in my car; the routes of travel; the -- the fact that she quit her job to take care of her kids but there's no one in the -- her kids aren't with her in this vehicle traveling across the country. I -- yeah, I guess when I look at everything as a whole and put everything together, I -- it's called a consent search, and I asked for permission to search her vehicle.

(Doc. 79, p. 24).

After Lor signed the consent form, the two troopers conferred again and discussed differences between the information Lor and Yang had given in response to their questioning. Trooper Helgoe then deployed his canine to conduct a sniff of the vehicle and concluded the dog displayed alert behavior. The two troopers searched the vehicle, finding three cell phones, cash in Lor's purse, and marijuana in packages taped to the inside of the glove box. Trooper Irvis arrested Lor and Yang. The Lor/Yang vehicle was searched further after it was impounded. Inside the doors, dash, hatch, and rear bumper, the troopers found approximately thirty pounds of methamphetamine and thirty-five pounds of marijuana. Trooper Irvis' report indicates $2,200 in cash was seized from the vehicle. (Doc. 42-1, p. 5).

Timeline

The clock on the dash-camera video shows Trooper Irvis activated his patrol vehicle's lightbar at 11:07:13[5] and the Lor/Yang vehicle stopped at 11:07:46. The video shows Lor applied the vehicle's brakes briefly at 11:07:20, when she was in the area where other vehicles were entering the highway, activated the vehicle's right turn signal at 11:07:27 after clearing the entrance ramp, and then began moving to the right shoulder of the highway. The video and CAD transcript indicate subsequent events at the following approximate times:

11:07:55 Trooper Irvis approached the Lor/Yang vehicle and activated his body microphone.

[5] During the state court hearing, Trooper Irvis testified activation of the lightbar is indicated by the presence of the letter "L" in the lower left corner of the dash-camera recording.

11:08:29 Trooper Irvis, standing next to the driver side of the Lor/Yang vehicle, stated, "I'm gonna cut you a warning," and asked Lor to come back to his patrol vehicle.

11:09:08 At Trooper Irvis' direction, Lor sat in the front seat of the patrol vehicle. Trooper Irvis walked around the patrol vehicle and sat in the driver's seat. He questioned Lor from the time he sat down in the driver's seat until he exited the patrol vehicle at 11:17:50 to talk with Trooper Helgoe, who had arrived on the scene.

11:09:41 Trooper Irvis contacted Trooper Helgoe via the CAD system to request his assistance as a canine handler. (Doc. 70-1, p. 1).

11:11:37 Trooper Irvis asked Lor for clarification of whether she had two middle names. He testified the response to his CAD inquiry on Lor's driver's license was delayed because of the need for that clarification.

11:11:52 Trooper Helgoe acknowledged the 11:09:41 message from Trooper Irvis and responded, "emergent?" Id. at 2.

11:12:20 Trooper Irvis responded to Trooper Helgoe via CAD, acknowledging the 11:11:52 message, and responded to Trooper Helgoe's prior question with "free air," indicating he was requesting assistance for a canine sniff of the vehicle.

11:12:33 Trooper Irvis stated, "Oh, came back," indicating he had received information in response to his query on Lor's driver's license.

11:12:40 Trooper Helgoe responded to the 11:12:20 message from Trooper Irvis, stating, "ok."

11:16:40 Trooper Irvis asked Lor's race, eye color, hair color, height, and current address.

11:17:50 Trooper Helgoe arrived, and Trooper Irvis exited his patrol vehicle to speak with Trooper Helgoe.

11:18:08 Trooper Irvis stated to Trooper Helgoe, "Sacramento to Minneapolis. They're way off course. I can see her heart beating through her shirt. Everything's two years." Trooper Helgoe responded, "As long as you think there's reasonable suspicion, or are you still on the, still part of the traffic?" Trooper Irvis responded, "No I do for sure. I'm typing up the warning right now. Let me ask her some drug questions real quick."

11:19:52 Trooper Irvis asked Lor a second group of questions, including whether she was transporting large amounts of U.S. currency, heroin, methamphetamine, or marijuana. Lor responded "no" to each of those questions. Trooper Helgoe walked to the Lor/Yang vehicle and questioned Yang while Trooper Irvis asked Lor the second group of questions.

11:20:14 Trooper Irvis asked Lor, "Can I search your vehicle today?" Lor replied, "If you want to." Trooper Irvis asked Lor, "Can't think of any reason that a canine would indicate on the presence of narcotics in the vehicle?" Lor responded, "No."

11:20:38 Trooper Irvis advised Lor he would print a consent to search form for her signature.

11:21:18 Trooper Irvis questioned Lor as to her reason for traveling through North Dakota, stating "according to the maps, you shouldn't be all the way up here." Lor responded that she had never been to Montana and wanted to see the "mountains and stuff."

11:24:35 Trooper Irvis printed a consent to search form and read it to Lor, after which Lor stated, "I don't have anything, but you can search if you want." Lor signed the consent form. A traffic warning was printed at the same time the consent form was printed.

11:24:56 Trooper Helgoe sent a CAD message to Trooper Irvis, stating, "passenger said going to grandpa, no uncles funeral in minneapolis, were tg for 6 mon and then have been married for a year."[6] Id. at 2.

11:26:34 Trooper Helgoe sent a CAD message to Trooper Irvis, stating, "no wedding ring, said they were culturally married, no american wedding, someone called him while I was standing there and had to confirm his uncles name with caller, was nervous, [couldn't] keep still, was uncomfortable while I was standing there." Id.

11:30:06-11:32:08 Trooper Helgoe conducted a canine sniff of the Lor/Yang vehicle, after which he advised Trooper Irvis that the dog was "definitely alerting."

[6] The court assumes "tg" means "together."

11:33:01 Trooper Helgoe asked Lor if it was still OK to search the vehicle, and she responded, "Yes."

11:33:19-11:44:25 Troopers Irvis and Helgoe searched the Lor/Yang vehicle, locating cash in Lor's purse, three cell phones, and packages of marijuana taped to the top of the glove box.

11:46:45 Trooper Irvis, standing outside the open passenger door of the Lor/Yang vehicle, stated to Trooper Helgoe, "Bro, I said to myself, let me shut my thing off here." Trooper Irvis then shut off his body microphone.

11:51:20 Trooper Irvis read a Miranda warning to Lor and Yang and advised them they were under arrest for possession of a controlled substance with intent to deliver.

State Court Hearing

In addition to testimony of Trooper Irvis, Trooper Helgoe, and Lor, evidence received by the state court included the dash-camera recording, the troopers' reports, and the Google Maps image showing possible routes between Sacramento and Minneapolis. There was no reference to the CAD log during that hearing, and this court assumes it was not in evidence at that hearing. In the state court, Yang challenged the initial traffic stop as well as its extension. At the conclusion of the hearing, the state court judge denied Yang's motion to suppress on the record. (Doc. 43, Day 2, 01:01:07). Yang's attorney did not reference the Rodriguez v. United States, 135 S. Ct. 1609 (2015), decision in closing argument, and the state court judge did not discuss it in stating his ruling.

Law and Discussion

Lor and Yang contend Trooper Irvis unlawfully prolonged the traffic stop without reasonable suspicion of other crimes, in violation of Rodriguez. 135 S. Ct. 1609. They further assert Trooper Irvis did not diligently complete the written warning, thus prolonging the stop, and argue Lor's consent to a search of the vehicle and the canine sniff were fruit of the unlawful expansion of the stop. Yang and Lor seek suppression of all evidence of drugs found during the search.

The United States contends the traffic stop was not unreasonably prolonged, pointing to Trooper Irvis interspersing "conversational questions" with questions routine to a traffic stop throughout the first 8 ½ minutes Lor was in the patrol car. The United States contends Trooper Irvis combined destination and purpose questions with "conversational questions," did so while entering information into the computer systems and waiting for return information from those systems, and argues any "off topic" questions did not add time to the stop to any measurable degree. Further, the United States argues Lor gave more information than needed when responding to some of Trooper Irvis' questions, thereby extending the stop. (Doc. 56, pp. 6-7).

In the United States' view, Trooper Irvis' "combination of suspicions" grew over the course of his interaction with Lor, justifying his broader inquiry to satisfy his suspicions. The United States also argues that Trooper Irvis could have taken time to question Yang himself while Lor waited in the patrol vehicle, rather than asking Trooper Helgoe to question Yang.

1. Fourth Amendment Standards

Under the Fourth Amendment, the "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. "The touchstone of [any] analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977) (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)).

As summarized by the Eighth Circuit:

> Supreme Court jurisprudence has placed police-citizen encounters into three tiers or categories: First, there are communications between officers and citizens that are consensual and involve no coercion or restraint of liberty. Such encounters are outside the scope of the Fourth Amendment. Second, there are the so-called Terry-type stops. These are brief, minimally intrusive seizures but which are considered significant enough to invoke Fourth Amendment safeguards and thus must be supported by a reasonable suspicion of criminal activity. Third, there are highly intrusive, full-scale arrests, which must be based on probable cause.

United States v. Poitier, 818 F.2d 679, 682 (8th Cir. 1987); see also United States v. Grant, 696 F.3d 780, 784 (8th Cir. 2012) (if a person consents to an encounter with a law enforcement officer, Fourth Amendment scrutiny is not triggered). Regarding suppression, the Supreme Court has held:

> The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Amendment says nothing about suppressing evidence obtained in violation of this command. That rule—the exclusionary rule—is a "prudential" doctrine, Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357, 363 (1998), created by this Court to "compel respect for the constitutional guaranty." Elkins v. United States, 364 U.S. 206, 217 (1960); see Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961). Exclusion is "not a personal constitutional right," nor is it designed to "redress the injury" occasioned by an unconstitutional search. Stone v. Powell, 428 U.S. 465, 486 (1976); see United States v. Janis, 428 U.S. 433, 454 n. 29 (1976) (exclusionary rule "unsupportable as reparation or

> compensatory dispensation to the injured criminal" (internal quotation marks omitted)). The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations. E.g., Herring [v. United States, 555 U.S. 135,] 141 and n.2 [(2009)]; United States v. Leon, 468 U.S. 897, 909, 921 n. 22 (1984); Elkins, supra, at 217 ("calculated to prevent, not to repair"). Our cases have thus limited the rule's operation to situations in which this purpose is "thought most efficaciously served." United States v. Calandra, 414 U.S. 338, 348 (1974). Where suppression fails to yield "appreciable deterrence," exclusion is "clearly . . . unwarranted." Janis, supra, at 454.

Davis v. United States, 564 U.S. 229, 236-37 (2011).

2. Fourth Amendment Standards Applied to Traffic Stops

The Supreme Court has held roadside traffic stops are seizures for the purposes of Fourth Amendment analysis. E.g., Delaware v. Prouse, 440 U.S. 648, 653 (1979). "For purposes of constitutional analysis, a traffic stop is characterized as an investigative detention, rather than a custodial arrest. As such, a traffic stop is governed by the principles of Terry v. Ohio, 392 U.S. 1 (1968)." United States v. Jones, 269 F.3d 919, 924 (8th Cir. 2001). A lawful traffic stop must be based on "at least a reasonable, articulable suspicion that criminal activity is afoot." Id. The United States bears the burden to establish a traffic stop complied with Fourth Amendment analysis. United States v. Adler, 590 F.3d 581, 583 (8th Cir. 2009).

In connection with a traffic stop, an officer's investigation must be limited in scope to the specific circumstances precipitating the stop. Rodriguez, 135 S. Ct. at 1614; Illinois v. Caballes, 543 U.S. 405, 407 ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."); Terry, 392 U.S. at 19 (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967)) ("The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.").

3. Rodriguez v. United States

The Supreme Court's 2015 Rodriguez decision further defined the contours of a lawful traffic stop. A canine officer had stopped Rodriguez at 12:06 a.m. after observing his vehicle "veer slowly onto the shoulder . . . for one or two seconds and then jerk back onto the road," a violation of Nebraska law. 135 S. Ct. at 1612. The officer gathered Rodriguez's license, registration, and proof of insurance, then ran a records check. After the records check, the officer asked a passenger in Rodriguez's vehicle for identification, questioned the passenger about travel plans, and ran a records check on the passenger. The canine officer called for a second officer, then began writing a traffic warning. By 12:28 a.m. at the latest, the canine officer had explained the warning and returned the documents to Rodriguez and his passenger. The canine officer testified, "I got all the reason[s] for the stop out of the way[,] . . . took care of all the business" by that point. Id. at 1613.

After completing the warning and returning the documents, the officer asked for permission to conduct a canine sniff, which Rodriguez refused. The canine officer asked Rodriguez to exit the vehicle to wait for a second officer, and Rodriguez complied. The second officer arrived at 12:33 a.m. The canine officer took his dog around the vehicle twice, and the dog alerted during the second pass, leading to discovery of a large bag of methamphetamine. At most eight minutes passed between completion of the traffic warning and discovery of the drugs. Id.

Rodriguez was charged with a drug distribution crime, and he moved to suppress evidence of the methamphetamine as fruit of a traffic stop prolonged in the absence of reasonable suspicion of other criminal activity. A magistrate judge recommended

finding (1) no reasonable suspicion supported Rodriguez's detention after the warning was issued, and (2) no probable cause supported the vehicle search absent the canine alert. But, because Eighth Circuit law permitted extension of a traffic stop where there was "only a de minimis intrusion" on Fourth Amendment rights, the magistrate judge recommended denying the motion to suppress. The district judge adopted those recommendations, and the Eighth Circuit affirmed. Id.

The Supreme Court reversed, holding the officer did not have "the reasonable suspicion ordinarily demanded to justify detaining an individual" in order to extend the stop after the time required to effect the original purpose of the stop, i.e., issuance of a traffic warning. Id. at 1615. On remand, the Eighth Circuit declined suppression, applying the good faith exception to the exclusionary rule because the officers conducted the traffic stop in objectively reasonable reliance on the de minimis rule, which was binding circuit precedent at the time of the search. U.S. v. Rodriguez, 799 F.3d 1222, 1223 (8th Cir. 2015). "[S]earches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." Davis, 564 U.S. at 232.

Rodriguez resolved a division among circuit courts: whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion of other criminal activity, in order to conduct a canine sniff. Rodriguez, 135 S. Ct. at 1614. The Supreme Court rejected the de minimis rule which had been Eighth Circuit law, stating:

> We hold that 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. A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation.

Id. at 1612 (quoting Caballes, 543 U.S. at 407). The court explained the "mission" of issuing a ticket for a traffic violation:

> 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.

Id. at 1615 (citations omitted). A canine sniff is aimed at "detect[ing] evidence of ordinary criminal wrongdoing rather than at traffic code enforcement." Id.

The Supreme Court stated an officer may conduct certain unrelated checks during an otherwise lawful traffic stop but "may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." Id. Under Rodriguez, a traffic stop may last no longer than is necessary to effectuate its purpose. "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." Id. at 1614.

4. Searches Conducted After Rodriguez

Although a number of Eighth Circuit cases have discussed Rodriguez, only two of those cases involved searches conducted subsequent to the Rodriguez decision. Both cases are distinguishable from this one because both involved suspicion of other criminal activity prior to the traffic stops. United States v. Harry, 930 F.3d 1000 (8th Cir. 2019), involved a post-Rodriguez search. Officers were surveilling the defendant based on a tip from a confidential informant regarding drug distribution. A canine officer stopped the defendant for traveling ten miles per hour over the speed limit and recognized the defendant and a passenger from previous law enforcement encounters. A

second officer arrived shortly thereafter, and the two officers "collaborated to process the traffic violation while also searching the truck for drugs." Id. at 1003. A drug-sniffing canine alerted on the vehicle approximately three minutes after the initial stop, and ten minutes later, an officer found methamphetamine in the vehicle. The Eighth Circuit affirmed denial of suppression, concluding there had been two purposes for the stop: the traffic violation and the confidential informant's tip regarding drug distribution. Thus, the officers had not extended the stop in violation of Rodriguez because there was reasonable suspicion for the search independent of the traffic violation. Id. at 1005-06.

United States v. Mosley, 878 F.3d 246 (8th Cir. 2017), also challenged a post-Rodriguez search. In that case, officers stopped a vehicle believed to be associated with a bank robbery and discovered the robbery suspects in the trunk four minutes after making the stop. Id. at 250. Although the driver did not match witness descriptions and was alone in the passenger compartment, the officers nonetheless had reasonable suspicion of criminal activity—bank robbery—and their communication with other officers via radio did not "measurably extend the stop" in contravention of Rodriguez. Id. at 252-53.

In United States v. Traylor, No. 18-00233-01-CR-W-GAF, 2019 WL 1450559 (W.D. Mo. Mar. 7, 2019), report and recommendation adopted, 2019 WL 1440919 (W.D. Mo. Apr. 1, 2019), a district court addressed a motion to suppress evidence obtained during a post-Rodriguez search. A detective stopped a vehicle for bearing expired registration tags and having license plates registered to a different vehicle. The defendant provided a handwritten bill of sale, and the detective's records check led him to suspect the vehicle was stolen. Five minutes after initiating the stop, the detective

asked the defendant whether he was on parole or probation, the defendant stated he was on probation for a narcotics offense, the detective asked for consent to search the vehicle, the defendant did not consent, and the detective called for a canine unit. Shortly thereafter, the defendant produced insurance documents, alleviating the detective's suspicions as to ownership of the vehicle. The detective completed a ticket for lack of registration approximately twenty minutes into the stop, but, before giving the ticket to the defendant, the detective called the defendant's probation officer. While the detective spoke with probation staff, the canine unit arrived and conducted an open-air walk around the vehicle, and the dog alerted to the presence of narcotics. Approximately twenty-five minutes into the stop, the detective gave the ticket to the defendant, then informed the defendant his vehicle would be searched. The search resulted in discovery of a handgun and a small amount of marijuana. Id. at *2-3. In recommending denial of suppression, a magistrate judge described the facts as a close case: although the calls to the probation officer were extraneous and prolonged the stop, the canine sniff took place approximately within the time reasonably required to complete the traffic ticket given the unusual circumstances. Id. at *7.

In United States v. Chenier, No. 3:19-cr-30, 2019 WL 3798396 (D. Neb. Aug. 13, 2019), detectives stopped a vehicle for failure to signal a traffic move. The defendant lacked identification, prolonging a routine background check. While one detective ran the record check, the other detective spoke to the defendant, who grew nervous and evasive. A partial background check returned felony convictions for methamphetamine and firearm possession. The detectives requested a canine sniff approximately eight minutes into the traffic stop, but before the full interstate background check came back.

Approximately ten minutes into the stop, the defendant was placed in handcuffs after refusing to exit the vehicle and cooperate with the detectives. The canine unit arrived, conducted a sniff, and the dog alerted to narcotics in the vehicle, leading to the discovery of methamphetamine. Id. at *1-2. In denying suppression, the district court held the traffic stop was not unlawfully prolonged because the defendant's lack of identification, the interstate background check, and the defendant's uncooperative behavior in leaving the vehicle extended the time required. Id. at *3. Further, no evidence suggested the detectives used the time needed to complete the interstate background check as a delay tactic. Id.

In United States v. Linaman, No. CR16-4102, 2017 WL 2225580 (N.D. Iowa May 22, 2017), an officer stopped a vehicle for speeding and crossing the center line. The driver sat with the officer in the patrol car while the officer ran routine checks. Passengers in the vehicle appeared nervous, but their stated itineraries were consistent. The officer noticed the driver's eyes appeared red but wrote a warning ticket and told the driver he was free to go. While the driver walked back to the vehicle, the officer stopped and questioned him, then asked for consent to search the vehicle. The driver denied consent. At that point, other officers had arrived, and the passengers sat in other patrol cars. The first officer conducted a canine sniff, the dog alerted, and a search uncovered more than twenty pounds of methamphetamine. Id. at *2-4. The district judge, affirming a magistrate judge's unchallenged report and recommendation, found the officer unlawfully prolonged the stop and lacked reasonable suspicion of unrelated criminal activity—specifically, nothing in the totality of the circumstances rose to the level of reasonable suspicion to extend the stop. Id. at *5. The magistrate judge

concluded the officer appeared to have "a hunch that [the vehicle] contained drugs before he pulled it over, following the car for more than seven minutes after it briefly crossed the center line, likely to gain a better reason to stop the car." United States v. Linaman, No. 5:16-cr-4102, 2017 WL 9440796, at *9 (N.D. Iowa May 2, 2017).

5. Searches Conducted Before Rodriguez

Several Eighth Circuit decisions subsequent to Rodriguez discuss that case but deny suppression under the de minimis rule in effect at the time of the searches. In United States v. Murillo-Salgado, 854 F.3d 407, 410 (8th Cir. 2017), cert. denied, 138 S. Ct. 245 (2017), a Missouri Highway Patrol officer stopped a vehicle with California license plates for driving in the left lane at three miles per hour over the speed limit and informed the driver he would issue a warning. The driver and a passenger provided inconsistent itinerary information, and the driver's middle and last names were transposed on the vehicle rental agreement. The driver consented to a search of the vehicle approximately twenty-three minutes after the vehicle was stopped. Another officer arrived, and together the two officers found cocaine in a hidden compartment in the vehicle. The Eighth Circuit affirmed denial of suppression, reasoning the initial officer did not prolong the stop because his actions fell within permissible bounds: asking about itinerary, corroborating itinerary, calling dispatch, verifying identities and criminal histories, and entering information into the patrol car computer. Id. at 416. Reasonable suspicion to extend the stop to investigate drug crimes arose from the officer's "observations of the truck's contents [and] the seeming implausibilities and inconsistencies in the responses." Id. Though the Eighth Circuit concluded the search comported with the constitutional boundaries set by Rodriguez, it also relied on the

good faith exception to the exclusionary rule because the search had taken place prior to Rodriguez, while the de minimis rule governed in the Eighth Circuit. Id.

In United States v. Ahumada, 858 F.3d 1138, 1139 (8th Cir. 2017), a North Dakota Highway Patrol trooper stopped a vehicle for speeding and asked for consent to conduct a canine drug sniff. The driver did not consent, but the trooper conducted a canine sniff less than nine minutes after the stop, leading to the discovery of over four pounds of heroin in the vehicle's trunk. The Eighth Circuit affirmed denial of suppression on good faith grounds, reasoning the canine sniff was a de minimis extension of the stop and then-applicable case law permitted the extension. Id. at 1140.

United States v. Fuehrer, 844 F.3d 767, 773 (8th Cir. 2016), involved a defendant who was the subject of a drug distribution investigation pursuant to which a court had authorized a tracking device attached to his vehicle. Officers stopped the vehicle for traveling one mile per hour over the speed limit. The defendant could not produce a driver's license. One officer took the defendant to a patrol car to complete paperwork while another officer simultaneously conducted a canine sniff, leading to the discovery of methamphetamine in the vehicle. The Eighth Circuit affirmed denial of suppression, distinguishing the case from Rodriguez: "In Rodriguez, the officer had already issued the driver a warning before conducting the dog-sniff search," while the officer in Fuehrer completed the traffic warning after the canine sniff was complete and the dog had alerted to the presence of narcotics. Thus, the canine sniff had not unnecessarily prolonged the traffic stop. Id.

In United States v. Walker, 840 F.3d 477, 483 (8th Cir. 2016), officers stopped a vehicle because it had a cracked windshield. As soon as the vehicle's windows were

rolled down, the officers smelled the odor of marijuana, which provided reasonable suspicion for a further search of the passenger compartment and trunk of the vehicle, where drug paraphernalia and firearms were discovered. The Eighth Circuit affirmed denial of suppression based on the officer's reasonable suspicion of criminal activity independent of the traffic violation, which permitted extension of the stop under Rodriguez. Id. at 484.

In United States v. Leon, 924 F.3d 1021, 2015 (8th Cir. 2019), an Arkansas police officer observed a tractor-trailer illegally parked on the shoulder of a highway entrance ramp. The officer stopped to do a welfare check on the driver, and the driver told the officer he had stopped to call his dispatch. The officer had not observed the driver using a phone, and asked to see the driver's logbook. After noting irregularities in the logbook, the officer asked the driver if he was carrying drugs, which the driver denied. The officer perceived the driver to be very nervous when he denied the presence of drugs and asked for the driver's consent to search the vehicle. The driver consented, and the officer contacted a nearby canine trooper to assist with the search. The canine alerted to the presence of drugs, and the officers found almost 260 pounds of methamphetamine in the trailer. The Eighth Circuit affirmed denial of suppression, noting, "The month after the stop at issue here, the Supreme Court changed the law in this circuit when it held that reasonable suspicion is required to extend a stop to include a dog sniff. But as the district court correctly observed, the exclusionary rule does not apply to searches conducted in objectively reasonable reliance on binding appellate precedent." Id. at 1025 (citations and internal quotation marks omitted).

In United States v. Woods, 829 F.3d 675, 677 (8th Cir. 2016), the defendant was stopped for excessive window tint and littering, but the officer also had information that the defendant was a drug trafficker and that the vehicle contained hidden compartments used to conceal narcotics. The driver and a passenger gave conflicting information about travel plans, the officer detected the odor of marijuana in the vehicle, and the officer observed a fake iPhone in the vehicle which appeared to be a digital scale used to measure drug quantities. The driver gave consent for a vehicle search, and the officer asked for assistance from a canine officer. The canine officer arrived approximately forty minutes after the initial stop, and the canine quickly alerted to the presence of narcotics in the vehicle, leading to discovery of marijuana, methamphetamine, cocaine, and a firearm. Id. at 678. The Eighth Circuit upheld denial of suppression under Rodriguez, concluding the officer had reasonable suspicion of other criminal activity to extend the traffic stop until the canine officer arrived. Id. at 679-80.

In United States v. Englehart, 811 F.3d 1034, 1036 (8th Cir. 2016), a Nebraska police officer stopped Englehart's vehicle for following too closely behind another vehicle. The officer noted a large amount of luggage and debris from a fast-food restaurant in the vehicle "from which the officer deduced Englehart was not local and had been traveling for some time." The officer asked Englehart to sit in the patrol car while he prepared a written warning for the traffic violation. In the patrol car, the officer asked Englehart about his itinerary, purpose of travel, and employment. Englehart expressed notable confusion or frustration twice during the twelve-minute encounter but otherwise provided direct answers. The officer returned Englehart's license, registration, and proof of insurance with the written warning.

When Englehart turned to exit the patrol car, the officer engaged him in a series of drug interdiction questions, ultimately asking for consent to search the vehicle. Id. at 1039. Englehart denied consent to a search or to a canine drug sniff. The officer stated he was "not too concerned about personal use" narcotics, and Englehart admitted to "a little bit of personal use" marijuana in the vehicle. Id. at 1038-39. The admission came "sixteen minutes after initially sitting down in the patrol car, just over four minutes after [the officer] completed the traffic warning citation, and just under three minutes after [the officer] stated he intended to conduct a dog sniff." Id. at 1039. Officers subsequently conducted a canine sniff, leading to discovery of a very small amount of marijuana and over $350,000 in cash.

In recommending Englehart's motion to suppress be granted, a magistrate judge considered the additional questioning after the warning was completed to have been consensual until Engelhart resisted the officer's request to conduct a discretionary sniff, and the magistrate judge concluded there was not reasonable suspicion to extend the traffic stop in order to conduct the canine sniff. Id. The magistrate judge recommended suppression of all statements Englehart made "after he resisted [the officer's] desire to employ his K-9," as well as the physical evidence obtained thereafter. Id. at 1040. In adopting the magistrate judge's report and recommendation, the district judge clarified the officer had unlawfully detained Englehart and lacked reasonable suspicion to continue the approximately thirty-minute detention once Englehart withdrew consent by indicating he did not want his vehicle searched. Id.

On appeal, however, the Eighth Circuit found Englehart's admission of possession of "personal use" drugs, which occurred within four minutes after the traffic

warning procedures were completed, constituted probable cause to search the vehicle for drugs.[7] Id. at 1042-43. Under the de minimis rule in effect at the time of the stop, extension of the traffic stop was not unlawful, and the Eighth Circuit reversed the district court's grant of suppression. Id. at 1043.

In United States v. Gomez, 877 F.3d 76 (2d Cir. 2017), while Gomez was a subject of a heroin-trafficking investigation, officers observed him drive through a red light, speeding, changing lanes without signaling, and turning through a red light without stopping, leading to a traffic stop. The officer who stopped Gomez began the interaction by mentioning "an investigation into bad heroin as well as firearms within the city," then discussed the traffic violations. Id. at 82. The officer asked for Gomez's vehicle registration—but not his driver's license—and questioned Gomez about his itinerary. Gomez provided a false answer. A second officer joined the first, and together they brought Gomez to a grassy area on the side of the road, where officers again mentioned a heroin investigation. Gomez consented to a search of the vehicle, and the officers found a duffel bag in the trunk. One officer asked if Gomez "mind[ed]" if he opened the bag, and Gomez replied, "[N]o, but what are you looking for?" Id. at 83-84. Officers found 13,000 small bags and a larger bag collectively containing over 378 grams of heroin. Altogether the stop lasted less than six minutes before Gomez's arrest.

The district court denied Gomez's motion to suppress. Id. at 85. On appeal, the Second Circuit found extension of the stop violated Rodriguez, reasoning,

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[7] In the district court, "the entirety of the factual record was based only on a visual, soundless, recording of the encounter" between the officer and Englehart. Englehart, 811 F.3d at 1036. The recording submitted with the record on appeal, however, included audio.

> Just as an officer may not earn 'bonus time' to conduct inquiries for an unrelated criminal investigation by efficiently processing the matters related to the traffic stop, an officer may not consume much of the time justified by the stop with inquiries about offenses unrelated to the reasons for the stop.

Id. at 91-92. Notably, the government argued the officers had reasonable suspicion based on the prior drug investigation, but because the district court had not reached that issue, the Second Circuit declined to consider it. Id. at 92. But, at the time of the stop, Second Circuit precedent permitted the officers' unrelated questioning because it did not measurably prolong the stop, so the evidence was not suppressed. Id. at 96.

Similarly, in United States v. Campbell, 912 F.3d 1340 (11th Cir. 2019), the Eleventh Circuit found a traffic stop had been unlawfully prolonged but applied the good faith exception to the exclusionary rule and denied suppression. There, a deputy sheriff stopped a vehicle for what appeared to be a broken turn signal and asked the driver to sit in the patrol car while he completed paperwork to issue a traffic warning. Following questions about criminal history and travel itinerary, the deputy asked the driver if he was traveling with a firearm and if he had "any counterfeit CDs or DVDs, illegal alcohol, marijuana, cocaine, methamphetamine, heroin, ecstasy, or dead bodies in his car." Id. at 1345. The deputy requested and obtained the driver's consent to search the car, and a second deputy began a search.

After the deputy had given the driver a warning ticket, the two deputies continued the search and found a pistol and face mask hidden in the trunk, and "Campbell admitted that he lied about not traveling with a firearm because he was a convicted felon and had done time." Id. The Eleventh Circuit summarized its detailed timeline: "From the time [the deputy] began writing the warning ticket to Campbell's

consent to the search, a total of 6 minutes and 7 seconds elapsed. Campbell consented 8 minutes and 57 seconds after [the deputy] made the stop." Id. at 1348.

The district court found the questions about contraband consumed twenty-five seconds and were not related to the purpose of the stop but concluded the "few unrelated questions did not transform the stop into an unconstitutionally prolonged seizure." Id. (internal quotation marks omitted). The Eleventh Circuit, however, found the search unlawful under Rodriguez, stating "a stop is unlawfully prolonged when an officer, without reasonable suspicion, diverts from the stop's purpose and adds time to the stop in order to investigate other crimes." Id. at 1353. In finding the stop unlawful, the Eleventh Circuit applied a three-part test: "to unlawfully prolong, the officer must (1) conduct an unrelated inquiry aimed at investigating other crimes (2) that adds time to the stop (3) without reasonable suspicion." Id. at 1353. Since, however, the search was conducted prior to the Supreme Court's Rodriguez decision, the court affirmed the district court's denial of the motion to suppress based on the good-faith exception. Id. at 1355.

Prior to Rodriguez, the Eighth Circuit applied Fourth Amendment analysis to extension of a traffic stop in United States v. Peralez, 536 F.3d 1115 (8th Cir. 2008). In Peralez, a canine officer stopped a vehicle because its plates were obscured by a trailer. The officer brought the driver to the patrol car and issued a warning ticket. The driver then consented to answer additional questions about drugs and answered all questions in the negative. The officer then spoke with the defendant, who was a passenger in the vehicle. Ten minutes after initiating the stop, the officer took both men's identification to run a records check. Before dispatch responded, the officer conducted a canine sniff,

taking about one minute, and the dog alerted to the presence of drugs. A subsequent search of the vehicle revealed a digital scale with marijuana residue, a handgun with an obliterated serial number, and bullets, all of which belonged to the defendant. Id. at 1117-18. The Eighth Circuit held the officer's "non-routine questions prolonged the stop beyond the time reasonably required to complete its purpose" and violated the defendant's Fourth Amendment rights. Id. at 1121 (internal quotation marks omitted). Ultimately, however, the Eighth Circuit denied suppression because the officer planned to conduct the sniff at the outset of the stop, regardless of the defendant's answers, and the unlawful prolongation of the stop was therefore not a "but-for" cause of obtaining the evidence such that suppression was the appropriate remedy. Id. at 1121-22.

6. Fruit of the Poisonous Tree

Yang and Lor argue Lor's consent to the search resulted from the illegally prolonged traffic stop and contend evidence obtained through the search thus must be excluded as fruit of the poisonous tree. The fruit of the poisonous tree doctrine extends to voluntary consent. In Florida v. Royer, 460 U.S. 491 (1983), a person suspected of drug distribution was the subject of a "Terry-type stop," under circumstances determined to constitute an illegal detention. The defendant consented to a search of his luggage but, because he was being illegally detained when he gave consent, "the consent was tainted by the illegality and was ineffective to justify the search." Id. at 508; see also Brown v. Illinois, 422 U.S. 590 (1975) (Miranda warnings, by themselves, may not purge taint of an illegal arrest).

The Eighth Circuit recently articulated the "fruit of the poisonous tree" doctrine:

> The exclusionary rule extends to evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree." If the defendant

> establishes a nexus between a constitutional violation and the discovery of evidence sought to be excluded, the government must show the challenged evidence did not arise by exploitation of that illegality . . . [but] instead by means sufficiently distinguishable to be purged of the primary taint. The illegality must be at least a but-for cause of obtaining the evidence.

United States v. Tuton, 893 F.3d 562, 568 (8th Cir. 2018) (internal citations and quotation marks omitted), cert. denied, 139 S. Ct. 1192 (2019). Regarding application of the fruit of the poisonous tree doctrine to subsequent consent, the Eighth Circuit has stated:

> In a "fruit of the poisonous tree" doctrine case, a constitutional violation has occurred, and the issue is whether law enforcement obtained evidence by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. [V]oluntary consent to search, which was preceded by an illegal police action does not automatically purge the taint of an illegal [seizure]. Rather, to purge the taint, i.e. prevent the application of the "fruit of the poisonous tree" doctrine, the government bears the burden of demonstrating that the voluntary consent was an independent, lawful cause of the search. We determine whether this standard is met pursuant to the three factors elucidated in Brown v. Illinois, 422 U.S. 590 (1975), considering: (1) the temporal proximity between the Fourth Amendment violation and the grant of consent to search; (2) the presence of any intervening circumstances; and (3) the purpose and flagrancy of the officer's Fourth Amendment violation.

United States v. Alvarez-Manzo, 570 F.3d 1070, 1077 (8th Cir. 2009) (internal citations and quotation marks omitted). In Alvarez-Manzo, the district court concluded the defendant's consent to a search of his wallet was involuntary and suppressed evidence obtained from that search, and the United States challenged that determination on appeal. Id. The Eighth Circuit held officers had unlawfully seized the defendant's bag and person prior to obtaining consent to search his wallet and noted, "[E]ven if the consent to search was voluntary, standing alone, the evidence from the wallet still must be suppressed under the 'fruit of the poisonous tree' doctrine unless the consent was sufficient to purge the taint of the unlawful seizure of [the defendant's] bag and person."

Id. The Eighth Circuit affirmed suppression of the evidence because the government did not argue or attempt to show voluntary consent purged the taint of the prior unlawful seizures of the defendant's bag and person.

More recently, a magistrate judge in the Eastern District of Missouri recommended suppression of evidence where a defendant was unlawfully arrested and subsequently consented to a residential search that revealed an unlawfully possessed firearm. United States v. Holloman, No. 4:17-cr-218, 2017 WL 9750963 (E.D. Mo. Nov. 9, 2017), report and recommendation adopted, No. 4:17-cr 218, 2018 WL 1166557 (E.D. Mo. Mar. 6, 2018). The United States argued only that the consent was voluntary. Id. at *14. In adopting the report and recommendation, the district judge found the unlawful arrest tainted the subsequent search and, even if the consent was voluntary, the United States failed to show that consent purged the taint.

6. Application of Rodriguez to Hearing Evidence

Yang and Lor do not challenge reasonable suspicion supporting the initial traffic stop. Their challenges are based solely on alleged prolongation of the stop. Under Rodriguez, prolongation of the March 4, 2018 stop longer than reasonably required to complete the mission of issuing a warning for following too closely was constitutionally impermissible. Though an officer may conduct certain checks during an otherwise lawful traffic stop—checking driver's license and vehicle registration—an officer may not do so in a way that prolongs the stop, absent reasonable suspicion of other criminal activity. The critical question is not whether unrelated investigation "occurs before or after the officer issues a ticket," but whether conducting the unrelated investigation adds

time to the stop. Rodriguez, 135 S. Ct. at 1616. There is no per se time limit for a traffic stop.

In this court's opinion, the United States has not met its burden to prove reasonable suspicion of other criminal activity supported Trooper Irvis detaining Lor and Yang until Trooper Helgoe arrived. Trooper Irvis did not have reasonable suspicion of other criminal activity at the time he requested assistance of a canine trooper. The "pre-stop indicators" he described—slowing down when observing a patrol vehicle, driving in a "rigid" manner, and not looking at him when he paralleled the vehicle—singly or in combination are not indicative of criminal activity. Rather, they are innocuous behaviors. See United States v. Beck, 140 F.3d 1129, 1137 (8th Cir. 1998).

Nor does this court view information Trooper Irvis gained during the 8 ½ minutes he questioned Lor prior to the arrival of the canine trooper as constituting reasonable suspicion. Lor's explanation of choosing a route through North Dakota and traveling without her children are not indicative of criminal behaviors. Though nervous behavior and high pulse rate can contribute to a finding of reasonable suspicion, United States v. Anguiano, 795 F.3d 873, 877 (8th Cir. 2015), the Eighth Circuit has cautioned against undue reliance on similar factors, stating it "certainly cannot be deemed unusual for a motorist to exhibit signs of nervousness when confronted by a law enforcement officer," United States v. Jones, 269 F.3d 919, 929 (8th Cir. 2001) (internal quotation marks omitted).

Moreover, Trooper Irvis did not complete the traffic warning expeditiously. The evidence indicates he had received verification of Lor's driver's license information by 11:12:33, but he did not ask other questions necessary to complete the traffic warning

form—Lor's height, hair color, eye color, and address—until four minutes later, at 11:16:40. While he did not actually print the warning until he printed the consent form at 11:24:35, there is no evidence demonstrating it could not have been printed at least by 11:16:40. Apart from printing the warning, Trooper Irvis had completed the mission of issuing the warning prior to asking the second round of questions and prior to asking for Lor's consent to search the vehicle.

Though Lor testified in the state court that she knew she did not have to consent to a search of the vehicle, she and Yang argue her consent was "fruit of the poisonous tree" because Trooper Irvis obtained her consent as a result of the prolonged traffic stop. As discussed above, the exclusionary rule extends to evidence discovered as a result of consent obtained after an illegal seizure. See Alvarez-Manzo, 570 F.3d at 1077. The illegality must be at least a "but-for cause of obtaining the evidence." United States v. Olivera-Mendez, 484 F.3d 505, 511 (8th Cir. 2007).

Here, the prolongation of the traffic stop was a "but-for" cause of Lor's consent and the canine sniff. Had Trooper Irvis completed the mission of the traffic stop within the bounds of Rodriguez, the canine sniff would not have been conducted, and the stop would have been completed several minutes prior to Trooper Irvis obtaining Lor's consent to the search. The United States does not argue taint of the prolonged stop was purged. In this court's opinion, the United States has not met its burden to show the challenged evidence did not arise from exploitation of a traffic stop that was unlawfully prolonged under Rodriguez.

Conclusion

For the reasons discussed above, this court **RECOMMENDS** the motions to suppress, (Doc. 35; D0c. 41), be **GRANTED**. The United States has not addressed Lor's motion to dismiss the indictment, (Doc. 35), and the court is not familiar with other evidence against her. This court therefore cannot recommend dismissal of the indictment.

Dated this 30th day of October, 2019.

/s/ *Alice R. Senechal*
Alice R. Senechal
United States Magistrate Judge

NOTICE OF RIGHT TO OBJECT[8]

Any party may object to this Report and Recommendation by filing with the Clerk of Court, no later than **November 13, 2019**, a pleading specifically identifying those portions of the Report and Recommendation to which objection is made and the basis of any objection. Failure to object or to comply with this procedure may forfeit the right to seek review in the Court of Appeals.

[8] See Fed. R. Crim. P. 59(b)(2); D.N.D. Crim. L.R. 59.1(D)(3).