NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

COLEMAN TUTON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

INDEX TO APPENDICES

APPENDIX A

safeguarding the physical and psychological well-being of a minor is compelling." ***Id.*** at 852-53, 110 S.Ct. 3157 (internal quotations omitted), *quoting* ***Osborne v. Ohio***, 495 U.S. 103, 109, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). This interest may "outweigh . . . a defendant's right to face his or her accusers in court." ***Id.*** at 853, 110 S.Ct. 3157.

[11–13] When "the State makes an adequate showing of necessity," its interest "is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation." ***Id.*** at 855, 110 S.Ct. 3157. This finding of necessity must be "case-specific," based on evidence, to determine whether a different procedure "is necessary to protect the welfare of the particular child witness." ***Id.*** The trial court must "find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." ***Id.*** at 856, 110 S.Ct. 3157. The trauma must be "more than *de minimis, i.e.,* more than 'mere nervousness or excitement or some reluctance to testify.'" ***Id.*** "[W]here face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal." ***Id.*** at 857, 110 S.Ct. 3157, *citing* ***Coy v. Iowa***, 487 U.S. 1012, 1032, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) (Blackmun, J., dissenting).

[14] In *Craig*, the child abuse victims testified by closed-circuit television after the trial court found that they would suffer severe emotional distress and be unable to communicate if face-to-face with the defendant. After a proper finding of necessity, a child witness may testify by use of a special procedure if under oath, subject to full cross-examination, and "observed by" the judge, jury, and defendant. ***Id.***

Rosales-Martinez argues that the trial court erred by not making new express findings of necessity in the retrial to support the special procedure for A.C.'s testimony. The trial court incorporated its previous findings made six months earlier, with no reason to doubt them. Rosales-Martinez asserts this violates *Craig*. But *Craig* does not require the trial court to conduct a new *Craig* hearing at every stage. Section 2254(d)(1) "does not require state courts to *extend* [Supreme Court] precedent or license federal courts to treat the failure to do so as error." ***White v. Woodall***, 572 U.S. 415, 134 S.Ct. 1697, 1706, 188 L.Ed.2d 698 (2014) (emphasis in original).

Rosales-Martinez is not entitled to habeas corpus relief.

* * * * * * *

The judgment is affirmed.

UNITED STATES of America, Plaintiff–Appellee

v.

Coleman TUTON, Defendant–Appellant.

No. 17-1493

United States Court of Appeals, Eighth Circuit.

Submitted: January 12, 2018

Filed: June 25, 2018

Background: Defendant conditionally pled guilty to possession with intent to distribute cocaine, after the United States

District Court for the Western District of Arkansas, Susan O. Hickey, J., denied defendant's motion to suppress cocaine seized from his luggage during a traffic stop of bus. Defendant appealed.

Holdings: The Court of Appeals, Loken, Circuit Judge, held that:

(1) defendant was not unconstitutionally seized;

(2) officer's conduct after discovering his mistake regarding ownership of luggage was lawful, so that exclusionary rule did not apply;

(3) district court did not commit clear error in finding that there was no evidence to suggest officer cued drug detection dog to alert;

(4) training sufficiently established reliability of drug detection dog; and

(5) officer had probable cause to search defendant's luggage.

Affirmed.

Kelly, Circuit Judge, filed dissenting opinion.

1. Searches and Seizures ⚿22

Law enforcement officers need not obtain consent to conduct a dog sniff during an otherwise lawful encounter. U.S. Const. Amend. 4.

2. Automobiles ⚿349(17)

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 issuing a ticket for the violation. U.S. Const. Amend. 4.

3. Automobiles ⚿349(10, 18)

Defendant, who was a bus passenger, was not unconstitutionally "seized" within the meaning of the Fourth Amendment when law enforcement officer expanded the traffic stop by asking bus driver if there was any contraband in the bus and if officer could search the bus; officer asked bus driver for consent to search only two minutes after traffic stop began, the Fourth Amendment did not prohibit officer from asking questions unrelated to the traffic stop such as asking if bus driver would wait for the canine unit to arrive, bus driver consented to a search and necessarily consented to an extension of traffic stop, defendant had no authority to override bus driver's consent, and defendant made the decision to ride bus to his destination. U.S. Const. Amend. 4.

4. Criminal Law ⚿392.39(1)

The exclusionary rule extends to evidence later discovered and found to be derivative of an illegality, or "fruit of the poisonous tree." U.S. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⚿392.39(10)

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. U.S. Const. Amend. 4.

6. Criminal Law ⚿392.39(1)

In order for the exclusionary rule to apply under the fruit of the poisonous tree doctrine, the constitutional violation which resulted in the discovery of evidence must be the but-for cause of obtaining the evidence. U.S. Const. Amend. 4.

7. Searches and Seizures ⚿28

A warrantless search of abandoned property is not unreasonable and does not violate the Fourth Amendment. U.S. Const. Amend. 4.

8. Searches and Seizures ⚿28

Whether the basis for authority to search abandoned property exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably. U.S. Const. Amend. 4.

9. Criminal Law ⚿392.38(1)

When the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale of the exclusionary rule loses much of its force, and exclusion cannot pay its way. U.S. Const. Amend. 4.

10. Criminal Law ⚿392.38(2)

Even if law enforcement officer acted unreasonably in opening what he believed to be abandoned property consisting of defendant's suitcase in the luggage compartment of a bus defendant was a passenger on, officer's conduct after discovering the mistake was lawful, so that exclusionary rule did not apply to suppress cocaine discovered in suitcase during a later search that was validated by drug-detection dog alert; when officer found defendant's name tag on the suitcase and realized he had made a mistake of fact he immediately ceased searching and called for canine unit. U.S. Const. Amend. 4.

11. Controlled Substances ⚿137

District court did not commit clear error in finding that there was no evidence to suggest that law enforcement officer cued drug-detection dog to alert to the presence of narcotics in the luggage compartment of a bus, on the basis that officer knew before dog's search began that one of the suitcases had a false bottom; common sense suggested that inadvertent cuing was an unlikely explanation for dog's sustained profound-alert behavior in the luggage compartment. U.S. Const. Amend. 4.

12. Controlled Substances ⚿137

Assuming that the dog is reliable, a dog sniff resulting in an alert on a container, car, or other item, standing alone, gives an officer probable cause to believe that there are drugs present. U.S. Const. Amend. 4.

13. Controlled Substances ⚿137

In determining whether a drug-detection dog's alert establishes probable cause to search an area, the inquiry is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. U.S. Const. Amend. 4.

14. Controlled Substances ⚿137

Evidence of a drug-detection dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert when determining the existence of probable cause. U.S. Const. Amend. 4.

15. Controlled Substances ⚿137

Lack of prior, comparable real-world experience does not preclude a finding that a drug-detection dog's alert was reliable when determining the existence of probable cause. U.S. Const. Amend. 4.

16. Controlled Substances ⚿137

Training sufficiently established reliability of drug-detection dog that alerted to narcotics in luggage compartment on bus, even though defendant argued that the dog's alert was unreliable because the dog had not been previously deployed on a passenger bus in a real-world scenario; dog and law enforcement officer competed a 320 hour training course, dog had earned

a high accuracy rating for positive and negative alerts and had trained in varied environments, and dog had trained both on a bus and on the side of a highway. U.S. Const. Amend. 4.

17. Controlled Substances ⚿137

Drug-detection dog reliably alerted to the presence of narcotics in the luggage compartment of a bus that defendant was a passenger on, even though defendant argued that dog never provided a final indication of a specific drug source and merely showed interest in the luggage compartment which contained defendant's suitcase; law enforcement officer testified that dog repeatedly gave a "profound alert" to the odor of narcotics in luggage compartment, and the head of the state police canine certification program also testified that dog's behavior amounted to a profound alert. U.S. Const. Amend. 4.

18. Controlled Substances ⚿112, 116, 137

With drug-detection dog's profound alert to the presence of narcotics in the luggage compartment of a bus that defendant was a passenger on, law enforcement officer had probable cause to search defendant's suitcase which contained cocaine, even if the profound alert was directed only towards the luggage compartment in general; officer knew that drug traffickers had often traveled on that bus line and observed that bus driver was uncharacteristically nervous, and officer observed that defendant, one of only four passengers, was the only passenger that was nervous, evasive, and gave inconsistent answers about the nature of his trip. U.S. Const. Amend. 4.

19. Searches and Seizures ⚿161

Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. U.S. Const. Amend. 4.

Appeal from United States District Court for the Western District of Arkansas—Texarkana

Benjamin Wulff, Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Arkansas, Texarkana, AR, for Plaintiff–Appellee.

Christopher Aaron Holt, Anna Marie Williams, Assistant Federal Public Defender, Federal Public Defender's Office, Fayetteville, AR, for Defendant–Appellant.

Coleman Tuton, Pro Se.

Before LOKEN, GRUENDER, and KELLY, Circuit Judges.

LOKEN, Circuit Judge.

Coleman Tuton conditionally pleaded guilty to possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). Tuton appeals the district court's [1] denial of his motion to suppress eight pounds of cocaine seized from his luggage during an extended traffic stop of a bus he was riding from El Paso, Texas to Chicago. Reviewing the district court's legal conclusions *de novo* and fact findings for clear error, we affirm. United States v. Holleman, 743 F.3d 1152, 1155 (8th Cir.), cert. denied, —— U.S. ——, 134 S.Ct. 2890, 189 L.Ed.2d 846 (2014) (standard of review).

1. The Honorable Susan O. Hickey, United States District Judge for the Western District of Arkansas.

I. Background

While patrolling Interstate 30 on November 6, 2014, Corporal Chris Goodman, a twelve year veteran of the Arkansas State Police, stopped a Tornado bus for following a tractor trailer too closely. See Ark. Code Ann. § 27–51–305. At the suppression hearing, Goodman testified that traffic enforcement was an important part of his duties, but he was also a member of an Interstate Criminal Patrol Team that had "saturate[d]" this portion of I–30 with patrol cars and canine units, seeking to uncover evidence of criminal activity by those who were legitimately stopped for traffic violations. In this capacity, Goodman had attended drug interdiction training at the federal El Paso Intelligence Center and regularly received High Intensity Drug Trafficking Area summaries identifying methods being used by those smuggling drugs across the country. These intelligence summaries had reported "countless" seizures of contraband from Tornado buses, a bus line popular along the U.S.–Mexico border, and that drug traffickers were storing drugs in unlabeled, apparently abandoned luggage to keep police from linking a bag to a passenger if drugs were discovered in the luggage.

After the stop, in a brief conversation with the bus driver, Jose Soto, Goodman observed Soto's "hands were trembling" and his voice was "pretty nervous and shaky." Goodman found this odd because a professional driver typically interacts more comfortably with law enforcement and regulatory authorities than the average driver. Soto provided his commercial driver's license, said four passengers were on the bus, and said he was driving to Milwaukee from southern Texas. Examining the passenger manifest, Goodman noted the passengers were en route to Chicago, not Milwaukee. He thought it suspicious that a bus company would undertake a costly cross-country trip with only four passengers.

[1] Approximately two minutes after making contact, Goodman asked Soto if there was any contraband on the bus and if he could search the bus. Goodman testified that he quickly asked for consent because, had Soto refused, Goodman would have time to call for one of the nearby canine units while he completed the traffic stop.[2] Soto consented to the search and opened three doors to a luggage compartment in the bus's undercarriage. Goodman saw five or six bags with name tags hanging off their handles inside the far right door. On the left side of the middle door, Goodman testified, "was a black bag all by itself with no apparent markings of any kind, no name tag associated with it, nothing." Seeing no name tag "made me think that it was either the driver's luggage because he wouldn't put a name tag on his own luggage or it was someone who didn't want me to know whose bag it was.... [I]t was an unclaimed bag for that reason."

Goodman opened the black bag in the luggage compartment and reached inside, feeling what he believed was a false bottom. While trying to access the hidden compartment, Goodman saw a name tag bearing Tuton's name trapped beneath the bag's collapsed handle. Goodman stopped searching the bag, requested a canine unit, and entered the bus to question the passengers. One passenger had his luggage above the seat and consented to a search. Goodman testified that passenger Tuton was "very nervous," the only passenger

2. Law enforcement officers "need not obtain consent to conduct a dog sniff during an otherwise lawful encounter." United States v. Grant, 696 F.3d 780, 784 (8th Cir. 2012), cert. denied, 571 U.S. 832, 134 S.Ct. 63, 187 L.Ed.2d 52 (2013).

who appeared to avoid eye contact with him. Tuton said his journey began in El Paso, where Goodman knew "a lot of drugs cross the border ... and then are distributed ... all across the country." Tuton's explanation why he chose to take the bus rather than fly "didn't make sense." He initially said he did not fly because the plane ticket was too expensive, but then said a plane ticket would have cost $120.00 when he paid $192.00 for the bus ticket. Goodman testified that he did not know what was in the false compartment of Tuton's bag but suspected drugs were hidden there. Asked why he did not ask Tuton for consent to search, Goodman replied:

> I thought is the consent tainted if for some reason [Tuton] saw me already looking in his bag.... I feel like the most neutral thing to do will just be have a dog come run the bus ... the dog doesn't know anything about what I did.... He just runs, and he tells us whether he smells the drugs he's trained to smell or not.

About four minutes after Goodman requested the canine unit, Corporal Rocky Rapert arrived with his drug-detection dog, Hemi. Goodman asked that Hemi sniff one suitcase, but Rapert said he would deploy Hemi on the entire luggage compartment. At the suppression hearing, Rapert explained this practice strengthens the reliability of any alert because a handler who directs his dog to sniff only one bag can be accused of having "cued" a false alert.

Hemi jumped into the luggage compartment and immediately showed behavioral changes. He assumed an excited posture, normal for being "in the odor of narcotics," closed his mouth, breathing just through his nose, and focused his sniffing on the back side of the luggage area. When Rapert pulled Hemi away from the luggage compartment, Hemi resisted leaving. Rapert concluded Hemi had given a "profound alert," a behavior change that any lay person would notice, which is a more definitive signal of drug detection than a "normal alert," a change detectible only by the handler. Though Hemi sniffed the individual bags in the compartment, he did not give a "final indication" on any bag—when Hemi sits or stands before and stares at the source of the drug odor he is detecting. Based on the profound alert, Rapert advised Goodman that Hemi's behavior provided probable cause to search for drugs in the luggage compartment. Officers searched all the bags and, in Tuton's, found eight pounds of cocaine after breaking into the false bottom. Tuton confessed to transporting the cocaine in a post-arrest interview.

In denying Tuton's motion to suppress, the district court concluded: (i) Corporal Goodman conducted a lawful traffic stop and had reasonable suspicion to investigate whether the bus was transporting contraband; (ii) Goodman's warrantless search of the bag without probable cause, reasonable suspicion, or consent violated passenger Tuton's Fourth Amendment rights; (iii) Hemi's profound alert provided a lawful, independent source of probable cause to justify search of the bags in the compartment; and (iv) "all the facts surrounding [Hemi's] alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." Florida v. Harris, 568 U.S. 237, 248, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013).

II. Discussion

[2, 3] **A.** On appeal, Tuton first argues that he was unconstitutionally seized when Corporal Goodman unreasonably expanded the traffic stop by asking bus driver Soto if there was any contraband in the bus and if Goodman could search the bus. This con-

tention is without merit. It is of course true that "[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 issuing a ticket for the violation." Rodriguez v. United States, —— U.S. ——, 135 S.Ct. 1609, 1612, 191 L.Ed.2d 492 (2015) (quotation omitted). Here, Corporal Goodman asked bus driver Soto for consent to search the bus only two minutes after the traffic stop began. The Fourth Amendment did not prohibit Goodman "from asking questions unrelated to the traffic stop, from seeking consent to search the [bus], or even from asking if [Soto] would wait for the canine unit to arrive." United States v. Jones, 269 F.3d 919, 925 (8th Cir. 2001). Soto did consent to a search, which "necessarily consent[ed] to an extension of the traffic stop while the search [was] conducted." United States v. Rivera, 570 F.3d 1009, 1013 (8th Cir. 2009). Passenger Tuton had no authority to override Soto's consent, and Tuton was not seized during the search; he made the decision to ride the bus to his destination. See Florida v. Bostick, 501 U.S. 429, 436, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); United States v. Slater, 411 F.3d 1003, 1005 (8th Cir. 2005).

[4–6] **B.** Tuton next argues that the initial, unlawful search of his bag requires suppressing the later-discovered evidence because Corporal Goodman would not have requested the canine unit had he not unlawfully discovered the bag's false bottom, and without Hemi's alert officers would have lacked probable cause to search the bag and discover eight pounds of cocaine. The exclusionary rule extends to "evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.' " Segura v. United States, 468 U.S. 796, 804, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) (citations omitted). 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." United States v. Hastings, 685 F.3d 724, 728 (8th Cir. 2012), cert. denied, 568 U.S. 1134, 133 S.Ct. 958, 184 L.Ed.2d 745 (2013), quoting Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). 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).

The district court found that discovery of the cocaine was not caused by Goodman's prior unlawful search of the bag because "Hemi's sniff and subsequent alert was unaffected by the previous unlawful search.... Alternatively, any possible causal connection ... is so attenuated that any taint of the unlawful search is purged." On appeal, acknowledging that Goodman testified he would have called for a canine unit anyway, Tuton argues that the close temporal proximity between Goodman's discovery of the false bottom, discovery of Tuton's name tag, ceasing his search of the bag, calling for a canine unit, and directing dog handler Rapert to a bag with a false compartment "supports the conclusion that [Hemi's] sniff was tainted by the unconstitutional discovery of the false compartment."

This argument has considerable force, but we reject it for two reasons. First, as the district court noted, Goodman testified that his suspicions were raised before he received consent to search the luggage compartment, and he would have called for a canine unit even had he not discovered the false bottom in Tuton's bag. This is supported by his testimony that he asked Soto for consent early in the encounter so

that, if Soto refused, there would be time for a canine unit to arrive before Goodman completed the traffic stop. Of course, in that event, the dog would have sniffed from outside the closed luggage compartment, but Soto's consent provided whatever consent was needed to enter the compartment where Hemi alerted. The district court necessarily credited Goodman's testimony in finding that Hemi's alert was not tainted by Goodman's prior search of the bag. Deferring to that credibility determination, as we must, we conclude the district court committed no clear error. See United States v. Gregory, 302 F.3d 805, 811 (8th Cir. 2002), cert. denied, 538 U.S. 992, 123 S.Ct. 1815, 155 L.Ed.2d 691 (2003).[3]

[7, 8] Second, although the government has not challenged the district court's conclusion that Goodman's initial search of the bag was unlawful, that issue requires clarification. We agree with the court that passenger Tuton had a protected privacy interest in properly tagged luggage stowed in the bus's luggage compartment. But the court did not focus on the brief, isolated, and good faith nature of Goodman's unlawful search. Goodman had received law enforcement communications reporting that drug traffickers were smuggling illegal drugs in unlabeled, apparently abandoned luggage so they could not be identified if the drugs were discovered. When he found an isolated bag matching that description in the luggage compartment of a bus that had aroused his suspicion of criminal activity, Goodman believed he could search the bag as abandoned property. It is "firmly established that a warrantless search of abandoned property is not unreasonable and does not violate the Constitution." United States v. Sanders, 130 F.3d 1316, 1317 (8th Cir. 1997). Like other fact-intensive Fourth Amendment issues, "[w]hether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably." Illinois v. Rodriguez, 497 U.S. 177, 186, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990).

[9, 10] Of even greater significance, when Goodman found Tuton's name tag and realized he had made a mistake of fact, he immediately ceased his search of the bag and called for a canine unit, concluding that having a drug dog sniff the reclosed bag was the "neutral" way to determine whether his suspicion that the false bottom contained drugs was correct. Even if this decision was based on his discovery of the false bottom in a bag he believed was abandoned property, the decisive question becomes whether the subsequently discovered cocaine must be suppressed because it was tainted by information acquired in this manner. The exclusionary rule's "sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations." Davis v. United States, 564 U.S. 229, 236–37, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). "[W]hen

3. The dissent asserts that Goodman's decision to call for a canine unit "was necessarily informed by the knowledge he had obtained through the initial search." *Infra* at 572. We disagree. Goodman's suspicions were sufficiently aroused at the start of the traffic stop that he immediately asked for consent to search so there would be time to call for a canine unit if Soto did not consent. So the question becomes, having gained consensual access to the luggage compartment, if Goodman had seen the isolated bag with no apparent name tag but felt constrained not to open it, would he nonetheless have called for the canine unit? Logically, the answer is yes. If the suppression issue turned on this question (in our view it does not), remand for a specific finding would be the proper disposition of the appeal.

the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, or when their conduct involves only simple, 'isolated' negligence, the 'deterrence rationale loses much of its force,' and exclusion cannot 'pay its way.' " Id. at 238, 131 S.Ct. 2419 (citations and quotations omitted); see United States v. Davis, 760 F.3d 901, 904–05 (8th Cir. 2014) (exclusionary rule did not apply to warrantless dog sniff based on prior precedents cast in doubt by a recent decision), cert. denied, —— U.S. ——, 135 S.Ct. 996, 190 L.Ed.2d 872 (2015). We need not decide whether the initial search of the bag, in isolation, was objectively reasonable. Instead, we conclude that, as in Utah v. Strieff, —— U.S. ——, 136 S.Ct. 2056, 2063, 195 L.Ed.2d 400 (2016), even if Goodman acted unreasonably in opening what he believed to be abandoned property, his conduct after discovering the mistake was lawful, and "all the evidence suggests that the [mistake] was an isolated instance of negligence that occurred in connection with a bona fide investigation." In these circumstances, the exclusionary rule does not apply to suppress evidence discovered in a subsequent search that was validated by Hemi's alert.

[11] **C.** Finally, Tuton challenges the validity of Hemi's probable cause alert on multiple grounds. First, he argues that "[t]he possibility of inadvertent cuing should have been factored in to the officers' probable cause analysis" because Corporal Rapert knew before Hemi began that one of the bags contained a false bottom, information unlawfully acquired that compromised the integrity of Hemi's alert. The district court rejected this contention, finding "no evidence to suggest that Corporal Rapert cued the dog to alert to the presence of narcotics." Common sense suggests that inadvertent cuing is an unlikely explanation for Hemi's *sustained* profound-alert behavior in the luggage compartment. See United States v. Carbajal, 449 F. App'x 551, 555 (8th Cir. 2012) (per curiam), cert. denied, 568 U.S. 1195, 133 S.Ct. 1454, 185 L.Ed.2d 366 (2013). There was no clear error in finding that the unlawful search did not affect Hemi's alert.

[12, 13] Tuton next argues that Hemi's alert, even if not tainted by Goodman's unlawful search of Tuton's bag, did not provide probable cause to search bags in the luggage compartment. "Assuming that the dog is reliable, a dog sniff resulting in an alert on a container, car, or other item, standing alone, gives an officer probable cause to believe that there are drugs present." United States v. Donnelly, 475 F.3d 946, 955 (8th Cir.), cert. denied, 551 U.S. 1123, 127 S.Ct. 2954, 168 L.Ed.2d 278 (2007). In determining whether a dog's alert establishes probable cause to search an area, the inquiry is "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." Harris, 568 U.S. at 248, 133 S.Ct. 1050.

[14–16] "[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert." Id. at 246, 133 S.Ct. 1050. Here, Corporal Rapert testified that he and Hemi completed a 320–hour training course in 2013, and that Hemi had earned a high accuracy rating for positive and negative alerts and had trained in varied environments. Compare Donnelly, 475 F.3d at 955. Tuton argues that any alert Hemi gave was unreliable because he was operating in an unfamiliar environment—according to training records, he had not previously been deployed on a passenger bus in a real-world scenar-

io. But Tuton and his expert presented no evidence supporting this speculative theory. Hemi had trained both on a bus and on the side of a highway. Lack of prior, comparable real-world experience does not preclude a finding that a dog's alert was reliable. See United States v. Jackson, 811 F.3d 1049, 1051 (8th Cir. 2016) (dog's positive alert in "her first field operation" provided probable cause to search defendant's aircraft).

[17] Tuton further argues Hemi did not reliably alert because he never provided a final indication of a drug source, as he had been trained to do; he merely showed interest in the luggage compartment, which was not a reliable "alert." This contention is contrary to Corporal Rapert's testimony, credited by the district court, that Hemi repeatedly gave a "profound alert" to the odor of narcotics in the luggage compartment. Sergeant Roby Rhoads, head of the Arkansas State Police's canine certification program, also testified that Hemi's behavior amounted to a profound alert. In Holleman, we rejected the contention that a final indication is required to establish probable cause. 743 F.3d at 1156–57. We noted testimony, consistent with Corporal Rapert's and Sergeant Rhoads's testimony in this case, that a dog can be so overwhelmed by the odor of narcotics that it has "difficulty pinpointing the strongest source of the odor." Id. at 1157; see Carbajal, 449 F. App'x at 555.

[18] Finally, Tuton argues, even if Hemi gave a reliable profound alert, it was directed only to the luggage compartment, not to the bags in the compartment, which Hemi sniffed but then returned to sniffing the compartment wall. Therefore, the district court's conclusion that Hemi's general alert gave officers probable cause to search the bags would mean that a dog's alert to a luggage compartment that contained hundreds of bags would justify a warrantless search of every bag. This argument, while it parades a legitimate "horrible," ignores that the determination of probable cause depends on the totality of the circumstances, which included Corporal Goodman's suspicions as well as Hemi's profound general alert. See Donnelly, 475 F.3d at 955; Carbajal, 449 F. App'x at 554.

[19] Hemi gave a repeated profound alert in an otherwise empty luggage compartment. Corporal Goodman knew that drug traffickers had often traveled on the Tornado bus line and observed that bus driver Soto was uncharacteristically nervous. He knew that passenger Tuton's journey began in El Paso and observed that Tuton, one of only four passengers, was nervous, evasive, and gave inconsistent answers about the nature of his trip. We agree with the district court that these circumstances, viewed through the lens of common sense, created a "fair probability that contraband or evidence of a crime will be found" in the seven pieces of luggage in the compartment where Hemi alerted. Donnelly, 475 F.3d at 954, quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). This conclusion obviously does not mean that hundreds of bags in the luggage compartment of another bus could be searched without consent or a warrant based on a drug dog's general alert. The Fourth Amendment probable cause inquiry is always fact specific. With Hemi's profound alert, Goodman had probable cause to search Tuton's bag because he was the only nervous and evasive bus passenger. The dissent's assertion that Hemi's alert did not provide probable cause to search the other six bags is of no moment. "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." Rakas v. Illinois, 439 U.S. 128, 133–34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (quotation omitted).

The judgment of the district court is affirmed.

KELLY, Circuit Judge, dissenting.

I agree that the driver of the Tornado bus willingly gave Corporal Goodman permission to search the bus for contraband. When Goodman looked in the luggage compartment and noted one bag separated from the others and without a visible name tag, he assumed—without any further inquiry—that the bag was abandoned, thereby giving him the right to search. Cf. Sanders, 130 F.3d at 1317. But Goodman made no attempt to discover the owner of the bag—which did, in fact, have a name tag attached to it—and his assumption was not reasonable under the circumstances. Thus, I agree with the district court that this was an unlawful search.

Tuton argues that, as a result of this unlawful search, any evidence seized from the bag must be suppressed. This is so, he maintains, because "the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or fruit of the poisonous tree." Segura, 468 U.S. at 804, 104 S.Ct. 3380 (cleaned up). Nonetheless, the district court applied the independent source doctrine, see Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319 (1920), and concluded that "Hemi's sniff and subsequent alert was unaffected by th[is] previous unlawful search." This conclusion was based in large part on Goodman's testimony that he would have called for a canine unit even if he had not found the false bottom in Tuton's bag. Even if the district court did credit Goodman's testimony,[4] however, Goodman did not call for the canine unit until *after* he reached in the bag, i.e., after the Fourth Amendment violation had already occurred. Under these circumstances, when his decision was necessarily informed by the knowledge he had obtained through the initial search, Goodman's after-the-fact, hypothetical assertion is insufficient to purge the taint.[5]

I also disagree that Hemi's "profound alert" provided Goodman with independent probable cause to search all the bags located in the luggage compartment of the bus. "The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." Harris, 568 U.S. at 248, 133 S.Ct. 1050. I agree with the court that, under our precedent in Holleman, a dog need not give a so-called "final indication" in order to establish probable cause in every case.[6] But Holleman does not establish that an alert, in the absence of a

4. The court states that the district court "necessarily credited Goodman's testimony" based on the ultimate conclusion it reached, but the district court made no explicit credibility determination.

5. The district court concluded, in the alternative, that "any possible causal connection between the unlawful search and the discovery of the cocaine is so attenuated that any taint of the unlawful search is purged." See Hamilton v. Nix, 809 F.2d 463, 465–66 (8th Cir. 1987) (en banc) (citing United States v. Ceccolini, 435 U.S. 268, 273–80, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978)). The district court did not provide further explanation, but I see no attenuation under this set of facts that is sufficient to purge the taint.

6. But cf. United States v. Heir, 107 F.Supp.2d 1088, 1091 (D. Neb. 2000) (finding a lack of probable cause where a drug dog exhibited "subtle" alert behavior—akin to the court's description of a "normal alert" in this case—that "might only be recognized by" a person familiar with that particular dog).

final indication, will always satisfy the probable cause requirement. 743 F.3d at 1156–57. Instead, we must look at the facts in each case to make that determination.

In Holleman, Henri, the drug dog, was directed to sniff the exterior of a truck owned by Holleman, the defendant. Id. at 1154. Henri alerted to the outside of Holleman's truck twice, but did not give a final indication of where on the outside of the truck the odor was strongest. Id. We held that Henri's "full alert"—as compared with the mere "interest" shown by a drug dog in United States v. Jacobs, 986 F.2d 1231, 1233 (8th Cir. 1993)—was sufficient to establish probable cause to search Holleman's truck. Holleman, 743 F.3d at 1156–57. But, here, Hemi did not sniff the outside of a personal vehicle. Rather, Hemi had complete access to the entire inside of the luggage compartment of a commercial bus containing bags owned by multiple travelers, each with his or her own individual, reasonable expectation of privacy. Inside that compartment were seven bags. And yet, even when he was allowed to sniff each of them individually, Hemi showed no interest in any of the bags. Instead, he returned repeatedly to the back wall of the luggage compartment. Of course, as the government witnesses posited, it is possible that Hemi was overwhelmed by the odor because he was operating in an unfamiliar environment. But that possibility undermines, rather than enhances, the reliability of Hemi's alert on any particular spot. In light of Hemi's alert to the luggage compartment, his disinterest in the bags, and his strong interest in the compartment's rear wall, it is my view that Goodman lacked probable cause to conduct a search of each individual piece of luggage in the compartment.[7]

For these reasons, I respectfully dissent.

Megan MOORE, Plaintiff–Appellant

v.

APPLE CENTRAL, LLC, Defendant–Appellee.

No. 17-1815

United States Court of Appeals, Eighth Circuit.

Submitted: February 15, 2018

Filed: June 25, 2018

Background: Beneficiary of voluntary life insurance policy offered as part of employee's benefits package brought action in state court against employer alleging that employer failed to forward premiums to insurer that were withheld from employee's salary and that such failure was cause of insurer's denial of her proof of claim for benefits following employee's death, and asserting state law claims for breach of contract, negligence, breach of fiduciary duty, and promissory estoppel. Following removal, the United States District Court for the Western District of Arkansas, P.K. Holmes, III, Chief Judge, 2017 WL

7. And while the court is correct that "[t]he Fourth Amendment probable cause inquiry is always fact specific," its dismissal of the "legitimate horrible" wherein a dog's "general alert" to the entire luggage compartment of a commercial vehicle with hundreds of bags would be used to "justify a warrantless search of every bag" does not strike me as more than a stone's throw down the road. Even if we stretched to assume that Hemi's "general alert" constituted sufficient proof that 1 out of 7 of the bags contained drugs, it does not seem obvious to me that an officer is justified to search each bag based on the approximately 14 percent chance that that bag is the one that contains contraband.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

UNITED STATES OF AMERICA PLAINTIFF

v. CASE NO. 4:15-cr-40002-SOH

COLEMAN TUTON DEFENDANT

ORDER

Before the Court is a Motion to Suppress filed by Defendant Coleman Tuton. ECF No. 27. The government has filed a response. ECF No. 32. On December 16, 2015, the Court held a hearing on the motion. After the hearing, Defendant filed a supplemental brief. ECF No. 40. The government then filed an amended response. ECF No. 43. The Court finds that the matter is ripe for consideration.

BACKGROUND

On November 6, 2014, Arkansas State Police Corporal Chris Goodman pulled over a Tornado bus for following too closely behind a tractor-trailer on Interstate 30. Corporal Goodman made contact with the bus driver, who informed Corporal Goodman that the bus was traveling from South Texas to Milwaukee. The passenger manifest, however, showed that the destination of each passenger was Chicago, Illinois. Corporal Goodman observed that the bus driver appeared to be nervous, which was unusual given the fact that he was a professional driver with a commercial driver's license. Corporal Goodman also observed that there were only four passengers on the bus. Because of these observations, Corporal Goodman asked the bus driver for consent to search the bus. The bus driver gave Corporal Goodman permission to search the bus, and he opened the luggage compartment for inspection.

According to Corporal Goodman, he had been apprised of a recent trend in which Tornado

buses were used by drug traffickers to ferry drugs across the country. He had also received intelligence that one drug trafficking scheme was to place narcotics in a bag that could not be identified as belonging to the traveling trafficker. He was instructed that when bags contained narcotics, traffickers would usually not claim the bag as belonging to them. Based upon his training, he considered a bag lacking identification and separated from other bags as a potential indicator of drug trafficking.

With knowledge of this specific scheme, Corporal Goodman observed the presence of a black suitcase, which was separated from the other five or six suitcases in the compartment underneath the Tornado bus. Corporal Goodman did not see a nametag on the suitcase, unlike the other luggage. Corporal Goodman quickly inspected the bag for a nametag and saw no indication of ownership. Thus, Corporal Goodman opened the black suitcase and noticed a false bottom. Corporal Goodman continued to inspect the suitcase, and he noticed a nametag folded up underneath the suitcase that was not visible before. The name on the tag was Coleman Tuton. Realizing that the bag was not unclaimed, Corporal Goodman ceased his inspection and manipulation of the bag.

Corporal Goodman stated that the name on the tag matched the name on some luggage that was in close proximity to other passengers' luggage. He also stated that he did not know what, if anything, was contained in the false bottom of the suitcase. Having been granted consent to search the luggage compartment, Corporal Goodman called for assistance from a canine unit. Corporal Goodman then boarded the bus and asked for identification from each of the four passengers. He noticed one passenger who appeared nervous and was later identified as Defendant Coleman Tuton. When questioned by Corporal Goodman, Defendant responded that he was traveling to Chicago to pick up a car that he had purchased and planned to drive it to Mexico to sell. Defendant told Goodman that he was meeting a friend in Chicago and that they were each going to

drive a newly-purchased car to Mexico. Defendant stated that his friend was then going to fly back to Chicago. Corporal Goodman asked Defendant why he chose to take a bus rather than fly to Chicago. Corporal Goodman then inquired about the price of a bus ticket to Chicago versus a plane ticket. According to Corporal Goodman, Defendant was nervous during this exchange and his answers were confusing.

Within twelve minutes of the initial stop by Corporal Goodman, Corporal Rocky Rapert with the Arkansas State Police arrived on the scene with his narcotics dog "Hemi." Corporal Rapert and Hemi were and are duly certified in narcotics detection. Corporal Rapert and Hemi completed a 320 hour police canine course on December 4, 2013, and were certified as a Narcotics Detector Team. Hemi had an accuracy rating of 89.3% for positive and negative alerts.

Once on the scene, within thirteen minutes of the initial stop, Corporal Rapert ran Hemi on the luggage area of the bus. Corporal Rapert testified that he possibly knew that Corporal Goodman had discovered a false bottom. Corporal Goodman asked Corporal Rapert to have Hemi sniff only one suitcase. Corporal Rapert, however, decided that it would be best to deploy Hemi on the entire luggage compartment. Once Hemi was deployed, he jumped in the luggage compartment, and Corporal Rapert noticed an immediate behavior change in Hemi. Rapert understood that Hemi was detecting the odor of narcotics. Hemi became very excited, began to breather only through his nose, and gave a profound alert in the undercarriage of the bus near the back wall of the luggage compartment.

According to Corporal Rapert, there are three main levels of a narcotics dog alert: (1) a normal alert where only the handler could detect that the dog was detecting narcotics; (2) a profound alert where any normal observer would note that the dog was behaving differently; and (3) a final indication where the dog pinpoints the strongest source of the odor and gives a signal. Corporal Rapert stated that the terms "indication" and "alert" are often interchanged. Rapert

stated that Hemi was unable to pinpoint the strongest source of the narcotics odor, but he did give a profound alert.

Corporal Rapert put Hemi back in his vehicle, and as Corporal Rapert made his way back to the bus, Corporal Goodman is heard on the traffic stop video asking, "Did he alert?" Corporal Rapert can be heard responding, "No, but—." According to Corporal Rapert, after the dog sniff concluded, he had either verbally or non-verbally signaled to Corporal Goodman that Hemi had alerted for the presence of narcotics. Goodman explained that, when asked whether Hemi had alerted, he responded "No, but—" meaning Hemi had given a profound alert but not a final indication.

Because of Hemi's profound alert in the luggage compartment, all the bags in the compartment were searched, as there were only a few. During the search, Defendant's black suitcase was found to contain a false bottom and three kilos of cocaine. Defendant was arrested, mirandized, and later confessed in an interview with officers from the Drug Enforcement Administration. Mr. Tuton was charged with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

DISCUSSION

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Defendant argues that his Fourth Amendment rights were violated because Corporal Goodman did not have probable cause to stop the bus, because Corporal Goodman did not have reasonable suspicion to extend the traffic stop to gain consent to search the bus, because Corporal Goodman did not have probable cause to search Defendant's suitcase, and because the narcotics dog deployed in this case was not reliable. Defendant asserts that all evidence obtained by virtue of the unlawful search must be suppressed. Further, Defendant argues that his pre-arrest statements

to Corporal Goodman were taken in violation of *Miranda v. Arizona* and must be suppressed.

A. Traffic Stop

Defendant contends that Corporal Goodman did not have probable cause to stop the Tornado bus because there is no evidence that the bus committed a traffic violation. A police officer may conduct a traffic stop when he has probable cause to believe that a traffic violation has occurred. *Whren v. U.S.*, 517 U.S. 806, 810 (1996). Here, Corporal Goodman testified at the suppression hearing that he observed the Tornado bus following too close to a tractor-trailer immediately in front of the bus. Corporal Goodman estimated that the Tornado bus was within thirty to forty feet of the tractor trailer. Pursuant to Arkansas Code Annotated § 27-51-305, a motor vehicle traveling upon a roadway is prohibited from following within 200 feet of the vehicle in front of it. Because Corporal Goodman had probable cause to believe that a traffic violation had occurred, the Court concludes that the traffic stop was supported by probable cause.

B. Expansion of Traffic Stop

Defendant next argues that Corporal Goodman did not have reasonable suspicion to extend the scope of the traffic stop to request consent to search the bus. When an officer stops a motorist for a traffic violation, the officer may detain the occupants of the vehicle while the officer completes a number of tasks related to the traffic violation. *U.S. v. Olivera-Menendez*, 484 F.3d 505, 509 (8th Cir. 2007). "While the officer performs these tasks, he may ask the occupants routine questions, such as the destination and purpose of the trip, and the officer may act on whatever information the occupants volunteer." *Id*. "If an officer develops reasonable suspicion regarding unrelated criminal conduct during the course of a lawful traffic stop, an officer may broaden his inquiry and satisfy his suspicion without running afoul of the Fourth Amendment." *U.S. v. Gill*, 513 F.3d 836, 844 (8th Cir. 2008) (quotation omitted). "Whether an officer has reasonable suspicion to expand the scope of the traffic stop is determined by looking at the totality

of the circumstances, in light of the officer's experience." *Id*. (quotation omitted).

In this case, based on the totality of the circumstances, the Court concludes there was reasonable suspicion to expand the scope of the traffic stop to include an investigation into whether the bus was transporting contraband. Corporal Goodman asked routine questions concerning the destination of the trip, which yielded inconsistent answers. The bus driver told Corporal Goodman that the bus was traveling from South Texas to Milwaukee, Wisconsin. The passenger manifest, however, showed that the passengers were traveling to Chicago, Illinois. Corporal Goodman testified at the suppression hearing that the bus driver appeared nervous which was unusual given that he was a professional driver with a commercial driver's license. Corporal Goodman observed that there were only four passengers on the large bus, which raised his suspicions in light of his highway drug interdiction training. Based on Corporal Goodman's observations, he asked for and received consent to search the luggage compartment of the bus. Considering the totality of the circumstances in light of Corporal Goodman's experience, there was reasonable suspicion to expand the scope of the traffic stop to investigate the presence of contraband.

C. Search

Defendant argues that the search of his bag by Corporal Goodman was an illegal search. Individuals possess a privacy interest in the contents of their personal luggage that is protected by the Fourth Amendment. *U.S. v. Place*, 462 U.S. 696, 707 (1983). Further, a bus passenger has a subjective expectation that the exterior of his piece of luggage will not be subjected to a physical manipulation by others. *U.S. v.* Gwinn, 191 F.3d 874, 878 (8th Cir. 1999). In *U.S. v. Washington,* the Eighth Circuit expressed "grave doubts about the constitutional propriety of an officer's conduct when he lifted, manipulated, and felt along the bottom of a bag in the overhead compartment of a [commercial] bus." 146 F.3d 536, 537 (8th Cir. 1998) (quotation omitted).

Also, the Eighth Circuit has determined that an unlawful search took place when officers manipulated the exterior of a bag found in the overhead rack of a train without a warrant, probable cause, reasonable suspicion, or consent. *Gwinn*, 191 F.3d at 879.

In this case, during the consensual inspection of the undercarriage, Corporal Goodman saw that Defendant's bag appeared to have no name tag and was separated from the other luggage. He then assumed that the bag was either the driver's bag or an unclaimed bag. Based upon that, he began to inspect and manipulate the bag. He noted that there appeared to be a false bottom of the bag and then he saw a nametag folded up underneath the bag. When he saw the nametag, he immediately ceased the search. The Court concludes that Corporal Goodman's manipulation of the outside and inspection of the inside of Defendant's bag was an unlawful search because Corporal Goodman had neither a warrant, probable cause, reasonable suspicion, nor consent to search the bag.

D. Sniff

The government argues that the positive alert provided during the canine sniff cured any Fourth Amendment violation that occurred when Corporal Goodman searched Defendant's bag. The exclusionary rule prohibits the admission of physical and testimonial evidence gathered illegally. *U.S. v. Reinholz*, 245 F.3d 765, 779 (8th Cir. 2001). Evidence, however, should not be excluded from trial based on a constitutional violation unless the illegality is at least a but-for cause of obtaining the evidence. *Olivera-Mendez*, 484 F.3d at 511. "Under the independent source doctrine, the challenged evidence is admissible if it came from a lawful source independent of the illegal conduct." *Reinholz*, 245 F.3d at 779. Under the attenuated connection doctrine, the challenged evidence is admissible if the causal connection between the constitutional violation and the discovery of the evidence is so attenuated as to purge the taint of the Fourth Amendment violation. *Id*.

The government contends that Corporal Goodman's unlawful search of Defendant's bag did not lead to the discovery of the cocaine. Instead, the government argues, the valid canine sniff and positive alert gave law enforcement probable cause to search Defendant's luggage, which led to the discovery of the cocaine. "Probable cause exists where there is a fair probability that contraband or evidence of a crime will be found in a particular place." *U.S. v. Donnelly*, 475 F.3d 946, 954 (8th Cir. 2007) (quotation omitted). "Determining whether probable cause exists at the time of the search is a commonsense, practical question to be judged from the totality of the circumstances." *Id*. (quotation omitted). "Assuming that the dog is reliable, a dog sniff resulting in an alert on a container, car, or other item, standing alone, gives an officer probable cause to believe that there are drugs present." *Id.* at 955.

In this case, Corporal Goodman testified that his suspicions had already been raised before receiving consent to search the luggage compartment. Thus, according to Corporal Goodman, he would have called for a canine unit even if he had not discovered the false bottom in Defendant's bag. Corporal Rapert testified that Hemi, the narcotics dog, jumped into the luggage compartment right away and alerted to the presence of narcotics. Hemi's sniff and subsequent alert was unaffected by the previous unlawful search. The profound alert in the luggage compartment, standing alone, gave law enforcement probable cause to search the luggage compartment and the seven pieces of luggage contained within that compartment. The unlawful search of Defendant's bag had no effect on the finding of probable cause by Corporal Rapert and a duly certified canine unit. In other words, the discovery of the cocaine was not caused by the illegal search of Defendant's bag. Instead, the positive alert during the canine sniff, which provided probable cause to search the luggage, caused the discovery and subsequent seizure of the cocaine. Alternatively, any possible causal connection between the unlawful search and the discovery of the cocaine is so attenuated that any taint of the unlawful search is purged. Accordingly, the Court

concludes that the positive alert during the canine sniff cured the violation resulting from Corporal Goodman's prior illegal search of Defendant's bag.

E. Hemi's Reliability

The Court turns now to the issue of Hemi's reliability.[1] Defendant attempts to challenge Hemi's reliability by arguing that Corporal Rapert either advertently or inadvertently cued Hemi to alert to the presence of narcotics because he knew that there was suspicion surrounding one of the bags. Defendant makes this allegation but offers no evidence of cuing by Corporal Rapert. In fact, Defendant admits that "[i]t cannot be conclusively ascertained" from the video of the traffic stop "whether Corporal Rapert engaged in any intentional or inadvertent cuing of Hemi." ECF No. 40, p. 10. Corporal Rapert purposefully ran Hemi on the entire undercarriage of the bus, and there is no evidence to suggest that Corporal Rapert cued the dog to alert to the presence of narcotics. In fact, Hemi never even pinpointed a particular piece of luggage as the strongest source of the narcotics odor. Defendant's argument is simply not supported by any evidence.

Defendant next argues that the canine sniff in this case was not reliable and did not establish probable cause to search the luggage because Hemi only alerted to the possible presence of narcotics in the luggage area and did not specifically indicate the presence of narcotics in a particular piece of luggage. To determine whether a canine sniff is reliable enough to give police officers probable cause to conduct a search, "[t]he appropriate inquiry is 'whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.'" *See U.S. v Holleman,* 743 F.3d 1152, 1156 (8th Cir. 2014) (quoting *Fla. v. Harris*, ___ U.S. ___, 133 S. Ct. 1050, 1058 (2013)). Generally, a dog's "alert," as opposed to the more conclusive "indication," is

[1] Defendant does not challenge Hemi's overall reliability but instead challenges the reliability of Hemi in this particular case.

enough to establish probable cause. *See id*.

In this case, Corporal Rapert testified that Hemi began his sniff at the rear of the bus on the passenger side. Hemi quickly jumped into the luggage compartment of the bus and sniffed around the luggage compartment. Corporal Rapert testified that Hemi exhibited an excited posture. Corporal Rapert stated that Hemi was breathing exclusively through his nose and focusing his sniff at the back wall of the luggage compartment. Hemi did not want to leave the luggage compartment of the bus, which contained seven pieces of luggage. Hemi never pinpointed the strongest source of the odor or indicated that a particular piece of luggage contained narcotics,[2] but Corporal Rapert testified that Hemi gave a profound alert that there were narcotics present in the luggage compartment. He described a profound alert as obvious behavior changes in Hemi that any observer would recognize, not just the trained handler of the dog. Corporal Rapert testified that the airflow in the open luggage compartment on the side of the interstate may have prevented Hemi from being able to pinpoint the strongest source of the narcotics odor. Viewing all the facts surrounding Hemi's profound alert through the lens of common sense, the Court concludes that a reasonably prudent person would think that a search of the seven pieces of luggage contained in the compartment where Hemi alerted would reveal the presence of narcotics.

F. Pre-Miranda Statements

Defendant moves to suppress his responses to questions regarding his travel plans, finances, and luggage during the encounter with Corporal Goodman, because these statements were taken in violation of *Miranda v. Arizona*. 384 U.S. 436 (1966). Defendant appears to argue that because Defendant was seized, it follows that he would be considered to be in custody for Miranda purposes. Defendant further argues that Corporal Goodman's questions went beyond

[2] Corporal Rapert testified that a "final indication" is signified by Hemi lying down or sitting and staring intently at the object containing the strongest source of the odor.

requests for biographical information and were keyed towards a search for contraband. The government asserts that Defendant was not in custody and thus was not entitled to a Miranda warning.

"*Miranda* prohibits the government from introducing into evidence statements made by the defendant during a custodial interrogation unless the defendant has been previously advised of the Fifth Amendment privilege against self-incrimination and right to an attorney." *U.S. v. Chipps*, 410 F.3d 438 (8th Cir. 2005) (quote omitted). *Miranda* warnings are required for official interrogations where a person has been "taken into custody or otherwise deprived of his freedom of action in any significant way." *Stansbury v. California*, 511 U.S. 318, 322 (1994). Here, the Court must determine whether Defendant was subjected to a custodial interrogation when Corporal Goodman approached him and asked questions about his travel.

"[T]he Fourth Amendment permits officers to approach bus passengers at random to ask questions and request their consent to searches, provided a reasonable person would feel free to decline the requests or otherwise terminate the encounter." *U.S. v. Bostick*, 501 U.S. 429, 436 (1991). In *U.S. v. Drayton*, the Court concluded that the police did not seize two bus passengers when they boarded the bus and began questioning them. 536 U.S. 194, 203 (2002).

Defendant argues that he "did not feel that he could decline Corporal Goodman's request for information or terminate the encounter" because Corporal Goodman was in control of Defendant's belongings and identification and was waiting for other officers to arrive. ECF No. 27, p. 11. However, Corporal Goodman was not in possession of Defendant's belongings when he requested information from Defendant. Corporal Goodman had already ceased his search of Defendant's bag and the bag was in the luggage compartment under the bus. There is no evidence that Corporal Goodman made any intimidating movements, raised his voice, or said anything that would suggest to a reasonable person that he could not terminate the encounter. Corporal

Goodman simply asked Defendant general, routine questions regarding his travel and identification. Accordingly, the Court cannot find that Defendant was seized during his encounter with Corporal Goodman. Further, there is nothing in the record that would suggest that Corporal Goodman's questioning of Defendant amounted to a custodial interrogation. Accordingly, the Court cannot find that Defendant should have been given a Miranda warning prior to him being placed under arrest.

CONCLUSION

For the reasons stated above, the Court finds that Defendant's Motion to Suppress (ECF No. 27 should be and hereby is **DENIED**.

IT IS SO ORDERED, this 1st day of July, 2016.

/s/ Susan O. Hickey
Susan O. Hickey
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1493

United States of America

Appellee

v.

Coleman Tuton

Appellant

Appeal from U.S. District Court for the Western District of Arkansas - Texarkana
(4:15-cr-40002-SOH-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge Smith and Judge Kelly would grant the petition for rehearing en banc. Judge Shepherd did not participate in the consideration or decision of this matter.

September 13, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans