APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

No. 194A16–2

STATE OF NORTH CAROLINA,
Appellee,

versus

MICHAEL ANTONIO BULLOCK,
Defendant-Appellant.

Appeal from the Court of Appeals of North Carolina

(August 14, 2018)

Before Morgan, Judge

MORGAN, Judge:

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Defendant on the 27th of March 2018 in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the State of NC, the following order was

entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 14th of August 2018."

/s/ Morgan, J.

For the Court

Upon consideration of the petition filed on the 27th of March 2018 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 14th of August 2018."

/s/ Morgan, J.

For the Court

APPENDIX B

IN THE COURT OF APPEALS
OF NORTH CAROLINA

No. COA 15–731–2

Durham County Docket No. 12 CRS 61997

STATE OF NORTH CAROLINA,
Appellee,

Versus

MICHAEL ANTONIO BULLOCK,
Defendant-Appellant.

Appeal by defendant from judgment entered 30 July 2014 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 17 November 2015. By opinion issued 10 May 2016, a divided panel of this Court reversed the decision of the trial court denying Defendant's motion to suppress evidence. Upon review granted by the Supreme Court and by opinion dated 3 November 2017, the Supreme Court of North Carolina reversed and remanded the case to the Court of Appeals to consider Defendant's remaining arguments.

(February 20, 2018)

MURPHY, Judge.

After remand by our Supreme Court, Michael Antonio Bullock ("Defendant") has two issues to be considered on appeal. Defendant first argues that the trial court erred in denying his motion to suppress because his consent to search the rental car he was driving was not voluntary due to the stop's excessive scope and duration. Specifically, Defendant argues the stop was prolonged because of questioning by Officer John McDonough ("Officer McDonough") and due to the delay in waiting for a second officer. Defendant also argues that the trial court committed prejudicial error by accepting his guilty plea without informing him of the maximum possible sentence he could receive, in violation of N.C.G.S. § 15A-1022(a)(6). A detailed statement of the facts related to the traffic stop and Defendant's motion to suppress are stated in this Court's opinion at *State v. Bullock*, ___ N.C. App. ___, 785 S.E.2d 746 (2016), *writ allowed*, 369 N.C. 37, 786 S.E.2d 927 (2016), and *rev'd*, ___ N.C. ___, 805 S.E.2d 671(2017)(194A16). To the extent Defendant's remaining arguments rely on independent facts, they will be stated and analyzed separately.

MOTION TO SUPPRESS

On 27 November 2012, Defendant was pulled over by Officer McDonough, a K-9 handler with the Durham Police Department. Officer McDonough activated his emergency equipment and initiated a traffic stop after witnessing Defendant exceed the speed limit and commit other traffic infractions. After routine questioning, Officer McDonough asked Defendant to step out of the vehicle and for permission to search Defendant. Defendant consented. After searching Defendant, Officer McDonough placed

Defendant in his car and ran database checks on Defendant's license. Officer McDonough continued to ask Defendant questions while waiting for the checks to finish. Officer McDonough asked Defendant if there were any guns or drugs in the car and for consent to search the vehicle. Defendant responded that he did not want Officer McDonough to search "my shit" (hereinafter Defendant's "property"). Officer McDonough then asked what kind of property Defendant had in the vehicle, to which Defendant replied that his property included a bag and two hoodies. Defendant then said that Officer McDonough could search the car, but not his property. After which, Officer McDonough called for backup explaining that he could not search the car without another officer present. Defendant asked what would happen if he revoked his consent, and Officer McDonough replied that he would use his dog to sniff around the vehicle. Defendant responded, "that's okay."

A second officer arrived three to five minutes after the call for backup, and Defendant's unopened bag was removed from the vehicle. Officer McDonough began to search Defendant's vehicle. During the search, Defendant was seated in Officer McDonough's patrol car with the window rolled down. Officer McDonough then brought his K-9 to the vehicle and it did not alert to any narcotics. The K-9 next sniffed the bag and indicated to Officer McDonough that there were narcotics in the bag.

Defendant argues that the trial court erred in denying his motion to suppress because his consent was not voluntary due to the prolonging of the traffic stop by Officer McDonough and by waiting for a second officer to arrive. Our review is limited by Defendant's

brief "to issues defined clearly and supported by arguments and authorities." *State v. Roache*, 358 N.C. 243, 299, 595 S.E.2d 381, 417 (2004) (citation omitted); *see* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

Review of a motion to suppress is "limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013) (citation and quotation marks omitted).

I. Prolonging of the Traffic Stop

Defendant's argument challenges conclusion of law 2.

> That none of defendant's Constitutional rights, either Federal or State, have been violated in the method or procedure by which the traffic stop of defendant's vehicle was extended, the vehicle was searched, and defendant was seized and arrested on 27 November 2012.

The Supreme Court of the United States has held that a traffic stop is limited by "the time needed to handle the matter for which the stop was made . . . ." *Rodriguez v. United States*, 135 S. Ct. 1609, 1612

(2015). The trial court's conclusion that the stop was not unlawfully prolonged was confirmed by our Supreme Court in *State v. Bullock*, ___ N.C. ___, 805 S.E.2d 671 (2017)(194A16). The Supreme Court held that the initiation of the traffic stop to be lawful based on Officer McDonough's observations of Defendant's traffic violations. *Id. at* ___, 805 S.E.2d at 676. The Supreme Court held that Officer McDonough lawfully frisked Defendant without prolonging the stop. *Id. at* ___, 805 S.E.2d at 677. The Supreme Court also held that Officer McDonough's database checks on Defendant's license constitutionally extended the traffic stop. *Id.* Further, the Supreme Court held that Officer McDonough's conversation during the lawful stop were sufficient to form reasonable suspicion which authorized him to use his dog to sniff Defendant's vehicle and bag. *Id. at* ___, 805 S.E.2d at 678. Because all parts of the stop were lawfully extended, the trial court did not err in determining Defendant's consent to search his vehicle was voluntary.

Defendant's argument also challenges conclusion of law 5.

> That defendant gave knowing, willing, and voluntary consent to search the vehicle. That at no point after giving his consent did defendant revoke his consent to search the vehicle.

Consent given without coercion, "freely, intelligently, and voluntarily" allows an officer to reasonably search a vehicle anywhere that might contain contraband. *State v. Baublitz, Jr.*, 172 N.C. App. 801, 807-08, 616 S.E.2d 615, 620 (2005) (citation and quotation marks omitted). "A warrantless search

supported by consent is lawful only to the extent that it is conducted within the spatial and temporal scope of the consent." *Id.* at 808, 616 S.E.2d at 620. "The temporal scope of a consent to a search is a question of fact to be determined in light of all the circumstances." *State v. Williams*, 67 N.C. App. 519, 521, 313 S.E.2d 236, 237 (1984) (citation omitted).

We hold that the evidence before the trial court supports the finding that Officer McDonough's search of the vehicle did not exceed the scope of Defendant's consent, and that Defendant's consent was knowing, willing, and voluntary. Officer McDonough explained to Defendant that he needed to wait for a second Officer to search his vehicle, and Defendant never revoked his consent. The only limitation that Defendant placed on Officer McDonough was to not search his property. Therefore, the trial court did not err in determining that Defendant's consent was voluntary.

DEFENDANT'S GUILTY PLEA

Pursuant to a plea agreement with the State, Defendant pleaded guilty to trafficking in heroin by possession of 28 grams or more, trafficking in heroin by transportation of 28 grams or more, and possession of a controlled substance with the intent to sell a Schedule I controlled substance (heroin). The trial court correctly informed Defendant that each trafficking charge carried a potential maximum punishment of 279 months but erroneously informed Defendant that the possession charge carried a potential maximum punishment of 24 months. The trial court told Defendant that he faced a total potential maximum punishment of 582 months. The

transcript of plea contained the same erroneous information regarding the total potential maximum punishments. The trial court accepted Defendant's plea, and Defendant's pursuant convictions were consolidated into one active sentence for trafficking in heroin by possession of 28 grams or more to 225 to 279 months.

Defendant petitioned this Court for a writ of certiorari on 10 August 2015, which was dismissed on 10 May 2016 "as moot per opinion." In order to comply with the Supreme Court's mandate and given the law of the case, we hold that the Supreme Court's opinion negated the prior mootness determination by our Court, and we independently exercise our authority to grant the writ of certiorari in order to review the judgment dated 30 July 2014.

Defendant and the State acknowledge that the potential maximum sentence for a class H felony is 39 months. *See* N.C.G.S. §§ 15A-1340.17(c)-(d). The transcript of plea also reflects this 15 month error. The total potential maximum punishment that Defendant actually faced was 597 months, not 582 months as stated by the trial court and indicated on the transcript of plea. As a result, Defendant argues that the trial court violated N.C.G.S. § 15A-1022(a)(6) which states that a trial court may not accept a guilty plea from a defendant without addressing him personally and "[i]nforming him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge[.]" N.C.G.S. § 15A-1022(a)(6) (2017).

"Our Courts have rejected a ritualistic or strict approach in applying these standards and determining remedies associated with violations of G.S. § 15A-1022. Even when a violation occurs, there must be prejudice before a plea will be set aside." *State v. Reynolds*, 218 N.C. App. 433, 435, 721 S.E.2d 333, 335 (2012) (citation omitted). Errors resulting from a statutory violation require a showing of prejudice to a defendant. *State v. McLaughlin*, 320 N.C. 564, 568, 359 S.E.2d 768, 771 (1987) ("We agree that the trial judge erred as defendant contends by not adhering to the requirements of the statute, but we find no error of constitutional dimension and hold that a new trial is unnecessary because there is no showing that the error prejudiced defendant.").

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C.G.S. § 15A-1443(a) (2017).

Defendant argues that this sentencing error was prejudicial and points to *State v. Reynolds* in support of his argument. In *Reynolds*, a defendant accepted a plea deal with a maximum sentence of 168 months. *Reynolds*, 218 N.C. App. at 434, 721 S.E.2d at 334. The defendant was subsequently sentenced to 135 to 171 months in prison. *Id.* Because defendant's sentence carried an additional three months of

potential imprisonment due to attaining habitual felon status, this Court held that the voluntariness of the guilty plea was called into question and vacated defendant's convictions. *Id.* at 438, 721 S.E.2d at 336.

Here, Defendant's reliance on *Reynolds* is misplaced and fails to recognize a critical distinction. In contrast to *Reynolds*, Defendant faced no additional time of imprisonment as a result of this error. Per agreement, Defendant's charges were consolidated into one sentence with a mandatory minimum and maximum punishment as set out in the applicable version of N.C.G.S. § 90-95(h)(4)(c). As a result, the trial court's calculation error did not affect the maximum punishment that Defendant received as a result of his plea. Further, Defendant fails to make an argument as to how the result of this case would have been different if Defendant had been informed of the correct potential maximum punishment. It would be a miscarriage of justice for us to accept that Defendant would have backed out of his agreement if Defendant knew that the total potential maximum punishment was 15 months longer on a charge that was being consolidated into his trafficking conviction. *Reynolds* did not create a per se rule requiring reversal. Reversal was appropriate in *Reynolds,* because "Defendant had been misinformed as to the maximum sentence he would receive as a result of his guilty plea." *Id.* at 437*,* 721 S.E.2d at 335-36. Here, Defendant has failed to show prejudice, and the trial court did not commit prejudicial error by accepting Defendant's voluntary guilty plea.

CONCLUSION

For the reasons stated above, we hold that the trial court did not err by denying Defendant's motion to suppress and did not commit prejudicial error in accepting Defendant's guilty plea.

AFFIRMED IN PART AND NO PREJUDICIAL ERROR IN PART.
Judge BRYANT concurs.
Judge ARROWOOD concurs in result only.

APPENDIX C

IN THE SUPREME COURT OF NORTH CAROLINA

No. 194A16

STATE OF NORTH CAROLINA,
Appellant,

versus

MICHAEL ANTONIO BULLOCK,
Defendant-Appellee.

Appeal from the Court of Appeals of North Carolina

(November 3, 2017)

Before MARK MARTIN, Chief Judge

MARK MARTIN, Chief Judge:

Officer John McDonough pulled defendant over for several traffic violations on I-85 in Durham. During the traffic stop that followed, Officer McDonough and another police officer discovered a large amount of heroin inside of a bag in the car that defendant was driving. Before the superior court, defendant moved to suppress all evidence derived

from this search, arguing that the search had violated the *Fourth Amendment*. The trial court denied defendant's motion to suppress, defendant appealed, and the Court of Appeals reversed the trial court's order. *State v. Bullock, N.C. App. , , 785 S.E.2d 746, 747 (2016).* The Court of Appeals concluded that the traffic stop that led to the discovery of the heroin had been unlawfully prolonged under the standard that the Supreme Court of the United States set out in *Rodriguez v. United States, 575 U.S. , 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015). Bullock, N.C. App. , 785 S.E.2d at 750, 752*. We hold that the stop was not unlawfully prolonged under that standard, and therefore reverse.

After the superior court denied defendant's motion to suppress, defendant pleaded guilty but specifically reserved the right to appeal the denial of his motion. Before the Court of Appeals, defendant raised three arguments: first, that Officer McDonough unlawfully prolonged the traffic stop; second, that the consent to search defendant's car that defendant gave during the stop was not voluntary; and third, that the superior court erred in accepting defendant's guilty plea. In a divided opinion, the Court of Appeals agreed with defendant's first argument, which made it unnecessary for the court to rule on his other two arguments. *See id. at , 785 S.E.2d at 755*. The State exercised its statutory right of appeal to this Court based on the dissenting opinion in the Court of Appeals.

The Fourth Amendment to the United States Constitution states that "[t]he right of the people to be secure . . . , against unreasonable searches and seizures, shall not be violated." *U.S. Const. amend. IV*.

"A traffic stop is a seizure 'even though the purpose of the stop is limited and the resulting detention quite brief.'" *State v. Styles, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008)* (quoting *Delaware v. Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979)*). Under *Rodriguez*, the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop, *see 575 U.S. at , 135 S. Ct. at 1612* (quoting *Illinois v. Caballes, 543 U.S. 405, 407, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005))*, unless reasonable suspicion of another crime arose before that mission was completed, *see id. at , , 135 S. Ct. at 1614, 1615*. The reasonable duration of a traffic stop, however, includes more than just the time needed to write a ticket. "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.'" *Id. at , 135 S. Ct. at 1615* (alteration in original) (quoting *Caballes, 543 U.S. at 408*). These inquiries include "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.*

In addition, "an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Id. at , 135 S. Ct. at 1616*. These precautions appear to include conducting criminal history checks, as *Rodriguez* favorably cited a Tenth Circuit case that allows officers to conduct those checks to protect officer safety. *See id.* (citing *United States v. Holt, 264 F.3d 1215, 1221-22 (10th Cir. 2001)* (en banc), *abrogated on other grounds as recognized in United States v. Stewart, 473 F.3d 1265, 1269 (10th Cir. 2007))*; *see also United States v.*

McRae, 81 F.3d 1528, 1536 n.6 (10th Cir. 1996) ("Considering the tragedy of the many officers who are shot during routine traffic stops each year, the almost simultaneous computer check of a person's criminal record, along with his or her license and registration, is reasonable and hardly intrusive."), *quoted in Holt, 264 F.3d at 1221*. Safety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped, however, are not permitted if they extend the duration of the stop. *Rodriguez, 575 U.S. at , 135 S. Ct. at 1616*. But investigations into unrelated crimes during a traffic stop, even when conducted without reasonable suspicion, are permitted if those investigations do not extend the duration of the stop. *See id. at , ,135 S.Ct. at 1612, 1614*. The reasonable suspicion standard is "a less demanding standard than probable cause" and a "considerably less [demanding standard] than preponderance of the evidence." *Illinois v. Wardlow, 528 U.S. 119, 123, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)*. In order to meet this standard, an officer simply must "reasonably . . . conclude in light of his experience that criminal activity may be afoot." *Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)*. The officer "must be able to point to specific and articulable facts," and to "rational inferences from those facts," that justify the search or seizure. *Id. at 21*. "To determine whether reasonable suspicion exists, courts must look at 'the totality of the circumstances' as 'viewed from the standpoint of an objectively reasonable police officer.'" *State v. Johnson, N.C. , 803 S.E.2d 137, 139 (2017)* (citations omitted) (quoting *United States v. Cortez, 449 U.S. 411, 417, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)*, and

Ornelas v. United States, 517 U.S. 690, 696, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)).

When reviewing a ruling on a motion to suppress, we analyze whether the trial court's "underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law." *State v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).*

In summary, the trial court found the facts as follows. Officer McDonough is an experienced police officer, having served with the Durham Police Department since 2000 and specifically on the drug interdiction team within the special operations division of the department since 2006. On 27 November 2012, while monitoring I-85 South in Durham, Officer McDonough observed a white Chrysler speeding, following a truck too closely, and weaving briefly over the white line marking the edge of the road. Officer McDonough pulled the Chrysler over, then walked up to the passenger-side window and spoke to defendant, who was the car's driver and sole occupant. Officer McDonough asked to see defendant's driver's license and vehicle registration. Defendant's hand trembled when he handed his license to Officer McDonough. The car was a rental, but defendant was not listed as an authorized driver on the rental agreement. Officer McDonough saw that defendant had two cell phones in the rental car, and, in Officer McDonough's experience, people who transport illegal drugs have multiple phones. I- 85 is a major thoroughfare for drug trafficking between Atlanta and Virginia.

Officer McDonough asked defendant where he was going. Defendant said that he was going to his girlfriend's house on Century Oaks Drive in Durham, and that he had missed his exit. Officer McDonough knew that defendant was well past his exit if defendant was going to Century Oaks Drive. Specifically, defendant had gone past at least three exits that would have taken him where he said he was going. Defendant said that he had recently moved from Washington, D.C., to Henderson, North Carolina. Officer McDonough asked defendant to step out of the Chrysler and sit in the patrol car, and told defendant that he would be receiving a warning, not a ticket. Behind the Chrysler, Officer McDonough frisked defendant. The frisk revealed a wad of cash totaling $372 in defendant's pocket. After the frisk, defendant sat in Officer McDonough's patrol car.

While running defendant's information through various law enforcement databases, Officer McDonough and defendant continued to talk. Defendant gave contradictory statements about his girlfriend, saying at one point that his girlfriend usually visited him in Henderson but later saying that the two of them had never met face-to-face. While talking with Officer McDonough in the patrol car, defendant made eye contact with the officer when answering certain questions but looked away when asked specifically about his girlfriend and about where he was travelling. The database checks, moreover, revealed that defendant had been issued a North Carolina driver's license in 2000, and that he had a criminal history in North Carolina starting in 2001. These facts appeared to contradict defendant's earlier claim to have just moved to North Carolina.

Officer McDonough asked defendant for permission to search the Chrysler. Defendant gave permission to search it but not his possessions—namely, a bag and two hoodies—within it.[1] A few minutes later, another officer arrived, and Officer McDonough opened the trunk of the Chrysler. Officer McDonough found the bag and two hoodies, but defendant quickly objected that the bag was not his (contradicting his earlier statement) and said that he did not want it to be searched. Officer McDonough put the bag on the ground and had his police dog sniff the bag. The dog alerted to the bag, and, on opening it, the officers found a large amount of heroin.

At the suppression hearing, the trial court heard testimony from Officer McDonough and reviewed video footage of the stop captured by his patrol car's dash cam. Officer McDonough testified about his experience patrolling I-85 and his knowledge that the highway serves as a major thoroughfare for drug trafficking. Officer McDonough also testified that he observed defendant going about 70 miles per hour in a 60 mile-per-hour zone, crossing over the white shoulder line twice, and coming within a car length and a half of a truck in front of him. The dash-cam video shows Officer McDonough pulling defendant over, asking him for his driver's license, and telling him not to follow other vehicles too closely. In recounting what he observed during the traffic stop, Officer McDonough testified that defendant had two phones: one smartphone and one flip phone. The video shows Officer McDonough asking defendant about his

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[1] In this opinion, we do not decide whether the permission that defendant gave constituted legal consent to search the car.

destination and defendant giving an answer that does not match his driving route. Officer McDonough then asks for defendant's rental agreement and receives it from defendant. Shortly after this, the officer asks defendant to exit the rental car, and defendant complies. On camera, behind the rental car, Officer McDonough says that defendant will receive only a warning, and then, after asking permission, briefly frisks defendant, finding a wad of cash. After that, Officer McDonough asks defendant to sit in the front passenger seat of the patrol car, which defendant does.

During his testimony, Officer McDonough gave details about the three databases that he generally runs a driver's information through during a traffic stop: one local, one statewide, and one national. He also explained that his conversation with defendant in the patrol car happened while he was running the database checks, which ran in the background during the conversation. He testified that these checks inherently take a few minutes to run. The video captured the conversation that Officer McDonough had with defendant while the checks were running. On the video, defendant gives self-contradictory statements about when and where he has seen his girlfriend previously.

The video then shows Officer McDonough asking defendant about a list of controlled substances that might be in the car. Defendant denies possession of all of them. He objects to any search of his bag or his hoodies, but says that Officer McDonough can search the Chrysler if he wants to. After this conversation, Officer McDonough tells defendant that he is waiting for another officer to arrive. The video shows the time after the second officer has arrived, and shows the

removal of a bag from the Chrysler's trunk. Defendant suddenly says that the bag is not his and repeats that he does not want it searched. The actual dog sniff that Officer McDonough's police dog performed, and that resulted in an alert on the bag, occurs offscreen, but Officer McDonough testified about it and about the subsequent search of the bag. Officer McDonough can also be heard on the video discussing the heroin that he and the other officer have found.

The dash-cam video, combined with Officer McDonough's suppression hearing testimony, provides more than enough evidence to support the trial court's findings of fact. We therefore turn to the second part of our review: namely, "whether those factual findings in turn support the [trial court's] ultimate conclusions of law." *Cooke, 306 N.C. at 134, 291 S.E.2d at 619*. We review conclusions of law de novo. *E.g., State v. Williams, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012)*.

The initiation of the traffic stop here—which defendant does not challenge—was justified by Officer McDonough's observations of defendant's driving. "[R]easonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected," *Styles, 362 N.C. at 415, 665 S.E.2d at 440*, and Officer McDonough reasonably suspected multiple traffic violations. Defendant was driving ten miles per hour over the speed limit; following a truck too closely, which is forbidden by *N.C.G.S. § 20-152*; and weaving over the white line marking the edge of the road, which is forbidden by *N.C.G.S. § 20-146(d)(1)*. These facts allowed Officer McDonough to pull defendant over based on reasonable suspicion of those violations.

Once the traffic stop had begun, Officer McDonough could and did lawfully ask defendant to exit the rental car. "[A] police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle . . . ." *Maryland v. Wilson, 519 U.S. 408, 410, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997)* (citing *Pennsylvania v. Mimms, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977)* (per curiam)). Asking a stopped driver to step out of his or her car improves an officer's ability to observe the driver's movements and is justified by officer safety, which is a "legitimate and weighty" concern. *See Mimms, 434 U.S. at 110*. "[T]he government's officer safety interest stems from the mission of the stop itself." *Rodriguez, 575 U.S. at , 135 S. Ct. at 1616*; *see also id. at 135 S. Ct. at 1614* (indicating that the proper duration of a traffic stop includes time spent to "attend to related safety concerns"). So any amount of time that the request to exit the rental car added to the stop was simply time spent pursuing the mission of the stop.

After defendant left the rental car, Officer McDonough lawfully frisked him for weapons without unconstitutionally prolonging the stop, for two independent reasons.

First, frisking defendant before placing him in Officer McDonough's patrol car enhanced the officer's safety. "Traffic stops are 'especially fraught with danger to police officers,' so," as we have already noted, "an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Id. at , 135 S. Ct. at 1616* (citation omitted) (quoting *Arizona v. Johnson, 555 U.S. 323, 330, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009))*. Once again, because officer safety stems from the mission of

the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete that mission. As a result, the frisk here did not "prolong[ ]" a stop "beyond the time reasonably required to complete th[e] mission" of the stop under *Rodriguez*. *Id. at , 135 S. Ct. at 1612* (second alteration in original) (quoting *Caballes, 543 U.S. at 407*). "Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular." *Id. at 135 S. Ct. at 1616*.

Second, traffic stops "remain[ ] lawful only 'so long as [unrelated] inquiries do not *measurably* extend the duration of the stop.'" *Id. at , 135 S. Ct. at 1615* (second set of brackets in original) (emphasis added) (quoting *Johnson, 555 U.S. at 333*). It follows that there are some inquiries that extend a stop's duration but do not extend it measurably. In *Rodriguez*, the government claimed that extending a traffic stop's duration by seven or eight minutes did not violate the *Fourth Amendment*. *Id. at , , 135 S. Ct. at 1613, 1615-16*. The Supreme Court disagreed. *Id. at 135 S. Ct. at 1616*. But here, the frisk lasted eight or nine seconds. While we do not need to precisely define what "measurably" means in this context, it must mean something. And if it means anything, then *Rodriguez*'s admonition must countenance a frisk that lasts just a few seconds. So this very brief frisk did not extend the traffic stop's duration in a way that would require reasonable suspicion.[2]

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[2] In addition to arguing that the frisk unconstitutionally prolonged the stop, defendant also argues in his brief to this Court that the frisk itself was unconstitutional. When an appeal of right is based solely on a dissent in the Court of Appeals, we

Asking defendant to sit in the patrol car did not unlawfully extend the stop either.[3] Officer McDonough had three database checks to run before the stop could be finished: one check for information covering the Durham area, one for statewide information, and one for out-of- state information. It takes a few minutes to run checks through these databases, and it takes no more time to run the checks when a defendant is in a patrol car than when a defendant is elsewhere. Indeed, as the trial court found here and as both the dash-cam video and Officer McDonough's testimony also established, Officer McDonough spoke with defendant while the checks were running. With these checks running in the background, Officer McDonough was free to talk with defendant at least up until the moment that all three database checks had been completed.

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limit our review to the issue or issues "specifically set out in the dissenting opinion as the basis for that dissent," unless a party successfully petitions this Court for discretionary review of additional issues. N.C. R. App. P. 16(b). In this case, the Court of Appeals did not decide whether defendant had consented to the frisk because it decided the case on other grounds, *see State v. Bullock, N.C. App. at , 785 S.E.2d at 752*, and neither party petitioned this Court for discretionary review of this issue. The issue is therefore not properly before us.

[3] In his brief, defendant also appears to argue that Officer McDonough independently violated the *Fourth Amendment* when he had defendant sit in his patrol car, regardless of whether this extended the stop. But, like the issue of whether defendant consented to the frisk, this issue was not "the basis for th[e] dissent" in the Court of Appeals, N.C. R. App. P. 16(b)(1), and no party has petitioned us to review it. It is thus not before us.

The conversation that Officer McDonough had with defendant while the database checks were running enabled Officer McDonough to constitutionally extend the traffic stop's duration. The trial court's findings of fact show that, by the time these database checks were complete, this conversation, in conjunction with Officer McDonough's observations from earlier in the traffic stop, permitted Officer McDonough to prolong the stop until he could have a dog sniff performed.

Officer McDonough came into the stop with extensive experience investigating drug running, and he knew that I-85 is a major drug trafficking corridor. Shortly after pulling defendant over, Officer McDonough observed defendant's nervous demeanor and two cell phones—including a flip phone—in the Chrysler that defendant was driving, and the officer learned that the Chrysler was a rental car that had been rented in someone else's name. All of this information suggested possible drug-running, even before defendant began talking.

Defendant's conversation with Officer McDonough, and other aspects of their interaction, quickly provided more evidence of drug activity. Defendant gave an illogical account of where he was going, given that he had driven past at least three different exits that he could have taken to reach his purported destination. The $372 in cash that Officer McDonough discovered during the frisk behind the car added to Officer McDonough's suspicion of drug crime. And Officer McDonough certainly gained reasonable

suspicion of drug activity that justified a prolonged stop shortly after defendant entered the patrol car.[4]

There, as he continued his conversation with Officer McDonough, defendant gave mutually contradictory statements about his girlfriend, whom he claimed to be visiting, and the database check revealed, among other things, that defendant had apparently not been truthful when he said that he had recently moved to North Carolina. On top of all of this, defendant broke eye contact when discussing his girlfriend and his travel plans, after maintaining eye contact while giving apparently honest answers to other questions. So, after Officer McDonough had spoken with defendant in his patrol car and finished the database checks, the officer legally extended the duration of the traffic stop to allow for the dog sniff.

The Supreme Court indicated in *Rodriguez* that reasonable suspicion, if found, would have justified the prolonged seizure that led to the discovery of Rodriguez's methamphetamine. *See 575 U.S. at , 135 S. Ct. at 1616-17*. Officer McDonough prolonged the traffic stop of defendant's rental car only after the officer had formed reasonable suspicion that

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[4] As we have already said, unless a party has successfully petitioned this Court for discretionary review of other issues, we limit our review to the issue or issues "specifically set out in the dissenting opinion as the basis for that dissent." N.C. R. App. P. 16(b). The dissent in this case agreed with the majority that reasonable suspicion was not formed before defendant had entered the patrol car, *see Bullock, N.C. App. at , 785 S.E.2d at 756* (McCullough, J., dissenting), and the State did not petition this Court for review of this issue. We therefore take no position on whether reasonable suspicion existed earlier in the stop.

defendant was a drug courier, which allowed for the dog sniff that ultimately led to the discovery of heroin in the bag that was pulled from the rental car. Because this extension of the stop's duration was properly justified by reasonable suspicion, it poses no constitutional problem under *Rodriguez*.

It is worth noting just how different the procedural posture of this case is from the one that the Supreme Court confronted in *Rodriguez*. There, the Eighth Circuit had not reached the question of reasonable suspicion in its opinion. *See id. at , , 135 S. Ct. at 1614, 1616-17*. As a result, the Supreme Court essentially had to assume, for the purposes of its *Fourth Amendment* analysis, that no reasonable suspicion had existed at any time before the dog sniff in that case occurred. *See id. at , 135 S. Ct. at 1616-17*. And in Rodriguez, the officer had issued a written warning and therefore completed the traffic stop before the dog sniff occurred. Id. at , 135 S. Ct. at 1613. So the Supreme Court found that the stop was necessarily prolonged beyond the time needed to complete the stop's mission, see id. at , 135 S. Ct. at 1614-16, but did not determine whether reasonable suspicion to prolong the stop existed, *see id. at , 135 S. Ct. at 1616-17*. Instead, the Supreme Court remanded the case to the Eighth Circuit and noted that the reasonable suspicion question "remain[ed] open for Eighth Circuit consideration on remand." Id. at , 135 S. Ct. at 1616-17. Here, by contrast, the question of reasonable suspicion is squarely before us.

Officer McDonough did not extend the duration of the traffic stop in this case beyond the time needed to complete the mission of the stop until he had reasonable suspicion to do so. It is worth reiterating

that we are addressing only the issue that formed the basis of the dissenting opinion in the Court of Appeals, as we are required to do under Rule 16(b) of our Rules of Appellate Procedure. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals to consider defendant's remaining arguments on appeal.

REVERSED AND REMANDED.

APPENDIX D

IN THE COURT OF APPEALS
OF NORTH CAROLINA

No. COA 15–731

Durham County Docket No. 12 CRS 61997

STATE OF NORTH CAROLINA,
Appellee,

Versus

MICHAEL ANTONIO BULLOCK,
Defendant-Appellant.

Appeal by defendant from judgment entered 30 July 2014 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 17 November 2015.

(May 10, 2016)

GEER, Judge.

Defendant Michael Antonio Bullock was indicted for trafficking in heroin by possession, trafficking in heroin by transportation, and possession with the intent to sell or deliver a Schedule I controlled substance (heroin). Following the denial of defendant's motion to suppress evidence obtained by law enforcement as a result of a search of his vehicle

following a traffic stop, defendant pled guilty to the charged offenses. On appeal, defendant argues that the trial court erred in denying his motion to suppress because its findings of fact establish that the officer unlawfully extended the stop, making the subsequent search unlawful. In light of the United States Supreme Court's decision in *Rodriguez v. United States*, ___ U.S. ___, 191 L. Ed. 2d 492, 135 S. Ct. 1609 (2015), we agree and hold, based on the trial court's findings of fact, that the officer unlawfully extended the stop and that defendant's consent to the search did not, therefore, justify the search. Accordingly, we reverse.

FACTS

The State presented evidence at the motion to suppress hearing that tended to show the following facts. On 27 November 2012, defendant was traveling south on I-85 through Durham. Officer John McDonough of the Durham Police Department was stationary on the side of the interstate when defendant drove past him in the far left lane in a white Chrysler, traveling approximately 70 mph in a 60 mph zone. Officer McDonough observed defendant change lanes to the middle lane "even though there was no car in front of him."

Officer McDonough began following defendant and paced him for about a mile, as defendant continued to maintain a speed of 70 mph, although the speed limit increased to 65 mph. Officer McDonough, while following defendant in a marked patrol car, observed defendant apply the brakes twice and cross over the white shoulder line. He also observed

defendant following a truck too closely, coming within approximately one and a half car lengths of it.

Officer McDonough initiated a traffic stop and approached defendant's car from the passenger side. Officer McDonough asked how defendant was doing and for his driver's license and registration. Defendant already had his driver's license out when Officer McDonough approached and his hand was trembling a little. Officer McDonough observed two cell phones in the center console of defendant's vehicle. Officer McDonough understood defendant as saying that he was going to Century Oaks Drive to meet a girl, but that he had missed his exit.

Officer McDonough asked defendant for the rental agreement for the vehicle once defendant indicated that the car was a rental. The rental agreement specified that the car was rented by an "Alicia Bullock," and "it looked like [defendant] had written his name in at the date part down where the renter signed her name." However, the only authorized user on the rental agreement was Alicia Bullock.

Officer McDonough asked defendant to step back to his patrol car while he ran defendant's driver's license. He shook hands with defendant and told him that he would give him a warning for the traffic violation. He then asked if he could briefly search defendant for weapons before he got into his patrol car. Defendant agreed and lifted his arms up in the air -- Officer McDonough found only cash on him. Defendant later stated that the cash totaled about $372.00. Defendant told Officer McDonough that he was about to go shopping.

While defendant was seated in his patrol car, Officer McDonough ran defendant's North Carolina driver's license through his mobile computer. Officer McDonough's K-9 was located in the back of his police car. Defendant claimed that he had just moved down from Washington, but Officer McDonough learned by running his license that the license was issued back in 2000 and that defendant had been arrested in North Carolina in 2001. Defendant later admitted he had been in the area for a while and claimed he was going to meet a girl he met on Facebook for the first time. However, defendant also mentioned that the same woman would sometimes come up to Henderson to meet him. In addition, when Officer McDonough misidentified the street that defendant had claimed he was traveling to, defendant did not correct him.

Officer McDonough thought defendant looked nervous while he was questioning him in the police car. He noted that defendant was "breathing in and out in his stomach" and was not making much eye contact. Officer McDonough then asked defendant if there were any weapons or drugs in the car and if he could search the vehicle. Defendant gave consent for Officer McDonough to search the car, but not his personal belongings in the car. Defendant clarified that his personal belongings included a bag, some clothes, and some condoms. Officer McDonough called for a backup officer and explained to defendant that he could not conduct a search of a car without a backup officer present. Officer McDonough testified that it took Officer Green around three to five minutes to arrive, although the surveillance tape indicates closer to 10 minutes elapsed.

While they were waiting for Officer Green, defendant asked what they were waiting for, and Officer McDonough explained that he could get in trouble if he searched the car without another officer present. Defendant asked Officer McDonough what would happen if he did not consent to a search of the car, and Officer McDonough stated that he would then deploy his K-9 dog to search the car. At that time, defendant and Officer McDonough spoke some more about the girl defendant was going to see and other matters unrelated to the traffic stop. Defendant then asked again, "What are we waiting for now?" He also expressed concern to Officer McDonough that he was "going to make me miss this."

Once Officer Green arrived, Officer McDonough began searching the front passenger area of the car. Officer McDonough felt that the car was still "kind of outside the shoulder" so he moved it further off to the side of the road. Officer McDonough rolled down the window of his patrol car in case defendant revoked consent to search the car, but other than limiting the search to not including the bags, defendant never revoked his consent to search his car. Officer McDonough got to the trunk and then defendant yelled out, "it's not my bag" and "those are not my hoodies. . . ." Defendant explained that it was his sister's bag and that he couldn't give Officer McDonough permission to search her bag.

Officer McDonough had Officer Green remove the bag and put it on the grass. He then got his K-9 dog out of the car. The K-9 went around the car and did not alert to any drugs being in the car. Officer McDonough then had his K-9 sniff the bag on the side of the road, and the dog "immediately put his nose on

the bag and came to a sit" -- the behavior he exhibits when there is an odor of narcotics. According to Officer McDonough, his K-9 dog has never given a false alert. Officer Green opened the bag and found 100 bindles of heroin in it.

Defendant was indicted on 17 December 2012 by a grand jury for trafficking in heroin by possession, trafficking in heroin by transportation, and possession with the intent to sell or deliver a Schedule I controlled substance. Defendant filed a motion to suppress on 2 July 2014, arguing that the trial court should suppress all of the evidence obtained as a result of the search of the vehicle defendant was driving. A suppression hearing was held on 30 July 2014, and on 4 August 2014, the trial court entered an order denying defendant's motion.

In its order, the trial court made the following findings of fact. Officer McDonough initiated a traffic stop after observing defendant "traveling 70 miles per hour in a 60 mile per hour zone in the far left travel lane." In addition, Officer McDonough observed defendant "come within approximately one and a half car lengths of a silver Ford pickup truck." The trial court noted that Officer McDonough requested defendant's license and registration and that "Defendant's hand was trembling when handing his license over to [Officer] McDonough." Further, the trial court found that defendant was the sole occupant and driver of the car and he "was not listed as an authorized driver" on the rental agreement.

The trial court also found "[t]hat [Officer] McDonough observed that defendant had two cellular phones inside the Chrysler[.]" The trial court found that Officer McDonough "asked defendant where he

was traveling" and that "Defendant responded he was going to his girlfriend's house on Century Oaks Drive in Durham and he just missed his exit." The court also found that defendant claimed he just moved from Washington, D.C. to Henderson, North Carolina and indicated that he was using the GPS on his cellphone in order to get to his destination.

In addition, the trial court found:

> That [Officer] McDonough requested defendant to exit the Chrysler and have a seat in McDonough's patrol vehicle in order to check defendant's driver's license. Before defendant sat in the passenger seat of the patrol vehicle, [Officer] McDonough met defendant at the rear of the Chrysler, shook defendant's hand, told him he was going to give him a warning for the traffic violations, and briefly check him for weapons. While checking for weapons, [Officer] McDonough observed a small bundle of United States currency totaling $372.00 in defendant's right side pants pocket. Defendant stated he was about to go shopping.

Next, the trial court found that Officer McDonough told defendant he was receiving a warning ticket and that the reason Officer McDonough did so was "to calm [him] down to be able to gauge nervousness not caused by general fear of getting a ticket." The court also noted that Officer McDonough claimed he asked defendant to sit next to him in his patrol vehicle "to observe defendant when defendant answer[ed] his questions."

The court further found "[t]hat information came back to [Officer] McDonough from the various law enforcement databases that defendant was issued a North Carolina driver's license in 2000 and had a criminal history in North Carolina that began in 2001." Additionally, the court found that Officer McDonough requested that another officer check in with him so that two officers would be present and able to search the Chrysler. The court also noted that when Officer McDonough questioned defendant about certain items, such as "whether there were any guns in the vehicle, or a dead body in the trunk, defendant was able to make eye contact with [Officer] McDonough while answering the question." When asked about his girlfriend or where he was traveling, however "defendant would not make eye contact and instead looked out the window and away from [Officer] McDonough." Further, "defendant's breathing was elevated and his stomach was rising and falling rapidly."

The trial court then described what happened after Officer McDonough asked defendant if he could search his vehicle, finding "[t]hat [Officer] McDonough asked defendant if he had a problem with him searching the vehicle" and that defendant responded " 'yeah, I don't want you to go in my stuff.' " But, defendant said Officer McDonough could check the car if he wanted. The court indicated "[t]hat at no time did defendant state that he changed his mind and that he did not want [Officer] McDonough to search the Chrysler." Finally, the court found, in Finding of Fact No. 18, that 1,500 bindles of heroin were found in defendant's bag.

Ultimately, the trial court concluded that Officer McDonough had reasonable, articulable suspicion to conduct the traffic stop because defendant was speeding and following another vehicle too closely. Additionally, the court concluded:

> That [Officer] McDonough had reasonable, articulable suspicion to extend the traffic stop based on his observations that: defendant was driving on an interstate where illegal drugs are transported; defendant was operating a rental vehicle which he was not authorized to drive; defendant possessed two cellphones and a small bundle of United States currency; defendant was obviously nervous, deceptive, and evasive as noted in his trembling hands, elevated breathing, and lack of eye contact; and defendant made multiple inconsistent statements regarding his destination, who he was going to meet, and how long he had lived in North Carolina.

After the trial court denied defendant's motion to suppress, he pled guilty to the charged offenses, and the trial court sentenced him to a term of 225 to 279 months imprisonment. Defendant timely appealed to this Court.

DISCUSSION

On appeal, defendant argues that the trial court erred in denying his motion to suppress because the officer unlawfully extended the traffic stop, making the subsequent search unlawful. In reviewing a trial

court's ruling on a motion to suppress, this Court "determine[s] only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the court's conclusions of law." *State v. Pulliam*, 139 N.C. App. 437, 439-40, 533 S.E.2d 280, 282 (2000). Conclusions of law are, however, reviewable de novo. *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001).

This appeal is controlled by *Rodriguez*. In addressing the reasonableness of the duration of a traffic stop, the Supreme Court explained:

> A seizure for a traffic violation justifies a police investigation of that violation. A relatively brief encounter, a routine traffic stop is more analogous to a so-called *Terry* stop than to a formal arrest. Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's mission -- to address the traffic violation that warranted the stop, and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. Authority for the seizure thus ends when tasks tied to the traffic infraction are -- or reasonably should have been -- completed.
>
> Our decisions in [*Illinois v.*] *Caballes*[, 543 U.S. 405, 160 L. Ed. 2d 842, 125 S. Ct. 834 (2005)] and [*Arizona*

> *v.*] *Johnson*[, 555 U.S. 323, 172 L. Ed. 2d 694, 129 S. Ct. 781 (2009)] heed these constraints. In both cases, we concluded that the *Fourth Amendment* tolerated certain unrelated investigations that did not lengthen the roadside detention. In *Caballes*, however, we cautioned that a traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket. And we repeated that admonition in *Johnson*: The seizure remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop. An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. *But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.*

Id. at ___, 191 L. Ed. 2d at 498-99, 135 S. Ct. at 1614-15 (second emphasis added) (internal citations, quotation marks, brackets, and ellipses omitted).

Before the U.S. Supreme Court's *Rodriguez* decision, this Court had recognized essentially the same principles. In *State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 754 (quoting *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998)), *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008), this Court explained that " '[o]nce the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion

in order to justify further delay.' " "To determine whether the officer had reasonable suspicion, it is necessary to look at the totality of the circumstances." *Id.* The Court emphasized that "in order to justify [the officer's] further detention of defendant, [the officer] must have had defendant's consent or 'grounds which provide a reasonable and articulable suspicion in order to justify further delay' *before* he questioned defendant." *Id.*, 654 S.E.2d at 755 (quoting *Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360).

Applying *Rodriguez* and *Myles* to this case, the mission of the stop was to issue a traffic infraction warning ticket to defendant for speeding and following a truck too closely. Officer McDonough's stop of defendant could, therefore, last only as long as necessary to complete that mission and certain permissible unrelated "checks," including checking defendant's driver's license, determining whether there were outstanding warrants against defendant, and inspecting the automobile's registration and proof of insurance. *Rodriguez*, ___ U.S. at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615.

Officer McDonough completed the mission of the traffic stop when he told defendant that he was giving defendant a warning for the traffic violations as they were standing at the rear of defendant's car. With respect to the permissible checks, Officer McDonough checked the car rental agreement -- the equivalent of inspecting a car's registration and proof of insurance -- before he asked defendant to exit his car. Officer McDonough was still permitted to check defendant's license and check for outstanding warrants. But, he was not allowed to "do so in a way that prolong[ed] the stop, absent the reasonable suspicion ordinarily

demanded to justify detaining an individual." *Id.* at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615.

Rather than taking the license back to his patrol car and running the checks, Officer McDonough required defendant to exit his car, subjected him to a pat down search, and had him sit in the patrol car while the officer ran his checks. The trial court's findings of fact set out the reason Officer McDonough proceeded in this manner. He told defendant that he was giving him just a warning so he could "attribute nervousness to something other than general anxiety from a routine traffic stop." In addition, the trial court found that Officer "McDonough [had] defendant sit in the passenger seat next to him to observe defendant when defendant answer[ed] his questions." Then, apart from just checking defendant's license and checking for warrants, Officer McDonough ran "defendant's name through various law enforcement databases" while he questioned defendant at length about subjects unrelated to the traffic stop's mission.

Under existing case law, an officer may, during a traffic stop, lawfully ask the driver to exit the vehicle. *See, e.g, State v. McRae*, 154 N.C. App. 624, 629, 573 S.E.2d 214, 218 (2002) ("When an officer has lawfully detained a vehicle based on probable cause to believe that a traffic law has been violated, he may order the driver to exit the vehicle."). In *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 54 L. Ed. 2d 331, 337, 98 S. Ct. 330, 333 (1977), the United States Supreme Court found that the "additional intrusion" into the personal liberty of the driver by the officer asking him to step out of the car was, at most, "*de minimis*." Although "prior to *Rodriguez*, many jurisdictions -- including North Carolina -- applied a *de minimis* rule,

. . . the holdings in these cases to the extent that they apply the *de minimis* rule have been overruled by *Rodriguez*." *State v. Warren*, ___ N.C. App. ___, ___, 775 S.E.2d 362, 365 (2015), *aff'd per curiam*, ___ N.C. ___, 782 S.E.2d 509 (2016). Thus, under *Rodriguez*, even a de minimis extension is too long if it prolongs the stop beyond the time necessary to complete the mission. ___ U.S. at ___, 191 L. Ed. 2d at 500-01, 135 S. Ct. at 1616.

The *Rodriguez* Court considered *Mimms* and made comparisons to a dog sniff, noting that while ordering an individual to exit a car can be justified as being for officer safety, a dog sniff could not be justified on the same basis. *Id.* at ___, 191 L. Ed. 2d at 500, 135 S. Ct. at 1616. Even so, the Court noted that the "critical question . . . is not whether the dog sniff occurs before or after the officer issues a ticket, . . . but whether conducting the sniff 'prolongs' -- i.e., adds time to -- 'the stop[.]' " *Id.* at ___, 191 L. Ed. 2d at 501, 135 S. Ct. at 1616. Moreover, the Court focused on whether the imposition or interest "stems from the mission of the stop itself[,]" noting: "On-scene investigation into other crimes . . . detours from that mission. So too do safety precautions taken in order to facilitate such detours." *Id.* at ___, 191 L. Ed. 2d at 500, 135 S. Ct. at 1616 (internal citations omitted).

Even assuming Officer McDonough had a right to ask defendant to exit the vehicle while he ran defendant's license, his actions that followed certainly extended the stop beyond what was necessary to complete the mission. The issue is not whether Officer McDonough could lawfully request defendant to exit the vehicle, but rather whether he unlawfully extended and prolonged the traffic stop by frisking

defendant and then requiring defendant to sit in the patrol car while he was questioned. To resolve that issue, we follow *Rodriguez* and focus again on the overall mission of the stop. We hold, based on the trial court's findings of fact, that Officer McDonough unlawfully prolonged the detention by causing defendant to be subjected to a frisk, sit in the officer's patrol car, and answer questions while the officer searched law enforcement databases for reasons unrelated to the mission of the stop and for reasons exceeding the routine checks authorized by *Rodriguez*.

With respect to Officer McDonough's decision, as the trial court found, to "briefly check [defendant] for weapons," it is well established that "[d]uring a lawful stop, 'an officer may conduct a pat down search, for the purpose of determining whether the person is carrying a weapon, *when the officer is justified in believing that the individual is armed and presently dangerous*.' " *State v. Johnson*, ___ N.C. App. ___, ___ S.E.2d ___, 2016 WL 1319083, at *10, 2016 N.C. App. LEXIS 341, at *28-29 (April 5, 2016) (No. COA15-29) (quoting *State v. Sanders*, 112 N.C. App. 477, 480, 435 S.E.2d 842, 844 (1993)) (emphasis added). Here, however, the trial court made no findings suggesting that Officer McDonough was justified in believing that defendant might be armed and presently dangerous. Thus, Officer McDonough's frisk of defendant for weapons, without reasonable suspicion that he was armed and dangerous, unlawfully extended the stop.

The dissent argues that defendant consented to the pat down search. We need not decide, however, whether defendant consented, because the moment Officer McDonough asked if he could search defendant's person, without reasonable suspicion that

defendant was armed and dangerous, he unlawfully prolonged the stop. Under *Rodriguez*, other than running permissive checks, any additional amount of time Officer McDonough took that was unrelated to the mission of the stop unlawfully prolonged it.

Officer McDonough then extended the stop further when he had defendant get into his patrol vehicle and ran defendant's name through numerous databases while being questioned, as this went beyond an authorized, routine check of a driver's license or for warrants. The only basis found by the trial court for Officer McDonough's decision to have defendant get into his patrol vehicle was so that he could "observe defendant when defendant answer[ed] his questions." In other words, the officer was prolonging the detention to conduct a check unrelated to the traffic stop. Under *Rodriguez*, he could "not do so in a way that prolong[ed] the stop absent the reasonable suspicion ordinarily demanded to justify detaining an individual." ___ U.S. at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615. Consequently, given the trial court's finding of fact and *Rodriguez*, Officer McDonough was required to have reasonable suspicion before asking defendant to go to his patrol vehicle to be questioned.

By requiring defendant to submit to a pat-down search and questioning in the patrol car unrelated to the purpose of the traffic stop, the officer prolonged the traffic stop beyond the time necessary to complete the stop's mission and the routine checks authorized by *Rodriguez*. As this Court has recently emphasized in *State v. Castillo*, ___ N.C. App. ___, ___ S.E.2d ___, 2016 WL _____, 2016 N.C. App. LEXIS ____ (May 3, 2016) (No. COA15-855), under *Rodriguez*, investigation unrelated to the mission of the traffic

stop "is not necessarily prohibited, but extending the stop to conduct such an investigation is prohibited."

The question is, then, did Officer McDonough have reasonable articulable suspicion that criminal activity was occurring prior to the extended detention? *See Rodriguez*, ___ U.S. at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615 (holding that while officer may engage in checks unrelated to traffic stop, "he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual"); *Castillo*, ___ N.C. App. at ___, ___ S.E.2d at ___, 2016 WL ___, at *__, 2016 N.C. App. LEXIS ___, at *___ (in determining whether officer had reasonable suspicion to extend detention, Court looked at "factors . . . known to [the officer] while he stood on the roadside before defendant joined him in the patrol vehicle").

" '[A] trial court's conclusions of law regarding whether the officer had reasonable suspicion [or probable cause] to detain a defendant is reviewable *de novo*.' " *State v. Hudgins*, 195 N.C. App. 430, 432, 672 S.E.2d 717, 718 (2009) (quoting *State v. Wilson*, 155 N.C. App. 89, 93-94, 574 S.E.2d 93, 97 (2002)). Thus, we review de novo the trial court's conclusion in this case that Officer McDonough had reasonable, articulable suspicion to extend the defendant's detention.

Based on the trial court's findings, the only information that Officer McDonough had to raise suspicion prior to the officer subjecting defendant to the Terry pat down was: (1) defendant was driving on I-85, an interstate used for the transport of drugs; (2) defendant was operating a rental vehicle that he was not authorized to drive; (3) defendant possessed two

cellphones; (4) defendant's hand trembled when he handed the officer his license; (5) defendant told the officer he was going to Century Oaks Drive, but had missed his exit, when in fact he had passed three major exits that would have allowed defendant to reach his claimed destination; and (6) defendant, when first observed, was traveling in the far left hand lane and did not appear to be intending to exit off of I-85. However, these circumstances, considered together, give rise to only a hunch and not the particularized suspicion necessary to justify detaining defendant. *See State v. Fields*, 195 N.C. App. 740, 744, 673 S.E.2d 765, 767-68 (2009) (holding that "police officer must develop more than an unparticularized suspicion or hunch before he or she is justified in conducting an investigatory stop" (internal quotation marks omitted)).

Officer McDonough's testimony and the trial court's findings that the officer told defendant he would get a warning ticket so that the officer would then be able to distinguish between nervousness over receiving a ticket and nervousness for other reasons shows that the nervousness before the warning -- the hand tremble – was not enough to raise a suspicion. *See Myles*, 188 N.C. App. at 49, 654 S.E.2d at 757 (noting that the Supreme Court has held "that a defendant's extreme nervousness may be taken into account in determining whether reasonable suspicion exists"). Mere trembling of a hand when handing over a driver's license cannot be considered "extreme nervousness," *id.*, and, therefore, this tremble is not relevant to the totality of the circumstances. *See also State v. Pearson*, 348 N.C. 272, 276, 498 S.E.2d 599, 601 (1998) (noting that "[t]he nervousness of the

defendant is not significant" because "[m]any people become nervous when stopped by a state trooper").

The other circumstances, without more, describe innocent behavior that even collectively does not raise a particularized suspicion of criminal activity. *See Myles*, 188 N.C. App. at 47, 50, 51, 654 S.E.2d at 756, 758 (holding no reasonable suspicion existed to extend traffic stop when rental car occupants' stories did not conflict, rental car was rented by passenger rather than driver, there was no odor of alcohol although car had weaved in lane, officer found no contraband or weapons upon frisking driver, and driver's license was valid, although driver's "heart was beating unusually fast" and rental car was one day overdue).

Indeed, the trial court's finding of reasonable suspicion depended substantially on circumstances that arose after Officer McDonough had extended the stop, including the discovery that defendant had $372.00 in cash, defendant's elevated breathing and lack of eye contact, and his multiple inconsistent statements regarding his destination, who he was going to meet, and how long he had lived in North Carolina. Although both the trial court and Officer McDonough, in his testimony, relied substantially on inconsistencies in defendant's story that developed while he was questioned in the officer's patrol car, defendant's initial explanation for missing his exit -- he was talking on his cell phone -- presented no inconsistent statement and was not implausible without consideration of the further questioning. The State has pointed to no authority that suggests that in the absence of the post-extension circumstances, the

circumstances present in this case prior to the frisk were sufficient to give rise to reasonable suspicion.

However, we find the Fourth Circuit's decision in *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011), persuasive. In *Digiovanni*, the Fourth Circuit acknowledged that "[t]he Supreme Court has recognized that factors consistent with innocent travel can, when taken together, give rise to reasonable suspicion." *Id.* at 511. On the other hand, "[t]he articulated innocent factors collectively must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied." *Id.* (internal quotation marks omitted).

The officer in *Digiovanni* claimed to have developed reasonable suspicion to prolong the traffic stop due to 10 factors, including that: (1) the car was a rental car; (2) the car was coming from a known drug-supply state (Florida); (3) the car was travelling on I-95, a known drug corridor; (4) the car was clean; (5) two shirts hanging in the back; (6) toiletry bag in backseat; (7) the defendant's hands trembled; (8) the defendant's response to questions; (9) the defendant's travel itinerary; and (10) the defendant said, " 'oh boy' " when the officer asked if he had any luggage in the car and if everything in the car belonged to him. *Id.* at 512. The Fourth Circuit dismissed the officer's reliance on the clean car, the two shirts, and the toiletry bag as absurd and accepted the district court's finding that the defendant's " 'oh boy' " statement referred to the heat. *Id.*

Turning to the remaining circumstances, the Fourth Circuit reasoned:

> With regard to the car rental, the traveling on I-95, and the traveling from

Florida factors, there is little doubt that these facts enter the reasonable suspicion calculus. With regard to [the defendant's] travel itinerary, [the officer] certainly was entitled to rely, to some degree, on its unusual nature in determining whether criminal activity was afoot.

Nevertheless, we agree with the district court that reasonable suspicion was not present to turn this routine traffic stop into a drug investigation. The articulated facts, in their totality, simply do not eliminate a substantial portion of innocent travelers. . . . It is true that [the defendant's] travel itinerary is unusual -- not many people are flying from Boston to Miami for the weekend, renting a car for the return trip to Boston, traveling part of the way on the Auto Train, and stopping in New York to pick up some paintings. The problem for the government is that this unusual travel itinerary is not keyed to other compelling suspicious behavior. In this case, other than [the defendant's] unusual travel itinerary, there is nothing compellingly suspicious about the case. There is no evidence of flight, suspicious or furtive movements, or suspicious odors, such as the smell of air fresheners, alcohol, or drugs. All the government can link to the unusual travel itinerary are the facts that [the defendant] rented a car from a

> source state, was stopped on I-95, and was initially nervous. Such facts, without more, simply do not eliminate a substantial portion of innocent travelers.

Id. at 512-13 (internal citations omitted).

We find *Digiovanni* remarkably similar to this case. As in *Digiovanni*, defendant was driving a rental car, was stopped on I-85, and his hand trembled. The issue with defendant's travel itinerary -- missing multiple exits for his supposed destination while talking on the phone -- was less unusual than that in *Digiovanni*. In addition, defendant had two cell phones, but, just as in *Digiovanni*, there was no compelling suspicious behavior. These circumstances considered together, "without more, simply do not eliminate a substantial portion of innocent travelers[,]" *id.* at 513, and, therefore, do not give rise to reasonable, articulable suspicion. *See also United States v. Williams*, 808 F.3d 238, 246 (4th Cir. 2015) (holding that "the relevant facts articulated by the officers and found by the trial court, after an appropriate hearing, must in their totality serve to eliminate a substantial portion of innocent travelers" (internal quotation marks omitted)).

In this Court's decision in *Castillo*, by contrast, the Court found that the trial court properly determined that an officer had reasonable suspicion to extend a traffic stop based on "defendant's bizarre travel plans, his extreme nervousness, the use of masking odors, the smell of marijuana on his person, and the third-party registration of the vehicle . . . ." ___ N.C. App. at ___, ___ S.E.2d at ___, 2016 WL ___, at *___, 2016 N.C. App. LEXIS ___, at *___. The evidence in this case does not rise to the same level.

See also State v. Cottrell, ___ N.C. App. ___, ___, 760 S.E.2d 274, 281 (2014) (holding that officer unlawfully extended stop when he based detention on only strong incense-like fragrance and defendant's felony and drug history). Accordingly, we hold that the trial court erred in concluding that Officer McDonough had reasonable articulable suspicion to extend the traffic stop.

However, the trial court also concluded that defendant voluntarily consented to the search of his vehicle. In its order denying defendant's motion to suppress, the trial court concluded "[t]hat defendant gave knowing, willing, and voluntary consent to search the vehicle" and "[t]hat at no point after giving his consent did defendant revoke his consent to search the vehicle." Since we have concluded that Officer McDonough did not have reasonable suspicion to extend the stop, whether defendant may have later consented to the search is irrelevant, as consent obtained during an unlawful extension of a stop is not voluntary. *See Myles*, 188 N.C. App. at 51, 654 S.E.2d at 758 ("Since [the officer's] continued detention of defendant was unconstitutional, defendant's consent to the search of his car was involuntary."); *see also Cottrell*, ___ N.C. App. at ___, 760 S.E.2d at 282 (holding that because officer unlawfully extended stop, did not give defendant his license back, and continuously questioned defendant, "the trial court correctly found that defendant's detention never became consensual in this case").

Thus, we hold that the trial court's order denying defendant's motion to suppress must be reversed. We, therefore, vacate defendant's guilty plea and remand to the trial court for further proceedings

consistent with this opinion. Since we vacate defendant's plea, we do not need to address his additional arguments related to whether he entered into it knowing and voluntarily.

REVERSED.

Judge BRYANT concurs.

Judge McCULLOUGH dissents in a separate opinion.

McCULLOUGH, Judge, dissent.

From the majority's conclusion that Officer John McDonough of the Durham Police Department unnecessarily extended the traffic stop involving Michael Antonio Bullock ("defendant"), I respectfully dissent. The facts are fully set forth in the majority opinion and will not be repeated unless necessary to demonstrate the reasoning of this dissent. Needless to say, traffic stops are some of the most-litigated police-citizen encounters and have long been recognized as fraught with danger to officers. Thus, certain rules have evolved over the years to allow traffic law enforcement to be conducted safely and efficiently. We grapple with those rules in this opinion.

In the case at bar, the majority concludes that the traffic stop in question was extended when the officer caused defendant to exit his car, be subjected to a frisk, and sit in the patrol car while answering questions while the officer ran various data bases, thereby violating the traffic stop rules recently set forth by the United States Supreme Court in *Rodriguez v. U.S.*, __ U.S. __, 191 L. Ed. 2d 492, (2015). I disagree and believe his actions to be reasonable, well within the parameters allowed by *Rodriguez*. It is conceded by defendant that the initial traffic stop was based on reasonable suspicion, thus we focus on what Officer McDonough's actions were from the time he approached the defendant's vehicle until consent was given to search that vehicle.

As the majority opinion notes, before leaving defendant's vehicle, the officer was aware that the car was on I-85, but being a local vehicle and licensee, this factor is not significant; defendant had two cell

phones; was not the authorized user of the rental car; defendant told the officer he was going to Century Oaks Drive which was several exits previous to the one where he was stopped; when stopped defendant was accelerating in the far left lane and thus did not appear to be seeking an exit. Defendant had also told the officer he had been on his cell phone as an excuse for how he missed the proper exit. The majority concludes that based on these facts the officer did not have reasonable suspicion to extend the stop. I agree with that conclusion. Where the majority and I disagree is whether a stop is unnecessarily extended by having the motorist accompany the officer to the patrol car while a citation is prepared and data bases are checked.

Police questioning during a traffic stop is not subject to the strictures of *Miranda*, *Berkemer* v. *McCarty*, 468 U.S. 420, 435-42, 82 L. Ed. 2d 317, 331-36 (1984), and mere police questioning does not constitute a seizure. *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991). As the majority notes, under existing case law, a driver may be ordered to exit the vehicle. *State v. McRae*, 154 N.C. App. 624, 629, 573 S.E.2d 214, 218 (2002). Such orders by police without any reasonable suspicion, but based on officer safety have long been permitted. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 54 L. Ed. 2d 331, 337 (1977). The ultimate question here is can the officer, as a matter of routine, have the motorist sit in the police vehicle while the officer prepares his citation and runs any data base checks.

In *Rodriguez*, the United States Supreme Court held that a traffic stop cannot be unnecessarily extended while an unrelated investigation is

conducted, absent reasonable suspicion. __ U.S. at __, 191 L. Ed. 2d at 496. Even a *de minimis* delay is impermissible. The holding in *Rodriguez* is actually unremarkable and is essentially what has been the rule for quite a while in North Carolina. *See State v. Myles*, 188 N.C. App. 42, 45, 645 S.E.2d 752, 754, *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008).

The majority opinion relies on two main reasons it believes the traffic stop was unnecessarily extended. First, the majority concludes that the pat down of defendant prior to directing him to sit in the patrol car extended the stop as the officer did not have any reasonable suspicion that defendant was armed and he testified he did not feel threatened. I disagree that this pat down search during which a sum of money ($372) was discovered was an unnecessary extension as the pat down was conducted by consent. At the suppression hearing held on 30 July 2014, Officer McDonough testified as follows:

> A. Just the two phones, and at that point, I asked him to step back to my car, and we were going to run his driver's license.
> Q. Okay. And what happened when you made that request?
> A. He agreed and got out. I met him in the back of his car. I shook his hand, gave him a warning for the traffic violation, and then I asked him if I could search him before he got into my patrol car.
> Q. Okay. And what did he say to you?
> A. He said, yes, and he lifted his arms up in the air.
> Q. Okay. And then what happened after that?

> A. I searched his right pants' pocket that had the currency of different denominations, and he said he was about to go shopping.
> Q. Do you know how much money he had in that bundle you were talking about that he was going shopping with?
> A. It was -- he told me later on in the traffic stop, I think he said $372.
> Q. And when he told you he was going shopping, when did he say that to you?
> A. Right when I grabbed the money, that he was going shopping.
> Q. And what kind of indicator was that to you?
> A. Through my experience, a lot of times guys who are involved in activity of transporting or either be a courier or be involved in it will have large sums of money in their pockets.

I do not believe an officer unnecessarily extends a traffic stop by conducting a consensual search prior to running a driving history check or warrants check on a motorist.

The majority opinion quotes from *Rodriguez* emphasizing that a traffic stop may not be unnecessarily extended while an officer conducts an unrelated investigation. *Rodriguez* also noted however that the officer may conduct certain routine actions, stating:

> 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. (A "warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.").

Rodriguez, __ U.S. at __, 191 L. Ed. 2d at 499, (internal citations omitted).

It should also be noted that Officer McDonough's questioning defendant about his travel plans, usually referred to as "coming and going" questions are part and parcel of a traffic stop as the questions and answers given can impact driver fatigue and other traffic related issues. *See U.S. v. Barahona*, 990 F.2d 412, 416 (8th Cir. 1993); *Ohio v. Carlson*, 657 N.E.2d 591, 599 (Ohio Ct. App. 1995). In the case at bar the officer was also confronted by an unauthorized operator of a rental vehicle. The use of rental vehicles by unauthorized users was one of the major indicators of unlawful activity that the officer stressed in his suppression hearing testimony. Depending on what his data base checks revealed, Officer McDonough might have an individual who was in violation of several motor vehicle laws, N.C. Gen. Stat. § 14-72.2 (unauthorized use of motor-propelled conveyance) or even N.C. Gen. Stat. § 20-106 (possession of stolen vehicle). In other words, the officer is not obligated to

credit the motorist's version of how he came into possession of the vehicle, but is entitled to conduct a short investigation into the circumstances. *See United States v. Sharpe*, 470 U.S. 675, 84 L. Ed. 2d 605 (1985).

With this background in mind, we must face the issue presented by the majority opinion, namely whether Officer McDonough had the authority to direct defendant to sit in the patrol car with him as he wrote him a warning ticket and conducted his background checks. For if he had that authority, almost immediately after sitting down in the patrol car defendant provided information that evolved into reasonable suspicion. If the encounter is to be limited to what the officer knew roadside, the majority opinion is correct and the trial court should be reversed. As far as delaying the mission of the traffic stop, directing a motorist to sit in the police vehicle does not in any way delay the traffic stop. The majority recognizes that the traffic stop is not unnecessarily extended while the officer prepares the ticket and runs his data base checks. Directing the motorist to accompany the officer does not create unnecessary delay as the two (motorist and officer) will walk to the police car in the same length of time as if the officer had walked alone.

Whether an officer can direct a motorist to sit in the police vehicle while these actions are taken, is an open question in North Carolina. The courts that have considered this issue view it through the prism of an additional seizure. Many cases, state and federal, have implicitly recognized that officers have the authority to direct a motorist to sit in the police vehicle while the ticketing process is accomplished. *See*, *Barahona*, 990 F.2d at 414 (in which the officer asked the defendant to exit the car and accompany

him to the patrol car). Several federal courts have concluded that an officer needs a reasonable justification, normally a specific, articulable safety concern, before the officer may direct a motorist to sit in the patrol vehicle, *see U.S. v. Cannon*, 29 F.3d 472, 476-77 (9th Cir. 1994), *U.S. v. Ricardo D.*, 912 F.2d 337, 340-41 (9th Cir. 1990), while other courts have determined that if an officer's request is merely part of the ticketing procedure, then having the motorist sit in the police vehicle is within the permissible scope of a *Terry* stop. *See U.S. v. Rodriguez*, 831 F.2d 162, 166 (7th Cir. 1987), *U.S. v. Rivera*, 906 F.2d 319, 322-23 (7th Cir. 1990), *U.S. v. Bloomfield*, 40 F.3d 910, 915 (8th Cir. 1994) (reasonable investigation includes requesting that the driver sit in the patrol car), *Ohio v. Lozada*, 748 N.E.2d 520, 523 (Ohio Ct. App. 2001). Even those jurisdictions which believe the officer needs some justification to direct a motorist to accompany him or her to the patrol vehicle recognize some exceptions. Here Officer McDonough was faced with an unauthorized user of a rental vehicle. At the moment he directed defendant to proceed to the police vehicle, as stated earlier, he did not know if the data base check might reveal a reported theft. Even verification of defendant's story that he borrowed the car from a relative who was the renter could be facilitated by defendant's presence.

Thus, I maintain that an officer acts within the constitutional parameters of a "*Terry* stop" when he directs a motorist to accompany the officer to the police vehicle during the ticketing process. Based on the line of cases cited previously, it is my position that under either line of cases, Officer McDonough was justified in directing defendant to sit in the patrol car,

even if it was only to be of assistance in determining if defendant had permission to use the vehicle from the renter. We know he did not have the owner's permission as he was not on the rental agreement. Upon entering the vehicle, defendant almost immediately provided enough information to provide the officer with enough reasonable suspicion to extend the stop until he received consent to search. It is not contested that consent was given, the only issue concerns whether the stop was unnecessarily extended in violation of *Rodriguez* so that the officer was never in a position to ask for consent.

At the suppression hearing Officer McDonough testified as follows:

> A. I told him to have a seat in the patrol car.
>
> Q. And did he comply?
>
> A. Yes, sir.
>
> Q. And when you had him in your patrol vehicle, what happened?
>
> A. At that point, I started -- got his license and started running his license and other information in my mobile computer.
>
> Q. Can you walk the Court through when you're running someone's name like how many programs are you running the names through?
>
> A. There's about three databases that I usually use. One is for our police program, CJ Leads, and I use a program called "TLO", also.
>
> Q. What do those programs actually tell you?

A. CJ Leads will give all criminals in North Carolina. Our program will have driver's -- had arrested in Durham, and TLO usually helps with people from out-of-state, shows their criminal history from out-of-state.
Q. Do you have an idea how long it takes you to run a CJ Lead or how long it takes to run somebody's license?
A. It takes a little bit because we have to go in and out, log in, run a wire -- so it takes a little bit.
Q. You said it takes a little bit, like are you talking seconds, minutes?
A. It takes minutes.
Q. So while you're running his name through various databases, what is happening?
A. Well, I remember when he first got in the car and -- where he was going, he said he just moved down here from Washington. So I started running that in CJ Leads and TLO, he said he was from Washington. When I ran his driver's license, it was issued back in 2000, and he had been arrested in North Carolina starting 2001. So he's already been down here 12 years when he said he just moved down here from Washington.
Q. What does that tell you?
A. I just thought I [sic] was strange because you just moved down here from Washington, but you've been here for 12 years. You didn't just move down from

Washington. I don't know if he's just trying to throw that out at me, to throw me off or not.

Q. And what happened after you noticed that he had a license since 2000, and you were looking at records, an arrest record that started from 2001, and had indicated to you on November 27th, 2012 that he had just moved from DC?

A. We started having some conversation. He did later say that he's been down here awhile, started talking about how he met this girl, he said he met her on Facebook, known her about two weeks, and he said it's the first time he came down here to meet her because she always comes to Henderson. And I think we were discussing his criminal history. He mentioned about the gun, he said he had two occasions where his ex-wife had put the gun in the glove box, and he was driving the car and got arrested for it in Vance County, and I think South Carolina -- and he started asking me questions about why I think that happened in Vance County while it was running his information.

Q. So taking a step back, so you are discussing you mention about how he met the girl he was apparently going to see on Century Oaks. Was there anything of note in your discussion about the woman he was apparently going go see?

> A. Like I said, he said he just met her on Facebook. He never met her face-to-face, but he confused me when he says, well, she always comes up to Henderson; if he never met her face-to-face, how does she always come to Henderson. And later on in the conversation, he said she's come to Henderson, but he's never met her I believe.
>
> Q. So when you're speaking in regards to the girlfriend, what does that tell you?
>
> A. That tells me that that story is -- he's not telling the truth about that story.

After having this conversation and running defendant's driver's license record as *Rodriguez* permits while also checking for warrants, Officer McDonough obtained reasonable suspicion to extend the stop and request consent to search. To summarize, the officer not only had that information he obtained prior to proceeding to the police vehicle, he also knew defendant had a sum of cash ($372), defendant had not just come down from D.C. as claimed initially, but had been here since 2000, thus his story about not being that familiar with the roads is likely to be untrue, and defendant made contradictory statements about the girl he was going to meet. Also, during this dialogue, the officer twice mispronounced the name of the street defendant said he was going to without any correction being made by defendant. Contradictory statements regarding one's destination are a strong factor in providing reasonable suspicion. *See U.S. v. Carpenter*, 462 F.3d 981, 987 (8th Cir. 2006). After the conversation, while the data base for defendant's drivers license was checked, the officer had reasonable

suspicion to detain defendant and ask for consent to search. I would then affirm the decision of the trial court to deny the motion to suppress.

APPENDIX E

IN THE GENERAL COURT OF JUSTICE,
SUPERIOR COURT DIVISION, DURHAM
COUNTY, NORTH CAROLINA

No. 12 CRS 61997

STATE OF NORTH CAROLINA,

Versus

MICHAEL ANTONIO BULLOCK,
Defendant.

Order on Motion to Suppress Evidence

(August 14, 2014)

THIS CAUSE came on to be heard in the 28 July 2014 Session of Criminal Superior Court for Durham County before the undersigned Presiding Judge upon a Motion to Suppress Evidence, which was filed on behalf of the defendant in the Office of the Durham County Clerk of Superior Court on 2 July 2014. This matter being heard upon an evidentiary hearing on 30 July 2014 and conducted with the State of North Carolina being represented by Assistant District Attorney Nicholas W. Yates, with defendant being represented by defense counsel Daniel Meier,

and in the presence of defendant, the Court, having considered the allegations contained in the motion, and from the credible evidence presented, the Court finds, by at least a preponderance of the evidence, the following:

FINDINGS OF FACT

1. That on 27 November 2012 Durham City Police Officer John McDonough (hereinafter "McDonough") was on duty in the city of Durham, in Durham County, North Carolina. McDonough has been a sworn law enforcement officer with the city of Durham since 2000 and has been a part of the Interdiction Team within the Special Operations Division since 2006. McDonough was assigned Fife, a specially trained drug detecting dog in May of 2010.

2. That McDonough has seized millions of dollars of illegal drugs and cash patrolling Interstate 85, Interstate 85 is a major thoroughfare for illegal drugs going between Virginia and Atlanta.

3. That on 27 November 2012 McDonough, while stationary near the area of Interstate 85 South and Cole Mill Road, in Durham County, observed a white Chrysler 200 (hereinafter "Chrysler") traveling 70 miles per hour in a 60 mile per hour zone in the far left travel lane. McDonough was in a marked Durham Police Department vehicle. When the Chrysler passed him, the Chrysler changed to the middle lane with no other vehicles in front of it. Upon catching up to the Chrysler, McDonough began to pace the Chrysler at a speed of 70 miles per hour in now a 65 mile per hour zone for approximately one mile. McDonough observed the Chrysler brake light come on twice and then cross into the shoulder area

for a brief moment. Then McDonough observed the Chrysler come within approximately one and a half car lengths of a silver Ford pickup truck. At that point McDonough activated his emergency equipment and initiated a traffic stop.

4. That upon approaching the passenger side of the Chrysler, McDonough requested the driver, Michael Antonio Bullock (hereinafter "defendant"), to provide his license and registration. Defendant's hand was trembling when handing his license over to McDonough. Defendant, the driver and sole occupant of the Chrysler, was not listed as an authorized driver on the Chrysler's rental agreement.

5. That McDonough's experience as an Interdiction Team member makes him aware that individuals that transport illegal drugs will utilize rental vehicles for three reasons; 1) the vehicles are new and therefore do not have equipment issues, such as burned out tail lights; 2) the vehicles cannot be seized because the vehicle belongs to the rental company; and 3) the transporter can deny knowledge or possession of the items found in the vehicle because the vehicle is not his or hers.

6. That McDonough observed that defendant had two cellular phones inside the Chrysler. McDonough stated that in his experience individuals that transport illegal drugs will have multiple phones.

7. That McDonough asked defendant where he was traveling. Defendant responded he was going to his girlfriend's house on Century Oaks Drive in Durham and he just missed his exit. Defendant also stated that he just moved down to Henderson, N.C. from Washington D.C. Defendant indicated that he

was using the GPS on his cellphone to get to Century Oaks drive,

8. That McDonough, being employed with the Durham Police Department since 2000 was aware that the location of Century Oaks was off of North Carolina Highway 55. The area in which defendant was observed driving was well past North Carolina Highway 55. Defendant was stopped passing Durham and nearing the Orange County line. There were at least three major exits that were passed that would have directed defendant to Century Oaks drive, When McDonough first observed defendant, he was traveling in the far left hand lane with no indication of intention to exit off of Interstate 85. Continuing on this path was not a plausible route to Century Oaks Drive.

9. That McDonough requested defendant to exit the Chrysler and have a seat in McDonough's patrol vehicle in order to check defendant's driver's license. Before defendant sat in the passenger seat of the patrol vehicle, McDonough met defendant at the rear of the Chrysler, shook defendant's hand, told him he was going to give him a warning for the traffic violations, and briefly check him for weapons. While checking for weapons, McDonough observed a small bundle of United States currency totaling $372.00 in defendant's right side pants pocket. Defendant stated he was about to go shopping.

10. That McDonough advised defendant that he was getting a warning ticket. McDonough did this to calm down to be able to gauge nervousness not caused by general fear of getting a ticket. After informing defendant that he will receive a warning, McDonough can attribute nervousness to something other than general anxiety from a routine traffic stop. In addition,

McDonough has defendant sit in the passenger seat next to him to observe defendant when defendant answers his questions.

11. That while running defendant's name through various law enforcement databases, McDonough and defendant talked about defendant's girlfriend whom defendant was traveling to meet. Defendant stated that he had been dating her for a few weeks. Defendant also stated that this was his first time going to his girlfriend's house because she usually visits him in Henderson. Later in their conversation, McDonough asked defendant if he had met his girlfriend face-to-face yet. Defendant responded "nail, not face-to-face." McDonough remembered that earlier in their conversation defendant indicated that the girlfriend always traveled to Henderson to meet defendant.

12. That information came back to McDonough from the various law enforcement databases that defendant was issued a North Carolina driver's license in 2000 and had a criminal history in North Carolina that began in 2001. McDonough then asked how long defendant has been down in North Carolina. Defendant responded "I have been down here for a while." McDonough recalled that defendant stated he had just moved down to North Carolina when he first encountered defendant in the Chrysler at the beginning of the traffic stop.

13. That McDonough requested Officer Green to check in with him so he would be in a position to search the Chrysler. It is the Durham Police Department's policy that a second officer be present when a vehicle is searched. In addition, police officers are required to check in. with an officer conducting a

traffic stop after ten minutes for officer safety purposes.

14. That when McDonough asked defendant questions about whether there were any guns in the vehicle, or a dead body in the trunk, defendant was able to make eye contact with McDonough while answering the question. When defendant answered questions about his girlfriend or where he was traveling, defendant would not make eye contact and instead looked out the window and away from McDonough. McDonough also observed defendant's breathing was elevated and his stomach was rising and falling rapidly,

15. That McDonough asked defendant if he had a problem with him searching the vehicle. Defendant responded "yeah, I don't want you to go in my stuff." McDonough asked defendant "how much stuff do you got in there?" Defendant responded "there is nothing in there, you can check if you want." McDonough replied "okay." Defendant responded "I don't want you to look through my shit, though." McDonough replied "when you say shit, how much stuff do you got?" Defendant advised McDonough that he had a bag and two hoodies in the Chrysler.

16. That within three to five minutes after being called, Officer Green arrived on scene. McDonough began to search the Chrysler and when he opened the trunk of the Chrysler McDonough found a small bag and two hoodies. When McDonough asked defendant if he could look into the bag, defendant responded "It ain't mine. I don't want you to look at it if it ain't mine." defendant's statement contradicted his earlier statement that he had a bag and two hoodies.

17. That at no time did defendant state that he changed his mind and that he did not want McDonough to search the Chrysler. McDonough then removed the bag from the trunk and placed the items on the ground. Then McDonough deployed his K-9, Fife, The K-9 was walked around the Chrysler and near the bag. The K-9 alerted McDonough to the presence of an illegal drug in the bag.

18. That inside the bag were 1,500 bindles of heroin wrapped in newspaper as multiple small bricks.

Upon the foregoing findings of facts all found by at least a preponderance of the evidence; the Court concludes as a matter of law and makes the following:

CONCLUSIONS OF LAW

1. That this Court has jurisdiction to hear this matter.

2. That none of defendant's Constitutional rights, either Federal or State, have been violated in the method or procedure by which the traffic stop of defendant's vehicle was extended, the vehicle was searched, and defendant was seized and arrested on 27 November 2012.

3. That law enforcement officers involved in the subject matter committed no substantial violations of rules of criminal law or procedure as those are prescribed by the North Carolina General Statutes and as those regard the method or procedure used by them upon defendant during the traffic stop, the search of the Chrysler defendant was operating, defendant's arrest, and seizure of items from the

vehicle on 27 November 2012. That McDonough had reasonable, articulable, suspicion to conduct a traffic stop on defendant for speeding 70 miles per hour in a 60 mile and hour zone and following another vehicle too closely.

4. That McDonough had reasonable, articulable suspicion to extend the traffic stop based on his observations that: defendant was driving on an interstate where illegal drugs are transported; defendant was operating a rental vehicle which he was not authorized to drive; defendant possessed two cellphones and a small bundle of United States currency; defendant was obviously nervous, deceptive, and evasive as noted in his trembling hands, elevated breathing, and lack of eye contact; and defendant made multiple inconsistent statements regarding his destination, who he was going to meet, and how long he had lived in North Carolina. Based on this reasonable suspicion, McDonough's investigation was a diligent effort to confirm or dispel his suspicions that defendant was engaged in illegal activity. In making this conclusion of law, the Court relies on State v. Cottrell, N.C. App. , 2014 N.C. App Lexis 678 (2014), State v. Hernandez, 170 N.C. App. 299, 612 S.E.2d 420 (2005), United States v. Foreman, 369 F.3d 776, 2004 U.S. App. Lexis 10989 (2004), and Illinois v. Caballes, 543 U.S. 405, 125 S. a. 834 (2005).

5. That defendant gave knowing, willing, and voluntary consent to search the vehicle. That at no point after giving his consent did defendant revoke his consent to search the vehicle.

6. That during the investigation, McDonough's drug sniffing dog indicated the presence of illegal

drugs in the bag found in the trunk of the vehicle, giving McDonough probable cause to search the bag.

Based upon the foregoing findings of fact and conclusions of law, it is therefore ORDERED, ADJUDGED, AND DECREED, that defendant's Motion to Suppress Evidence is **DENIED** and therefore the items seized from the vehicle the defendant was operating and statements made to law enforcement while in custody are admissible at trial.

This, the 4th day of August 2014, effective nunc pro tunc 30 July 2014.

/s/ Orlando F. Hudson
The Honorable Orlando F. Hudson, Jr.
Superior Court Judge Presiding