APPENDIX A

Opinion from the Northern District of Alabama

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

UNITED STATES OF AMERICA	}	
	}	
v.	}	**1:17-cr-00471-MHH-TMP**
	}	
CANTRELL LAMONT BURWELL,	}	
	}	
Defendant.	}	

MEMORANDUM OPINION AND ORDER

Cantrell Burwell is charged in a three-count indictment with possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(A), possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A), and felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (Doc. 1, pp. 1-3). Mr. Burwell has asked the Court to suppress all evidence obtained as a result of what Mr. Burwell characterizes as an unconstitutional search of his vehicle following a traffic stop. (Doc. 25). For the reasons discussed below, the Court grants Mr. Burwell's motion to suppress.

I. BACKGROUND

On September 16, 2016, at approximately 2:46 a.m., Anniston Police Department Officer Josh Powers conducted a traffic stop of a black Chevrolet

Tahoe that Mr. Burwell was driving. (GX-1, 00:00).[1] Officer Powers informed Mr. Burwell that he pulled him over for failure to maintain lane. (GX-1, 00:17-00:23). Mr. Burwell handed Officer Powers his driver's license, registration, and proof of insurance. (GX-1, 00:23-00:25). Mr. Burwell informed Officer Powers that he and his passenger, Kelly Boucher, were returning home to Toney, Alabama after fishing in LaGrange, Georgia. (GX-1, 00:34-01:13). Officer Powers collected Ms. Boucher's license. (GX-1, 02:03-02:07).

Officer Powers returned to his patrol car to check whether Mr. Burwell or Ms. Boucher had outstanding warrants. Neither did. (GX-1, 02:11-09:22). Officer Collins then arrived on the scene. (GX-1, 09:30). Officer Powers told Officer Collins that he thought that Mr. Burwell was "real nervous." (GX-1, 09:33-09:34). Officer Powers added that Mr. Burwell had a temporary insurance card. (GX-1, 09:55-10:23). Officer Powers said, "so I can't write him for not having proof to tow it, so I'm gonna try and get in that car." (GX-1, 10:19-10:24). Officer Powers said, "I'm gonna get him out and explain to him and write him a warning and try to sweet talk my way in." (GX-1, 10:51-10:58).

Officer Powers told Officer Collins that Mr. Burwell had prior drug possession charges. (GX-1, 10:58). Officer Powers stated that he doubted that Mr. Burwell was returning from a fishing trip because it was 2:30 a.m., and other than

[1] Officer Powers's body camera recorded the incident. (GX-1 & GX-2).

fishing poles, Mr. Burwell did not have fishing gear in his car. (GX-1, 10:58-11:18).[2] Officer Powers said that he did not understand why Mr. Burwell would leave LaGrange, Georgia at midnight or 1:00 a.m. to drive to Toney, Alabama, and he did not understand why Mr. Burwell had to travel so far to find a place to fish. (GX-1, 11:18-11:30). Officer Powers commented that Mr. Burwell could have been driving that particular route to avoid "the gauntlet," a stretch of I-20 that law enforcement routinely monitors. (GX-1, 11:33-11:56).[3]

Officer Powers said "here we go" and returned to Mr. Burwell's car to launch his effort to "sweet talk" his way into consent. (GX-1, 12:02-12:14). Officer Powers told Mr. Burwell that he was giving him a warning for improper lane usage and asked Mr. Burwell to step out of the car. (GX-1, 12:14-12:25). Mr. Burwell complied, and Officer Powers patted him down. (GX-1, 12:33-13:26). Officer Powers discovered about $600 in cash from Mr. Burwell's pocket. (GX-1, 12:46-12:59). Mr. Burwell followed Officer Powers back to the patrol car so that Officer Powers could explain the warning. (GX-1, 13:31-13:38). Using a friendly tone, Officer Powers told Mr. Burwell that he was just "giv[ing him] a warning on that – I know it's late." (GX-1, 13:33-13:36). Mr. Burwell thanked Officer

[2] At the suppression hearing, Officer Powers testified that Mr. Burwell had fishing poles, rods, and reels in the back of the car. Officer Powers believed that Mr. Burwell should have had a cooler too if he truly were on a fishing trip.

[3] At the suppression hearing, Officer Powers testified that "the gauntlet" is a stretch of highway with a strong county law enforcement presence.

Powers. (GX-1, 13:46-13:50). As Officer Powers filled out the warning paperwork, using a friendly tone, he asked Mr. Burwell about the fishing trip and questioned Mr. Burwell's decision to leave at an odd hour. (GX-1, 13:38-15:34). Mr. Burwell answered all of Officer Powers's questions. (GX-1, 13:38-15:34).

Officer Powers returned Mr. Burwell's and Ms. Boucher's licenses to them. (GX-1, 15:34-15:45). Officer Powers and Mr. Burwell spoke briefly, Officer Powers joking about the number of times he accidentally kept someone's license. (GX-1, 15:37-15:56). Officer Powers then said, "all right man, here's that warning. Like I said, that's for when I had you pulled over, you were swerving a little bit, not terrible but you come over on that fog line a couple times. So I was just making sure you was alright." (GX-1, 15:56-16:05). Officer Powers handed Mr. Burwell the warning and said "there's that back." (GX-1, 16:09).

As Mr. Burwell turned and began to walk towards his car, (GX-1, 16:10), Officer Powers said, "hey before you go, you care if I ask you a few more questions?" (GX-1, 16:10-16:12). Mr. Burwell said "sure." (GX-1, 16:12). Officer Powers said, "all right, man. Our boss has been on us pretty bad about being productive and trying to, you know, do work -- they like to see us out here working. Part of our job is to, you know, find drugs, large amounts of money, firearms, anything -- stuff like that. You don't have anything like that in the car do you?" (GX-1, 16:13-16:32). Mr. Burwell responded, "no sir, you can check."

(GX-1, 16:33). Officer Powers asked, "you don't care if I search it real quick?" and Mr. Burwell gave consent. (GX-1, 16:34-16:35).

After having Ms. Boucher exit the car, Officer Powers searched inside the car. (GX-1, 16:36-27:54). After searching the passenger compartment for more than 10 minutes, Officer Powers opened the hood of the car. Under the hood, he found a handgun and methamphetamine. (GX-1, 27:52-28:08, 29:23-30:25). Officer Powers arrested Mr. Burwell. (GX-1, 28:08-29:23).

In his motion to suppress, Mr. Burwell argues that Officer Powers's search under the hood of the car exceeded the scope of the consent that he (Mr. Burwell) provided. (Doc. 25, pp. 3-6). In response, the United States argues that Officer Powers reasonably interpreted Mr. Burwell's consent to extend beyond the interior of the car. (Doc. 26, pp. 4-7). In reply, Mr. Burwell argues that his consent was ineffective because Officer Powers improperly elicited consent after the traffic stop ended, and the interaction had not become a consensual encounter. (Doc. 29, pp. 1-5).

II. ANALYSIS

A. The traffic stop was complete before Officer Powers asked for permission to search Mr. Burwell's car.

"A seizure justified only by a police-observed traffic violation, [] 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." *Rodriguez v. United States*, 575 U.S.

---, 135 S. Ct. 1609, 1612 (2015) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). "On-scene investigation into other crimes [] detours from that mission." *Rodriguez*, 135 S. Ct. at 1616. "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.*[4]

When conducting a traffic stop, "[b]eyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.'" *Rodriguez*, 135 S. Ct. at 1615 (quoting *Caballes*, 543 U.S. at 408). 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." *Rodriguez*, 135 S. Ct. at 1615. These incidental checks ensure "that vehicles on the road are operated safely and responsibly," and therefore "serve the same objective as enforcement of the traffic code" and do not unconstitutionally prolong the traffic stop. *Id.*

The officer in *Rodriguez* stopped a car that the driver was operating on the shoulder of the road. The officer gathered the driver's license, registration, and proof of insurance, performed a records check on the driver, identified the

[4] With respect to officer safety, a law enforcement officer conducting a traffic stop may "take certain negligibly burdensome precautions in order to complete his mission safely." *Rodriguez*, 135 S. Ct. at 1616. There is nothing in the video recording of the traffic stop or in Officer Powers's testimony that suggests that Officer Powers had any particular concerns for his safety during the traffic stop. His desire to get into the car that Mr. Burwell was operating was tied solely to his interest in detecting possible drug trafficking.

vehicle's passenger, and issued a written warning to the driver for driving on the shoulder. The officer testified that at that point, the driver and passenger "had all their documents back and a copy of the written warning. I got all the reason[s] for the stop out of the way[,] . . . took care of all the business." *Rodriguez*, 135 S. Ct. at 1613. Nevertheless, the officer continued to detain the driver and walked a drug dog around the car, even though the driver had declined the officer's request for permission for a dog sniff. Finding that a "dog sniff is not fairly characterized as part of the officer's traffic mission," the Supreme Court held that the drug dog search was unconstitutional because it unlawfully prolonged the detention. *Id.* at 1615.[5]

There may be aspects of an officer's traffic mission that may legitimately prolong a traffic stop. In *United States v. Vargas*, the Eleventh Circuit established that a police officer may lawfully prolong a traffic stop after issuing a citation for the traffic violation to resolve the disposition of the stopped vehicle. 848 F.3d 971, 974-75 (11th Cir. 2017). In *Vargas*, a police officer stopped a car for following

[5] The law enforcement officer wanted to have his dog sniff the car in part because when the officer approached the car, "he smelled an 'overwhelming odor of air freshener coming from the vehicle,' which is, in his experience, 'a common attempt to conceal an odor that [people] don't want . . . to be smelled by the police.' App. 20–21. He also observed, upon approaching the front window on the passenger side of the vehicle, that Rodriguez's passenger, Scott Pollman, appeared nervous. Pollman pulled his hat down low, puffed nervously on a cigarette, and refused to make eye contact with him. The officer thought he was 'more nervous than your typical passenger' who 'do[esn't] have anything to worry about because [t]hey didn't commit a [traffic] violation.' *Id.*, at 34." *Rodriguez*, 135 S. Ct. at 1622 (Thomas, J., dissenting). There is no such evidence in this case.

too closely behind another car and issued a written warning for the violation. Because neither the driver nor the passenger had a driver's license, the officer questioned the occupants to determine how to safely and legally move the car. During this inquiry, the driver gave the officer consent to search the car. The Eleventh Circuit found that even though the police officer continued to detain the driver after he issued the warning ticket, the officer did not unlawfully prolong the traffic stop. *Vargas*, 848 F.3d at 875. The Eleventh Circuit explained that "[p]reventing them from driving off without a license is lawful enforcement of the law, not unlawful detention. What prolonged the stop was not [the officer's] desire to search the vehicle but the fact that both occupants of it could not lawfully drive it away." *Id.* at 974-75.

Here, "[w]hat prolonged the traffic stop" was Officer Powers's "desire to search the vehicle." The traffic stop was complete before Officer Powers asked to search Mr. Burwell's car. There was a clear end to the traffic stop for failure to maintain the lane of traffic when Officer Powers returned Mr. Burwell's license, explained the warning to Mr. Burwell, and gave Mr. Burwell the written warning. At this point, Officer Powers's traffic mission was complete. The break in the chain was clear when Officer Powers began discussing the pressure he was under to be "productive." That new conversation related solely to Officer Powers's desire to search Mr. Burwell's vehicle and his goal of obtaining consent from Mr.

Burwell for a search.

Unlike the officer in *Vargas*, Officer Powers did not have to resolve additional matters with the car after he gave Mr. Burwell a warning. Officer Powers observed no evidence of criminal conduct in the vehicle; he saw no guns or drugs – he smelled no marijuana. He noted that Mr. Burwell seemed nervous, but there is nothing particularly remarkable about a driver being nervous during a traffic stop. During the suppression hearing, Officer Powers acknowledged that drivers typically are nervous during a traffic stop; even he gets nervous when a police officer pulls him over. As the body camera footage reveals, Officer Powers prolonged the stop because he wanted to "sweet talk [his] way in" to the vehicle. (GX-1, 10:19-10:24; 10:51-10:58). Officer Powers testified that he wanted to get into the car because he had a hunch that something was going on.

B. Mr. Burwell's consent to search was coerced.

The United States argues that even if the traffic stop ended before Mr. Burwell gave consent, the traffic stop had become a consensual encounter. (Doc. 32, p. 3). According to the United States, Mr. Burwell was not detained when he gave consent to search, so his Fourth Amendment rights were not implicated. (Doc. 32, p. 3).

A consensual encounter between a citizen and a police officer does not implicate the Fourth Amendment. *United States v. Perez*, 443 F.3d 772, 778 (11th

Cir. 2006). A *Terry* traffic stop shifts from a Fourth Amendment seizure to a consensual encounter "'if a reasonable person would feel free to terminate the encounter.'" *United States v. Ramirez*, 476 F.3d 1231, 1238 (11th Cir. 2007) (quoting *United States v. Drayton*, 536 U.S. 194, 201 (2002)).

"There is no bright-line 'litmus test' for whether a traffic stop is a seizure or is a consensual encounter." *Ramirez*, 476 F.3d at 1240 (quoting *United States v. White*, 81 F.3d 775, 779 (8th Cir. 1996)). Instead, a district court must examine the totality of the circumstances to determine whether a reasonable person would feel free to terminate the encounter. *Ramirez*, 476 F.3d at 1240. "Among other things," a district court considers "'whether a citizen's path is blocked or impeded; whether identification is retained; the suspect's age, education and intelligence; the length of the suspect's detention and questioning; the number of police officers present; the display of weapons; any physical touching of the suspect, and the language and tone of voice of the police.'" *Perez*, 443 F.3d at 778 (quoting *United States v. De La Rosa*, 922 F.2d 675, 678 (11th Cir. 1991)). A court "does not apply these factors rigidly," and "[t]he ultimate inquiry remains whether a person's freedom of movement was restrained by physical force or by submission to a show of authority." *United States v. Jordan*, 635 F.3d 1181, 1186 (11th Cir. 2011) (citing *California v. Hodari D.*, 499 U.S. 621, 626 (1991)). The Government bears the burden of proving that an encounter was consensual. *Jordan*, 635 F.3d at 1186.

In *Ramirez*, the Eleventh Circuit considered whether a traffic stop had shifted to a consensual encounter before a citizen gave consent to search his car. There, police officers stopped a motorist for failing to maintain lane on an interstate. Officers gathered the driver's license and registration, questioned the driver about his vehicle and his travel plans, checked the validity of the driver's license, ran a background check on the driver, and issued a warning citation for the traffic violation. The officers gave the driver the warning citation, returned the driver's license and registration, and advised the driver that "the traffic stop [was] over." *Ramirez*, 476 F.3d at 1234. Afterwards, but "almost simultaneous[ly]," an officer asked the driver if he was carrying anything illegal in the car. *Id.* at 1239. The driver responded by volunteering that the officer could search the car, and the driver signed a consent to search form after the officer explained the substance of the form. 476 F.3d at 1234.

The Eleventh Circuit found that a reasonable person in the driver's circumstances would have felt free to terminate the encounter after he received his documentation and the written warning. *Ramirez*, 476 F.3d at 1240. The Eleventh Circuit based its conclusion "not only on the fact that [the driver] had received all of his documentation and thus had everything he needed to proceed on his way, but also that his follow-up discussion with [the officer] appears, from the videotape of the event, to have been fully cooperative and non-coercive." *Id.* Accordingly, the

Eleventh Circuit found that the driver consented to the post-citation encounter and was not detained when he gave consent to search. *Id.*

Here, Mr. Burwell cooperated at all times, and Officer Powers gave Mr. Burwell everything that Mr. Burwell needed to proceed on his way. But the similarities to *Ramirez* end there because Officer Powers coerced Mr. Burwell's consent to search. It was not the coercion of strong-arm tactics or intimidation; Officer Powers did not unholster his weapon, and, after the pat down, he had no physical contact with Mr. Burwell. Officer Powers did not use a threatening tone of voice. Instead, he used "sweet talk." And he used his friendly tone to exert a more subtle but equally improper form of pressure – the pressure of a debt that Officer Powers created and made Mr. Burwell feel compelled to oblige.

First, Officer Powers let Mr. Burwell know that he was giving him a break, stating that he (Officer Powers) was just issuing a warning because it was late. The tone of the conversation and Mr. Burwell's expression of thanks make clear that Mr. Burwell understood that Officer Powers was using restraint in selecting a warning rather than a citation. To cement the feeling of good will, Officer Powers joked with Mr. Burwell. Then, when the traffic stop was over, Officer Powers asked for a favor in return – the quid pro quo for his generosity to Mr. Burwell during the traffic stop. Officer Powers asked Mr. Burwell to help him look good for his boss because his boss had "been on [him] pretty bad." (GX-1, 16:13-

16:35). Officer Powers told Mr. Burwell that part of his job as a law enforcement officer was to search for drugs, firearms, and money, and he said that his boss "like[s] to see us out here working." *Id.* Officer Powers motioned to the car and asked "you don't care if I search it real quick?" *Id.* Mr. Burwell then consented. Unlike the law enforcement officer in *Ramirez*, Officer Powers did not tell Mr. Burwell that "the traffic stop [was] over," and after Officer Powers asked for the pay-off for going easy on Mr. Burwell, he did not tell Mr. Burwell that he was free to say "no." Officer Powers did not try to get a written consent form from Mr. Burwell.

During the suppression hearing, Officer Powers testified that an officer may use a friendly demeanor to de-escalate tension during a traffic stop. That is a wise thing to do. Inducing consent to search by offering a driver a favor and requesting one in return is not. Officer Powers was in a position of authority during the traffic stop. Mr. Burwell appreciated that, and he understood that Officer Powers could exercise that authority in a variety of ways. Officer Powers's use of "sweet talk" did not diminish his authority; it was a product of his authority. So too was the restraint Officer Powers exercised in giving Mr. Burwell a written warning instead of a citation, with the attendant fees and court appearance. Officer Powers used his authority to create a sense of obligation, and he used Mr. Burwell's sense of indebtedness to "get in that car." To refuse Officer Powers's request to search, Mr.

Burwell would have had to deny an officer who had just let him off easy with a warning and place that officer in jeopardy with his boss. This is coercion. A reasonable person under these circumstances would not have felt free to say no when Officer Powers asked, "you don't care if I search [your car] real quick?"

The Supreme Court's careful discussion of law enforcement pressure tactics in *Miranda v. Arizona* dispels any notion that Officer Powers's conduct was constitutionally sound. 384 U.S. 436 (1966). *Miranda*, of course, concerns coerced confessions, but the Supreme Court's discussion of coercive tactics applies equally here.[6] In *Miranda*, the Supreme Court "stress[ed] that the modern practice of in-custody interrogation is psychologically rather than physically oriented." 384 U.S. at 448. Citing its decision in *Chambers v. Florida*, 309 U.S. 227 (1940), the Supreme Court reiterated that "coercion can be mental as well as physical." 384 U.S. at 448. Examining interrogation practices described in police manuals, the Supreme Court explained that law enforcement officers use those practices to "persuade, trick, or cajole [an individual] out of exercising his constitutional rights." 384 U.S. at 455. Among those practices is the tactic of an officer showing himself to be "a kindhearted man" who befriends the subject and tries to help him – for example, Officer Powers's statement "I was just making sure you was

[6] Indeed, the Fifth Amendment right to remain silent and avoid self-incrimination is, in many respects, similar to the Fourth Amendment right to walk away from a law enforcement officer at the conclusion of a lawful traffic stop and avoid a search for evidence of criminal conduct.

alright" and his decision to issue only a warning because "I know it's late." (GX-1, 13:33-13:36, 15:56-16:05); 384 U.S. at 452.

As in *Miranda*, the coercive nature of the encounter between Officer Powers and Mr. Burwell may have been alleviated if Officer Powers had told Mr. Burwell that the traffic stop was over or that he was not obligated to consent to the search. *See Miranda*, 384 U.S. at 467 (to combat the pressures that "undermine the individual's will to resist" and "to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights").[7] The Court recognizes that as a general rule, to prove that consent is valid, the United States does not have to demonstrate that an officer told a driver that he "was free to go." *Ohio v. Robinette*, 519 U.S. 33 (1996). But officers are relieved of the obligation to inform drivers of their rights only in "normal consent search[es]," *Robinette*, 519 U.S. at 39, and "'knowledge of the right to refuse consent is one factor to be taken into account'" in determining whether consent is valid, *Robinette*, 519 U.S. at 39 (quoting *Schneckloth v.*

[7] During the suppression hearing, Officer Powers testified that during a traffic stop, law enforcement officers may try to put an individual at ease so that the individual will cooperate and consent to a search. Officer Powers acknowledged that he is not trained to tell individuals that they do not have to cooperate and that they are free to leave when a traffic stop is complete. As in *Miranda*, this coercive law enforcement practice of befriending a defendant during a traffic stop and offering a defendant a break during the stop before asking the defendant for permission to search after the stop is complete seems to be a recurrent issue. *Miranda*, 384 U.S. at 491. The Court recently conducted another suppression hearing that involved the use of this tactic. *See United States v. Wilson*, 17-cr-428-MHH-HNJ.

Bustamonte, 412 U.S. 218, 231 (1973)).[8] In a normal set of circumstances, a law

[8] The Supreme Court remanded the *Robinette* case to the Ohio Supreme Court for the state court to determine whether the driver's consent was voluntary based on the totality of the circumstances. *Robinette*, 519 U.S. at 39-40. On remand, the Ohio Supreme Court found that a reasonable person would not have felt free to refuse the officer's request to search. *State v. Robinette*, 685 N.E.2d 762 (Ohio 1997). Although it is not binding precedent, the Ohio Supreme Court's rationale is persuasive:

> In the case at bar, Officer Newsome stopped Robinette for driving sixty-nine miles per hour in a forty-five mile-per-hour construction zone. Officer Newsome asked Robinette to step to the rear of his (Robinette's) car, which was in front of the patrol car. Newsome returned to his patrol car and turned on a video camera. Newsome gave Robinette a verbal warning *and advised Robinette that he was letting him off with only a verbal warning. But without any break in the conversation* and still in front of the camera, Newsome then asked Robinette, "One question before you get gone [*sic*]: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" Robinette denied having any contraband in the car. Newsome then immediately asked Robinette if he could search the car. Robinette hesitated, looked at his car, then back at the officer, then nodded his head. Newsome commenced a lengthy search of Robinette's car. During the search Newsome recovered some marijuana and a pill. Robinette was charged with drug abuse. At the suppression hearing, Robinette provided the following testimony pertaining to the search:
>
> "Q And did he [Newsome] indicate to you that at that time [when he returned from activating the video camera] that he was giving you a warning and that you were free to go?
>
> "A Yes, he did.
>
> "Q And then at that time, I think, as the tape will reflect, the officer asked you some questions about did you have any weapons of any kind, drugs, anything like that. Do you recall that question?
>
> "A Yes.
>
> " * * *
>
> "Q Did you in fact feel that you were free to leave at that point?
>
> "A I thought I was.
>
> " * * *

"Q The officer then asked if he could search your vehicle. What went through your mind at that point in time?

"A Uhm, I was still sort of shocked and I—I thought—I just automatically said yes.

"Q Did—did you feel that you could refuse the officer?

"A No."

Newsome's words did not give Robinette any indication that he was free to go, but rather implied just the opposite—that Robinette was *not* free to go until he answered Newsome's additional questions. The timing of Newsome's immediate transition from giving Robinette the warning for speeding into questioning regarding contraband and the request to search is troubling. As the majority stated in *Robinette I:*

> "The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow." *Id.,* 73 Ohio St.3d at 654, 653 N.E.2d at 698.

When these factors are combined with a police officer's superior position of authority, any reasonable person would have felt compelled to submit to the officer's questioning. While Newsome's questioning was not expressly coercive, the circumstances surrounding the request to search made the questioning impliedly coercive. Even the state conceded, at an oral argument before the United States Supreme Court, that an officer has discretion to issue a ticket rather than a warning to a motorist if the motorist becomes uncooperative. *See* 1996 WL 587659, at 5 (Official Transcript of Oral Argument). From the totality of the circumstances, it appears that Robinette merely submitted to "a claim of lawful authority" rather than consenting as a voluntary act of free will. Under *Royer,* this is not sufficient to prove voluntary compliance. *Royer,* 460 U.S. at 497, 103 S. Ct. at 1324, 75 L. Ed. 2d at 236.

We are very mindful that police officers face the enormous and difficult task of fighting crime. Furthermore, we explicitly continue to recognize that officers may conduct checkpoint-type questioning and consensual searches, and may progress to further detention and investigation when individualized suspicion of criminal activity arises during questioning based on reasonably articulable facts. But allowing police officers to do their jobs must be balanced against an individual's

enforcement officer does not (or at least should not) use "sweet talk," offer a driver a favor, and cajole consent by describing the pressures that the friendly officer faces from a supervisor who is "on us pretty bad about being productive." If an officer chooses to use these tactics, then consent potentially may be valid only if the officer tells the driver that he is free to decline. An officer must "undertake to afford appropriate safeguards at the outset of [the request for consent] to insure that [consent is] truly the product of free choice." *Miranda*, 384 U.S. at 457.

Because Officer Powers used coercive tactics to try to trick Mr. Burwell into giving consent, and because Officer Powers did not tell Mr. Burwell that the traffic stop was over or that he was free to leave without consenting to the search, the Court does not find that Mr. Burwell's consent was voluntary. Under the totality of the circumstances in this case, the consent was not valid. Because Mr. Burwell's consent was not valid, the search of his vehicle violated the Fourth Amendment.

The causal connection between the invalid consent and the discovery of the gun and the drugs is not attenuated. The evidence was obtained because of the Fourth Amendment violation. *Compare Hudson v. Michigan*, 547 U.S. 586

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right to be free from unreasonable searches. At some point, individual rights must prevail. This is just such a case.

685 N.E. 2d at 770-71 (emphasis in *Robinette*). *Robinette* is different from *Ramirez* because unlike the officer in *Ramirez*, the officer in *Robinette* did not have the driver sign a consent form after explaining the substance of the form. In *Robinette*, the transition from completed traffic stop to search request was seamless.

(2006); *United States v. Farias-Gonzalez*, 556 F.3d 1181 (11th Cir. 2009). Therefore, the evidence obtained as the result of the unconstitutional search cannot be used against Mr. Burwell. *Miranda*, 384 U.S. at 479.

III. CONCLUSION

The Court recognizes the challenges that law enforcement officers face when assessing a situation and deciding how best to address it. It is not an easy task. The Constitutional boundaries that set the parameters for the task are important. "Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that 'illegitimate and unconstitutional practices get their footing * * * by silent approaches and slight deviations from legal modes of procedure.'" *Miranda*, 384 U.S. at 459 (quoting *Boyd v. United States*, 116 U.S. 616 (1886)). Officer Powers's deviation from legal modes of procedure may have been slight but it was not harmless; it was unconstitutional. Accordingly, the Court **GRANTS** Mr. Burwell's motion to suppress. The United States may not use evidence obtained as a result of the unconstitutional search of Mr. Burwell's car.[9]

[9] Implicit in Officer Powers's effort to "sweet talk" his way into consent was his recognition that he could not articulate probable cause to conduct a search without consent.

DONE and **ORDERED** this the 29th day of June, 2018.

Madeline H. Haikala

MADELINE HUGHES HAIKALA
UNITED STATES DISTRICT JUDGE

APPENDIX B

Opinion of the U.S. Court of Appeals for the Eleventh Circuit

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13039
Non-Argument Calendar

D.C. Docket No. 1:17-cr-00471-MHH-TMP-1

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

CANTRELL LAMONT BURWELL,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(February 27, 2019)

Before BRANCH, HULL and JULIE CARNES, Circuit Judges.

PER CURIAM:

The government appeals the district court's order granting defendant Cantrell Burwell's motion to suppress the drugs and firearm found in his vehicle during a traffic stop. The government seeks reversal of that order on the ground that the district court erred in concluding that Burwell's consent to search his vehicle was coerced and not voluntary. After careful review, we vacate the order granting Burwell's motion to suppress because we conclude that, at the time when Burwell consented to the search, he was engaged in a consensual encounter with the police officer, Burwell's consent was voluntarily given, and the police officer's search of his vehicle did not exceed the scope of his consent.

I. BACKGROUND

A. Traffic Stop and Search of Burwell's Vehicle

The material facts of this case are undisputed. On September 16, 2016, at approximately 2:46 a.m., Anniston City Police Officer Josh Powers pulled over a black Chevrolet Tahoe that Burwell was driving in Anniston, Alabama. Officer Powers wore a body camera, which recorded the traffic stop and his interactions with Burwell. All of the factual background here is based on the video and audio recordings on the body camera and Powers's testimony at the evidentiary hearing on the motion to suppress.[1]

[1]Burwell did not testify at that evidentiary hearing.

Powers parked his patrol car behind the Tahoe, which Burwell had stopped in a parking lot. Powers got out of his car, approached the Tahoe on the driver's side, and told Burwell that he pulled him over for failing to maintain his lane. Burwell handed Powers his driver's license, registration, and proof of insurance. From his license, Powers noted that Burwell lived in Toney, Alabama, and Burwell told the officer where within Alabama Toney was located. Burwell volunteered to Powers that he and his passenger, Kelly Boucher, had been fishing at his buddy's house. In a friendly tone, Powers asked if they had caught any fish, and Burwell said they had not. Powers asked a few follow-up questions about their fishing trip and learned that Burwell and Boucher were on their way home after fishing that day at a friend's pond in LaGrange, Georgia. Boucher also gave Powers her driver's license.

Powers then went back to his patrol car to determine whether Burwell or Boucher had any outstanding warrants. Neither did. Powers also called for backup and another Anniston Police Officer, Officer Collins, arrived to assist about five minutes later. Powers told Collins that Burwell had prior drug possession convictions and seemed "real nervous." Powers explained to Collins that Burwell's fishing story was suspicious and questioned why Burwell and Boucher would drive from Toney, Alabama, which is near Tennessee, all the way to LaGrange, Georgia to fish in someone's pond and return in the middle of the night.

Powers also told Collins that when he ran Burwell's insurance through their system, it came back unconfirmed, but that did not justify him towing the Tahoe for lack of insurance.

Nevertheless, Powers said he was going to "try to get in that car." Powers continued, "I'm gonna get him out and explain to him I'm going to write him a warning and try to sweet talk my way in."[2] Powers repeated that he doubted Burwell's fishing story because they were returning at 2:30 a.m. and, while they had fishing poles in the vehicle, they had no cooler. Powers also questioned Burwell's choice of route, suggesting that he should have stayed on the interstate. Officer Collins responded that Burwell could have been driving that particular route to avoid "the gauntlet," a stretch of I-20 with a heavy presence of law enforcement. Powers then said, "God, I wish we had a dog. Here we go. Let's try it."

Powers walked back to the Tahoe and told Burwell that he was going to give him a warning for his improper lane usage. Powers asked Burwell to step out of the car so that he could explain the warning. Burwell said "alright," and Powers asked if he had any weapons on his person. Burwell answered no. Powers then

[2]At the suppression hearing, Powers testified that, by "sweet talk," he meant asking questions in order to de-escalate the situation. He explained that police officers are trained to de-escalate during roadside interviews because everyone is nervous when pulled over by the police. Also, in answering questions from the district court, Powers admitted that by de-escalating the situation, he tries to put individuals at ease so that they will cooperate and voluntarily consent to him conducting various searches.

patted him down and found none. After Burwell gave Powers permission to search his pockets, Powers discovered about $600 in cash in Burwell's front pocket. Burwell told Powers that he earned the money from work.

Both men walked back to the patrol car so that Powers could explain the warning to Burwell. Powers said that he was "giv[ing] him a warning [for failure to maintain lane]—I know it's late." Burwell thanked Powers. Powers then began to fill out the warning paperwork, first verifying that the address listed on Burwell's license was correct. While writing out the warning, Powers asked Burwell additional questions about the fishing trip, including why he decided to drive back to Alabama in the middle of the night, his relationship with Boucher, and where she lived. Burwell answered all of Powers questions, explaining that he and Boucher had planned to stay the night in LaGrange, but instead left because Boucher needed to get home to Alabama to take care of her son.

After finishing the paperwork, Powers returned Burwell's and Boucher's driver's licenses. Powers joked about the number of times he accidentally kept someone's license. Burwell said that had actually happened to him before—that an officer accidently kept his driver's license. Powers then said, "all right man, here's that warning. Like I said, that's for when I had you pulled over, you were swerving a little bit, not terrible but you come over on that fog line a couple times. So I was just making sure you was alright." Powers handed Burwell the warning

and said, "there's that back." This part of the traffic stop lasted 16 minutes and 9 seconds.

With the warning and licenses in hand, Burwell turned and began to walk towards his car, but Powers said, "hey before you go, you care if I ask you a few more questions?" Burwell responded "sure." Powers said, "all right, man. Our boss has been on us pretty bad about being productive and trying to, you know, do work—they like to see us out here working. Part of our job is to, you know, find drugs, large amounts of money, firearms, anything—stuff like that. You don't have anything like that in the car do you?"

Burwell responded, "no sir, you can check." Powers then confirmed that he had Burwell's consent to search his vehicle: "You don't care if I search it real quick?" Burwell again gave consent. This exchange about the consent lasted approximately 25 seconds.

At that point, Powers returned to the Tahoe and Burwell stayed back by the patrol car. After having Boucher exit the car, Powers searched the passenger compartment of the vehicle for about 11 minutes. Powers then opened the vehicle's hood and looked in the engine compartment. He found a handgun and approximately 55 grams of methamphetamine partially hidden under the fuse box in the engine. Powers arrested Burwell, who admitted that the gun and drugs belonged to him.

Thereafter, Burwell was charged with possession with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

B. District Court Suppresses the Evidence

Burwell moved to suppress the evidence against him on the ground that his consent to search the vehicle did not permit Powers to open the vehicle's hood and search the engine compartment. In his reply brief, Burwell argued further that the traffic stop was completed before Powers asked about contraband and requested consent to search his vehicle. As such, Burwell contended that Powers was not justified in detaining him to ask to search his car.

Following a hearing on the motion, during which Powers testified, the district court granted Burwell's motion to suppress on a different ground—that Burwell's consent to the search was coerced. To reach this conclusion, the district court first determined that the traffic stop was completed before Powers asked to search Burwell's car because Powers returned Burwell's driver's license, explained the warning to him, and handed him the written warning.

After the traffic stop ended, the court found that Burwell's interaction with Powers was not a consensual encounter because Powers coerced him into

cooperating with "sweet talk." Specifically, the court explained that Powers used a friendly tone and joked with Burwell to exert a subtle form of pressure—the pressure of a debt that Powers created by letting Burwell off with a warning instead of a citation, which made Burwell feel compelled to oblige the officer's requests. According to the court, Powers then asked for a favor in return for the warning, that is Burwell's permission to search the vehicle, which would make Powers look good to his boss. "Because Officer Powers used coercive tactics to try to trick Mr. Burwell into giving consent, and because Officer Powers did not tell Mr. Burwell that the traffic stop was over or that he was free to leave without consenting to the search, the [c]ourt does not find that Mr. Burwell's consent was voluntary." With no valid consent, the court concluded that the search of Burwell's vehicle violated the Fourth Amendment.

This is the government's appeal. Among other things, the government argues that the district court erred in granting the motion to suppress because: (1) at the time that Powers asked for consent to search Burwell's vehicle, the stop had become a consensual encounter; (2) Burwell's consent to search was voluntary; and (3) Powers did not exceed the scope of Burwell's consent by searching under the vehicle's hood. In his response, Burwell argues for the first time that Powers unlawfully prolonged the traffic stop before he gave Burwell the

written warning by taking actions aimed at discovering general criminal activity unrelated to the traffic stop. We address each argument in turn.

II. DISCUSSION

A. Standard of Review

"A denial of a motion to suppress involves mixed questions of fact and law. We review factual findings for clear error and view the evidence in the light most favorable to the prevailing party. We review de novo the application of the law to the facts." United States v. Barber, 777 F.3d 1303, 1304 (11th Cir. 2015) (citations omitted).

B. Consensual Encounter

On appeal, the government first argues that at the time when Powers asked Burwell for consent to search the vehicle, the traffic stop had become a consensual encounter. Because Burwell was not detained when he gave consent to search, the government asserts that his Fourth Amendment rights were not implicated. We find this argument persuasive.

The Fourth Amendment protects individuals from unreasonable searches and seizures. U.S. Const. amend. IV. A routine traffic stop is a limited form of seizure that is more analogous to an investigative detention than a custodial arrest, and so we analyze the legality of such stops under the standard articulated in Terry v.

Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968). United States v. Purcell, 236 F.3d 1274, 1277 (11th Cir. 2001). "Under Terry, an officer's actions during a traffic stop must be reasonably related in scope to the circumstances which justified the interference in the first place." Id. (internal quotation marks omitted).

Moreover, "the duration of the traffic stop must be limited to the time necessary to effectuate the purpose of the stop." Id. "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." Rodriguez v. United States, 575 U.S. __, 135 S. Ct. 1609, 1614 (2015). "[T]he 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." Id. (internal citation omitted). That mission or purpose often includes checking the driver's license, attending to safety concerns, searching for outstanding warrants against the driver, and inspecting the vehicle's registration and proof of insurance. Id. at __, 135 S. Ct. at 1615. But "unrelated inquiries" that "measurably extend the duration of the stop" offend the Constitution. Id.

The Fourth Amendment allows lengthening the traffic stop for unrelated inquiries in only two situations. United States v. Ramirez, 476 F.3d 1231, 1237 (11th Cir. 2007).

> First, the officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion

> illegal activity has occurred or is occurring. Second, further questioning unrelated to the initial stop is permissible if the initial detention has become a consensual encounter.

United States v. Pruitt, 174 F.3d 1215, 1220 (11th Cir. 1999). Although there is no bright-line test for determining whether a traffic stop is a seizure or a consensual encounter, we examine the totality of the circumstances, including whether there is any police coercion, whether the exchange is cooperative in nature, and whether the defendant had everything reasonably required to leave. Ramirez, 476 F.3d at 1240. We also may consider the following factors in determining whether a police-citizen encounter was consensual:

> whether a citizen's path is blocked or impeded; whether identification is retained; the suspect's age, education and intelligence; the length of the suspect's detention and questioning; the number of police officers present; the display of weapons; any physical touching of the suspect, and the language and tone of voice of the police.

United States v. Jordan, 635 F.3d 1181, 1186 (11th Cir. 2011) (internal quotation marks omitted).

The Supreme Court has instructed that the ultimate, objective inquiry remains whether "a reasonable person would feel free to terminate the encounter." United States v. Drayton, 536 U.S. 194, 201, 122 S. Ct. 2105, 2110 (2002). Therefore, where a reasonable person would feel free to decline the requests of law enforcement or otherwise terminate the encounter, the encounter is consensual, and the Fourth Amendment is not implicated. Ramirez, 476 F.3d at 1238.

In Ramirez, a case similar to this one, we rejected the defendant Ramirez's assertion that additional questioning by police constituted an illegal prolonging of his detention during a traffic stop. Id. at 1236. In that case, after the police officer returned Ramirez's license, handed him the traffic citation, and told him the traffic stop was over, the officer asked the defendant if he was carrying anything illegal in his car. Id. at 1234. Ramirez responded by advising the police officer that he could search the vehicle if he wanted to. Id. After some additional discussion, Ramirez signed a consent form. Id. at 1234-35. The officer then searched the vehicle and found cocaine. Id.

On appeal, we concluded that Ramirez's Fourth Amendment challenge to the traffic stop was meritless because, after the police officer returned Ramirez's license and gave him the traffic citation, the stop became a consensual encounter. Id. at 1241. In so ruling, we explained that when the officer asked the post-citation question about contraband in Ramirez's car, "all business with [Ramirez] was completed and [] he was free to leave." Id. at 1240 (internal quotation marks omitted). We also said that Ramirez's post-citation discussion with the officer appeared to be fully cooperative and non-coercive. Id. For those reasons, we concluded that a reasonable person in Ramirez's position would have felt free to terminate the encounter with the police officer and thus the encounter was consensual. Id. at 1241.

In this case, like in Ramirez, the traffic stop ended when Powers returned Burwell's and Boucher's licenses, explained the warning to Burwell, and gave him the written warning. As Burwell then turned to walk to his car, Powers asked if Burwell would mind answering additional questions. Burwell responded "sure." At that point, "the exchange [became] cooperative in nature" because Burwell "had everything he reasonably required to proceed on his journey" but voluntarily agreed to answer Powers's additional questions instead of ending the encounter. See id. at 1240. That Burwell chose to answer the follow-up questions instead of terminating the encounter does not change the fact that it had converted from a traffic stop into a consensual encounter. Id.

Contrary to Burwell's argument on appeal, Powers was not required to inform him that the traffic stop was over or that he was free to go for the encounter to be consensual. See Ohio v. Robinette, 519 U.S. 33, 35, 117 S. Ct. 417, 419 (1996) (holding that the Fourth Amendment does not require that a lawfully seized defendant must be advised that he is "free to go" before his consent to search will be recognized as voluntary). In any event, Powers's question itself—"hey before you go, you care if I ask you a few more questions?"—indicated to Burwell that the traffic stop was over and staying to answer additional questions was optional. Moreover, at that time, Burwell was not impeded, touched, or threatened by Powers, their interactions appeared to be fully cooperative, Powers's gun remained

holstered, and Powers used the same friendly tone that he had used during the entire traffic stop. See Jordan, 635 F.3d at 1186. We know all this because the video camera tells us so.

Under these particular undisputed factual circumstances, we conclude that a reasonable person in Burwell's position would have felt free to leave when Powers asked Burwell for permission to question him further. Therefore, at that point, the encounter was consensual, and the Fourth Amendment was not implicated. See Ramirez, 476 F.3d at 1238. The district court erred in concluding otherwise.

C. Voluntary Consent

The government next argues that the district court erred in determining that Burwell's consent to search the vehicle was coerced by Powers's "sweet talk." Instead, the government maintains that Burwell voluntarily consented to the search, pointing out that Burwell offered to let Powers search the car before Powers even asked. We agree.

Voluntariness is a question of fact that we may disturb only if clearly erroneous. United States v. Spivey, 861 F.3d 1207, 1212 (11th Cir. 2017). "Normally, we will accord the district judge a great deal of deference regarding a finding of voluntariness, and we will disturb the ruling only if we are left with the definite and firm conviction that the trial judge erred." United States v. Fernandez, 58 F.3d 593, 596–97 (11th Cir. 1995) (internal quotation marks omitted).

However, whereas here, the district court applied the law about voluntariness to the uncontested facts, our review is de novo. See Spivey, 861 F.3d at 1212.

An officer conducting a routine traffic stop may request consent to search the vehicle. Schneckloth v. Bustamonte, 412 U.S. 218, 222, 93 S. Ct. 2041, 2045 (1973). A consensual search is constitutional if it is voluntary; if it is the product of an "essentially free and unconstrained choice." Schneckloth, 412 U.S. at 225, 93 S. Ct. at 2046. Voluntariness is "not susceptible to neat talismanic definitions; rather, the inquiry must be conducted on a case-by-case analysis" that is based on "the totality of the circumstances." United States v. Blake, 888 F.2d 795, 798 (11th Cir. 1989). "Relevant factors include the voluntariness of the defendant's custodial status, the presence of coercive police procedure, the extent and level of the defendant's cooperation with police, the defendant's awareness of his right to refuse to consent to the search, the defendant's education and intelligence, and, significantly, the defendant's belief that no incriminating evidence will be found." Spivey, 861 F.3d at 1213 (internal quotation marks omitted). The government bears the burden of proving the voluntariness of the consent. United States v. Chemaly, 741 F.2d 1346, 1352 (11th Cir. 1984).

In this case, the district court erred in finding that Burwell did not voluntarily consent to the search of his vehicle because the record does not support that finding. First, Burwell was not seized, handcuffed, or in custody at the time he

gave consent; rather, his encounter with Powers was consensual. See United States v. Hall, 565 F.2d 917, 920 (5th Cir. 1978) ("It is generally recognized that coercion is more easily found if the person consenting to the search has been placed under arrest[.]"). Indeed, after getting Burwell's permission to continue the encounter, Powers said, "all right, man. Our boss has been on us pretty bad about being productive and trying to, you know, do work—they like to see us out here working. Part of our job is to, you know, find drugs, large amounts of money, firearms, anything—stuff like that. You don't have anything like that in the car do you?" In response, Burwell denied having contraband in his car and offered his consent to search the vehicle before Powers even asked for it, saying: "no sir, you can check." Powers then verbally confirmed that he had Burwell's consent to search the vehicle. And Burwell gave consent a second time.

The record, therefore, shows that Burwell, an adult with no apparent intellectual difficulties, offered to let Powers search his vehicle before Powers even asked and gave his consent to the search twice. Moreover, Burwell had been fully cooperative with Powers during their entire exchange. In fact, by the time that Burwell volunteered to let Powers search his vehicle, Burwell had already agreed to cooperate with Powers in two separate instances—first when allowing Powers to search his pockets and then in agreeing to answer his questions. In addition, the video and audio record shows that Powers and Burwell spoke in a friendly tone

and even joked with each other. While Powers did not inform Burwell that he had the right to refuse consent, he was not required to do so. See Schneckloth, 412 U.S. at 248-49, 93 S. Ct. at 2058-59.

The district court concluded otherwise because it determined that Powers engaged in what it deemed the coercive technique of using "sweet talk." According to the district court, Powers coerced Burwell by using a friendly tone to exert pressure, by first letting Burwell off with a warning, second, cementing good will with jokes, and then third asking Burwell for a favor in return, "a quid pro quo," that is consent to search his vehicle so that Powers looked good for his boss. While police coercion is one factor a court may consider in determining whether a consent is voluntary, we find no trace of such coercion in the record before us.

Indeed, there is no evidence of any inherently coercive tactics, either from the nature of Powers's questioning or the environment in which it took place. Rather, the encounter was "polite and cooperative," and Powers "used no signs of force, physical coercion, or threats." Spivey, 861 F.3d at 1216. Nothing in the video and audio record shows that Powers lied, deceived, or tricked Burwell—tactics we have suggested may constitute psychological coercion in the context of consent for a search. See id. at 1214.

Importantly too, in the district court Burwell did not testify or even argue that he believed that Powers induced his consent by letting him off with a warning

and then requesting to search his vehicle in return for that favor. And although the district court found a quid pro quo in that arrangement, nothing that Powers said to Burwell at the time expressed or implied that the warning might turn into a ticket if Burwell did not consent to the search.

We recognize too that police officers routinely give drivers warnings rather than issue traffic citations, and they are trained to engage with drivers in a friendly tone to de-escalate the situation. There is nothing inherently coercive about that. And Powers's statement about his boss wanting him to be productive is not inherently coercive because, even if it was not true, there is no evidence that Powers's statement led Burwell to believe he could not refuse to consent. Moreover, Powers expressly told Burwell that he was looking for drugs and firearms, which was in fact the case, so we see no trickery or deception in that statement either.

It appears to us that the district court's own conclusion that Powers coerced Burwell's consent through the use of "sweet talk" to "get into [Burwell's] car" was largely based on Powers's own statements to Officer Collins at the scene that he was going to try to "sweet talk his way in" to the vehicle.[3] However, the

[3]The district court also relied on Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), in concluding that Powers's conduct violated the Constitution. In doing so, the district court stated that "the Fifth Amendment right to remain silent and avoid self-incrimination is, in many respects, similar to the Fourth Amendment right to walk away from a law enforcement officer at the conclusion of a lawful traffic stop." However, the Supreme Court has made clear that "[t]here is a vast difference between those rights" in the Fifth and Fourth Amendments and

subjective motivation of police officers is irrelevant in determining whether a consent is voluntary. Spivey, 861 F.3d at 1215. We have made plain that "[c]onsent is about what the suspect knows and does, not what the police intend" because "[c]oercion is determined from the perspective of the suspect." Id. (internal quotation marks omitted). Even if a police officer deliberately lies to a suspect, that does not matter because the "only relevant state of mind" for voluntariness "is that of [the suspect] himself." United States v. Farley, 607 F.3d 1294, 1330 (11th Cir. 2010). Accordingly, Powers's subjective purpose for his friendly tone, letting Burwell off with a warning, and then asking to search Burwell's vehicle due to pressure from his boss does not affect the voluntariness of Burwell's consent. See Spivey, 861 F.3d at 1215; Whren v. United States, 517 U.S. 806, 812-13, 116 S. Ct. 1769, 1774 (1996).

In sum, under the totality of the undisputed circumstances, we conclude that the government has shown that Burwell's consent to search the vehicle was voluntary and uncontaminated by coercion. Accordingly, the district court erred in

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that the "considerations that informed the Court's holding in Miranda are simply inapplicable" in a consent to search case. Schneckloth, 412 U.S. at 241-47, 93 S. Ct. at 2055-58. We also note that the tactic of an officer showing himself to be "a kindhearted man" discussed in Miranda had to do with a ploy set forth in police manuals "termed the 'friendly-unfriendly' or the 'Mutt and Jeff' act," where two officers play good-cop, bad-cop to extract a confession from a suspect. Miranda, 348 U.S. at 452, 86 S. Ct. at 1616. There is no evidence that Powers engaged in that ploy here.

concluding that Burwell's consent was coerced and granting the motion to suppress.

D. Scope of Burwell's Consent

The government also argues that, although the district court did not address the issue, Powers did not exceed the scope of Burwell's consent by looking under the vehicle's hood into the engine compartment because Burwell's consent was general, and there was a reasonable chance that Powers might find guns or drugs in the engine compartment. Burwell responds that we should remand this issue to the district court to determine in the first instance whether Powers's search exceeded the scope of the consent.

It is true that where the district court did not address a party's argument and a determination of that issue is fact-specific, we may remand to the district court to address the issue in the first instance. See Torres v. Pittston Co., 346 F.3d 1324, 1334 (11th Cir. 2003). However, a federal appellate court is justified in resolving an issue not passed on below where the proper resolution is beyond any doubt. Narey v. Dean, 32 F.3d 1521, 1526-27 (11th Cir. 1994). Because the facts of this case are undisputed and the proper resolution of this issue is beyond a reasonable doubt, we will exercise our discretion and resolve the issue here.

"[A] search is impermissible when an officer does not conform to the limitations imposed by the person giving consent." United States v. Zapata, 180

F.3d 1237, 1242 (11th Cir. 1999). "A general consent to search for specific items includes consent to search any compartment or container that might reasonably contain those items." Id. at 1243. "When an individual provides a general consent to search, without expressly limiting the terms of his consent, the search is constrained by the bounds of reasonableness: what a police officer could reasonably interpret the consent to encompass." Id. at 1242 (internal quotation marks omitted). "While we have held that a search exceeds the scope of consent when an officer destroys a vehicle, its parts, or its contents, a search does not exceed the scope of consent merely because an officer forces open a secured compartment that reasonably may contain the objects of the search." Id. at 1243 (internal citation omitted) (distinguishing a valid search of an interior door panel from an invalid search during which an officer slashed open a spare tire). The person who gave consent can also limit the scope of a search as it is occurring or request that it be discontinued. See United States v. Harris, 928 F.2d 1113, 1117-18 (11th Cir. 1991).

In this case, Powers informed Burwell that he was searching for drugs, large amounts of money, and firearms, which Powers knew were sometimes hidden under a vehicle's hood in the engine compartment. Burwell did not put any limitations on his consent to search the vehicle, he did not object when Powers started looking under the hood of the car, and Powers did not damage the vehicle

in any way when he looked under the hood. Accordingly, Powers did not exceed the scope of Burwell's consent to search. See Zapata, 180 F.3d at 1242-43; Harris, 928 F.2d at 1117-18.

E. Burwell's Alternative Reason to Affirm

On appeal, Burwell asks us to affirm the district court's suppression order for an alternative reason not addressed by the court below. He now argues that Powers took steps that unlawfully prolonged the traffic stop so that he could inquire into general criminal conduct before issuing the written warning. Specifically, Burwell challenges these four actions taken by Powers before he completed the written warning: (1) calling and waiting for backup; (2) explaining the situation to Officer Collins when he arrived, including his suspicion of general criminal activity; (3) asking Burwell to step out of the vehicle and patting him down; and (4) asking Burwell additional questions about the fishing trip and his travel plans while filling out the written warning.[4]

We have discretion to affirm a district court's ruling on a motion to suppress on alternative grounds when the record below supports that reason, even if not

[4]We note that at the suppression hearing, Burwell briefly argued that the questions that Powers asked him while writing out the warning citation were not related to the mission of the traffic stop, but his briefing on the motion to suppress did not include any argument that Powers unlawfully prolonged the traffic stop before giving him the warning. In the district court, Burwell also never argued at all that Powers unlawfully extended the traffic stop by calling for back up, discussing the situation with Collins, or having Burwell exit the vehicle and patting him down.

relied upon by the district court. United States v. Caraballo, 595 F.3d 1214, 1222 (11th Cir. 2010). We decline to exercise our discretion to do so here.

Alternatively, even if we consider Burwell's new arguments, we conclude that the record shows that Powers's conduct fell within the lawful purpose of the traffic stop and did not unlawfully prolong the stop before he issued the warning citation. As we explained above, the duration of a traffic stop must be limited to the time necessary to effectuate the purpose of the stop. The purpose of a traffic stop includes determining whether to issue a traffic citation, checking the driver's license, searching for outstanding warrants against the driver, and inspecting the vehicle's registration and proof of insurance. Rodriguez, 575 U.S. at __, 135 S. Ct. at 1615. These tasks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. Id. In addition, "[g]enerally, questions about travel plans are ordinary inquiries incident to a traffic stop." United States v. Campbell, 912 F.3d 1340, 1354 (11th Cir. 2019).

The purpose of a traffic stop also includes attending to any related safety concerns, including "the government's officer safety interest [that] stems from the mission of the stop itself." Rodriguez, 575 U.S. at __, 135 S. Ct. at 1616. "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. The

Supreme Court has repeatedly recognized that traffic stops are "'especially fraught with dangers to police officers.'" Rodriguez, 575 U.S. at __, 135 S. Ct. at 1616 (quoting Arizona v. Johnson, 555 U.S. 323, 330, 129 S. Ct. 781, 782 (2009)); see also Pennsylvania v. Mimms, 434 U.S. 106, 110, 98 S. Ct. 330, 333 (1977) (explaining that "a significant percentage of murders of police officers occurs when the officers are making traffic stops"). Therefore, "an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." Rodriguez, 575 U.S. at __, 135 S. Ct. at 1616. In that vein, it is well-settled that an officer may direct a driver to get out of the car during a lawful traffic stop. See Mimms, 434 U.S. at 111 n.6, 98 S. Ct. at 333 n.6 ("[O]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment[.]"). Moreover, once that driver is outside a stopped vehicle, he may be patted down for weapons if the officer has reason to believe that his own safety or the safety of others is at risk. Id. at 112, 98 S. Ct. at 334; United States v. White, 593 F.3d 1199, 1202 (11th Cir. 2010). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." White, 593 F.3d at 1202-03 (internal quotation marks omitted).

Given this precedent, we conclude that Powers's conduct—of calling for back up, briefing Officer Collins on the situation when he arrived, directing Burwell out of his vehicle, and patting him down—was related to the mission of the traffic stop, that is, ensuring officer safety. Because Powers's actions in this regard related to safety concerns, the delays they caused are the sort of "negligibly burdensome precautions" tolerated by the Fourth Amendment. See Rodriguez, 575 U.S. at __, 135 S. Ct. at 1616.[5]

Indeed, Powers's safety concerns were objectively strong. The traffic stop took place at 2:46 a.m. at a location with little other traffic. Two individuals were in the stopped vehicle, but Powers was alone. The driver, Burwell, appeared to be very nervous, he had prior drug convictions, and provided an unusual explanation for where he had been, namely, that earlier in the evening, he had driven several hours to Georgia to fish in a pond and decided to drive back to Alabama in the middle of the night. Further, Powers found it suspicious that Burwell was not driving on the interstate. In Powers's experience, individuals transporting drugs often avoid that section of interstate that he referred to as the "gauntlet," which was known to have a heavy law-enforcement presence. Based on Burwell's prior drug

[5]Our conclusion remains the same even considering that Powers testified at the suppression hearing that one reason why he called for backup and was interested in Burwell's fishing story was because he thought something was up and he wanted to investigate it further. We do not consider an officer's subjective motivations in this area of the law. See Whren, 517 U.S. at 812-13, 116 S. Ct. at 1774.

convictions, Powers also was concerned that he might have a firearm because "if you find drugs, you are going to find weapons."

We also readily conclude that Powers's general questions at 2:46 a.m. about Burwell's fishing trip and travel itinerary, including his destination, route, and reasons for driving at that time of night, were ordinary inquiries incident to a traffic stop. In particular, all of Powers's questions were reasonably related to ascertaining why Burwell had been swerving and failed to maintain his lane and whether he posed a danger to others on the road given where he still had to drive that night. As such, asking about Burwell's travel plans was related to investigating his failure to maintain his lane while driving.

Importantly, Powers's conduct before issuing the warning citation did not include inquiries that were unrelated to a traffic stop's purpose and instead aimed at investigating other crimes. In Rodriguez, the Supreme Court made clear that "unrelated inquiries" aimed to detect general criminal activity that "measurably extend the duration of the stop" offend the Constitution, even if de minimis. Id. at ___, 135 S. Ct. at 1614-16.[6] In Johnson, for instance, the Court intimated that asking about a passenger's gang affiliation is not an inquiry related to a traffic stop.

[6]Nonetheless, inquiries into matters unrelated to the purpose of the traffic stop are permissible so long as they do not prolong the stop. Id. at 1614–15; see also Johnson, 555 U.S. at 327-38, 129 S. Ct. at 787-88 (concluding that the Fourth Amendment tolerated the unrelated investigation into the passenger's gang affiliation that did not lengthen the duration of the roadside detention).

See Johnson, 555 U.S. at 332-33, 129 S. Ct. at 787-78. And in Rodriguez, the Supreme Court held that using a dog to sniff for contraband is not related to the purpose of a traffic stop and instead aimed at detecting ordinary criminal wrongdoing. Rodriguez, 575 U.S. at __, 135 S. Ct. at 1615.

Here, Powers did not use a drug dog or ask about Burwell's gang affiliation during the traffic stop. Instead the four actions Powers took prior to issuing the written warning were related to the purpose of the traffic stop and thus did not unlawfully prolong it.

F. United States v. Campbell

Finally, Burwell has filed supplemental authority following this Court's recent decision in United States v. Campbell, 912 F.3d 1340 (11th Cir. 2019), which he claims "makes absolutely clear that Officer Powers violated the Fourth Amendment."

In Campbell, we applied Rodriguez to hold that a traffic stop was unlawful because it had been prolonged for 25 seconds by an officer's efforts to uncover evidence of general criminal activity unrelated to the purpose of the stop. Id. at 1354-55. There, an officer pulled over a vehicle after witnessing two potential traffic violations and began issuing a written warning. Id. at 1344-45. As the officer filled out the warning, he asked the driver whether he had any contraband in his vehicle, such as counterfeit merchandise, illegal alcohol, drugs, or any dead

bodies. Id. at 1345. The driver said that he did not and gave the officer permission to search his vehicle, and the officer found a firearm and ski mask. Id. The driver sought suppression of that evidence on the basis that the officer unlawfully prolonged the stop by asking questions designed to investigate general criminal activity. Id. On appeal, we agreed that the stop was unlawful under Rodriguez because it had been prolonged by the officer's questions about the contraband, which were unrelated to the purpose of the traffic stop. Id. at 1354-55. But we declined to invoke the exclusionary rule, finding that the good faith-exception applied. Id. at 1355-56.

Campbell is materially distinguishable from this case for two reasons. First, in Campbell, the officer asked the driver questions about contraband while filling out the warning citation, that is, during the traffic stop. Id. at 1344-45. In contrast here, Powers did not ask Burwell whether he had any contraband in his vehicle until after the traffic stop was finished and had converted into a consensual encounter. The Fourth Amendment is not implicated during a consensual encounter. See Pruitt, 174 F.3d at 1220.

Second, although Powers did ask Burwell questions while simultaneously filling out the written warning, the questions Powers asked concerned Burwell's travel plans and were reasonably related to the purpose of the traffic stop. In fact, in Campbell, we expressly found that "questions about travel plans are ordinary

inquiries incident to a traffic stop." Id. at 1354. On the other hand, the unlawful questions posed by the officer in Campbell concerned contraband possession and related solely to investigating general criminal activity. Therefore, Burwell's reliance on Campbell is unpersuasive.

III. CONCLUSION

After careful review of the uncontroverted facts established in the record, we conclude that the conditions which existed at the time Burwell consented to allow Powers to search his vehicle do not support the district court's finding that his consent was coerced and could not have been voluntary. We also conclude that Powers's search of the vehicle did not exceed the scope of Burwell's consent. Finally, we decline to affirm the district court's suppression order for the alternative reason Burwell now advances on appeal. Accordingly, we reverse the district court's order granting Burwell's motion to suppress and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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February 27, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-13039-CC
Case Style: USA v. Cantrell Burwell
District Court Docket No: 1:17-cr-00471-MHH-TMP-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Carol R. Lewis, CC at (404) 335-6179.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna Clark
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion

APPENDIX C

Order of the U.S. Court of Appeals for the Eleventh Circuit denying Petition for Rehearing and Rehearing En Banc

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 18-13039-CC

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

versus

CANTRELL LAMONT BURWELL,

Defendant - Appellee.

On Appeal from the U. S. District Court
for the Northern District of Alabama

PETITION(S) FOR REHEARING EN BANC

BEFORE: BRANCH, HULL and JULIE CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled no rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP 2)

ENTERED FOR THE COURT:

Frank M. Hull

UNITED STATES CIRCUIT JUDGE

ORD-42