

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAFAEL TELLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition presents the following important question of federal law, on which the United States courts of appeals are split, that should be settled by the Court at this time: May a Border Patrol agent working in the primary inspection lane of an interior immigration checkpoint extend the immigration stop beyond the “brief question or two and possibly the production of a document evidencing the right to be in the United States” permitted by *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976), without reasonable suspicion of an immigration violation or other crime, to allow time for a Border Patrol service canine to complete a free-air sniff of the vehicle?

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

None.

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PRAYER

Petitioner Rafael Tello prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Westlaw version of opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Tello's case is attached to this petition as the Appendix. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit's judgment and opinion was entered on May 21, 2019. *See* Appendix. This petition is filed within 90 days after entry of the judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]

U.S. Const. amend. IV.

STATEMENT OF THE CASE

I. Procedural Background

On August 23, 2017, a federal grand jury in the Corpus Christi Division of the United States District Court for the Southern District of Texas returned a three-count indictment charging Rafael Tello, in each count, with transporting an illegal alien within the United States by means of a motor vehicle in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and (v)(II) and (B)(ii). The aliens were found hidden in a storage compartment beneath the bed in the sleeper area of the tractor-trailer that Mr. Tello was driving, after he was stopped at the interior immigration checkpoint located near Falfurrias, Texas.¹

On November 16, 2017, the case proceeded to a jury trial on the first two counts. During the one-day trial, the government presented the testimony of two Border Patrol agents and two of the three aliens found under the bed in the tractor. Mr. Tello did not testify or present any witness in his defense.

Midway through the trial, after the two Border Patrol agents had testified, Mr. Tello moved to suppress the evidence found during the immigration-checkpoint stop. He argued that the agents' testimony demonstrated that they had impermissibly extended the checkpoint stop beyond its limited immigration purpose before procuring his consent to search the tractor-trailer. The district court denied the motion.

The jury found Mr. Tello guilty of both counts. Thereafter, on April 11, 2018, the district court sentenced him to concurrent terms of 27 months' imprisonment and two

¹ The Falfurrias checkpoint, which is on Highway 281 in Texas, is one of 34 permanent interior checkpoints near the southern border. Falfurrias is roughly 70 miles north of the border.

years' supervised release. The court imposed no fine but did impose a \$100 special assessment for each count of conviction, for a total of \$200.

Mr. Tello timely appealed the district court's denial of his motion to suppress. The Fifth Circuit affirmed in a published opinion, *United States v. Tello*, 924 F.3d 782 (5th Cir. 2019). *See* Appendix.

II. Statement of Relevant Facts

The facts relevant to Mr. Tello's appeal of the district court's denial of his motion to suppress, as set forth by the Fifth Circuit in its opinion, were as follows:

Shortly before 1:00 a.m. on August 1, 2017, a tractor-trailer entered the primary inspection lane at the U.S. Border Patrol checkpoint south of Falfurrias, Texas. Agent Villanueva was on duty in the primary inspection lane. A Border Patrol service canine and its handler were working with him.

Tello was driving the tractor-trailer. Agent Villanueva's first question was: "[A]re you a citizen – are you a United States citizen?" He replied that he was a naturalized citizen. Agent Villanueva was satisfied with this answer so he did not ask for proof of citizenship.

Agent Villanueva next asked Tello what he was hauling in the trailer. He asked this question to give the Border Patrol service canine more time to conduct a canine sniff of the tractor-trailer:

Because at that point, kind of I looked – because usually when I start [questioning], I also keep in mind that I have the K9 handler working with me; because sometimes, you know, the vehicles coming up to our inspection, and the dog might be alerting right away, but – and sometimes, we question these occupants. And we might be doing a simple question, so we might relieve the vehicle right away. But at this time, the K9 [handler] kind of glanced over at me, you know, give me a little bit more time. So that's kind of why I questioned a little bit more.

Tello answered that he was hauling carrots and handed the agent a bill of lading. Agent Villanueva asked him whether he had made any stops after loading the carrots in the trailer. Tello answered that he was coming from Pharr, Texas and had not made any stops. Agent Villanueva testified that Tello did not appear to be nervous and there was no indication that he was hiding anything.

The canine handler told Agent Villanueva that he needed to send the tractor-trailer to the secondary inspection area. The agent then asked Tello for consent to search and backscatter (x-ray) the tractor-trailer, and he agreed. This happened about 30 seconds into the checkpoint stop.

In the secondary inspection area, another agent (Agent Reyes) boarded the tractor-trailer to conduct a physical inspection in advance of the backscatter inspection, a routine precaution to minimize the risk of exposing possible occupants to radiation. Under the bed in the sleeper area of the tractor-trailer was a small hole through which Agent Reyes could see a person's torso. He unlatched the bed and found three persons hiding in the storage compartment. These persons were citizens of Honduras who were illegally present in the United States.

Tello, 924 F.3d at 785-86.

On appeal Mr. Tello contended, as he did in the district court, that Agent Villanueva unlawfully prolonged the immigration stop by extending the stop beyond the “brief question or two and possibly the production of a document evidencing the right to be in the United States” permitted by *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976), and embarking on the type of “detour” that “adds time to the stop,” which is prohibited by *Rodriguez v. United States*, 135 S. Ct. 1609, 1615-16 (2015). *See* Brief for Appellant, *United States v. Tello*, 924 F.3d 782 (5th Cir. 2019) (No. 18-40347), 2018 WL 4522494, at *10-20. He also contended that his consent to the search did not dissipate the taint of the Fourth Amendment violation, as there were no intervening circumstances between the

violation and the consent (and, therefore, the consent was not an “independent act of free will”). *See* Brief for Appellant, *supra* at *20-21.

The Fifth Circuit rejected these arguments. The court first noted, “We have avoided scrutinizing the questions a Border Patrol agent asks at the checkpoint, instead focusing on the duration of the stop.” *Tello*, 924 F.3d at 786-87 (citing *United States v. Machuca-Barrerra*, 261 F.3d 425, 434 (5th Cir. 2001)). “The critical question,” it stated, is “whether conducting the sniff prolongs the purpose of the stop.” *Tello*, 924 F.3d at 787. It then decided that the stop was not impermissibly prolonged because a canine sniff is “relevant to the purpose of the stop” and the total duration of the stop, from when the vehicle appeared at the checkpoint until the dog alerted and Mr. Tello consented to a search, was only about 30 seconds. *Id.* at 787-89.

In support of its decision, the court noted that *Rodriguez* allows for stops of “tolerable duration” and, under *Martinez-Fuerte*, “an immigration stop may take up to five minutes.” *Id.* It dismissed Mr. Tello’s concerns about the agent’s particular *purpose* for asking him these additional questions about his itinerary and cargo; questions about “citizenship, cargo and travel” are “permissible,” it reasoned, because they are “commonplace for an agent to ask.” *Tello*, 924 F.3d at 787.

Finally, the court decided that Mr. Tello validly consented to the search of his tractor-trailer. *Tello*, 924 F.3d at 789. Its conclusion was based in part on its earlier determination that the agent “did not unreasonably seize Tello.” *Id.*

**BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT**

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

In this case a Border Patrol agent working in the primary inspection lane of an interior immigration checkpoint asked Mr. Tello, “[A]re you a citizen – are you a United States citizen?” He replied that he was a naturalized citizen. The agent was satisfied with this answer so he did not ask for proof of citizenship. Nonetheless, the agent continued asking Mr. Tello questions about his itinerary and the cargo he was carrying in the tractor-trailer he was driving. He did so to allow time for a Border Patrol service canine to complete a free-air sniff of the tractor-trailer. *Tello*, 924 F.3d at 785-86.

The Fifth Circuit held that this immigration-checkpoint stop was not impermissibly prolonged in violation of the Fourth Amendment because a canine sniff is “relevant to the purpose of the stop” and the total duration of the stop, from when the vehicle appeared at the checkpoint until the dog alerted and Mr. Tello consented to a search, was only about 30 seconds. *Id.* at 787-89. It noted that *Rodriguez* allows for stops of “tolerable duration” and, under *Martinez-Fuerte*, “an immigration stop may take up to five minutes.” *Id.*

This case thus presents the following question: May a Border Patrol agent working in the primary inspection lane of an interior immigration checkpoint extend the immigration stop beyond the “brief question or two and possibly the production of a document evidencing the right to be in the United States” permitted by *Martinez-Fuerte*, 428 U.S. at 558, without reasonable suspicion of an immigration violation or other crime, to allow time for a Border Patrol service canine to complete a free-air sniff of the vehicle?

This Court has provided very little guidance on this question. In *Martinez-Fuerte*, this Court justified the authorization of interior immigration checkpoints by balancing the public interest in controlling illegal immigration near the border against the limited nature of the intrusion upon individuals resulting by the checkpoint stops. *See* 428 U.S. at 556-60; *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 38-39 (2000). First, the Court determined that “the flow of illegal aliens cannot be controlled effectively at the border,” making interior checkpoints a reasonable method of controlling that flow. *See Martinez-Fuerte*, 428 U.S. at 556-57; *see also Edmond*, 531 U.S. at 38-39. Second, the checkpoint stops approved by the Court were brief, minimal intrusions on the interests of motorists. *See Martinez-Fuerte*, 428 U.S. at 556-60; *see also Edmond*, 531 U.S. at 38.

Martinez-Fuerte observed that stops at interior immigration checkpoints should require only “a response to a brief question or two and possibly the production of a document evidencing the right to be in the United States.” *Martinez-Fuerte*, 428 U.S. at 558 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)). These stops “should not be frightening or offensive,” causing nothing more than “some annoyance.” *Martinez-Fuerte*, 428 U.S. at 560. And, “the inspection is limited to what can be seen without a search.” *Id.* at 558.

More recently, in *Rodriguez*, the Court made clear that the permissible duration of any non-arrest detention is firmly linked to its justifying purpose, and is limited to “the time needed to handle the matter for which the stop was made.” 135 S. Ct. at 1612. “The scope of the detention must be carefully tailored to its underlying justification” and “may

last no longer than is necessary to effectuate that purpose.” *Id.* at 1614 (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)); *see also Terry v. Ohio*, 392 U.S. 1, 20 (1968) (officer’s action must be “justified at its inception” and “reasonably related in scope to the circumstances which justified the interference in the first place”). Authority for the seizure ends when tasks tied to the original purpose of the stop “are—or *reasonably should have been*—completed.” *Rodriguez*, 135 S. Ct. at 1614 (emphasis added).

Rodriguez also held that an officer may not investigate crimes different from the original purpose of the stop in a way that extends the stop. *See Rodriguez*, 135 S. Ct. at 1615-16. Instead, the Court recognized that “[o]n scene investigation into other crimes,” different from the original justification for the stop, “detours from that mission” and renders a stop unlawful if such a detour “adds time to the stop.” *Id.* at 1615. Although an officer may perform unrelated tasks during an otherwise lawful stop, “he may not do so in a way that prolongs the stop,” absent independent reasonable suspicion to do so. *Id.* at 1615. Importantly, this no-detour principle applies regardless of the length of time added to the stop. *See id.* at 1615-16.

Lastly, in *Rodriguez*, the Court specifically rejected the principle that the reasonableness of the length of a stop could be judged by reference to some objective standard of the length of time a particular sort of stop should take, but instead must be judged by the officer’s actual diligence in pursuing the purpose of the stop. *See Rodriguez*, 135 S. Ct. at 1616. The Court expressly rejected the approach taken by the Eighth Circuit, which approved traffic stops as reasonable regardless of what actions the officer took

unrelated to the purpose of the stop, so long as the overall stop lasted approximately as long as other stops of that kind and any additional intrusion was *de minimis*. *See id.* at 1615-16. Instead, the Court emphasized that an officer “always has to be reasonably diligent” in his investigation, and held that “[t]he reasonableness of a seizure . . . depends on what the police in fact do.” *Id.* at 1616 (citing *Knowles v. Iowa*, 525 U.S. 113, 115-17 (1998)). If an officer can complete inquiries about the underlying justification for the stop “expeditiously,” then “that is the amount of ‘time reasonably required to complete the stop’s mission.’” *Rodriguez*, 135 S. Ct. at 1616 (citing *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). An officer may not earn “bonus time” to investigate whatever he wants by completing the original mission of the stop more quickly than usual, and then using additional time to pursue an unrelated investigation. *See Rodriguez*, 135 S. Ct. at 1616.

In the wake of *Martinez-Fuerte* and *Rodriguez*, one would expect that a court judging the constitutionality of a stop at an interior immigration checkpoint would scrutinize the nature and purpose of the primary agent’s questions to determine whether that agent prolonged the stop beyond the “brief question or two and possibly the production of a document evidencing the right to be in the United States” permitted by *Martinez-Fuerte*, 428 U.S. at 558, and embarked on the type of “detour” that “adds time to the stop,” which is prohibited by *Rodriguez*, 135 S. Ct. at 1615-16. Additional questioning that is designed to buy time for a Border Patrol service canine to complete a free-air sniff of the vehicle would certainly seem to be a “detour” adding time to the stop, especially since “the inspection is limited to *what can be seen* without a search.” *Martinez-Fuerte*, 428 U.S. at 560 (emphasis added).

But the Fifth Circuit takes a different approach. It simply asks whether the duration of the immigration checkpoint stop was “tolerable” in the sense that it was “circumscribed by the reason for the stop,” bearing in mind that an immigration checkpoint stop may take up to five minutes. *See Tello*, 924 F.3d at 787-89; *United States v. Vallejo*, 772 Fed. Appx. 129, 2019 WL 2494535, at *1 (5th Cir. June 14, 2019) (unpublished) (same).² And according to the Fifth Circuit, a canine sniff is “relevant to the purpose of the stop” and “fits squarely within the officials’ discretion when conducting their inspection,” even if there is no articulable suspicion of an immigration violation or other crime. *Tello*, 924 F.3d at 789.

On the latter point, the Fifth Circuit’s approach is in direct conflict with that of the Ninth and Tenth Circuits. The Ninth Circuit has held that a brief further detention, following completion of an immigration inspection, to allow a dog “trained to alert to hidden persons or narcotics” to sniff the vehicle must “be predicated on an articulable suspicion, or a minimal showing of suspicion, of criminal activity.” *United States v. Taylor*, 934 F.2d 218, 219, 221 (9th Cir. 1991) (cleaned up and internal citation omitted); *see, e.g., id.* (holding that a Border Patrol agent’s observation that motorist became increasingly nervous and uneasy at end of initial check for illegal aliens constituted minimal, articulable suspicion necessary to justify brief further delay for dog sniff). The Tenth Circuit has similarly recognized that, in this context, further detention for the purpose of conducting a

² *Martinez-Fuerte* recognized that the “the average length of an investigation in the secondary inspection area [of the San Clemente checkpoint in 1976] is three to five minutes.” *Martinez-Fuerte*, 428 U.S. at 546-47.

canine sniff must be based on reasonable suspicion, consent, or probable cause. *See United States v. Massie*, 65 F.3d 843, 848 (10th Cir. 1995); *see also id.* (“Although consent is not required for a dog sniff of a lawfully detained vehicle [at the checkpoint] . . . it is required for continued detention beyond the lawful period.”) (cleaned up).

The Fifth Circuit’s opinion in this case is also in conflict with the law of the Tenth Circuit insofar as it holds that questions about cargo and travel are always “permissible.” *Tello*, 924 F.3d at 787. In the Tenth Circuit, questioning on “vehicle ownership, cargo, destination, and travel plans” is permitted only “as long as such questions are reasonably related to the agent’s duty to prevent the unauthorized entry of individuals into this country and to prevent the smuggling of contraband.” *Massie*, 65 F.3d at 848 (internal citation omitted).

Whether an agent may extend the checkpoint stop, without reasonable suspicion, to allow time for a service canine to complete a free-air sniff of the vehicle is an important question of federal law, on which the United States courts of appeals are split, that should be settled by the Court at this time. *See* Sup. Ct. R. 10(a) & (c). “The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop.” *Martinez-Fuerte*, 428 U.S. at 566-67. Appropriate limitations are crucial, as these checkpoints “detain thousands of motorists” in “a dragnet-like procedure,” and “[t]he motorist whose conduct has been nothing but innocent . . . surely resents his own detention and inspection.” *Id.* at 571 (Brennan, J., dissenting).

This Court should address this important question now, rather than later, given the “strong hints that the Constitution is being routinely violated at these checkpoints.” *United States v. Soyland*, 3 F.3d 1312, 1316–1320 (9th Cir. 1993) (Kozinski, J., dissenting) (“There’s reason to suspect the agents working these checkpoints are looking for more than illegal aliens. If this is true, it subverts the rationale of *Martinez-Fuerte* and turns a legitimate administrative search into a massive violation of the Fourth Amendment Given the strong hints that the Constitution is being routinely violated at these checkpoints, we owe it to ourselves and the public we serve to look into the matter.”). Indeed, as was reported in *The New York Times* earlier this year,

. . . [t]he agents at [these interior checkpoints] arrest relatively few unauthorized migrants The agents at the checkpoints deal largely with seizures of marijuana and other drugs from motorists.

The checkpoints have emerged as a source of contention with human rights groups, which have contended that Border Patrol agents routinely ignore their legal authority during the traffic stops to search people without warrants. By law, agents must have probable cause to search the interior of a vehicle, though an alert from a drug-sniffing dog ‘legitimately’ alerts to the presence of drugs, according to the American Civil Liberties Union.

Simon Romero, *Border Patrol Takes a Rare Step in Shutting Down Inland Checkpoints*, N.Y. Times (March 25, 2019), available at: <https://www.nytimes.com/2019/03/25/us/border-checkpoints-texas.html> (last visited July 30, 2019).

Other news sources have similarly reported that in recent years a primary use of these fixed interior immigration checkpoints—including the Falfurrias checkpoint—has been drug interdiction. See, e.g., Robert Moore, *Border Patrol Inland Checkpoints Shut Down So Agents Can Help Process Asylum Seekers*, Texas Monthly (March 23, 2019), available at:

<https://www.texasmonthly.com/news/border-patrol-inland-checkpoints-shut-down-so-agents-can-help-process-asylum-seekers/> (last visited Aug. 9, 2019) (“The primary use of the checkpoints in recent years has been drug seizures . . . In fiscal year 2018, the Border Patrol reported seizing 41,863 pounds of marijuana, 2,717 pounds of cocaine[,], 405 pounds of heroin, 6,366 pounds of methamphetamine[,], and 200 pounds of fentanyl at its checkpoints.^[3]”); Cedar Attanasio, Associated Press, *U.S. Shuts Interior Checkpoints to Focus on Mexico Border*, available at: <https://www.foxnews.com/us/us-shuts-interior-checkpoints-to-focus-on-mexico-border> (last visited July 30, 2019) (“While [interior immigration] checkpoints account for only a sliver of Border Patrol arrests – 2 percent from 2013 to 2016, they also handled 43 percent of drug busts during that time, according to the GAO.^[4]”); Eric Westervelt, National Public Radio (NPR), *As Migrants Stream in at the Border, Inland Checkpoints Feel the Strain*, available at: <https://www.npr.org/2019/06/12/731797754/as-migrants-stream-in-at-the-border-inland-checkpoints-feel-the-strain> (last visited July 30, 2019) (“Agents [at the Falfurrias checkpoint] are also on the lookout for illegal drugs. The new checkpoint has more drug-detecting dogs and new state-of-the-art technology to detect contraband or people.”).

To be sure, in Mr. Tello’s case the Fifth Circuit also decided that his consent to the search was valid. *Tello*, 924 F.3d at 789. But this does not make his case a poor vehicle for

³ See U.S. Customs and Border Protection, *U.S. Border Patrol Nationwide Checkpoint Drug Seizures in Pounds*, available at: <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/usbp-drug-seizures-sector> (last visited July 30, 2019) (reporting these drug seizures).

⁴ See U.S. Government Accountability Office, Report to Congressional Requesters (GAO-18-50), *Border Patrol, Issues Related to Agent Deployment Strategy and Immigration Checkpoints* (Nov. 2017), available at: <https://www.gao.gov/assets/690/688201.pdf> (last visited July 30, 2019).

deciding the question presented in his petition for certiorari. As noted above, the Fifth Circuit’s rejection of his argument that his consent was not an “independent act of free will” was based in part on its earlier determination that the agent “did not unreasonably seize Tello.” *Id.* Since the Fifth Circuit’s decision on the validity of the consent was tainted by its earlier determination that the seizure at the checkpoint was not unreasonably prolonged, the issue of consent should be remanded for further consideration after this Court decides the important issue that is presented in this petition for certiorari.

This Court should, therefore, grant Mr. Tello’s petition for certiorari to resolve this important question concerning the Fourth Amendment’s limitations on the scope of immigration-checkpoint stops. *See* Sup. Ct. R. 10(a) & (c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: August 13, 2019

Respectfully submitted,

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924 F.3d 782

United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff - Appellee

v.

Rafael TELLO, Defendant - Appellant

No. 18-40347

|

FILED May 21, 2019

Synopsis

Background: Defendant charged with transporting illegal aliens within the United States by means of motor vehicle moved to suppress evidence discovered during stop of his vehicle at immigration checkpoint. The United States District Court for the Southern District of Texas, [Nelva Gonzales Ramos](#), J., denied suppression motion and subsequently convicted defendant as charged, and defendant appealed.

Holdings: The Court of Appeals, [Carl E. Stewart](#), Chief Judge, held that:

[1] questions that border patrol agent asked to driver of tractor-trailer that had been stopped at immigration checkpoint did not impermissibly extend this initial stop without reasonable suspicion of criminal activity, and

[2] defendant validly consented to search of vehicle at secondary inspection site.

Affirmed.

West Headnotes (16)

[1] Criminal Law

🔑 Review De Novo

Criminal Law

🔑 Evidence wrongfully obtained

On appeal challenging denial of motion to suppress, the Court of Appeals reviews factual findings for clear error and legal conclusions de novo.

[Cases that cite this headnote](#)

[2] Criminal Law

🔑 Reception of evidence

On appeal challenging denial of motion to suppress, the Court of Appeals views evidence in light most favorable to prevailing party.

[Cases that cite this headnote](#)

[3] Criminal Law

🔑 Evidence wrongfully obtained

On appeal challenging denial of motion to suppress, the Court of Appeals gives particular deference to district court's findings where the court's denial of the suppression motion was based on live testimony.

[Cases that cite this headnote](#)

[4] Searches and Seizures

🔑 Fourth Amendment and reasonableness in general

Ordinarily, a search or seizure is unreasonable under the Fourth Amendment in the absence of individualized suspicion of wrongdoing. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[5] Aliens, Immigration, and Citizenship

🔑 Checkpoints

At a fixed immigration checkpoint, vehicles may be briefly detained, and occupants may be questioned, in furtherance of the checkpoint's primary purpose of identifying illegal immigrants, without the need for either a warrant or any individualized reasonable suspicion. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[6] Aliens, Immigration, and Citizenship

🔑 Checkpoints

Permissible duration of stop at immigration checkpoint includes time necessary to inquire

about citizenship status, ascertain number and identity of vehicle's occupants, request documentation, and seek consent to extend the detention. [U.S. Const. Amend. 4](#).

[1 Cases that cite this headnote](#)

[7] Aliens, Immigration, and Citizenship

 [Checkpoints](#)

In assessing validity of stop at immigration checkpoint, courts will focus on duration of stop and will not parse too closely the relevance of the particular questions asked based on an after-the-fact standard for admissibility at trial. [U.S. Const. Amend. 4](#).

[1 Cases that cite this headnote](#)

[8] Aliens, Immigration, and Citizenship

 [Checkpoints](#)

Stop at immigration checkpoint may not exceed its permissible duration unless the officer has reasonable suspicion. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[9] Aliens, Immigration, and Citizenship

 [Checkpoints](#)

Customs Duties

 [Scope and Nature; Successive or Secondary Searches](#)

Border Patrol agents may conduct canine sniff to search for drugs or concealed aliens at immigration checkpoints, as long as the sniff does not lengthen the stop beyond the time necessary to verify the immigration status of vehicle's passengers. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[10] Aliens, Immigration, and Citizenship

 [Checkpoints](#)

Critical question when assessing validity of canine sniff conducted in connection with stop at immigration checkpoint is not whether the canine sniff occurred before or after the purpose of the stop was completed, but whether

conducting the sniff prolonged the purpose of the stop. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[11] Aliens, Immigration, and Citizenship

 [Checkpoints](#)

Customs Duties

 [Scope and Nature; Successive or Secondary Searches](#)

Questions that border patrol agent asked to driver of tractor-trailer that had been stopped at immigration checkpoint, about what he was hauling and whether he had made any stops, after agent had already inquired about driver's immigration status and been satisfied with his answer that he was United States citizen, did not impermissibly extend this initial stop without reasonable suspicion of criminal activity, though agent acknowledged that reason that he had asked these questions, after agent was satisfied with driver's citizenship status, was chiefly to give dog that was in process of conducting sniff more time to do so; questions were permissible, and total duration of initial stop, from when vehicle appeared at checkpoint until dog alerted and driver consented to search at secondary inspection site, was only about 30 seconds. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[12] Aliens, Immigration, and Citizenship

 [Checkpoints](#)

Questions about travel, including origin and destination, are commonplace for agent to ask during a stop at immigration checkpoint. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[13] Aliens, Immigration, and Citizenship


 [Checkpoints](#)

Border patrol officers must have wide discretion in selecting motorists to be diverted for brief questioning at immigration checkpoints, and the incidents of checkpoint operation also must be

committed to discretion of such officials. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[14] Arrest

 Duration of detention and extent or conduct of investigation or frisk

Fourth Amendment allows for investigatory stops of a tolerable duration, a duration that is circumscribed by the reason for the stop. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[15] Aliens, Immigration, and Citizenship

 Checkpoints

Customs Duties

 Scope and Nature; Successive or Secondary Searches

Driver of tractor-trailer to which dog alerted at stop conducted at immigration checkpoint validly consented to search of vehicle at secondary inspection site, where border patrol agents did not unreasonably seize driver and were not holding any of driver's documents, and there was nothing in record to suggest that driver did not voluntarily answer agents' questions and consent to their requests. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[16] Searches and Seizures

 Custody, restraint, or detention issues

Whether consent to search given after an unconstitutional detention is sufficient to dissipate the taint of that prior detention is analyzed under a two-pronged inquiry, based on: (1) whether the consent was freely and voluntarily given, and (2) whether the consent was an independent act of free will. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

***784** Appeal from the United States District Court for the Southern District of Texas, Nelva Gonzales Ramos, U.S. District Judge

Attorneys and Law Firms

Eileen K. Wilson, Carmen Castillo Mitchell, Assistant U.S. Attorneys, U.S. Attorney's Office, Southern District of Texas, for Plaintiff - Appellee.

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Before STEWART, Chief Judge, and DAVIS and ELROD, Circuit Judges.

Opinion

CARL E. STEWART, Chief Judge:

A federal grand jury returned a three-count indictment charging Rafael Tello with transporting an illegal alien within the United States by means of a motor vehicle. At an immigration checkpoint, the aliens were found hidden in a storage compartment in the sleeper area of the tractor-trailer that Tello was driving. The case proceeded to trial on the first two counts. Midway through the trial, after the two Border Patrol agents had testified, Tello moved to suppress the evidence found during ***785** the immigration-checkpoint stop. The district court denied the motion and the jury found Tello guilty of both counts. Tello was sentenced to concurrent terms of 27 months of imprisonment and two years of supervised release. For the reasons below, we AFFIRM.

I.

Shortly before 1:00 a.m. on August 1, 2017, a tractor-trailer entered the primary inspection lane at the U.S. Border Patrol checkpoint south of Falfurrias, Texas. Agent Villanueva was on duty in the primary inspection lane. A Border Patrol service canine and its handler were working with him.

Tello was driving the tractor-trailer. Agent Villanueva's first question was: "[A]re you a citizen – are you a United States citizen?" He replied that he was a naturalized citizen. Agent

Villanueva was satisfied with this answer so he did not ask for proof of citizenship.

Agent Villanueva next asked Tello what he was hauling in the trailer. He asked this question to give the Border Patrol service canine more time to conduct a canine sniff of the tractor-trailer:

Because at that point, kind of I looked – because usually when I start [questioning], I also keep in mind that I have the K9 handler working with me; because sometimes, you know, the vehicles coming up to our inspection, and the dog might be alerting right away, but – and sometimes, we question these occupants. And we might be doing a simple question, so we might relieve the vehicle right away. But at this time, the K9 [handler] kind of glanced over at me, you know, give me a little bit more time. So that's kind of why I questioned a little bit more.

Tello answered that he was hauling carrots and handed the agent a bill of lading. Agent Villanueva asked him whether he had made any stops after loading the carrots in the trailer. Tello answered that he was coming from Pharr, Texas and had not made any stops. Agent Villanueva testified that Tello did not appear to be nervous and there was no indication that he was hiding anything.

The canine handler told Agent Villanueva that he needed to send the tractor-trailer to the secondary inspection area. The agent then asked Tello for consent to search and backscatter (x-ray) the tractor-trailer, and he agreed. This happened about 30 seconds into the checkpoint stop.

In the secondary inspection area, another agent (Agent Reyes) boarded the tractor-trailer to conduct a physical inspection in advance of the backscatter inspection, a routine precaution to minimize the risk of exposing possible occupants to radiation. Under the bed in the sleeper area of the tractor-trailer was a small hole through which Agent Reyes could see a person's torso. He unlatched the bed and found three persons hiding

in the storage compartment. These persons were citizens of Honduras who were illegally present in the United States.

On August 23, 2017, a federal grand jury returned a three-count indictment charging Tello with transporting an illegal alien within the United States by means of a motor vehicle in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and (v)(II) and (B)(ii).

On November 16, 2017, the case proceeded to a jury trial on the first two counts.¹ During the one-day trial, the government *786 presented Agents Villanueva's and Reyes's testimony on the details of the immigration-checkpoint inspection. Midway through the trial, after the agents testified, Tello moved to suppress the evidence found during the immigration-checkpoint stop.² Tello argued that the agents had impermissibly extended the immigration-checkpoint stop beyond its legitimate, limited immigration purpose before asking him for his consent to search the tractor-trailer.

The district court denied the motion to suppress. The jury found Tello guilty of both counts. On April 11, 2018, the district court sentenced him to concurrent terms of 27 months' imprisonment and two years' supervised release. Tello appeals the district court's denial of his motion to suppress.

II.

[1] [2] [3] In reviewing the denial of a motion to suppress, we review factual findings for clear error and legal conclusions de novo. *United States v. Rodriguez*, 702 F.3d 206, 208 (5th Cir. 2012). We review the evidence “in the light most favorable to the prevailing party.” *United States v. Wise*, 877 F.3d 209, 215 (5th Cir. 2017) (citation omitted). We give particular deference to findings where the court's denial of the suppression motion was based on live testimony because the judge had the opportunity to observe the witness's demeanor. *United States v. Tovar*, 719 F.3d 376, 384 (5th Cir. 2013); see also *United States v. Wright*, 777 F.3d 769, 773 (5th Cir.) (same), cert. denied, — U.S. —, 135 S. Ct. 2821, 192 L.Ed.2d 860 (2015).

III.

[4] [5] [6] “The Fourth Amendment protects ‘[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ ” *District of Columbia v. Wesby*, — U.S. —, 138 S. Ct. 577, 585, 199 L.Ed.2d 453 (2018) (brackets in original) (quoting U.S. Const. amend. IV). Ordinarily, a search or seizure is unreasonable “in the absence of individualized suspicion of wrongdoing.” *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) (citation omitted). At a fixed checkpoint, however, which has as its primary purpose identifying illegal immigrants, vehicles may be briefly detained in furtherance of that purpose, and the occupants questioned, without either a warrant or any individualized reasonable suspicion. *United States v. Jaime*, 473 F.3d 178, 181 (5th Cir. 2006). The permissible duration of the stop includes the time necessary to inquire about citizenship status, ascertain the number and identity of the vehicle’s occupants, request documentation, and seek consent to extend the detention. *United States v. Machuca-Barrera*, 261 F.3d 425, 433 (5th Cir. 2001).

[7] [8] We have avoided scrutinizing the questions a Border Patrol agent asks at the checkpoint, instead focusing on the duration of the stop:

We decline a protocol that measures the pertinence of questions to the immigration purpose by an after-the-fact standard for admissibility at trial. So long as a checkpoint is validly created, policing the duration of the stop is the most practical enforcing discipline of purpose. The key is the rule that a stop may not *787 exceed its permissible duration unless the officer has reasonable suspicion. We deploy a test that is both workable and which reinforces our resistance to parsing the relevance of particular questions. To scrutinize too closely a set of questions asked by a Border Patrol agent would engage judges in an enterprise for which they are ill-equipped and would court inquiry into the subjective purpose of the officer asking the questions.

Id. at 434 (footnote omitted); *see also Jaime*, 473 F.3d at 183 (“[I]t is the length of the detention, not the questions asked, that makes a specific stop unreasonable.”) (citation omitted); *United States v. Castille*, 478 F. App’x 868, 869 (5th Cir. 2012) (per curiam) (unpublished) (“The scope and duration of the immigration checkpoint stop remained valid even though [the agent] had concluded that both [defendants] were United States citizens before he asked for consent to search.”).

[9] [10] Border Patrol agents may conduct a canine sniff to search for drugs or concealed aliens at immigration checkpoints so long as the sniff does not lengthen the stop beyond the time necessary to verify the immigration status of a vehicle’s passengers. *United States v. Ventura*, 447 F.3d 375, 378 (5th Cir. 2006). The critical question is not whether the canine sniff occurs before or after the purpose of the stop is completed, but whether conducting the sniff prolongs the purpose of the stop. *Rodriguez v. United States*, — U.S. —, 135 S. Ct. 1609, 1616, 191 L.Ed.2d 492 (2015).

[11] Tello avers that the immigration-inspection purpose of the checkpoint stop was completed when Agent Villanueva received the answer that Tello is a United States citizen and was satisfied by that answer. He argues that, as the agent admitted at trial, the questions about what he was hauling in his trailer and whether he had any stops after loading the trailer were unrelated to his citizenship. Rather, the agent’s purpose in asking the questions was to give the Border Patrol service canine more time to conduct a canine sniff of the tractor-trailer to look for violations of immigration law, which Tello maintains extended the stop beyond its permissible scope and made it unconstitutional.

[12] Viewing the evidence in the light most favorable to the government, *Wise*, 877 F.3d at 215, we find that the canine sniff here did not prolong the immigration stop. Tello does not dispute that the stop lasted approximately 30 seconds. Agent Villanueva asked Tello about his citizenship, cargo, and travel, all of which are permissible questions. As we have stated, “questions about travel including origin and destination would be commonplace for an agent to ask during an immigration inspection.” *United States v. Alvarez*, 750 F. App’x 311, 313 (5th Cir. 2018) (per curiam) (unpublished).

When Agent Villanueva started questioning Tello about his citizenship, the canine and its handler were already circling the tractor-trailer. Therefore, Agent Villanueva’s questioning occurred simultaneously with the canine sniff. At most, mere seconds elapsed before the dog alerted and Tello consented to

a search. See *United States v. McMillon*, 657 F. App'x 326, 330 (5th Cir. 2016) (per curiam) (unpublished) (noting that if an agent requests consent to extend the duration of a checkpoint stop, or if probable cause arises, then the stop's countable duration is measured only up until the time of consent or probable cause).

Moreover, the duration of the stop was significantly less than or comparable to the time frames we have found acceptable for immigration stops. See *788 *Machuca-Barrera*, 261 F.3d at 435 (holding that questions that “took no more than a couple of minutes” were “within the permissible duration of an immigration checkpoint stop”); *McMillon*, 657 F. App'x at 331 (“A checkpoint stop lasting approximately thirty to forty seconds to allow border patrol agents to ask citizenship and travel questions and to request consent for a search is of a sufficiently limited duration under our precedent.”).³ However, Tello criticizes the length-based approach to judging the permissible duration of a stop created by *Machuca-Barrera* and avows that it cannot survive *Rodriguez*.

Tello's argument overextends *Rodriguez*. *Rodriguez* involved a traffic stop. 135 S. Ct. at 1612. The officer checked the defendant's license and registration, the passenger's license, and ran a records check on them. *Id.* at 1613. The officer then called for a second officer and issued a warning ticket. *Id.* Although “all the reason[s] for the stop” were “out of the way,” the defendant was not “free to leave” and refused to allow the officer to walk his dog around the SUV. *Id.* at 1613 (brackets in original). When the second officer arrived, the original officer retrieved his dog who alerted. *Id.* Approximately seven or eight minutes had elapsed since the officer had issued the warning ticket. *Id.* A search “revealed a large bag of methamphetamine.” *Id.* The overall duration of the stop was 29 minutes. *Id.* at 1617 (Thomas, J., dissenting).

The defendant moved to suppress the evidence and the magistrate judge found that, because the post-warning detention and search were not supported by reasonable suspicion, a Fourth Amendment violation had occurred. *Id.* at 1613. However, the magistrate judge concluded that, consistent with Eighth Circuit precedent, the wait was a de minimis intrusion. *Id.* Adopting the magistrate judge's factual findings and legal conclusions, the district court denied the motion, and the Eighth Circuit affirmed. *Id.* at 1613–14. The Supreme Court granted certiorari on the question of “whether police routinely may extend an otherwise-completed traffic

stop, absent reasonable suspicion, to conduct a dog sniff.” *Id.* at 1614.

The Supreme Court reversed, holding that authority for the traffic stop ends “when tasks tied to the traffic infraction are—or reasonably should have been—completed.” *Id.* In addition to determining whether to issue a traffic ticket, an officer “may conduct certain unrelated checks during an otherwise lawful traffic stop,” but not in a way that “measurably extend[s] the duration of the stop.” *Id.* at 1615 (citation omitted). These inquiries, such as checking a driver's license, registration, and insurance and determining whether there are outstanding warrants, further the purpose of the traffic laws and *789 ensure “that vehicles on the road are operated safely and responsibly.” *Id.*

[13] Tello argues that *Rodriguez* prohibits officers at immigration checkpoints from asking anything other than a brief question or two directly about citizenship and for supporting documentation. However, the Supreme Court recognized in *United States v. Martinez-Fuerte* that an immigration stop may take up to five minutes, and the intrusion, which can include referral to secondary inspection, “is sufficiently minimal that no particularized reason need exist to justify it.” 428 U.S. 543, 563, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). “Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved,” *id.* at 563–64, 96 S.Ct. 3074, and “incidents of checkpoint operation also must be committed to the discretion of such officials.” *Id.* at 559 n.13, 96 S.Ct. 3074.

[14] *Rodriguez* does not change this law. Notably, *Rodriguez* dealt with a traffic stop; this is an immigration stop where canine sniffs are more relevant to the purpose of the stop. Cf. *Rodriguez*, 135 S. Ct. at 1615 (“[A] dog sniff is not fairly characterized as part of the officer's traffic mission.”). *Rodriguez* also does not dictate a script that agents must follow. Rather, *Rodriguez* simply allows for stops of a “tolerable duration”—a duration that is circumscribed by the reason for the stop. *Id.* at 1614. The Supreme Court cautioned against investigation into other possible crimes which add time to the stop and can make the continued seizure unconstitutional. *Id.* at 1615–16.

There is no evidence in this case that the canine was looking for drugs or other possible crimes. Agent Villanueva testified that the handler and canine were conducting an immigration inspection. Agent Villanueva agreed that he “wanted to make sure that the dog had time to finish its inspection of the

vehicle” and that it “probably takes a little more time for a Border Patrol K9 to sniff a tractor-trailer than a four-door sedan.” The canine handler noted he was trying to determine whether “there’s an immigration violation, even something going on in a vehicle that you can’t see, because someone’s hidden somewhere[.]” This type of checkpoint operation, lasting approximately 30 seconds, is reasonable and fits squarely within the officials’ discretion and case law. See *Martinez-Fuerte*, 428 U.S. at 557, 96 S.Ct. 3074 (“While the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited.”).

[15] Tello makes a secondary argument: his consent did not dissipate the taint of the prior constitutional violation. Because we find that the stop was constitutionally permissible, we are not obligated to reach the consent issue. See *United States v. Brigham*, 382 F.3d 500, 512 (5th Cir. 2004) (en banc) (“Absent a Fourth Amendment violation, [the defendant’s] consent to search the vehicle was not unconstitutionally tainted.”). Nevertheless, we note that Tello gave valid consent.

[16] Consent given after an unconstitutional detention is analyzed under a two-pronged inquiry: “(1) whether the consent was freely and voluntarily given; and (2) whether the consent was an independent act of free will.” *United States v. Macias*, 658 F.3d 509, 522 (5th Cir. 2011). As previously discussed, Agent Villanueva did not unreasonably seize Tello. Agent Villanueva was not holding any of Tello’s documents, and “[t]he record provides no basis for finding that he did not voluntarily answer the officers’ questions and consent to their requests.” *Wise*, 877 F.3d at 222. As such, the validity of Tello’s consent is without doubt.

*790 IV.

The district court’s judgment is AFFIRMED.

All Citations

924 F.3d 782

Footnotes

- 1 The government moved to dismiss the third count in the indictment because the alien was a juvenile when he was taken into custody.
- 2 Motions to suppress evidence must be made before trial. *Fed. R. Crim. P. 12(b)(3)(C)*. A court can consider an untimely motion if the party shows good cause. See *Fed. R. Crim. P. 12(c)(3)*. Tello does not specifically mention good cause, but defense counsel stated that he was not aware until Agent Villanueva testified that when he completed his inspection at the primary lane, Tello was detained to allow the dog to continue to search the vehicle.
- 3 See also *United States v. Hipolito-Ramirez*, 657 F. App’x 271, 272–73 (5th Cir. 2016) (per curiam) (unpublished) (rejecting argument that one minute between investigation of immigration status and consent to search suitcase was unreasonable); *Castille*, 478 F. App’x at 869 (noting that where agent spent 30 seconds asking each defendant about his citizenship status and for consent to search, stop “lasted no longer than necessary to fulfill its immigration-related purpose”) (citation omitted); *United States v. Hinojosa-Echavarria*, 250 F. App’x 109, 113 (5th Cir. 2007) (per curiam) (unpublished) (observing that one-to-one and one-half minute stop was within the time approved in *Machuca-Barrera* and did not exceed the permissible duration); *United States v. Reyes*, 243 F. App’x 858, 859 (5th Cir. 2007) (per curiam) (unpublished) (finding that two to three minute inspection was a “brief time” within the “permissible duration”); *Jaime*, 473 F.3d at 185 (holding that duration of detention from first question asked until defendant gave consent to search her bag was less than half a minute and was not excessive).

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