

APPENDIX

APPENDIX

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FILED

United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

December 2, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JESUS GOMEZ-ARZATE,

Defendant - Appellant.

No. 19-2119

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 19-2121

GUILLERMO MARTINEZ-TORRES,

Defendant - Appellant.

**Appeal from the United States District Court
for the District of New Mexico
(D.C. Nos. 1:18-CR-01960-WJ-2 and 1:18-CR-01960-WJ-1)**

Sylvia Baiz, Assistant Federal Public Defender, Albuquerque, New Mexico, for Defendant-Appellant Martinez-Torres; and Michael Garey, Santa Ana, California for Defendant-Appellant Gomez-Arzate.

Nicholas Ganjei, Assistant United States Attorney (and John C. Anderson, United States Attorney, on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee.

Before **LUCERO, KELLY, and BACHARACH**, Circuit Judges.

KELLY, Circuit Judge.

Defendant-Appellants Guillermo Martinez-Torres and Jesus Gomez-Arzate entered a conditional plea of guilty to conspiracy to possess with intent to distribute methamphetamine, 21 U.S.C. § 846, 841(b)(1)(A), reserving a right to appeal the district court's denial of their motions to suppress physical evidence and statements made during a traffic stop. See United States v. Martinez-Torres, No. 1:18-cr-1960 WJ-1, 2019 WL 113729 (D.N.M. Jan. 4, 2019). Each was sentenced to 63 months' imprisonment and five years of supervised release. On appeal, they contend that their initial traffic stop was invalid, the resulting detention was unlawfully extended and without valid consent, and the deputies' search of their car exceeded the scope of consent.¹ We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

Background

On the morning of May 17, 2018, defendants were driving their vehicle (a Kia Soul) eastbound on I-40. Bernalillo County Sheriff's Deputy Joshua Mora was conducting routine traffic enforcement. He noticed the defendants' vehicle swerving within the right-hand lane and crossing over the white shoulder line twice. He also noticed that the front driver's side tire appeared to be angled or out of alignment.

¹ We grant Mr. Gomez-Arzate's unopposed motion to incorporate Mr. Martinez-Torres' arguments pursuant to Federal Rule of Appellate Procedure 28(i).

After pulling the vehicle over and activating his audio recorder, Deputy Mora approached the passenger side window where Mr. Gomez-Arzate was seated. He immediately sensed a strong odor of air freshener. He attempted to explain to the defendants why he pulled them over, but realized there would be difficulty in communicating due to a language barrier. Upon request, Mr. Martinez-Torres provided a California driver's license, a Texas vehicle registration in the name of a third party, and proof of insurance. Deputy Mora then asked Mr. Martinez-Torres to exit the vehicle and join him on the passenger side.

About three minutes into the stop, Deputy Mora radioed Deputy Daniel Mauricio for assistance in translating. While waiting for Deputy Mauricio, Deputy Mora began filling out a warning citation. Mr. Martinez-Torres explained that the misaligned tire was due to a previous accident, and he asked Deputy Mora if he wanted to know the "motive of [their] trip." 3 Aplt. Gomez-Arzate App. 335. However, Deputy Mora told Mr. Martinez-Torres to hold off until Deputy Mauricio arrived.

Approximately 10 minutes into the stop, Deputy Mauricio arrived and explained to Mr. Martinez-Torres that Deputy Mora had seen the vehicle swerve and there appeared to be a problem with the left front tire. Mr. Martinez-Torres explained that a bent wheel was due to a previous accident.

The deputies then asked Mr. Martinez-Torres for permission to check the vehicle's VIN numbers and Mr. Martinez-Torres replied that it was "okay." Id. at 339. This request occurred about 11 minutes into the stop and approximately one

minute after Deputy Mauricio arrived. They also told Mr. Gomez-Arzate that they were going to check the VIN numbers, and he also said “okay.” Id. at 340.

While checking the VIN numbers, Deputy Mauricio asked Mr. Gomez-Arzate whether he could ask him some additional questions about his travel plans. Mr. Gomez-Arzate said “[o]h, yes,” id. at 340–41, and told the deputies that he and Mr. Martinez-Torres were traveling from California to Dalhart, Texas, then on to Dumas, Texas, both near Amarillo. When asked who owned the vehicle, Mr. Gomez-Arzate responded that it belonged to a man in Dumas, Texas who let them borrow it. They were travelling from California to Texas, staying three or four days to make a house habitable, and then returning with family.

About 15 minutes into the stop, the deputies told Mr. Martinez-Torres that they were going to give him back his documents as well as a warning citation for careless driving, N.M. Stat. § 66-8-114, and that he would not have to go to court or pay anything. Mr. Martinez-Torres signed the citation approximately 16 minutes into the stop.

As Mr. Martinez-Torres began walking back to his vehicle, Deputy Mora yelled to him, “Guillermo!” Id. at 346. When he walked back, the deputies asked, “do you understand you’re free to go? But we wanted to ask you some more questions, if that’s okay.” Id. And again, “[d]o you – do you understand that you are – you are free to go?” Id. Mr. Martinez-Torres responded “[y]es.” Id.

The deputies began asking him questions about their travel plans. Mr. Martinez-Torres told the deputies that they were travelling from Santa Ana,

California, to Amarillo, Texas. He and Mr. Gomez-Arzate were going for three or four days to see a house and visit friends. But, Mr. Martinez-Torres said that he did not know the name of the person they planned to visit. When asked who owned the vehicle, Mr. Martinez-Torres said that it was Mr. Gomez-Arzate's, and that they had picked it up in Amarillo and driven to California.

The deputies then returned to the vehicle to talk to Mr. Gomez-Arzate. They told him that they gave Mr. Martinez-Torres a warning and said, "we told him that he's free to go, and we're going to ask you more questions. Do you understand you're free to go? But we wanted to ask you some more questions, if that's fine with you." Id. at 353. Mr. Gomez-Arzate said that he understood and that it was no problem. Mr. Gomez-Arzate proceeded to reiterate their travel plans: they were going to Dumas, Dalhart, and Hartley, Texas, where there was a cattle ranch and they planned to clean a house. He obtained the vehicle from the ranch when his truck broke down. When asked the name of the owner of the vehicle, Mr. Gomez-Arzate said that he did not know the owner's name but knew the owner's friend, whose name was Jackie or Ezequiel.

The deputies turned back to Mr. Martinez-Torres and asked if he was responsible for everything in the vehicle. He claimed responsibility for only his clothes and bookbag. He denied having any drugs, weapons, or large bulk currency. The deputies then asked if they could search the car, but Mr. Martinez-Torres' response was inaudible on the recording.

While Mr. Martinez-Torres waited, Mr. Gomez-Arzate claimed responsibility for his bag and a cooler and also denied that the vehicle contained any drugs, weapons, or large bulk currency. Finally, the deputies asked him, “[c]an we check the car and your – your things?” Id. at 367. Mr. Gomez-Arzate responded, “[y]es, you can check.” Id.

The deputies provided each of the men with a Spanish consent-to-search form, which they signed. The deputies asked the men to stand about 25–50 yards away while they searched the vehicle and told Mr. Martinez-Torres that he was free to call his daughter. At this point the audio recording concluded, approximately 33 minutes after the initial stop, and the deputies began their search of the car.

During the search, they noticed that the car’s fender was not flush, so they removed it but later reattached it. One of the defendants even offered to assist with reattaching the fender. The deputies also removed the air filter, but nothing else was done to the engine. Finally, Deputy Mora noticed tooling marks on the right rear quarter panel, so he pulled back the panel slightly and discovered a circular void. He removed the panel and discovered two packages, wrapped in black tape. The packages contained approximately seven pounds of methamphetamine. The entire search of the vehicle lasted a total of 90 minutes.

Discussion

When reviewing a district court’s denial of a motion to suppress, we review findings of fact for clear error, and view the evidence in the light most favorable to

the government. United States v. Hernandez, 847 F.3d 1257, 1263 (10th Cir. 2017).

We review de novo the determination of whether the search and seizure were reasonable under the Fourth Amendment. Id.

A. Fourth Amendment

We first consider whether the traffic stop was invalid, whether the stop was unconstitutionally prolonged, and whether the deputies' search of the car exceeded the scope of consent. The Fourth Amendment provides: “[t]he 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. A traffic stop constitutes a “seizure” and “therefore must be conducted in accordance with the Fourth Amendment.” Heien v. North Carolina, 574 U.S. 54, 60 (2014).

a. Initial Justification for the Traffic Stop

At the outset, Mr. Gomez-Arzate and Mr. Martinez-Torres argue that the initial traffic stop was not justified, claiming that Deputy Mora did not have reasonable suspicion to initiate the traffic stop. The district court concluded that, by swerving within his lane and twice touching the solid white line, there was reasonable suspicion that Mr. Martinez-Torres violated two driving laws: New Mexico Statutes § 66-7-317(A) (driving on roadways laned for traffic) and § 66-8-114 (careless driving). Martinez-Torres, 2019 WL 113729, at *4–5. We agree that there was reasonable suspicion that Mr. Martinez-Torres violated the roadways-laned-for-traffic statute, and we need not address the other.

A traffic stop is reasonable if it is “justified at its inception and, in general, the officer’s actions during the stop must be reasonably related in scope to the mission of the stop itself.” United States v. Mayville, 955 F.3d 825, 829 (10th Cir. 2020) (quoting United States v. Cone, 868 F.3d 1150, 1152 (10th Cir. 2017)). A traffic stop is justified when the officer has “reasonable suspicion — that is, a particularized and objective basis for suspecting the particular person stopped of breaking the law.” Heien, 574 U.S. at 60.

New Mexico law provides that “a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.” N.M. Stat. Ann. § 66-7-317(A) (1978). Defendants contend that the initial stop was not justified by reasonable suspicion because, even if the car had touched the solid white line twice, Mr. Martinez-Torres had not violated § 66-7-317(A). In determining whether a violation occurs, New Mexico courts have adopted a totality of the circumstances approach that “takes into account whether there were any weather conditions, road features, or other circumstances that could have affected or interfered with a driver’s ability to keep his or her vehicle in a single lane.” State v. Siqueiros-Valenzuela, 404 P.3d 782, 787 (N.M. Ct. App. 2017). Here, the district court credited Deputy Mora’s account of the vehicle swerving and straddling the solid white line two times. See Martinez-Torres, 2019 WL 113729, at *5. Given that there were no additional circumstances — such as adverse weather conditions or

obstructions in the road, *id.* — it was objectively reasonable for Deputy Mora to conclude that Mr. Martinez-Torres violated § 66-7-317(A).

b. Deputies' Conduct During the Traffic Stop

We turn next to the defendants' argument that the deputies unreasonably prolonged the detention by asking questions related to their travel plans and checking the car's VIN number. This argument turns on "whether the stop's 'manner of execution unreasonably infringe[d]' upon Defendant's Fourth Amendment rights." United States v. Mayville, 955 F.3d 825, 829 (10th Cir. 2020) (alteration in original) (quoting Illinois v. Caballes, 543 U.S. 405, 407 (2005)).

The length of a traffic stop is analyzed in the context of the stop's "mission," which covers "address[ing] the traffic violation that warranted the stop and attend[ing] to related safety concerns." Rodriguez v. United States, 575 U.S. 348, 354 (2015) (citation omitted). The deputies' authority to seize the vehicle's occupants "ends when tasks tied to the traffic infraction are — or reasonably should have been — completed." *Id.* A traffic stop cannot be constitutionally prolonged unless "(1) the seized individual consents or (2) the officer has independent reasonable suspicion of criminal wrongdoing on behalf of the seized individual that justifies further investigation." United States v. Cortez, 965 F.3d 827, 833 (10th Cir. 2020).

A traffic stop's "mission" includes determining whether to issue a ticket and "ordinary inquiries incident to [the traffic] stop." Rodriguez, 575 U.S. at 355. These types of inquiries will include "checking the driver's license, determining whether

there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance.” Id. Furthermore, officers may take “negligibly burdensome precautions” in order to ensure their own safety during the stop. Id. at 356. Merely because officers could have possibly performed their task more quickly, does not, by itself, create a Fourth Amendment violation. Cortez, 965 F.3d at 837–38.

The district court broke the traffic stop into three segments. Minutes 0 to 11 occurred when Deputy Mora pulled over the vehicle, radioed Deputy Mauricio, and the officers explained to Mr. Martinez-Torres the reason he was pulled over. Minutes 11 to 16 involved the deputies checking the VIN numbers on the car, asking the defendants about their travel plans, and issuing Mr. Martinez-Torres the warning citation. Finally, minutes 16 to 33 of the stop involved further questioning about the defendants’ travel plans and concluding with signed consent-to-search forms.

i. Minutes 0 to 11

The first 11 minutes of the traffic stop were conducted in a constitutionally valid manner. Although Deputy Mora was able to obtain Mr. Martinez-Torres’ driver’s license, the car registration, and proof of insurance, he believed it was prudent to have a translator to facilitate communication.² This decision was entirely reasonable and did not impermissibly extend the stop. See United States v. Martinez,

² Counsel for Mr. Gomez-Arzate conceded during oral arguments that Deputy Mora could call Deputy Mauricio in order to translate. See Oral Argument at 14:00, United States v. Martinez-Torres, Nos. 19-2119, 19-2121 (10th Cir. argued Sept. 24, 2020), <https://www.ca10.uscourts.gov/oralarguments/19/19-2121.mp3>.

983 F.2d 968, 976 (10th Cir. 1992) (stating that the circumstances of the traffic stop justified calling a Spanish-speaking officer to assist in questioning); see also United States v. Ruiz, 412 F.3d 871, 880 (8th Cir. 2005) (concluding that a stop that was extended 10 minutes so a Spanish-speaking officer could arrive was reasonable in scope and duration). Indeed, within the first minute of Deputy Mauricio arriving, he was able to explain to Mr. Martinez-Torres why he was pulled over, and Mr. Martinez-Torres was able to explain the reason his front tire appeared out of place. Thus, the first 11 minutes of the traffic stop — most of which was spent waiting for Deputy Mauricio — did not violate the Fourth Amendment.

ii. Minutes 11 to 16

What occurred after the first 11 minutes forms much of the basis of defendants' objections. During this five-minute interval, the deputies asked Mr. Martinez-Torres and Mr. Gomez-Arzate whether they could check the VIN numbers. After Mr. Martinez-Torres said it was okay, Deputy Mauricio asked Mr. Gomez-Arzate whether the deputies could ask him some questions about their travel plans. Mr. Gomez-Arzate said, “[o]h, yes.” 3 Aplt. Gomez-Arzate App. 340–41. This questioning lasted about three minutes, at which time the deputies returned to Mr. Martinez-Torres to explain and issue the warning citation.

The defendants object to the VIN check and additional questions about their travel plans. They argue that the citation had already been written and explained 11 minutes in, such that the traffic stop had effectively been completed. The district court rejected the defendants' arguments concluding that questions about travel plans

and VIN searches are within the scope of a traffic stop and were permissible.

Martinez-Torres, 2019 WL 113729, at *5–7. We disagree because in this particular case the traffic stop had effectively been completed once Deputy Mora had completed the paperwork and Deputy Mauricio had translated the paperwork to Mr. Martinez-Torres.³ As a result, the traffic stop was improperly prolonged from minutes 11 to 16. See Rodriguez, 575 U.S. at 354 (“Authority for the seizure thus ends when tasks tied to the traffic infraction are — or reasonably should have been — completed.”).

However, this does not automatically mean the evidence should be suppressed. “Evidence will not be suppressed as fruit of the poisonous tree unless an unlawful search is *at least* the but-for cause of its discovery.” United States v. Chavira, 467 F.3d 1286, 1291 (10th Cir. 2006). A “but-for cause” is understood as the “factual nexus between the illegality and the challenged evidence.” Id. (quoting United States

³ With that said, the district court appears correct in its assessment that VIN searches and questions about travel plans can ordinarily be within the scope of a traffic stop. See, e.g., New York v. Class, 475 U.S. 106, 115 (1986) (“[A] demand to inspect the VIN, like a demand to see license and registration papers, is within the scope of police authority pursuant to a traffic violation stop.”); United States v. Moore, 795 F.3d 1224, 1229 (10th Cir. 2015) (“An officer may also generally inquire about the driver’s travel plans and ask questions”)(citation omitted); United States v. Williams, 271 F.3d 1262, 1267 (10th Cir. 2001) (“[W]e have repeatedly held (as have other circuits) that questions relating to a driver’s travel plans ordinarily fall within the scope of a traffic stop.”); see also United States v. Chavira, 467 F.3d 1286, 1289 n.1 (10th Cir. 2006) (explaining that there is no unlawful detention when the officer remains physically outside the car when examining the VIN). Here, though, the traffic stop had effectively been completed before the VIN search and questioning about travel plans.

v. Nava-Ramirez, 210 F.3d 1128, 1131 (10th Cir. 2000)). In Chavira, we held that there was no but-for causation because the unlawful VIN search “uncovered no contraband” and there was no connection between the cell phone officers discovered and the subsequent search. Id. at 1291–92. We also concluded that there was “no indication that the trooper would not have requested or obtained consent to search the truck but for the inspection of the VIN on the doorjamb.” Id. at 1292.

As in Chavira, there is no indication that Deputy Mora would not have requested (and obtained) consent to ask defendants additional questions. Deputy Mora testified that he had harbored suspicions from the outset of the stop based upon discrepancies in the driver’s documents, the overwhelming smell of air freshener, and the fact that defendants were travelling along a common contraband trafficking route. In contrast, he obtained largely innocuous information while performing the VIN search and briefly questioning Mr. Gomez-Arzate. It seems likely that Deputy Mora would have asked for consent to ask additional questions based on his initial suspicions even without the information he gleaned during minutes 11 to 16.

Moreover, we conclude that both defendants would have given voluntary consent for additional questioning regardless of what occurred during minutes 11 to 16. As the district court found, “[e]ach time the Deputies requested permission to do something, Defendants freely gave consent.” Martinez-Torres, 2019 WL 113729, at *12. Early on, Mr. Martinez-Torres asked Deputy Mora if he wanted to know the motive of the trip. There is no evidence suggesting coercion — the encounter was pleasant and cordial from start to finish. The defendants have simply failed to show

that “the evidence sought to be suppressed would not have come to light but for the government’s unconstitutional conduct.” Chavira, 467 F.3d at 1291 (quoting Navarez-Ramirez, 210 F.3d at 1131).

iii. Minutes 16 to 33

Next, we turn to what occurred after Deputy Mora returned Mr. Martinez-Torres’ documents and issued him a warning citation for careless driving. After issuing the citation, Mr. Martinez-Torres began walking back to the car when Deputy Mora turned around and yelled, “Guillermo!” 3 Aplt. Gomez-Arzate App. 346. Deputy Mora, through Deputy Mauricio, explained to Mr. Martinez-Torres that he was “free to go,” but asked if he could ask him some additional questions. After confirming that Mr. Martinez-Torres understood that he was free to go, the deputies began asking questions about their travel plans and who owned the vehicle. The deputies also went to Mr. Gomez-Arzate, who was sitting in the passenger’s seat of the car, and told him that they had issued Mr. Martinez-Torres a warning and that they told Mr. Martinez-Torres that he was free to go. The deputies then said to Mr. Gomez-Arzate, “[d]o you understand you’re free to go? But we wanted to ask you some more questions, if that’s fine with you.” Id. at 353. Mr. Gomez-Arzate responded that he understood and that it was no problem. At the conclusion of this additional questioning, both defendants signed a Spanish consent-to-search form.

Defendants contend that after the documents had been returned, the encounter did not become consensual and the deputies lacked reasonable suspicion that would warrant prolonging the stop. The district court concluded that Deputy Mora had

reasonable suspicion to continue the stop due to the smell of air freshener; discrepancies with the license, registration, and proof of insurance; and the route they were traveling along. Martinez-Torres, 2019 WL 113729, at *7–8. Furthermore, the district court concluded that reasonable suspicion grew due to the “implausible and inconsistent story” about the purpose of their travel, their explanations about who owned the car, and the defendants’ apparent nervousness. Id. at *8. In the alternative, the district court held that after the traffic stop ended, there was a valid consensual encounter. Id. at *8–10. We agree with the district court and hold that the additional questioning during this time was pursuant to a consensual encounter.

As mentioned, once a traffic stop is completed, the driver must be allowed to leave unless “(1) the officer has an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring, or (2) the initial detention has become a consensual encounter.” United States v. Bradford, 423 F.3d 1149, 1156–57 (10th Cir. 2005); see United States v. Harmon, 742 F.3d 451, 458–59 (10th Cir. 2014) (“An officer may continue questioning the driver if the stop has transitioned from a detention to a consensual encounter.”). A traffic stop can turn into a consensual encounter, which does not require reasonable suspicion, when the driver consents to additional questioning. Bradford, 423 F.3d at 1158. However, a prerequisite for a consensual encounter is that the driver’s documents are returned. Id.

The fundamental question we ask in these cases is whether “a reasonable person under the circumstances would believe [he] was free to leave or disregard the

officer's request for information." Id. (quoting United States v. Elliot, 107 F.3d 810, 814 (10th Cir. 1997)). We follow a bright-line rule that requires the driver's documents to be returned before the stop may be considered a consensual encounter, recognizing that merely handing back documents is not "always sufficient to demonstrate that an encounter has become consensual." Id. Factors that we have found relevant to our analysis include:

the location of the encounter, particularly whether the defendant is in an open public place where he is within the view of persons other than law enforcement officers; whether the officers touch or physically restrain the defendant; whether the officers are uniformed or in plain clothes; whether their weapons are displayed; the number, demeanor and tone of voice of the officers; whether and for how long the officers retain the defendant's personal effects such as tickets or identification; and whether or not they have specifically advised defendant at any time that he had the right to terminate the encounter or refuse consent.

United States v. Spence, 397 F.3d 1280, 1283 (10th Cir. 2005) (quoting United States v. Zapata, 997 F.2d 751, 756–57 (10th Cir. 1993)). While this list is not exclusive and no one factor is dispositive, we focus on "the coercive effect of police conduct, taken as a whole on a reasonable person." Id.

Once Deputy Mora returned Mr. Martinez-Torres' paperwork, the traffic stop turned into a consensual encounter. The district court found that the deputies did not brandish their weapons, they were conversational in tone, there were only two or three deputies on the scene — none of which were positioned in a coercive manner, and it occurred in daylight and in public view. Martinez-Torres, 2019 WL 113729, at *9.

As it relates to Mr. Martinez-Torres, who was standing outside of the car talking with the deputies, he was specifically asked twice whether he understood that he was free to go. Mr. Martinez-Torres responded, “yes.” See Spence, 397 F.3d at 1283 (stating that a relevant factor is “whether or not they have specifically advised defendant at any time that he had the right to terminate the encounter or refuse consent”); United States v. Sandoval, 29 F.3d 537, 544 (10th Cir. 1994) (considering “whether the driver was informed of his right to refuse consent or to proceed on his way” as an important factor). Moreover, the deputies allowed Mr. Martinez-Torres to call his daughter and make sure she was up for school, which bears on the officers’ demeanor and whether the interaction was coercive.

Mr. Martinez-Torres further argues that by calling him back to the police car, Deputy Mora was making a show of authority. We do not agree. The district court found that the officers were “polite and pleasant” and “did not convey an overbearing show of authority.” Martinez-Torres, 2019 WL 113729, at *9. Merely calling out Mr. Martinez-Torres’ name to ask whether he would be willing to answer additional questions does not preclude finding a consensual encounter. Cf. United States v. Villegas, 554 F.3d 894, 899 (10th Cir. 2009) (finding that consent was not involuntary simply because consent was solicited while the defendant had not completely exited the patrol car); Bradford, 423 F.3d at 1159 (finding that consent was not involuntary even though it was requested while the defendant was still in the patrol car). Thus, as to Mr. Martinez-Torres, this was a consensual encounter.

Mr. Gomez-Arzate, who was sitting in the passenger's seat of the car, also consented to the additional questioning and was not unlawfully detained. Although he was not the driver and therefore did not give the deputies any documents, he was informed that Mr. Martinez-Torres had received his documents and a warning citation, and that Mr. Martinez-Torres was free to leave. The deputies also informed Mr. Gomez-Arzate that he was free to leave but sought his permission to ask further questions. Like Mr. Martinez-Torres, Mr. Gomez-Arzate agreed to answer the deputies' questions. And again, there was no show of authority or coercion.

Mr. Gomez-Arzate asserts that he did not voluntarily consent because he was a passenger in the car and was not privy to the conversation between the deputies and Mr. Martinez-Torres. However, merely being the passenger of the car does not render his consent involuntary. Rather, we must consider whether Mr. Gomez-Arzate could reasonably "believe [he] was free to leave or disregard the officer's request for information." Bradford, 423 F.3d at 1158. Mr. Gomez-Arzate was informed of all the circumstances and was explicitly told that both he and Mr. Martinez-Torres were free to leave. Yet, Mr. Gomez-Arzate agreed to further questioning. Therefore, Mr. Gomez-Arzate's reliance on Guerrero-Espinoza is misplaced. In that case, we determined that the passenger could have reasonably believed he was not free to leave because he was not aware that the warning had been issued and it appeared that the driver continued to be detained. United States v. Guerrero-Espinoza, 462 F.3d 1302, 1309–10 (10th Cir. 2006); see also United States v. Yeomans, 211 F. App'x 753, 758 n.8 (10th Cir. 2007) (discussing Guerrero-Espinoza in the context of a case

where the driver and passenger remained together). Here, the deputies fully explained to Mr. Gomez-Arzate the circumstances of the stop and that both he and Mr. Martinez-Torres were free to go. Therefore, this was also a consensual encounter as to Mr. Gomez-Arzate.

Even though we conclude that this was a consensual encounter, we note that the deputies also had sufficient reasonable suspicion to justify the extension of the traffic stop. When Deputy Mora first approached the car, he noticed the “overwhelming” scent of air freshener. The district court found that Deputy Mora knew from his training and experience that this was one method used to mask the smell of drugs. Next, he learned that Mr. Martinez-Torres had a California driver’s license, but the car was registered in Texas to an absent third party. See United States v. Pettit, 785 F.3d 1374, 1382 (10th Cir. 2015) (“[I]n our case law, driving a vehicle registered to an absent third party can indicate drug trafficking.”). Moreover, Mr. Martinez-Torres was listed on the insurance but not on the registration, creating an additional layer of confusion.

Then, once Deputy Mauricio arrived on the scene and the deputies were able to ask some questions about the defendants’ travel plans, suspicion grew. When Mr. Gomez-Arzate was asked who owned the vehicle, he indicated that it was loaned to him, but he could not recall the person’s name. However, when Mr. Martinez-Torres was asked who owned it, he said that it was Mr. Gomez-Arzate. This unusual story about who owned the car — especially when coupled with the fact that Mr. Martinez-Torres was listed on the insurance — only added to the deputies’ reasonable

suspicion. The defendants' stories about what their plans were in Texas also did not help their cause. Pettit, 785 F.3d at 1381 ("We have consistently held that implausible travel plans can contribute to a reasonable suspicion."). They told the deputies that they were going to Texas to see a ranch and clean up a house, but neither knew the name of the owner of the ranch, or the "friends" they were going to stay with.

Although this questioning was under the umbrella of a consensual encounter, the totality of the circumstances created more than sufficient reasonable suspicion to justify the officer's additional questions.

c. Consent to Search the Vehicle

The deputies finally obtained valid consent from both defendants to search the vehicle. As we have discussed, this traffic stop had transitioned into a consensual encounter, and there is no indication that the deputies had applied coercive measures. Thus, it is difficult to question the voluntariness of both defendants' consent to allow the deputies to search the vehicle. Both defendants were orally asked whether they would agree to allowing a search of the car, and further, they both signed a Spanish language consent-to-search form. See United States v. Warwick, 928 F.3d 939, 945 (10th Cir. 2019) ("A signed consent form indicates voluntary consent."). The deputies also ensured that the defendants could read and understand the consent form. The district court's conclusion that there was express and voluntary consent to search the car is amply supported by the record.

d. Scope of the Vehicle Search

Mr. Martinez-Torres and Mr. Gomez-Arzate finally argue that the manner and duration of the deputies' search of the car exceeded the scope of consent. We review for clear error the question of whether a search exceeds the scope and duration of consent, "which turns on what a reasonable person would have understood to be the scope and duration of his consent under the circumstances." United States v. Rosborough, 366 F.3d 1145, 1150 (10th Cir. 2004). While the consenting party can limit the scope of consent, absent such a limitation "[a] general grant of permission to search an automobile typically extends to the entire car." Id. Additionally, we will consider whether the deputies conducted the search of the car diligently. Id. at 1151.

As the district court highlighted, Mr. Martinez-Torres and Mr. Gomez-Arzate did not provide any limitations on the scope of the car nor did they object to the duration of the search. This lack of objection indicates that the defendants' consent was not confined by time or location. Id. Furthermore, the search lasted 90 minutes, which is in the realm of reasonable duration under our case law. See id. at 1151 n.1 (collecting cases).

Mr. Martinez-Torres and Mr. Gomez-Arzate also contend that the search exceeded the scope of consent by being especially intrusive. However, as indicated, the defendants' general consent to search the car undercuts that argument. We have allowed deputies searching a car under a grant of general consent to effect some dismantling, and minor damage "does not by itself render a search excessive."

United States v. Mendoza, 817 F.3d 695, 701 (10th Cir. 2016); see United States v.

Marquez, 337 F.3d 1203, 1209 (10th Cir. 2003) (noting that many of our cases allow “an officer’s partial dismantling of an automobile pursuant to a general consent to search when the suspect did not object”). Here, the district court found that the deputies removed the air filter, took items out of the trunk, and removed and replaced the fender. Deputy Mora removed a rear quarter panel after seeing tooling marks and noticing a void behind the panel. Otherwise, the district court determined that “[t]here [was] no evidence of any further dismantling of the car.” Martinez-Torres, 2019 WL 113729, at *3 (quotations omitted). As with the duration of the search, this case is not beyond the realm of reasonable searches of the car, and again, the defendants never objected. Indeed, one of the defendants even offered to help replace the fender, further buttressing the district court’s conclusion that the search was within the scope of consent.

Defendants rely on United States v. Osage to argue that the deputies took the car apart and effectively dismantled it, thus exceeding the scope of consent. In Osage, the court held that “before an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search,” the officer needs either explicit consent or another valid justification. United States v. Osage, 235 F.3d 518, 522 (10th Cir. 2000). Although the deputies may have removed parts of the car, there is no indication that they destroyed or rendered the car completely useless. Indeed, the deputies appear to have reattached the fender that was removed and replaced the air filter. While the rear quarter panel may not have been replaced, we do not think this was the “complete

and utter destruction or incapacitation" that was at issue in Osage. Id. at 521 n.2.

The search was pursuant to consent and lawful.

AFFIRMED.

UNITED STATES DISTRICT COURT
District of New Mexico

UNITED STATES OF AMERICA

Judgment in a Criminal Case

V.

JESUS GOMEZ-ARZATE

Case Number: 1:18CR01960-002WJ

USM Number: 98281-051

Defendant's Attorney: Michael Ian Garey

THE DEFENDANT:

pleaded guilty to count(s) 1 of Indictment.

pleaded nolo contendere to count(s) which was accepted by the court.

was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<i>Title and Section</i>	<i>Nature of Offense</i>	<i>Offense Ended</i>	<i>Count</i>
21 U.S.C. Sec. 846	Conspiracy to violate 21 U.S.C. Sec. 841(b)(1)(A)	05/17/2018	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The Court has considered the United States Sentencing Guidelines and, in arriving at the sentence for this Defendant, has taken account of the Guidelines and their sentencing goals. Specifically, the Court has considered the sentencing range determined by application of the Guidelines and believes that the sentence imposed fully reflects both the Guidelines and each of the factors embodied in 18 U.S.C. § 3553(a). The Court also believes the sentence is reasonable, provides just punishment for the offense and satisfies the need to impose a sentence that is sufficient, but not greater than necessary to satisfy the statutory goals of sentencing.

The defendant has been found not guilty on count(s) .

Count(s) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

7/24/2019

Date of Imposition of Judgment

/s/ William P. Johnson

Signature of Judge

Honorable William P. Johnson
Chief United States District Judge

Name and Title of Judge

7/24/2019

Date

DEFENDANT: **JESUS GOMEZ-ARZATE**
CASE NUMBER: **1:18CR01960-002WJ**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **63 months**.

The Court recommends that Immigration and Customs Enforcement begin removal proceedings during service of sentence.

The court makes the following recommendations to the Bureau of Prisons:

FCI facility closest to Southern California so he may be close to family.

- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:
 - at on .
 - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before 2 p.m. on .
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **JESUS GOMEZ-ARZATE**
CASE NUMBER: **1:18CR01960-002WJ**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **5 years unsupervised**.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state, local, or tribal sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(Check, if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may, after obtaining Court approval, require you to notify that person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **JESUS GOMEZ-ARZATE**
CASE NUMBER: **1:18CR01960-002WJ**

SPECIAL CONDITIONS OF SUPERVISION

You must comply with all Immigration and Customs Enforcement laws.

If deported, you must not reenter the United States without legal authorization.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature

Date

DEFENDANT: **JESUS GOMEZ-ARZATE**
CASE NUMBER: **1:18CR01960-002WJ**

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments.

The Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

Totals:	Assessment	JVTA Assessment*	Fine	Restitution
	\$100	\$0.00	\$0.00	\$0.00

The determination of the restitution is deferred until . An *Amended Judgment in a Criminal Case* will be entered after such determination.
 The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A In full immediately; or
 B \$ due immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

Based on the defendant's lack of financial resources, the Court will not impose a fine. In lieu of all or a portion of the fine, the Court considered alternative sanctions, such as community service, placement at a residential reentry center, and location monitoring, and concludes the total combined sanction without a fine or alternative is sufficiently punitive.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties; and (9) costs, including cost of prosecution and court costs.

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA

Plaintiff,

vs.

Case No. 1:18-cr-1960 WJ-1

GUILLERMO MARTINEZ-TORRES, and
JESUS GOMEZ-ARZATE,

Defendants.

**MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS' MOTION TO
SUPPRESS**

THIS MATTER comes before the Court on Defendant Jesus Gomez-Arzate's Motion to Suppress Evidence, filed August 17, 2018 (**Doc. 29**), joined by his co-Defendant Guillermo Martinez-Torres (**Doc. 31**). Having considered the parties' arguments and applicable law, the Court finds that Defendants' motion is not well-taken and, therefore, is **DENIED**.

BACKGROUND

On June 13, 2018, Defendant Martinez-Torres and Defendant Jesus Gomez-Arzate were indicted with possession with intent to distribute 500 grams and more of a mixture containing methamphetamine, in violation of 21 USC §§ 841(a)(1), (b)(1)(A), and 846. **Doc. 15**.

The Court makes the following factual findings following an evidentiary hearing.¹ The Court finds the deputies' and trooper's testimony to be credible.

¹ To avoid repetition, additional facts are found below in the discussion section. A portion of the encounter was audio-recorded. The 33-minute audio recording was played during the evidentiary hearing, and a transcript with an English translation was used to follow along. The transcript was admitted without objection, and neither party pointed out any inaccuracies in the transcript. Therefore, the Court relies on the transcript and refers to English translations of any Spanish spoken.

A. Initial Traffic Stop.

On May 17, 2018, Defendants were traveling eastbound on Interstate 40 in a 2012 white KIA Soul. After a line of cars passed him, Deputy Mora pulled out from a median. Around mile marker 133 he spotted the Defendants' vehicle. He observed the Kia Soul swerving within the right-hand lane, and also straddling the right-hand white solid line twice. Deputy Mora also observed that the front driver's side tire appeared to be angled or out of alignment. Deputy Mora did not observe any external explanation for why the Kia Soul was swerving, aside from the front tire being "bent."

At around mile marker 132, Deputy Mora pulled over the Kia Soul. He approached the front passenger side window, and immediately noticed an "overwhelming odor of air freshener", from multiple air fresheners. Based on his experience and training, Deputy Mora knew that an air freshener can be used to mask the smell of drugs or contraband. Defendant Martinez-Torres was the driver, and the passenger, Defendant Gomez-Arzate, purported to be the owner of the car.

Deputy Mora explained to the Defendants that he pulled them over because they were swerving, and that the axle or wheel appeared to be bent. Deputy Mora asked for and obtained Defendant Martinez-Torres' driver's license, registration, and proof of insurance. Defendant Martinez-Torres produced a California driver's license. The car had Texas plates, and was registered to an absent third party.

Although Deputy Mora attempted to speak with Defendants, Defendant Martinez-Torres stated he didn't understand him. At approximately 3 minutes and 38 seconds into the stop, Deputy Mora called for Deputy Mauricio, who spoke fluent Spanish, to come and translate. Calling other deputies who are bilingual and fluent in Spanish to translate is common practice within the department. At around this time, Deputy Mora began filling out a warning citation.

It is also clear that a Spanish translator was necessary. Defendants – multiple times – expressed that they couldn’t understand Deputy Mora. Therefore, it was reasonable and necessary for Deputy Mora to wait for a translator to arrive. Without a translator, he could not even explain the citation or the reason for the traffic stop.

Defendants tried to speak with Deputy Mora, while Deputy Mora suggested they wait for Deputy Mauricio to arrive. Defendants asked Deputy Mora whether he wanted to know their “motive of the trip.” **Gov. Ex. 3, p. 6.** They also asked about the speed limit. While waiting, Defendant Martinez-Torres stated that he lived in Santa Ana, California and that he would like to move to Texas because the rent is cheaper and there is more work.

B. Deputy Mauricio arrives during traffic stop (Minute 10:00 to Minute 16:00).

Deputy Mauricio arrived at around ten minutes into the stop. It took him approximately seven minutes to arrive after he was called. After Deputy Mauricio began translating, there was no indication that Defendants had any further difficulty in understanding the deputies.

Deputy Mauricio asked for permission to search the VIN number of the car and both Defendants consented. The deputies checked the VIN on both the dashboard and the door. This process took a “couple minutes.”

At the same time, the deputies also asked permission to ask questions about Defendants’ travel plans. This took approximately two minutes and fifteen seconds, but overlapped with the VIN search. Defendant Gomez-Arzate said that they were coming from California, and were going to Dalhart first, then Dumas, Texas.

At around 13 minutes and 17 seconds, the deputies asked who owned the car, because neither Defendant was on the registration. Defendant Gomez-Arzate said the car belonged to a

man in Texas who let them borrow it. They stated the owner lives in Dumas, and they were going to his house to “clean it up”, live there, and possibly raise cattle.

Defendants stated they were traveling to Texas, from California, to clean up a house to make it habitable. They also stated they were only staying for three or four days. Then, they were going back to California for their family, to move to Texas.

At around fifteen minutes into the traffic stop, Deputy Mora explained to Defendant Martinez-Torres that he was giving him all of his documents back and that he was giving him a warning citation for hitting the solid white line twice. The Deputies also explained this to Defendant Gomez-Arzate. *See Gov. Ex. 3, p. 23-24.* In his traffic citation, he noted that Defendant hit the shoulder solid line twice, and that he violated the careless driving statute (NMSA § 66-8-114). **Gov. Ex. 1.** Deputy Mora gave the citation to Defendant Martinez-Torres, who signed it.

C. Further Questioning (minute 16:00 to approximately minute 33:00).

After receiving his documents back and his warning citation, Defendant Martinez-Torres began walking back to his car. Deputy Mora said “Guillermo” and Defendant Martinez-Torres walked back to the patrol car, a distance of approximately 20 feet.

Deputy Mora explained to Defendant Martinez-Torres that he was free to go, but that he had a couple more questions, “if that’s okay.” His response was inaudible on the recording. The Deputies repeated a second time “do you understand that you are free to go?” Defendant Martinez-Torres responded “yes.” Defendant Martinez-Torres did not object or indicate he wanted to leave.

At approximately twenty minutes into the encounter, the deputies received consent from Defendant Gomez-Arzate. Deputy Mauricio explained to Gomez-Arzate that they had only given a warning to Martinez-Torres for crossing the white line, and that they told him that he’s free to

go. They also told Gomez-Arzate that he was free to go and asked for consent to ask further questions. Defendant Gomez-Arzate consented.

Defendant Gomez-Arzate stated they were going to Dumas, Dalhart, and Hartley, near Amarillo, to a ranch. They stated the ranch was forty minutes from Amarillo. They stated they were going there to clean a house, to work or live there.

The deputies then asked where they got the car. They stated they got the car from the ranch. He stated the previous time he was there, his truck broke down and the owner lent the KIA Soul to him. Defendant Gomez-Arzate said he then took the KIA Soul with him back to California, and that he has had it for months.

Defendant Gomez-Arzate did not know the name of the owner of the car, but that he knew the name of the owner's friend.

Defendants affirmed that they were responsible for everything inside the car. Defendants denied having any large amounts of money, drugs, or weapons. Defendants then consented to the search of the car orally² and in writing. They affirmed that they understood the written consent form and could read Spanish. The transcript reflects that they also understood Deputy Mauricio's Spanish.

After the Defendants consented to the search, the audio recording ended.

D. Search of Car.

As Deputy Mora was searching the vehicle, he saw tool marks on the right rear quarter panel. He slightly pulled back the rear quarter panel and saw a circular void. The rear quarter panel was held in place with plastic rivets. He then pulled off the rear quarter panel, and saw two

² Defendant Martinez-Torres' oral response is inaudible on the audio recording. Deputy Mora asked for permission to search. However, Defendant Martinez-Torres signed the written consent form.

round packages, wrapped in black tape, which he knew was consistent with contraband. The search lasted approximately one hour and 30 minutes.

The Court credits Deputy Mora's testimony that he only had to pull back the quarter panel a slight degree before he saw a circular void. Based on his experience and training, once he saw that void, he had reasonable suspicion that the void contained drugs.

The deputies apparently removed the air filter. A picture in evidence shows a toolbox on the car, with the hood open. There is no evidence in the record that anything else was done to the engine. Moreover, the Deputies removed the fender because it was not flush with the car, but also put it back on. Items were taken out of the trunk and placed on the ground. There is no evidence of any further "dismantling" of the car.

DISCUSSION

Defendants argue that evidence resulting from the traffic stop should be suppressed, because the traffic stop itself either (1) was not initially valid, or alternatively (2) became invalid because it was extended for too long. Even if the traffic stop was valid, Defendants argue either that the resulting consent to search the car was invalid or outside the scope of consent.

"[A] traffic stop is reasonable if it is (1) justified at its inception and (2) reasonably related in scope to the circumstances which justified the interference in the first place." *United States v. Moore*, 795 F.3d 1224, 1228 (10th Cir. 2015) (quoting *United States v. Karam*, 496 F.3d 1157, 1161 (10th Cir. 2007)).

I. Initial Traffic Stop was Valid.

Defendant argues that the initial traffic stop was not valid, because it was not supported by reasonable suspicion. The Government argues that there was reasonable suspicion to stop the car

either for careless driving or for failure to maintain the vehicle in its lane. The Court agrees with the Government.

To justify a traffic stop at its inception, “an officer needs only reasonable suspicion—that is, a particularized and objective basis for suspecting the particular person stopped of breaking the law. [T]he government bears the burden of proving the reasonableness of the officer's suspicion.” *United States v. Vance*, 893 F.3d 763, 773 (10th Cir. 2018) (internal quotation marks and citations omitted). “For reasonable suspicion to exist, an officer need not rule out the possibility of innocent conduct; he or she simply must possess some minimal level of objective justification for making the stop.” *United States v. Winder*, 557 F.3d 1129, 1134 (10th Cir. 2009) (internal quotation marks omitted).

A. Careless driving.

New Mexico law requires drivers to not drive in a “careless, inattentive, or imprudent manner, without due regard for the width, grade, curves, corners, traffic, weather and road conditions and all other attendant circumstances,” NMSA § 66-8-114. Here, Deputy Mora observed that Defendant Martinez-Torres was swerving within his lane and also straddled the white solid right-hand line twice. Based on these observations, an objectively reasonable officer would have reasonable suspicion that Defendant Martinez violated the careless driving statute by either driving carelessly or inattentively without due regard for the width of the road or other “attendant circumstances.”

B. Failure to stay entirely within lane.

Alternatively, the traffic stop was also justified at its inception based on a reasonable suspicion of a violation of NMSA § 66-7-317, failing to maintain lane. That statute provides in part:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:
A. a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety;

N.M. Stat. Ann. § 66-7-317 (emphasis added).

To show a violation of NMSA § 66-7-317, the Government must first show that Defendants failed to drive “as nearly as practicable entirely within a single lane.” This is a fact-driven analysis under the totality of the circumstances. *State v. Siqueiros-Valenzuela*, 2017-NMCA-074, ¶ 26, 404 P.3d 782, 788, *cert. denied* (July 6, 2017), *citing United States v. Alvarado*, 430 F.3d 1305, 1309 (10th Cir. 2005) (interpreting identical language in Utah law); *see also United States v. Vance*, 893 F.3d 763, 772 (10th Cir. 2018) (interpreting NMSA § 66-7-317).

“This totality of the circumstances analysis takes into account whether there were any weather conditions, road features, or other circumstances that could have affected or interfered with a driver's ability to keep his or her vehicle in a single lane.” *State v. Siqueiros-Valenzuela*, 2017-NMCA-074, ¶ 19, 404 P.3d 782, 787, *cert. denied* (July 6, 2017), *citing Alvarado*, 430 F.3d at 1309. There is no *per se* rule that touching the fog line does or does not constitute a violation of NMSA § 66-7-317. *United States v. Alvarado*, 430 F.3d 1305, 1309 (10th Cir. 2005) (rejecting argument that touching fog line once does not constitute violation of statute). Rather, the statute requires “a fact-specific inquiry into the particular circumstances present during the incident in question in order to determine whether the driver could reasonably be expected to maintain a straight course at that time in that vehicle on that roadway.” *Id.*

Here, the clear evidence shows that there was no circumstance that affected or interfered with Defendant Martinez-Torres' ability to keep his car within his lane. *United States v. Valenzuela*, 494 F.3d at 888–89 (“In this case, nothing in the record suggests any outside factors contributed to Defendant's lane drift” which was a single drift from the left westbound lane into

right westbound lane for several seconds and then return to the left lane.); *United States v. Alvarado*, 430 F.3d at 1309 (“[T]here were no adverse weather or road conditions that might have made it impractical for Alvarado to prevent his vehicle from drifting out of the righthand lane and over the fog line” by about a foot for several seconds before crossing back.); *United States v. Ozbirn*, 189 F.3d 1194, 1199 (10th Cir. 1999) (“Officer “observed the motor home drift onto the shoulder twice within a quarter mile without any adverse circumstances like road or weather conditions to excuse or explain the deviation.”). Defendants were not passing other vehicles, and there were no adverse weather conditions. Nevertheless, Defendant Martinez-Torres swerved within his lane and also straddled the right-hand white line twice. Under the totality of the circumstances, the Court concludes that Defendant Martinez-Torres failed to drive “as nearly as practicable entirely within a single lane.”

Finally, Deputy Mora’s observations of Defendant’s swerving and straddling the line supports a finding that Defendant Martinez-Torres did not first ascertain whether such movement could be made with safety. Defendant’s straddling of the white line was clearly not a deliberate decision.

Therefore, based on Deputy Mora’s observations, an objectively reasonable officer would at the very least have reasonable suspicion that Defendants violated either the careless driving statute or NMSA § 66-7-317.

II. Traffic stop was not unreasonably extended after Deputy Mauricio arrived (approximately 10 minutes to 16 minutes into encounter).

Defendants argue that even if the initial traffic stop was valid, it became invalid because it was extended in scope and duration beyond the initial purpose of the stop, violating *Rodriguez v. United States*, — U.S. —, 135 S.Ct. 1609, 1614, 191 L.Ed.2d 492 (2015). Defendant argued

at the hearing that the traffic stop was unlawfully extended after Deputy Mauricio arrived. At that time, he argues, the deputies should have given Defendant Martinez-Torres his traffic citation and gone on their way.

“[A] lawful traffic stop may not extend beyond the time reasonably required to effectuate its purpose.” *United States v. Pettit*, 785 F.3d 1374, 1379 (10th Cir. 2015), *citing Rodriguez v. United States*, — U.S. —, 135 S.Ct. 1609, 1614, 191 L.Ed.2d 492 (2015). “In particular, questioning on matters *unrelated* to that mission is improper if it measurably extend[s] the duration of the stop.” *United States v. Cone*, 868 F.3d 1150, 1152–53 (10th Cir. 2017) (emphasis added), *cert. denied*, 138 S. Ct. 707, 199 L. Ed. 2d 578 (2018), *citing Rodriguez*, 135 S.Ct. at 1615 (internal quotation marks omitted). “Once the warning or citation has been issued and the driver's license and registration have been returned, however, the officer generally must allow the driver to proceed without further delay.” *United States v. Karam*, 496 F.3d 1157, 1161 (10th Cir. 2007), *citing United States v. Patterson*, 472 F.3d 767, 776 (10th Cir.2006).

However, “a traffic stop may be expanded beyond its initial purpose if the traffic stop has become a consensual encounter, or if the officer has an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring.” *United States v. Moore*, 795 F.3d 1224, 1229 (10th Cir. 2015) (internal citation and quotation marks omitted).

A. Traffic stop was not unreasonably extended or prolonged.

During the traffic stop, the deputies explained the reason for the traffic stop and Defendants' alleged violation, explained there was a safety issue with the car, asked for permission to search the VIN, asked about their travel plans while doing the VIN search, and asked about the owner of the car, who was an absent third party. Under these circumstances, the Court concludes

that all of these actions are within the scope and purpose of a traffic stop, and otherwise did not unreasonably extend the traffic stop.

A deputy may routinely ask questions about travel plans and car ownership in a traffic stop, and such questions are within the scope of a traffic stop. These questions are related to the traffic stop and do not impermissibly extend the duration of the stop. *See United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1259 (10th Cir. 2006) (“Such limited questioning is proper, because an officer may routinely ask about travel plans and ownership during a lawful traffic stop.”), *citing United States v. Bradford*, 423 F.3d 1149, 1156 (10th Cir. 2005) (officer may ask routine questions about the driver’s travel plans); *see also United States v. Williams*, 271 F.3d 1262, 1267 (10th Cir. 2001) (“[W]e have repeatedly held (as have other circuits) that questions relating to a driver’s travel plans ordinarily fall within the scope of a traffic stop.”); *see also United States v. Patterson*, 472 F.3d 767, 776–77 (10th Cir. 2006) (speaking to passengers about traffic plans is within scope of traffic stop for speeding), *cert. granted, judgment vacated on other grounds*, 555 U.S. 1131, 129 S. Ct. 989, 173 L. Ed. 2d 283 (2009). Moreover, if a deputy may ask for a car’s registration, it would be absurd to prohibit questions about obvious ownership questions arising from viewing the registration.

This is the same for VIN searches, which are one of the “ordinary inquiries incident to [] a stop.” *United States v. Ramos*, 723 F. App’x 632, 637 (10th Cir.) (unpublished) (VIN search within scope of routine traffic stop), *cert. denied*, 139 S. Ct. 132 (2018), *citing New York v. Class*, 475 U.S. 106, 115, 118-19, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986) (“a demand to inspect the VIN, like a demand to see license and registration papers, is within the scope of police authority pursuant to a traffic violation stop.”).

Defendants argue that *United States v. Caro*, 248 F.3d 1240 (10th Cir. 2001) indicates that a search of both the dashboard and doorjamb VIN is a detention, but that case is limited to “when (1) the officer has verified the dashboard or doorjamb VIN from outside the passenger compartment and (2) the officer nevertheless physically enters the passenger compartment to check the VIN.” *United States v. Chavira*, 467 F.3d 1286, 1289 n.1 (10th Cir. 2006). “There is no unlawful detention under *Caro* if the officer remains physically outside the car when he examines the VIN on the dashboard, the doorjamb, or both.” *Id.* Here, the Deputies received consent to do a VIN search and there is no evidence in the record that any deputy physically entered the passenger compartment to check the doorjamb VIN.

The VIN search and all questions were related to and within the scope of the traffic stop. Therefore, nothing unrelated to the traffic stop impermissibly extended the stop.

Moreover, the Court notes that the specific timing of the acts performed were caused by the delay in seeking a Spanish interpreter. Had there not been that delay Deputy Mora likely could have asked these questions – and performed the VIN search – while writing out the citation. Defendants’ objections based on the order of the specific acts in the traffic stop was rejected by the Tenth Circuit. *United States v. Valenzuela*, 494 F.3d 886, 890 (10th Cir. 2007). The “order of events” is not determinative, but rather the Court should focus on the “reasonableness of the traffic stop in light of both the length of the detention and the manner in which it was carried out ...” *Id.* Based on the specific circumstances of this case, asking these routine questions and performing a VIN search after the citation was written but before it was given to Defendants did not unreasonably extend the duration of the stop.

Moreover, the duration of the traffic stop was not extended beyond the time reasonably required to complete it. The fifteen to sixteen-minute duration was reasonably required to

effectuate the traffic stop. Seven of those minutes were spent waiting for Deputy Mauricio to arrive to translate during which Deputy Mora filled out the citation. Finally, the transcript and the evidence produced at the hearings showed that the deputies were diligent in performing the traffic stop. For example, it appears they asked questions while at the same time performing the VIN search. Defendants do not argue otherwise, aside from failing to give the warning citation immediately upon Deputy Mauricio's arrival.

Notably, if Deputy Mora declined to write out the citation during the seven-minute delay, there would likely be an objection that he did not work diligently. In other words, the result of Defendants' argument is that deputies may not ask any questions of Spanish-speaking Defendants if there is a delay in getting a translator. The Court does not believe the Tenth Circuit would so hold under these specific factual circumstances.

Therefore, the Court concludes that the time from Deputy Mauricio's arrival to the moment Deputy Mora gave and returned their documents (approximately sixteen minutes into the encounter) did not exceed the scope of the traffic stop.

B. Deputy Mora had reasonable suspicion of criminal activity, permitting him to ask follow-up questions related to ownership of the car and travel plans.

Alternatively, even if the traffic stop was unreasonably extended in scope or duration, Deputy Mora had reasonable suspicion of criminal activity and authority to ask follow up questions and perform a VIN search. *See, e.g., United States v. Clarkson*, 551 F.3d 1196, 1201 (10th Cir. 2009) (“The traffic stop may be expanded beyond its original purpose if during the initial stop the detaining officer acquires reasonable suspicion of criminal activity.”), *cited in Vasquez v. Lewis*, 834 F.3d 1132, 1136 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 1580, 197 L. Ed. 2d 705 (2017).

“The reasonable suspicion analysis does not consider each of an officer’s observations in isolation, but rather is based on the totality of the circumstances, taking into account an officer’s reasonable inferences based on training, experience, and common sense.” *United States v. Garcia*, 751 F.3d 1139, 1143 (10th Cir. 2014) (quotation marks and citation omitted), *cited in United States v. Hernandez*, 847 F.3d 1257, 1277 (10th Cir. 2017). “Reasonable suspicion may derive from a series of acts, each of them perhaps innocent if viewed separately, but which taken together warrant [] further investigation.” *United States v. Hernandez*, 847 F.3d 1257, 1277 (10th Cir. 2017) (internal quotation marks omitted).

First, Deputy Mora smelled an “overwhelming smell of air freshener.” Based on his experience and training, Deputy Mora knew that an air freshener could be used to mask the smell of drugs. Second, Defendant Martinez-Torres had a California driver’s license, but was driving a vehicle with Texas license plates. Third, the registration listed an absent third party. *See United States v. Pettit*, 785 F.3d 1374, 1381–82 (10th Cir. 2015) (registration to absent third party can indicate drug trafficking), *citing United States v. Ludwig*, 641 F.3d 1243, 1249 (10th Cir. 2011); *United States v. Turner*, 928 F.2d 956, 959 (10th Cir. 1991); *See also United States v. Moore*, 795 F.3d 1224, 1231 (10th Cir. 2015) (“The recent registration of a vehicle can contribute to reasonable suspicion.”). Fourth, Defendant Martinez-Torres was on the insurance but not on the registration. Finally, the route taken, California to Texas via I-40, based on Deputy Mora’s experience and training, is a common contraband travel route. All of these facts viewed together support a reasonable suspicion of drug trafficking activity. Therefore, any extended detention after Deputy Mauricio arrived was supported by reasonable suspicion.

C. Reasonable suspicion grew between minute 16 and minute 33.

Moreover, Deputy Mora's reasonable suspicion only became stronger as the encounter went on, further supporting any extended detention or prolonged questioning between minute 16 and minute 33. During this time, the Deputies asked additional questions about travel plans and car ownership, whether Defendants had any contraband, and whether they consented to a search of the vehicle.

In addition to the facts above, Deputy Mora heard their implausible and inconsistent story about why they were traveling back and forth between California and Texas numerous times. *United States v. Ludwig*, 641 F.3d 1243, 1249 (10th Cir. 2011) (bizarre travel plans may contribute to reasonable suspicion of criminal activity). Defendants' explanation about where they were going and what they were going to do at their destination was inconsistent and implausible.

Deputy Mora observed extreme examples of nervousness. He observed legs shaking; Defendants would not look him in the eye, and whenever they asked a question, he would look back at the vehicle. These extreme, articulable instances of nervousness support reasonable suspicion. *United States v. White*, 584 F.3d 935, 950 (10th Cir. 2009) (internal citations and quotation marks omitted)

Moreover, Deputy Mora did not get any reasonable answer on who owned the car. Rather, the Defendants apparently did not know who the owner was. *United States v. Ludwig*, 641 F.3d 1243, 1249 (10th Cir. 2011) (absent third party owner is a factor that may "indicate a stolen vehicle or drug trafficking"), citing *United States v. Olivares-Campos*, 276 Fed.Appx. 816, 821 (10th Cir.2008) (unpublished) and *United States v. Turner*, 928 F.2d 956, 959 (10th Cir.1991) (defendant driving car not registered to him supported reasonable suspicion); see also *United States v. Pettit*, 785 F.3d 1374, 1381–82 (10th Cir. 2015) (defendant driving vehicle registered to absent third party can indicate drug trafficking). Thus, for the reasons stated above and herein, Deputy Mora had

reasonable suspicion to extend any detention between minute 16 to minute 33 to ask additional questions.

III. Deputy Mora had consent to ask further questions after traffic stop ended (beginning around minute 15-16, to minute 33).

Alternatively, even if the deputies did not have reasonable suspicion to continue the detention and question the Defendants after the traffic stop ended, they had consent to ask further questions beginning around the fifteen to sixteen-minute mark. The traffic stop ended at approximately 15:58 into the encounter, when Deputy Mora gave Defendant Martinez-Torres his citation and gave him back all of his documentation. Deputy Mora then told Defendant Martinez-Torres he was free to go but asked for permission to ask him more questions. The Deputies also relayed that conversation to Defendant Gomez-Arzate and told him they were free to go and that Defendant Martinez-Torres' documents had been returned. **Gov. Ex. 3, p. 23-24.** Both Defendants consented to further questioning.

For consent to be valid, the Government must show that (1) there is clear and positive testimony that consent was unequivocal and specific and freely given, and that (2) "consent was given without duress or coercion, express or implied." *United States v. Guerrero*, 472 F.3d 784, 790 (10th Cir. 2007); *see also United States v. Jones*, 710 F.3d 1300, 1318 (10th Cir. 2012). The Government bears "the burden of proving that consent is given freely and voluntarily." *United States v. Jones*, 701 F.3d 1300, 1318 (10th Cir. 2012) (citation omitted). Voluntariness of consent "is a factual issue, determined through the totality of the circumstances." *United States v. Guerrero*, 472 F.3d 784, 789 (10th Cir. 2007).

A traffic stop may evolve into a consensual encounter, for "[o]nce the officer has returned the driver's documents, further questioning amounts to an unlawful detention only if the driver has

objectively reasonable cause to believe that he is not free to leave.” *United States v. Chavira*, 467 F.3d 1286, 1290 (10th Cir.2006). “Whether an encounter can be deemed consensual depends on whether the police conduct would have conveyed to a reasonable person that he or she was not free to decline the officer's requests or otherwise terminate the encounter.” *United States v. Bradford*, 423 F.3d 1149, 1158 (10th Cir.2005) (quoting *United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000)). Here, both Defendants gave clear, express, and unequivocal general consent to continued questioning. Defendants also gave no indication they wanted the encounter to end.

A. Defendants' express consent was not coerced.

Determining whether consent was coerced “turns on whether a reasonable person would believe he was free to leave or to deny the officer's request...” *United States v. Guerrero*, 472 F.3d 784, 790 (10th Cir. 2007). The Court considers the following non-exclusive factors:

the threatening presence of several officers; the brandishing of a weapon by an officer; some physical touching by an officer; use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory; prolonged retention of a person's personal effects such as identification and plane or bus tickets; a request to accompany the officer to the station; interaction in a nonpublic place or a small, enclosed place; and absence of other members of the public.

Id.; *United States v. Jones*, 701 F.3d 1300 (10th Cir. 2012); *see also United States v. Thompson*, 546 F.3d 1223, 1226 (10th Cir. 2008) (additional factors); *United States v. Harrison*, 639 F.3d 1273, 1279 (10th Cir. 2011) (additional factors).

Here, the Court concludes that the factors weigh heavily toward finding consent was voluntary and not coerced. No deputy brandished a weapon until the contraband was found and the defendants were arrested. The tone of the officers was conversational and not aggressive, and nothing they said in their tone or words indicated that compliance was necessary. Deputy Mora returned all of Defendant Martinez-Torres' documentation, and relayed that fact to Defendant

Gomez-Arzate. The encounter occurred in public view. Moreover, the Deputies gave Defendant Martinez-Torres the opportunity to call his daughter. Only two or three Deputies were present when Defendants gave their consent, and there is no indication they were positioned in a coercive manner.

There was no evidence of any show of authority. The Deputies did not unholster or draw their weapons, physically touch the Defendants, or use a commanding or aggressive tone indicating that compliance was mandatory.

Moreover, Defendants were both told they were free to go and were then asked for consent to continue the questioning. *United States v. Sandoval*, 29 F.3d at 544 (The Tenth Circuit has “regularly considered, as ‘important factors’ on the issue of voluntariness although not dispositive, whether the driver was informed of his right to refuse consent *or to proceed on his way.*”) (emphasis added). This weighs toward finding that consent was voluntary.

Defendant Martinez-Torres appears to argue that Deputy Mora detained Defendant Martinez-Torres when he called out “Guillermo!” Here, after Defendant Martinez-Torres was given his documents and citation, he began walking back to his car and Deputy Mora called out “Guillermo!” Defendant Martinez-Torres voluntarily walked back, and Deputy Mora (through Deputy Mauricio) said “Do you- do you understand you’re free to go? But we want to ask you some more questions, if that’s okay.” Deputy Mora repeated that “do you understand that you are – you are free to go?” Defendant Martinez-Torres replied “yes.” Both Deputies were polite and pleasant during this interaction. Therefore, the Court concludes that this interaction did not convey an overbearing show of authority. *See, e.g., United States v. Jimenez-Valenia*, 2009 WL 1181324, at *6 (D. Utah May 1, 2009) (Defendant was called back after traffic stop ended), *aff’d*, 419 F. App’x 816 (10th Cir. 2011).

Based on the totality of the circumstances, the Court finds that this consent was voluntary and not coerced.

B. Passenger (Defendant Gomez-Arzate) consented to additional questioning.

Defendant Gomez Arzate asserts that he could not have voluntarily consented, because he was sitting in the car and did not hear the Deputies' conversation with Defendant Martinez-Torres

But here, Defendant Gomez-Arzate was told by Deputy Mora that Defendant Martinez-Torres was given all of his documents back, was only given a warning citation, and was free to leave. Deputy Mauricio then told Gomez-Arzate that he was free to leave, but asked for permission to ask him further questions. **Gov. Ex. 3, p. 24.** Defendant Gomez-Arzate then consented. These circumstances are therefore distinguishable from *United States v. Guerrero-Espinoza*, 462 F.3d 1302, 1309 (10th Cir. 2006), in which the passenger had no knowledge that the documents were returned or that the driver was told he was free to leave.

Moreover, based on the totality of the circumstances, the Court finds that Defendant Gomez-Arzate's consent was voluntary and uncoerced. Therefore, a reasonable person in either Defendants' position would have believed they were free to go.

IV. Deputies had consent to search car.

Later on, Defendants also consented expressly and voluntarily to the search of the car. Defendants consented orally and in writing.

A. Consent was voluntary and uncoerced.

As explained above, the totality of the circumstances indicates that Defendants' consent to search the car was voluntary and uncoerced. There was no government action that implied the Defendants had no right to refuse consent to search. Moreover, both Defendants consented in writing to the search, and the record indicates they had the opportunity to ask questions about the

form and they understood it. “A signed consent form is indicative of a voluntary consent.” *Eidson v. Owens*, 515 F.3d 1139, 1147 (10th Cir. 2008), *citing Glover*, 104 F.3d at 1584. Defendants read the consent form. The consent form was in Spanish, and the Deputies verified that both Defendants could read Spanish and understand the form. Based on the totality of the circumstances, the Court concludes that Defendants’ consent was voluntary.

Defendants appear to argue that they were confused as to what would be searched. The Court disagrees. The Deputies asked for permission to search the car, and the written consent form indicated that the car would be searched.

B. Search was within scope of consent.

Defendants argue that the search was outside of the scope of consent, because the search went on too long and the deputies dismantled and allegedly damaged portions of the car.

1. Duration of Search. Defendants argue that the search went on too long, exceeding the scope of consent. “There is no absolute rule specifying the permissible duration of a search performed with the defendant’s consent. Rather, the court asks what a reasonable person would have understood to be the scope and duration of his consent under the circumstances.” *United States v. Carbajal-Iriarte*, 586 F.3d 795, 801 (10th Cir. 2009) (combined searches lasting an hour and half to two hours did not exceed scope of consent), *citing United States v. Rosborough*, 366 F.3d 1145, 1150 (10th Cir. 2004) (“As to duration, we find nothing in the record that would suggest that Rosborough objectively communicated a request to limit the duration of the search...”).

Here, the search took approximately an hour and a half. Defendants did not limit or provide any parameters for the search. Moreover, they did not at any time object to the duration of the search. Rather, they both consented to the search orally and in writing. Finally, there is no

indication, and Defendants do not argue, that the officers lacked diligence in their search. Therefore, the Court concludes that the duration was of the search did not exceed the scope of Defendants' consent.

2. General consent to search. "A defendant's failure to limit the scope of a general authorization to search, and failure to object when the search exceeds what he later claims was a more limited consent, is an indication that the search was within the scope of consent." *United States v. Jackson*, 381 F.3d 984, 988 (10th Cir. 2004); *see also United States v. Amador-Beltran*, 655 F. App'x 666, 668 (10th Cir. 2016) (Amador-Beltran's "consent to the search of [her] bag for narcotics could be reasonably construed as consent to search any containers within the bag which could have held narcotics."). The Tenth Circuit has "consistently and repeatedly [] held a defendant's failure to limit the scope of a general authorization to search, and failure to object when the search exceeds what he later claims was a more limited consent, is an indication the search was within the scope of consent." *United States v. Gordon*, 173 F.3d 761, 766 (10th Cir. 1999).

A "general consent" search may also include partially disassembling vehicles when a defendant does not object. *See United States v. Marquez*, 337 F.3d 1203, 1209 (10th Cir. 2003) ("We are therefore presented with a situation not much different than the situation presented in several of our cases upholding an officer's partial dismantling of an automobile pursuant to a general consent to search when the suspect did not object."); *see also United States v. Felix*, 12 F. App'x 827, 831 (10th Cir. 2001), *citing United States v. McRae*, 81 F.3d 1528, 1537-38 (10th Cir.1996) (removing trunk carpeting); *United States v. Santurio*, 29 F.3d 550, 553 (10th Cir.1994) (unscrewing strip holding down interior carpet and removing carpet); *United States v. Pena*, 920 F.2d 1509, 1515 (10th Cir.1990) (removing rear quarter panel vent and cardboard found beneath); *United States v. Espinosa*, 782 F.2d 888, 892 (10th Cir. 1986) (removing back seat).

Here, Defendants gave general consent to search the car. Because Defendants did not give any limit on the scope of the search, this general consent included consent to partially disassemble the car, as cited above. Defendants did not limit the scope of consent or object at any time during the search. Rather, they both signed a written consent form to the search of the car and agreed to the search orally. Under the specific facts of this case, the Court concludes that the deputies did not exceed the scope of the Defendants' consent to search.

3. Partial dismantlement of car. Defendant asserts that general consent usually does not include consent to destroy or render an object useless, unless specifically consented to. *United States v. Osage*, 235 F.3d 518, 522 (10th Cir. 2000) (“We therefore hold that, before an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other, lawful, basis upon which to proceed.”).

Unlike in *Osage*, there is no indication here that the search “destroy[ed] or render[ed] completely useless a container.” *Osage*, 235 F.3d at 522. Rather, if any damage did occur, it was “well short of the complete and utter destruction or incapacitation as in *Osage*.” *United States v. Marquez*, 337 F.3d 1203, 1209 (10th Cir. 2003) (removal of plywood nailed down to bench in RV was *de minimis* damage); *see also United States v. Jackson*, 381 F.3d 984, 989 (10th Cir. 2004) (“any loss or contamination of the baby powder by Perry's search with his blade was *de minimis* and well short of the type of complete and utter destruction or incapacitation that was the focus of our concern in *Osage*.”).

Moreover, there is no indication in the record that the vehicle was even damaged during the search. Here, prior to removing the rear quarter panel, Deputy Mora observed tool marks near the rear quarter panel. The testimony given was that a quarter panel, when taken off, can be put

back on without any further damage. In fact, someone had already taken off the quarter panel and put it back on to hide the drugs.

There was also testimony that the air filter was removed. But there is no indication in the record that removing the filter caused any sort of damage. Rather, an air filter is a removable and replaceable part. Finally, a fender was taken off, but it was put back on. Therefore, the Government has satisfied any burden of showing that no damage occurred.

Here, Defendants argue that they were both told to stand away from the car, therefore could not observe the search and could not object. But Defendants could see that the car was being dismantled – in fact, one of the Defendants even offered to assist to put the fender back on. Under these circumstances, Defendants had the ability to object to the dismantlement of the car or revoke their consent.

Instructing Defendants to stand away from the car was a reasonable safety precaution and under the totality of the circumstances, did not turn the encounter coercive. *United States v. Manjarrez*, 348 F.3d 881, 887 (10th Cir. 2003) (pat down following consent to search car was reasonable for officer safety, did not turn encounter coercive); *United States v. Harmon*, 785 F. Supp. 2d 1146, 1174 (D.N.M. 2011) (after consent given, asking Defendant to walk a little ways so that search could be conducted in a safe manner), *aff'd*, 742 F.3d 451 (10th Cir. 2014); *see also United States v. Jimenez-Valenia*, 419 F. App'x 816, 821 (10th Cir. 2011) (unpublished) (Defendant standing 100 feet from car that was being searched had opportunity to revoke consent).

V. Any prior illegal detention was attenuated and not a but-for cause of Defendants Granting Consent to Search Car.

The Government argues that any illegally prolonged detention was not a but-for cause of Defendants granting consent to search the car and was otherwise attenuated. The Court did not

find any illegal detention, but as an alternative basis for denying the motion, agrees with the Government.

A. But-for causation analysis.

Generally, evidence will not be suppressed as fruit of the poisonous tree unless an unlawful search or seizure is at least the but-for cause of its discovery. *See United States v. Chavira*, 467 F.3d 1286, 1292 (10th Cir. 2006) (“There is no indication that the trooper would not have requested or obtained consent to search the truck but for the inspection of the VIN on the doorjamb. We may not suppress evidence without but-for causation.”); *United States v. Nava-Ramirez*, 210 F.3d 1128, 1131 (10th Cir. 2000) (stating that to establish a factual nexus the defendant must show that the evidence “would not have come to light but for the government's unconstitutional conduct.”).

Here, even if the VIN search or questions about travel plans or ownership of the vehicle impermissibly prolonged Defendants' detention, the record does not indicate that this was a but-for cause of Defendants granting permission to search the vehicle. Moreover, the deputies conveyed to the Defendants that they were free to go. Each time the Deputies requested permission to do something, Defendants freely gave consent. There was no indication of coercion or pressure as a result of the delay that caused Defendants to consent. In other words, there is no indication that the deputies would not have obtained consent to search the vehicle but-for the questions and the VIN search. *Chavira*, 467 F.3d at 1291.

B. Attenuation Analysis.

Under the attenuation doctrine, “[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” *Utah v. Strieff*, —

U.S. —, 136 S.Ct. 2056, 2061, 195 L.Ed.2d 400 (2016). The Court analyses the following factors: “1) the temporal proximity between the police illegality and the consent to search; 2) the presence of intervening circumstances; and particularly 3) the purpose and flagrancy of the official misconduct.” *Melendez-Garcia*, 28 F.3d at 1054.

As to the first factor, there is a close temporal proximity between the alleged seizure and Defendants’ consent to search the car. This weighs against attenuation.

As to the second factor, the Government must identify events that “isolate[] the defendant from the coercive effects of the original illegal stop.” *United States v. Gregory*, 79 F.3d 973, 980 (10th Cir. 1996). Here, the Deputies returned Defendant Martinez-Torres documents, advised both they were free to leave, and asked for consent to search the car. The Deputies obtained this written and verbal consent prior to any search of the vehicle. After verbally consenting, the Defendants read the written consent form of the search and signed it. The Deputies made sure that Defendants understood the form. The Court finds that this factor weighs towards a finding of attenuation. *See Mendoza-Salgado*, 964 F.2d at 1012 (explaining a consent form and advising an individual of the right to withhold consent), *cited in United States v. Fox*, 600 F.3d 1253, 1261 (10th Cir. 2010).

As to the third factor, there was no purposeful or flagrant misconduct. “[P]urposeful and flagrant misconduct is generally found where: 1) the impropriety of the official’s misconduct was obvious or the official knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless and 2) the misconduct was investigatory in design and purpose and executed in the hope that something might turn up.” *Fox*, 600 F.3d at 1261. The impropriety of misconduct, if any, was not obvious, and there is no indication that the Deputies knew their behavior was unconstitutional. Moreover, the Deputies did not engage in a fishing expedition. As explained

above, they had strong reasonable suspicion of drug activity. This factor weighs toward attenuation.

Therefore, viewing the factors together, the Court concludes that any prolonged illegal detention was attenuated from Defendants' consent to search the car.

CONCLUSION

The initial traffic stop was valid and not impermissibly prolonged. Beginning around the fifteen to sixteen-minute mark, the traffic stop ended and became a consensual encounter. Alternatively, any prolonged detention was supported by reasonable suspicion. Finally, Defendants voluntarily consented to the search of the car, and such consent was attenuated from any illegal detention. Therefore, Defendants' motion to suppress (**Doc. 29**) is **DENIED**.

IT IS SO ORDERED.



CHIEF UNITED STATES DISTRICT JUDGE

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

December 29, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JESUS GOMEZ-ARZATE,

Defendant - Appellant.

No. 19-2119
(D.C. No. 1:18-CR-01960-WJ-2)
(D. N.M.)

ORDER

Before **LUCERO, KELLY, and BACHARACH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk