NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE SANCHEZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

INDEX TO APPENDIX

willfully made false, fictitious or fraudulent statements.

* * * * * *

The judgment is affirmed.

UNITED STATES of America
Plaintiff - Appellee

v.

Jose SANCHEZ Defendant - Appellant

No. 18-1890

United States Court of Appeals,
Eighth Circuit.

Submitted: January 16, 2019

Filed: April 3, 2020

Rehearing Denied May 29, 2020

Background: Defendant charged with narcotics offenses based on evidence discovered during traffic stop filed motion to suppress evidence. The United States District Court for the Western District of Arkansas, Susan O. Hickey, J., denied motion, and defendant appealed.

Holdings: The Court of Appeals, Melloy, Senior Circuit Judge, held that:

(1) police officer had reasonable suspicion of criminal activity, of kind sufficient to support his prolongation of lawful traffic stop;

(2) during an otherwise lawfully extended traffic stop, officer could look at the undercarriage of vehicle without probable cause;

(3) officer could properly seize object that he notice wrapped in plastic inside spare tire on undercarriage of vehicle.

Affirmed.

Kelly, Circuit Judge, filed dissenting opinion.

1. Automobiles ⚿349(2.1, 10)

Traffic stop constitutes a Fourth Amendment "seizure" of the vehicle's occupants, and for that reason, it must be justified by reasonable suspicion that criminal activity may be afoot. U.S. Const. Amend. 4.

2. Automobiles ⚿349(14.1)

When law enforcement officer makes a routine traffic stop, officer is entitled to conduct an investigation reasonably related in scope to the circumstances that initially prompted the stop. U.S. Const. Amend. 4.

3. Automobiles ⚿349(17)

Even a lawful traffic stop may become unlawful if it is prolonged beyond the time reasonably required to complete the mission of the stop. U.S. Const. Amend. 4.

4. Automobiles ⚿349(17, 18)

Tolerable duration of police inquiries during traffic stop is determined by the stop's mission, i.e., to address the traffic violation that warranted the stop and attend to related safety concerns; authority for the stop ends when tasks tied to the traffic infraction are, or reasonably should have been, completed. U.S. Const. Amend. 4.

5. Automobiles ⚿349(17)

Delay that prolongs the duration of traffic stop to conduct investigatory actions unrelated to the purposes of the stop is impermissible unless supported by reasonable suspicion of criminal activity. U.S. Const. Amend. 4.

6. Criminal Law ⚿1139, 1158.12

As general rule, determinations of "reasonable suspicion" and of "probable cause" should be reviewed de novo on ap-

peal from denial of motion to suppress evidence; however, reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers. U.S. Const. Amend. 4.

7. Arrest ⚿60.2(10)

Concept of "reasonable suspicion" of criminal activity, of kind required to justify an investigatory stop, is somewhat abstract, but the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a "preponderance of the evidence" standard. U.S. Const. Amend. 4.

8. Arrest ⚿60.2(10)

Determination as to whether there was "reasonable suspicion" of criminal activity, of kind required to support an investigatory stop, must be made based on totality of the circumstances, and courts may not view individual elements of suspicion in isolation; *Terry* precludes such a divide-and-conquer analysis. U.S. Const. Amend. 4.

9. Arrest ⚿60.2(10)

In deciding whether there was "reasonable suspicion" of criminal activity, of kind required in order to support an investigatory stop, court must view the individual elements in context, i.e., in light of one another, and give due weight to officer's inferences when assessing the overall level of suspicion. U.S. Const. Amend. 4.

10. Arrest ⚿60.2(10)

Determination that reasonable suspicion of criminal activity exists, of kind required for an investigatory stop, need not rule out the possibility of innocent conduct. U.S. Const. Amend. 4.

11. Automobiles ⚿349(17, 18)

Police officer had reasonable suspicion of criminal activity, of kind sufficient to support his prolongation of lawful traffic stop until drug sniff dog could arrive, based on fact that vehicle was out-of-state truck with expired paper tags being driven in middle of night by occupants who were not truck's owner, did not have valid driver's license, and expressed some confusion as to the owner's name, based on fact that purported purpose of trip was three-day paint job but that there was only a single can of paint in truck's bed, based on fact that driver and his passenger gave different first names for driver, though one of them was allegedly a nickname, and based on officer's belief that it was unusual for driver to bring two small children and an unlicensed partner/significant other with him for midnight travel in unlicensed vehicle for short term out-of-state job. U.S. Const. Amend. 4.

12. Automobiles ⚿349(17)

Statement by officer effecting lawful traffic stop that he want to search vehicle because the situation made the "hair on the back of [his] neck stand[ ] up for some reason," did not show that his suspicion of criminal activity was insufficiently particularized and insufficient to support prolongation of traffic stop. U.S. Const. Amend. 4.

13. Automobiles ⚿349.5(8)
Searches and Seizures ⚿61

During an otherwise lawfully extended traffic stop, law enforcement officer may look at the undercarriage of vehicle without probable cause; motorists have no recognized privacy interest in undercarriages of their vehicles. U.S. Const. Amend. 4.

14. Searches and Seizures ⚿61

Motorists have no recognized privacy interest, of kind protected by the Fourth

Amendment, in the exterior of their vehicles, or in interior spaces visible to the public. U.S. Const. Amend. 4.

15. Automobiles ⚿349.5(8)

Searches and Seizures ⚿65

Law enforcement officers, without violating any privacy interest possessed by motorists and protected by the Fourth Amendment, may crouch and change position when conducting an exterior examination of motor vehicle that they have lawfully stopped, and may use a flashlight to artificially illuminate the area being viewed. U.S. Const. Amend. 4.

16. Automobiles ⚿349.5(8)

Police officer who had lawfully prolonged traffic stop based on reasonable suspicion of criminal activity, long enough for drug dog to arrive and to alert to vehicle, could properly seize object that he noticed wrapped in plastic inside spare tire on undercarriage of vehicle, though it was not until officer examined plastic bundle that he could determine that it contained methamphetamine; upon seeing through the openings in spare tire and noticing something wrapped in black plastic, this new information added to the totality of the circumstances already known to officers, raising the level of suspicion they possessed. U.S. Const. Amend. 4.

Appeal from United States District Court for the Western District of Arkansas - Hot Springs

Counsel who presented argument on behalf of the appellant and appeared on the brief was Christopher Aaron Holt, AFPD, of Fayetteville, AR.

Counsel who presented argument on behalf of the appellee and appeared on the brief was Amy M. Driver, AUSA, of Fort Smith, AR.

Before BENTON, MELLOY, and KELLY, Circuit Judges.

MELLOY, Circuit Judge.

An Arkansas state trooper stopped Jose Sanchez while he was driving a pickup truck without license plates shortly after midnight. After confirming that Sanchez had no driver's license, no criminal history, and no outstanding warrants, the trooper continued to hold Sanchez and conducted a canine sniff of the truck. In addition, the trooper crawled on the ground to look at the truck's undercarriage. From the ground, the trooper saw a black plastic bag located above a spare tire, seized the bag, and arrested Sanchez.

Sanchez moved unsuccessfully to suppress evidence seized from the vehicle's undercarriage, arguing a lack of reasonable suspicion to extend the traffic stop. Following denial of his suppression motion, Sanchez entered a conditional plea of guilty to one count of possession of 50 grams or more of actual methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(viii). Sanchez appeals the denial of his motion to suppress, and we affirm.

I. Background

Shortly after midnight on May 26, 2016, Arkansas state trooper Derek Nietert stopped Sanchez on Interstate 30 near Malvern, Arkansas. Nietert stopped the truck because it had no license plates and he could not read its paper tags. Once Nietert stopped the truck, he noticed that the paper tags had recently expired. Sanchez was traveling with Vanessa Fuentes, who was in the passenger seat, and their two "very small children," who were in the backseat. Nietert testified that Sanchez looked "concerned" when Nietert approached the vehicle. Sanchez spoke little English, so Nietert mostly communicated

through Fuentes, who told Nietert that the driver was Jose Sanchez and that neither of them had a driver's license. Nietert testified that he believed they produced an insurance card bearing a different individual's name. Nietert realized the vehicle was at an unsafe location where a guardrail left little space between the vehicle and fast-moving traffic, so Nietert asked Sanchez to drive ahead to an exit. Sanchez did so.

At the second location, after riding the short distance alone in the truck with Sanchez and the children, Fuentes explained to Nietert that they had borrowed the vehicle from Sanchez's friend and were traveling from Dallas, Texas, to Little Rock, Arkansas, so that Sanchez could complete a two-to-three-day job painting a house. Fuentes did not know the truck owner's name. She stated they would be staying at a hotel, but did not know which hotel.

Nietert asked Sanchez to step out of the vehicle. Sanchez did so, and despite the language barrier, Sanchez confirmed some of the statements Fuentes had previously relayed to Nietert. Sanchez did, however, indicate that his first name was Jimmy rather than Jose. In addition, Sanchez identified his friend Miguel as the owner of the vehicle.

Nietert thought it was suspicious that Sanchez would bring Fuentes and their two children to Arkansas for a short job. Nietert observed two suitcases in the rear of the cab. In addition, he noted that he saw only one gallon of paint in the truck's bed, with no brushes or other paint or equipment visible. When questioned further, Fuentes explained that Sanchez would be working alone, not as part of a crew, and she believed the materials and equipment for the project were being provided by the homeowner in Little Rock. Nietert also questioned Fuentes as to why she reported Sanchez's first name was "Jose" while Sanchez said his name was "Jimmy." From the video evidence, it appears that Fuentes told Nietert that Jimmy was a nickname. Also on audio from the same evidence, Nietert indicated when talking to Fuentes that the name on the insurance card did not match the owner's name as asserted by Sanchez.

Nietert radioed Sanchez's name and date of birth to perform a warrant check. Nineteen minutes into the stop, dispatch confirmed that Sanchez did not have a driver's license and did not have any reported criminal history. Outside the presence of Fuentes and Sanchez, Nietert summarized the information available and said, "It's got the ... hair on the back of my neck standing up for some reason. ... I wanna search it."[1]

One minute after obtaining the results of the criminal history check, Nietert asked Fuentes for consent to search the vehicle and she declined. Approximately two minutes passed between the time that Fuentes declined to give consent and the canine sniff. Corporal Mike Bowman arrived and directed the canine. Before doing so, but after learning that neither adult had a license, the vehicle had expired tags, and the ownership was unknown, Bowman stated simply, "tow it." Nietert, in apparent explanation for why he had not simply called for a tow, responded that there were two babies present.

The canine sniff proceeded, and Bowman reported that the canine alerted. The

1. On the night of the stop, a civilian was riding along with Nietert at the behest of Nietert's superiors. Several of Nietert's comments as captured in the video appear to have been comments to the civilian. This same person exited Nietert's cruiser at the second location and is seen in the video at various times.

officers began searching the vehicle's cab area. Approximately ten minutes into the search, Bowman crawled under the vehicle and indicated he had located something. Nietert went under the vehicle and saw through holes in the spare wheel that a black plastic bundle was secreted above the wheel. Nietert arrested Sanchez and removed the bundle, which was later determined to contain methamphetamine. Sanchez was charged with conspiracy to distribute methamphetamine, possession with intent to distribute methamphetamine, and traveling in interstate commerce with the intent to promote unlawful activity.

Sanchez moved to suppress the methamphetamine evidence. Prior to the suppression hearing, the government conceded that the canine sniff did not provide troopers with probable cause to search the vehicle because Bowman had not followed proper canine handling procedures. At the hearing, the government introduced dash camera footage of the traffic stop, and both Nietert and Sanchez testified.

Nietert testified that, before conducting the search, he was considering towing the vehicle because neither Sanchez nor Fuentes had a valid driver's license and neither was listed as the owner of the vehicle. He acknowledged that troopers do not always impound vehicles under these circumstances and that he had not yet decided whether to do so when he called for the canine unit. Nietert testified that, had the vehicle been impounded, troopers would have conducted an inventory search. Nietert admitted that he did not run the truck's VIN to check its ownership or determine if it had been reported as stolen. He indicated, however, that when vehicles have paper tags, VIN checks are often inconclusive as to ownership due to the recency of changes in ownership likely surrounding the issuance of paper tags.

Defense counsel questioned Nietert as to several aspects of the stop. Nietert admitted that he did not ask the name of the homeowner to confirm the information about a painting job. In addition, counsel suggested Nietert "wasn't concerned about Mr. Sanchez or Ms. Fuentes. You had them drive to another exit . . . And they were free to move about the truck while you were running Mr. Sanchez's information." Nietert responded the "[u]nder the special circumstances with the babies, . . . I hate to see them stressed out without their parents. So, yeah. I allowed that."

The district court denied Sanchez's motion to suppress, concluding that reasonable suspicion justified the length of the stop and that exterior visual inspection of the undercarriage did not require probable cause. The court also concluded that, upon seeing the black plastic bundle, officers had probable cause to seize the bundle. Sanchez entered a conditional guilty plea to the charge of possession with intent to distribute, reserving the right to appeal the denial of his suppression motion. He was sentenced to 63 months of imprisonment.

II. Discussion

Sanchez presses three arguments on appeal. First, he asserts that the traffic stop was unreasonably prolonged, constituting an unlawful seizure. Second, he argues that the troopers' examination of the vehicle's undercarriage was a search unjustified by probable cause. Third, he argues that the troopers' manipulation and removal of the black plastic bags constituted a physical trespass—and therefore, a seizure—again unsupported by probable cause. We conclude that reasonable suspicion existed and supported extension of the stop. We also conclude that external, visual examination of the vehicle's undercarriage did not require probable cause.

Finally, discovery of the black plastic bundle secreted above the spare wheel added to the overall level of suspicion and provided the probable cause necessary to seize the bundle and arrest the occupants.

A. Reasonable Suspicion

[1–4] The Fourth Amendment protects against "unreasonable searches and seizures," U.S. Const. amend. IV, and a traffic stop constitutes a seizure of the vehicle's occupants, Brendlin v. California, 551 U.S. 249, 255, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). As such, a traffic stop must be justified by "reasonable suspicion . . . that criminal activity may be afoot." United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) (quotation marks and citation omitted). "When an officer makes a routine traffic stop, the officer is entitled to conduct an investigation reasonably related in scope to the circumstances that initially prompted the stop." United States v. Lyons, 486 F.3d 367, 371 (8th Cir. 2007) (quotation marks and citation omitted). But even a lawful traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete [the] mission" of the seizure. Illinois v. Caballes, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). "[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns." Rodriguez v. United States, 575 U.S. 348, 354, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015) (quoting Caballes, 543 U.S. at 407, 125 S.Ct. 834). "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." Id.

[5] A delay that "prolongs—*i.e.*, adds time to—the stop," id. at 357, 135 S.Ct. 1609, to conduct investigatory actions unrelated to the purposes of the stop is impermissible unless it is supported by reasonable suspicion. Sanchez does not dispute that Nietert's initial decision to conduct the traffic stop was lawful. See United States v. Sanchez, 572 F.3d 475, 478–79 (8th Cir. 2009) (affirming validity of a stop based on officer's reasonable suspicion that temporary license plate violated state vehicle registration statute). Instead, he asserts that Nietert exceeded his authority by extending the seizure. The government concedes that the decision to conduct the canine sniff prolonged the traffic stop but argues the extension was supported by reasonable suspicion.

[6] "[A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. . . . [but] a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." Ornelas v. United States, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); see also Arvizu, 534 U.S. at 273, 122 S.Ct. 744; United States v. Dortch, 868 F.3d 674, 680 (8th Cir. 2017) ("[O]ur review on this issue looks to the totality of the circumstances, 'allow[ing] officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them.' " (alteration in original) (quoting Arvizu, 534 U.S. at 273, 122 S.Ct. 744)). The reasonable suspicion inquiry asks "whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." United States v. Walker, 771 F.3d 449, 450 ((8th Cir. 2014) (quotation marks and citation omitted)).

[7–10] "The concept of reasonable suspicion is somewhat abstract," but "the like-

lihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." Arvizu, 534 U.S. at 274, 122 S.Ct. 744. Because the determination as to reasonable suspicion must be based on the "totality of the circumstances," id. at 273, 122 S.Ct. 744, courts may not view individual elements of suspicion in isolation. In fact, "Terry ... precludes this sort of divide-and-conquer analysis." Id. at 274, 122 S.Ct. 744. Rather, we must view the individual elements in context, *i.e.*, in light of one another, and give "due weight" to the officer's inferences when assessing the overall level of suspicion. Ornelas, 517 U.S. at 699, 116 S.Ct. 1657. As such, "[a] determination that reasonable suspicion exists ... need not rule out the possibility of innocent conduct." Arvizu, 534 U.S. at 277, 122 S.Ct. 744.

[11] The district court concluded that Nietert had reasonable suspicion based on several specific and interrelated facts. Viewing the facts collectively and in light of one another, and acknowledging that arguably innocent factors can be suspicious in context, we believe Nietert permissibly concluded there was a "particularized and objective basis" for suspecting that Sanchez was involved in wrongdoing beyond committing traffic violations. First, Nietert saw an out-of-state truck with paper tags driving in the middle of the night. Upon stopping the truck, he discovered neither adult in the vehicle had a driver's license and the paper tags were expired. Next, there was some confusion as to the name of the owner; Fuentes was unsure of the owner's real name, and the name on the insurance card did not match the information relayed to the officer. Nietert also learned that the purported purpose for the trip was a two-to-three-day painting job, but no supplies were present other than one can of paint. Nietert learned all of this after having his suspicion piqued by the fact that Sanchez and his partner gave different names (Jimmy and Jose) even if one name was later described as a nickname. Finally, Nietert thought it unusual that an unlicensed driver would bring small children and an unlicensed partner/significant other with him for the midnight travel in the unlicensed vehicle for a short term out-of-state job.

A reasonable officer could view this collection of facts as suspicious. A reasonable officer could find it inherently suspicious that someone would lend their truck to unlicensed drivers, especially if one of those drivers could not readily name that owner. It is more suspicious that the owner of a vehicle would do so when tags are expired and the borrowers are driving out of state through the middle of the night. The act of lending a vehicle in such a situation suggests a fair amount of risk and possible future hassle for the drivers and the vehicle owner. An officer reasonably could expect clarity from drivers as to vehicle ownership and could view it as suspicious that drivers could not provide full details, especially when given the timing of the stop and the absence of drivers' licenses or current plates.

In addition, it is suspicious that, for a two-to-three-day painting job with supplies and paint waiting at the destination, a worker would throw in a single can of paint. The government argues the case is analogous to United States v. Murillo-Salgado, 854 F.3d 407, 416 (8th Cir.), cert. denied, —— U.S. ——, 138 S. Ct. 245, 199 L.Ed.2d 157 (2017), where we upheld a finding of reasonable suspicion based in part on the officer's observation that the amount of wiring in the vehicle appeared insufficient to complete the job that was the stated purpose of the trip. Sanchez argues that the government's reliance on

Murillo-Salgado is misplaced. Sanchez emphasizes that, unlike the passengers in Murillo-Salgado, who offered no explanation for their lack of equipment and materials, Fuentes explained that the necessary equipment was located at the job. The driver in Murillo-Salgado also provided conflicting information about his occupation and about who was paying for the rental vehicle.

Here, we agree with the government that the lack of sufficient painting equipment reasonably can be viewed as adding to the overall level of suspicion. As in Murillo-Salgado, ownership and control of the vehicle were unclear. Regardless, we do not believe it necessary to finely parse distinctions between the present case and Murillo-Salgado. See Ornelas, 517 U.S. at 698, 116 S.Ct. 1657 ("It is true that because the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multi-faceted, one determination will seldom be a useful precedent for another." (citation and internal quotation marks omitted)). Rather, a reasonable officer could view the decision to bring along a single gallon of paint for a two-to-three day job as an awkward attempt to bolster a cover story. Giving due weight to the officer's interpretation of the situation, the explanation proferred by Fuentes does not dispel suspicion. In this regard, the reasonableness of different inferences and narratives flowing from the presence of one can, and the officer's permissible view of those narratives, is more convincing than arguable similarities or differences with the Murillo-Salgado case. We must give "due weight" to the officer's reasonable inferences and his discounting of the ostensibly innocent explanation as to the can of paint. Ornelas, 517 U.S. at 699, 116 S.Ct. 1657.

Sanchez, no doubt, is correct that there are possible innocent explanations for these various individual factors, such as limited housing, transportation, or childcare options. But, as the Court has held, even though "each of these factors alone is susceptible of innocent explanation, and some factors are more probative than others[,] ... together ... they sufficed to form a particularized and objective basis." Arvizu, 534 U.S. at 277, 122 S.Ct. 744. We conclude that such explanations, in context, are neither conclusive nor consistent with the officers' reasonable skepticism.

These suspicious facts suggested to Officer Nietert the possible transportation of contraband, as demonstrated by his decision to call for the dog. This suspicion is consistent with the midnight drive and the apparent desire to avoid detection. Importantly, this suspicion better explains why the not-readily-identified owner of a vehicle would loan it to unlicensed drivers to take it out of state. And, the applicable standard, after all, is less than a preponderance of the evidence.

[12] Finally, Nietert's statement that he wanted to search the truck because the situation made the "hair on the back of [his] neck stand[ ] up for some reason," does not show that his suspicion was insufficiently particularized. While it is true that an "officer's reliance on a mere 'hunch' is insufficient," Arvizu, 534 U.S. at 274, 122 S.Ct. 744, we do not view Nietert's comments to his ride-along passenger as an attempted articulation of a legal standard. And for the reasons just discussed, we do not view Nietert as having acted on an "inchoate and unparticularized suspicion or hunch." United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (citation and internal quotation marks omitted).

B. Privacy Interest in the Vehicle Undercarriage/Seizure

[13–15] We also conclude that, absent a physical trespass and during an other-

wise lawfully extended stop, an officer may look at the undercarriage of a vehicle without probable cause. Officers commonly look through windows and glance at wheel wells when sizing up the scene of stop, often for a combination of safety and investigatory reasons. It is well established that motorists have no recognized privacy interest in the exterior of their vehicles, or the interior spaces visible to the public. See Texas v. Brown, 460 U.S. 730, 740, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) ("There is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers." (internal citations omitted)). And, officers may crouch and change position when conducting an exterior examination or use a flashlight to artificially illuminate the area being viewed. See id. ("[T]he fact that [an officer] changed [his] position and bent down at an angle so [he] could see what was inside [a] car is irrelevant to Fourth Amendment analysis. The general public could peer into the interior ... from any number of angles; there is no reason [the officer] should be precluded from observing as an officer what would be entirely visible to him as a private citizen."); see also United States v. Bynum, 508 F.3d 1134, 1137 (8th Cir. 2007) ("The act of looking through a car window is not a search for Fourth Amendment purposes because 'a person who parks a car—which necessarily has transparent windows—on private property does not have a reasonable expectation of privacy in the visible interior of his car.' " (quoting United States v. Hatten, 68 F.3d 257, 261 (8th Cir. 1995))).

Without controlling authority, Sanchez argues the undercarriage is distinct from the rest of the exterior, or the visible interior, of a vehicle because motorists do not expect the public to view the undercarriage of their vehicles. Sanchez argues that because drivers would be surprised and concerned to see a stranger looking under their cars, there must exist a reasonable and recognizable expectation of privacy. But, the same could be said of the floor of a vehicle's interior when an officer must stand close to the vehicle to peer in or assume an awkward position to obtain a view. The sole test cannot be the level of concern a person would express at seeing a stranger in a parking lot looking in or under their vehicle.

Sanchez distinguishes "vehicle undercarriage" cases cited by the government as arising only in the context of border checkpoint stops. See, e.g., United States v. Rascon-Ortiz, 994 F.2d 749, 754 (10th Cir. 1993) ("The undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy. The fact that [an officer] knelt down to look under the car does not alter this finding. An officer may shift his position to obtain a better vantage point without transforming a visual inspection into a search, even though the agent's purpose is to look for contraband."). But, the material holding in Rascon-Ortiz did not appear to depend upon the border checkpoint context. That context, of course, provided justification for the stop, but the court, "tak[ing] guidance from the relevant search and seizure law" held "the brief visual examination of the vehicle's undercarriage was not a search." Id.

Further, the parties cite no case in which our own circuit has distinguished the undercarriage of a vehicle as outside the scope of a permissible exterior examination. Cf. United States v. Sanchez, 572 F.3d 475, 477 (8th Cir. 2009) (noting the fact of an undercarriage examination without identifying its legality as an issue in the case, stating that an officer "looked at the undercarriage of the minivan and no-

ticed fresh undercoating spray .... commonly used to conceal compartments in a vehicle's undercarriage for transporting illegal drugs"). And, although the Supreme Court has relied on a theory of physical trespass to strike the warrantless mounting of a GPS tracker on a vehicle's undercarriage, the Court has not held the simple act of viewing a vehicle's undercarriage requires probable cause. See United States v. Jones, 565 U.S. 400, 407–08, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).

At the end of the day, and as a practical matter, drawing a line between permissible and impermissible areas of a vehicle's exterior that officers may observe absent physical trespass would seem wholly unworkable. Vehicle configurations vary substantially and officers' inspections of undercarriages will involve varying levels of physical contortion. A distinction that would permit officers to look in windows, crane their necks, stand on their toes, crouch to look in wheel wells, and shine flashlights at night but that would preclude them from looking "too far" under a vehicle is too difficult to articulate. Separating the undercarriage from the rest of the vehicle's exterior necessarily entails defining a subjective dividing line that will vary in each situation and leave officers little guidance as to the limits of their authority.

[16] Finally, Sanchez argues that, even if officers could view the underside of the truck, they could not seize the black plastic bundle because, without physically invading the opaque wrapping, they could not have known its contents. Sanchez, therefore, characterizes discovery of the bundle as a physical trespass rather than an exterior vehicle examination. This argument overly discounts the permissible inferences arising from the cumulative information officers had received. Upon seeing through the openings in the spare wheel and noticing something wrapped in black plastic, this new information added to the totality of the circumstances already known to officers, raising the level of suspicion they possessed. See, e.g., United States v. Pulido-Ayala, 892 F.3d 315, 319 (8th Cir. 2018) (holding physical trespass into a vehicle constitutional when trespass occurred after officers received new information that provided probable cause). Here, before any physical trespass, officers possessed probable cause and, therefore, a legal basis for the subsequent seizure of the package. In fact, Nietert testified that he previously had encountered other motorists with contraband similarly situated. In this situation, officers did not need to know with certainty, or see, the contents of the bundle to have probable cause.

We affirm the judgment of the district court.

KELLY, Circuit Judge, dissenting.

Any extension of a traffic stop must be justified by "reasonable suspicion of criminal activity." Rodriguez v. United States, 575 U.S. 348, 358, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015). Reasonable suspicion requires that a police officer "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant further investigation." United States v. Woods, 829 F.3d 675, 679 (8th Cir. 2016) (cleaned up); see also United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) (explaining that reasonable suspicion requires "a particularized and objective basis for suspecting legal wrongdoing" (cleaned up)). Moreover, any further investigation must be "reasonably related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Viewing

the evidence in its totality, the facts in this case do not meet these standards.

In my view, state trooper Nietert violated Sanchez's Fourth Amendment rights by extending the stop to conduct a canine sniff without reasonable suspicion of drug activity. Sanchez driving without a license in a borrowed truck with recently expired tags justified Nietert issuing a citation for traffic violations or impounding the truck until its owner arrived to collect it—but a canine sniff required more. A canine sniff goes beyond the "ordinary inquiries" incident to a traffic stop and requires "independent[ ]" justification. Rodriguez, 575 U.S. at 355, 357, 135 S.Ct. 1609. Nietert's decision to extend Sanchez's detention could be justified only by reasonable suspicion that Sanchez was engaged in criminal activity that merited further investigation with a canine sniff. The officer's "unparticularized suspicion or 'hunch' " was not enough. See Terry, 392 U.S. at 27, 88 S.Ct. 1868.

The district court concluded that Nietert had reasonable suspicion based on several specific facts. Nietert observed that Sanchez seemed concerned about being pulled over. He found it suspicious that Sanchez appeared to lack painting equipment beyond the single visible can of paint. He also thought it was odd that Sanchez would bring his girlfriend and children along for the trip. Nietert was also concerned that neither Sanchez nor Fuentes had a driver's license, that the vehicle belonged to someone else, and that the vehicle's paper tags were expired. Finally, the district court noted that the video footage appeared to show inconsistent answers from Sanchez and Fuentes regarding Sanchez's first name.

Individually, these facts are not inherently suspicious. But even when viewed collectively, they do not create a "particularized and objective basis" for suspecting that Sanchez was involved in wrongdoing beyond committing traffic violations. See Arvizu, 534 U.S. at 273, 122 S.Ct. 744. That Sanchez, who spoke very little English, appeared "concerned" about being pulled over by a state trooper is hardly surprising. Nietert testified that Sanchez's level of concern was consistent with how many people appear when stopped by police. See United States v. Jones, 606 F.3d 964, 967 (8th Cir. 2010) (per curiam) (finding that circumstances "shared by countless, wholly innocent persons" do not add weight to reasonable suspicion analysis). Nietert did not describe Sanchez as "nervous," nor did he witness any behavior that would indicate unusual nervousness. Absent "the kind of 'unusual,' 'exceptional,' or more objective manifestations of nervousness" that might support a finding of reasonable suspicion when combined with other specific facts, Sanchez's look of "concern" carries little to no weight. See United States v. Jones, 269 F.3d 919, 929 (8th Cir. 2001) (expressing skepticism "of the objective suspicion supplied by generic claims that a Defendant was nervous or exhibited nervous behavior after being confronted by law enforcement officials").

Nietert also did not explain what was suspicious about Sanchez bringing Fuentes and his children along on the trip. Nietert acknowledged that they had luggage in the truck, consistent with their account that they were taking a brief trip to Little Rock. And as the court notes, Sanchez's family might have been traveling together that night due to a lack of access to housing or childcare. In any event, there was no inconsistency between Fuentes's explanation of the trip's purpose and Sanchez's explanation. When Nietert questioned Sanchez outside of the vehicle and away from Fuentes, he confirmed (albeit with some difficulty due to the language barrier) that he was a painter and that he had borrowed

the truck from his friend to perform a painting project in Little Rock. All of this was consistent with Fuentes's account. There is nothing in the record that would have objectively suggested that Sanchez's narrative was false. See United States v. Beck, 140 F.3d 1129, 1137 (8th Cir. 1998) (finding defendant's explanation for the trip was not suspicious where officer had "no reason to suspect that [the] explanation was untrue").

There was some inconsistency in how Fuentes and Sanchez described Sanchez's first name, but Nietert did not say this raised any suspicion when he testified at the suppression hearing. Fuentes readily provided a reasonable explanation when Nietert asked why she had said Sanchez's first name was Jose and Sanchez said his name was Jimmy. From the record, it appears Nietert accepted the explanation at the time, and understandably so.

The court places great weight on Nietert's observation that Sanchez appeared to lack sufficient painting equipment for the job he described. It is true that in United States v. Murillo-Salgado we upheld a finding of reasonable suspicion in part based on the officer's observation that the amount of wiring in the vehicle appeared insufficient to complete the job that was the stated purpose of the trip. 854 F.3d 407, 416 (8th Cir. 2017). But unlike the passengers in Murillo-Salgado, who offered no explanation for their lack of equipment and materials, Fuentes explained that the necessary equipment was located at the job site—a house in Little Rock. The driver in Murillo-Salgado also provided conflicting information about his occupation and about who was paying for the rental vehicle. Here, there is nothing in the record that would have suggested that either Fuentes or Sanchez was being untruthful.

And although we must give "due weight" to an officer's reasonable inferences, we should not credit inferences that an officer never made. Nietert testified it "did not appear to [him] that they were going to do a paint job at all with just the one paint can." But he never testified that he believed the inclusion of one can of paint was a ruse or an effort to prop up a cover story. I would not rely on an inference the officer did not make—particularly when Sanchez provided a reasonable explanation for his lack of painting materials.

Finally, just before conducting the canine sniff, Nietert commented that the situation made the "hair on the back of [his] neck stand[ ] up for some reason"—just the type of nebulous misgiving, or "hunch," that is insufficient to create reasonable suspicion. See Terry, 392 U.S. at 27, 88 S.Ct. 1868. I agree that Nietert's comment should not be viewed as an attempted articulation of a legal standard. But I also would not ignore it as it is evidence of Nietert's inability to articulate "a particularized and objective basis for suspecting legal wrongdoing." See Arvizu, 534 U.S. at 273, 122 S.Ct. 744 (cleaned up).

Considering the totality of the circumstances, I do not view the collection of facts in this case as creating reasonable suspicion that justified extending the traffic stop to conduct the canine sniff. Because the subsequent discovery of methamphetamine stemmed from this Fourth Amendment violation, the evidence seized should have been suppressed.

For these reasons, I respectfully dissent. I would not reach the other issues addressed in the court's opinion.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

UNITED STATES OF AMERICA PLAINTIFF

v. Case No. 6:16-cr-60027-001

JOSE SANCHEZ DEFENDANT

ORDER

Before the Court is Defendant Jose Sanchez's ("Defendant") Motion to Suppress. (ECF No. 28). The Government filed a response. (ECF No. 29). On July 31, 2017, the Court held a hearing on the motion.[1] On August 11, 2017, the Government and Defendant each filed supplemental briefs.[2] (ECF Nos. 38-39). The Court finds the matter ripe for consideration.

I. BACKGROUND

Defendant is charged with one count of conspiring to distribute a mixture or substance containing a detectible amount of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. Defendant is also charged with one count of knowingly or intentionally possessing with intent to distribute 50 grams or more of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii). Defendant is also charged with one count of knowingly and intentionally traveling in interstate commerce with the intent to promote, manage, establish, carry on, or

[1] At the hearing, the Government offered into evidence the dash-cam footage from Trooper Nietert's patrol car and Trooper Nietert's testimony. Defendant offered his own testimony into evidence.

[2] The parties' original briefs focused primarily on the propriety of the canine sniff of Defendant's vehicle. The Government informed the Court at the July 31, 2017 motion hearing that it was not relying on the canine sniff for probable cause, and that the parties were instead contesting other issues related to the search. At the conclusion of the motion hearing, the Court ordered the parties to file supplemental briefs addressing the new issues.

facilitate the promotion, management, or carrying on, of an unlawful activity, in violation of 18 U.S.C. § 1952(a)(3)(A).

On May 26, 2016, Arkansas State Police Trooper Derek Nietert observed a black Dodge Ram truck traveling on I-30 near Malvern, Arkansas. Trooper Nietert observed the vehicle to have temporary paper tags instead of a license plate. Trooper Nietert was unable to read the vehicle's paper tags and initiated a traffic stop. After stopping the truck, Trooper Nietert discovered that the paper tags had expired. Trooper Nietert made contact with the vehicle's occupants and found Defendant in the driver's seat, co-defendant Vanessa Fuentes ("Fuentes") in the passenger's seat, and two small children in the back seats. Trooper Nietert attempted to communicate with Defendant but encountered difficulties due to a language barrier. Trooper Nietert observed Defendant to appear concerned. Fuentes informed Trooper Nietert that Defendant did not speak English and did not have a driver's license. Trooper Nietert requested the vehicle's paperwork, and Fuentes produced an insurance card that showed that the vehicle did not belong to Defendant or Fuentes.

Trooper Nietert asked Fuentes to exit the vehicle and come to the front of the patrol car. Trooper Nietert asked Fuentes who the vehicle belonged to, and she replied that it belonged to a friend of Defendant's, but that she did not know his name. Fuentes informed Trooper Nietert that Defendant's name was Jose Sanchez, provided his date of birth, and stated that they were traveling from Dallas, Texas to Little Rock, Arkansas because Defendant was contracted to paint a house the next day. Fuentes told Trooper Neitert that they planned to stay in a hotel in Little Rock, but did not know what hotel.

Trooper Nietert requested that Defendant move his vehicle to the next exit ramp because the vehicles were stopped in a dangerous location along the interstate. While moving the vehicles,

Trooper Nietert called in a criminal-history search for Defendant. After Trooper Nietert and Defendant relocated their vehicles, Trooper Nietert asked Defendant to exit the truck. Trooper Nietert attempted to converse with Defendant but continued to encounter difficulties due to the language barrier. However, Defendant was able to understand a few of Trooper Nietert's questions and told Trooper Nietert that his name was Jimmy Sanchez, that he was traveling to Arkansas to work as a painter, and that his friend Miguel owned the vehicle.

The dispatch officer informed Trooper Nietert that he could not locate Defendant's name for the background search in Texas, and Trooper Nietert provided Defendant's middle name[3] for the dispatch officer to run a more specific criminal-history search. Trooper Nietert spoke to Fuentes again and informed her that the vehicle's paper tags were expired. Trooper Nietert asked Fuentes about the discrepancy regarding her and Defendant's answers regarding Defendant's name, and Fuentes' response was inaudible. At this time, the dispatcher notified Trooper Nietert that the criminal-history search for Defendant came back with no results.

Trooper Nietert asked Fuentes for permission to search the vehicle for contraband. Fuentes refused, and Trooper Nietert informed her that he was going to have a canine unit sniff the vehicle for drugs and guns. Corporal Mike Bowman, who had previously arrived on the scene, lowered the tailgate of Defendant's vehicle and deployed Ringo, his drug-sniffing canine. Corporal Bowman attempted to lead Ringo clockwise around the vehicle, but Ringo jumped into the truck bed, sniffed, and exited the back of the truck. Ringo then sniffed the rear of the vehicle and under the tailgate. Ringo circled and sniffed the vehicle for approximately two minutes, and then Corporal Bowman removed Ringo from the scene. Corporal Bowman indicated to Trooper Nietert that Ringo alerted multiple times on the vehicle.

[3] After review of the dash-cam video of the stop, the Court is unsure how and when Trooper Nietert obtained Defendant's middle name.

Trooper Nietert informed Defendant and Fuentes that the troopers no longer needed their consent to search the vehicle because Ringo alerted to the presence of narcotics. Corporal Bowman climbed into the bed of the truck and began to search. Trooper Nietert allowed Defendant and Fuentes to remove the children from the truck, and the troopers continued their search. Corporal Bowman checked underneath the back of the truck and observed black plastic bags hidden in the rim of the spare tire. Corporal Bowman emerged from underneath the truck and informed Trooper Nietert that he had discovered suspected drugs. The troopers instructed Defendant and Fuentes to place the children back in the vehicle. The troopers then placed Defendant and Fuentes under arrest. The troopers moved the vehicle to another location and removed the black plastic bags from behind the vehicle's spare tire. The troopers discovered four Tupperware containers inside the bags, containing a total of 1,844 grams of actual methamphetamine.

Defendant moves the Court to suppress all physical evidence seized from the vehicle, as well as any evidence or statements obtained, directly or indirectly, because of any unlawfully seized evidence. Specifically, Defendant argues that the canine's sniff of the truck constituted an unlawful search, that the troopers lacked probable cause to search the vehicle, and that the search occurred for an unreasonable length of time.

Prior to the July 31, 2017 motion hearing, the Government conceded that the canine sniff did not provide the troopers with probable cause for a search because the canine handler did not follow proper procedure during the canine sniff. At the hearing, the Government argued that the search did not violate Defendant's constitutional rights because the troopers discovered the plastic bags underneath the vehicle, which, as part of the vehicle's exterior, does not enjoy Fourth Amendment protections. The Government argued in the alternative that if the search violated Defendant's Fourth Amendment rights, the violation is *de minimus* and the seizure should be

upheld under the inevitable-discovery doctrine.[4]

II. DISCUSSION

As a preliminary matter, the Court must first determine whether Defendant has standing to challenge the search. If the Court finds that he does, the Court will then determine whether the search of the vehicle infringed on Defendant's constitutional rights.

A. Standing to Challenge Search

As a preliminary matter, the Court must determine whether Defendant has standing to challenge the search. "The defendant moving to suppress bears the burden of proving he had a legitimate expectation of privacy that was violated by the challenged search." *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995). "To establish a legitimate expectation of privacy, the defendant must demonstrate (1) a subjective expectation of privacy; and (2) that the subjective expectation is one that society is prepared to recognize as objectively reasonable." *Id.*

As a general rule, "a person has no reasonable expectation of privacy in an automobile belonging to another." *United States v. Kiser*, 948 F.2d 418, 424 (8th Cir. 1991). However, by presenting "some evidence of consent or permission from the lawful owner," a defendant may establish an objectively reasonable expectation of privacy in another person's vehicle. *Muhammad*, 58 F.3d at 355.

Defendant was certainly in possession of the truck at the time he was pulled over. It is likewise undisputed in this case that neither Defendant nor Fuentes owned the truck or were listed on its paperwork as registered users. At the motion hearing, Defendant took the stand for the limited purpose of testifying that his friend Miguel Mendoza ("Mendoza") owned the truck and gave him permission to drive it from Dallas, Texas, to Little Rock, Arkansas, on May 26, 2016.

[4] The Court will not consider this argument in light of its findings below.

The crux of the Government's argument is that Defendant's own, self-serving testimony that Mendoza allowed him to drive the truck is insufficient to establish "consent or permission from the lawful owner." The Government suggests that Defendant should have instead called Mendoza to testify or obtained his statement through other means, such as an affidavit or declaration. The Government concludes that because Defendant did not do so, he has failed to demonstrate that he had Mendoza's consent or permission to drive the truck. Defendant argues that the Eighth Circuit requires "some evidence of consent or permission," but does not expressly require any particular type of evidence to satisfy this burden. Defendant argues that he presented admissible evidence in the form of Defendant's testimony, which is sufficient to meet the "affirmative showing" required by the Eighth Circuit.

The Government correctly states that Defendant could have satisfied his burden by producing Mendoza as a witness. However, Eighth Circuit caselaw does not expressly require that the vehicle's owner testify, but instead requires only "some evidence of consent or permission from the lawful owner." *Muhammad*, 58 F.3d at 355. The Government points to no authority discussing the sufficiency of a defendant's own testimony regarding consent or permission from a vehicle's lawful owner. It appears that the Eighth Circuit has not addressed the issue under facts similar to those in this case.[5]

The United States District Court for the Southern District of Iowa has faced a similar issue. In *United States v. Villegas*, a defendant attempted to establish standing to challenge the constitutionality of a search of an absent third party's vehicle by vaguely testifying that the car's

[5] The Government cites to *United States v. Anguiano*, 795 F.3d 873, 878 (8th Cir. 2015), for the proposition that merely asserting a vehicle owner's name is insufficient to make an affirmative showing of consensual possession. However, *Anguiano* is distinguishable from the case at bar because the *Anguiano* defendant was a passenger of the vehicle rather than a driver, only knew the first name of the vehicle's owner, and provided no other details as to the owner's identity. *Id.* at 875.

owner loaned the vehicle to him. No. 4:05-cr-0177, 2006 WL 335444, at *3 (S.D. Iowa Feb. 13, 2006). The district court expressly noted that the defendant did not testify as to the car owner's identity, the terms of the loan, or the scope of permission for the use of the car. *Id.* at *4. The court concluded that the defendant's testimony was insufficient to satisfy the burden of proving a legitimate expectation of privacy in the car because the defendant "did not present more than cursory evidence." *Id.*

In this case, Defendant testified that Miguel Mendoza owned the truck and gave him permission to drive the truck from Dallas, Texas, to Little Rock, Arkansas, on May 26, 2016. The Court finds that Defendant's testimony revealed the vehicle owner's identity, the terms of the loan, and/or the scope of permission for Defendant's use of the car. Thus, Defendant's testimony touched on all the details contemplated by the *Villegas* court. The Court finds that Defendant presented more than "cursory" evidence that he had consent or permission from the vehicle's lawful owner at the time of the stop. As discussed above, the Eighth Circuit requires only "some evidence of consent or permission," *Muhammad*, 58 F.3d at 355, and the Court finds that Defendant has satisfied this burden. Accordingly, the Court finds that Defendant possessed an objectively reasonable expectation of privacy in the vehicle at the time of the stop, and thus Defendant has standing to challenge the constitutionality of the search.

B. Constitutionality of Search

Defendant argues that the stop and subsequent search of the vehicle violated his Fourth Amendment rights in two respects: first, that the stop was unreasonably and unlawfully prolonged, and second, that the search itself was unconstitutional. The Court will address each argument in turn.

1. Length of the Stop

Defendant argues that the troopers unreasonably prolonged the traffic stop by extending it beyond a time reasonably required to complete the purpose of the stop. The Government argues that the stop's length was reasonable.

The Fourth Amendment prohibits unreasonable searches and seizures. "A traffic stop constitutes a seizure of [a] vehicle's occupants, including any passengers." *United States v. Sanchez*, 572 F.3d 475, 478 (8th Cir. 2009) (citing *Brendlin v. California*, 551 U.S. 249, 255-57, (2007)). "Any traffic violation, however minor, provides probable cause for a traffic stop." *United States v. Wright*, 512 F.3d 466, 471 (8th Cir. 2008) (citation and internal quotes omitted).

"Once the stop of a vehicle has occurred, a police officer may detain the offending motorist while the officer completes a number of routine but somewhat time-consuming tasks related to the traffic violation, such as computerized checks of the vehicle's registration and the driver's license and criminal history, and the writing up of a citation or warning." *United States v. Barragan*, 379 F.3d 524, 528-29 (8th Cir. 2004) (internal quotation marks omitted). "While the officer performs these tasks, he may ask the occupants routine questions, such as the destination and purpose of the trip, and the officer may act on whatever information the occupants volunteer." *United States v. Olivera-Mendez*, 484 F.3d 505, 509 (8th Cir. 2007). Whether the length of a particular detention is reasonable is a fact-intensive question, and there is no *per se* time limit on all traffic stops.[6] *Id.* at 510.

"Once this initial investigation is finished, however, the purpose of the traffic stop is complete and further detention of the driver or vehicle would be unreasonable, unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention or unless the continued encounter is consensual." *United States v. Flores*, 474

[6] For example, when there are complications in carrying out the traffic-related purposes of the stop, police may reasonably detain a driver for a longer duration than when a stop is strictly routine. *Id.*

F.3d 1100, 1103 (8th Cir. 2007). If the driver's responses and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and satisfy those suspicions. *See United States v. Cummins*, 920 F.2d 498, 502 (8th Cir. 1990).

Defendant does not argue that the stop itself was improper, or that the first twenty minutes of the stop—during which Trooper Nietert performed an initial investigation—exceeded a reasonable amount of time. Instead, Defendant argues without citing to supporting authority that once the second criminal-history check came back, the purpose of the stop was complete and that the troopers unreasonably extended the stop when they initiated a canine sniff and subsequent search of the vehicle without probable cause or a reasonable suspicion of criminal activity.

At the motion hearing, the Government conceded that roughly twenty minutes passed from the time the troopers received the completed criminal background check on Defendant and chose to begin searching the vehicle, and the time that the troopers located the drugs. However, the Government argued that the stop's length was proper because at the time the troopers began searching the truck, Trooper Nietert had not issued Defendant any tickets, towed the vehicle, or otherwise concluded the traffic stop. The Government's supplemental brief does not discuss the length of the stop.

The Court will not concern itself with the propriety of the stop itself or Trooper Nietert's initial investigation because Defendant does not argue that either was improper or unreasonably lengthy. Thus, the Court must only determine whether the latter half of the stop was unreasonable in length. The point in time in which a traffic stop's purpose is competed is "determined, like other Fourth Amendment inquiries, by objective indicia of the officer's intent." *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 648 (8th Cir.1999), *cert. denied*, 528 U.S. 1161 (2000). Once a traffic stop is complete, further detention of the driver or vehicle would be

unreasonable, "unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention." *Flores*, 474 F.3d at 1103. "An officer's suspicion of criminal activity may reasonably grow over the course of a traffic stop as the circumstances unfold and more suspicious facts are uncovered." *United States v. Suitt*, 569 F.3d 867, 872 (8th Cir. 2009). To evaluate reasonable suspicion, the Court must "look to the totality of the circumstances, in light of the officer's experience." *United States v. Foley*, 206 F.3d 802, 806 (8th Cir. 2000).

Trooper Nietert, who has been employed by the Arkansas State Highway Police for nine years and possesses special training in criminal interdiction, testified that, while conducting the initial investigation, several things aroused his suspicions of criminal activity. Trooper Nietert stated that upon making contact with Defendant, he observed Defendant to appear concerned that he had been pulled over. He found it suspicious that Defendant claimed to be traveling for a painting job, but had no painting tools, equipment, or materials in the truck other than a single can of paint. He stated that he found it suspicious that Defendant chose to bring his partner and two small children with him on a short, two-day work trip to another state. He also found it suspicious that Defendant and Fuentes did not have driver's licenses and were traveling in a vehicle with expired temporary paper tags that did not belong to them. Additionally, the dash-cam video of the stop shows that Defendant and Fuentes gave inconsistent answers to Trooper Nietert's questions regarding Defendant's identity—Fuentes told Trooper Nietert that Defendant's name was Jose Sanchez, while Defendant stated that his name was Jimmy Sanchez.

Defendant argues that some of these individual factors can be innocently explained, and it is possible that some of them could be. However, the Court cannot consider the individual factors in isolation of each other, as they "must be considered as a whole and in the light of the officer's

experience and specialized training." *United States v. Yang*, 345 F.3d 650, 655 (8th Cir. 2003). The Court finds that the facts, viewed in their totality, gave Trooper Nietert the necessary reasonable suspicion to justify further detention of Defendant. *See, e.g.*, *United States v. Murillo-Salgado*, 854 F.3d 407, 415-16 (8th Cir. 2017) (finding that an officer trained in criminal interdiction had reasonable suspicion of drug activity based on the defendant driving a rented vehicle rented in someone else's name, the officer's belief that the vehicle did not have sufficient tools and equipment to perform labor work that the defendant claimed to be traveling for, and the defendants' inconsistent answers to the officer's questions), *appeal docketed*, No. 17-5303 (S. Ct. July 24, 2017).

The Court finds that the length of the stop was reasonable. Defendant argues that the period of time after Trooper Nietert received the criminal-history search for Defendant was unreasonably lengthy because the troopers lacked probable cause or a reasonable suspicion of criminal activity. However, as discussed above, the Court finds that Trooper Nietert possessed a reasonable suspicion of criminal activity. The Court also finds that the troopers acted diligently in pursuit of their investigation and that the additional twenty-minute wait was not excessive under this case's circumstances. *See United States v. Sharpe*, 470 U.S. 675, 686, 688 (1985) (recognizing that longer detentions may validly result from "a graduate[d] . . . respons[e] to the demands of [the] particular situation" and therefore rejecting a "hard-and-fast time limit" for investigatory stops). Therefore, the Court will not suppress any evidence seized as a result of the stop based on the stop's length.

2. Constitutionality of the Search

Defendant argues that the troopers' search of the vehicle was unconstitutional. The Government argues that the search was proper.

Defendant offers two arguments as to why the troopers' search of the vehicle was unconstitutional. First, Defendant argues that the troopers violated his Fourth Amendment rights by lying underneath the vehicle and observing the undercarriage. Second, Defendant argues that the troopers violated his constitutional rights by touching or manipulating the black plastic bags located inside the vehicle's spare tire without first obtaining a warrant. The Court will address each argument in turn.

a. Undercarriage of Vehicle

Defendant argues that the troopers violated his constitutional rights by lying underneath the vehicle and observing the undercarriage. The Government argues that the exterior of a vehicle does not receive Fourth Amendment Protection, and thus the troopers' observation of the vehicle's undercarriage was proper.

The exterior of a vehicle is not subject to Fourth Amendment protection. *United States v. Hephner*, 260 F. Supp. 2d 763, 776 (N.D. Iowa 2003), *aff'd*, 103 F. App'x 41 (8th Cir. 2004); *see also Katz v. United States*, 389 U.S. 347, 351, (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."). As a result, a police officer's examination of a vehicle's exterior does not constitute a "search." *New York v. Class*, 475 U.S. 106, 114 (1986).

Defendant argues, without citing to supporting authority, that although a vehicle's undercarriage is part of its exterior, it nonetheless receives Fourth Amendment protection because the undercarriage of a vehicle is not exposed to public view. Defendant points to Trooper Nietert's testimony that he very rarely examines vehicles' undercarriages during the course of ordinary traffic stops. Defendant concludes that the troopers' visual inspection of the vehicle's undercarriage violated his constitutional rights.

The Court does not agree. Defendant provides no supporting authority to distinguish the undercarriage of a vehicle from the remainder of the vehicle's exterior, and the Court is unaware of any. In fact, courts have found that visual inspections of a vehicle's undercarriage do not run afoul of the Constitution. *See United States v. Schanon*, No. CRIM 10-296 JRT JJK, 2010 WL 6426130, at *2 (D. Minn. Dec. 27, 2010), *report and recommendation adopted*, No. CRIM. 10-296 JRT JJK, 2011 WL 1261097 (D. Minn. Apr. 4, 2011); *see also United States v. Rascon-Ortiz*, 994 F.2d 749, 754 (10th Cir. 1993) ("The undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy."); *Hephner*, 260 F. Supp. 2d at 776 (holding that a toolbox located in an open truck bed is exposed to the public and does not receive Fourth Amendment protection). The fact that the troopers laid on the ground to observe the vehicle's undercarriage does not change this. *See California v. Ciraolo*, 476 U.S. 207, 213 (1986) (stating that a police officer may make visual inspections "from a public vantage point where he has a right to be"); *Texas v. Brown*, 460 U.S. 730, 740 (1983) (stating that the fact that an officer "changed [his] position" to visually inspect a vehicle's exterior is irrelevant to a Fourth Amendment analysis).

Therefore, the Court finds that the troopers did not violate Defendant's constitutional rights by visually inspecting the undercarriage of the vehicle.

b. Seizure of Plastic Bags

Defendant argues that the troopers violated his constitutional rights by manipulating the black plastic bags without having probable cause to do so. The Government argues that the troopers had probable cause.

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few

specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted). Law enforcement officials may search an automobile without a warrant under the so-called "automobile exception" when they have probable cause that the vehicle contains evidence of criminal activity. *See Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996). Probable cause exists when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983).

Defendant argues that Corporal Bowman observed the black, plastic bags partially hidden inside the rim of the vehicle's spare tire. Defendant speculates that Corporal Bowman then reached out and cut open or otherwise manipulated the plastic bags in order to determine their contents. Defendant argues that at that time, the troopers did not have probable cause of criminal activity because they could not see inside the black plastic bags to see their contents. Thus, Defendant argues that, without manipulating the bags, the troopers could not have known that it contained methamphetamine, and Defendant concludes that their manipulation of the bags to determine its contents amounted to an unconstitutional seizure.

The Court disagrees. In this case, the troopers visually inspected the undercarriage of the vehicle and observed black plastic bags partially hidden in the rim of the vehicle's spare tire. Trooper Nietert testified that, in his experience as a state trooper trained in criminal interdiction, ordinary people do not store legitimate goods inside black, plastic bags underneath a vehicle inside the rim of a spare tire. Trooper Nietert testified further that his training has taught him that drugs are occasionally hidden in vehicles' spare tires. The Court finds that, based on the totality of the circumstances, the troopers had probable cause to believe that the vehicle contained evidence of criminal activity at the exact moment they observed the black plastic bags partially hidden

underneath the vehicle. As a result, the troopers could seize the black plastic bags without a warrant pursuant to the "automobile exception." *See Labron*, 518 U.S. at 940.

III. CONCLUSION

For the reasons discussed above, the Court finds that Defendant's constitutional rights were not violated by the May 26, 2016 stop and the subsequent search and seizure. Accordingly, Defendant's motion to suppress evidence (ECF No. 28) is hereby **DENIED**.

IT IS SO ORDERED, this 30th day of August, 2017.

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

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1890

United States of America

Appellee

v.

Jose Sanchez

Appellant

Appeal from U.S. District Court for the Western District of Arkansas - Hot Springs
(6:16-cr-60027-SOH-1)

ORDER

The petition for rehearing by the panel is denied.

May 29, 2020

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

/s/ Michael E. Gans

Appellate Case: 18-1890 Page: 1 Date Filed: 05/29/2020 Entry ID: 4918093