No.____

In The Supreme Court Of The United States

Xzavione Taylor,

Petitioner,

v.

United States of America,

Respondent.

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

Appendix

Appendix A
United States v. Xzavione Taylor,
No. 21-10377, Dkt. No. 45 (9th Cir. Jul. 7, 2023),
Order denying petition for rehearing

FILED

JUL 7 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. XZAVIONE TAYLOR, Defendant-Appellant.	No. 21-10377 D.C. No. 2:20-cr-00204-GMN-EJY-1 District of Nevada, Las Vegas ORDER

Before: BRESS and VANDYKE, Circuit Judges, and RESTANI,* Judge.

The panel unanimously voted to deny the petition for panel rehearing. Judges Bress and VanDyke voted to deny the petition for rehearing en banc, and Judge Restani so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, Dkt. No. 41, is DENIED.

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

Appendix B
United States v. Xzavione Taylor,
No. 21-10377, Dkt. No. 38 (9th Cir. Mar. 1, 2023),
Opinion

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. XZAVIONE TAYLOR, *Defendant-Appellant.*	No. 21-10377 D.C. No. 2:20-cr-00204-GMN-EJY-1 OPINION

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, District Judge, Presiding

Argued and Submitted December 7, 2022
San Francisco, California

Filed March 1, 2023

Before: Daniel A. Bress and Lawrence VanDyke, Circuit Judges, and Jane A. Restani,[*] Judge.

Opinion by Judge Bress

[*] The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

SUMMARY**

Criminal Law

The panel affirmed the district court's denial of a motion to suppress evidence discovered following a traffic stop, and remanded for the district court to conform the written judgment to its oral pronouncement of sentence, in a case in which Xzavione Taylor entered a conditional guilty plea to being a felon in possession of a firearm.

The panel held that the officers did not unreasonably prolong the traffic stop. The panel wrote:

- An officer's asking Taylor two questions about weapons early in the counter—once before the officer learned that Taylor was on federal supervision for being a felon in possession and once after—was a negligibly burdensome precaution that the officer could reasonably take in the name of safety.
- An officer did not unlawfully prolong the traffic stop when he asked Taylor to exit the vehicle.
- The officers' subjective motivations are irrelevant because the Fourth Amendment's concern with reasonableness allows certain actions to be taken in certain circumstances, whatever the subjective intent.
- A criminal history check and the officers' other actions while Taylor was outside the car were within the lawful scope of the traffic stop.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

- Even if, contrary to precedent, the frisk and criminal history check were beyond the original mission of the traffic stop, they were still permissible based on the officers' reasonable suspicion of an independent offense: Taylor's unlawful possession of a gun.

As to whether the officers violated the Fourth Amendment when they searched Taylor's car, the panel held that the district court did not err in finding that Taylor unequivocally and specifically consented to a search of the car for firearms.

Taylor conceded that precedent forecloses his constitutional challenge to a risk-notification condition of supervised release. The panel remanded for the district court to conform the written judgment to its oral pronouncement of conditions concerning outpatient substance abuse treatment and vocational services programs.

COUNSEL

Aarin E. Kevorkian (argued) and Raquel Lazo, Assistant Federal Public Defenders; Rene L. Valladares, Federal Public Defender; Federal Public Defender's Office; Las Vegas, Nevada; Erin Michelle Gettel, Snell & Wilmer, Las Vegas, Nevada; for Defendant-Appellant.

Peter H. Walkingshaw (argued), James Alexander Blum, and Robert Lawrence Ellman, Assistant United States Attorneys; Elizabeth O. White, Appellate Chief; James M. Frierson, United States Attorney; Office of the United States Attorney, District of Nevada; Reno, Nevada; for Plaintiff-Appellee.

OPINION

BRESS, Circuit Judge:

Police stopped Xzavione Taylor for a traffic violation, which led to the discovery of a firearm that Taylor, a convicted felon, could not lawfully possess. We hold that the officers did not unreasonably prolong the stop and that Taylor voluntarily consented to the search of his car. We therefore affirm the district court's denial of Taylor's motion to suppress. But on one aspect of Taylor's supervised release, we remand for the district court to conform its written judgment to the court's oral pronouncement of Taylor's sentence.

I

On July 10, 2020, Officers Anthony Gariano and Brandon Alvarado were patrolling in Northeast Las Vegas when they spotted a car with no license plate or temporary registration tags. The events that followed were recorded on the officers' body-worn cameras.

Gariano and Alvarado stopped the driver, Xzavione Taylor, who had no driver's license or other means of identification. When Gariano asked Taylor if he knew why police had pulled him over, Taylor said that he did, explaining that he had just acquired the vehicle from his aunt. As part of his standard questioning during traffic stops, Gariano asked Taylor whether the vehicle contained any "guns/knives/drugs," which Taylor denied. In response to Gariano's inquiry whether Taylor had ever been arrested before, including for "anything crazy, anything violent," Taylor stated that he was on parole (i.e., federal supervision) for being a felon in possession of a firearm. Taylor also

provided Gariano his name, Social Security number, and date of birth.

Gariano later confirmed in his testimony that "everything changed" when he learned that Taylor had been convicted for being a felon in possession because Gariano became concerned that Taylor might be armed. Gariano asked Taylor if he was in violation of his supervision conditions or if he had weapons on him, which Taylor again denied. About a minute and thirty seconds into their conversation, Gariano asked Taylor to step out of the car. Taylor complied.

Until that point, it is not clear how much the officers could see of Taylor's person. Gariano's bodycam footage showed that, at a minimum, Gariano likely could see a red strap on Taylor's left shoulder while Taylor remained seated in his car. Once Taylor emerged from the car, however, it became obvious that he was wearing a distinctive unzipped red fanny pack slung across his upper body.

The unzipped fanny pack appeared to be light and empty. Gariano asked Taylor to remove the fanny pack, and, in the process, Gariano touched, slightly opened, and lifted the pack. Both officers later explained that the empty fanny pack aroused their suspicions. Alvarado testified that "it's known that's where subjects primarily sometimes conceal weapons." Gariano similarly testified that "we've been seeing an . . . uptick of people concealing firearms in fanny packs that are slung around their body," and that he "just wanted to make sure that there [were] no weapons on his person at that point."

Alvarado chatted with Taylor and pat-frisked him. The two recognized each other because Alvarado had been a correctional officer at the prison where Taylor was

previously incarcerated. As the district court described, the interaction was "calm" and, in fact, "friendly."

Gariano, meanwhile, returned to his patrol car and ran a criminal history check on Taylor, which would also allow him to verify Taylor's identity. By the time Gariano returned to his patrol car to initiate this computerized check, Taylor had been stopped for around three minutes and had been outside his vehicle for approximately 40 seconds. From his records check, Gariano learned that Taylor had at least two previous felony convictions for grand larceny and robbery. Gariano exited his patrol car and asked Taylor for consent to search his vehicle. The conversation went as follows:

> GARIANO: Is there anything in the car?
>
> TAYLOR: No, no I just got it from my aunt.
>
> GARIANO: No guns?
>
> TAYLOR: No, sir.
>
> GARIANO: Alright, cool if we check?
>
> TAYLOR: It don't matter, I just got it, I just got it, it don't matter to me.

Gariano searched Taylor's car for less than a minute and found a handgun under the driver's seat. Alvarado then placed Taylor under arrest. Taylor received *Miranda* warnings. He admitted to the officers that he carried the gun for protection, explaining that he normally placed it in the red fanny pack but kept it under the seat while driving.

A federal grand jury indicted Taylor for being a felon in possession of a firearm. *See* 18 U.S.C. § 922(g)(1). Taylor filed a motion to suppress evidence of the gun and his

ensuing incriminating statements as the fruits of an unlawful seizure and search. In his view, the officers violated the Fourth Amendment by prolonging the traffic stop without reasonable suspicion and by searching the car without proper consent.

After a suppression hearing at which Gariano and Alvarado both testified, a magistrate judge recommended granting Taylor's motion to suppress. The district court disagreed. The district court found that once officers observed Taylor's unzipped fanny pack, under the totality of circumstances they had reasonable suspicion to believe that Taylor was a felon in possession of a firearm, so the stop was not unlawfully prolonged. After a remand to the magistrate judge for a recommendation on the consent question, the district court agreed with the magistrate judge that Taylor voluntarily consented to a search of his car. The court thus denied Taylor's motion to suppress.

Taylor entered a conditional guilty plea that preserved his right to appeal the denial of his motion to suppress. He was sentenced to twenty months' imprisonment and three years of supervised release. Taylor now appeals. We review the district court's denial of a motion to suppress de novo and its factual findings for clear error. *United States v. Bontemps*, 977 F.3d 909, 913 (9th Cir. 2020).

II

A

Under the Fourth Amendment, a seizure for a traffic stop is "a relatively brief encounter," "more analogous to a so-called *Terry* stop than to a formal arrest." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (quoting *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (alterations omitted)). To

be lawful, a traffic stop must be limited in its scope: an officer may "address the traffic violation that warranted the stop," make "ordinary inquiries incident to the traffic stop," and "attend to related safety concerns." *Id.* at 354–55 (quotations and alterations omitted). The stop may last "no longer than is necessary to effectuate" these purposes and complete the traffic "mission" safely. *Id.* at 354–55 (first quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion); and then quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). However, a stop "may be extended to conduct an investigation into matters other than the original traffic violation" so long as "the officers have reasonable suspicion of an independent offense." *United States v. Landeros*, 913 F.3d 862, 867 (9th Cir. 2019).

In this case, it is undisputed that the officers had a proper basis for stopping Taylor: he was driving without license plates or temporary tags. Once Taylor was stopped on the side of the street, Gariano was permitted to ask Taylor basic questions, such as whether Taylor knew why he had been pulled over, whether he had identification, whether he had been arrested before, and whether he had any weapons in the vehicle. These are "ordinary inquiries" incident to a traffic stop made as part of "ensuring that vehicles on the road are operated safely and responsibly," or else are "negligibly burdensome precautions" that an officer may take "in order to complete his mission safely." *Rodriguez*, 575 U.S. at 355–56; *see also id.* at 355 (officers during traffic stops may check licenses, check for outstanding warrants against the driver, and inspect registration and insurance); *United States v. Nault*, 41 F.4th 1073, 1078–79, 1081 (9th Cir. 2022). Here, as is typical, these inquiries took mere seconds and were properly within the mission of the stop. Gariano did fleetingly mention drugs in the same breath that he asked

about weapons, but Taylor gave a single answer to the combined question and this did not measurably prolong the stop. *See Rodriguez*, 575 U.S. at 355 ("An officer . . . may conduct certain unrelated checks during an otherwise lawful traffic stop.").

It is of no moment, as Taylor protests, that Gariano asked about weapons a second time within the first 90 seconds of the stop, after Taylor had already responded in the negative. There is no strong form "asked and answered" prohibition in a Fourth Amendment analysis, the touchstone of which is reasonableness. Asking two questions about weapons early in the encounter—once before Gariano learned that Taylor was on federal supervision for being a felon in possession and once after—was a negligibly burdensome precaution that Gariano could reasonably take in the name of officer safety. *See Maryland v. Wilson*, 519 U.S. 408, 413 (1997) (noting that "traffic stops may be dangerous encounters"). The two questions did not unreasonably prolong the stop. Nothing in our precedents prevented Gariano from verifying an answer to an important question that bore on the danger Taylor might pose.

Gariano also did not unreasonably prolong the stop when he asked Taylor to step out of the vehicle. Decades ago, in *Pennsylvania v. Mimms*, 434 U.S. 106, 110–11 (1977) (per curiam), the Supreme Court held that police officers during a traffic stop may ask the driver to step out of the vehicle. *See also United States v. Williams*, 419 F.3d 1029, 1030 (9th Cir. 2005) ("[I]t is well established that an officer effecting a lawful traffic stop may order the driver and the passengers out of a vehicle . . . ."). The rationale is officer safety: "[t]raffic stops are 'especially fraught with danger to police officers,'" *Rodriguez*, 575 U.S. at 356 (quoting *Arizona v. Johnson*, 555 U.S. 323, 330 (2009)), and when it comes to

having a driver stand outside his vehicle, the "legitimate and weighty" justification of officer safety outweighs the "additional intrusion" on the driver, which "can only be described as *de minimis*." *Mimms*, 434 U.S. at 110–11. Once outside the stopped vehicle, the driver may also "be patted down for weapons if the officer reasonably concludes that the driver 'might be armed and presently dangerous.'" *Johnson*, 555 U.S. at 331 (quoting *Mimms*, 434 U.S. at 112).

By this authority, Gariano did not unlawfully prolong the traffic stop when he asked Taylor to exit the vehicle. Taylor argues otherwise, claiming that once he disclosed his felon-in-possession conviction, officers pivoted to a "fishing expedition" into whether Taylor might have a firearm.

This argument is misplaced. The officers' subjective motivations are irrelevant because "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Whren v. United States*, 517 U.S. 806, 814 (1996). In this case, *Mimms* and its progeny made clear that officers could have Taylor exit his vehicle in the interest of officer safety. *See Johnson*, 555 U.S. at 331. That was so regardless of whether the officers may have subjectively believed they were on to something more than a vehicle lacking license plates. The officers' subjective motivations, whatever they may have been, could not change the objective reasonableness of their actions. *Cf. United States v. Magallon-Lopez*, 817 F.3d 671, 675 (9th Cir. 2016) ("If, for example, the facts provide probable cause or reasonable suspicion to justify a traffic stop, the stop is lawful even if the officer made the stop only because he wished to investigate a more serious offense.").

Thus far, we have considered the officers' conduct before Taylor exited his car, and we have found that it formed part of the lawful traffic stop. Taylor maintains, however, that the remaining portion of his seizure was too attenuated from the traffic stop. From Taylor's perspective, once he was outside the car, the stop was unconstitutionally prolonged, meaning that the later-discovered gun and Taylor's own inculpatory statements should have been suppressed.

Taylor's argument is unavailing. Doctrinally, we can approach this issue in two different ways, with both paths leading to the same answer: the officers did not violate the Fourth Amendment. The first ground for affirmance on this point is that Gariano's criminal history check and the officers' other actions while Taylor was outside the car were within the lawful scope of the traffic stop. Gariano thus did not improperly prolong the stop when he spent a few minutes consulting computerized databases in his patrol car. In *United States v. Hylton*, 30 F.4th 842 (9th Cir. 2022), we specifically rejected the argument that a "criminal history check [is] a prolongation of the stop and need[s] to be supported by independent reasonable suspicion." *Id.* at 847. Instead, we aligned ourselves with the other circuits and held that "because a criminal history check 'stems from the mission of the stop itself,' it is a 'negligibly burdensome precaution' necessary 'to complete the stop safely.'" *Id.* at 848 (quoting *Rodriguez*, 575 U.S. at 356) (alterations omitted).

Taylor asserts that *Hylton* should not govern because here the officers knew or should have known that Taylor posed no danger when he was compliant during the stop, which had friendly overtones. Taylor's effort to distinguish *Hylton* fails. Taylor again improperly focuses on what the

officers might have subjectively believed when what matters, under *Hylton*, is that conducting a criminal records check in connection with a traffic stop is objectively reasonable. The officers here did not abandon the traffic stop and acted properly under *Hylton*. It is true that Taylor was compliant. But that a driver is acting cooperatively does not prevent police from performing actions that are permissibly within the mission of a traffic stop. Regardless, the officers clearly did have a basis to believe that Taylor posed a danger, as we will discuss.

Taylor points out that officers began the process of checking him for weapons before Gariano went to his patrol car to check criminal history, claiming that this part of the pat-down also unreasonably extended the stop. But as we noted above, officers in the course of a lawful investigatory stop of a vehicle may pat down the driver for weapons "if the officer reasonably concludes that the driver 'might be armed and presently dangerous.'" *Johnson*, 555 U.S. at 331 (quoting *Mimms*, 434 U.S. at 112). Here, the officers could have had that reasonable suspicion once they observed Taylor fully outside of the vehicle.

The reasonable suspicion standard "is not a particularly high threshold to reach" and is less than probable cause or a preponderance of the evidence. *United States v. Valdes-Vega*, 738 F.3d 1074, 1078 (9th Cir. 2013) (en banc). The standard allows officers to make "commonsense judgments and inferences about human behavior." *Kansas v. Glover*, 140 S. Ct. 1183, 1188 (2020) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)). In doing so, officers may "draw on their own experience and specialized training" to arrive at conclusions "that might well elude an untrained person." *Valdes-Vega*, 738 F.3d at 1078 (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)).

At the point when Gariano asked Taylor, consistent with *Mimms*, to exit the vehicle, the officers knew that Taylor was driving a vehicle without license plates or registration tags, that he lacked identification, and that he was on federal supervision for being a felon in possession of a firearm. But once Taylor stepped out of the car, officers had another data point: Taylor's distinctive unzipped fanny pack slung across his chest. Both officers testified that fanny packs are commonly used to store weapons, with Gariano noting police had seen "an uptick" in this behavior. The district court did not clearly err in crediting the officers' testimony. *See Bontemps*, 977 F.3d at 917 (district court's factual finding that a bulge in clothing appeared to be a firearm was not illogical or implausible when it was based on credible officer testimony). That the fanny pack was empty and unzipped added to the reasonable suspicion. As Officer Alvarado testified, it was "odd" that Taylor had the fanny pack "on his person" when "there was nothing in it."

We of course recognize that standing alone, a fanny pack is not necessarily an unusual item of apparel. We certainly do not suggest that officers have reasonable suspicion to frisk anyone who wears that accessory. But here, the fanny pack was curiously empty and unzipped, and it did not stand on its own: officers had just pulled Taylor over for driving without license plates, Taylor had no identification, and, most critically, Taylor had just disclosed that he was on federal supervision for being a felon in possession of a firearm. When combined with the officers' experience with fanny packs, the circumstances taken as a whole created reasonable suspicion that Taylor, who was not permitted to have a gun, might have one. *Cf. United States v. Garcia*, 909 F.2d 389, 391–92 (9th Cir. 1990) (affirming the denial of motion to suppress because based on the totality of

circumstances, "reasonably prudent officers would have patted down both the man and the [fanny] pack that could have contained a weapon"). Reasonable suspicion existed regardless of whether Northeast Las Vegas is a high crime area, a point Taylor disputes.

We mentioned above that there is a second doctrinal pathway to affirming the denial of Taylor's motion to suppress as to the duration of the stop once Taylor stepped out of the car. The second pathway is this: even if officers prolonged the encounter beyond the original mission of the traffic stop, they had a sufficient basis to do so. As we have described, the officers knew about Taylor's traffic offenses and that he was on federal supervision for being a felon in possession, and once Taylor stepped out of the car, the officers could clearly see Taylor's unzipped, empty fanny pack. At that point, under the totality of the circumstances, and for the reasons we gave above, officers had "reasonable suspicion of an independent offense." *Landeros*, 913 F.3d at 867; *see also Rodriguez*, 575 U.S. at 358. Thus, even if, contrary to precedent, the frisk and criminal history check were beyond the mission of the traffic stop, they were still permissible based on the officers' reasonable suspicion of an independent offense: Taylor's unlawful possession of a gun.

B

Having concluded that the stop was not unlawfully prolonged, we turn next to whether officers violated the Fourth Amendment when they searched Taylor's car. "Warrantless searches are presumptively unreasonable under the Fourth Amendment, subject to certain exceptions." *Verdun v. City of San Diego*, 51 F.4th 1033, 1037–38 (9th Cir. 2022). Consent is one such "specifically established" exception. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219

(1973). Police may search a car when they are given "voluntary," "unequivocal[,] and specific" consent. *United States v. Basher*, 629 F.3d 1161, 1167–68 (9th Cir. 2011).

The district court did not err in concluding that Taylor's consent was voluntary. We analyze the voluntariness of consent based on "the totality of all the circumstances," *Schneckloth*, 412 U.S. at 227, with our precedents focusing on five non-exclusive factors: "(1) whether defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether *Miranda* warnings were given; (4) whether the defendant was notified that [he] had a right not to consent; and (5) whether the defendant had been told a search warrant could be obtained." *Basher*, 629 F.3d at 1168 (quoting *United States v. Patayan Soriano*, 361 F.3d 494, 502 (9th Cir. 2004)). A defendant's consent is not voluntary "if his will has been overborne and his capacity for self-determination critically impaired." *Schneckloth*, 412 U.S. at 225 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

Here, Taylor was not in custody, so no *Miranda* warnings were given or required, *see Berkemer v. McCarty*, 468 U.S. 420, 440 (1984); officers did not have their guns drawn; and the officers never threatened Taylor that a search warrant could be obtained if he refused consent. These factors all suggest that Taylor's consent was voluntary. *See Basher*, 629 F.3d at 1168. The government was not required to prove that Taylor knew he had a "right to refuse consent" as a "necessary prerequisite to demonstrating a 'voluntary' consent." *Schneckloth*, 412 U.S. at 232–33. Even so, that officers never informed Taylor he had a right not to consent is at least a factor that weighs against voluntariness. *See Basher*, 629 F.3d at 1168.

We have encountered a similar constellation of facts before. In *Basher*, as here, officers asked for consent while the suspect was not in custody, they did not have guns drawn, and they made no mention of *Miranda*, search warrants, or the suspect's right to refuse consent. *Id.* Balancing those factors, we held consent to be voluntary. *Id.* We struck the same balance even earlier, in *United States v. Kim*, 25 F.3d 1426, 1432 (9th Cir. 1994).

The balance of the factors here is substantially similar to *Basher* and *Kim*. The district court also found—and the bodycam footage bears out—that "the entire interaction was calm[] and could even be described as friendly." That finding is not clearly erroneous. Nothing in the record suggests that Taylor's will was overborne. *Schneckloth*, 412 U.S. at 225–26.

Citing "racial disparities in the policing of America," Taylor argues that we should treat his consent as involuntary because the officers are of a different race than him. We reject this argument. As the district court found, although tensions between officers and suspects "may be heightened by personal experiences and other sociocultural factors," there was no evidence in this case that race affected the voluntariness of Taylor's consent.

Taylor's consent was also unequivocal and specific, and it included consent to search the interior of the car for guns. A suspect may "unequivocal[ly] and specific[ally]" consent by giving express permission, or consent can be inferred from conduct, such as a head nod. *See Basher*, 629 F.3d at 1167–68. Ultimately, the test "is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

The district court did not err in finding that Taylor unequivocally and specifically consented to a search of his car for firearms. When Gariano asked if there were guns in the car and then asked if he could "check," Taylor unambiguously responded, "it don't matter to me." In context, a reasonable person would have understood Taylor to be consenting to a search of the car for firearms in locations where a gun might be concealed. *See id.* Taylor's suggestion that he was only consenting to officers walking around the car and looking in the windows is not objectively reasonable given the nature of the exchange. We thus hold that the officers did not violate the Fourth Amendment when searching Taylor's car.

III

We lastly consider two sentencing issues. First, Taylor challenges as unconstitutionally vague and overbroad Standard Condition 12 of his supervised release, which requires him to comply with a probation officer's instructions to notify others of the risks posed by his criminal record. Although the parties dispute whether Taylor in his plea agreement waived the right to appeal this issue, Taylor concedes that our precedent forecloses his claim. *See United States v. Gibson*, 998 F.3d 415, 423 (9th Cir. 2021).

Second, in its oral pronouncement of Taylor's sentence, the district court ordered that for his outpatient substance abuse treatment and vocational services programs (Special Conditions One and Six), Taylor "must pay the cost of the program[s] based on [his] ability to pay." But the written judgment requires Taylor to pay the costs of these programs, without referencing his ability to pay. "When there is a discrepancy between an unambiguous oral pronouncement of a sentence and the written judgment, the oral

pronouncement controls." *United States v. Fifield*, 432 F.3d 1056, 1059 n.3 (9th Cir. 2005). The parties thus agree that to resolve this discrepancy, we should remand to the district court so it can conform the written judgment to its oral pronouncement.

* * *

For the foregoing reasons, we affirm Taylor's conviction. As to Special Conditions One and Six, we remand to the district court to conform the written judgment to the orally pronounced sentence.

AFFIRMED in part; **REMANDED** in part.

Appendix C
United States v. Xzavione Taylor,
No. 2:20-cr-00204-GMN-EJY, ECF No. 56
(D. Nev. Feb. 19, 2021),
Order of the District Court

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. XZAVIONE TAYLOR, Defendant.	Case No.: 2:20-cr-00204-GMN-EJY **ORDER**

Pending before the Court is the Report and Recommendation of United States Magistrate Judge Elayna J. Youchah, (ECF No. 41), counseling that the Court grant Defendant Xzavione Taylor's ("Defendant's") Motion to Suppress, (ECF No. 14). The Government timely filed its Objection, (ECF No. 47), and Defendant filed a Response, (ECF No. 50).

I. BACKGROUND

On August 12, 2020, an Indictment was entered charging Defendant with one count of Felon in Possession of a Firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (*See* Indictment, ECF No.1). The Indictment issued following Defendant's arrest during a traffic stop conducted by the Las Vegas Metropolitan Police Department ("LVMPD"). During the stop and subsequent investigation, LVMPD officers discovered a firearm in Defendant's vehicle.

As the Magistrate Judge explains, the facts of this case are largely undisputed because the events in question were recorded by the LVMPD officers' body camera footage. (Report and Recommendation ("R&R") 1:16–17, ECF No. 41). On the evening of July 10, 2020, LVMPD

Officers Gariano and Alvarado were patrolling in Northeast Las Vegas.[1] The officers executed the traffic stop, pulling over Defendant because his vehicle lacked a license plate and a temporary registration tag in the window. (Arrest Report, Ex. B to Mot. Suppress, ECF No. 14-2). Defendant acknowledged that he knew why he was stopped and claimed he had just gotten the vehicle. (*See* Body Camera 0:00–1:50, Ex. A to Mot. Suppress, ECF No. 14-1). Officer Gariano asked Defendant some preliminary questions, including whether Defendant had any drugs or weapons in the car and whether he had been arrested before; Defendant denied the presence of any weapons or drugs and volunteered that he was currently on supervised release for a conviction of felon in possession of a firearm. (*Id.*). Because Defendant did not have any identification with him, he gave Officer Gariano his name, social security number, and date of birth. (*Id.*).

Officer Gariano then ordered Defendant out of his vehicle, and they walked back to the patrol car, where Officer Alvarado was waiting. (*Id.* 2:06–2:30). Prior to frisking Defendant, Officer Gariano removed the unzipped fanny pack that Defendant was wearing across his chest and set it on the hood of the patrol car. (*Id.* 2:30–40).[2] Once the fanny pack had been removed, Officer Alvarado proceeded to pat down Defendant. (*Id.* 127:9–129:13). Meanwhile, Officer Gariano conducted a records search with Defendant's information using his patrol car's mobile data terminal. (*Id.* 60:1–61:17).[3] This search confirmed that that Defendant had prior felony

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[1] Officer Gariano testified that this is a high crime area. (Hr'g Tr. 76:23–24, ECF No. 42).

[2] At the Motion hearing, Officer Gariano testified that "we've been seeing an uptick of people concealing firearms in fanny packs that are slung around their body and I just wanted to make sure that there [were] no weapons on his person at that point." (Hr'g Tr. 25:17–26:2, ECF No. 42). Regarding the fanny pack, Officer Alvarado testified that "it's known that's where subjects primarily sometimes conceal weapons." (*Id.* 95:6–23).

[3] Officer Gariano searched Defendant's criminal history in the National Crime Information Center and the Nevada Criminal Justice Information System, but not the Department of Motor Vehicles database. (Hr'g Tr. 60:1–61:17, ECF No. 42).

convictions for crimes such as Robbery and Grand Larceny of an Automobile. (Arrest Report, Ex. B to Mot. Suppress).

After learning this information, Officer Gariano exited the patrol car and inquired again if Defendant had a gun in his vehicle. (Body Camera 5:30–5:50, Ex. A to Mot. Suppress). Defendant again denied the presence of a gun, and Officer Gariano asked Defendant if he could "check." (*Id.*). Defendant responded, "it don't matter, I just got [the car], it don't matter to me." (*Id.*). Officer Gariano searched the vehicle and found a gun under the driver's seat. (Arrest Report, Ex. B to Mot. Suppress). Officer Alvarado then placed Defendant in handcuffs, and Defendant confessed that he had a gun in the car. (*Id.*). Defendant was ultimately arrested for being a prohibited person in possession of a firearm under state law, and then indicted under federal law for the same crime. (*See generally* Indictment, ECF No. 1).

In his Motion to Suppress, Defendant asks the Court to exclude the firearm and his confession from evidence because the "police unlawfully prolonged the stop to investigate non-traffic offenses for which they lacked reasonable suspicion." (Mot. Suppress 1:19–22, ECF No. 14). Following an evidentiary hearing, the Magistrate Judge recommends that this Court find that the officers impermissibly prolonged the traffic stop without reasonable suspicion, and therefore, evidence of the gun and Defendant's statements should be excluded as fruit of the poisonous tree. (R&R 17:3–4, 18:10–25, 20:2–5).

II. LEGAL STANDARD

A party may file specific written objections to the findings and recommendations of a United States Magistrate Judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B); D. Nev. R. IB 3-2. Upon the filing of such objections, the Court must make a de novo determination of those portions of the Report and Recommendation to which objections are made. *Id*. The Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. 28 U.S.C. § 636(b)(1); D. Nev. IB 3-2(b).

III. DISCUSSION

The Government asserts two objections to the Magistrate Judge's Report and Recommendation. First, the Government argues that the traffic stop was not prolonged during Officer Gariano's records search or Officer Alvarado's pat down, and even if it was prolonged, the officers had the requisite reasonable suspicion to extend the stop. (Objection ("Obj.") 7:1–27:3, ECF No. 47). Second, the Government claims that Defendant consented to the search of his vehicle, and so the gun found as a consequence of that search should not be excluded from evidence. (*Id.* 6:22). The Court will discuss each objection in turn.

A. Traffic Stop Investigation

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Generally, a warrant is required to ensure a search's reasonableness. *Maryland v. Dyson*, 527 U.S. 465, 466, 119 S. Ct. 2013, 144 L. Ed. 2d 442 (1999). Thus, a warrantless search or seizure is presumed unreasonable unless it falls into a "specifically established and well-delineated exception[]." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (quoting *Katz v. United States*, 389 U.S. 347, 356 (1967)). For example, in *Terry v. Ohio*, the Supreme Court determined that a suspect on the street could be briefly detained and investigated without a warrant when an officer has "a reasonable suspicion of criminal activity based on 'specific and articulable facts and rational inferences from those facts.'" 392 U.S. 1, 19, 21 (1968); *Florida v. Royer*, 460 U.S. 491, 512 (1983). If the officers also have a reasonable suspicion that the suspect is armed and dangerous, they can then frisk or pat down the suspect in the interests of officer safety. *See Terry*, 392 U.S. at 24. This principle extends to traffic stops, which are "more analogous to a so-called '*Terry* stop'. . . than to a formal arrest." *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

"A seizure for a traffic violation justifies a police investigation of that violation." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015). However, a traffic stop becomes unlawful when it is "prolonged beyond the time reasonably required to complete [its] mission," that is, "to address the traffic violation that warranted the stop, . . . and . . . related safety concerns . . . ." *Id.* at 350–51, 354 (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). Nonetheless, a traffic stop "may be extended to conduct an investigation into matters other than the original traffic violation . . . if the officers have a reasonable suspicion of an independent offense." *United States v. Landeros*, 913 F.3d 862, 867 (9th Cir. 2019) (citing *Rodriguez*, 575 U.S. at 356–57). In other words, if any time is added to a traffic stop to investigate an offense other than the traffic infraction, police officers must have an independent reasonable suspicion of criminal activity. *See United States v. Evans*, 786 F.3d 779, 787 (9th Cir. 2015). The Court will first consider whether the traffic stop was prolonged, before addressing reasonable suspicion.

1. Prolongation of the Traffic Stop

The Report and Recommendation found that the officers prolonged the traffic stop because they "pause[d] the traffic investigation . . . to investigate a potential gun crime." (*See* R&R 14:4–14,15:3–9). The Magistrate Judge explained that, "[Officer] Gariano agreed with Defense Counsel that 'everything changed' when he learned Defendant was on parole from a conviction for being a felon in possession of a firearm," shifting his focus to "whether Defendant had a gun." (R&R 3:3–7). The Magistrate Judge concluded that Officer Gariano had stopped investigating a traffic offense and had started to investigate a gun crime, implicating the records search, pat-down, and eventual car search as prolongations of the stop.

However, Officer Gariano's shift in focus does not necessarily equate to a deviation from the traffic stop's mission. An officer's mission during an ordinary traffic stop includes inquiries such as "'checking the driver's license, determining whether there are outstanding

warrants against the driver, and inspecting the automobile's registration and proof of insurance' as these checks are aimed at 'ensuring that vehicles on the road are operated safely and responsibly.'" *Evans*, 786 F.3d at 786 (quoting *Caballes*, 543 U.S. at 408). However, "an ex-felon registration check . . . violate[s] the Fourth Amendment" absent independent reasonable suspicion because it is "wholly unrelated to [the] 'mission' of 'ensuring that vehicles on the road are operated safely and responsibly.'" *Id.* at 780–81, 786 (quoting *Caballes* 543 U.S. at 408). An ex-felon registration check "entails inquiring into [the suspect's] criminal history and then determining whether he was properly registered at the address he provided to [law enforcement]." *Id.* at 783.

Here, Officer Gariano testified that he conducted a records search on Defendant using his patrol car's mobile data terminal. (Hr'g Tr. 60:1–61:17, ECF No. 42). He visited the National Crime Information Center, which is a database that will alert an officer if a suspect has any outstanding warrants, and the Nevada Criminal Justice Information System, which catalogs Nevada criminal history. (*Id.* 60:10–25, ECF No. 42). Officer Gariano further testified that a criminal history search is another way to identify a person without identification, such as Defendant. (*Id.* 46:12–18). Nothing about these searches deviated from the ordinary inquiries made by officers during a typical traffic stop; Officer Gariano was checking for outstanding warrants and identifying the driver, both of which are actions aimed at ensuring road safety. *See Evans*, 786 F.3d at 786. *Cf. United States v. Landeros*, 913 F3d 862, 867–68 (9th Cir. 2019). (indicating that while identifying a passenger is not part of the traffic stop's mission, identifying a driver is, because it "ensure[s] vehicles on the road are operated safely and responsibly").

Defendant likens Officer Gariano's criminal history records search to the ex-felon registration check that the Ninth Circuit invalidated in *Evans*, claiming that it was unrelated to the traffic mission. (Mot. Suppress 10:11–15, ECF No. 14). However, an ex-felon registration

check involves not only searching criminal history, but also determining whether the suspect has properly registered his address with law enforcement. The part of an ex-felon registration check that deviates from the traffic mission is the address confirmation; in Nevada, it is a misdemeanor when felons fail to register their address, so checking address registration after learning the suspect is a felon becomes a separate criminal investigation that deviates from the stop's mission. *See* NRS §§ 179C.100–179C.220; *Evans*, 786 F.3d at n.5. In this case, Defendant has presented no evidence that Officer Gariano's records search was more akin to an impermissible ex-felon registration check, than to mere a warrant or identification inquiry. *See United States v. Caymen*, 404 F.3d 1196, 1199 (9th Cir. 2005) (citing *Rakas v. United States*, 439 U.S. 128 (1978) ("the proponent of the motion to suppress evidence has the burden of establishing that his own rights are violated by the challenged search or seizure.")).[4] Thus, because the records search was part of the mission of the traffic stop, the traffic stop was not prolonged.

Similarly, Officer Alvarado did not prolong the traffic stop when he patted down Defendant because the entirety of the pat-down occurred while Officer Gariano lawfully conducted the records searche.[5] While a frisk may not be part of the ordinary mission of a traffic stop, in this scenario, patting down Defendant was not a prolongation because no additional time was added to the stop to accommodate it. *See Rodriguez*, 575 U.S at 350–51 (quoting *Caballes*, 543 U.S. at 407).

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[4] For a traffic stop, before the ultimate burden of proof on a Fourth Amendment motion to suppress shifts to the Defendant, the police officer has the initial burden to justify the traffic stop itself. *See United States v. Willis*, 431 F.3d 709, 724 (9th Cir. 2005) (Fletcher, Circuit J. dissenting). However, in this case, it is undisputed that the traffic stop was valid because Defendant was pulled over for a traffic offense: lack of registration.

[5] Patting down a suspect without reasonable suspicion that he is armed and dangerous is unlawful. *See Terry v. Ohio*, 392 U.S. 1, 24 (1968). However, in this case, the officers had a reasonable suspicion that Defendant was armed and dangerous, which the Court discusses in the next section.

2. Reasonable Suspicion to Prolong the Traffic Stop

Even if the Court found that the traffic stop was prolonged, the Court also disagrees with the Magistrate Judge's recommendation that the officers did not have the requisite reasonable suspicion to do so. The Magistrate Judge found the proffered suspicion insufficient because it is predicated on only four pieces of information: (1) Defendant's car lacked registration, (2) Defendant was driving without a driver's license or any identification on him, (3) Defendant was driving in a high crime area, and (4) Defendant was on supervised release from a conviction for being a felon in possession of a firearm. (R&R 14:6–14).

The Court agrees that these four facts alone are not enough to establish reasonable suspicion to investigate a gun crime. While driving a car without a license plate or identification may raise reasonable suspicion sufficient to investigate a stolen vehicle, it does not provide reasonable suspicion to investigate a gun crime. *See United States v. Perez*, 37 F.3d 510, 514 (9th Cir. 1994) (quoting *United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994) ("[A] defining characteristic of our traffic stop jurisprudence is the defendant's lack of a valid registration, license, bill of sale, or some other indicia of proof to lawfully operate and possess the vehicle in question, thus giving rise to objectively reasonable suspicion that the vehicle may be stolen."), *overruled on other grounds by United States v. Mendez*, 476 F.3d 1077, 1080 (9th Cir. 2007)); (Hr'g Tr. 52:12–15, ECF No. 42). Here, Officer Gariano testified multiple times that he was investigating Defendant's possible commission of a gun crime. (*See, e.g.*, Hr'g Tr. 55:3–8; 66:10–12; 69:13–15, ECF No. 42). Further, neither prior criminal history nor presence in a high crime area alone can support reasonable suspicion for a detention or arrest. *See Burrell v. McIlroy*, 464 F.3d 853, n.3 (9th Cir. 2006); *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). Even when considered together, Defendant's prior criminal history and presence in a high crime area cannot establish reasonable suspicion; otherwise "conceivably every time an individual with a prior gun or drug conviction is stopped for a traffic violation in

a high crime area, law enforcement would be free to expand the stop into a separate criminal investigation." (R&R 16:17–20). Accordingly, the Magistrate Judge is correct that these facts alone are not sufficient or particularized enough to support reasonable suspicion that a gun crime is afoot, especially considering that Defendant exhibited no furtive movements, dangerous behavior, or nervousness throughout the stop. (R&R 14:15–23).

However, there was additional key information known to Officer Gariano: Defendant was wearing a fanny pack, and Officer Gariano's personal experience indicated that persons in the area had been hiding guns in fanny packs. When assessing the reasonableness of a search, courts allow officers to "make inferences that draw upon their specialized training and experience in the field." *See United States v. Navarro*, 756 Fed. Appx. 702, 704 (9th Cir. 2018). Here, both Officer Gariano and Officer Alvarado testified that, in their experience, a fanny pack is a common location to store a firearm. (*See* Hr'g Tr. 25:17–26:2, 95:6–23, ECF No. 42). It is then reasonable to conclude that there could be a weapon inside a fanny pack, indicating that a suspect could be armed and dangerous. *See United States v. Leary*, No. 19-cr-10474-DJC-1, 2020 WL 6384446, at *3 (D. Mass. Oct. 20, 2020) (finding reasonable suspicion that a suspect wearing a fanny pack was armed and dangerous). Accordingly, the presence of the fanny pack, coupled with the officers' personal experiences, created a reasonable suspicion that Defendant was armed and dangerous, which justifies the pat-down in the interests of officer safety. *See Terry*, 392 U.S. at 24.

Similarly, the knowledge that Defendant had a felony conviction, in conjunction with the possible presence of a firearm, provides reasonable suspicion that Defendant was committing a gun crime. *Burrell*, 464 F.3d at n.3 ("although a prior criminal history alone cannot establish reasonable suspicion . . . it is permissible to consider such a fact as part of the total calculus of information"). Officer Gariano knew Defendant was a convicted felon; Defendant had volunteered this information prior to the moments of disputed prolongation. (*See*

Body Camera 0:00–1:50, Ex. A to Mot. Suppress). Officer Gariano also had a reasonable suspicion that Defendant was armed with a gun, as discussed above. In this case, because Defendant is a convicted felon, reasonable suspicion that Defendant has a gun also provides reasonable suspicion that Defendant may be committing a crime, because it is a crime for a felon to possess a firearm. *See* 18 U.S.C. §§ 922(g)(1) and 924(a)(2). As such, Officer Gariano had the requisite reasonable suspicion required to prolong the traffic stop to investigate a gun crime.

The Report and Recommendation found a lack of reasonable suspicion in part because "generalized concern, even when genuine and well intentioned, is not a lawful basis to expand a traffic stop into a gun crime investigation." (R&R 16:23–24). It continued, "there must be something more than a high crime area and a criminal history that lawfully supports reasonable suspicion," positing that the only other reason for the prolongation of the traffic stop was Officer Gariano's personal, but unsubstantiated, concern that Defendant had a gun. (R&R 15:3–9, 17:1–2); (Hr'g Tr. 47:7–14, ECF No. 42) (explaining that everything changed for Officer Gariano when he learned defendant was on parole because he thought there might be a gun). In its Objection, the Government claims that the Report and Recommendation came to this conclusion by erroneously relying on Officer Gariano's subjective motivations to prolong the stop based on a hunch that Defendant possessed a gun, rather than on an objective survey of the facts known to Officer Gariano at the time. (Obj. 11:7–13:21).

The Supreme Court has found that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," and "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Whren v. United States*, 517 U.S. 806, 813–14 (1996). Further, "the standard for determining whether probable cause or reasonable suspicion exists is an objective one; it does not turn . . . on the subjective thought processes of the officer," as long as the facts

known to the officer amount to reasonable suspicion. *United States v. Magallon-Lopez*, 817 F.3d 671, 675 (9th Cir. 2016) (citing *Moreno v. Baca*, 431 F.3d 633, 639–40 (9th Cir. 2005)) ("the facts justifying the stop must be known to officers at the time of the stop").

In the present case, the objective facts known to Officer Gariano support a finding of reasonable suspicion: Defendant was driving without a license or registration in a high crime area, he was convicted for being a felon in possession of a firearm, he was wearing a fanny pack, and the officers testified that there had been an uptick of people concealing firearms in fanny packs.[6] Regardless of any subjective motivation or hunch that Officer Gariano was acting upon, the objective facts at his disposal would still amount to the requisite reasonable suspicion required to prolong the stop. *See id.*

B. Vehicle Search

Because the Report and Recommendation found that Officer Gariano did not have reasonable suspicion to prolong the traffic stop and investigate a gun crime, the Magistrate Judge did not reach the question of whether Officer Gariano's subsequent search of Defendant's vehicle was lawful. Accordingly, the Court remands the Motion to Suppress to the Magistrate Judge for a recommendation regarding whether the search of Defendant's car was lawful, given that the Officers did not unlawfully prolong the traffic stop.

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[6] During the hearing, the parties debated whether Officer Gariano gave enough testimony about the fanny pack to consider it as part of the reasonable suspicion analysis. (*See, e.g.*, Hr'g Tr. 109:11–112:12, ECF No. 42); (Hr'g Tr. 27:7 –22; 36:21–37:17, ECF No. 43). Officer Gariano testified that Defendant was wearing a fanny pack, that he helped Defendant remove the fanny pack, and that there was an uptick of people concealing firearms in fanny packs. (Hr'g Tr. 25:15–26:7, ECF No. 42). This is adequate testimony to establish that Officer Gariano had knowledge of the fanny pack and could draw reasonable inferences from its presence at the scene.

IV. CONCLUSION

IT IS HEREBY ORDERED that the Report and Recommendation, (ECF No. 41), is **REJECTED.**

IT IS FURTHER ORDERED that the Motion to Suppress is **REMANDED** to the Magistrate Judge for a recommendation on whether the search of Defendant's car was lawful, given that the Officers did not unlawfully prolong the traffic stop.

DATED this 18 day of February, 2021.

Gloria M. Navarro, District Judge
United States District Court