

NOT DESIGNATED FOR PUBLICATION

No. 116,637

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellant,*

v.

DERRICK LOWERY,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Geary District Court; MARITZA SEGARRA, judge. Opinion filed May 12, 2017.  
Affirmed.

*Tony Cruz*, assistant county attorney, and *Derek Schmidt*, attorney general, for appellant.

*Dakota Loomis*, of Law Office of Dakota Loomis, LLC, of Lawrence, for appellee.

Before BRUNS, P.J., HILL and SCHROEDER, JJ.

*Per Curiam*: The State presents this interlocutory appeal following the suppression of evidence seized after an unreasonably prolonged valid traffic stop. We find no error by the district court. We affirm.

FACTS

On August 25, 2015, Officer Nicholas Blake of the Junction City Police Department stopped Derrick Lowery for following a vehicle too closely. Officer Blake explained to Lowery he was stopped for following too close. He then requested Lowery's

driver's license and vehicle registration, which Lowery provided. Officer Blake asked Lowery who the vehicle belonged to, and Lowery explained it belonged to his friend who was not present. Officer Blake asked Lowery to sit in his patrol car so he could check his license information and fill out a warning citation.

Officer Blake called dispatch to check Lowery's license and the vehicle registration. Dispatch advised Lowery's license was valid and the vehicle was not stolen. According to Officer Blake, Lowery appeared nervous—his carotid artery was thumping and his hands were shaking. Officer Blake spoke to Lowery about his travel plans. Lowery stated he and his passenger, Matthew Markey, were traveling from Knoxville, Tennessee, to Fraser, Colorado. He told Officer Blake he lived in Colorado and worked as a ski patroller and had flown to Knoxville to work construction over the summer. Lowery said they were headed back for ski season and Markey was going to try to get a job at a ski resort. He said it was cheaper to fly to Tennessee than drive; however, it was more expensive to fly back so he borrowed his friend's car, and his friend would later fly to Colorado to retrieve it.

Officer Blake noticed the vehicle had been recently purchased, licensed, and insured, which made him suspicious of illegal activity. He used his cell phone to check airline ticket prices online and found it was cheaper to fly from Knoxville to Denver on all but one airline; however, he was not sure of the dates on which he checked the fares or whether he did so during or after the stop. Officer Blake contacted his friend, a Missouri State Trooper, to ask whether there had been any recent license plate readings. The trooper advised Officer Blake the vehicle's license plate had been read three times since July 19, 2015, on I-70 in the Columbia, Missouri, area.

Officer Blake returned to Lowery's vehicle and made contact with Markey. Markey told Officer Blake they were headed to Colorado to stay at Lowery's home for a few days before returning to Knoxville. Markey said he had a job in Knoxville and

Lowery had unexpectedly called him and asked if he wanted to help drive to Colorado. Officer Blake indicated Markey was extremely nervous during their conversation.

Officer Blake returned to his patrol car and finished writing the warning citation. He gave Lowery the citation, returned his documents, and told him to drive safely. As Lowery exited the patrol vehicle, Officer Blake asked if Lowery would answer some more questions. Lowery agreed; however, when Officer Blake asked for consent to search the vehicle, Lowery explicitly refused. Officer Blake asked whether Lowery would mind waiting until he could get a canine unit on scene but never got an explicit answer, so he detained Lowery. Officer Blake contacted the Riley County Police Department to see if there were any nearby canine units; however, he was unable to get a response. He had a backup officer stay with Lowery and Markey while he went to his home to retrieve his drug dog 12 minutes and 51 seconds after Officer Blake told Lowery he was being detained. Officer Blake returned to the scene with his drug dog to examine the vehicle's exterior. The dog alerted to the odor of drugs. A subsequent search of the vehicle revealed drug-related evidence. Lowery was charged with criminal transportation of drug proceeds, criminal transfer of drug proceeds, and possession of marijuana.

Lowery filed a motion to suppress evidence, arguing the extension of the stop and search of his vehicle were unlawful. The district court held an evidentiary hearing on August 19, 2016. At the suppression hearing, Officer Blake indicated his basis for extending the stop was: (1) use of a recently purchased third-party vehicle; (2) discrepancies between Lowery and Markey's travel plans; (3) multiple recent license plate readings in the Columbia, Missouri, area; (4) traveling to Colorado, a known narcotics source destination; and (5) Lowery and his passenger displayed extreme nervousness. The district court took the matter under advisement and subsequently issued an oral ruling granting Lowery's motion to suppress. The district court found the initial stop was lawful. However, the district court held the extension of the stop and subsequent

search was unlawful since "the officer was working on a hunch only." Specifically, the district court found:

- Officer Blake's testimony did not show Lowery or Markey displayed nervousness to a degree justifying further detention;
- Lowery did not drop his paperwork;
- Lowery was able to answer questions;
- Lowery and Markey did not show signs of confusion—the only inconsistencies in their travel plans were the length of their stay and whether Markey was attempting to find employment;
- Lowery and Markey were consistent in stating where they came from and where they were going, where Lowery lived, and what Lowery did for a living;
- Officer Blake's inquiry into the cost of airfare was limited;
- The license plate readings were insignificant because Columbia is not far from Tennessee;
- There was no testimony regarding Missouri having any connection to drug trafficking or being a narcotics source;
- There was no indication Knoxville was a narcotics source;
- There was no indication the vehicle had been to Colorado or any known drug source in that time;
- The vehicle check came back clean;
- Officer Blake had no reason to believe Lowery was not legally in possession of the car;
- Officer Blake had not seen or smelled any indicia of drugs;
- Officer Blake did not notice any large sums of money, air fresheners, or drug paraphernalia; and

- Officer Blake did not see anything reasonably indicating the vehicle contained contraband.

The State timely filed notice of interlocutory appeal.

#### ANALYSIS

The State argues the district court erred in granting Lowery's motion to suppress, asserting Officer Blake had reasonable suspicion to detain Lowery under the totality of the circumstances. In reviewing the granting or denial of a motion to suppress evidence, the court determines whether the factual findings underlying the trial court's suppression of evidence are supported by a substantial competent evidence standard. Appellate courts do not reweigh the evidence or reassess the credibility of the witnesses. The ultimate legal conclusion drawn from those factual findings is reviewed under a de novo standard. *State v. Carlton*, 297 Kan. 642, 645, 304 P.3d 323 (2013).

The Fourth Amendment to the United States Constitution and § 15 of the Kansas Constitution Bill of Rights prohibit unreasonable searches and seizures. *State v. Ramirez*, 278 Kan. 402, 404, 100 P.3d 94 (2004). A routine traffic stop is a seizure under the Fourth Amendment; therefore, it is subject to the constitutional requirement of reasonableness. *State v. Smith*, 286 Kan. 402, 406, 184 P.3d 890 (2008). To satisfy the reasonableness requirement, the scope and duration of a traffic stop must be strictly tied to the circumstances that rendered its initiation proper. *State v. Thompson*, 284 Kan. 763, 774, 166 P.3d 1015 (2007). Traffic stops must be minimally intrusive, diligently pursued, and a law enforcement officer's actions must be reasonably related in scope to the circumstances which justified the initial interference. See *United States v. Sharpe*, 470 U.S. 675, 682, 686-87, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985). During a routine traffic stop, an officer may: (1) request the motorist's driver's license, vehicle registration, and proof of insurance; (2) conduct a computer check; (3) issue a citation or warning; and (4)

take steps reasonably necessary to protect officer safety. The stop can last only as long as necessary to complete those tasks and they must be diligently pursued. See *Thompson*, 284 Kan. at 774.

When a driver produces a valid license and proof that he is entitled to operate the vehicle, he must be allowed to proceed without being subject to further delay for additional questioning. In order to justify a temporary detention for further questioning or investigation, the officer must have reasonable and articulable suspicion of illegal transactions in drugs or another serious crime. *State v. Anderson*, 281 Kan. 896, 902, 136 P.3d 406 (2006). Reasonable suspicion requires something more than an unparticularized suspicion or hunch; law enforcement must be able to articulate a particularized and objective basis for believing the person stopped is engaged in criminal activity. *State v. DeMarco*, 263 Kan. 727, 734-35, 952 P.2d 1276 (1998). Without reasonable suspicion to justify the extension of an otherwise-concluded stop, any further delay—even *de minimis*—is per se unreasonable. See *Rodriguez v. United States*, 575 U.S. \_\_\_, 135 S. Ct. 1609, 1615, 191 L. Ed. 2d 492 (2015) ("An officer . . . may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.").

In *DeMarco*, the driver and his passenger, Bennici, were stopped for failure to signal a lane change. The trooper advised DeMarco of the reason for the stop and stated he was not going to give him a ticket. The trooper inquired into their travel plans and learned the men were traveling from Los Angeles but had stopped in Salt Lake City to visit relatives. When asked if the vehicle was a rental, DeMarco stated it was and explained it had been rented by himself and Bennici's brother. The trooper collected identification from both men and contacted dispatch to check for warrants and criminal history. While the trooper waited on a response from dispatch, he asked DeMarco to come to his patrol car where he questioned him.

The trooper received a response from dispatch, indicating DeMarco's driver's license was valid but stating the criminal history was "still printing." The trooper understood this to mean one or both of the men had a lengthy criminal history. The trooper issued a warning citation, returned DeMarco's paperwork, and asked for consent to search the trunk of the car, which DeMarco denied. The trooper asked for and was denied consent several more times and eventually requested a canine unit. When the canine arrived approximately 20 minutes later, it alerted to the trunk. A subsequent search uncovered 190 pounds of marijuana.

Both men filed motions to suppress evidence. At the suppression hearing, the trooper cited the following eight factors which caused him to suspect DeMarco and Bennici may have been transporting a controlled substance: (1) DeMarco's nervous behavior; (2) the two men were traveling from Los Angeles, a known source city for narcotics; (3) they were taking an out-of-the-way route from Los Angeles to Florida; (4) use of a rental car; (5) I-70 was a major drug courier highway; (6) the rental contract only allowed 3 days to drive to Florida; (7) DeMarco and Bennici had inconsistent stories about how DeMarco had traveled to Los Angeles; and (8) the trooper was aware one or both of the men had criminal history. The trial court granted the motions to suppress and our Supreme Court affirmed. In so doing, the *DeMarco* court extensively discussed prior opinions regarding nervousness, travel plans, the use of rental vehicles, and discounted their relative value. 263 Kan. at 741.

*DeMarco* first discussed *State v. Chapman*, 23 Kan. App. 2d 999, 939 P.2d 950 (1997). In *Chapman*, the officer claimed Chapman was nervous because he was breathing heavily, avoiding eye contact, and his voice and hands were trembling. *Chapman* found the officer had no prior acquaintance with Chapman from which to contrast his behavior during the traffic stop with his usual demeanor. 23 Kan. App. 2d at 1009-10. Specifically, *Chapman* stated:

"We have repeatedly held that nervousness is of limited significance in determining reasonable suspicion and that the government's repetitive reliance . . . on nervousness . . . as a basis for reasonable suspicion . . . "must be treated with caution." [Citation omitted.]' *United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994). It is not uncommon for most citizens, whether innocent or guilty, to exhibit signs of nervousness when stopped by the police." *Chapman*, 23 Kan. App. 2d at 1009.

*DeMarco* further relied on *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997) (no objective basis for the trooper to rely on Wood's apparent nervousness without prior acquaintance by which to compare his behavior during the stop with his normal demeanor); *United States v. McRae*, 81 F.3d 1528, 1534 n.4 (10th Cir. 1996) (nervousness alone insufficient to justify further detention); and *United States v. Walker*, 933 F.2d 812, 817 (10th Cir. 1991) (driver's nervousness due to shaking hands and difficulty retrieving his license did not give rise to reasonable suspicion). Ultimately, *DeMarco* held nervousness alone does not provide reasonable suspicion of illegal activity. 263 Kan. at 738.

*DeMarco* also found the inconsistencies in *DeMarco* and Bennici's travel plans did not justify further detention. 263 Kan. at 739-41. Further, *DeMarco* held the fact the men were coming from Los Angeles—a known source city for narcotics—was too innocuous to arouse suspicion. 263 Kan. at 740-41 (citing *Chapman*, 23 Kan. App. 2d at 1010 ["The fact that Chapman was driving from Phoenix to some other point in the United States is not a fact that would provide probable cause or even reasonable suspicion."]). Finally, *DeMarco* held there was nothing suspicious about driving a rental car. 263 Kan. at 740-41. (citing *Wood*, 106 F.3d at 946-47 [not suspicious Wood took a one-way flight to California and drove back to Kansas in a rental car]).

Here, the facts are similar to *DeMarco*. Officer Blake pulled Lowery over for a valid reason—following too closely—and the validity of the initial stop is not in dispute. However, after giving Lowery a warning and returning his documents, Officer Blake

unreasonably extended the stop when he asked for and was denied consent to search. He then continued the detention beyond the conclusion of the initial stop for more than 12 minutes so he could retrieve his drug dog to perform a search of the vehicle's exterior. He justified the extended detention on:

- Discrepancies in Lowery and Markey's travel plans;
- Lowery and his passenger displaying extreme nervousness;
- The use of a recently purchased third-party vehicle;
- Multiple recent license plate readings in the Columbia, Missouri, area; and
- They were traveling to Colorado.

On appeal, the State only addresses the first three factors; thus, the license plate readings and travel to Colorado have been abandoned. See *State v. Williams*, 303 Kan. 750, 758, 368 P.3d 1065 (2016) (an issue not briefed by the appellant is deemed waived and abandoned).

The factors the State relies on have been routinely discounted and rejected by Kansas courts. *DeMarco* found nervousness, inconsistent or unlikely travel plans, and the use of a rental car did not justify further detention. 263 Kan. at 741. Similarly, Lowery and Markey's nervousness, their allegedly implausible travel plans, and the use of a third-party vehicle do not justify further detention. Officer Blake had no previous encounters with Lowery or Markey; therefore, he had no basis to compare their behavior during the traffic stop with their ordinary demeanor. See *DeMarco*, 263 Kan. at 738; *Chapman*, 23 Kan. App. 2d at 1009-10. Further, even if Lowery and Markey were more nervous than usual, it is not unusual for citizens to display nervousness when stopped by a police officer. See *Chapman*, 23 Kan. App. 2d at 1009.

While Lowery and Markey provided slightly different accounts of their travel plans, they were not so inconsistent as to arouse suspicion. Both agreed they were coming

from Tennessee and traveling to Colorado. They also both stated Lowery lived in Colorado. The only discrepancies were to the amount of time Markey planned to stay in Colorado and whether he intended to seek employment.

Officer Blake's research into the cost of airfare is of no value because he only researched the cost through a single travel website on or after the date of the stop, and he could not recall whether he did so during the traffic stop or after. He had no basis to determine what the fares may have been at the time Lowery went to Tennessee—several months prior to the stop—or when he planned his return trip to Colorado. Further, Officer Blake acknowledged one airline's fare was more expensive from Knoxville to Denver. The State contends Lowery's travel plans were inconsistent and implausible; however, any such inconsistency or implausibility is largely a product of incomplete information and unfounded assumptions on the part of Officer Blake. Here, Officer Blake's generalized assumptions and incomplete information do not rise above an unparticularized hunch or inchoate suspicion; thus, they do not provide an objectively reasonable justification for further detention. See *Anderson*, 281 Kan. at 902; *DeMarco*, 263 Kan. at 734-35.

The use of a third-party vehicle is also not suspicious. See *DeMarco*, 263 Kan. at 740-41; *Chapman*, 23 Kan. App. 2d at 1011 (Chapman driving his uncle's car was not suspicious). Lowery indicated the vehicle belonged to his friend and he had been given permission to use it. It was validly licensed, registered, and insured and had not been reported stolen. Lowery had a valid license, and a records check showed no outstanding warrants. In other words, Lowery showed he had permission to use the vehicle and could legally do so; therefore, he should have been allowed to proceed without further delay after the conclusion of the initial stop. See *Anderson*, 281 Kan. at 902.

Officer Blake lacked reasonable suspicion to detain Lowery after the conclusion of the initial stop. Lowery explicitly denied consent to search and never expressly consented

to further detention; therefore, the continued detention and subsequent search were unlawful. See *Rodriguez*, 135 S. Ct. at 1615. Accordingly, we find no error. The district court properly suppressed the evidence obtained from Lowery's vehicle. See *DeMarco*, 263 Kan. at 741.

Affirmed.