

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-33

Filed: 20 September 2016

Johnston County, No. 14 CRS 54773, 14 CRS 54776

STATE OF NORTH CAROLINA

v.

DAVID MICHAEL REED, Defendant.

Appeal by Defendant from a judgment entered 21 July 2015 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 6 June 2016.

*Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.*

*Patterson Harkavy LLP, by Paul E. Smith, for Defendant-Appellant.*

HUNTER, JR., Robert N., Judge.

David Michael Reed (“Defendant”) filed a motion to suppress evidence found during a traffic stop. On 14 July 2015, the trial court entered an order denying Defendant’s motion to suppress. On 21 July 2015, Defendant pled guilty, pursuant to a written agreement, to trafficking more than 200 grams but less than 400 grams of cocaine by transportation, and trafficking more than 200 grams but less than 400 grams of cocaine by possession. In exchange for his guilty plea, the State agreed to dismiss charges against his co-defendant, consolidate his two trafficking charges for

judgment, and stipulate to an active sentence of 70 to 93 months imprisonment with a \$100,000.00 fine. The trial court accepted the plea agreement and sentenced Defendant to 70 to 93 months imprisonment and imposed a \$100,000.00 fine and \$3,494.50 in court costs. Defendant timely entered his notice of appeal and contends the trial court committed error in denying his motion to suppress. We agree and reverse the trial court.

### **I. Factual and Procedural Background**

At 8:18 a.m. on 9 September 2014, Defendant drove a rented Nissan Altima faster than the posted 65 mph speed limit on Interstate 95 (“I-95”) in Johnston County, North Carolina. His fiancée, Usha Peart, rode in the front passenger seat and held a female pit bull in her lap. Trooper John W. Lamm, of the North Carolina State Highway Patrol, was parked in the median of I-95. Trooper Lamm used his radar to determine Defendant was traveling 78 mph, and performed a traffic stop for Defendant’s speeding infraction. Trooper Lamm’s patrol car had a camera that faced forwards towards the hood of the vehicle, and recorded audio inside and outside of the patrol car.

Defendant pulled over on the right shoulder of I-95, Trooper Lamm pulled behind him, and Trooper Lamm approached the passenger side of the Nissan. Trooper Lamm saw energy drinks, trash, air fresheners, and dog food scattered on

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the floor of the vehicle. He asked if the dog in Peart's lap was friendly and Defendant and Peart said that the dog was friendly.

Trooper Lamm stuck his arm inside the vehicle to pet the dog and asked Defendant for his driver's license and the rental agreement. Defendant gave Trooper Lamm his New York driver's license, a registration card, and an Enterprise rental car agreement. The rental agreement listed Peart as the renter and Defendant as an authorized driver. Trooper Lamm told Defendant "come on back here with me" motioning towards his patrol car.

Defendant exited the Nissan and Trooper Lamm asked if he had any guns or knives on his person. Defendant asked Trooper Lamm why the frisk was necessary, and Trooper Lamm replied, "I'm just going to pat you down for weapons because you're going to have a seat with me in the car." Trooper Lamm found a pocket knife, said it was "no big deal," and put it on the hood of the Nissan

Trooper Lamm opened the passenger door of his patrol car. His K-9 was in the back seat of the patrol car at that time. Defendant sat in the front passenger seat with the door open and one leg outside of the car. Trooper Lamm told Defendant to close the door. Defendant hesitated and said he was "scared" to close the door; Lamm replied, "Shut the door. I'm not asking you, I'm telling you to shut the door. I mean you're not trapped, the door [is] unlocked. Last time I checked we were the good guys." Defendant said, "I'm not saying you're not," and Trooper Lamm said, "You

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don't know me, don't judge me." Defendant said he was stopped before in North Carolina, but he was never taken to the front passenger seat of a patrol car during a stop. Following Trooper Lamm's orders, Defendant closed the front passenger door.

Trooper Lamm ran Defendant's New York license through record checks on his mobile computer. While doing so, Trooper Lamm asked Defendant about New York, and "where are y'all heading to?" Defendant said he was visiting family in Fayetteville, North Carolina. Trooper Lamm noted the rental agreement restricted travel to New York, New Jersey, and Connecticut, but told Defendant the matter could likely be resolved with a phone call to the rental company.

Then, Trooper Lamm asked Defendant about his criminal history. Defendant admitted he was arrested for robbery in the past, when he was in the military. Trooper Lamm asked Defendant about his living arrangements with Peart, and whether he or Peart owned the dog in the Nissan. Trooper Lamm noticed the rental agreement was drafted for a Kia Rio not a Nissan Altima. Trooper Lamm exited the patrol car to ask Peart for the correct rental agreement, and told Defendant to "sit tight."

Trooper Lamm approached the front passenger side of the Nissan Altima and asked Peart for the correct rental agreement. He asked about her travel plans with Defendant and the nature of their trip. She said they were visiting family in Fayetteville but might also travel to Tennessee or Georgia. She explained the first

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rental car they had, the Kia Rio, was struck by another car and the rental company gave them the Nissan Altima as a replacement. She could not find the rental agreement for the Nissan Altima and continued to look for it. Trooper Lamm told Peart he was going to issue Defendant a speeding ticket and the two would “be on [their] way.”

Trooper Lamm returned to the patrol car, explained Peart could not locate the correct rental agreement, and continued to question Defendant about the purpose of the trip to Fayetteville. Then, Trooper Lamm called the rental company and the rental company confirmed everything was fine with the Nissan Altima rental, but informed Trooper Lamm that Peart still needed to call the company to correct the restricted travel condition concerning use of the car in New York, New Jersey, and Connecticut. After the call, Trooper Lamm told Defendant that his driver’s license was okay and he was going to receive a warning ticket for speeding. Trooper Lamm issued a warning ticket and asked Defendant if he had any questions.

Then, Trooper Lamm told Defendant he was “completely done with the traffic stop,” but wanted to ask Defendant additional questions. Defendant did not make an audible response, but at the suppressing hearing, Trooper Lamm testified Defendant nodded his head. Trooper Lamm did not tell Defendant he was free to leave.

Trooper Lamm asked Defendant if he was carrying a number of controlled substances, firearms, or illegal cigarettes in the Nissan Altima. Defendant

responded, “No liquor, no nothing, you can break the car down.” Trooper Lamm continued questioning Defendant and said, “I want to search your car, is that okay with you?” Defendant hesitated, mumbled, and told Trooper Lamm to ask Peart. Defendant stated, “I’m just saying, I’ve got to go to the bathroom, I want to smoke a cigarette, we’re real close to getting to the hotel so that we can see our family, like, I don’t, I don’t see a reason why.” Trooper Lamm responded, “[W]ell let me go talk to her then, sit tight,” and walked to the front passenger side of the Nissan Altima. By this time, two additional officers were present at the scene.

Trooper Lamm told Peart everything was fine with the rental agreement and asked her the same series of questions he asked Defendant, whether the two were carrying controlled substances, firearms, or illegal cigarettes. Trooper Lamm asked Peart if he could search the car. Peart hesitated, expressed confusion, and stated, “No. There’s nothing in my car, I mean . . . .” Trooper Lamm continued to ask for consent, Peart acquiesced and agreed to sign a written consent form. Trooper Lamm searched the Nissan Altima and found cocaine under the back passenger seat.

## **II. Standard of Review**

Our review of a trial court’s denial of a motion to suppress is “strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of

law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). “The trial court’s conclusions of law . . . are fully reviewable on appeal.” *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

### **III. Analysis**

Defendant contends the trial court made findings of fact that are not supported by competent evidence because his “initial investigatory detention was not properly tailored to address a speeding violation.” Further, he contends Trooper Lamm seized him without consent or reasonable suspicion of criminal activity when Trooper Lamm told him to “sit tight” in the patrol car. Defendant contends Trooper Lamm unlawfully seized items from the car during the search, and these items are fruit of the poisonous tree that must be suppressed. After carefully reviewing the record and video footage of the traffic stop, we agree.

On appeal, Defendant challenges the following findings of fact and conclusion of law:

#### FINDINGS OF FACT

11. That the Defendant complied with Trooper Lamm’s request<sup>1</sup> to accompany him back to the patrol vehicle where Trooper Lamm told the Defendant, while the Defendant was still outside the vehicle, that he was stopped for speeding, which the Defendant acknowledged stating that he “was running about 84” . . . .

21. That while Ms. Peart looked for the current rental

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<sup>1</sup> Defendant contends the trial court’s “determination of [Trooper] Lamm’s statement to be a ‘request’ rather than a command or order is actually a conclusion of law . . . because it requires the exercise of judgment.”

agreement, which was never found, Trooper Lamm engaged her in casual conversation and learned from her that she was unsure of their travel plans, but believed they were visiting family in “Fayetteville or maybe Tennessee or Georgia. . . .”

26. That after asking the Defendant if he could search his car, the [D]efendant expressed reluctance before directing Trooper Lamm to ask Ms. Peart since she was the lessee of the vehicle. At which time, Trooper Lamm left the patrol car, asked the Defendant to sit tight, and went to ask Ms. Peart. . . .

CONCLUSIONS OF LAW

2. That Trooper Lamm was at all times casual and conversational in his words and manner.

“[T]he tolerable duration of police inquires 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.” *State v. Bedient*, \_\_\_ N.C. App. \_\_\_, 786 S.E.2d 319, 322 (2016) (quoting *Rodriguez v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_, 135 S.Ct. 1609, 1614 (2015) (internal citations omitted)). In addition to deciding whether to issue a traffic ticket, a law enforcement officer’s “mission” includes “ordinary inquires incident to the traffic stop.” *Bedient*, \_\_\_ N.C. App. at \_\_\_, 786 S.E.2d at 322 (quoting *Rodriguez*, \_\_\_ U.S. at \_\_\_, 135 S.Ct. at 1615). This inquiry typically includes checking the driver’s license, determining if the driver has any outstanding warrants, inspecting the vehicle’s registration and proof of insurance, or a rental agreement for a rental car, which is the equivalent of inspecting a vehicle’s registration and proof of insurance. *See Bedient*, \_\_\_ N.C. App. at \_\_\_, 786 S.E.2d at 322–23 (quoting



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*Rodriguez*, \_\_\_ U.S. at \_\_\_, 135 S.Ct. at 1615); *See also State v. Bullock*, \_\_\_ N.C. App. \_\_\_, 785 S.E.2d 746, 751 (2016), *writ of supersedeas allowed*, 786 S.E.2d 927 (2016).

The trial court held its suppression hearing 1 June 2015 and issued an order denying Defendant's motion to suppress on 10 July 2015. If the trial court had the benefit of this Court's guidance in *Bullock*, \_\_\_ N.C. App. \_\_\_, 785 S.E.2d 746, it may have ruled in Defendant's favor.

In *Bullock*, this Court examined a fact pattern that is nearly identical to the case *sub judice* and applied the principles of *Rodriguez*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1609. In *Bullock*, the defendant sped and followed another vehicle too closely on the highway. *Bullock*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 747–48. When the officer pulled Bullock over, he asked for Bullock's license and rental agreement. *Id.*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 748. The rental agreement did not list Bullock's name, though it appeared he wrote his name on the form below the renter's signature. *Id.* The officer saw two cell phones in the car and noticed Bullock's hands were "trembling a little." *Id.* The officer asked Bullock where he was traveling. *Id.* Bullock said he was driving to meet a girl and missed his exit on the highway. *Id.* The officer "asked [Bullock] to step back to his patrol car while he ran [Bullock's] driver's license." *Id.* The officer "shook hands with [Bullock] and told him that he would give him a warning for the traffic violation." *Id.* The officer "then asked if he could briefly search [Bullock] for weapons before he got into his patrol car." *Id.* Bullock "agreed and lifted

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his arms up in the air . . . .” *Id.* Bullock sat in the front seat of the patrol car as the officer ran his driver’s license through a mobile computer. *Id.* The officer’s K-9 was in the back seat. *Id.* While the officer and Bullock sat in the front seats, the officer questioned Bullock. *Id.* The officer thought Bullock “looked nervous while he was questioning him . . . .” and saw he was “‘breathing in and out in his stomach’ and not making much eye contact.” *Id.* The officer attributed this nervousness “to something other than general anxiety from a routine traffic stop” because he already told Bullock he was going to issue a warning ticket. *Id.*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 751. The officer asked Bullock “if there were any weapons or drugs in the car and if he could search the vehicle.” *Id.*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 748. Bullock consented to the search except for his personal belongings, which included a bag, some clothes, and condoms. *Id.* The officer called for a backup officer and explained he could not search without another officer present. *Id.* While they waited approximately ten minutes for a backup officer to arrive, Bullock asked “what would happen if he did not consent to a search of the car,” and the officer stated “he would then deploy his K-9 dog to search the car.” *Id.* “At that time, [Bullock] and [the officer] spoke some more about the girl [Bullock] was going to see and other matters unrelated to the traffic stop.” *Id.* The backup officer arrived, searched the car, and found 100 bindles of heroin. *Id.*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 749.

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The *Bullock* Court applied the United States Supreme Court’s guidance in *Rodriguez* and held the officer could check Bullock’s license and rental agreement, but he “was not allowed to ‘do so in a way that prolonged the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.’” *Id.*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 751 (quoting *Rodriguez*, \_\_\_ U.S. at \_\_\_, 135 S.Ct. at 1615). This Court held, “[the officer] completed the mission of the traffic stop when he told [Bullock] that he was giving [Bullock] a warning for the traffic violations as they were standing at the rear of [Bullock’s] car.” *Id.*

Here, Trooper Lamm’s authority to seize Defendant for the speeding infraction ended “when tasks tied to the traffic infraction [were]—*or reasonably should have been*—completed.” *Rodriguez*, \_\_\_ U.S. at \_\_\_, 135 S.Ct. at 1614 (emphasis added) (citation omitted). At the very latest, this occurred when Trooper Lamm told Defendant he was going to issue a warning ticket and gave him a hard copy of the warning ticket. *See Bullock*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 751. Beyond this identifiable point in time, this Court notes an officer may not delay telling a driver they are going to receive a ticket (or warning ticket), withhold writing or providing a written copy of the ticket (or warning ticket), withhold the driver’s license, car registration, rental agreement, or other pertinent documents, in such a way that prolongs “the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.” *Id.* (quoting *Rodriguez*, \_\_\_ U.S. at \_\_\_, 135 S.Ct. at 1615).

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Prior to *Rodriguez*, it was well settled that an officer may ask a driver to exit a vehicle during a traffic stop. See *State v. McRae*, 154 N.C. App. 624, 629, 573 S.E.2d 214, 218 (2002) (citations omitted). Historically, the *de minimis* intrusion of asking a driver to exit a vehicle was outweighed by “the government’s ‘legitimate and weighty’ interest in officer safety . . . .” *Rodriguez*, \_\_\_ U.S. at \_\_\_, 135 S.Ct. at 1615 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 110–11 (1977) (per curiam)). However, “under *Rodriguez*, even a *de minimis* extension is too long if it prolongs the stop beyond the time necessary to complete the mission.” *Bullock*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 752. Therefore, an officer may offend the Fourth Amendment if he unlawfully extends a traffic stop by asking a driver to step out of a vehicle. See *Id.* The same is true of an officer who unlawfully extends a traffic stop by asking a driver to sit in his patrol car, thereby creating the need for a weapons pat down.<sup>2</sup> It is also possible for an officer to unlawfully extend a traffic stop by telling a driver to close the patrol car’s front passenger door, while the officer questions the driver about matters unrelated to the traffic stop. Further, this Court notes officer safety is put at risk an increased number of times when an officer adds additional steps to delay the traffic stop, such as ordering the driver to step out of the vehicle, patting the

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<sup>2</sup> “By requiring defendant to submit to a pat-down search and questioning in the patrol car unrelated to the purpose of the traffic stop, the officer prolonged the traffic stop beyond the time necessary to complete the stop’s mission and the routine checks authorized by *Rodriguez*.” *Bullock*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 753 (citing *State v. Castillo*, \_\_\_ N.C. App. \_\_\_, 787 S.E.2d 48 (2016)).

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driver down, having the driver sit in the patrol car, and sitting next to the driver to ask them questions and observe their demeanor.

To detain a driver beyond a traffic stop, an officer must have “reasonable articulable suspicion that illegal activity is afoot.” *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166–67 (2012) (citing *Florida v. Royer*, 460 U.S. 491, 497–98 (1983)) (citation omitted). An officer is “required to have reasonable suspicion before asking [a] defendant to go to his patrol vehicle to be questioned.” *Bullock*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 753. During a lawful traffic stop, an officer “may conduct a pat down search, for the purpose of determining whether the person is carrying a weapon, *when the officer is justified in believing that the individual is armed and presently dangerous.*” *State v. Sanders*, 112 N.C. App. 477, 480, 435 S.E.2d 842, 844 (1993) (citing *Terry v. Ohio*, 392 U.S. 1, 24 (1968); *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993)) (emphasis added).

Here, the trial court found Trooper Lamm had “sufficient reasonable suspicion of criminal activity to continue the traffic stop beyond the speeding enforcement action” for the following reasons:

- a. Defendant was overly nervous for a traffic stop for speeding.
- b. Defendant would not close the patrol car door until ordered to do so, stating that he was “scared to do that” and had one leg out of the door.
- c. Defendant gave the Trooper a rental agreement for a

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different car than he was operating and that car was paid for in cash.

d. Defendant was operating the car outside of the approved area for travel, New York, New Jersey, and Connecticut.

e. He noted the presence of numerous air fresheners in the vehicle.

f. The vehicle had a lived in look showing hard travel, such as, coffee, energy drinks, and trash.

g. The presence of a female dog in the car and dog food scattered throughout the car.

h. The driver and passenger provided inconsistent travel plans.

The trial court's findings do not support its conclusion that Trooper Lamm had reasonable suspicion of criminal activity to extend the traffic stop and conduct a search after the traffic stop concluded. The various legal behaviors in the trial court's findings do not amount to a "reasonable articulable suspicion that illegal activity is afoot." *Williams*, 366 N.C. at 116, 726 S.E.2d at 166–67 (citing *Royer*, 460 U.S. at 497–98) (citation omitted). "In order to preserve an individual's Fourth Amendment rights, it is of the utmost importance that we recognize that the presence of [a suspicious but legal behavior] is not, by itself, proof of any illegal conduct and is often quite consistent with innocent travel." *State v. Fields*, 195 N.C. App. 740, 745, 673 S.E.2d 765, 768 (2009) (citing *United States v. Sokolow*, 490 U.S. 1, 9 (1989)). Reasonable suspicion may arise from "wholly lawful conduct." *Reid v. Georgia*, 448

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U.S. 438, (1980) (citing *Terry*, 392 U.S. at 27–28). However, “the relevant inquiry is . . . the degree of suspicion that attaches to particular types of noncriminal acts.” *Sokolow*, 490 U.S. at 10 (quoting *Illinois v. Gates*, 462 U.S. 213, 243–44 n. 13 (1983)).

Here, Defendant’s nervousness is “an appropriate factor to consider,” but it must be examined “in light of the totality of the circumstances” because “many people do become nervous when [they are] stopped by an officer . . . .” *State v. McClendon*, 350 N.C. 630, 638, 517 S.E.2d 128, 134 (1999) (citations omitted). The degree of suspicion attached to Defendant’s possession of a female dog, dog food, coffee, energy drinks, trash, and air fresheners is minimal, as it is consistent with innocent travel.

Most importantly, the trial court’s findings are based upon facts that were discovered after the “tolerable duration” of the speeding stop expired, namely Defendant’s nervousness and his fear about closing the front passenger door of the patrol car. *See Bedient*, \_\_\_ N.C. App. at \_\_\_, 786 S.E.2d at 322 (quoting *Rodriguez*, \_\_\_ U.S. \_\_\_, \_\_\_, 135 S.Ct. at 1614). *Rodriguez* clearly changes the law and traffic stop procedures that existed prior to its issuance on 21 April 2015. To affirm the trial court, as the dissent suggests, is to ignore the United States Supreme Court’s direction in *Rodriguez*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1609.

**IV. Conclusion**

For the foregoing reasons, we reverse the trial court.

REVERSED.

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Chief Judge McGEE concurs.

Judge DILLON dissents in a separate opinion.



DILLON, Judge, dissenting.

Because I agree with the State that Judge Adams' findings support a conclusion that Trooper Lamm obtained Defendant's consent to search the rental vehicle *after* the traffic stop had concluded and Defendant was otherwise free to leave, I respectfully dissent.

Assuming, *arguendo*, that Trooper Lamm's exchange with Defendant following the conclusion of the traffic stop was non-consensual and that Defendant's "consent" was coerced, I believe that Trooper Lamm had *reasonable suspicion* of separate, independent criminal activity to support an extension of the traffic stop beyond the time necessary to complete the mission of citing Defendant for the traffic violation.

I. There Was the Consensual Search After Traffic Stop Had Concluded and Defendant Was Free to Leave.

Judge Adams' findings support her conclusion that Trooper Lamm obtained Defendant's voluntary consent after Defendant was otherwise free to leave the scene.

The majority contends that Defendant's consent to search the car was ineffective since Trooper Lamm impermissibly extended the traffic stop in violation of the principles set out in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015). *See also Florida v. Royer*, 460 U.S. 491, 507-08 (1983) (holding that a defendant's consent to a search is ineffective to justify the search when the consent is obtained while the defendant is being illegally detained). *Rodriguez* is certainly an important development in Fourth Amendment law, clarifying that even a *de minimis* extension

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of a traffic stop to investigate matters unrelated to the mission of the traffic stop without reasonable suspicion of separate criminal activity is impermissible. However, this principle in *Rodriguez* is inapplicable here as Trooper Lamm did not extend the traffic stop to question Defendant and then search Defendant's rental vehicle. Rather, Judge Adams' findings show that Trooper Lamm concluded the traffic stop and then obtained Defendant's consent only *after* his exchange with Defendant evolved into a consensual encounter. For the same reasons, our case is distinguishable from our recent decision in *State v. Bullock*, \_\_\_ N.C. App. \_\_\_, 785 S.E.2d 746 (2016), which is cited by the majority, where we applied *Rodriguez* to invalidate a search based on the impermissible extension of a traffic stop. *Bullock* did not involve a situation where a traffic stop had concluded and the encounter became consensual.

There is no detention for Fourth Amendment purposes when law enforcement engages with a defendant unless a reasonable person in the defendant's position "would have believed he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). In the context of a traffic stop, the detention of a motorist is a seizure for Fourth Amendment purposes. However, when the traffic stop is over and the detainee is free to leave, the traffic stop transforms into a consensual encounter: the officer may ask questions, and the detainee can choose to answer them or simply refuse to answer and leave.

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Our Court has held on a number of occasions that “[g]enerally, an initial traffic stop concludes and the encounter becomes consensual . . . after an officer returns the detainee’s driver’s license and registration.” *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009). *See also State v. Henry*, 237 N.C. App. 311, 324, 765 S.E.2d 94, 104 (2014) (recognizing that “a traffic stop is not terminated until after the officer returns the driver’s license or other documents to the driver”); *State v. Cottrell*, 234 N.C. App. 736, 742-43, 760 S.E.2d 274, 279 (2014) (restating the general principle that the return of motorist documentation typically renders any subsequent exchanges between motorist and law enforcement consensual). In *State v. Kincaid*, we recognized that “subject to a totality of the circumstances test, that once an officer returns the license and registration, the stop is over and the person is free to leave.” 147 N.C. App. 94, 99, 555 S.E.2d 294, 298 (2001).

Likewise, the Fourth Circuit Court of Appeals has consistently held that a motorist is no longer detained after the officer gives the motorist his or her license and other paperwork, absent some other factor which might indicate restraint. *See, e.g., United States v. Sullivan*, 138 F.3d 126, 133-34 (4th Cir. 1998); *United States v. Whitney*, 391 F. App’x. 277, 280-81 (4th Cir. 2010); *United States v. Meikle*, 407 F.3d 670, 673-74 (4th Cir. 2005).

Here, Judge Adams found that Trooper Lamm did not seek Defendant’s consent to search the rental car until *after* returning Defendant’s paperwork back to

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him and informing Defendant that the traffic stop had concluded. There is no finding to suggest any restraint or compulsion by Trooper Lamm when he obtained Defendant's consent to search the rental vehicle. That is, Trooper Lamm did not simply launch into an interrogation after returning to Defendant his license and other paperwork. Rather, Judge Adams found that Trooper Lamm took the extra step of first *asking* Defendant for his consent to question him further. *See Kincaid*, 147 N.C. App. at 102, 555 S.E.2d at 300 (holding in a similar situation when the officer "asked if he could question defendant . . . [,] [he] did not deprive defendant of freedom of action in any significant way. After [the officer] handed back defendant's license and registration, defendant was free to leave and free to refuse to answer questions"). Judge Adams also found that Trooper Lamm "was at all times casual and conversational in his words and manner."<sup>3</sup> *See Sullivan*, 138 F.3d at 133 (finding relevant that "there is no indication that [the officer] employed any physical force or engaged in any outward displays of authority"). Also significant is that the questioning occurred on a public highway during the daytime.

It is true that there is no indication (or finding) that Trooper Lamm ever told Defendant that he "was free to leave." The United States Supreme Court, however, has held that an officer is *not required* to inform a detainee that he is free to leave to

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<sup>3</sup> Defendant challenges the finding regarding the casualness of the conversation; however, he does not challenge this finding with regards to any portion of the encounter occurring after Trooper Lamm informed Defendant that the traffic stop was completed.

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transform a traffic stop into a consensual encounter. *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996) (concluding that it would “unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary.”). The Fourth Circuit has reached this same conclusion. *Sullivan*, 138 F.3d at 133 (“While [the officer] never told [the defendant] that he was free to go, that fact alone is not dispositive.”) And our Court has also reached this same conclusion. *Kincaid*, 147 N.C. App. at 97, 555 S.E.2d at 297 (affirming the trial court’s conclusion that the defendant was free to leave “although the officer never told defendant that he was free to leave”).

It is also true that Judge Adams found that *after* Defendant gave Trooper Lamm consent to search the rental vehicle (subject to Ms. Peart’s consent), Trooper Lamm asked Defendant to “sit tight” in the unlocked patrol car while he returned to the rental vehicle to ask Ms. Peart for her consent, which she gave. Given the context of Trooper Lamm’s request that Defendant “sit tight,” I believe that a reasonable person in Defendant’s position would have still felt that he could have withdrawn his consent and terminated the encounter.<sup>4</sup> Trooper Lamm only “asked” Defendant to sit

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<sup>4</sup> By this point, another officer was on the scene who remained with Defendant while Trooper Lamm sought Ms. Peart’s consent to search the vehicle. Defendant could have simply told this other officer that he was withdrawing his consent and that he was going to leave.

tight and only did so *after* Defendant had already given his consent and *after* Defendant “direct[ed] Trooper Lamm to ask Ms. Peart” for her consent.<sup>5</sup>

In conclusion, I believe that Defendant gave consent to search the car after the traffic stop concluded and the encounter between Defendant and Trooper Lamm became consensual. Therefore, I would affirm Judge Adams’ order.

## II. Trooper Lamm Otherwise Had Reasonable Suspicion to Extend the Stop.

Assuming, *arguendo*, that the traffic stop did not become consensual after Trooper Lamm returned all of the paperwork to Defendant, informed Defendant that the traffic stop had concluded, and asked Defendant for his consent to question him further, I believe that Judge Adams’ findings support her conclusion that Trooper Lamm had reasonable suspicion that Defendant was transporting illegal drugs.

The majority likens this case to our recent decision in *Bullock*, which applied *Rodriguez* and held that a traffic stop cannot be extended beyond the time necessary to complete the mission of the traffic stop (issuing the citation, processing tags, reviewing driver’s license information, etc.), without reasonable suspicion of some other crime being afoot. *Bullock*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 752. Admittedly, there are similarities between the facts in *Bullock* and Judge Adams’ findings in the

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<sup>5</sup> Defendant does not make any argument concerning whether *Ms. Peart* would not have felt free to leave when *she* gave *her* consent to search the vehicle or any argument about the impact the validity of Ms. Peart’s consent should have on our analysis in this prosecution of Defendant. Therefore, any issue concerning Ms. Peart’s consent is not before us.

present case. Specifically, in *Bullock*, our Court determined that the defendant's presence on a busy interstate typically used for drug trafficking, the defendant's unauthorized operation of a rental vehicle,<sup>6</sup> the defendant's nervous behavior, and the defendant's statement that he had missed an exit to explain his erratic driving did not give rise to a "particularized suspicion of criminal activity" permitting extension of the traffic stop to conduct a frisk of the defendant. *Id.* at \_\_\_, 785 S.E.2d at 753-56. In reaching its conclusion, our Court relied on the Fourth Circuit's acknowledgment that:

[T]he Supreme Court has recognized that factors consistent with innocent travel can, when taken together, give rise to reasonable suspicion. On the other hand, the articulated innocent factors collectively *must serve to eliminate a substantial portion of innocent travelers* before the requirement of reasonable suspicion will be satisfied.

*Id.* at \_\_\_, 785 S.E.2d at 754 (quoting *U.S. v. Digiovanni*, 650 F.3d 498, 511 (4th Cir. 2011)) (emphasis added) (internal citations and marks omitted).

Judge Adams found additional facts which, I believe, distinguish this case from *Bullock*. For instance, the trial court found that the following events occurred before Trooper Lamm committed any act which could arguably be related to the traffic stop:

6. Trooper Lamm observed a female in the front passenger seat holding an adult female pit bull dog and defendant in driver's seat.

7. Trooper Lamm noticed the presence of . . . dog food

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<sup>6</sup> The rental agreement in the present case only allowed the vehicle to be driven in New York, New Jersey, and Connecticut.

scattered throughout the interior of the vehicle.

8. Trooper Lamm knew that the presence of a female dog and dog food are sometimes used to distract a male canine during a dog sniff.

9. Trooper Lamm noticed several air fresheners which Trooper knew are sometimes used to mask the odor of a controlled substance.

Indeed, in *Digiovanni*, which was relied upon by our Court in *Bullock*, the Fourth Circuit opined that the presence of air fresheners would have had an impact on their determination that no reasonable suspicion existed to extend the stop. *Digiovanni*, 650 F.3d at 513. I believe that these additional findings were sufficient to “eliminate a substantial portion of innocent drivers,” *Bullock*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 754, and supported the conclusion that Trooper Lamm had reasonable suspicion that criminal activity was afoot to justify an extension of the traffic stop. *See State v. Warren*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 775 S.E.2d 362, 365-66 (2015) (holding that *Rodriguez* was not violated and that there was reasonable suspicion to conduct a dog sniff search).