

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

No. S-1-SC-39752

MARCUS COLEMAN,

Defendant-Appellee.

STATE'S REPLY BRIEF

Appeal from the Eleventh Judicial District Court
McKinley County, New Mexico
Honorable Robert A. Aragon

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Statement of Compliance

This brief complies with Rule 12-318(F)(3) NMRA because its body being proportionally spaced contains 3,589 words. This word count was obtained from Microsoft 365. Rule 12-318(G).

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Overview of Reply

Defendant's Answer Brief broadly considered asserts that Officer Salazar lacked a sufficient totality of the circumstances to support reasonable suspicion to expand the scope of his investigation of the following-too-closely traffic violation by questioning Defendant regarding his travel. In the reply, the State relies upon the arguments made in its Brief in Chief, and further addresses the flaws in Defendant's analysis, and details the sequence of events that supported with reasonable suspicion the particular "travel questions" posed by Officer Salazar to Defendant.

The Different Nature of "Reasonable Suspicion" to Expand an Investigation. When a police officer stops a vehicle, the police officer must have "reasonable suspicion" that that a crime has occurred. But when a police officer expands an existing investigation, for example, by asking a question unrelated to the initial reason for the traffic stop, the police officer must have "reasonable suspicion that other crime is afoot." The State submits that "reasonable suspicion" to expand an existing investigation by asking an question unrelated to the initial reason for the stop is different in that it does not require the police office to suspect that a particular crime has occurred but only that something in the totality of the circumstances to that point in time causes reasonable suspicion that some other

crime is afoot, which equates to whether the particular expansion (question) was reasonable based on the totality of the circumstances at that point in time. Thus, if a police officer reasonably would be prompted by the circumstances to seek additional information to explain suspicious behavior or questionable information received, that is all that is required. (For example, when two occupants of a vehicle tell inconsistent stories, an expansion of the investigation to attempt to determine the reason for the discrepancy does not have to provide a police officer with reasonable suspicion that a particular person has committed a particular crime.)

The Reasonableness of Expansion Dance. Under New Mexico law, the reasonableness of an expansion of an initial traffic stop beyond the scope of the reason for the initial stop, and the reasonableness of *each* expansion, is considered based on the objective observations of the police officer and the reasonableness of the police officer's interpretations of those objective observations in supporting the conclusion that the officer had reasonable suspicion that some other criminal activity was afoot *at the moment of each expansion*. Thus, the reasonableness evaluation for *each expansion* is a real-time interactive dance dependent upon the officer's nuanced consideration and interpretation of constantly "evolving circumstances," and particularly the totality of which circumstances *at the moment*

of each expansion that support the conclusion that there existed a reasonable suspicion that some other criminal activity was afoot.

The complexity of the constitutional evaluations required by Article II, Section 10 of the New Mexico Constitution calls for minute examination of the factual record to determine whether at each moment in an investigatory detention the police officer “actions were fairly responsive to the emerging tableau” – i.e., to *the totality of the circumstances that existed at the time of each expansion* - and represented a “graduated response to the evolving nature of the stop.”

An Unappreciated Basis for Officer Salazar’s “Travel Questions” that were Unrelated to the Traffic Violation of Following Too Closely. The District Court and Defendant misunderstand the applicable law and circumstances in concluding and arguing that once Defendant had acknowledged the fact that he had been following other vehicles too closely that all other lines of inquiry by the police officer were “superfluous.” [CD 11:16:06-11:17:14] (The officer testified that immediately after the ... after the stop took place, the Defendant admitted the violation. So all of the questions regarding why he went to California, when he got there, his reason for leaving there so soon ... all of that was superfluous, and persuades the Court that that was an investigation that went well beyond the reason for the stop.”); [Def. S.Ct. Answer Brief, pages 2-3, 9].

To the contrary, from very near the outset of the investigation - when Officer Salazar learned that the vehicle was rented and Defendant was not the registered owner of the vehicle - a wholly different basis for Officer Salazar's investigation arose into whether Defendant was lawfully authorized to be in possession of the vehicle. *See e.g., State v. Van Dang*, 2005-NMSC-033, ¶ 15, 138 N.M. 408 (“because [d]efendant's name did not appear on the rental contract, the officer had a right to investigate whether the vehicle was stolen [and a]s part of that investigation we believe that questions about travel plans would be reasonable.”). Nor did the Court of Appeals give adequate consideration to this basis for Officer Salazar's travel plans questions.

Officer Salazar's investigation of this question of Defendant's right to be in possession of the vehicle continued even after asking Defendant questions about his travel, as demonstrated by Officer Salazar leaving his patrol car and Defendant to go back to the stopped vehicle to determine whether the vehicle identification number (VIN) on the vehicle matched the VIN on the license plate. *See [CD 10:46:19-33]* (“[S]ince [Defendant] did not provide a registration document for the vehicle itself, I went up to the vehicle to confirm that the VIN on the vehicle was associated to the plate on it.”); *[CD 10:11:37-49]* (“I wanted to verify the VIN on the vehicle to ensure that – cause he didn't provide me with the registration

document – that it was valid, [that] everything was matching up per the return from metro dispatch.”

Argument

The State submits that Deputy Salazar’s four questions regarding Defendant’s travel plans were minimally intrusive expansions of the initial traffic stop that were supported by objective circumstances giving rise to reasonable suspicion that other criminal activity was afoot.

Defendant’s Answer Brief also raises an issue not previously raised or addressed, and which should not now be considered on certiorari, as to whether Officer Salazar’s request that Defendant return to his patrol vehicle to continue the investigation constituted an unreasonable expansion of the original investigation.

I. Each of Officer Salazar’s “travel plans” questions was supported by an evolving totality of circumstances that supported reasonable suspicion that other criminal activity was afoot

Officer Salazar’s evolving questions to Defendant relative to travel plans information were supported by circumstances that gave rise to reasonable suspicion that other criminal activity was afoot that was sufficient to support each such inquiry.

District Court’s Disregard of Issue of Defendant’s Right to Possess the Vehicle. For its part, the District Court’s ruling from the bench and order granting

the motion to suppress completely disregarded information received by Officer shortly after commencement of the traffic stop that Defendant was not the registered owner of the vehicle and that the vehicle had been rented by someone other than Defendant, which gave rise to a wholly separate line of questioning into whether the Defendant had permission to be in possession of it.

A Failure to Consider the *Totality* of the Circumstances. For their part, Defendant and the Court of Appeals both failed to acknowledge *the totality* of the evolving circumstances that supported reasonable suspicion for each travel plan question that constituted an expansion of Officer Salazar's investigation of the traffic offense of following too closely. Critically, Defendant and the Court of Appeals appear mistakenly to assume that Officer Salazar's questions about travel plans had to be supported by reasonable suspicion *of the crime of illegal possession of drugs*, whereas such questions were supported by Officer Salazar's reasonable investigation into Defendant's *authority to be in possession of the vehicle* as well as by reasonable suspicion relative to the possession of illegal drugs. Defendant's responses to these "authority to be in possession" travel plans questions then created additional reasonable suspicion supporting further expansions of Officer Salazar's investigation.

Initial Travel Plans Questions Relative to Rental Agreement and Defendant's Right to Be in Possession of Vehicle. Having received from Defendant the vehicle rental agreement, it appears that Officer Salazar's questions and receipt of information relative to "travel plans" proceeded in four steps. The first question asked by Officer Salazar regarding Defendant's travel plans asked who had rented the vehicle. [CD 10:31:16-10:32:01] (audio from Officer Salazar's lapel camera recording in which Officer Salazar asked Defendant who had rented the vehicle and Defendant confirmed that the vehicle had been rented by "James [McClendon, the passenger]"). Second, it appears that Officer Salazar asked Defendant generically about the purpose of Defendant's travel. *See* [CD 10:10:06-19] ("I continued on with the conversation with him, asking [Defendant], you know, the purpose of their travel; he said that they were coming from California and that they were out there for a couple of days.") Effectually, by this question, Officer Salazar asked Defendant to confirm the travel plans story volunteered by passenger James McClendon. Third, Officer Salazar asked Defendant how they got to California, and learned they had flown there. Fourth, Officer Salazar asked Defendant when he had flown to California, and Defendant said (inconsistently with his prior statement) that he had flown to California only the day before, April 15th.

The Sequence of Events – The Evolving Totality of Circumstances

Leading to Questions About Rental of the Vehicle by Passenger, the “Purpose” of Travel, and the Means of Arrival and Day of Arrival in California. Preceding any expansion and in expanding his investigation by asking questions not related to the traffic offense of following too closely, Officer Salazar observed and obtained information regarding a number of circumstances that supported his developing reasonable suspicion that other criminal activity was afoot sufficient to ask these questions about Defendant’s travel plans.

Before the First Question. Before asking Defendant who rented the rental vehicle, Officer Salazar learned the following information.

- **A California License Plate.** After making the decision to follow and stop Defendant’s vehicle, Officer Salazar observed that the vehicle had a California license plate. [CD 10:10:22-10:23:30]; [CD 10:07:10-25]
- **The Smell of Marijuana from Vehicle.** While informing Defendant of the reason for the traffic stop, Officer Salazar smelled the odor of marijuana emitting from the interior of the vehicle. [11-12-2021 CD 10:08:35-46]; [RP 5]; [RP 74]

- **Suspicious Unsolicited Comments of Passenger, Initiating Discussion of Travel Plans with Unsolicited Comments About Visiting Veteran Friends in California.** Officer Salazar asked Defendant for his license, insurance, and registration documentation, and while waiting for Defendant to provide the requested documentation, the passenger (apparently later identified as James McClendon) interjected and volunteered information about McClendon’s status as a disabled veteran and about the two occupants’ immediately preceding travel plans involving visiting with friends who were veterans dealing with “post-traumatic-type issues.” [CD 10:08:46-10:09:24]; [CD 10:27:45-10:28:17] (confirming passenger identified himself as a “disabled veteran”); Officer Salazar, based on his training and experience, viewed the passenger’s volunteered comments as suspicious and as indicating passenger McClendon was trying to “control the conversation of the stop” and to “manage” him into thinking they were normal, law-abiding citizens. [CD 10:08:46-10:09:24]; [CD 10:15:14-44]] (“[T]he unprovoked utterance of the passenger at initial contact, stating that he was a veteran and he was visiting veteran friends – that

was an ability in with my training – it was his ability ... or attempt to control my impression of the individuals.”); [RP 5] (“While [Defendant] was providing me with the information, the passenger willingly began telling me that they were visiting friends in California and that he was a veteran. Based off my training and experience I believe this was an attempt by the passenger to control the conversation.”); [RP 74] (same).

- **Receipt of Documents, Including a Driver’s License indicating Defendant was from Baltimore, Maryland in Possession of a Vehicle with a California License Plate.** Sometime early in the traffic stop, Defendant provided Officer Salazar with his driver’s license (which indicated Defendant was from Baltimore, Maryland) and a copy of a vehicle rental agreement. [RP 5]; [RP 74]’ [11-12-2021 CD 10:08:21]; [RP 93] (incident report reflecting Defendant’s Baltimore, Maryland address and Maryland driver’s license). But Defendant never provided Officer Salazar with a vehicle registration document for the vehicle. [CD 10:46:19-33]; [RP 5]
 - **NOTE:** After passenger McClendon’s attempt to control the conversation [RP 74] and after having received some

documentation from Defendant, Officer Salazar invited Defendant back to his patrol vehicle (away from passenger McClendon) to complete the enforcement action for the violation, asking Defendant to sit in the front passenger seat while Officer Salazar sat in the driver's seat. **[CD 10:09:24-42]** Officer Salazar also returned to his vehicle to use a computer located there to verify the information represented in the documents he had received from Defendant. *See also* **[CD 10:28:16-23]** (audio from Officer Salazar's lapel camera recording in which Officer Salazar just before taking Defendant back to his patrol car is heard to say that if everything checks out he's going to get them out of here). **[CD 10:35:29-58]** (Officer Salazar confirming to Defense Counsel that as shown in the video he was using the computer in his patrol vehicle to check on the validity of Defendant's driver's license and the registration on the vehicle); *see also* **[CD 10:36:55-10:37:15]** ("I was ensuring that the driver's license and registration were valid.")

- **The Smell of Marijuana from Defendant.** Back in his patrol car with Defendant, Officer Salazar could still smell the odor of marijuana emanating from Defendant, which Officer Salazar considered to be a suspicious circumstance in that at the time marijuana was an illegal substance in New Mexico. [CD 10:09:43-52]; [RP 74]

The First “Travel Plans” Question. Up to this time, Officer Salazar had asked Defendant no “travel plans” questions. The first travel plans question - about who had rented the vehicle - arose from the fact that the name on the vehicle rental agreement he had been provided was not Defendant’s name.

- **Defendant Not the Renter of the Vehicle.** Officer Salazar then began to examine the vehicle rental agreement. *See e.g.*, [CD 10:31:16-10:32:01] (audio from Officer Salazar’s lapel camera recording in which Officer Salazar asked Defendant who had rented the vehicle and Defendant confirmed that the vehicle had been rented by “James”). Officer Salazar testified that his review of and questions about a vehicle rental agreement are intended “to insure that the occupants of the vehicle are the valid ones with permission from the rental company to drive it.” [CD 10:52:02-15]

- **“Irregular” One-Way Travel Across the Country in a Rental Vehicle.** Officer Salazar knew the vehicle was rented in California, he that the passenger had said he and Defendant were visiting friends in California, and he knew Defendant was from Baltimore, Maryland. Officer Salazar gave his opinion that the very fact of Defendant and passenger renting a vehicle to return home to Baltimore, Maryland – appeared to him to constitute “irregular travel” constituting a suspicious circumstance. [CD 10:31:52-10:32:01] (“I was asking [Defendant] about the rental agreement, and like, the irregular travel associated with it ... the one-way travel”.); *see also* [CD 10:33:23-10:34:16] (Officer Salazar confirming he had asked Defendant regarding Defendant’s irregular travel to provide a reason why Defendant and his passenger were driving back to Baltimore, Maryland rather than flying back and describing his perception that Defendant’s manner of response, i.e., stuttering and saying “umm” numerous times, was that Defendant’s explanation was an alibi).

The Second Travel Plans Question. Officer Salazar’s second travel plans question appears to have been a generic question relative to Defendant’s use of a rental car that had been rented by someone other than himself regarding the

purpose of Defendant's travel, to which Defendant appears to have responded that he and his passenger had been visiting friends in California for two days.

Moreover, this general question essentially asked Defendant to confirm the "travel plans" story volunteered by passenger James McClendon.

- **Defendant Says He Was in California A "Couple of Days" Before the April 16th Traffic Stop.** Apparently in conversation relative to the vehicle rental agreement and the purpose of their travel using a rental vehicle, Defendant informed Officer Salazar that he had been in California "a couple of days" before the April 16th traffic stop.

[CD 10:10:05-19] (Officer Salazar testified Defendant had told him that "they were coming from California and that they were out there for a couple of days.")

The Third and Fourth "Travel Plans" Questions. Following up on Defendant's response that he had been visiting friends in California for two days, Officer Salazar asked Defendant how he had gotten to California, and being told by Defendant that Defendant had flown to California, Officer Salazar asked Defendant when he had flown to California, and was told inconsistently by Defendant that he had flown to California only the day before, on April 15th.

- **Inconsistency in Defendant’s Story – In California Less Than One Day.** Officer Salazar then “noticed on the vehicle rental agreement it was rented on April 15th, which was just one day prior [to the 11:00 a.m. traffic stop], at about 12:30 in the afternoon. So [he] asked [Defendant] how did they get to California. [Defendant] stated they flew out there.” [CD 10:10:19-43] “And like I said, [Defendant had already] mentioned that they were there for a few days; but when I asked when they flew out there, [Defendant inconsistently] said that they flew out *on the 15th of April* [which was only one day before the traffic stop and was the same day the vehicle had been rented.]” [CD 10:10:19-43]; [CD 10:10:05-19] (Earlier in his testimony, Officer Salazar testified Defendant had told him inconsistently that “they were coming from California and that they were out there for a couple of days.”); *see also* [RP 74] (“[Officer Salazar] observed on the rental agreement that the vehicle was rented out of California [the day before the traffic stop] on 4/15/2021 by the passenger, James McClendon, and was to be returned in Maryland on 4/18/2021.”) [RP 5] (same).

Summary. Officer Salazar’s questions to Defendant about (1) who had rented the vehicle, (2) about the “purpose” of the travel, and (3) about the means of arrival in California and (4) day of arrival in California constituted minimally intrusive expansions of Officer Salazar’s investigation that were warranted not only to determine Defendant’s right to be in possession of the rental vehicle, but by the totality of the evolving circumstances as described above. *Compare State v. Van Dang*, 2005-NMSC-033, ¶ 15, 138 N.M. 408 (questions about a driver's travel plans were reasonable because the absence of driver's name on a vehicle rental contract gave “the officer ... a right to investigate whether the vehicle was stolen.”); *State v. Affsprung*, 2004-NMCA-038, ¶ 10, 135 N.M. 306 (“Following a valid stop, for a traffic violation, an officer may lawfully continue with a de minimis detention for inquiry into matters reasonably related to the circumstances that initially justified the stop and to check out license, registration, and insurance.”). The State submits that in the present case and pursuant to the reasoning in *Van Dang* and *Affsprung*, Deputy Salazar had justification to inquire about Defendant’s travel plans to determine his right to be in possession of the rental vehicle.

II. The fact that Officer Salazar smelled marijuana emanating from the interior of the vehicle and from Defendant's person formed only a part of the totality of the circumstances.

The State does not argue that the totality of the circumstances supporting Officer Salazar's questions to Defendant about travel plans consisted *only* of the fact that he had smelled marijuana emanating from the interior of the vehicle and from Defendant's person. Rather, the State argues that reasonable suspicion to expand an existing traffic stop is determined from the totality of the circumstances and not from any single circumstance. *See State's Brief in Chief, page 6.*

III. Defendant's Answer Brief Raises an issue not raised by Defendant in the Court of Appeals and not decided by the Court of Appeals that should not be considered for the first time on certiorari.

For the first time here, Defendant makes a new argument that he did not make in his Motion to Suppress in the District Court [RP 60-70], and that he did not make before the Court of Appeals; Defendant now contends that Officer Salazar's request that Defendant leave the rental vehicle to continue his investigation in the patrol car constituted an unreasonable expansion of the traffic stop. *See S.Ct. Answer, pages 6-8, 9.* In the Court of Appeals, Defendant argued only that Officer Salazar's travel-related questions not related to the traffic offense of following too closely were not supported by reasonable suspicion. *See Ct. App.*

Def. Response Brief, pages 6, 11. Correspondingly, the Court of Appeals did not consider or address the issue now raised about continuing the investigation in Officer Salazar's patrol car, instead evaluating only the issue of whether the questions Officer Salazar asked Defendant related to his travel were supported by reasonable suspicion based on the totality of the circumstances. Nor is this issue reasonably within the question presented by the State's Petition for Writ of Certiorari as granted by this Court, in that the question presented was whether the expansion of the traffic stop as decided by the Court of Appeals relative to travel questions was reasonable under the evolving circumstances presented.

The State submits that the Court should not consider this issue for the first time on certiorari. *See* Rule 12-321 NMRA; *contrast State v. Lucero*, 2001-NMSC-024, ¶ 4, 130 N.M. 676. Nor has Defendant presented an argument as to why such consideration should be granted for the first time on certiorari.

Conclusion

The State respectfully requests this Court to reverse the *Memorandum Opinion* of the Court of Appeals and the order of the District Court suppressing evidence and to remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed and electronically served via Odyssey E-File & Serve on Defendant through his counsel of record on this 20th day of June, 2023.

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