

No. DA 20-0461

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NICOLE ABENCIA NOLI,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Seventh Judicial District Court,
Dawson County, the Honorable Olivia Rieger, Presiding

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STATEMENT OF THE ISSUES

1. After stopping Nicole on a remote stretch of highway for driving in the left-hand lane, did Trooper Barry Kilpela exceed the scope of the stop and illegally seize Nicole when he had her sit in the front seat of his cop car and repeatedly asked her questions unrelated to the traffic citation?
2. Did the trooper coerce Nicole into giving verbal consent to search her minivan after she said “no” two times, said she “did not understand” and refused to sign a written consent form?
3. Alternatively, should Nicole’s statements be suppressed because the trooper failed to provide a *Miranda* warning before isolating and questioning her in his patrol car?

STATEMENT OF THE CASE

On February 22, 2019, Montana Highway Patrol Trooper Barry Kilpela stopped Nicole Noli on a remote stretch of I-94 for driving in the left-hand lane. (D.C. Doc. 1.) Kilpela expanded the scope of the stop and conducted a drug trafficking investigation. (D.C. Doc. 1.) The expanded investigation happened to undercover suspected methamphetamine and drug paraphernalia, for which the State charged Nicole with Criminal Possession of Dangerous Drugs, in violation of § 45-9-102, MCA, and Criminal Possession of Drug Paraphernalia, in violation of § 45-10-103, MCA. (D.C. Doc. 3.)

Nicole filed a motion to suppress, arguing that Kilpela lacked particularized suspicion to extend the stop, conducted an unmirandized custodial interrogation and searched the vehicle without valid consent. (D.C. Doc. 31.) The district court held a hearing. (D.C. Doc. 42.) The court denied Nicole’s motion. (D.C. Doc. 43.)

Nicole pled guilty and reserved her right to appeal the motion ruling. (D.C. Doc. 61.) The district court sentenced Nicole to a three-year deferred sentence on Count I and six months in jail, all suspended, on Count II. (D.C. Doc. 62.) Nicole timely appealed. (D.C. Doc. 63.)

STATEMENT OF THE FACTS

Trooper Kilpela

Trooper Barry Kilpela is a member of the Eastern Montana Interdiction Team. (12/11/19 Tr. at 10.) He completed 500 hours of drug interdiction and canine narcotics detection training. (12/11/19 Tr. at 7.) Part of his training included making “high volume contacts with people”—including innocent people—and then using those contacts to hone his drug detection skills. (12/11/19 Tr. at 11.) “We contact people a lot, a lot of days, every day, and uh, then we look for various vehicle and subject indicators.” (12/11/19 Tr. at 11.) He continues this practice by

making “700 or 800” stops a year. (12/11/19 Tr. at 13.) On February 22, 2019, he stopped Nicole Noli.

The Stop

Nicole rented a minivan to drive from her home in Las Vegas to North Dakota to visit family. (State’s Ex. 3 at 04:21.) Because it was a long trip in the middle of winter, Nicole knew her own Infiniti sedan would not be the best for the trip. (State’s Ex. 3 at 07:13.) On the first night of the road trip, she and her girlfriend stayed at a hotel right outside of Idaho Falls. (State’s Ex. 3 at 06:00.) On the second day of the trip, on a remote stretch of highway just an hour and a half from North Dakota, Trooper Kilpela stopped Nicole. (State’s Ex. 3 at 01:46.)

Kilpela approached the vehicle’s passenger side, where Nicole’s girlfriend, a black female, was sitting. (State’s Ex. 3 at 02:04.) Kilpela told Nicole, who is a Hispanic female, that he stopped her for driving in the left-hand lane. (State’s Ex. 3 at 2:07.) No other cars were around. (State’s Ex. 3 at 00:10.) However, her rental minivan had California plates. (State’s Ex. 3 at 01:47.) Nicole said she was from Vegas and had “no idea” that driving in the left-hand lane was a violation. (State’s Ex. 3 at 02:32.) Kilpela later testified that he smelled a cigarette smoke

odor coming from the car, saw rolling papers and thought Nicole's arm was shaking. (12/11/19 Tr. at 19-20.) Kilpela ensured Nicole that "as long as everything checks out" he would "get [her] a warning." (State's Ex. 3 at 02:25.)

After Nicole provided the rental paperwork, Kilpela said, "You want to grab your license and then you can just hop in my front seat of my car and I'll fill you out a warning." (State's Ex. 3 at 03:02.) He said he did not want to "have to stand out here in the cold." (State's Ex. 3 at 03:07.) Nicole followed his directive and got out of the minivan. (State's Ex. 3 at 03:28.)

While Nicole was getting out of the car, Kilpela put his head against the back window and peered into the backseat. (State's Ex. 3 at 03:18.) He said he saw a "blanket" in the backseat, and asked Nicole if there was anyone else in the vehicle, which there was not. (State's Ex. 3 at 03:19.) Kilpela later testified that he saw "blankets and/or pillows," which he described as "hard travel." (12/11/19 Tr. at 22.)

Once Nicole got out, she handed Kilpela her driver's license. (State's Ex. 3 at 03:31.) Kilpela again told Nicole, "You can hop right in my front seat, alright." (State's Ex. 3 at 03:35.) Nicole again followed his

direction and got into the front seat of the patrol car. (State's Ex. 3 at 03:36.) Kilpela told her to close the door, which she did. (State's Ex. 3 at 03:55.)

Questioning Nicole Inside the Patrol Vehicle

Kilpela testified he started having people come sit in his K-9 unit patrol car in 2014 or 2015, which is around the same time he began his drug interdiction training. (12/11/19 Tr. at 49; State's Ex. 1 at 2-3.) He said "it creates a better environment for everybody" and it "becomes a lot more personable." (12/11/19 Tr. at 23 and 24.) It also helps to separate the driver from their passenger so that they cannot "conspire or anything like that." (12/11/19 Tr. at 24.) Additionally, it stops the individual from leaving because "they're not gonna be able to flee." (12/11/19 Tr. at 23.)

Here, after Nicole got into Kilpela's car, Kilpela did not call in Nicole's information to dispatch until she was in his car for almost two minutes. (State's Ex. 3 at 05:28.) Instead, he questioned Nicole about her trip and background. (State's Ex. 3 at 03:45-12:02.) Over time, the questions became more invasive and accusatory. (State's Ex. 3 at 03:45-12:02.)

Kilpela asked Nicole when she left Vegas. (State's Ex. 3 at 04:02.) He asked where she was heading. (State's Ex. 3 at 04:20.) He asked how long they were staying in North Dakota. (State's Ex. 3 at 04:38.) He asked if they drove through any bad weather. (State's Ex. 3 at 04:54.) He asked if they were driving straight through. (State's Ex. 3 at 05:55.) He asked if she and her passenger were taking turns driving. (State's Ex. 3 at 05:57.) He asked about her driving record and if she had any tickets. (State's Ex. 3 at 06:20.) He then asked Nicole if she had ever been arrested. (State's Ex. 3 at 06:39.)

Nicole answered all Kilpela's questions. She explained she was driving to North Dakota. (State's Ex. 3 at 04:21.) She was picking up her two little sisters and nephew. (State's Ex. 3 at 04:25.) Right after picking them up, they were going to head back. (State's Ex. 3 at 04:41.) She thought the name of the town was "Willington." (State's Ex. 3 at 04:24.) She said that Google maps took them through a mountainous part of Wyoming, where there was some "scary" weather and the roads were icy. (State's Ex. 3 at 04:56-05:20.) She said she did not want to take her own Infiniti on such a long trip, so they rented the minivan. (State's Ex. 3 at 07:13-07:24.) She said they were not driving straight

through and had stopped at a hotel around Idaho Falls the night before. (State's Ex. 3 at 06:02.) She told him she recently got a speeding ticket in Las Vegas. (State's Ex. 3 at 06:25.) She told him she had a DUI in 2012. (State's Ex. 3 at 06:46.)

Kilpela continued to question Nicole. He said, "You guys must've not got too much sleep, huh?" (State's Ex. 3 at 07:35.) He asked if they were going to spend the night in North Dakota. (State's Ex. 3 at 07:59.) He asked what she did for work. (State's Ex. 3 at 08:22.) He asked again who she was visiting in North Dakota. (State's Ex. 3 at 09:21.) He asked about her relationship with her passenger. (State's Ex. 3 at 10:02.) He asked if her passenger worked. (State's Ex. 3 at 10:11.) He asked how much she paid for the rental car. (State's Ex. 3 at 10:41.) He asked if she knew how to get where she was going. (State's Ex. 3 at 11:47.) He then said again, "You must be tired, huh?" (State's Ex. 3 at 12:23.) He asked her how many hours she had driven that day. (State's Ex. 3 at 12:25.)

Again, Nicole answered all his questions. She said that they got to the hotel room last night around 9 or 9:30pm. (State's Ex. 3 at 07:42.) She said they were going to get a room for a night in North Dakota.

(State's Ex. 3 at 08:02.) She said she used to work at AutoZone but now works security. (State's Ex. 3 at 08:25.) She was driving to pick up her little sisters and nephew, who had been staying with their father in North Dakota. (State's Ex. 3 at 09:29.) The passenger was her girlfriend (State's Ex. 3 at 10:04.) Her girlfriend also works security. (State's Ex. 3 at 10:14.) She paid \$260 for the rental car with insurance and then a \$200 deposit. (State's Ex. 3 at 10:54.) She told him for a third time that she was picking up her little sisters and nephew. (State's Ex. 3 at 11:20.) She explained a second time she was following Google maps. (State's Ex. 3 at 11:49.) In response to Kilpela's second leading question about being tired, Nicole said she was a "little bit" tired, had "got up at 6am," "stopped for lunch for about an hour" and it was "3pm now." (State' Ex. 3 at 12:24-12:35.)

Over ten minutes after questioning Nicole in his car, Kilpela said he needed to check the minivan's VIN. (State's Ex. 3 at 13:00.) When Nicole asked if she should come with him, Kilpela immediately said he would be right back and shut his door. (State's Ex. 3 at 13:02.) Kilpela testified that he made Nicole stay in his vehicle because "I don't like people walking behind me in the traffic stop." (12/11/19 Tr. at 78.)

Kilpela reiterated that although he had returned Nicole's driver's license, she was "not free to leave, no." (12/11/19 Tr. at 78.)

Questioning Nicole's Girlfriend

Kilpela walked to the minivan, glanced at the VIN, and approached the passenger side window to speak with Nicole's girlfriend. (State's Ex. 3 at 13:13-13:25.) He asked her the same questions he asked Nicole. (State's Ex. 3 at 13:30.) He asked where they were heading. (State's Ex. 3 at 13:32.) He asked what part of North Dakota they were going to. (State's Ex. 3 at 13:35.) He asked her how long they were going to be there. (State's Ex. 3 at 13:44.) He asked her the reason for the trip. (State's Ex. 3 at 13:50.) He asked what they have for luggage as he again looked into the backseat. (State's Ex. 3 at 14:03.) Then, he asked her if there was anything illegal in the vehicle. (State's Ex. 3 at 14:11.)

Nicole's girlfriend told him they were headed to North Dakota. (State's Ex. 3 at 13:34.) She told him they were going to "Williston," North Dakota. (State's Ex. 3 at 13:38.) She told him they were going there and then were going to "come right back." (State's Ex. 3 at 13:48.) She said they were seeing family. (State's Ex. 3 at 13:52.) She told him

they brought a change of clothes that was in the back of the car. (State's Ex. 3 at 14:10.) She told him nothing illegal was in the vehicle. (State's Ex. 3 at 14:13.)

Although Kilpela knew that Nicole rented the minivan and she was the only driver on the paperwork, Kilpela asked Nicole's girlfriend if he could search the vehicle. (State's Ex. 3 at 14:16.) Kilpela said Nicole's girlfriend's "stress level was high" at this time, and she smoked a cigarette. (12/11/19 Tr. at 36.) She told Kilpela he would have to ask Nicole. (State's Ex. 3 at 14:17.)

The Search

Kilpela returned to the front seat of his patrol car. (State's Ex. 3 at 14:28.) He asked Nicole what they had for luggage (State's Ex. 3 at 14:35.) She said they had a change of clothes and a couple of blankets. (State's Ex. 3 at 14:39.) Kilpela then explained his printer was broken, so he was giving her a verbal warning for the traffic citation and then said, "Can I ask you? Is there anything illegal in the car today?" (State's Ex. 3 at 14:44-15:00.) Nicole immediately said, "No." (State's Ex. 3 at 15:00.)

Kilpela then went through a list of six drugs and asked if they were in the car. (State's Ex. 3 at 15:01-15:09.) Nicole said "no" to each. (State's Ex. 3 at 15:02-15:09.) Kilpela immediately asked, "Do you have any issue with me searching the vehicle today?" (State's Ex. 3 at 15:10.) Nicole responded in the same breath, as she had the previous six questions, "No." (State's Ex. 3 at 15:11.) Kilpela then said:

Kilpela: No problem? Ok, then I'll do that quick, but I'll get [passenger] out, ok? Sound good?

Nicole: Why are you going to search it?

Kilpela: Well, I just think it's a crazy trip, that's why I was just asking you if you had a problem with it and you said "no."

Nicole: Alright.

Kilpela: Is that alright? Are you responsible for everything in the vehicle? And I'll tell you if you have, like, a joint or something like that, that's not what I'm looking for.

Nicole: Ok.

Kilpela: Is that what's in the car or what?

Nicole: Yeah.

Kilpela: Well, if that's all it is, I'm not worried about a joint.

Nicole: I don't feel comfortable with you searching the car, though. I don't understand why you would have to search it.

Kilpela: Just 'cause what you guys are doing it's a quick trip and stuff like that so...Just something I do out here.

(State's Ex. 3 at 15:12-15:53.)

Kilpela posed the leading question again, "That's all you have is a joint?" (State's Ex. 3 at 15:54.) Nicole told Kilpela that "no," she did not have a joint. (State's Ex. 3 at 15:57.) Nicole said again, "I just don't understand why you would search." (State's Ex. 3 at 16:01.) Kilpela again told her, "I just think it's a quick trip and it's something I do out here." (State's Ex. 3 at 16:16.)

The conversation continued back and forth. Kilpela again told her he was not worried about a joint or a little bit of weed. (State's Ex. 3 at 16:30.) Kilpela asked if there was something else and Nicole told him there was an open beer. (State's Ex. 3 at 16:42.) Kilpela told her he was not worried about that. (State's Ex. 3 at 16:45.) He then asked again if he could "search the car or not" and Nicole said, "Yeah." (State's Ex. 3 at 16:48.) Kilpela handed her a consent to search form and this discussion followed:

Kilpela: All this says is that you are giving me your consent to search this vehicle today, ok? And if there's any illegal items, then I'm gonna take 'em [inaudible]. Does that make sense to you?

Nicole: It does. I don't understand, why though?

Kilpela: Do you want to read it, or do you not like to sign forms?

Nicole: I do not. Like, it was a traffic violation. It wasn't even a violation it was a warning that you were pulling me over for.

Kilpela: Yea, but you told me a couple times that there's a joint in the car, now you've told me that there's an open beer in the car. I don't understand what you're saying anymore.

(State's Ex. 3 at 17:28-18:18.)

Despite not understanding what Nicole was saying, Kilpela continued the conversation. He again asked Nicole if she was responsible for everything in the vehicle and if he could search car.

(State's Ex. 3 at 19:04.) This time, she said, "Yes." (State's Ex. 3 at 19:04.) Kilpela then went back to the written consent form and asked Nicole to sign it that "gives your consent" to the search, and Nicole said, "No, I don't want to sign." (State Ex. 3 at 19:25.) Kilpela then asked, "But I understand you right that I can search your vehicle and you're giving me your verbal consent to search the car" and Nicole responded:

Nicole: No.

Kilpela: So, can I or can I not search the car?

Nicole: No.

(State's Ex. 3 at 19:29-19:47.)

Kilpela then told Nicole he would deploy his drug dog, which was sitting in the back of the car this entire time, and Nicole responded, "You can search the car." (State's Ex. 3 at 19:48-19:58.) Kilpela said, "I don't want you to feel that I'm coercing you." (State's Ex. 3 at 20:01.) At this point, he had asked Nicole to search the car seven times. (State's Ex. 3 at 15:01-20:03.)

Kilpela again went over the consent form and asked Nicole to sign it. (State's Ex. 3 at 20:34.) Nicole asked what the difference would be if she signed. (State's Ex. 3 at 21:00.) Instead of answering the question, Kilpela responded, "Well, this is called a written consent, meaning you read this and you're still good with the search." (State's Ex. 3 at 21:06-21:11.)

Nicole said, "I don't know." (State's Ex. 3 at 21:27.) Kilpela then said he was going to "put this away" and asked if she was good with him searching the vehicle and she said, "Yeah." (State's Ex. 3 at 21:29-21:36.) Kilpela later characterized this entire conversation as an attempt "to clarify whether I was confused on what was transpiring or not." (12/11/19 Tr. at 43.)

Backup was on scene waiting. (State's Ex. 3 at 22:12.) Kilpela told Nicole to tell the other trooper if she wanted him to stop searching. (State's Ex. 3 at 21:48.) Kilpela thoroughly searched the car for almost twenty minutes. (State's Ex. 3 at 22:58-40:36.) Kilpela opened a duffel bag in the trunk area of the minivan, which contained drug paraphernalia and a personal use amount of methamphetamine. (State's Ex. 3 at 40:37.)

Suppression Hearing Testimony

At the suppression hearing, Defense counsel asked Kilpela if he thought a minority, such as Nicole, might be uncomfortable being stopped by a white police officer in Montana, and the Court upheld the prosecutor's objection to the question after concluding that Kilpela "doesn't know and it doesn't necessarily matter to him." (12/11/19 Tr. at 66.)

The prosecutor asked Kilpela if his testimony was that "nervousness typically subsid[es] the same across race" and Kilpela responded:

"Typically, it is. Uh, but sometimes there may be, a, I'll interact with someone from like, say a third world country or something like that, and they have a little bit different

culture. It's been my experience, especially, say, like, uh, Slavic countries, they tend to have a little bit different culture here than in the U.S. So, some of these interactions are, are a little different. And same with some middle Eastern countries, but most people that I come into contact that, uh, live in the United States, for the most part, they, their race really doesn't have that much bearing. They're all kinda together here."

(12/11/19 Tr. at 88.)

Defense counsel asked Kilpela if he ever told Nicole that she was free to leave the vehicle and Kilpela responded, "A person is not free to leave a traffic stop. They are temporarily detained." (12/11/19 Tr. at 84.)

At the end of cross, counsel clarified:

Q: And during this time, she was in your vehicle?

A: Correct

Q: And she was not free to leave?

A: Correct. (85-86.)

(12/11/19 Tr. at 85-86.)

Defense counsel also asked Kilpela if he had a particularized suspicion of drug activity prior to removing Nicole from her vehicle and he replied, "Absolutely not." (12/11/19 Tr. at 82.)

STANDARDS OF REVIEW

This Court reviews the denial of a motion to suppress to determine whether the lower court’s findings were clearly erroneous and whether those findings were correctly applied as a matter of law. *State v. Hoover*, 2017 MT 236, ¶ 12, 388 Mont. 533, 402 P.3d 1224.

“Findings of fact are clearly erroneous if they are not supported by substantial credible evidence, if they are based upon misapprehension of the evidence or if review of the record convinces the Court that a mistake has been made.” *State v. Flynn*, 2011 MT 48, ¶ 6, 359 Mont. 376, 251 P.3d 143. The lower court’s conclusions of law and application of legal standards are reviewed de novo. *Hoover*, ¶ 12.

SUMMARY OF THE ARGUMENT

In a stop justified to investigate driving in the left-hand lane, Kilpela went too far. Although he had all the paperwork needed to issue a citation, he had Nicole sit in the front seat of his cop car and asked her questions unrelated to the stop. He engaged in a drug investigation before he had particularized suspicion to support it. His unwarranted extension of the stop contravenes § 46-5-406, MCA—that a stop must last no longer than necessary to effectuate the purpose of the stop. The

evidence found after the illegal extension of the stop must be suppressed.

Further, Kilpela searched the minivan without valid consent. Nicole told Kilpela “no” twice. She said she did not understand. She refused to sign a written consent form. However, Kilpela used his position of power and badgered Nicole until she gave in. Looking at the totality of the circumstances, Nicole’s consent was not knowing or voluntary. The evidence found pursuant to the invalid consent must be suppressed.

Alternatively, Nicole’s statements were obtained in violation of Nicole’s *Miranda* rights. Kilpela subjected Nicole to a custodial investigation when he isolated her in his car and repeatedly asked her questions. Kilpela should have informed Nicole that he was using her statements against her as part of his drug investigation. The statements obtained in violation of Nicole’s right against self-incrimination and resulting drug evidence must be suppressed.

ARGUMENT

- I. The district court erred when it denied Nicole’s motion to suppress because Kilpela violated Nicole’s constitutional and statutory rights when he unlawfully expanded the scope of the stop and illegally seized Nicole.**

The Fourth Amendment to the United States Constitution and Article II, Section 11 of the Montana Constitution protect Nicole against unreasonable searches and seizures, including brief investigatory stops such as traffic stops. *State v. Elison*, 2000 MT 288, ¶ 15, 302 Mont. 228, 14 P.3d 456.

While the Montana Constitution's provision regarding searches and seizures mirrors the Fourth Amendment, the Montana Constitution also affords its citizens additional privacy protections: “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.” Mont. Const. art. II, § 10. “Thus, Montanans enjoy a greater right to privacy exceeding even that provided by the federal constitution.” *State v. Ellis*, 2009 MT 192, ¶ 22, 351 Mont. 95, 100–01, 210 P.3d 144, 148.

For a seizure to be reasonable, it generally must be based on a warrant. However, stops under *Terry v. Ohio*—brief and limited in

nature, and conducted upon reasonable suspicion of particularized wrongdoing—constitute a *narrow exception* to the probable cause and warrant requirement. *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968); *State v. Graham*, 2007 MT 358, ¶ 13, 340 Mont. 366, 370, 175 P.3d 885, 888.

A “seizure that is lawful at its inception” become unlawful “if its manner of execution unreasonably infringes interests protected by the Constitution,” *Illinois v. Caballes*, 543 U.S. 405, 407 (2005), “by virtue of its intolerable intensity and scope.” *Terry*, 392 U.S. at 18. Indeed, the absence of protection against pretextual stops at the front end makes it even more important, at the back end, to keep stops within their proper scope—limited to matters for which there is particularized suspicion.

Here, in finding a particularized suspicion, the district court included facts Kilpela obtained while he questioned Nicole and Nicole’s girlfriend. It follows that the court believed Kilpela expanded the stop when he returned to his car and asked Nicole to search the minivan. Instead, Nicole maintains that Kilpela expanded the stop when he had Nicole sit in his car and questioned her about matters unrelated to the stop. Nevertheless, whether Kilpela expanded the stop when questioning Nicole in his car, checking the VIN and questioning Nicole’s

girlfriend, or returning to his car and asking Nicole to search, the expansion of the stop was not supported by a particularized suspicion.

A. Kilpela violated Nicole’s right against unreasonable searches and seizures when he isolated her in his vehicle and extensively questioned her.

After making a traffic stop, “law enforcement officers must act with reasonable diligence to quickly confirm or dispel the predicate suspicion for the stop.” *City of Missoula v. Kroschel*, 2018 MT 142, ¶ 13, 391 Mont. 457, 463, 419 P.3d 1208, 1216. “The duration and scope of an investigative stop must be carefully limited to its ‘underlying justification.’” *Kroschel*, ¶ 13 (citing *Fla. v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325–26, 75 L. Ed. 2d 229 (1983)).

Montana codified these principles into law: a traffic stop “may not last longer than is necessary to effectuate the purpose of the stop.” Mont. Code Ann. § 46-5-403. “If a law enforcement officer's investigation exceeds the scope of the stop, the seizure may be deemed unreasonable. When an unreasonable search or seizure has occurred, the exclusionary rule bars the admission of the resulting evidence.” *State v. Bailey*, 2021 MT 157, ¶ 21, 404 Mont. 384, 489 P.3d 889, 896.

- 1. Kilpela expanded the scope of the stop from a traffic citation to a drug investigation when he had Nicole sit in his car and asked her questions unrelated to the lane violation.**

By its nature, a *Terry* stop is a limited and brief encounter, especially when the suspected wrongdoing is obvious and not especially serious. On one end, the stop in *Terry* was of a person who looked like he was casing a bank for a robbery. *Terry*, 392 U.S. at 23. The officer had to make more of an investigation to either confirm or dispel his suspicion that a serious and dangerous offense was imminent. *See Terry*, 392 U.S. at 23.

On the other end, the *Terry* stop in this case was made to investigate a simple traffic infraction. Nicole was driving in the left-hand lane. She was not speeding. There were no other cars around. She said she did not know it was a violation and did not deny doing it. This was a simple traffic offense—and not a serious one. As such, it did not require much further investigation.

Montana law allows an officer conducting a traffic stop to “request the person’s name and present address and an explanation of the person’s actions and, if the person is the driver of a vehicle, demand the

person's driver's license and the vehicle's registration and proof of insurance." Mont. Code Ann. § 46-5-401(2)(a).

Once this limited purpose of a traffic stop is accomplished, no further police intrusion is warranted. *State v. Martinez*, 2003 MT 65, ¶ 29, 314 Mont. 434, 443, 67 P.3d 207, 216 (holding that while the initial stop was justified to verify temporary registration sticker, that permissible basis did not warrant further police intrusion related to drug possession).

An officer may not conduct inquiries unrelated to the stop's underlying justification "in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Rodriguez v. United States*, 575 U.S. 348, 355, 135 S. Ct. 1609, 1615 (2015).

For instance, in *Rodriguez*, an officer pulled over a vehicle for driving on the shoulder, issued a warning for the infraction, but continued to seize the driver in order to perform a dog-sniff search of the vehicle. *Rodriguez*, 135 S. Ct. at 352. The Court held that the officer converted the initially lawful stop into an unreasonable seizure by

prolonging it to investigate matters unrelated to the traffic stop's mission. *Rodriguez*, 135 S. Ct. at 352.

The *Rodriguez* court explained that “[a]uthority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.” *Rodriguez*, 135 S. Ct. at 349. A stop extended beyond the time needed to complete traffic-based inquiries is unlawful. *Rodriguez*, 135 S. Ct. at 349.

Once Kilpela obtained Nicole's driver's license and rental paperwork, he had all he needed to complete his investigation. Kilpela told Nicole that if the paperwork checked out, he would give her a warning. Rather than verifying the information, Kilpela exceeded statutory authorization by having Nicole exit her vehicle and get into the front seat of his patrol car. § 46-5-401, MCA, is quite clear about what it authorizes an officer to do at a traffic stop. Having a seized person get into the patrol vehicle is not one of those things.

Once the stop moved to inside a police car, its nature changed from a simple and brief traffic stop into something more intense and intrusive. Kilpela testified that this practice stops someone from being “able to flee,” thus acknowledging that it is a greater detention than a

normal traffic stop where the individual stays in their vehicle. Nicole was taken out of her vehicle and separated from her girlfriend. She was placed in an enclosed space over which Kilpela had unquestioned and exclusive control. Kilpela proceeded to interrogate her for almost ten minutes about her travels, occupation, relationships and criminal history. Nicole was a young woman, on a remote stretch of highway in an unfamiliar place, isolated with and under the control of a male officer.

That Kilpela claims this is his normal procedure is problematic. Almost anyone who has driven for any measure of time has been pulled over once or twice. Yet, have you, or any female you know, ever been told by an armed male officer to get in the patrol vehicle during a traffic stop? This is not a normal or reasonable part of a traffic stop. It is an indignity that Montanans did not bargain for when drafting the Montana Constitution to provide greater privacy rights than the United

States Constitution. And this is the sort of intrusion, that, if permitted, may befall racial minorities with greater frequency.¹

Further, Kilpela admitted that the following questions he asked Nicole were unrelated and unnecessary to complete the traffic citation:

1. Where Nicole was going
2. Where she was going to stay in North Dakota
3. Her sleeping arrangements during her travels
4. If she had her own vehicle
5. Why she rented a vehicle
6. Who she was seeing in North Dakota
7. Who all lived at her family's residence in North Dakota
8. Her relationship with her passenger
9. Her employment history
10. What her girlfriend did for a living
11. Her girlfriend's travel plans

(12/11/19 Tr. at 80-82.)

¹ See *State v. Pham*, 2021 MT 270, 406 Mont. 109, 497 P.3d 217 (“Several lawful instruments exist for officers to investigate potential crimes. ‘When we condone officers’ use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.’” (citing *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting)).

Additionally, questions about Nicole’s criminal and arrest history were similarly irrelevant.

Trooper Kilpela engaged in similar “cordial conversation” in a recent case evaluated by this Court. *State v. Pham*, 2021 MT 270, 406 Mont. 109, 497 P.3d 217. In *Pham*, troopers stopped Pham in a gas station and began questioning him. The troopers were aware that Pham was Vietnamese, several Vietnamese individuals had been arrested for drug trafficking along the same route that Pham was traveling, and Pham looked suspicious. *Pham*, ¶ 22. Kilpela spoke with Pham and testified that his “behavior was out of the ordinary compared to other travelers and that he interpreted it as ‘over nervousness.’” *Pham*, ¶ 4. Pham also mispronounced the name of the town he was headed to. However, this Court concluded that the troopers lacked a particularized suspicion to delay their interactions with Pham, resulting in an illegal seizure. *Pham*, ¶ 22.

In the same way, it is inconceivable that Kilpela’s continuous barrage of questions was merely cordial conversation. Kilpela, as part of the Eastern Montana Interdiction Team was trained to “look beyond the traffic stop” and look for drugs as soon as he stops someone. (12/11/19

Tr. at 10.) He is not focused on traffic enforcement—he is looking for drugs.

And that is what he did here. Even as Nicole was getting out of the minivan, Kilpela peered into the backseat and trunk—though it was unlikely evidence of the traffic citation would be found here. Kilpela only had the authority to ask for Nicole’s license and rental paperwork. He did not need anything more than this to confirm her identity to either give her a ticket or a warning. The investigation should have been over.

By asking questions unrelated to the stop’s mission for which he had a particularized suspicion—a traffic offense—Kilpela unnecessarily extended the stop’s duration. The prolonged stop violated both statutory and constitutional law, and the Court must reverse and remand for suppression and dismissal.

2. Kilpela lacked particularized suspicion of criminal activity beyond the traffic citation at the time he expanded the scope of his investigation.

At the time Kilpela had Nicole get into his car and started questioning her, Kilpela did not have a particularized suspicion beyond

the lane violation. To extend a traffic stop, a law enforcement officer must have particularized suspicion that the occupant of the vehicle is or has been engaged in unlawful conduct. Mont. Code Ann. § 46-5-401(1). The burden is on the State to show that “based on specific and articulable facts known to the officer, including rational inferences therefrom based on the officer's training and experience, the officer has an objectively reasonable, particularized suspicion that the person is engaged, or about to engage, in criminal activity.” *Kroschel*, ¶ 11.

“[P]articulized suspicion requires more than mere generalized suspicion or an undeveloped hunch of criminal activity.” *Hoover*, ¶ 18. Basing inferences “on nothing more than inarticulable hunches, are not the building blocks of particularized suspicion but rather subject drivers to the perils of profiling and other impermissible motives for initiating traffic stops.” *State v. Reeves*, 2019 MT 151, ¶ 13, 396 Mont. 230, 444 P.3d 394.

During the suppression hearing, Kilpela twice clarified that that the time he had Nicole get into his car, he “absolutely” did not have a particularized suspicion of drug activity. (12/11/19 Tr. at 82 and 83.) And he is correct. All that Kilpela knew at the time he expanded the

stop was that Nicole was from Vegas, the minivan was a rental, it smelled like cigarette smoke and contained rolling papers, and Kilpela thought Nicole was nervous. These facts are inadequate to support a particularized suspicion—and Kilpela testified to that.

Since a particularized suspicion is objective facts indicating criminal behavior known to the officer, the Court cannot manufacture a particularized suspicion that Kilpela himself said he did not have at the time. Kilpela lacked a subjective belief that he had a particularized suspicion, and he lacked objective facts to support one. Without a particularized suspicion, Kilpela unlawfully exceeded the scope of the stop when he started asking Nicole questions unrelated to the stop's mission.

B. Even if the Court concludes Kilpela did not expand the scope of the stop when he directed Nicole into his car and questioned her, Kilpela still lacked particularized suspicion to extend the traffic stop when he checked the VIN and questioned Nicole's girlfriend.

First, Nicole maintains that under § 46-5-401(2)(a), MCA, Kilpela lacked the authority to examine the vehicle's VIN. Since there was no indication that the plate did not match the rental paperwork, Kilpela

did not have a particularized suspicion that the vehicle was stolen to justify a VIN check. When he did this, he further unlawfully expanded the stop.

However, even if this Court finds Kilpela justified in checking the VIN, the moment he did, the traffic citation investigation was complete. The paperwork checked out. The vehicle was not stolen. Nicole explained the purpose of their trip. Any initial hunches were dispelled. There was no need to speak with Nicole's girlfriend about the lane violation. Questioning Nicole's girlfriend about the trip and asking for her consent to search was a clear expansion of the original traffic stop without an objective particularized suspicion. This Court must suppress the evidence obtained from the unlawful expansion.

C. At a minimum, the district court erred when it concluded that Kilpela had particularized suspicion to extend the stop when he returned to his patrol car and asked Nicole about drugs.

Kilpela testified that it was “[a]fter speaking with the passenger, like I said, I believed the subjects were involved in additional criminal activity, other than driving in the left-hand lane.” (12/11/19 Tr. at 38). In part, his particularized suspicion was based on the conversation and

“demeanor of the passenger.” (12/11/19 Tr. at 40.) Although the district court failed to explicitly state when Kilpela extended the traffic stop into a drug investigation, the court included facts regarding Kilpela’s conversation with Nicole’s girlfriend in its particularized suspicion findings, so it follows that it when the district court believed Kilpela expanded the stop.

Nicole maintains the district court improperly relied on facts developed by Kilpela while questioning Nicole to retroactively justify his drug investigation. The expansion itself must be justified at the time Kilpela expanded the investigation. Because it was not, Kilpela lacked a particularized suspicion to extend the stop. However, even if this Court agrees with the district court Kilpela did not expand the stop into a drug investigation until after he questioned Nicole’s girlfriend, the extension was still not supported by a particularized suspicion.

- 1. The district court’s ruling was based on clearly erroneous fact findings not supported by substantial evidence in the record.**

Not only did the district court rely on facts unlawfully obtained, but the district court’s conclusions directly conflict with the court’s own factual findings and Kilpela’s testimony:

<p style="text-align: center;">Basis of the District Court’s Finding of a Particularized Suspicion (D.C. Doc. 43 at 8.)</p>	<p style="text-align: center;">District Court’s Findings of Fact and Kilpela’s Testimony and Dash Camera Video</p>
<p>Nicole was unable to identify the location she stayed the night before</p>	<p>Nicole said that “she and her passenger stayed in a motel ‘in a little city’ right before Idaho Falls.” “Defendant told [Kilpela] she checked into the motel room just before Idaho Falls at between 9:00 and 9:30pm” (D.C. Doc. 43 at 4.) Kilpela never asked the name of the hotel.</p>
<p>Nicole thought maybe she went through the mountains of Wyoming on the trip but not sure</p>	<p>Nicole twice told Kilpela she was following Google maps for directions. (State’s Ex. 3 at 05:07 and 11:49.) When Kilpela asked Nicole if they ran into any bad weather, she said that there was some “scary” weather when Google maps took them through a mountainous part of Wyoming. (State’s Ex. 3 at 04:57-05:20.)</p>
<p>Nicole obtained a <i>two-day</i> rental of the vehicle that was due back to Las Vegas, Nevada</p>	<p>“The term of the rental was approximately <i>four to five days.</i>” (D.C. Doc. at 4 (emphasis added).)</p>
<p>Nicole’s version of events did not match up with the passenger about the amount of time that would be spent in North Dakota</p>	<p>Nicole told Kilpela they were spending one night in North Dakota before heading back. (State’s Ex. 3 at 08:02.) Nicole’s girlfriend said they were going to “come right back” after stopping in North Dakota. (State’s Ex. 3 at 13:48.) Kilpela never asked if coming “right back” included spending one night.</p>
<p>Nicole’s nervous mannerisms and escalating stress throughout the encounter</p>	

Nicole's deceptive actions	Conclusory statement not supported by facts or testimony.
Signs of travel in the vehicle (blankets, pillows, the Defendant indicating she was tired)	In his dash camera video, Kilpela mentioned seeing a "blanket." (State's Ex. 3 at 03:19.) It was not until the suppression hearing that he said he saw a "blanket and/or pillows." (12/11/19 Tr. at 22.)

Everyone traveling in remote Montana in the winter should have a blanket in their car. "Hard travel" is more than just evidence of a road trip—there must be something further to indicate criminal behavior. And Nicole told him that they got a hotel room the night before, which dispels the suspicion of driving straight through without any stops. "When the only basis for suspecting a specific person of wrongdoing is inferences that could be drawn from the conduct of virtually any law-abiding person, the resulting suspicion cannot, by definition, be particularized." *Reeves*, ¶ 13.

Similarly, Kilpela stated he thought it was "unusual" that Nicole continued to become nervous while in his car. Kilpela's dash camera shows Nicole answering his questions quickly and easily. Her level of nervousness is what should be expected from female in a remote location as a male officer, with a weapon, continues to ask evading questions.

In all, the district courts finding of a particularized suspicion was clearly erroneous because it was based on facts not supported by substantial evidence in the record.

2. Regardless, the district court's conclusion that Kilpela had a particularized suspicion is incorrect under this Court's precedent.

In its order finding a particularized suspicion, the district court compared the cases of *Estes* and *Wilson*. In *State v. Estes*, the defendant was stopped for expired registration. *State v. Estes*, 2017 MT 226, ¶ 3, 388 Mont. 491, 403 P.3d 1249. The trooper observed two cell phones and cash in the car's console, multiple air fresheners, food wrappers and energy drinks strewn around, and a sleeping bag in the back seat covering a cardboard box. *Estes*, ¶ 3. The driver was inordinately nervous. *Estes*, ¶ 3. The Court, looking at the totality of the circumstances, found that a particularized suspicion existed to extend the stop and request a canine search. *Estes*, ¶ 18.

The Court distinguished *Estes* in *Wilson*. *State v. Wilson*, 2018 MT 268, 393 Mont. 238, 430 P.3d 77. In *Wilson*, an officer stopped the defendant along a known drug trafficking route for expired registration. *Wilson*, ¶ 13. The car had out-of-state plates. *Wilson*, ¶ 3. Both

occupants of the car were unusually nervous. *Wilson*, ¶ 4. The driver was trembling, and the passenger avoided eye contact. *Wilson*, ¶ 4. The officer observed a rental car sticker. *Wilson*, ¶ 3. The car was messy with old food items and had a “lived in appearance.” *Wilson*, ¶¶ 9 and 4. The driver could not provide a valid license, registration or insurance. *Wilson*, ¶ 5. The driver had a history of drug charges. *Wilson*, ¶ 10. The deputy requested a canine sniff and eventually located 262.2 grams of marijuana in the car. *Wilson*, ¶ 18. The deputy testified that during the stop he was “compounding...indicators on top of each other” as he developed a particularized suspicion to request the canine. *Wilson*, ¶ 34.

While this Court acknowledged similarities in the facts to *Estes*, the Court concluded that there was “only a generalized hunch” and found that the deputy illegally extended the stop when he requested a canine. *Wilson*, ¶ 34.

In evaluating these two cases, the district court here simply said that “*Wilson* does not overrule any prior case law.” (D.C. Doc. 43 at 10.) And yes, that is correct. However, Nicole’s case is more like *Wilson* than *Estes*, and that is what the district court failed to consider. There was no evidence of drug trafficking, such as multiple cell phones or rolls of

cash. There was also no real evidence of “hard travel,” such as sleeping bags, trash everywhere and energy drinks strewn about.

Instead, the facts are more like *Wilson*, except the facts in *Wilson* came closer to a particularized suspicion than in this case. Nicole was able to provide valid paperwork and had no history of drug charges. She explained the reason for the trip. Being a nervous cigarette smoker from Vegas in a rental car does not indicate criminal activity. The district court’s denial of Nicole’s motion was a violation of this Court’s holding in *Wilson*.

The district court also briefly discussed *State v. Hurlbert*, 2009 MT 221, 351 Mont. 316, 211 P.3d 869, and found that Kilpela “in this case made many of the same observations as the Trooper in *Hurlbert*.” (D.C. Doc. at 171.) In *Hurlbert*, the trooper observed that the suspect was under the influence of drugs. He was driving over 100 miles per hour, “nervous, shaking, very uneasy, constantly moving around...sweating quite a bit; he would not sit still; he was rapidly smoking a cigarette; and he would open up his wallet and just stare at it.” *Hurlbert*, ¶ 22. Here, Nicole exhibited no signs of being under the influence. Kilpela

told Nicole, “I don’t think that you’re drunk or impaired.” (State’s Ex. 3. at 18:50.) The district court’s reliance on *Hurlbert* was misplaced.

Not only were the district court’s findings of fact clearly erroneous, but those facts were incorrectly applied as a matter of law. Even assuming Kilpela did not expand the stop until he returned to his car and asked Nicole about drugs, this Court must still suppress the drug evidence and remand for dismissal.

II. Even if this Court disagrees that Kilpela unlawfully expanded the stop, the drug evidence must still be suppressed because Nicole did not knowingly and voluntarily consent to a search of her minivan.

“Just something I do out here” is twice what Trooper Kilpela told Nicole after she asked him why he wanted to search her car. Kilpela asked Nicole if he could search her car seven times. She said “no” twice, said she did not understand and refused to sign a written consent form. Then, she finally gave in after Kilpela threatened to bring out the drug dog. This is not knowing and voluntary consent.

Despite being an experienced member of the state-specialized drug trafficking interdiction team, Kilpela asked Nicole’s girlfriend, who he knew did not have permission to consent to a search of the vehicle, if

she would let him search the car. This was the beginning of Kilpela using his position of authority to coerce Nicole into letting him search the vehicle.

One exception to the warrant requirement is knowing and voluntary consent to search. *State v. Copelton*, 2006 MT 182, ¶ 10, 333 Mont. 91, 94, 140 P.3d 1074, 1076. Courts apply the totality of the circumstances test to determine if consent is voluntary given or is contaminated by coercion or duress. *Copelton*, ¶ 19.

The Court may examine a variety of factors, such as whether the individual was in custody, whether consent was obtained after the search, whether the individual was informed of the right not to consent or that a search warrant could be obtained, whether the individual was advised of their constitutional rights, whether the individual was threatened or coerced in any manner, and the repeated and prolonged nature of the questioning. *State v. Munson*, 2007 MT 222, ¶ 51, 339 Mont. 68, 87, 169 P.3d 364, 377. “In the end, however, the determination of whether consent was given freely and voluntarily and without duress or coercion depends on the totality of all of the surrounding facts, and no single fact is dispositive.” *Munson*, ¶ 51.

“The prosecution carries the burden of establishing that consent to a warrantless search was freely and voluntarily given and uncontaminated by any express or implied duress or coercion.” *State v. Olson*, 2002 MT 211, ¶ 20, 311 Mont. 270, 278, 55 P.3d 935, 941. Evidence obtained after an invalid consent to search must be suppressed. *State v. Romain*, 1999 MT 161, ¶ 21, 295 Mont. 152, 159, 983 P.2d 322, 327.

When it comes to consent, no should mean no. Nicole told Kilpela twice that she did not consent. Then she told him she did not understand. At one point, Kilpela said, “I don’t understand what you are saying anymore.” (State’s Ex. 3 at 18:14.). At this point, since Kilpela did not understand what Nicole was saying, the conversation should have stopped. Instead, Kilpela kept prodding, in a genial tone, until Nicole gave in.

Additionally, Kilpela created an isolated and coercive environment when he had Nicole sit in his patrol car. Kilpela testified he does that to prevent someone from fleeing. Kilpela told Nicole to shut the door. He subjected her to an initial interrogation about her plans, relationships and criminal history. He then followed it up with a second interrogation

related to drugs and consent to search for drugs. This prolonged, accusatory questioning created a coercive environment from which no reasonable person would feel free to leave.

Also, Kilpela confused Nicole. While asking for consent, he used leading and compound questions that inaccurately described what she actually said to him. For example:

Nicole: Why are you going to search [the car]?

Kilpela: Well I just think it's a crazy trip. That's why I was just asking you if you had any problem with [me searching] and you said no.

Nicole: Alright.

Kilpela: Is that right? Now, are you responsible for everything in the vehicle? And I'll tell you, if you have like a joint, or something like that, that's not what I'm looking for."

Nicole: Okay.

(State's Ex. 3 at 15:20-15:37.)

Kilpela: If that's all you have is a joint.

Nicole: Right.

Kilpela: I'm asking you.

Nicole: No. I don't have a joint in there. I just don't understand why...

Kilpela: I thought that's what you just told me.

Nicole: No... I did. I did say you did, yes.

Kilpela: Okay.

Nicole: But I was just trying to question you about why you were going to...

Kilpela: No, no, no. I just think it's a quick trip. And it's something I do out here.

(State's Ex. 3 at 15:53-16:20.)

Searching vehicles is not just “something we do” in Montana. Kilpela made it sound like this was a normal part of a traffic stop in this state, which is disingenuous. Overall, he confused her. And he knew that because she told him she did not understand.

Then Kilpela threatened to run his drug dog. If Kilpela thought he had particularized suspicion, then he should have deployed the canine. Instead, he relied on equivocal consent obtained under coercive circumstances. It was in response to his threat that Nicole verbally agreed. However, even after this, Nicole, still refused to sign a written consent.

Kilpela told Nicole he did not want her to feel coerced, but that does not magically erase everything that happened—the Court must look at the totality of the circumstances. *See Olson*, ¶ 21 (“knowledge of

the right to refuse to consent is only one factor to be considered and is not determinative of the question of whether consent was voluntary; rather, we must consider the totality of the circumstances surrounding the giving of the consent.”)

Looking at the totality of the circumstances, what happened here cannot be considered a valid waiver of Nicole’s constitutional rights. Because Kilpela searched without valid consent, the drug evidence must be suppressed.

III. Alternatively, Nicole’s statements and resulting drug evidence must be suppressed because Kilpela failed to provide *Miranda* warnings.

The Fifth Amendment to the United States Constitution and Article II, Section 25 of the Montana Constitution provide that individuals have the right not to incriminate themselves.

This right against self-incrimination applies to bar the use of statements obtained from a custodial interrogation “unless the defendant is warned, prior to questioning, that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney.” *Hurlbert*, ¶ 33. “The privilege against self-incrimination protects the

individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.” *Miranda v. Arizona*, 384 U.S. 436, 476, 86 S. Ct. 1602, 1629 (1966).

“Persons are considered to be ‘in custody’ and entitled to Miranda warnings if they have been deprived of their freedom of action in any significant way” and are subject to questioning. *Hurlbert*, ¶ 33. “Failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained.” *State v. Maile*, 2017 MT 154, ¶ 11, 388 Mont. 33, 37, 396 P.3d 1270, 1274 (internal citations omitted).

Whether a “custodial interrogation” occurred involves a two-step inquiry: 1) whether the individual was “in custody” and 2) whether the individual was subject to an interrogation.” *Elison*, ¶ 27. “This determination focuses on whether, given the circumstances surrounding the interrogation, a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.” *State v. Morrissey*, 2009 MT 201, ¶ 37, 351 Mont. 144, 159, 214 P.3d 708, 721 (internal citations omitted).

Nonexclusive considerations include “whether the person affirmatively consented or requested to speak with police; the time and place of the detention and questioning; the degree of force, restraint, or threat of force used to detain or question the person; whether police moved the person to another area for questioning; whether police informed the person that he or she was not under arrest, free to leave, or free to otherwise terminate the questioning; the extent to which the police presence, manner, or posture was threatening or otherwise coercive under the circumstances; the duration of questioning; and the extent to which police confronted the person with evidence of guilt.” *Kroschel*, ¶ 24.

In *Elison*, this Court held that the defendant was not in custody for *Miranda* purposes. *Elison*, ¶ 34. The officers observed Elison smoking marijuana in his car and executed a traffic stop. *Elison*, ¶ 7. The officers asked the defendant about the marijuana while standing outside of his vehicle. *Elison*, ¶ 30. Elison admitted to criminal activity that led to his arrest. *Elison*, ¶ 30. Although Elison was not free to leave, he was standing outside and not handcuffed. *See Elison*, ¶ 30. The Court held that because the defendant was not subject to custodial

interrogations, his statements were not afforded *Miranda* protection. *Elison*, ¶ 34. The Court also noted that the officer’s “questions were reasonably related to the reason for the stop and designed to dispel his particularized suspicion that Elison had been smoking marijuana.” *Elison*, ¶ 32.

On the other hand, in *Morrisey*, the Court found that the defendant was in custody for *Miranda* purposes when he was questioned by detectives in a police car. *Morrisey*, ¶ 160. While investigating a homicide, officers stopped Morrisey and put him in the back seat of a patrol vehicle. *Morrisey*, ¶ 160. Officers first drove Morrisey to his house where officers were ready to search his residence and then transported Morrisey in an unmarked police car to interview him elsewhere. *Morrisey*, ¶ 160. While in the police car, officers became increasingly forceful in their questioning, however, the defendant was not restrained by handcuffs or force. *Morrisey*, ¶ 160.

In all, the Court found that “a reasonable person in Morrisey’s shoes would not have felt free to terminate the interrogation, get out of the police car, and leave. *Morrisey*, ¶ 160. “The totality of the circumstances establishes that he was in custody, having been ‘deprived

of his freedom in [a] significant way.” *Morrisey*, ¶ 160 (citing *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612).

Like in *Morrisey*, Nicole was subject to a custodial investigation when she was isolated in a police car and subjected to repeated questions. Kilpela deprived Nicole of her freedom of action. Kilpela never told her that she could leave; to the contrary, through his statements and conduct, Kilpela communicated that Nicole was under his control and not able to leave until he said.

Unlike *Elison*, Kilpela’s questions were unrelated to the reason for the stop. Kilpela asked a barrage of questions about Nicole’s travel plans, life circumstances and illegal activity. He sought incriminating responses and incriminating responses were likely to be elicited. Kilpela should have informed Nicole that her statements were going to be used against her to justify a drug investigation.

Kilpela escalated the stop from a Fourth Amendment seizure, that is public, routine and temporary in nature, to a Fifth Amendment custodial interrogation when he questioned Nicole repeatedly in his patrol car. He was uniformed, with a weapon and a drug dog, and Nicole was separated from her girlfriend and not free to leave. Nicole’s

disclosures that formed the basis of the district court’s finding of a particularized suspicion resulted from a custodial interrogation without a *Miranda* advisory.

Consequently, the State cannot use Nicole’s statements, and the resulting drug evidence—found through a search justified by her statements—is inadmissible pursuant to the exclusionary rule of *Miranda*. See *Kroschel*, ¶ 36; *Munson*, ¶ 20; *Miranda*, 384 U.S. at 444. This Court should reverse the district court’s ruling.

CONCLUSION

Kilpela’s intrusive tactic of having Nicole get into his patrol vehicle for questioning unreasonably expanded the scope and intensity of a traffic offense seizure. At the point that Kilpela had Nicole get into his car, he testified that he “absolutely” did not have particularized suspicion to investigate a drug crime. However, he began that investigation by asking Nicole questions that he knew, as an interdiction expert, would build his drug investigation case. The drugs that Kilpela happened to find do not retroactively justify his investigation transgressing statutory and constitutional safeguards

against unreasonable seizures. The Court must reverse the district court's ruling, suppress the evidence and remand for dismissal.

Should the Court disagree, the Court must still reverse because Nicole's consent to search the vehicle was not voluntary or knowing. She said "no" twice and refused to sign a written consent form. Despite Kilpela's use of certain magic words, looking at the totality of the circumstances, Nicole's coerced consent was not knowing or voluntary. Without consent, the drug evidence must be suppressed and the case dismissed.

Alternatively, this Court should find that Nicole's statements must be suppressed because they were obtained without a *Miranda* advisory. Kilpela subjected Nicole to a custodial investigation when he separated her from her girlfriend, had her sit in his patrol car, and questioned her. Kilpela should have told Nicole he was using Nicole's answers against her to justify a drug investigation. Because the statements were obtained in violation of Nicole's right against self-incrimination, the statements should be suppressed. Without these statements, the district court erred in finding a particularized suspicion

and denying Nicole's motions. This Court must reverse and remand for dismissal.

Respectfully submitted this 9th day of March, 2022.

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By: /s/ Jeavon C. Lang
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,909, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Jeavon C. Lang
JEAVON C. LANG

APPENDIX

Judgment and Order Deferring Sentence.....App. A
Order on Defendant’s Motion to Suppress and DismissApp. B

CERTIFICATE OF SERVICE

I, Jeavon Lang, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-09-2022:

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