IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0461

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NICOLE ABENCIA NOLI,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

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

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INTRODUCTION

The State argues that Trooper Kilpela did not expand the stop from a traffic citation investigation into a drug investigation until after he gave Nicole the warning for the lane violation. (Appellee's Br. at 19-20.) In doing so, the State characterizes Kilpela's questioning of Nicole in his patrol car—including his repeated questions about her travel plans and criminal history—as friendly, "general conversation" within the scope of a traffic citation investigation. (Appellee's Br. at 20.)

However, the record shows that Kilpela's questions both prolonged the duration and expanded the scope of the stop long before Kilpela told Nicole he was going to give her a warning. Considering Kilpela's extensive drug interdiction experience, his intrusive questions were not small talk—it was part of a drug investigation. And as Kilpela testified, he "absolutely" did not have a particularized suspicion to support a drug investigation at this time. Similarly, the State makes no argument that Kilpela had a particularized suspicion prior to giving Nicole the warning. Therefore, if this Court finds that Kilpela exceeded the scope or prolonged the duration of the stop when he questioned Nicole about

matters unrelated to the reason for the stop, the State implicitly concedes Kilpela illegally seized Nicole.

Further, Kilpela's means of detaining Nicole exceeded what was reasonable for a lane violation investigation. The State claims that Kilpela having Nicole sit in his patrol vehicle was reasonable under the circumstances, but that is unsupported. The State cites just one case in support, which involved a DUI crash investigation. In that case, the trooper needed to investigate the accident and determine if the smell of alcohol was coming from the driver. In contrast, here, Nicole provided all the information Kilpela needed to go back to his car and issue a traffic citation. No further investigation was required. Instead, by having Nicole get out of her vehicle and sit in his patrol car, Kilpela exceeded the means of detainment appropriate and reasonable to investigate a lane violation.

Next, after Kilpela gave Nicole the warning, the State argues that Kilpela's subsequent questioning of Nicole about contraband and illegal activity was simply a voluntary, consensual encounter. (Appellee's Br. at 34.) The State relies on one case, *State v. Snell*, 2004 MT 269, 323 Mont. 157, 99 P.3d 191, in arguing that Nicole was not seized at this

time. However, the State fails to address *State v. Case*, 2007 MT 161, ¶ 27, 338 Mont. 87, 93, 162 P.3d 849, 854, where this Court distinguished *Snell* and found that "[w]hen a police officer states that he has a question before you take off, that means, to the reasonable person, you have to stay and answer the question before you are free to leave…" *Case*, ¶ 30.

Like in *Case*, a reasonable person in Nicole's shoes would not have felt free to leave. First, Kilpela interrogated Nicole regarding her arrest history, whereabouts and travel plans. Then, he told Nicole to stay in his car while he went and questioned her girlfriend. After returning to the vehicle, he handed Nicole back her information, told her he was just going to give her a verbal warning, and then immediately asked if she had any drugs or guns in her vehicle. Nicole never had the chance to get out of the car before Kilpela started asking her more questions. No reasonable person would have felt free to leave under these circumstances.

Lastly, the State cannot carry its burden of showing that Kilpela obtained Nicole's consent freely and without coercion. After initially agreeing to the search, Nicole then repeatedly declined, but Kilpela was

relentless. He used leading questions and confusing language. Although the State claims that Nicole did "not seem confused," she told Kilpela she "did not understand." Kilpela responded, "I don't understand what you are saying anymore." Nicole then refused to sign a written consent form. The State fails to provide any legal support showing that this is voluntary and knowing consent. Without a warrant or valid consent, this Court must suppress the resulting evidence.

I. Kilpela violated Nicole's right to be free from unreasonable searches and seizures.

A "law enforcement's *means of detainment and investigative questions* may not exceed the scope of the predicate suspicion for the stop." *State v. Bailey*, 2021 MT 157, ¶ 21, 404 Mont. 384, 489 P.3d 889, 895 (emphasis added). Here, both Kilpela's questions and means of detaining Nicole exceeded what was reasonable for a lane violation investigation.

A. Kilpela's means of detaining Nicole inside his patrol car exceeded the scope of what was reasonable to investigate a lane violation.

The State argues that "it was reasonable for Trooper Kilpela to ask Noli to accompany him to the front seat of his patrol vehicle" and cites *Bailey* in support. (Appellee's Br. at 23-24.) In *Bailey*, a trooper

responded to a report of a car accident and a possibly impaired driver. *Bailey*, ¶ 2. The driver removed the car from the scene before law enforcement arrived. *Bailey* ¶ 5. The road was covered with ice and snow. *Bailey*, ¶ 3. When the trooper arrived, he thought he smelled alcohol coming from the driver and asked the driver to sit in the back of his vehicle while he questioned him. *Bailey*, ¶ 6.

Because the car was previously removed from the scene, the trooper also knew the questioning would take longer because he would be relying on the driver's description of events. *Bailey*, ¶ 6. Additionally, consistent with his training, the trooper was not wearing his jacket at that point in his investigation, so he needed to stay in the vehicle for his safety due to the weather conditions. *Bailey*, ¶ 6.

Bailey argued that the trooper lacked a particularized suspicion to expand the stop into a DUI investigation and that the trooper violated his *Miranda* protections. *Bailey*, ¶¶ 24 and 1. However, Bailey did not argue that the trooper's method of detainment violated his right to privacy, as Nicole argued here.

Nevertheless, in the context of determining if the trooper violated Bailey's *Miranda* rights, the Court found that there "were objectively

reasonable factors" that led the trooper to question Bailey in the back seat of his patrol vehicle. *Bailey*, ¶ 37. Considering the time of day, road and weather conditions, and the trooper's need to confirm if the odor of alcohol was coming from Bailey, it was reasonable for the trooper to question Bailey inside the patrol car. *Bailey*, ¶ 37.

Here, Kilpela was not investigating an accident or DUI. He was investigating a lane violation—where the driver immediately admitted and provided all the information he requested. Unlike *Bailey*, he did not need Nicole in his car to conduct his investigation.

The State also claims that Kilpela needed Nicole to come "inside the warmth of [Kilpela's] patrol vehicle." (Appellee's Br. at 5.) However, like a typical traffic stop, Kilpela could have completed the citation in his vehicle while Nicole stayed in her minivan. He already had all the information he needed—and was statutorily allowed to ask for under § 46-5-401(2)(a)—without asking Nicole to get out of her car.

Additionally, such a practice raises safety concerns for both the officer and driver. Requesting a driver exit their vehicle on the side of a highway is, itself, dangerous. It requires the individual walk along the side of the road, placing them in greater risk of bodily harm than if they

had stayed in their car. Likewise, absent a reason, an officer should refrain from having a stranger sit in the front seat of their patrol car. Also, women traveling on remote Montana highways should not be asked by armed troopers to get into a patrol car when stopped for a minor traffic citation. And as argued by Nicole below and in her opening brief, such a practice—possibly influenced by conscious or unconscious bias—may befall minorities at a higher rate.[1]

The State highlights that the purpose of the Montana and United States constitution's prohibition of unreasonable searches and seizures "is not to eliminate all contact between the police and citizenry, but rather to prevent arbitrary and oppressive government interference with individual privacy." Nicole agrees. However, in this instance, when Kilpela isolated and questioned Nicole in his car during a lane violation investigation where he already determined that he likely would be issuing nothing more than a warning, he arbitrarily and oppressively interfered with Nicole's individual privacy.

[1] Kilpela testified, and the State agreed, that part of the reason Kilpela had Nicole get into his car was to diminish "any attempt by Noli to flee." (Appellee's Br. at 11.) No explanation was given as to why Kilpela was worried that Nicole, as opposed to other drivers pulled over for a lane violation, would flee.

B. Kilpela's questions unrelated to the traffic citation both prolonged and exceeded the scope of the predicate suspicion for the stop.

A shorter stop should be expected for a minor traffic violation—especially like the one here, where Nicole immediately admitted the lane violation and provided all requested information. Because the law requires that the stop must last no longer than necessary to effectuate its purpose, a stop like this should take little time to investigate. *See* Mont. Code. Ann. § 46-5-406; *see also Rodriguez v. United States*, 575 U.S. 348, 349 (2015) ("Authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."). A seizure becomes illegal the moment the officer violates an individual's rights, even during a brief stop. *See e.g., Rodriguez*, 575 U.S. 348 (prolonging a stop "seven to eight minutes" was unlawful).

Contrary to the State's claim, when Kilpela asked Nicole questions unrelated to the reason for the stop, he prolonged its duration. Kilpela questioned Nicole about her trip and background—including when she left, where she was heading, and where she was staying—before calling in her information to dispatch. (State's Ex. 3 at 03:45-05:28.) Kilpela testified that he asked Nicole at least eleven questions that were

unrelated and unnecessary to complete the traffic warning. (12/11/19 Tr. at 80-82.) If Kilpela simply verified Nicole's information and completed the warning, the stop, which lasted almost forty minutes, would have ended sooner.

Additionally, Kilpela's questions exceeded the scope of those necessary to investigate a lane violation. The State cannot emphasize Kilpela's expertise as a drug interdiction expert and then claim his questions were innocuous conversation. Specific and repeated questions about Nicole's travel plans, who she was visiting, her employment history, how much she paid for the rental car, and arrest history went far beyond what Kilpela needed to complete his investigation. Because Kilpela extended the questioning beyond what was statutorily and constitutionally authorized to complete his traffic-based inquiry, he unlawfully expanded the scope of the stop.

C. Kilpela continued to illegally seize Nicole after he gave her the warning for the traffic citation.

The State argues that the district court did not need to find that Kilpela had a particularized suspicion to conduct a drug investigation because Kilpela's questioning of Nicole after he gave her the verbal

warning was a voluntary and consensual interaction. (Appellee's Br. at 29.) In arguing this, the State relies on *Snell*. (Appellee's Br. at 34-36.)

In *Snell*, the defendant moved the court to suppress evidence obtained after a search of his vehicle. Snell conceded that he voluntarily consented to the search, but he argued that his consent was invalid because he was illegally detained at the time he consented. *Snell*, ¶ 20.

After stopping Snell, the officer returned to his vehicle to run Snell's driver's license and registration information. *Snell*, ¶ 3. He left Snell to continue looking for his proof of insurance. *Snell*, ¶ 3. Snell then got into the patrol car to tell the officer he could not find his insurance information, but he thought the car was insured. *Snell*, ¶ 3. The officer issued a citation. *Snell*, ¶ 4. He then asked Snell to search the vehicle and Snell agreed. *Snell*, ¶ 4. Looking at the circumstances, this Court found that a reasonable person would have felt free to leave the vehicle upon completion of the traffic stop. *Snell*, ¶ 25.

This Court distinguished *Snell* in *Case*. In *Case*, an officer stopped the defendant for running a red light. *Case*, ¶ 5. Because the officer recognized the passengers in the vehicle, the officer suspected the driver, Case, might be involved in drug activity. *Case*, ¶¶ 6-8. The

officer asked Case if he had any weapons on him and to step out of the vehicle. *Case*, ¶ 10. Case complied. *Case*, ¶ 10. The officer issued Case a traffic ticket and returned his information. *Case*, ¶ 10. As the officer handed back the paperwork, he told Case he had a question for him. *Case*, ¶ 11. The officer then proceeded to ask Case four questions, including "what's your business in town? What are you doing here?" *Case*, ¶ 11. The officer asked Case if there was anything in the vehicle and Case agreed to let him search it. *Case*, ¶¶ 12-13. The search resulted in syringes, rock cocaine and methamphetamine. *Case*, ¶ 13.

Under the "free to leave" analysis, the Court found that when "a police officer states that he has a question before you take off, that means, to a reasonable person, you have to stay and answer the question before you are free to leave…" *Case*, ¶ 30. In viewing the circumstances surrounding the incident, a person in Case's situation would not have felt free to leave even though the traffic stop was "technically complete." *Case*, ¶¶ 31 and 28. Therefore, the conversation was not a voluntary exchange, but Case was, in fact, seized when he gave consent to search the vehicle. *Case*, ¶ 32. The Court found this was different than *Snell*, where the defendant entered the car to explain his

insurance and there was no indication the officer asked Snell to stay or prevented him from exiting the vehicle. *Case*, ¶ 27.

Here, Kilpela told Nicole to stay in the vehicle when he left to check the VIN and question Nicole's girlfriend. After Kilpela returned, he gave Nicole the verbal warning and told her she was "good to go" for the traffic stop, but then he immediately asked, "Can I ask you is there anything illegal in the car today?" (State's Ex. 3 at 14:44.) Like in *Case*, Kilpela's immediate question prevented Nicole from leaving. Although the State insinuates that Nicole was free to leave at that moment, no reasonable person would have felt free to get out of a cop car while a trooper asks them if they have anything illegal. And if Nicole walked away from Kilpela as he asked her questions, Kilpela easily could have arrested her for obstructing his investigation. *See* Mont. Code. Ann. § 45-7-302. Based on the circumstances, and contrary to the State's assertion, Kilpela's continued questioning of Nicole after giving her the verbal warning was not a voluntary and consensual interaction.

D. The district court erred in finding that Kilpela had a particularized suspicion to conduct a drug investigation.

Alternatively, the State argues that if this Court finds that Kilpela continued to seize Nicole after giving her the warning, Kilpela had a particularized suspicion to conduct a drug investigation. The State says that the district court relied on a "panoply" of circumstances to form a particularized suspicion based on Kilpela's "extensive training and experience" investigating drug trafficking charges. (Appellee's Br. at 30.) The State then focuses on Nicole's "nervousness" and Kilpela's testimony that Nicole was more nervous than most stops for a traffic violation. (Appellee's Br. at 30.)

However, Nicole's nervousness may have subsided if she was sitting in her car—as most people are when pulled over for a traffic violation. Logically, one's nervousness level may rise if taken and questioned by an armed officer inside a patrol vehicle with a K-9 sitting in the backseat. This may be especially true if someone is travelling in an unfamiliar and remote place.

Not only that, but Nicole was a Hispanic female with a black female passenger on a remote stretch of highway. This circumstance

cannot be ignored when evaluating how a reasonable person in Nicole's shoes would have behaved and if her behavior truly indicated criminal activity. As shown by the video, Nicole acted no more nervously than someone in her shoes would reasonably be expected to act.

In Nicole's opening brief, she also discussed how the district court's factual findings were clearly erroneous. The State responds that the district court's "interpreting the facts a different way is not clear error." (Appellee's Br. at 32.) However, interpreting facts and misstating facts are different. For instance, the district court stated that the rental term was "two days" in its finding of a particularized suspicion, when the term was "four to five days." This was not an interpretation issue. It was clearly erroneous.

Similarly, the district court said that Nicole was "unable to answer basic questions." Again, the video shows that Nicole answered all Kilpela's questions. She told him where she was heading and who she was visiting. She explained that the passenger was her girlfriend. She told him they were taking the route from google Maps. She told him about the weather along the way. She told him they stopped at a hotel around Idaho Falls the night before. She told him what time they got to

the hotel. She told him when they stopped for lunch. She told him about her work history at AutoZone and as a security guard. She told him how much she paid for the rental car. She told him what she had for luggage. She told him about her recent speeding ticket. And she also told him she had a DUI in 2012. All of this was in response to Kilpela's questions. Although she may have mispronounced the name of a town, that is not indicative of criminal activity—especially considering all the information she quickly and fully provided to Kilpela.

The State also says that trash was strewn "throughout" the vehicle, which is not supported by the video or Kilpela's testimony. Kilpela said he saw "trash," but there was no testimony that it was excessively dirtier than a typical road trip. And there was no testimony that it was "throughout" the vehicle. There was no evidence that the vehicle had any sort of lived-in appearance or indication that Nicole and her girlfriend were sleeping in the minivan. The State stretches the facts in an attempt to support a particularized suspicion, but Montana law does not support such a conclusion here.

The State claims that the only authority Nicole points to that Kilpela unlawfully expanded the scope of the investigation was *State v.*

Pham, 2021 MT 270, 406 Mont. 109, 497 P.3d 217. (Appellee's Br. at 27.) Nicole highlighted this recent decision because Trooper Kilpela was one of the troopers in Pham's case. In *Pham*, the defendant was also a minority traveling in remote Montana. Kilpela believed Pham was more nervous "compared to other travelers" and testified that he was aware drugs were being trafficked along the same route Pham was driving. *Pham*, ¶ 4. If the Court considers Kilpela's experience, it should consider all of it—including this recently documented stop where he illegally seized someone based on similar testimony.

Additionally, this Court recently discussed the illegal expansion of a stop in *State v. Harning*, 2022 MT 61, 408 Mont. 140, 507 P.3d 145. In *Harning*, this Court found that although the officer was justified in stopping the defendant, the officer lacked particularized suspicion to extend the traffic stop into a drug investigation. *Harning*, ¶29. Similarly, the trooper claimed that Harning appeared "evasive" because he would not answer questions immediately, hesitated, appeared nervous and picked his words carefully. *Harning*, ¶ 4. The trooper smelled an odor of marijuana coming from the vehicle, Harning admitted to smoking marijuana earlier that day and Harning said he

did not have marijuana "on him." *Harning*, ¶ 20. However, looking at the totality of the circumstances, the trooper did not have a particularized suspicion to expand the stop from a traffic citation into a drug investigation.

Further, this Court in *Harning* noted "the 'annoying, frightening and perhaps humiliating' experience of an investigatory stop." *Harning*, ¶ 24 (citing *Terry v. Ohio*, 392 U.S. 1, 25 (1968)). In all, an "officer who impermissibly extends a detention just to fish for further evidence of wrongdoing breaches the protections afforded by the Fourth Amendment. Nervous behavior during a traffic stop is not uncommon and does not establish particularized suspicion to extend a traffic stop into a drug investigation of Harning's vehicle." *Harning*, ¶ 24.

Similarly, this Court recently found that officers lacked a particularized suspicion to extend a traffic stop into a drug investigation in *State v. Carrywater*, 2022 MT 131, 409 Mont. 194, 512 P.3d 1180. Once the officer's suspicion of wrongdoing was dispelled—here, driving without a valid license—the investigation should have ended. *Carrywater*, ¶ 27. The Court noted that "[a]n officer's justification for an investigative stop may change as he acquires new or

additional information." *Carrywater*, ¶ 17. However, the stop may permissibly ripen into broader particularized suspicion of crimination activity only "so long as sufficient particularized suspicion of criminal activity existed at the start and continues to exist prior to the development of the additional information on which an officer relies to expand its duration or scope." *Carrywater*, ¶ 17 (internal citations omitted).

Looking at the totality of the circumstances here, Kilpela fell short of having a particularized suspicion to conduct a drug investigation like in *Pham*, *Harning* and *Carrywater*. First, Nicole maintains Kilpela started a drug investigation when he isolated Nicole in his vehicle and started asking her questions unrelated to the stop before giving her a warning. As a drug interdiction expert, Kilpela knew his invasive questions were a part of him building a drug investigation. Kilpela testified that he "absolutely" did not have a particularized suspicion when he started questioning Nicole, and he is correct. Because he expanded into a drug investigation without a particularized suspicion when he questioned Nicole, the resulting evidence must be suppressed.

The State and district court, on the other hand, are unclear about when Kilpela expanded his investigation. The district court included facts from Kilpela's conversation with Nicole's passenger when finding a particularized suspicion, so it follows that the district court believed that Kilpela expanded the stop after speaking with Nicole's girlfriend and returning to his vehicle.

The question then follows: what was the legal justification for approaching and questioning Nicole's girlfriend? While the reason for a search can change as an officer gains additional information, in the same way, additional information that dispels any suspicion cannot be ignored. There was no issue with Nicole's paperwork. Nicole explained why she got a rental car rather than driving her own vehicle. She explained that she lived in Las Vegas and was visiting family in North Dakota. Her and her girlfriend stopped at a hotel the previous night, so they were not driving straight through. She had no history of drug charges. Appearing nervous—but not excessively so—while being questioned in the front seat of a patrol car is not enough to support the expansion of the stop. Kilpela had a hunch, but he did not have a particularized suspicion.

Whether Kilpela started his drug investigation when he isolated Nicole in his patrol car and repeatedly questioned her, checked the minivan's VIN, questioned Nicole's girlfriend, or returned to his vehicle and interrogated Nicole about illegal contraband, he did not have the requisite particularized suspicion to support a drug investigation. Therefore, because he illegally expanded the stop, the subsequently discovered evidence must be suppressed.

II. The State cannot carry its burden of showing that Nicole's consent was knowingly and voluntarily obtained.

One factor when determining if consent is knowing and voluntary is whether the person was seized at the time. *State v. Munson*, 2007 MT 222, ¶ 51, 339 Mont. 68, 87, 169 P.3d 364, 377. As shown above, at a minimum, Nicole was seized when Kilpela asked for her consent to search. The State points to another factor: "the repeated and prolonged nature of the questioning." (Appellee's Br. at 38.) And here, the conversation went on too long. Kilpela asked for consent seven times. Once Nicole said "no" and that she did not understand what was going on, Kilpela should have stopped and gotten a warrant. The warrant—not consent—is the default for a search. Instead, Kilpela kept prying.

The State carries the burden of showing that Kilpela obtained Nicole's consent without any "implied duress or coercion." *State v. Olson*, 2002 MT 211, ¶ 20, 311 Mont. 270, 278 55 P.3d 935, 941. Kilpela was an armed officer and he asked for Nicole's consent while she sat in his patrol car. He used leading questions. He previously asked Nicole's girlfriend for consent even though he knew she could not legally provide it. His K-9 sat in the backseat. He then threatened to run the dog. This was coercive. The State attempts to justify the conversation because Nicole eventually agrees to the search. But that is the goal of a coercive conversation—to get that person to agree, which is what Kilpela did here.

Based on these facts, in addition to Nicole saying "no" twice, expressing confusion, and refusing to sign a written consent form, the State cannot carry its burden in showing that Nicole's consent was knowing and voluntary. Searching a vehicle is not "just something we do out here" in Montana absent a warrant, and the evidence of the illegal search must be suppressed.

CONCLUSION

Kilpela unreasonably expanded the scope and duration of the traffic stop. The Court must reverse the district court's ruling, suppress the evidence and remand for dismissal. Alternatively, the Court must still reverse because the State cannot carry its burden of showing that Nicole's consent was knowing or voluntary. Absent consent, the evidence must be suppressed and case dismissed.

Respectfully submitted this 6th day of September, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 4,372, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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CERTIFICATE OF SERVICE

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