

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.

BRIEF OF APPELLEE

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. Did the district court correctly deny the Appellant's motion to suppress based on a particularized suspicion of criminal activity beyond the traffic offense despite the scope of the stop not being enlarged?
2. Did the district court correctly conclude that Noli voluntarily consented to the search of her vehicle after the traffic stop was complete?

STATEMENT OF THE CASE

On March 8, 2019, the State charged the Appellant, Nicole Noli (Noli), with felony drug possession, in violation of Mont. Code Ann. § 45-9-102, and misdemeanor possession of drug paraphernalia, in violation of Mont. Code Ann. § 45-10-103. (District Court Documents (Docs.) 1-3.)

On February 22, 2019, Montana Highway Patrol Trooper Barry Kilpela (Trooper Kilpela) stopped Noli for a traffic offense on the interstate in Dawson County near Glendive. (12/11/19 Hearing Transcript (Tr.) at 6, 15; Doc. 1 at 2.) Trooper Kilpela issued Noli a warning for the traffic offense, then asked Noli for consent to search her vehicle. (Tr. at 38, 41-45, 84-85, 90-91.) Noli verbally consented. (State's Exhibit (Ex.) 3¹ at 14:55-21:50; Tr. at 43-45, 90-91.) Trooper

¹During the suppression hearing the State introduced two camera views of the dash camera as State's Exhibit 3. (Tr. at 16.)

Kilpela searched Noli's rental vehicle and found methamphetamine, pills, packaging, empty bags with marijuana residue, and a scale. (Tr. at 45-46.)

Noli moved to suppress any evidence obtained from the search. (Docs. 32, 36.) Noli argued Trooper Kilpela lacked a particularized suspicion to expand the scope of the stop beyond the traffic offense and, in the alternative, that her consent to search was coerced and involuntary. (*Id.*) The district court denied Noli's motion to suppress and found Trooper Kilpela had a particularized suspicion to expand the scope of the stop and Noli's consent was voluntary. (Doc. 43.)

Noli changed her plea to guilty and reserved her right to challenge the district court's denial of her motion to suppress. (Docs. 54, 56.) The district court sentenced Noli to six months, all suspended, for the misdemeanor paraphernalia conviction and deferred the imposition of sentence for three years on the felony drug possession charge. (Doc. 62 at 2.) Noli appealed. (Doc. 63.)

STATEMENT OF THE FACTS

I. The offenses

On February 22, 2019, Trooper Kilpela was patrolling Interstate 94 in Dawson County near Glendive. (Tr. at 6, 15.) Trooper Kilpela saw a van drive by in the left-hand lane with no vehicles around it. (*Id.* at 15.) Trooper Kilpela stopped

the vehicle for improper lane use. (*Id.*) The encounter was captured on Trooper Kilpela's dash camera. (*Id.* at 15-16 (State's Ex. 3).)

Trooper Kilpela walked to the passenger-side window and contacted Noli, who was driving, and one passenger. (*Id.* at 18.) Trooper Kilpela said he stopped them because they were traveling in the left-hand lane. (State's Ex. 3 at 2:05-2:20.) Trooper Kilpela asked Noli for the vehicle registration, and Noli said it was a rental car. (Tr. at 19.) Trooper Kilpela told them if everything checked out, he would give them a warning. (State's Ex. 3 at 2:25-2:30.) Noli said they did not know they were not supposed to drive in the left-hand lane, and both she and the passenger said they were from Las Vegas. (*Id.* at 2:30-2:35.)

After Trooper Kilpela reviewed the rental documents, he had the following exchange with Noli:

Trooper Kilpela: Let's see. I can try looking up all the, the rest of the stuff. Did you get the insurance through the, uh, rental contract?

Noli: Yeah.

Trooper Kilpela: I can try looking that up on my computer too. You don't have any weapons on you do you, Nicole?

Noli: No, I don't.

Trooper Kilpela: Do you wanna grab your license, then you can just hop in my front seat of my car. I'll fill you out a warning.

Noli: Ok.

Trooper Kilpela: Then I don't have to stand out here in the cold.

Noli: Ok.

Trooper Kilpela: Sound good?

Noli: Yep.

Trooper Kilpela: (looking through the window) Is that just a blanket or some?

Noli and the passenger: (Inaudible speech while laughing.)

Trooper Kilpela: I thought there was another person sleeping back there. (Laughing.)

(*Id.* at 2:50-3:30.) At the back of the vehicle Noli stopped and handed

Trooper Kilpela her license. (*Id.* at 3:30-3:35.) Trooper Kilpela asked Noli again if she had any weapons, and Noli said she did not. (*Id.*) Trooper Kilpela said, “you can hop right there in my front seat, alright.” (*Id.* at 3:30-3:40.) They entered his patrol vehicle. (*Id.*)

While Trooper Kilpela was at the window of the vehicle, he noticed a strong smell of cigarette smoke. (Tr. at 19.) He saw a blanket or pillows in the back seat and trash throughout the vehicle, which Trooper Kilpela understood to indicate hard travel. (*Id.* at 20-22.) Trooper Kilpela saw rolling papers on the center console. (*Id.* at 20.) Trooper Kilpela testified that when Noli handed him the rental agreement her “whole arm seemed to be shaking.” (*Id.*) Noli put her arm down over the rolling papers. (*Id.*) Trooper Kilpela testified, “I’m not sure if she put her arm down to kind of cover the rolling papers, or to do [sic] brace her arm because it was shaking so much.” (*Id.*) Trooper Kilpela said, Noli was more nervous than the average person during a traffic stop. (*Id.*)

Based on Trooper Kilpela's training and experience, he concluded the circumstances taken together—rental vehicle, heightened nervousness, rolling papers, excessive cigarette smoke, signs of hard travel from Las Vegas—are consistent with other stops he had conducted that resulted in the discovery of drug trafficking. (*Id.* at 21-23, 26.) Trooper Kilpela's conclusions were based on his extensive training and experience with criminal and drug interdiction, as illustrated by the State's exhibits one and two. (*Id.* at 7-9, 52-53.) Trooper Kilpela, who had previously worked as a sheriff's deputy in Colorado, had been a Montana state trooper for 5 years at the time of the stop and conducted between 700 to 800 traffic stops per year. (*Id.* at 10-13.) Of these stops, Trooper Kilpela had been involved in around 80 stops that turned into drug trafficking cases. (*Id.* at 13.) Trooper Kilpela had also received approximately 250 hours of training in criminal interdiction and served as an instructor for criminal interdiction. (*Id.* at 10-11.)

Trooper Kilpela testified that he often asks drivers to accompany him to his vehicle for safety concerns and the convenience of being able to ask all pertinent questions inside his patrol vehicle without any back and forth. (Tr. at 23-24, 49-51.) On the day of this offense, it was a cold February day on the roadside of the interstate near Glendive. (*Id.* at 6, 15, 25.) Asking Noli to the vehicle allowed Trooper Kilpela to get off the road, inside the warmth of his patrol vehicle, and

avoided standing alongside a busy highway. (*Id.* at 23-24.) Further, it diminished any attempt by Noli to flee or to conspire with the passenger. (*Id.*)

As Trooper Kilpela entered Noli's information into his system, he had a general conversation with Noli regarding her trip. (*Id.* at 27-28.) Trooper Kilpela tries to make this dialogue part of every stop to lessen the typically robotic interactions between law enforcement and drivers during traffic offenses. (*Id.* at 24, 27-29, 49-51.) Noli's conduct and comments during the conversation caused Trooper Kilpela to believe Noli was being deceptive. (*Id.* at 30-33, 86-87.) Noli was taking short breaths, rubbing her face, avoiding eye contact, and constantly looking at the rental van. (*Id.*) These were signs of an irregularly high-level of nervousness that increased during the stop, especially for a person who was only receiving a warning. (*Id.* at 20-21, 30-34.)

Noli seemed confused about the day, which indicated heightened stress. (*Id.* at 27.) Noli said she had been driving for a couple days, which was impossible because she had rented the vehicle the day prior. (*Id.*) Noli was able to answer some simple questions quickly, but she paused with others as if she had to come up with an answer. (*Id.* at 32.) Noli was vague about what she did for work, and she gave a long pause before she told Trooper Kilpela she had been arrested for driving under the influence. (*Id.* at 29, 31.) Noli was unsure of the town she was traveling to, saying "Wilmington or Welmington." (*Id.* at 29, 35.)

Noli said she was traveling from Las Vegas to North Dakota to pick up her two sisters and a nephew, who were staying with Noli's father. (*Id.* at 29.) Noli said they stayed the previous night somewhere near Idaho Falls, but she did not know the name of the "little city." (State's Ex. 3 at 6:00-6:10; Tr. at 29-30, 70-71.) Noli said they were staying overnight in a hotel in North Dakota then traveling back to Las Vegas. (*Id.* at 29-30, 70-71.) Noli said she thought they went through Wyoming based on the map, but she was not sure. (State's Ex. 3 at 5:00-5:15.) Trooper Kilpela said the manner of Noli's responses were confusing, and she repeatedly answered "definitely, definitely, definitely" to his questions. (Tr. at 30-33.) Trooper Kilpela interpreted this, in addition to the short trip and other circumstances, as an effort to mask nervousness and be deceptive. (*Id.* at 31, 86-87.)

Noli's conduct, in conjunction with the circumstances, heightened Trooper Kilpela's suspicions that Noli may have contraband in the vehicle. (*Id.* at 12-14, 21-22, 26-33.) Las Vegas is a major source for methamphetamine and other illegal drugs. (*Id.* at 30.) North Dakota is a major destination for those drugs, and Trooper Kilpela the week before had seized a large amount of methamphetamine going to North Dakota from Las Vegas. (*Id.*) Trooper Kilpela also knew that rental vehicles are commonly used to traffic illegal drugs to ensure mechanical reliability and avoid forfeiture. (*Id.* at 12-13, 19-22.)

After Trooper Kilpela's conversation with Noli, he returned to the rental vehicle to check the vehicle identification number (VIN number) to verify its credentials. (*Id.* at 34-35.) Trooper Kilpela said he checks the VIN number on any rental vehicle he stops to make sure it matches the vehicle registration. (*Id.* at 34.) Trooper Kilpela returned the rental vehicle papers to the passenger. (*Id.* at 35.) The passenger also referred to their destination as "Wilmington" or "Welmington." (State's Ex. 3 at 13:35-13:45.) After Trooper Kilpela's prompting, she confirmed they were traveling to Williston and told Trooper Kilpela they were immediately returning to Las Vegas rather than staying overnight, which Trooper Kilpela interpreted to be in conflict with Noli's statement. (Tr. at 35, 70-71.)

Trooper Kilpela asked about the luggage, and the passenger avoided eye contact and appeared nervous. (*Id.* at 36-37.) He asked if there was anything illegal in the car. (*Id.*) The passenger shook her head but did not verbally answer. (*Id.*) The passenger avoided eye contact and pulled out a cigarette from a pack and lit it. (*Id.*) She did not use the rolling papers, which added to Trooper Kilpela's suspicion about possible marijuana in the vehicle. (*Id.* at 36-37, 60-61.) Further, Trooper Kilpela knows based on his experience that people will use cigarettes to calm their nerves, which was especially important in this case because the passenger was not receiving a warning or any other reprimand for the traffic offense. (*Id.* at 36-37.)

Trooper Kilpela interacted with the passenger for about 35 seconds. (State's Ex. 3 at 13:25-14:20.) However, the passenger's responses and conduct, in addition to his observations and interactions with Noli, led Trooper Kilpela to believe that he had a particularized suspicion that Noli and the passenger were involved in additional criminal activity. (Tr. at 39-40.) Trooper Kilpela asked the passenger for consent to search the vehicle. (*Id.* at 37-38.) She told Trooper Kilpela to ask Noli. (*Id.* at 38.)

Trooper Kilpela returned to his patrol vehicle. (*Id.* at 40.) He asked Noli what they had for luggage. (*Id.*) Noli responded just some clothes and blankets. (*Id.*) But while Noli responded she was shaking her head back and forth like she was saying no, which Trooper Kilpela interpreted as deceptive. (*Id.*) Trooper Kilpela handed all of Noli's documents back to her along with the warning, and told her, "as far as the traffic stop you're good to go there. You got your stuff back, right?" (*Id.*; State's Ex. 3 at 14:40-15:00.) Noli confirmed. (*Id.*) The duration of the stop from the moment Noli stopped her vehicle to the completion of the traffic stop was 13 minutes and 9 seconds. (State's Ex. 3 at 1:47-14:56.)

Trooper Kilpela then had the following exchange with Noli. (State's Ex. 3 at 14:55-21:50.)

Trooper Kilpela: And can I ask you is there anything illegal in the car today?

Noli: No.

Trooper Kilpela: Any marijuana?

Noli: No.

Trooper Kilpela: Any cocaine?

Noli: No.

Trooper Kilpela: Any methamphetamine?

Noli: No.

Trooper Kilpela: Any heroine?

Noli: No.

Trooper Kilpela: Guns?

Noli: No.

Trooper Kilpela: Anything like that?

Noli: No.

Trooper Kilpela: Do you have any issue with me searching the vehicle today?

Noli: No.

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

Noli: Why are you gonna search it?

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

Noli: Right.

Trooper Kilpela: Is that right? 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.

Noli: Ok.

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

Noli: Yeah.

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

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

Trooper Kilpela: Just 'cause what you guys are doing it's a quick trip and stuff like that so, just something I do out here. And, that's all you have is a joint?

Noli: Right.

Trooper Kilpela: No, I'm asking you.

Noli: No.

Trooper Kilpela: Yes or no?

Noli: I don't have a joint in there. I just don't understand why you would search.

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

Noli: No. (pause) I did.

Trooper Kilpela: Uh. You just told me that right?

Noli: I did say to you I did, yes.

Trooper Kilpela: Ok.

Noli: But I was just trying to question you with the fact that why you were gonna.

Trooper Kilpela: No, no, I just think it's a quick trip, and it's something I do out here. Some things don't really make a lot of sense to me.

Noli: Yeah.

Trooper Kilpela: Ok, so it's something that I asked you. But like I said, I'm not worried about a joint or something like that or a little bit of weed.

Noli: Right.

Trooper Kilpela: And then you just told me that's what's in there.

Noli: Right.

Trooper Kilpela: So, is there something more than that, or that's it?

Noli: No, it was just an open beer.

Trooper Kilpela: Well, I'm not worried about an open beer.

Noli: Ok, then that's it, no.

Trooper Kilpela: Ok, so can I search the car or not?

Noli: Yeah.

Trooper Kilpela: Yeah, I can? Ok. And I'll have this, you understand why I'm asking you this, all this, right, what I just asked you?

Noli: I do understand.

Trooper Kilpela: Ok, then I'll have this other guy you can hang out with him and there's nothing, are you responsible for everything else in the vehicle, or did anybody give you something that doesn't belong to you?

Noli: No. There's a knife in there, there's a baton, um, like a pocketknife.

Trooper Kilpela: Ok.

Noli: Um, a baton.

Trooper Kilpela: Just a baton from the security stuff.

Noli: Yeah.

Trooper Kilpela: Hang on just a second. (Papers shuffling.) So, this, I don't have a printout or else I would give you a good one, 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. Excuse me. Does that make sense to you?

Noli: It does. I don't understand why though.

Trooper Kilpela: Do you want to read it? Or do you not like to sign forms?

Noli: 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.

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

Noli: The fact that you're asking me to search my car, when you're pulling me over for a warning

Trooper Kilpela: Right, right, but what I'm saying is I asked you did you, did you or did you not tell me there's a joint in the car?

Noli: I did. And it was false, it was false, yes.

Trooper Kilpela: Ok, did you or did you not tell me that there's an open container in the car?

Noli: Yes.

Trooper Kilpela: Ok, are either of those things in the car?

Noli: Yes.

Trooper Kilpela: One or both of them?

Noli: One.

Trooper Kilpela: Ok, what is in the car?

Noli: The beer.

Trooper Kilpela: Ok. If, I don't think that you're drunk or impaired right now.

Noli: Right.

Trooper Kilpela: Ok. So, if there's an open container in the car, I am going to dump that out.

Noli: Ok.

Trooper Kilpela: But what I'm asking, the rest of the vehicle and everything in the vehicle, are you responsible for everything else in the vehicle?

Noli: Yes.

Trooper Kilpela: And can I search the rest of the vehicle?

Noli: Yes.

Trooper Kilpela: I can?

Noli: Yes.

Trooper Kilpela: Ok. So, what this says is that you are offering your consent for me to search this vehicle today, and if there's any illegal items in the vehicle, then I am going to seize said items.

Noli: Ok.

Trooper Kilpela: So, what I'm asking you, do you want to sign this that gives your consent?

Noli: No, I do not want to sign it.

Trooper Kilpela: Ok, but, I understand you, right, that I can search your vehicle and you're giving me your verbal consent to search the car?

[pause]

Trooper Kilpela: Yes or no?

Noli: No.

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

Noli: No.

Trooper Kilpela: Ok, so what I am going to do is I'm gonna, she's going to get out of the car and then I'm going to deploy my narcotics detecting dog around the car.

Noli: You can search the car. If you're going to do all that, go ahead and search the car.

Trooper Kilpela: Well, I don't wanna feel, I don't, I don't want you to feel that I'm coercing you or anything like that.

Noli: I understand, I'll sign it. That's fine

Trooper Kilpela: You don't have to sign it if you don't want to. I just want to make sure you understand what I'm, 'cause you're, we're kinda going around and around in circles here.

Noli: Right, I understand.

Trooper Kilpela: So, I'm simply asking you, can I with your consent, search this vehicle that you're driving today for any and all contraband, including marijuana, cocaine, methamphetamine, or heroin?

Noli: Yes.

Trooper Kilpela: I can?

Noli: Yes.

Trooper Kilpela: And you understand that you do not have to give that consent to me?

Noli: Right.

Trooper Kilpela: So, what this says is, like I explained, ok, this is, we are in the county, Dawson County, ok, that is me, ok and I'm asking to search this vehicle and remove any of the illegal items that I may find in the vehicle. Ok? And the rest of it is all explained there, so do you want to sign this form or not? If you do not want to, you don't have to.

Noli: What's gonna be the difference if I do or not?

Trooper Kilpela: If you sign this?

Noli: Yeah.

Trooper Kilpela: Well, this is called the written, written consent, that's, meaning that you have read this and then you're still good with the search.

Noli: Ok.

Trooper Kilpela: Do you want to read it, or have you, can you see it?

[pause]

Noli: I don't know.

Trooper Kilpela: Ok, then we'll put this away, so I'm going to clarify one more time, I did a couple times. You are good with me searching this vehicle?

Noli: Yeah.

Trooper Kilpela: Ok. Then I'll have her get out and then I'll have this other guy come up and stand here, ok?

Noli: Ok.

Trooper Kilpela: And if you decide you want me to stop searching the vehicle, let him know, ok?

Noli: Ok.

(State's Ex. 3 at 14:55-21:50.)

Trooper Kilpela described this interaction during his testimony and explained that Noli's inconsistent statements about the "joint" in the car in addition to his observations throughout the stop provided probable cause to believe there were illegal drugs in the car, which justified Noli's arrest. (Tr. at 42-43, 91-92.) After Noli indicated she was not comfortable with consenting, Trooper Kilpela told Noli he was going to run his narcotics dog around the car. (*Id.* at 43-44, 90-91.) But Noli stopped Trooper Kilpela and said she consented to the search of her vehicle. (*Id.*) Trooper Kilpela did not deploy the drug dog. (*Id.*; State's Ex. 3 at 19:50-51:00.) Noli did not sign the written consent form provided by Trooper Kilpela, but she repeatedly affirmed verbally that she consented to Trooper Kilpela's search of the car. (Tr. at 44-45.)

After Noli consented, she got out of the front seat of Trooper Kilpela's patrol vehicle and walked around the front of the vehicle. (*Id.* at 21:55-22:10.) Trooper Kilpela asked Noli to step to the back of his vehicle where a second officer had parked. (*Id.* at 22:05-22:15.) Trooper Kilpela also asked the passenger to go back to stand with the second officer. (*Id.* at 22:15-22:50.) Trooper Kilpela searched Noli's vehicle and found methamphetamine, pills, packaging, empty bags with marijuana residue, and a scale. (*Id.* at 45-46.) Trooper Kilpela then advised Noli of her *Miranda* rights and placed her under arrest. (*Id.*)

II. The charges and motion to suppress

The State charged Noli with felony drug possession and misdemeanor possession of drug paraphernalia. (Docs. 1-3.) Noli moved to suppress any evidence obtained from the search. (Docs. 32, 36.) Noli argued Trooper Kilpela lacked a particularized suspicion to expand the scope of the stop beyond the traffic offense and in the alternative that her consent to search was coerced and involuntary. (*Id.*)

After a hearing, the district court denied Noli's motion to suppress. (Doc. 43.) The district court made detailed findings of fact explaining the purposes of highway interdiction and Trooper Kilpela's extensive training and experience with interdiction during traffic stops. (*Id.* at 1-5.) Based on these detailed findings of

fact, the district court concluded Trooper Kilpela had a particularized suspicion to extend the stop. (*Id.* at 7-11.)

Trooper Kilpela is an experienced officer who testified extensively as questioned by the State regarding his training and experience, the objective nature of indicators that, when taken as a whole, led the Trooper to believe the Defendant was engaged in criminal activity. Trooper Kilpela did not rely on any single, one factor to infer that there was criminal activity afoot during the stop of the Defendant in this case, but rather on the totality of what he physically saw, the things he smelled, the things that the Defendant said to him, and the manner in which those things were said. The circumstances presented, coupled with the training and experience of the Trooper, indicate that the Defendant was engaged in activity that was illegal.

(*Id.* at 10.)

The district court also made detailed findings of fact explaining the interaction between Trooper Kilpela and Noli after the traffic stop was concluded where he asked for her consent to search the vehicle. (*Id.* at 5-6.) Based on these detailed findings, the district court concluded Noli voluntarily and knowingly consented to the search of her vehicle. (*Id.* at 11-13.)

Based on the totality of the circumstances, Trooper Kipela obtained consent to search the vehicle voluntarily and knowingly from the Defendant. He informed her that she had the right to refuse consent; explained to her he did not want her to feel pressured or coerced into giving consent; wanted her to know that she did not have to consent; she was not threatened; and she was advised she could ask him to stop the search at any time. The Defendant asked reasonable questions relating to the search request by the Trooper indicating she had above-average intelligence when it came to the issue of searches, such as when she questioned why the Trooper would want to search the vehicle after she was pulled over for driving in the left lane. Trooper Kilpela was not threatening and, in review of the video

evidence from the patrol vehicle, Trooper Kilpela did not display aggression towards the Defendant each time she changed her mind about consent.

(*Id.* at 13.)

III. The guilty plea and sentence

After Noli's motion to suppress was denied, Noli changed her plea to guilty and reserved her right to challenge the district court's denial of her motion to suppress. (Docs. 54, 56.) The district court sentenced Noli to six months, all suspended, for the misdemeanor paraphernalia conviction and deferred the imposition of sentence for three years on the felony drug possession charge.

(Doc. 62 at 2.)

SUMMARY OF THE ARGUMENT

Trooper Kilpela lawfully stopped Noli. Nothing in the record shows that Trooper Kilpela's general conversation with Noli or his request for her to sit in his front seat expanded the scope of the stop. Noli does not address the stop's brief duration and the record shows Trooper Kilpela diligently pursued his investigation of the uncontested traffic offense. Trooper Kilpela had legitimate public safety justifications for asking Noli, who willingly agreed, to accompany him to the front

seat of his patrol vehicle, and the law does not prohibit an officer from engaging a driver in general conversation during a lawful stop.

Although the district court did not need to find Trooper Kilpela had a particularized suspicion to expand the scope of the stop, its conclusion was correct. The district court made detailed factual findings based on the record that the things Trooper Kilpela observed, smelled, and heard during the brief stop provided him with a particularized suspicion that Noli may possess illegal drugs. Based on his extensive training and experience, Trooper Kilpela explained in detail how the combination of factors presented to him supported the district court's conclusion and the denial of Noli's motion to suppress.

At the conclusion of the traffic stop, Trooper Kilpela returned Noli's documents and told her she was good to go. Trooper Kilpela's subsequent conversation with Noli was an objectively voluntary exchange with no exercise of force or formal arrest by Trooper Kilpela. Noli intelligently and willingly engaged Trooper Kilpela in his request to search her vehicle, even questioning his purpose. The totality of the circumstances show Trooper Kilpela did not coerce Noli to consent. Rather, Trooper Kilpela repeatedly explained his purpose, repeatedly confirmed that Noli verbally consented before he searched her vehicle, told Noli she could refuse, and told Noli that she could ask him to stop at any time.

The district court's denial of Noli's motion to suppress should be affirmed.

ARGUMENT

I. The district court correctly denied Noli’s motion to suppress based on the scope of the stop.

A. Standard of review

This Court “independently review[s] a trial court’s denial of a motion to suppress evidence to determine whether the trial court’s findings of fact are clearly erroneous and whether its conclusions of law are correct.” *State v. Bailey*, 2021 MT 157, ¶ 18, 404 Mont. 384, 489 P.3d 889. “A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if this Court has a definite or firm conviction that the trial court committed a mistake.” *Id.*

B. Trooper Kilpela did not expand the scope of the stop beyond what was reasonable to address the uncontested traffic offense.

“The Fourth Amendment to the United States Constitution and Article II, Section 11, of the Montana Constitution prohibit unreasonable searches and seizures.” *Bailey*, ¶ 20. “The purpose of these provisions is not to eliminate all contact between the police and citizenry, but rather to prevent arbitrary and oppressive government interference with individual privacy and security.” *Id.* (quotations and citations omitted). “Because of these protections, ‘government searches and seizures must generally occur pursuant to a judicial warrant issued on

probable cause.’” *Bailey*, ¶ 20 (quoting *City of Missoula v. Kroschel*, 2018 MT 142, ¶ 10, 391 Mont. 457, 419 P.3d 1208).

It is well established that “[a] temporary investigative stop is a recognized exception to the warrant requirement.” *Bailey*, ¶ 21 (quoting *Kroschel*, ¶ 11; Mont. Code Ann. §§ 46-5-401, -403 (2017)).

Under this exception, a law enforcement officer may briefly stop and detain a person for investigative purposes without a warrant or probable cause for an arrest if, 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.

Bailey, ¶ 21. Noli does not dispute that Trooper Kilpela had a particularized suspicion to initiate a traffic stop. However, “[s]uch a stop may last only as long as is reasonably necessary to confirm or dispel the predicate suspicion for the stop, and law enforcement’s means of detainment and investigative questions may not exceed the scope of the predicate suspicion for the stop.” *Id.*

Noli challenges the scope of the stop, but she fails to address its brief duration, which was only 13 minutes from the moment Noli stopped to the moment Trooper Kilpela provided Noli a warning and returned her documents. The touchstone of the Fourth Amendment and article II, section 11, is reasonableness. *See State v. Pham*, 2021 MT 270, ¶¶ 2-10, 406 Mont. 109, 497 P.3d 217. Noli does not point to any authority to argue this duration was unreasonable, because it was

not. *Compare State v. Maile*, 2017 MT 154, ¶ 28, 388 Mont. 33, 396 P.3d 1270 (a 30-minute stop at a game-check station was a reasonable duration to perform the necessary investigation for the stop); *with State v. Zeimer*, 2022 MT 96, ¶ 15, 408 Mont. 433, 510 P.3d 100 (officers unreasonably prolonged a DUI stop when they failed to investigate DUI until 20 minutes into the stop, which continued for more than 47 minutes).²

Instead, Noli argues Trooper Kilpela unreasonably expanded the scope of the stop despite its brief duration. *But see Zeimer*, ¶ 45 (unrelated questioning does not exceed the scope, purpose, or duration of the stop so long as it does not “substantially prolong the duration of the stop” beyond reasonable necessity) (citing *State v. Snell*, 2004 MT 269, ¶¶ 16-17, 323 Mont. 157, 99 P.3d 191; *State v. Clark*, 2008 MT 419, ¶¶ 24-25, 347 Mont. 354, 198 P.3d 809; *Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *Florida v. Royer*, 460 U.S. 491, 502 (1983)). Neither Trooper Kilpela’s request for Noli to sit in his patrol vehicle nor the general conversation substantially prolonged the duration of the stop. *See Zeimer*, ¶ 45. Under the circumstances of this case, it was reasonable for Trooper Kilpela to ask Noli to accompany him to the front seat of his patrol vehicle.

²Like the United States Supreme Court, this Court has not placed a rigid time limit on the reasonable duration of an investigatory stop. *See, e.g., United States v. Sharpe*, 470 U.S. 675, 685-86 (1985) (a rigid time limitation is unwise and undermines the government’s ability to react to the demands of any situation).

This Court’s opinion in *Bailey*, ¶ 37, is instructive. In *Bailey*, ¶ 2, an officer received a report of a single-vehicle crash on a rural road and with beer cans on the ground. It was December and the road was rutted with snow and ice. *Id.* ¶ 3. On his way to the site, the officer stopped a vehicle that was significantly damaged and matched the reported description. *Id.* ¶ 4. The driver exited the vehicle. *Id.* The officer did not believe the driver’s story based on the circumstances and was concerned that the driver may have been impaired due to the beer cans at the scene. *Id.* ¶ 5. The officer asked the driver to sit in the back of his patrol vehicle for three reasons: (1) while investigating the crash, he could more conveniently ask questions and enter them in the patrol vehicle computer; (2) it was cold and he did not want himself or the driver to be outside; and (3) he was concerned the driver may be impaired and he could more easily smell alcohol in his patrol vehicle. *Id.* ¶ 6. The officer’s primary concern was for the health and safety of himself and the driver. *Id.*

This Court explained the officer’s request for the driver to sit in the back of his patrol vehicle was reasonable, because the “determinative reason” was to ensure his safety and that of the driver “given the time of day and the road and weather conditions.” *Id.* ¶ 37 (citing *Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (noting that an officer’s mission during a traffic stop is to (1) “address the traffic violation that warranted the stop” and (2) “attend to related safety concerns”); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (holding that any

inconvenience to a driver in being asked to step out of his vehicle is outweighed by the public interest supported by allowing the practice—namely, officer and traffic safety); accord *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997)). This Court distinguished its decision in *State v. Roy*, 2013 MT 51, ¶ 13, 369 Mont. 173, 296 P.3d 1169, where “this Court declined to apply the rule from *Mimms* and *Wilson* because the officer’s rationale in asking the defendant to exit his vehicle was not due to an accepted public policy reason underlying the *Mimms* rule, such as public or officer safety.” *Bailey*, ¶ 37.

Here, Trooper Kilpela provided various reasons to ask Noli to sit in the front seat of his patrol vehicle, including officer safety. Like the officer in *Bailey*, ¶ 6, the stop in this case occurred on a cold winter day (February in Dawson County). Snow covered the ditches and steam funneled out of the exhaust of Noli’s vehicle. Trooper Kilpela did not want himself or Noli to be unnecessarily exposed to the cold. The stop did not occur at night on a rural road, but it did occur on Interstate 94 with traffic traveling at or around 80 miles per hour, and Trooper Kilpela explained it is safer to minimize time standing on the side of the interstate. Like the officer in *Bailey*, ¶ 6, Trooper Kilpela offered other justifications for asking Noli to accompany him to his vehicle, but his concern for public safety is an accepted public policy reason that supports the application of this rule. See *Bailey*, ¶ 37.

This conclusion is further supported by the absence of any coercion, force, or threats by Trooper Kilpela to compel Noli into the front seat of his patrol vehicle. *Id.* ¶¶ 37-38.

Trooper Kilpela: I can try looking that up on my computer too. You don't have any weapons on you do you, Nicole?

Noli: No, I don't.

Trooper Kilpela: Do you wanna grab your license, then you can just hop in my front seat of my car. I'll fill you out a warning.

Noli: Ok.

Trooper Kilpela: Then I don't have to stand out here in the cold.

Noli: Ok.

Trooper Kilpela: Sound good?

Noli: Yep.

(*Id.* at 2:55-3:15.) Noli cannot persuasively argue that she did anything but agree to accompany Trooper Kilpela to his patrol vehicle.

It is also unpersuasive for Noli to argue that Trooper Kilpela's general conversation with her about travel plans and background information was unreasonable. Neither the United States Constitution nor the Montana Constitution prevent an officer from asking general questions during a traffic stop. Noli provides a list of questions that Trooper Kilpela testified were not necessary to write a warning, but none of those questions were unreasonable things to discuss. As Trooper Kilpela explained, he makes it a point to break from the robotic mold of a

typical traffic interaction. Nothing in the record shows Trooper Kilpela was not diligently entering Noli's information in his system, waiting for necessary responses, writing the warning, or otherwise diligently performing a necessary investigation into the traffic offense. Trooper Kilpela did not unreasonably expand the scope of the investigatory stop by engaging Noli in conversation. *See Zeimer*, ¶ 45.

The only authority Noli relies on to support this argument is *Pham*, ¶¶ 2-10. However, that case has little application to the facts in this case, because there was not a lawful traffic stop in that case. Pham had stopped in Miles City to get gas and food. *Id.* ¶ 2. At the same time, three officers stopped at the gas station who were transporting a van of seized marijuana. *Id.* ¶¶ 2-3. An officer saw Pham in the gas station "continuously staring at the van," so he initiated a conversation. *Id.* ¶ 4. Despite Pham's difficulty with the English language, the officer persisted, and he was later joined by another officer. *Id.* ¶¶ 4-9. This conversation extended outside to Pham's vehicle. *Id.* Officers testified that Pham voluntarily opened his trunk where they discovered 19 pounds of marijuana. *Id.* ¶ 9.

Pham moved to suppress the marijuana based on an illegal seizure, which was denied. *Id.* ¶ 10. Pham appealed, and this Court reversed. *Id.* ¶¶ 1, 10, 23. The sole issue in that case was whether Pham had been seized. *Id.* ¶ 12. That is not the issue in this case because Noli was seized based on the particularized suspicion that she had committed a traffic offense. *See Bailey*, ¶ 21; *Roy*, ¶ 15 (stopping a

vehicle for an investigative stop is a permissible seizure justified by a particularized suspicion). Without a valid traffic stop, this Court's analysis in *Pham*, ¶¶ 12-22, does not support Noli's argument in this case.

Finally, Trooper Kilpela's check of the VIN number on the vehicle and brief conversation with the passenger was within the scope of the investigatory stop. Trooper Kilpela testified that he checks the VIN number on any rental vehicle he stops to make sure it matches the vehicle registration. Noli provides no authority or logic to explain why this is inappropriate. While Trooper Kilpela checked the VIN number and briefly thereafter, he spoke with the passenger for 35 seconds. Nowhere in Mont. Code Ann. § 46-5-401(2)(a), or any other authority, is an officer precluded from speaking with a passenger. This conversation was not an unreasonable expansion of the investigatory stop, because Trooper Kilpela merely asked the passenger to put the rental documents back in the glove box, reminded her that traveling in the left lane was a traffic violation, and asked her a few questions about their trip. *See Zeimer*, ¶ 45.

Noli has failed to show that Trooper Kilpela's conduct substantially prolonged the duration of the stop or unreasonably expanded the scope beyond the purpose of the investigatory stop. *Id.* On these grounds alone, the district court's denial of Noli's motion to suppress was correct. *See State v. Ellison*, 2012 MT 50, ¶ 8, 364 Mont. 276, 272 P.3d 646 (This Court will affirm the lower court when it

reaches a legally correct result even if it reached the right result for the wrong reason).

C. Although the scope of the investigatory stop was reasonable to address the traffic offense, the district court correctly found Trooper Kilpela had a particularized suspicion that Noli may have possessed illegal drugs.

Trooper Kilpela did not unreasonably expand the scope of the investigatory stop, so the district court did not need to conclude that Trooper Kilpela had a particularized suspicion of additional criminal activity. However, the district court's conclusion is correct because the totality of the circumstances supported Trooper Kilpela's particularized suspicion that Noli may possess illegal drugs in her vehicle.

A traffic stop “may not last longer than is necessary to effectuate the purpose of the stop.” Mont. Code Ann. § 46-5-403. However, once a lawful stop is made, an officer's suspicions may become further aroused and justify the expansion of the investigation pursuant to those suspicions. *Hulse v. Motor Vehicle Div.*, 1998 MT 108, ¶ 40, 289 Mont. 1, 961 P.2d 75.

A particularized suspicion of criminal activity exists when the State shows: “(1) objective data and articulable facts from which an experienced officer can make certain inferences, and (2) a resulting suspicion that the occupant of a certain vehicle is or has been engaged in wrongdoing or was a witness to criminal activity.” *City of Helena v. Brown*, 2017 MT 248, ¶ 9, 389 Mont. 63, 403 P.3d 341.

The experience of the officer is an important element that courts should consider in their determination of the existence of particularized suspicion. *State v. Gopher*, 193 Mont. 189, 193, 631 P.2d 293 (1981). Particularized suspicion requires the evaluation of the totality to the circumstances and the “quantity, substance, quality, and degree of reliability of information known to the officer.” *State v. Wilson*, 2018 MT 268, ¶ 28, 393 Mont. 238, 430 P.3d 77.

As the district court meticulously illustrated in its order, Trooper Kilpela did not merely rely on a few innocuous things to form a particularized suspicion that Noli may possess illegal contraband in her vehicle. It was a panoply of circumstances that were informed by his participation in several hundred traffic offenses—only a small percentage of which escalated to drug trafficking charges. Based on Trooper Kilpela’s extensive training and experience, he picked up on the consistencies between those stops and the circumstances in this case to support his particularized suspicion that Noli may have illegal drugs in her vehicle.

The circumstances, as explained by Trooper Kilpela and relied on by the district court included: Noli had an abnormally heightened nervousness for a traffic warning that increased throughout the stop; Noli was taking short breaths, rubbing her face, avoiding eye contact, and constantly looking at the rental car; Noli inconsistently responded to simple questions; Noli repeated “definitely” multiple times in response to questions, which confused the dialogue with Trooper Kilpela

and indicated deception; rolling papers were in plain view on the center console; the passenger had heightened nervousness despite having no liability for a driving violation; there was excessive cigarette smoke in the vehicle, which is often used to cover up the odor of drugs; the passenger lit a prepackaged cigarette during her brief conversation with Trooper Kilpela while ignoring the rolling papers; Noli and the passenger gave differing accounts of the travel plan; the vehicle showed indications of hard travel with blankets and trash; drug traffickers often use rental vehicles to avoid recourse on personal assets; the long-distance trip was made with a short travel time from Las Vegas to a destination known to Trooper Kilpela for illegal drug trafficking; and the week prior Trooper Kilpela had discovered illegal contraband in a vehicle traveling from Nevada to North Dakota.

The district court correctly found these facts, based on the totality of these circumstances, supported its conclusion that Trooper Kilpela had a particularized suspicion that Noli was engaged in criminal activity beyond the traffic offense.

(Doc. 43 at 7-11.) As the district court explained:

Trooper Kilpela did not rely on any single, one factor to infer that there was criminal activity afoot during the stop of the Defendant in this case, but rather than the totality of what he physically saw, the things he smelled, the things that the Defendant said to him, and the manner in which those things were said.

(*Id.* at 10.)

The district court found the facts in this case were closer to those in *State v. Hurlburt*, 2009 MT 221, 351 Mont. 316, 211 P.3d 869, and *State v. Estes*, 2017 MT 226, 388 Mont. 491, 403 P.3d 1249, than those in *Wilson*, ¶¶ 2-9. In *Hurlburt*, ¶ 22, this Court affirmed an officer had particularized suspicion for additional criminal activity based on the officer’s observations that the driver was “nervous, shaking, very uneasy, and 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.” The district court specifically found that Trooper Kilpela’s testimony was reliable and included “many of the same observations as the Trooper in *Hurlburt*.” (Doc. 43 at 8.)

The district court acknowledged that this Court in *Wilson*, ¶ 34, explained that particularized suspicion cannot be based on merely “generalized hunches.” (Doc. 43 at 9.) But the district court properly weighed the facts in this case, which were based on Trooper Kilpela’s reliable and experienced testimony, to find they were more similar to *Hurlburt* and *Estes* than *Wilson*. Noli downplays the facts and argues the district court clearly erred in its findings. (Appellant’s Brief (Br.) at 32-35.) But possibly interpreting the facts a different way is not clear error. *Bailey*, ¶ 18. It is the district court’s duty to make findings based on its first-hand view of the evidence and draw the conclusions necessary to rule. *See Hurlburt*, ¶ 40 (“The weight of evidence and the credibility of witnesses are exclusively within the

province of the trier of fact, and this Court does not reweigh the evidence or the credibility of witnesses.”).

The district court’s factual findings were not in clear error, because everything Noli lists in her brief is based on Trooper Kilpela’s testimony or the video of the stop. (*See* Br. at 33-34.) Noli did not know the name of the town she stayed in near Idaho Falls. (State’s Ex. 3 at 6:00-6:10.) Noli thought she went through Wyoming but was not sure. (*Id.* at 5:00-5:15.) The last four district court findings that Noli identifies are either based on Trooper Kilpela’s interpretation of the facts or admittedly in his testimony. (*See* Br. at 33-34.) The only potential confusion Noli identifies is the difference between the findings of fact where the district court said the rental was for “approximately four to five days” and its analysis, which says the rental was for two days. (Doc. 43 at 4, 8.) However, this minor inconsistency does not amount to clear error. *See Bailey*, ¶ 18.

The district court made detailed factual findings to support its conclusion that Trooper Kilpela had a particularized suspicion to expand the scope of the stop to a drug investigation. Noli’s argument boils down to the existence of this Court’s opinion in *Wilson*. However, Noli fails to account for the lack of evidence in *Wilson*, ¶ 35, to tie the officer’s suspicions to illegal drug activity. Here, Trooper Kilpela provided testimony consistent with the officers in *Hurlburt* and

Estes and explained in detail why the indicators he picked up on correlated to Noli's possession of illegal drugs.

The district court correctly concluded, pursuant to detailed findings of fact, that Trooper Kilpela's testimony and the video evidence provided Trooper Kilpela with a particularized suspicion that Noli may possess illegal drugs in her vehicle.

II. The district court correctly concluded that Noli voluntarily consented to the search of her rental vehicle after the traffic stop had completed.

A. The conversation Trooper Kilpela had with Noli after he completed the traffic offense was a voluntary exchange.

In *Snell*, ¶ 3, an officer stopped a driver for speeding. The driver produced his license and registration but could not locate proof of insurance. *Id.* The officer instructed the driver to locate it and bring it to his car. *Id.* As the officer checked the driver's other credentials, the driver got into the officer's patrol vehicle and told him he could not locate proof of insurance. *Id.* The officer cited the driver for failure to carry insurance. *Id.* The officer questioned the driver about various subjects as he wrote the citation. *Id.* After he issued the citation, he asked for consent to search the vehicle. *Id.* The driver consented and verified everything in the vehicle was his. *Id.*

The driver challenged the basis of consent to search a vehicle without probable cause and argued any detention after he was issued the citation was

illegal. *Id.* ¶¶ 11, 20. This Court rejected the driver’s first argument and held that during a valid traffic stop “Montana law does not require additional justification for requesting consent.” *Id.* ¶ 17.

To determine whether the driver was illegally detained, this Court considered whether a reasonable person in his situation would believe they were free to go based on the totality of the circumstances. *Id.* ¶ 25 (applying *State v. Merrill*, 2004 MT 169, ¶ 3, 322 Mont. 47, 93 P.3d 1227 and *State v. Hill*, 2004 MT 184, ¶ 5, 322 Mont. 165, 94 P.3d 752, which both resulted in affirmed voluntary consent decisions). This Court noted the circumstances differed from *Merrill* and *Hill* because the driver “was sitting in [the officer’s] patrol car and [the officer] did not expressly state that [the driver] was free to go or the matter was done.” *Id.* ¶ 25. However, this Court said no evidence indicated the officer ordered the driver to stay or showed an attempt to restrain or prevent the driver from leaving. *Id.* This Court held, “that the post-stop interaction between [the officer] and [the driver] was a voluntary exchange rather than an illegal detention or an unlawful seizure.” *Id.*

This Court clarified further that the officer’s interaction with the driver after the stop completed did not violate Mont. Code Ann. § 46-18-403 or *State v. Martinez*, 2003 MT 65, 314 Mont. 434, 67 P.3d 207, “because it was ‘neither a subsequent investigatory stop nor an extension of the first one,’ but a voluntary

encounter.” *Snell*, ¶ 27 (quoting *Merrill*, ¶ 17). “The requirement that an officer have additional justification to detain an individual after completing a traffic stop—as set forth in *Martinez* and § 46-5-403, MCA—applies only when an individual is actually detained.” *Snell*, ¶ 27.

Here, after Trooper Kilpela completed the warning, he gave it to Noli, and confirmed that Noli received her documents. Trooper Kilpela said she was “good to go.” (State’s Ex. 3 at 14:40-15:00.) After the stop was completed, Trooper Kilpela needed no additional justification to request consent to search Noli’s vehicle. *See Snell*, ¶ 17. Further, Trooper Kilpela’s subsequent conversation with Noli and request to search her vehicle was a voluntary exchange. *Id.* ¶ 27.

A reasonable person in Noli’s position would have felt free to leave. *See Snell*, ¶ 25. Like this Court explained in *Snell*, ¶ 25, no evidence here indicated Trooper Kilpela ordered Noli to stay or showed an attempt to restrain or prevent her from leaving. Noli was in the front seat of Trooper Kilpela’s patrol vehicle. *See id.* Noli would have that fact alone be determinative, but it is not. *Id.* The facts here are even more compelling than those in *Snell*, ¶ 25, because Trooper Kilpela expressly told Noli she was good to go. Any argument that Trooper Kilpela’s questioning was coercive is undermined by Noli’s willingness to freely engage with him, even questioning his purpose. Noli does not address *Snell* or otherwise provide an argument that would support distinguishing it from the facts in this case.

For similar reasons, this Court should reject Noli’s argument that her conversation with Trooper Kilpela violated *Miranda*. “[T]here is no requirement that *Miranda* warnings be given prior to a request for consent to search.” *Hurlburt*, ¶ 34. “A *Miranda* warning is required only if the defendant is subject to custodial interrogation.” *State v. Braulick*, 2015 MT 147, ¶ 16, 379 Mont. 302, 349 P.3d 508. An encounter is only custodial if there was objectively “a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” *Maile*, ¶ 12.

Noli’s reliance on *Kroschel* and *State v. Morrissey*, 2009 MT 201, 351 Mont. 144, 214 P.3d 708, is misplaced because those cases are substantially different factually. In *Kroschel*, ¶¶ 2-6, a young woman was forcefully removed from a football game, questioned by a first officer, questioned by a second officer, then moved to a secluded room, separated from a friend and questioned again by both officers—alone and in tears. In *Morrissey*, ¶ 15, a uniformed officer stopped a homicide suspect. During the stop, two plain-clothed officers served a search warrant on the suspect and asked him to sit in the caged back seat of a patrol car. *Id.* The suspect was transported to his house where multiple officers searched his house and vehicles. *Id.* ¶ 16.

At no point was Noli restrained in a manner consistent with the suspects in *Kroschel*, ¶¶ 2-6, and *Morrissey*, ¶ 15, and the facts here do not objectively indicate a restraint consistent with a formal arrest. Noli freely engaged in conversation with

Trooper Kilpela and the record includes no attempt by Trooper Kilpela to attempt to arrest, restrain or prevent her from leaving.

B. Noli's consent to the search of her vehicle was voluntary.

“This Court has adopted the United States Supreme Court’s totality-of-the-circumstances test for determining whether consent was given freely, voluntarily and without duress or coercion.” *Hurlburt*, ¶ 46 (citations omitted). “A number of questions are pertinent to this inquiry, such as whether they were in custody or under arrest at the time consent was requested; whether consent was sought after the search had already been conducted; whether they were expressly informed that they had the right not to consent to the search; whether they were told that a search warrant could be obtained; whether they were advised of their constitutional rights; and whether they were threatened or coerced in any manner.” *Id.*

“Also pertinent to the inquiry is information regarding the repeated and prolonged nature of the questioning, and their age, education, and intelligence.” *Id.* One factor is whether the accused is advised of their *Miranda* rights, but this is only a factor to consider, not a requirement. *Id.* ¶ 47. “In the end, the determination of whether consent was given freely, voluntarily, and without duress or coercion depends on the totality of all the surrounding facts, and no single fact is dispositive.” *Id.*

Noli's only argument is that Trooper Kilpela coerced her to consent with confusing questions. (Br. at 38-43.) Noli does not address any of the other pertinent inquiries that impact the voluntariness of her consent. *See Hurlburt*, ¶¶ 46-47. Noli was not under arrest or illegally detained while Trooper Kilpela asked her for consent to search her vehicle, Noli intelligently participated in the conversation, Trooper Kilpela did not start the search until Noli repeatedly confirmed that she consented to the search, and he expressly informed Noli that she did not need to consent to the search of her vehicle. *Id.*

Noli argues being in the front seat of Trooper Kilpela's patrol vehicle is inherently coercive, but that is inconsistent with the circumstances. Noli agreed to accompany Trooper Kilpela to the front seat of his patrol vehicle where she sat with an unlocked door while he completed the warning. As the district court noted, after the stop concluded, Trooper Kilpela told her she was "good to go" and then began his first question with "can I ask you." (Doc. 43 at 12.) Noli answered Trooper Kilpela's questions and freely engaged in a conversation. At no point did Trooper Kilpela restrain Noli or tell her she was not free to leave.

Noli argues Trooper Kilpela confused her. (Br. at 40-42.) Although the conversation may show Noli is conflicted at times, she does not seem confused. Noli intelligently participated in the conversation throughout, willingly responded to Trooper Kilpela's questions, and asked questions of her own. Noli takes

comments out of context to generally characterize the conversation as showing a lack of understanding from both Noli and Trooper Kilpela. (Br. at 40.) The only thing Noli said she did not understand is why Trooper Kilpela asked to search the vehicle. She consistently affirmed she understood his request and none of her comments indicate she did not knowingly consent. The only time Trooper Kilpela said he did not understand was regarding Noli's inconsistent statements about having marijuana in the car. This inconsistency demanded clarification.

Almost immediately, Noli told Trooper Kilpela that she had weed in the car. Then she said she did not have weed in the car. Then she said she had an open beer in the car. This all happened before Noli changed course and said she did not consent. Prior to that, Noli told Trooper Kilpela four times that he could search the car. The prompt for her retraction was Trooper Kilpela's request to sign the written consent form. After Trooper Kilpela told Noli she did not have to sign the form, Noli reiterated three times that she verbally consented to Trooper Kilpela's request to search the vehicle.

Noli argues that Trooper Kilpela threatened her when he said he was going to run the drug dog around the vehicle. But this was only after she gave him inconsistent responses to having marijuana in the vehicle—first she said she did, then she said she did not. It is not a threat to notify a person how the investigation is going to proceed. Noli's marijuana comments, in addition to the rolling papers

and all the factors Trooper Kilpela observed during the stop, arguably provided a particularized suspicion to support the use of the drug dog. That determination is unnecessary here because Trooper Kilpela did not take that step, but Noli argues that would have been the legally correct route as opposed to continuing the consent conversation. However, Noli ignores that she chose to continue the conversation with her immediate response, “You can search the car. If you’re going to do all that, go ahead and search the car.” (State’s Ex. 3 at 19:50-20:00.)

Trooper Kilpela responded. He informed Noli he did not want her to feel like he was coercing her, and she affirmed she understood. Trooper Kilpela told Noli that she did not have to consent, and she affirmed she understood. Trooper Kilpela told Noli she did not have to sign the written consent, which she did not sign. But before Trooper Kilpela searched Noli’s vehicle he verbally confirmed with Noli three more times that she did in fact consent and told her that she could stop the search at any time. The totality of the circumstances show Trooper Kilpela ensured Noli understood his request and was voluntarily consenting to the search of her vehicle.

The district court correctly relied on the totality of these circumstances to conclude that Noli’s consent was knowing and voluntary. (Doc. 43 at 11-13.) The denial of Noli’s motion to suppress should be affirmed.

CONCLUSION

The State respectfully requests this Court affirm Noli's conviction and sentence.

Respectfully submitted this 28th day of July, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 9,942 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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CERTIFICATE OF SERVICE

I, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-28-2022:

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