STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

STATE OF NEW HAMPSHIRE
v.
BRIAN JOSEPH PEREZ

218-2018-CR-334

STATE OF NEW HAMPSHIRE
v.
JOSE MARIO MELENDEZ

218-2018-CR-335

ORDER

The matters before the court are the defendants' motions to suppress. The motions are GRANTED with respect to all evidence obtained and derived from the consent search of the motor vehicle in which the defendants were travelling. The request for the search altered the fundamental nature of the traffic stop and was not supported by reasonable and articulable suspicion.

The court apologizes to the parties for the delay in issuing this order.

I. The Stop

(A) Facts Relating To The Stop

Defendants Brian Perez and Jose Melendez were travelling from Connecticut to Maine on Interstate 95 when they were pulled over by State Trooper Michael Arteaga. Melendez was driving. Perez was the only passenger. They were travelling in a Cadillac sedan that belonged to Melendez's ex-wife. Melendez had permission to use the car.

Trooper Arteaga pulled the Melendez/Perez vehicle over at approximately 6:30 pm on a weekday in early March, 2018. Based on the calendar, the court takes judicial notice that it was dusk, just before sunset. The traffic was light. The weather was good.

Trooper Arteaga first noticed the vehicle as it was leaving the Hampton tolls. The trooper was in an unmarked cruiser, in a small parking lot, parked perpendicular to the highway. He was assigned to the State Police Mobile Enforcement Team ("MET"). The MET is tasked with detecting serious crimes on the highways, such as drug trafficking and human trafficking.

Trooper Arteaga had no prior information about Melendez, Perez, the Cadillac or anybody associated with the vehicle. Indeed, at the time Melendez and Perez drove past his cruiser, the trooper had no information from any agency about any vehicle that might be on I-95 at that time. Trooper Arteaga was simply observing traffic, waiting for either a BOLO or a suspicious vehicle.

The trooper testified that his attention was drawn to the to the Melendez/Perez vehicle because Perez, the passenger, was reclined far back in his seat, making it difficult for Arteaga to view his face from the side of the road. Arteaga found this somewhat suspicious. The court does not.

Arteaga also noticed that the driver had his hands at "ten and two" on the wheel, as drivers are trained to do. The trooper found this to be "odd" and concerning in light of his other observations. The court sees nothing "odd" about Melendez's grasp of the wheel. As the U.S. District Court recently observed in another case involving Trooper Arteaga:

> [T]he court finds it difficult to credit—and therefore to defer to—the Trooper's testimony about what facts he found suspicious, especially

> where he testified that [the defendant's] hands on the steering wheel at "ten and two" bolstered his suspicion of criminality. Drivers are taught to drive with their hands on the wheel at "ten and two." [citation omitted]. Were [the defendant's] hands in a position other than "ten and two" and in some way not visible to the Trooper, the Trooper could have used that fact to support a concern that [the defendant] was hiding his hands from the Trooper's view. . . . The bottom line here is that the Trooper's use of these kinds of neutral or innocent facts to support his suspicion of criminality draws into doubt the credibility of his reliance on other facts to support his suspicion of [the defendant's] criminal activity.

Hernandez, 2019 WL 2992045, at *8 (D.N.H. July 9, 2019).

Finally, Trooper Arteaga noted that neither the driver nor the passenger looked in his direction as they were driving. The trooper speculated that they might have been attempting to avoid being noticed by law enforcement. However, the trooper was in an unmarked cruiser, in a parking lot, off the highway, and it was dark outside. The court does not see anything noteworthy about the fact that neither Melendez nor Perez looked towards the trooper's vehicle.

The court also notes that there is a certain "heads-I-win-tales-you-lose quality" to treating the driver's and passenger's reactions to the unmarked vehicle as suspicious. Had either the driver or passenger, or both, turned to face the trooper's vehicle, he could have speculated that they appeared hypervigilant about being observed by the police. Had either looked towards the trooper and then away from the trooper, he could have speculated that they recognized him to be a police officer and then tried to blend in with traffic. What permutation does not fit the profile?[1]

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[1] See generally, U.S. v. Broomfield, 417 F.3d 654, 655 (7th Cir. 2005) (Posner, J) ("Gilding the lily, the officer testified that he was additionally suspicious because when he drove by [the defendant] in his squad car before turning around and getting out and accosting him he noticed that [he] was 'staring straight ahead.' Had [the defendant]

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Based on these facts, Trooper Arteaga drove onto the highway and approached the Melendez/Perez vehicle. He then ran its license plate. The plate was from Connecticut. The car was legally registered to a female although both occupants appeared to be male.

The trooper then continued to follow the Cadillac. It was going approximately 67 or 68 miles per hour in a posted 65 mph speed limit. But it continued at that speed after the posted speed limit was reduced to 50 mph. The driver also moved left two lanes, using his signals but starting them too late, after the lane changes had begun.

The trooper then turned on his blue lights and signaled for Melendez to pull over. Melendez pulled over without incident.

(B) Legal Analysis Of The Stop

When a motor vehicle is pulled over by a police officer, both the driver and any passengers are "seized" within the meaning of Part 1, Article 19 of the New Hampshire Constitution and the Fourth Amendment. State v. Hunt, 155 N.H. 465, 470 (2007); Whren v. United States, 517 U.S. 806, 809 (1996); Delaware v. Prouse, 440 U.S. 648, 653 (1979).

Continued from previous page

instead glanced around him, the officer would doubtless have testified that [he] seemed nervous or, the preferred term because of its vagueness, 'furtive.' Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited." (internal bracketing omitted)).

In order to survive constitutional scrutiny, a traffic stop must be supported by reasonable and articulable suspicion of either a motor vehicle infraction or criminal activity. State v. Hight, 146 N.H. 746, 748 (2001); see also, State v. McKinnon-Andrews, 151 N.H. 19, 25–26 (2004); Terry v. Ohio, 392 U.S. 1, 21 (1968).

In this case, the initial stop was plainly constitutional because the trooper observed two motor vehicle infractions, i.e. speeding (RSA 265:60) and making lane changes without first signaling (RSA 265:45).

* * *

While that is the end of the legal analysis for this particular stop, it is not the end of the discussion. Neither Melendez nor Perez has challenged the State Police policy under which the stop was made. Therefore, the factual record regarding that policy is sparse and the legality of that policy has not been briefed. Nonetheless, because tunnel vision is to be avoided, the court looks beyond the quotidian nature of the stop and considers the extraordinary policy behind it.

As noted above, Trooper Arteaga was assigned to the Mobile Enforcement Team which focuses its efforts on detecting felony level crimes on the highways. That assignment meant that Arteaga was not concerned with issuing tickets and warnings for minor motor vehicle violations. Rather, in the absence of reasonable suspicion from other law enforcement officers that a particular vehicle is connected with a crime, a MET trooper's job is to stop motor vehicles for objectively reasonable grounds in the hope of developing or dispelling reasonable suspicion of other, more serious crimes.

Put another way, as the court has learned from prior cases, when MET troopers are not responding to BOLOs, they are specifically tasked by the Department of Safety

to make pretextual detentions, sometimes for very minor perceived driving infractions. Thus, for example, in United States v. Garcia, 53 F. Supp. 3d 502 (D.N.H. 2014), a MET trooper, who was parked in the very same spot as Trooper Arteaga was in this case, followed a vehicle on a "hunch," and stayed within the driver's blind spot for three miles, until the vehicle's tires partially transgressed the dotted lane line and then corrected by touching the white fog line, whereupon the trooper stopped the vehicle. Garcia, 53 F. Supp. 3d at 504 (D.N.H. 2014); see also, Hernandez, 2019 WL 2992045 at *1 (Trooper Arteaga was parked near the tolls and decided to stop a vehicle that had a license plate registered to a car rental company (because he opined that rental cars are frequently used for drug trafficking), so he caught up with the vehicle and then noticed that it was speeding and travelling too close to the next vehicle, providing the trooper with objectively reasonable grounds to make the stop); State v. Perkins, 218-2018-CR-00263 (a single pine shaped air freshener hung from the rear view mirror); State v. Lamoureux, 218-2016-CR-00167 (car driving through a section of a rest area designated by sign for trucks); State v. Thurston, 218-2016-CR-00874 (left his turn signal on for approximately twelve seconds while travelling in the left lane); State v. Hach, 218-2017-CR-274 (signaled and safe change from one toll booth lane to another across solid white line); State v. Cotton, 218-2014-CR-00209 (tires veered over the white dotted lane line twice over several miles); State v. Longval, 218-2016-CR-00138 (unsignaled lane change).

When an individual stop is challenged, without reference to the policy under which the stop was made, courts cannot look beyond the pretext and must uphold the stop so long as it is supported by an objectively reasonable rationale. Whren; State v.

McBreairty, 142 N.H. 12 (1997). Put another way, "an officer's motivations are immaterial so long as there exists a valid justification for an investigatory stop." McBreairty, 142 N.H. at 15. "[T]he fact that an officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." Whren, 517 U.S. at 813.

Query, however, whether Whren and McBreairty foreclose the possibility that a sufficiently *de jure* departmental policy of detaining citizens for purely pretextual reasons could be found to be inconsistent with Fourth Amendment and Article 19 "reasonableness." Whren and McBreairty stand for the proposition that it is inappropriate and unnecessary to plumb the subjective motivations of individual officers. But what about the objective policy of the State to exploit Whren and McBreairty by deploying an entire unit to conduct what amounts to rolling spot checks based on hunches? Cf. Opinion of the Justices (Sobriety Checkpoints), 128 N.H. 14 (1986); State v. Koppel, 127 N.H. 286 (1985).

To be sure, this is an inefficient and very imperfect way to make spot checks based on hunches. As the cases cited above demonstrate, sometimes MET troopers must follow a target vehicle for miles before the driver commits an arguable driving infraction. Some target drivers will avoid the spot check altogether by driving perfectly all the way to Maine. Yet, these exceptions prove the rule: The State police have taken the shield that Whren and McBreairty extended to individual traffic stops and turned it into a sword to allow them to get as close to spot checks as possible.

When Whren was followed by Maryland v. Wilson, 519 U.S. 408 (1997), which recognized that the Fourth Amendment does not limit the right of an officer to demand a driver to get out of the car, Justice Kennedy warned that this could "put[] tens of millions of passengers at risk of arbitrary control by the police." Maryland v. Wilson, 519 U.S. at 423 (1997) (Kennedy, J, dissenting). The creation of a specialized unit designed to make pretextual stops, often followed by out-of-the-car questioning, demonstrates that Justice Kennedy's fear was well-founded. All of that said, this is an issue that has not been raised and, therefore, must wait for another day.

II. The Expansion Of The Stop

(A) Facts Relating To The Expansion Of The Stop

The driver, Melendez, pulled the car over without incident. Melendez did not have his license with him, a fact that he discovered after searching through his pockets. Melendez gave Trooper Arteaga his name, date of birth and license number (which he had memorized). The trooper ran a check on this information from his cruiser and there was nothing out of the ordinary. As best he could tell, Melendez was who he purported to be and he was a licensed driver with no warrants. The trooper did not inquire any further into Melendez's identity and he appeared to be satisfied with respect to that issue.

The passenger, Perez, gave the trooper his identification. The trooper confirmed that Perez was also a licensed driver with no warrants.

The trooper asked Perez where he and Melendez were heading. The trooper asked this question while standing at the passenger side window. Perez answered

quietly and possibly out of Melendez's hearing. Perez said that the men were headed to Augusta, Maine. He did not elaborate about their plans.

Perez obtained the vehicle's registration from the glove compartment and handed it to the trooper. The vehicle was registered to a female with a name that was not common to either the driver or the passenger. Trooper Arteaga asked Melendez to step outside the vehicle. The alternative would have been to speak with Melendez from the driver's side window, which would have left the trooper more exposed to oncoming traffic.

Trooper Arteaga then spoke with Melendez outside of the vehicle. Melendez explained that he was driving his ex-wife's car with permission. Melendez then invited the trooper to call his ex-wife. Trooper Arteaga declined to do so. However, the trooper confirmed that vehicle had not been reported stolen.

The trooper was apparently satisfied with Melendez's answers because he did not inquire any further into (a) Melendez's identity, (b) the identity of the registered owner or (c) Melendez's permission to use the vehicle. The State does not argue that the trooper had any continuing reasonable suspicion regarding those matters.

Prior to asking Melendez to get out of the vehicle, the trooper noticed three cell phones in the passenger compartment. He noted that drug traffickers sometimes use multiple cell phones. Beyond this, Trooper Arteaga did not observe anything else of evidentiary significance. He did not observe any apparent drugs, drug packaging (i.e. plastic "knots" or "tie-offs," plastic bags, etc.), paraphernalia (i.e. aluminum foil, cotton swabs, syringes or syringe covers, pipes, spoons, straws, scales, etc. etc.), masking

agents (i.e. air fresheners or heavy scents), indications of drug use (i.e. track marks, indicia of impairment, etc.) or anything else having to do with illegal drugs.

While Melendez was standing outside the car, Trooper Arteaga asked about his plans for the night. Melendez said they were headed to "Old Port," which is in Portland, not Augusta. Thus, Melendez and Perez gave the trooper conflicting information about their destination. The court takes judicial notice that Portland is approximately 55 miles away from Augusta.

Melendez explained that they were planning to meet up with girls. However, Melendez had a hard time naming any of these "girls," and nervously stated that he thought one of the girls went by the name Tanya. The trooper asked Melendez whether he planned to stay overnight. He said that he was not sure. Given the fact that Melendez would first get to Portland at approximately 8:00 pm, the inchoate nature of his stated plans was noteworthy. The trooper did not observe luggage in the passenger compartment of the Cadillac, but it was a sedan and he did not have a view of the trunk.

Trooper Arteaga then returned to the vehicle where he spoke with Perez about the pair's itinerary. This time Perez told the trooper that they were going to Old Port. When the trooper reminded Perez that he earlier said they were going to Augusta, Perez replied that they were going to Old Port and might then go to Augusta to visit Melendez's ex-wife.

Trooper Arteaga asked Perez why they were going to Old Port. Perez replied that they were going to visit girls. He did not know the girls and told the trooper that the visit to Old Port was Melendez's idea. During this conversation Perez appeared

nervous. He maintained minimal eye contact with the trooper and his shoulders were hunched.

Trooper Arteaga noted that Melendez and Perez had time to communicate with each other while the trooper was running license and registration checks in his cruiser. Therefore, he opined that the two men could have conspired to tell him that they were heading to Portland, despite Perez's earlier statement that their destination was Augusta. The trooper thought that a trip to Augusta would be suspicious because Augusta is a "known drug distribution area."

The trooper next returned to Melendez and told him that there was a "significant confliction" between his account and Perez's account of their plans. Whether the difference between the two accounts was a "significant confliction" or not is in the eye of the beholder. In any event, Melendez became nervous when he was confronted in this manner by the trooper.

The trooper than asked Melendez if Perez placed anything illegal in the vehicle. Melendez responded by saying "I hope not." The trooper responded by asking Melendez point blank whether there was anything illegal in the car. Melendez said "No."

After Melendez told Trooper Arteaga that he was <u>not</u> transporting contraband, the trooper asked if he could search the car for himself. When Melendez did not immediately respond, the trooper repeated the question. Melendez then said, "Yes you can search."

Trooper Arteaga then prepared a written consent to search form which both Melendez and the trooper signed. The form advised Melendez that he was not required to consent to the search. Thereafter, Trooper Arteaga searched the Cadillac.

(B) Legal Analysis Of The Expansion Of The Stop

1. Governing Law

Both the state and federal constitutions limit the scope and duration of investigative traffic stops. However, as explained below, Part 1, Article 19 provides a layer of protection that the Fourth Amendment does not.

Principles Common To Both Constitutions: Under Article 19 and the Fourth Amendment, a traffic stop "must be carefully tailored to its underlying justification . . . must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 500 (1983); see also Rodriguez v. United States, 135 S. Ct. 1609, 1614 (2015); McKinnon-Andrews, 151 N.H. at 22; State v. Michelson, 160 N.H. 270, 274 (2011).

Under both constitutions, the scope and duration of the stop can be expanded to include the investigation of any past, present, imminent or planned criminal activity, or community caretaking need, if the officer happens to stumble across reasonable and articulable suspicion for such matters. See e.g., State v. Sage, 170 N.H. 605 (2018) (stop for speeding was lawfully expanded into a DUI investigation because the officer gained reasonable and articulable suspicion of that offense); State v. Blesdell-Moore, 166 N.H. 183, 187 (2014); Mckinnon-Andrews, 151 N.H. at 25.

"Reasonable suspicion" cannot be defined with mathematical precision. Indeed, it is often defined in terms of what it is not: Reasonable suspicion is more than a hunch but less than probable cause. See, e.g., McKinnon-Andrews, 151 N.H. at 26 ("A reasonable suspicion must be more than a hunch. [citation omitted]. The articulated

facts must lead somewhere specific, not just to a general sense that this is probably a bad person who may have committed some kind of crime. [citation omitted]. The officer's suspicion must have a particularized and objective basis in order to warrant that intrusion into protected privacy rights." (internal citations and quotation marks omitted)); United State v. Sokolow, 490 U.S. 1, 7–8 (1989) ("The officer . . . must be able to articulate something more than an inchoate and unparticularized suspicion or 'hunch'."); United States v. Brown, 500 F.3d 48, 54 (1st Cir. 2007) ("While the reasonable suspicion standard requires more than a visceral hunch about the presence of illegal activity, it requires less than probable cause.").

In deciding whether this "more-than-a-hunch" standard has been met, "the court must keep in mind that a trained officer may make inferences and draw conclusions from conduct that may seem unremarkable to an untrained observer." McKinnon–Andrews, 151 N.H. at 26; see also, United States v. Cortez, 449 U.S. 411, 418 (1981) ("[T] he evidence . . . must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."). However, the phrase "training and experience" is not a talisman that divests the court of its responsibility to make an independent, fact-based determination of reasonable suspicion *vel non*.

Under both constitutions, in the absence of such new reasonable and articulable suspicion, the stop cannot be prolonged beyond its natural duration. Illinois v. Caballes, 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."); Rodriguez, 135 S. Ct. at 1612 ("We

hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures."); Arizona v. Johnson, 555 U.S. at 333; McKinnon-Andrews, 151 N.H. at 25.

The Federal Constitution's "Duration" Test: Under the federal constitution, so long as the stop is not extended beyond its inherent duration, the officer is free to inquire into unrelated matters in an effort to develop reasonable and articulable suspicion. See Arizona v. Johnson, 555 U.S. at 333 ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."); United States v. Fernandez, 600 F.3d 56, 60 (1st Cir. 2010); United States v. Chaney, 584 F.3d 20, 26 (1st Cir. 2009). Thus, under the Fourth Amendment, the scope of questioning is limited only because the duration of the stop is limited.

Also, the Fourth Amendment permits the officer to demand that the driver and all passengers step out of the vehicle for any reason, so long as the traffic stop is not prolonged beyond its natural duration. Arizona v. Johnson, 555 U.S. 323, 331 (2009); see also Pennsylvania v. Mims, 434 U.S. 106, 111 (1977):

> Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both.
>
> . . .[W]e are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car. We think this additional intrusion can only be described as *de minimis*. The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in

> the driver's seat of his car or standing alongside it. . . . What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.

Maryland v. Wilson, 519 U.S. 408, 415 (1997) ("[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop."); Hernandez, 2019 WL 2992045, at *6 (holding that Trooper Arteaga's demand that a driver exit his vehicle violated the Fourth Amendment because it prolonged the natural duration of the traffic stop since the demand was made for purely investigative purposes that were not supported by reasonable suspicion).

The State Constitution's "Fundamental Nature" Test: Under Part 1, Article 19, the scope of police questioning cannot either (a) prolong the duration of the stop or (b) "change the fundamental nature of the stop" in the absence of newly developed reasonable and articulable suspicion. Mckinnon-Andrews, 151 N.H. at 25:

> If the question is reasonably related to the purpose of the stop, no constitutional violation occurs. If the question is not reasonably related to the purpose of the stop, we must consider whether the law enforcement officer had a reasonable, articulable suspicion that would justify the question. If the question is so justified, no constitutional violation occurs. In the absence of a reasonable connection to the purpose of the stop or a reasonable, articulable suspicion, we must consider whether in light of all the circumstances and common sense, the question impermissibly prolonged the detention or changed the fundamental nature of the stop.

(emphasis added and internal bracketing removed).

Thus, for example, in Blesdell-Moore, the New Hampshire Supreme Court held that an officer transgressed Article 19 by asking a driver who was stopped for a defective taillight to stick out his tongue. This request was made to determine whether the driver's tongue was coated in a manner the officer believed could reveal recent marijuana use. The court found that there was no reasonable suspicion for such an

investigation. The court then found that, while inspecting the driver's tongue did not prolong the stop, it did change its fundamental nature:

> Although the brief inspection of the defendant's tongue did not prolong the stop, we conclude that the search altered the fundamental nature of the stop by transforming a routine traffic stop into an investigation of potential drug activity. By asking to see the defendant's tongue, the officer set out to determine whether the defendant had, in fact, consumed or was in possession of marijuana. Although a reasonable motorist may not understand that a green film on the tongue may be indicative of marijuana consumption, he would certainly recognize that the officer's request to see his tongue changed the fundamental nature of an otherwise routine traffic stop.

Blesdell-Moore, 166 N.H. at 190 (internal citation omitted).

To be sure, even under Part 1, Article 19 an officer may engage in "facially innocuous" dialog that the detainees "would not reasonably perceive as altering the fundamental nature of the stop." McKinnon-Andrews, 151 N.H. 25. Such dialog includes, as pertinent to this case, "a few prosaic questions" about the detainees' itinerary. Id., at 28-29 (Broderick, concurring).

Asking a driver or passenger to get out of the vehicle for purely investigative purposes that are unrelated to the initial reason for the traffic stop changes its fundamental nature. Therefore, Article 19 forbids an officer from asking either the driver or the passenger to exit the vehicle absent either (a) a safety concern or (b) reasonable and articulable suspicion relating to the matters to be discussed outside of the vehicle. See e.g., State v. Moore, 151 N.H. 288, 291, 78 (2004) (The ". . . objective facts were sufficient to create an independent basis for having reasonable, articulable suspicion that the [passenger] had been, was, or was about to engage in criminal activity and thus allow an expansion of the scope of the initial stop. Thus, these facts justified the

officer's request that the [passenger] exit the vehicle without violating her State constitutional rights.").

2. Application Of Governing Law To Each Stage Of The Stop That Has Been Challenged By The Defendants

The Initial Question To Perez Regarding Travel Plans: Trooper Arteaga first veered away from the initial purpose of the stop (i.e. speeding and late signaled lane changes) when he asked Perez where he was heading. However, this question neither prolonged the duration of the stop nor altered the fundamental nature of the stop. Regardless of Trooper Arteaga's ulterior purpose in asking Perez about his destination, the inquiry into his destination was the archetype of a permissible, facially innocuous question. McKinnon-Andrews, 151 N.H. at 25. It was not an expansion of the stop within the meaning of either the state or federal constitution.

The Initial Questioning Of Melendez Outside The Vehicle: The trooper next addressed the question of Melendez's identity and his permission to use the Cadillac. He asked Melendez to get out of the vehicle to speak about these matters. To the extent this expanded the stop, the expansion was well supported by both safety concerns and reasonable and articulable suspicion.

With respect to the safety concerns, the alternative would have been for the trooper to stand by the driver's side window, with his back to the highway, as other vehicles sped by at highway speeds in the dark. Although the trooper might have been protected by his cruiser, it was entirely reasonable and constitutional for him to choose to speak with Melendez in a safer location.

With respect to the topics of conversation, the trooper was entitled to ask Melendez several questions to confirm his identity because Melendez did not have his physical license with him. Further, while the vehicle had not been reported stolen, it was entirely appropriate for the trooper to ask additional questions regarding Melendez's relationship to the registered owner and his permission to use the vehicle.

While Melendez was outside of the vehicle, Trooper Arteaga asked him about his itinerary. This was done in a casual manner. Notwithstanding the trooper's hidden purpose, the questions themselves did not either prolong the stop or change its fundamental nature. Therefore, the conversation between the trooper and Melendez about how Melendez was going to Old Port to meet girls did not expand the stop.

Asking Perez About His Travel Plans For A Second Time: Thereafter, the trooper returned to Perez, for the specific purpose of interrogating him again about the pair's itinerary. The trooper once again asked Perez where they were heading. Given all of the surrounding circumstances, perhaps this question was not as facially innocuous the second time around. However, it still did not exceed the permissible scope of the stop: It neither measurably expanded the duration of the stop nor altered the fundamental nature of the stop.

The next question that Trooper Arteaga asked Perez crossed the threshold from "innocuous" and "prosaic," McKinnon, to accusatory and inquisitorial. When Perez said they were going to Old Port, the trooper confronted him by asking why he earlier said they were going to Augusta. To be sure, if questions about travel plans are permissible then some follow-up questions are as well. However, just because an officer can ask a few facially innocuous questions about a driver's itinerary does not mean that the officer

can take a deposition on the subject without altering the fundamental nature of the stop within the meaning of Article 19. See, e.g., State v. Jimenez, 420 P.3d 464, 475 (Kan. 2018) (Case-specific "circumstances dictate how a court views travel plan questioning. And courts must guard against what might be called 'mission creep' by rejecting poorly justified excuses for law enforcement actions[.] . . . [W]hen travel plan questions can be seen as having a close connection to roadway safety, they can occur without unconstitutionally extending the stop's scope." (internal citation and quotation marks omitted)); State v. Schooler, 419 P.3d 1164, 1174 (Kan. 2018) (Travel plan questioning was not relevant to a traffic infraction for a license tag obscured by snow); Lafave, 4 Search & Seizure § 9.3(d) (5th ed.) (criticizing caselaw that adopts a blanket rule authorizing questions about travel plans and itineraries); Cf. Rodriguez, 135 U.S. at 1615 (not including "travel plans" or "itinerary" in a list of the ordinary inquiries incident to a traffic stop).

In this particular case, Trooper Arteaga's confrontational question to Perez concerning the discrepancy between his initial response (i.e. "Augusta") and his later response (i.e. "Old Port") was permissible follow up. This is especially true because the trooper had a legitimate purpose in asking about travel plans in light of the fact that neither Perez nor Melendez was the registered owner of the vehicle. See, e.g., United States v. Brigham, 382 F.3d 500, 508 (5th Cir. 2004) (a greater inquiry into travel plans is within the scope of the initial stop if there is a question regarding the permissive use of the vehicle); United States v. Williams, 271 F.3d 1262, 1267 (10th Cir. 2001) (questioning regarding travel plans was within the scope of the stop because the

defendant was not the named lessee on the car rental agreement and the officer could ask questions related to his lawful possession of the vehicle).

Confronting Melendez With The "Significant Confliction" Regarding Travel Plans:

After the trooper confronted Perez with the discrepancy between his initial and later statements regarding the pair's destination (i.e. "Augusta" v. "Old Port"), Perez told the trooper that they were going to Old Port to meet girls and might then go on to Augusta. The trooper then returned to Melendez and told him that there was a "significant confliction" between his account and Perez's. This was not a facially innocuous or prosaic question. It was close to a direct accusation that either Melendez or Perez had given untruthful information.

That said, for the reasons stated above, on the facts presented, the trooper had sufficient leeway to continue following up with respect to travel plans. However, immediately after asking this final follow-up question about the itinerary, the trooper changed direction and began to ask about contraband.

The Questions About Contraband And The Consent To Search: The scope of the stop was unconstitutionally expanded when Trooper Arteaga brought up the issue of contraband and then asked for permission to search. When the trooper began to ask about contraband, he expanded the stop beyond anything having to do with (a) speeding, (b) late signaled lane changes, (c) the identification of the driver and (d) the ownership and permissive use of the vehicle. This was an entirely new topic of conversation and it was completely unmoored from the initial purpose of the stop. As Blesdell-Moore demonstrates, even a single question about drugs or drug use alters the

fundamental nature of the stop. However, in this case Trooper Arteaga did more than ask a single question:

A. First he asked whether Perez put anything illegal in the vehicle.

B. Then he asked whether there was anything illegal in the vehicle.

C. Then, because Melendez denied that there was anything illegal in the vehicle, the trooper asked for permission to conduct a full blown search of the vehicle on the side of the highway.

D. Then, when Melendez did not reply, he asked again for permission to search. This was no longer a routine traffic stop for minor driving violations.

Trooper Arteaga lacked reasonable and articulable suspicion to believe that there might be contraband in the vehicle:

A. For the reasons explained above, the trooper's observations of Melendez and Perez before he pulled them over were innocuous rather than suspicious.

B. The presence of three cell phones for two passengers was noteworthy but hardly suspicious. Many people, including most prosecutors and many other government employees, carry both work and personal phones. The trooper did not ask about the extra cell phone. The trooper himself admitted at the suppression hearing that the presence of an extra cell phone, standing alone, does not amount to reasonable suspicion.

C. The discrepancies regarding travel plans were also noteworthy but not specifically indicative of drug trafficking, either standing alone or in conjunction with all of the other evidence available to the trooper. The trooper speculated that Melendez did not want to disclose Augusta as the pair's destination because Augusta is a known

drug distribution location. He further speculated that Melendez and Perez got their stories straight while he was in his cruiser. Neither of these speculative inferences is even rational:

> 1. There is nothing inherently incriminating about traveling to Augusta (and the undersigned judge travels near there several times each year, often in a vehicle registered to his wife who has a different last name). It is the capital city of Maine. Why would two men travelling in a vehicle without any indicia of drug trafficking be embarrassed to say they were headed for Augusta? Likewise, Portland is not known to be a drug free city so owning up to traveling there would not diminish the likelihood of drug trafficking.[2]

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[2]In Hernandez, Trooper Arteaga testified that all of Vermont, New Hampshire and Maine are considered drug destination areas. Hernandez, at *9. He said nothing in this case to suggest that Portland is any less a drug destination or distribution area than Augusta.

Furthermore, as anybody who ever travelled on I-95 on a busy weekend can attest, thousands of vehicles travel on a daily basis to and from drug source states (i.e. Massachusetts, Connecticut, New York, etc.) and Maine. It is absurd on its face to suggest that drug couriers make up more than a tiny fraction of drivers on I-95 heading into Maine. See United States v. Wisniewski, 358 F.Supp.2d 1074, 1093 (D. Utah 2005) ("[T]raveling on a 'drug corridor' cannot reasonably support a suspicion that the traveler is carrying contraband. To so hold would give law enforcement officers reasonable suspicion that every vehicle on every major-and many minor-thoroughfares throughout this country was transporting drugs."); United States v. White, 584 F.3d 935, 951-52 (10th Cir. 2009) ("Because law enforcement officers have offered countless cities as drug source cities and countless others as distribution cities ... the probativeness of a particular defendant's route is minimal."); United States v. Beck, 140 F.3d 1129, 1138 n. 3 (8th Cir. 1998) (citing cases recognizing that, among other places, Colorado, Texas, Florida, Arizona, the entire West Coast, New Jersey, New York City, Phoenix, Fort Lauderdale, Houston, Chicago, and Dallas are drug source cities or states).

2. Because Perez initially volunteered that the destination was Augusta, it would be odd indeed if the two men later conspired to give the trooper inconsistent accounts of their travel plans. Indeed, the fact that they gave somewhat inconsistent accounts proves that they did not get their stories straight.

Of course, there were some discrepancies about the itinerary. However, these discrepancies did not point to drug trafficking. There are a googol of legal but embarrassing or confidential purposes for a trip to Maine that a driver might want to keep from a trooper who stopped him for speeding (i.e., to meet a paramour, to travel with a same sex romantic companion, to use marijuana in Maine in compliance with that State's law, to gamble at Maine casinos, to attend a political or social gathering that might not be everybody's cup of tea, to participate in a religious service or celebration for a minority religion, to visit a relative in prison or in a psychiatric hospital, to attend criminal court, etc. etc. etc.).[3] In the absence of reasonable and articulable suspicion of some actual crime, the officer cannot continue to detain the driver and passenger in order to get to the bottom of their plans. After all, unless those plans involved a crime, they would not be the trooper's business in the first place. Furthermore, neither RSA 265:4 (disobeying an officer) nor any other New Hampshire statute requires truthful statements about immaterial matters during a traffic stop.

D. There was nothing unusual about the nervousness displayed by Melendez and Perez. Perez only displayed signs of nervousness (i.e., avoiding eye contact and

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[3]A "googol" is the number 10^{100} which is the digit one followed by one hundred zeros. It is a large number.

hunching his shoulders) when the trooper accusingly confronted him with the fact that he initially said "Augusta" and later said "Old Port." Melendez only became nervous when the trooper re-approached him and said there was a "significant confliction" between what he and Perez had said. Who wouldn't be somewhat nervous when a State Trooper made such accusations during an investigative detention on the side of the highway?

Neither man was nervous at the time of the initial stop. Melendez was not nervous when he first stepped out of the car. He was not nervous when he gave his account of travelling to Old Port to meet girls. He was not nervous when he identified himself and explained his permissive use of the vehicle. Perez was not nervous at any point before the trooper confronted him.

"Nervousness is a common and entirely natural reaction to police presence," Hernandez, at *8, quoting United States v. McKoy, 428 F.3d 38, 40 (1st Cir. 2005). Further, as the U.S. District Court noted in Hernandez, it is especially likely that a "non-Caucasian male" who has been pulled over will appear anxious.[4] Hernandez, at *8.

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[4]The U.S. District Court went out of its way to note that Hernandez was a "non-Caucasian male." Hernandez at *2. The same is true for Melendez and Perez. The federal court did not suggest—and this court certainly does not suggest—that invidious discrimination played a role in the decision to expand the traffic stop. Yet, if New Hampshire is to have a round-the-clock unit making highly discretionary pretext stops on the Interstate, and then expanding those stops in the hope of interdicting drugs and disrupting serious crimes, it is important to keep track of any patterns that might develop. See Whren, 517 U.S. at 813 (traffic stops must comply with the equal protection clause of the Fourteenth Amendment as well as the Fourth Amendment); cf. Batson v. Kentucky, 476 U.S. 79, 97 (1986) ("[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination."); United States v. Johnson, 28 F. Supp. 3d 499 (M.D.N.C. 2014) (question of fact existed

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Beyond the apparent discrepancies in the two men's accounts of their travel plans, there was nothing out of the ordinary. There were no indicia of past, present or planned drug use. There were no apparent objects in the vehicle even arguably connected to drugs. Traveling round trip by car between northern Connecticut and Maine is not in itself suspicious. Using a friend or relative's car with permission is not suspicious.

Without more, the sum total of all of these facts amounts to nothing more than a generalized hunch. As explained above, the reasonable suspicion standard requires more than this. Accordingly, the court finds that Trooper Arteaga unconstitutionally expanded the scope of the traffic stop when he began asking about contraband and then asked for permission to search.

The use of the written Consent To Search form was not an intervening or superseding event. To be sure, the form advised Melendez that he did not have to consent to the search. However: (A) No time had elapsed between the trooper's unconstitutional verbal request to search the vehicle and his production of the waiver form; (B) Melendez was not given the opportunity to consult with a third party, or even to consult with Perez, (C) By this point in the stop, two additional troopers and two additional cruisers had arrived, further distinguishing this investigative detention from the typical speeding stop, (D) Melendez had already been frisked (although, as the trooper admitted at the suppression hearing there was absolutely no evidence that he

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as to whether county sheriff's department discriminated against Latinos when making traffic stops); Floyd v. City of New York, 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013).

was either dangerous or armed, see, e.g., State v. Michelson, 160 N.H. 270, 272 (2010); United States v. Romain, 393 F.3d 63, 71 (1st Cir. 2004)), and (E) Melendez had been accusingly confronted by the trooper, first about the discrepancy in travel plans and later about whether there was contraband in the vehicle. The use of the government waiver form, standing alone, did not dissipate the taint from the trooper's unconstitutional expansion of the stop. Wong Sun v. United States, 371 U.S. 471, 487-488 (1963); State v. Robinson, 170 N.H. 52 57-58 (2017). Accordingly, the court finds that the search of the vehicle was fruit of the poisonous tree. Id.

The motion to suppress is, therefore, GRANTED with respect to all evidence obtained from the search of the vehicle.

October 4, 2019

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/04/2019