IN THE SUPREME COURT OF OHIO

State of Ohio,

Plaintiff-Appellee,

vs.

Justin Hawkins,

Defendant-Appellant.

Case No. 2018-1177

Upon an Entry Certifying A Conflict between the Fifth and Twelfth District Courts of Appeals

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MERIT BRIEF OF JUSTIN HAWKINS

Shannon M. Treynor (0072813) (Counsel of Record)
63 North Main Street
P.O. Box 735
London, Ohio 43140
(740) 845-1889
(740) 845-2919 FAX
Counsel for Appellant Justin Hawkins

Jess C. Weade, Prosecuting Attorney (0082415) (Counsel of Record)
John M Scott, Assistant Prosecuting Attorney (0064420)
110 East Court Street
Washington Courthouse, Ohio 43160
(740) 335-0888 / (740) 333-3539 FAX
Counsels Appellee State of Ohio

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STATEMENT OF THE CASE

This instant matter initiates in this Court upon a motion and entry certifying a conflict between the Fifth District Court of Appeals (*State v. Unger*, 5th Dist. Stark No. 2016 CA 00148, 2017-Ohio-5553), and the Twelfth District Court of Appeals, on whether a discrepancy in the paint color of a vehicle and the vehicle's registration is sufficient to justify a warrantless stop. Specifically, in the entry certifying the question, the Twelfth District summarizes:

> This case involves an appeal from a conviction for failure to comply with an order or signal of a police officer. The issue argued on appeal was whether the Fayette County Court of Common Pleas erred by denying the appellant's motion to suppress. The case involved whether an officer had reasonable articulable suspicion to initiate a traffic stop based upon a discrepancy between the pain color of a vehicle and the color listed on the registration records accessed by law enforcement.
>
> Appellant contends that this court's decision upholding the denial of the motion to suppress is in conflict with a decision by the Fifth District Court of Appeals in *State v. Unger*, 5th Dist. Stark No. 2016 CA 00148, 2017-Ohio-5553. In *Unger*, the Fifth District concluded that a discrepancy in an automobile's paint color found via a database check cannot be classified as a reasonable suspicion of motor vehicle theft sufficient to justify a warrantless stop.
>
> * * *
>
> The question before this Court in the present case and before the Fifth District in *Unger* is virtually identical.

The Twelfth District, upon application, certified the following question:

> Does the discrepancy between the paint color of a vehicle and the paint color listed in vehicle registration records accessed by a police officer provide the officer with reasonable articulable suspicion to perform a lawful investigative traffic stop where the officer believes the vehicle or its displayed license plates may be stolen?

STATEMENT OF FACTS

This matter initiated upon the filing of an indictment, charging the Defendant-Appellant with two counts of Receiving Stolen Property in violation of R.C. §2913.51(A) and (C), felonies of the fifth degree, and one count of Failure to Comply, a violation of R.C. §2921.331(B) and (C)(5)(a)(ii), as a felony of the third degree, for the allegation that his operation of the motor vehicle in question caused a substantial risk of serious physical harm to persons or property.

The Appellant filed a motion to suppress all evidence retrieved from the traffic stop, alleging that the officer lacked a reasonable articulable suspicion to initiate the stop, based solely upon a 'mismatch' between the vehicle's color and the color indicated on its registration information.

The matter proceeded to hearing, and the officer was the only witness to testify. When questioned about whether a color discrepancy is itself a crime, the officer initially indicated that he wasn't sure, and then changed his mind. He explained that he believed it to be a fictitious registration, but that officers do not routinely issue citations for such infractions.

The trial court denied the motion to suppress, finding no constitutional infirmities with the Officer's conduct in this case. The matter proceeded to jury trial, where the Defendant was acquitted of the two RSP charges, and found guilty of the Failure to Comply by causing a substantial risk of harm with his motor vehicle. The Defendant was sentenced to thirty-six months in the penitentiary, and three years mandatory post release control.

The Defendant appealed to the Twelfth District, raising as his sole assignment of error that the Court erred by overruling his motion to suppress based on the lack of reasonable, articulable suspicion of the officer based singularly upon the discrepancy between the vehicle's registration and actual paint color. The Twelfth District found that of the Courts that have

addressed this issue previously, there was a split of authority. Ultimately, the Twelfth District found that the mismatch between a vehicle's paint color and registration does amount to a reasonable, articulable suspicion when the officer believes that the vehicle or plates could be stolen. The Fifth District came to the opposite result on this same question.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: A discrepancy between the color of a vehicle and the vehicle's registered color, by itself, is insufficient cause to conduct a warrantless stop and investigation of the vehicle, the driver, or its occupants.

1. Ohio law does not require the owner of a vehicle to update the color with renewal of registration.

In its opinion, the Twelfth District noted that the Seventh Circuit Court of Appeals, the Arkansas Supreme Court, the Florida Supreme Court and the Fifth District Court of Appeals for Ohio have all decided the same issued as is certified before this Court. See, *United States v. Uribe*, 709 F.3d 646 (7th Cir. 2013); *Schnieder v. State*, 459 S.W. 3d 296 (Ark. 2015), *State v. Teamer*, 151 So.3d 421 (Fla. 2014); *State v. Unger*, 5th Dist. Stark No. 2016 CA 00148, 2017-Ohio-5553. Every one of those jurisdictions determined that the discrepancy between the automobile's color and the color indicated on the vehicle registration information, by itself, is insufficient to justify a warrantless investigatory stop.

The Twelfth District justified its decision to not be guided by these earlier cases, because "In many of these cases, the court considering the issue have noted that there was no requirement under state law to update a vehicle registration when an owner changes the color of his or her car." Presumably, the lower court was persuaded by the officer's testimony that he believed failure to update the Bureau of Motor Vehicles would be tantamount to a charge of "fictitious

registration" or a registration violation.

Ohio Revised Code §4549.08 provides:

> Fictitious license plates or identification number or mark.
>
> (A) No person shall operate or drive a motor vehicle upon the public roads and highways in this state if it displays a license plate or a distinctive number or identification mark that meets any of the following criteria:
>
> (1) Is fictitious;
>
> (2) Is a counterfeit or an unlawfully made copy of any distinctive number or identification mark;
>
> (3) Belongs to another motor vehicle, provided that this section does not apply to a motor vehicle that is operated on the public roads and highways in this state when the motor vehicle displays license plates that originally were issued for a motor vehicle that previously was owned by the same person who owns the motor vehicle that is operated on the public roads and highways in this state, during the thirty-day period described in division (A)(4) of section 4503.12 of the Revised Code.
>
> (B) A person who fails to comply with the transfer of registration provisions of section 4503.12 of the Revised Code and is charged with a violation of that section shall not be charged with a violation of this section.
>
> (C) Whoever violates division (A)(1), (2), or (3) of this section is guilty of operating a motor vehicle bearing an invalid license plate or identification mark, a misdemeanor of the fourth degree on a first offense and a misdemeanor of the third degree on each subsequent offense.
>
> Effective Date: 01-01-2004.

Is a variant color on the vehicle registration, a "fictitious registration?" The Ohio Revised Code does not contain a definition of "fictitious" for purposes of interpreting the "fictitious registration" statute. However, according to Black's Law Dictionary, 6th Ed., 1990:

> Fictitious. Founded on a fiction; having the character of a fiction; pretended; counterfeit. Feigned, imaginary, not real, false, not genuine, nonexistent. Arbitrarily invested and set up, to accomplish an ulterior object.
>
> Fictitious action. An action brought for the sole purpose of obtaining the

> opinion of the court on a point of law, not for the settlement of any actual controversy between the parties.
>
> Fictitious name. A counterfeit, alias, feigned, or pretended name taken by a person, differing in some essential particular from his true name (consisting of Christian name and patronymic), with the implication that it is meant to deceive or mislead.
>
> Fictitious payee. Negotiable instrument is drawn to fictitious payee whenever payee named in it has no right to it, and its make does not intend that such payee shall take anything by it; whether name of payee used by maker is that of a person living or dead or one who never existed is immaterial.
>
> Fictitious plaintiff. A person appearing in the writ, complaint, or record as the plaintiff in a suit, but who in reality does not exist, or who is ignorant of the suit and of the use of his name in it. It is a contempt of court to sue in the name of a fictitious party.

American Heritage Dictionary describes "fictitious" as

> *adj*.
> 1. Concocted or fabricated, especially in order to deceive or mislead; make up: a fictitious name; fictitious transactions.
> 2. Of or relating to the characters, settings, or plots that are created for a work of fiction: a book in which fictitious characters interact with historical figures.
> [From Latin fictīcius, from fictus, past participle of fingere, to form; see FICTION.]

Indeed, it is difficult to ascertain from these definitions whether a faulty color description could be construed as fictitious in the absence of some affirmative action or affirmative inaction on behalf of the motorist. It is true that an initial vehicle registration does require affirmative information from the registrant regarding the color of the vehicle to be registered. Factually speaking, that case would have to arise wherein a motorist is charged with a misdemeanor for intentionally registering his or her vehicle as the wrong color. Those are not the facts which underpin this current action. As the facts are only that (1) a vehicle is a color, and (2) that vehicle's color appears differently on the official registration, one must presume that there has

been a change in the vehicle from its initial registration to the time that it was stopped by law enforcement. As vehicles are re-registered every year (with a multiple-year renewal option for up to five years), it is incumbent to inspect Ohio's vehicle registration renewal process.

Official Form BMV 4603, or the Vehicle Renewal Application form, contains the data report of a registered Ohio Vehicle, including its owner, owner address, plate category, plate number, title number, vehicle year/make/model, registration expiration date, renewal expiration date, county of registration, taxing district/name, VIN, seating capacity, and weight. You are instructed "If any of the vehicle information on this form has changed, you must take your Certificate of Title to a deputy registrar." Notably, "Color of Vehicle" is not contained in the data report for the vehicle. From the information contained in this form, the innocent automobile owner would have no way of knowing what color the BMV has his vehicle registered under, and furthermore, no opportunity to change it via the same vehicle renewal registration form. See, Appendix.

In the absence of an ordinary course vehicle registration renewal, what is the Ohio motorist required to provide to the BMW? Ohio Revised Code section 4503.101 provides instruction:

> 4503.101 Registration periods; notice of change of residence.
>
> (E) Every owner or lessee of a motor vehicle holding a certificate of registration shall notify the registrar of any change of the owner's or lessee's correct address within ten days after the change occurs. The notification shall be in writing on a form provided by the registrar or by electronic means approved by the registrar and shall include the full name, date of birth if applicable, license number, county of residence or place of business, social security account number of an individual or federal tax identification number of a business, and new address.

Again, notably *absent* is any affirmative action required as the result of a change in vehicle color.

The Twelfth District perhaps did not realize that Ohio falls into the same category of states that are lacking in a legislative requirement to update a vehicle registration when an owner changes the color of his or her car. Accordingly, it would seem as though the lower court's decision to *not* be guided by the Seventh Circuit Court of Appeals, or Florida /Arkansas Supreme Courts was misplaced.

2. The Twelfth District chose to be persuaded by first level appellate courts of Georgia, Indiana and Idaho.

a. The Indiana Case

The first case cited as reliable by the lower court is that of *Smith v. State*, 713 N.E.2d 338, 341 (Ind. App. 1999). The facts in this case are summarized as follows:

> The facts most favorable to the conviction establish that on February 19, 1998, at approximately 7:15 p.m., Indiana State Police Sergeant David Henson pulled over a blue and white Oldsmobile driven by Steve Martin, in which Smith was a front seat passenger. Trooper Henson initiated the traffic stop because a computer check on the vehicle's license plate revealed the plate was registered to a yellow Oldsmobile rather than a blue and white one. Trooper Henson approached the vehicle and asked Martin for his license and registration. Following the arrival of Troopers Troy Sunier and Patrick Spellman, Martin and Smith were asked to exit the vehicle, separated, and questioned in an effort to determine if the car was stolen. The troopers' inquiries revealed that the car belonged to Smith, who had painted it a different color, which explained the apparently mismatched license plate.
>
> During the course of this investigatory stop, Trooper Dean Wildauer arrived on the scene and asked Smith if he and Trooper Spellman could search the vehicle for guns, drugs, money, or illegal contraband. Smith consented to the search. While no guns, drugs, money, or illegal contraband were recovered as a result of the search, two cellular flip phones were retrieved from the front seat of Smith's car. One phone was found on the passenger's side of the vehicle where Smith had been sitting, and the other was found on the driver's side where Martin had been sitting. When asked whether the cellular phone found on the passenger's side was his, Smith stated that it was his girlfriend's; however, he could not recall the name of her service provider.

> Trooper Wildauer then took both phones back to his police vehicle where he removed the batteries and performed a short-out technique on each device. The results of this field-test revealed that the cellular phones' internal ESNs did not match the external ESNs, indicating that the cellular phones had been illegally cloned, or reprogrammed such that, when in use, the charges would be billed to someone else's phone number. After discovering that the phones were cloned, Trooper Wildauer called a law enforcement hotline which informed him that the internal ESN of the cellular phone Smith claimed was his girlfriend's in fact belonged to GTE Mobilnet and was assigned to one of its legitimate service customers, Technology Marketing Corporation. Upon further questioning, Smith admitted that he had purchased the cloned phone on the street from an acquaintance and that he knew it was a clone. Thereafter, Smith agreed to cooperate with the police investigation, his car was impounded, and he and Martin were released.

Smith v. State, 713 N.E.2d 338, (1999).

The Indiana Appellate Court found that the initial investigatory stop was constitutional:

> Initially, we observe that Sergeant Henson's investigatory stop of Smith's vehicle was valid and supported by reasonable suspicion. Police officers may stop a vehicle when they observe minor traffic violations. *State v. Hollins*, 672 N.E.2d 427, 431 (Ind.Ct.App.1996) (citing *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996); *Small v. State*, 632 N.E.2d 779, 782 (Ind.Ct.App.1994), trans. denied), trans. denied. Indeed, because of the limited nature of the intrusion, brief investigative detentions may be justified on less than probable cause. *Jones v. State*, 655 N.E.2d 49, 55 (Ind.1995) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 880, 95 S.Ct. 2574, 2579-80, 45 L.Ed.2d 607 (1975)). Moreover, a police officer's subjective motives in initiating an investigatory stop are irrelevant in Fourth Amendment analysis. "[A] stop will be valid provided there is an objectively justifiable reason for it. If there is an objectively justifiable reason for the stop, then the stop is valid whether or not the police officer would have otherwise made the stop but for ulterior suspicions or motives." *State v. Voit*, 679 N.E.2d 1360, 1362 (Ind.Ct.App.1997) (citing *Hollins*, 672 N.E.2d at 430-31). Here, the evidence was uncontroverted that the license plate on Smith's blue and white car was registered to a yellow car. Upon conducting a computer check, Sergeant Henson had reasonable suspicion to believe that Smith's vehicle had a mismatched plate, and as such, could be stolen or retagged. Sergeant Henson's traffic stop was valid and comported with the mandates of the Fourth Amendment.

Smith v. State, 713 N.E.2d 338, (1999).

Interestingly, the Indiana Court of Appeals came to this conclusion without first determining whether it was a violation of Indiana vehicle registration laws to fail to inform the registrar of a change in vehicle color. This Court focused only on the *motivation* of the officer, which was stated here to confirm whether or not the vehicle was stolen. By this reasoning, once the vehicle was confirmed to belong to the driver, the stop should have ended and the parties set free.

But, the officers in Indiana continued. After seeking consent to search the vehicle for guns, drugs, money or illegal contraband and receiving the same, the officers removed cellular phone from the console, took the cellular phones back to the police cruiser, removed the batteries and performed a field service check on them and to discover spoofing software. It was only this, the Indiana Court concluded, where the officers went too far. The court ultimately reversed the conviction of the defendants, findings that the officers' search exceeded the consent that was given.

b. The Georgia Case

The Twelfth District also relied on the case of *Andrews v. State*, 289 Ga. App. 679, 681 (2008). In this case, the Georgia Court does in fact provide lip service to the statute which prohibits transferring tags from one vehicle to another, similar to the law in Ohio. It makes no mention of whether the automobile owner is under an affirmative duty to notify the registrar of a change in vehicle color while maintaining the same tags on the same vehicle. The interesting thing about the Georgia case, is that the officer was simply *mistaken* in his belief that the vehicle was a color different from that on its registration, as the evidence suggested it was otherwise properly tagged. So here again, the Georgia Court focused only on the *motivation* of the officer, instead of whether that motivation could survive constitutional scrutiny:

[T]he record reveals that in the late afternoon of March 21, 2006, Officer Jimmy Jones was patrolling a stretch of I-85 in Troup County. Jones ran a routine registration check of a vehicle traveling the highway and learned that the car was registered as silver in color. According to Jones, the car appeared greenish-gold. Thus, Jones was suspicious that someone had taken the tag from another vehicle, and he pulled the car over to determine if the tag matched the vehicle identification number.

After pulling the vehicle over, Jones asked Andrews-the driver-for his driver's license. Andrews promptly handed Jones his driver's license, which had expired. At that point, Jones asked Andrews to step out of the car, and the two walked to the front of the patrol car. While Andrews appeared to be searching for another license, Jones asked where Andrews had been. Andrews responded that he and Stanton-the passenger in the car-had taken one of Stanton's relatives to the airport for a trip to California.

When Andrews was unable to produce a valid license, Jones walked to the passenger window to ask Stanton if he had a driver's license and could thus legally drive the car. Jones asked Stanton where he and Andrews had been, and Stanton responded that they had been to Jonesboro to look at a truck. Given the inconsistent responses Jones received, he became suspicious. He then took both drivers' licenses back to the patrol car to run checks and discovered that Andrews' license had been suspended. Upon exiting the patrol car, Jones walked back to the passenger window and asked Stanton-whose brother owned the car-for consent to search the vehicle. Stanton declined. Jones then informed Stanton that he was going to have his drug dog walk around the car. Within two minutes, Jones retrieved the dog from his patrol car and walked it around the perimeter of the car. After the dog alerted twice, Jones entered the car and smelled the odor of marijuana and found marijuana residue on the seat. At that point, both Andrews and Stanton were handcuffed. A more thorough search of the car yielded a bag containing over 250 grams of cocaine. Andrews and Stanton were arrested for trafficking in cocaine.

On appeal, both Andrews and Stanton assert that the trial court erred in denying their motions to suppress because Jones lacked a sufficient basis for instigating the initial traffic stop. According to the appellants, Jones' belief that the car was a different color than that listed on the registration was a mere “hunch" that did not give rise to reasonable, articulable suspicion of criminal conduct. As a threshold matter, we note that it is unlawful to transfer a license plate assigned to one vehicle to another vehicle and/or to knowingly operate a vehicle with such improperly transferred tag. Thus, if Jones had reason to believe that the tag had been improperly transferred, he would have had a legitimate basis for stopping the car. In determining whether Jones' action was reasonable, we must consider the specific reasonable inferences that he was entitled to draw from

> the facts in light of his experience. Pictures tendered at the hearing show that the car did in fact have a greenish hue. Accordingly, Jones had a basis for believing the car to be a different color than that listed on the registration, and it was reasonable for him to infer that the license plate may have been switched from another car. Under these circumstances, we cannot say that Jones acted on a mere hunch.
>
> The fact that Jones was ultimately mistaken does not change the result. If an officer, acting in good faith, has reason to believe that an unlawful act has been committed, his subsequent actions are not automatically rendered improper by a later finding that no criminal act has occurred. Rather, "[t]he question to be decided is whether the officer's motives and actions at the time and under all the circumstances, including the nature of the officer's mistake, if any, were reasonable and not arbitrary or harassing." Again, Jones had reasonable suspicion that the license plate on the car Andrews was driving had been switched. It follows that the trial court did not err in finding the initial stop to be lawful.

The Georgia Court seems to have skipped over the requirement that an officer's motivations for pulling a vehicle over still have to be based upon a perceived violation of an existing law. And here, the vehicle was in fact in full compliance with its registration requirements, as there was no evidence to suggest that the tag was on the wrong vehicle, only that the officer thought the vehicle had changed color. And given that the automobile was stopped because the officer was conducting a "routine registration check" it seems improbable that the officer's decision to stop the vehicle was formulated because he observed other furtive or clandestine behavior which would have given him the belief that criminal activity was afoot.

c. The Idaho Case

For its final choice of guiding precedent, the Twelfth District turns to an unpublished opinion from the Fourth Judicial District of Idaho, *State v. Creel*, 2012 Ida. App. Unpub. LEXIS 267 *4-5 (2012). Again in this case, the Court focused on the *motivation* of the officer in his intent to determine whether a vehicle was stolen, simply on the basis that the color on the registration didn't match the color of the vehicle. This Court *also* ignores whether there is an

affirmative requirement of the automobile owner to update an existing registration with the current color of the vehicle:

> A deputy conducted a traffic stop of Creel's vehicle, a black Chevrolet S-10 pickup. The deputy had been following the vehicle and ran its license plates on his mobile data terminal. The vehicle's registration information indicated that the pickup should have been red in color instead of black. Based upon this information, the deputy initiated the traffic stop. The deputy spoke to the driver, Creel, who explained that he had recently painted the vehicle by rolling on black truck-bed lining. While speaking with Creel, the deputy smelled the odor of marijuana. A subsequent search of Creel's vehicle resulted in the seizure of approximately seven ounces of marijuana.
>
> * * *
>
> Creel contends that the district court erred by ruling that the deputy had reasonable suspicion to conduct the traffic stop simply because the color of the vehicle did not match the color listed on the vehicle's registration. The deputy testified at the evidentiary hearing that there was a color discrepancy between the vehicle he was following and the vehicle's registration. He further testified that, due to this discrepancy, the vehicle could have had fictitious license plates in violation of I.C. § 49-456(3), or the vehicle could have been stolen and the plates were from another S-10 pickup. Thus, the deputy had articulable facts within his knowledge and drew reasonable inferences based on his experience. Under a totality of the circumstances, the deputy had a reasonable and articulable suspicion to initiate the stop. We also note that our holding is in accord with other jurisdictions that have decided the precise question at issue here. See, e.g., *Aders v. State*, 67 So.3d 368 (Fla. Dist. Ct. App. 2011); *Andrews v. State*, 658 S.E.2d 126, 127-28 (Ga.Ct.App. 2008); *Smith v. State*, 713 N.E.2d 338 (Ind.Ct.App. 1999). Therefore, the district court properly denied Creel's motion to suppress.[1]

It is worthwhile to note that each of these cases which the Twelfth District found to be persuasive pre-date the Seventh Circuit, Florida and Arkansas cases that it found to be non-persuasive. These cases are also of first level appellate review, as opposed to the Florida and Arkansas cases heard in the court of final resort, similar to this action.

[1] In *State v. Creel*, the Idaho Court also used the *Andrews v. State* (289 Ga. App. 679), *supra*, as well as the *Smith v. State*, 713 N.E.2d 338 (Indiana App. 1999), s*upra*, as precedence in determining the outcome in this case.

3. This Court should consider the reasoning of the Seventh Circuit, the Arkansas Supreme Court and the Florida Supreme Court as worthy of precedential consideration**.**

a. The Seventh Circuit Case

In *United States v. Uribe*, 709 F. 3d 646 (7th Cir. 2013), the facts leading to the defendant's arrest are similar to those of the cases previously recited:

> Shortly after two o'clock in the morning on July 14, 2010, Deputy Dwight Simmons of the Putnam County (Indiana) Sheriff's Department was working traffic enforcement and driving behind a blue Nissan Altima traveling eastbound on Interstate 70. When Deputy Simmons performed a Bureau of Motor Vehicles registration inquiry on the car's Utah license plate number, he received information for a white 2002 Nissan. In his narrative arrest report, Deputy Simmons stated that he initiated an enforcement stop of the vehicle "to check for registration compliance." That report did not include any other description of the vehicle, and it did not mention the driver's pre-stop behavior.
>
> After Deputy Simmons pulled the car over, he observed that the driver, Jesus Uribe, appeared nervous. Eventually, another officer arrived with a canine, which gave a positive alert. Uribe gave Deputy Simmons permission to search the vehicle, and the officer with Deputy Simmons found two packages containing nearly a pound of heroin. Uribe was indicted for possessing with intent to distribute 100 grams or more of heroin, in violation of 21 U.S.C. §841(a)(1) and (b)(1)(B)(i).

Here again, the officer attempted to justify the stop claiming that it was common for vehicle thieves to paint the automobile in order to avoid detection. Not only did the *Uribe* Court reject that assertion in the absence of real evidence to support it, it also rejected the reasoning of the Indiana and Georgia cases relied upon by the Twelfth District in the case *sub judice*:

> Although it appears that no federal court has addressed the exact issue presented in this case, several state courts have done so. In *Andrews v. State*, a Georgia appellate court held that it was reasonable for an officer to infer from a color discrepancy that a car's license plate had been switched in violation of Georgia law. 289 Ga.App. 679, 658 S.E.2d 126, 127-28 (2008); see also *Aders v. State*, 67 So.3d 368, 371 (Fla.Dist.Ct.App.2011)[2] (finding

[2] *Aders v. State*, 67 So. 3d 361, referenced here by the *Uribe* Court as a case to be distinguished, also serves as the underpinning case in the certified conflict which resulted in the question being brought before for the Florida Supreme Court in *State. vTeamer*, 1515 So.3 d 421 (Fla. 2014). The holding in the Florida Supreme Court

> a color discrepancy sufficient to create a reasonable suspicion that a driver committed a second-degree misdemeanor by improperly transferring a license plate). An Indiana appellate court found that a color discrepancy supported reasonable suspicion that a "vehicle had a mismatched plate, and as such, could be stolen or retagged." *Smith v. State*, 713 N.E.2d 338, 342 (Ind.Ct.App.1999).

Rather, the *Uribe* court focused a Virginia case, where the rights of the individual motorist to be free of unreasonable searches are superior to the rights of the public to inquire into a color discrepancy on a vehicle registration:

> In *Commonwealth v. Mason*, a Virginia appellate court determined that color discrepancy alone is insufficient to establish reasonable suspicion because "the benefit gained from stopping individual vehicles based solely on a disparity in the color listed on the vehicle's registration ... is marginal when compared to the constitutional rights of drivers and their passengers who are seized during such a stop." No.1956- 09-02, 2010 WL 768721, at *3 (Va.Ct.App. Mar. 9, 2010) (unpublished decision) (internal quotations omitted); see also *State v. O'Neill*, Nos. 06-S-3456, 06-S-3457, 2007 WL 2227131, 2007 N.H.Super. LEXIS 2, at *8 (N.H.Super.Ct. Apr. 17, 2007) (unpublished decision) (because the color discrepancy violated no law, the officer "could not possibly have suspected the defendant of any criminal wrongdoing").

b. The Florida Supreme Court Case

The Florida Supreme Court case of *State v. Teamer*, 151 So.3d 421 (Fla. 2014) originates upon a certified conflict question between the First Appellate District (*Teamer*) and the Fourth Appellate District, as decided in *Aders v. State*, 67 So. 3d 368 (Fla. 4th DCA (2011).

The *Teamer* case involved a situation wherein:

> On June 22, 2010, an Escambia County Deputy Sheriff observed Kerrick Teamer driving a bright green Chevrolet. *Teamer*, 108 So. 3d at 665. After noticing the car, the deputy continued on his patrol, driving into one of the neighborhoods in that area. Upon traveling back to where he had first seen Teamer, the deputy again observed Teamer driving the same car. The deputy then "ran" the number from Teamer's license plate through the Florida Department of Highway Safety and Motor Vehicles (DHSMV) database, as is customary for him while on patrol, and learned that the vehicle was

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disapproved the decision in *Aders*.

registered as a blue Chevrolet. *Id*.

> The database did not return any information regarding the model of the vehicle. Based only on the color inconsistency, the deputy pulled the car over to conduct a traffic stop. "Upon interviewing the occupants, the deputy learned that the vehicle had recently been painted, thus explaining the inconsistency." *Id*. However, during the stop, the deputy noticed a strong odor of marijuana emanating from the car and decided to conduct a search of the vehicle, Teamer, and the other passenger. *Id*. "Marijuana and crack cocaine were recovered from the vehicle, and about $1,100 in cash was recovered from [Teamer]. [He] was charged with trafficking in cocaine (between 28–200 grams), possession of marijuana (less than 20 grams), and possession of drug paraphernalia" (scales). *Id*.

In the *Aders v. State* case, the facts were not dissimilar:

> The facts leading up to the traffic stop in this case are undisputed. At about 1:00 a.m. on a Friday night, Deputy Jason Pickering observed a black two-door Honda. He learned that the Honda's color did not match the color reported on a law enforcement database, which indicated that the Honda should have been light-blue. Deputy Pickering activated his blue lights and stopped the Honda. The deputy explained his reason for making the stop." [T]hat struck me as odd," the deputy stated. "I didn't know if that tag might not belong to that car or it could have been possibly a stolen vehicle I didn't know."
>
> The only occupant in the vehicle was Joshua Aders. He gave Deputy Pickering his vehicle registration and insurance information, which also described the car as light blue. However, the VIN on the car and registration matched. Aders told Deputy Pickering that he had spray painted the car when he bought it but had not yet changed the color on the registration. Deputy Pickering handed back Aders' license, registration, and insurance information, gave him a warning, and told him he was free to leave. Before Aders left the scene, however, the deputy requested his consent to search the car. Aders consented and volunteered that he had drug paraphernalia in the car's center console. The deputy's search also uncovered marijuana and pills.

Aders, 67 So.3d 368, 370 (Fla.App. 4 Dist. 2011).

The Supreme Court found that the First District's rationale in *Teamer 1* was compelling:

> The First District acknowledged "that any discrepancy between a vehicle's plates and the registration may legitimately raise a concern that the vehicle is stolen or the plates were swapped from another vehicle," but found that such concern must be weighed "against a citizen's right under the Fourth

> Amendment to travel on the roads free from governmental intrusions." The district court cited several cases demonstrating that color discrepancy is typically one of several factors constituting reasonable suspicion.

Teamer v. State, 108 So.3d 664, 667-668 (Fla. 1st DCA 2013)(internal citations omitted).

The Florida Court turned to the United States Supreme Court for guidance in evaluating whether a stop and search was reasonable or unreasonable given the circumstances. Our highest court has held that:

> "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); *Popple v. State*, 626 So.2d 185, 186 (Fla. 1993) ("[A] police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime." (citing § 901.151, Fla. Stat. (1991))). However, a "police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant an investigatory stop." *Terry*, 392 U.S. at 21. The Supreme Court has described reasonable suspicion as "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). This standard requires "something more than an 'inchoate and unparticularized suspicion or hunch.'" *Sokolow*, 490 U.S. at 7 (quoting *Terry*, 392 U.S. at 27) (internal quotation marks omitted).

State v. Teamer, 151 So.3d 421, 425-5 (Fla. 2014)

Specific to the facts of the case at hand, the Florida Court found that indeed, a discrepancy between the color of a vehicle and the information contained on the registry database does cause an ambiguity that an officer would be justified to wanting to resolve. However, the officer can only detain an individual if there are other factors which would support the reasonableness of the officer's suspicions that more criminal behavior is imminent. "Turning to the instant case, the sole basis here for the investigatory stop is an observation of one completely noncriminal factor, not several incidents of innocent activity combining under a

totality of the circumstances to arouse a reasonable suspicion--as was the case in Terry." *Teamer,* at 429.

The court went on to conclude that the officer's inferences drawn from the ambiguity – that tags had been switched or the vehicle had been stolen- need to be rational in order to support reasonable suspicion. And here, "without more, this one fact may provide a 'mere suspicion,' but it does not rise to the level of a reasonable suspicion. Neither does the sole innocent factor here--a color discrepancy--rise to such level. The deputy may have had a suspicion, but it was not a reasonable or well-founded one, especially given the fact that the driver of the vehicle was not engaged in any suspicious activity." *Id*.

The Florida Court went to liken the instant case to those of similar governmental intrusions which occurred in the cases of *U.S. v. Brignoni-Ponce*, 42 U.S. 873 (1975)(it is a violation of the Fourth Amendment for a roving patrol car to stop a vehicle solely on the basis of the driver appearing to be of Mexican descent) and *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) ("[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."). "Thus we must balance the nature and quality of the intrusion required to stop an individual and investigate a color discrepancy against the government's interest in finding stolen vehicles or enforcing vehicle registration laws." *Id*.

Ultimately, the Florida Court was swayed by the *Brignoni-Ponce* and *Prouse* decisions. In *Prouse*, the United States Supreme Court described the impact a random document check is likely to have on an unsuspecting motorist as "an unsettling show of authority," as interfering "with the freedom of movement," time consuming and could possibly "create substantial

anxiety." *Prouse,* at 657. Whereas, the government's interests in ferreting out swapped tags or stolen vehicles, the Court characterized as indistinguishable from a "general interest in crime control" --and promoting roadway safety. *Id*. at 658-59 & n.18. The Supreme Court held that given the alternative mechanisms available for enforcing traffic and vehicle safety regulations--the foremost of which being to act only upon observed violations—the incremental contribution to highway safety of the random stops in that case did not justify their intrusion on Fourth Amendment rights. *Id.* at 659.

c. The Arkansas Supreme Court Case

In the case of *Schneider v. State*, 459 S.W.3d 296 (Ark. 2015), the Court had the luxury of some Courts of high import whose decisions had preceded its own. Thus, when evaluating the facts of the case and isolating the circumstances surrounding the questioned stop, the Court now had some guidance to determine that the interests of the government in quelling bad behavior are not outweighed by the interests of the public in being free from unreasonable intrusions. The case of Schneider involved a situation where the arresting officer:

> was at the intersection of North Second Street and Wood Street at approximately 1:00 a.m. on November 24, 2011, when appellant drove past him. He pulled behind appellant and ran the vehicle's license plate. The license plate returned as being registered to a blue 1992 Chevrolet Camaro. Officer Wiens testified that he noticed that the car was red when it passed him and saw that the bumper was black while he was following it. Based solely on the color discrepancy, Officer Wiens stopped the vehicle and made contact with appellant. He testified that he performed the stop in order to investigate further, check the vehicle-identification number, and determine whether the vehicle had been painted or was stolen. Appellant introduced photographs of the vehicle that Officer Wiens described as showing a car with a red door, black bumper, and other parts that were painted blue. Officer Wiens denied seeing any blue on the car before he stopped it. He repeated on cross-examination that the color of the vehicle was the only reason that he initiated the traffic stop.

Guided by the cases which had come before it, the Arkansas Court rejected the holding in

Andrews v. State, 289 Ga. App. 679, 681 (2008) (the Georgia Case) and *Smith v. State*, 713 N.E.2d 338, 341 (Ind. App. 1999) (the Indiana Case):

> We conclude that the decisions in *Van Teamer* and *Uribe* are more persuasive given the facts presented in this case. In Van Teamer, the court noted that there was no requirement under Florida law for a registration to be updated to reflect a change in a vehicle's color. In affirming the court of appeals decision, the Florida Supreme Court stated that "the color discrepancy here is not 'inherently suspicious' or 'unusual' enough or so 'out of the ordinary' as to provide an officer with a reasonable suspicion of criminal activity, especially given the fact that it is not against the law in Florida to change the color of your vehicle without notifying the DHSMV." *State v. Teamer*, 151 So.3d 421, 427 (Fla. 2014).
>
> Arkansas, like Florida, has no requirement that the owner of a vehicle change the registration to reflect the color of a vehicle in the event it is painted or the color otherwise altered. It is also not prohibited in Arkansas to replace portions of a vehicle's body with new body pieces that do not match the vehicle's original color. The innocence of the conduct, however, is not determinative, as the United States Supreme Court has stated, in connection with a reasonable suspicion inquiry, that "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *United States v. Sokolow*, 490 U.S. 1, 10, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

4. <u>The facts in Hawkins are virtually indistinguishable from the Uribe, Teamer, or Schneider cases.</u>

The pertinent facts, taken from the Twelfth District's summary, are that in the small hours of the morning, the officer was on a traffic stop with another vehicle, when the Appellant drove by. The officer's onboard license plate reader captured the image of the plate, and the officer ran it once he was finished with his other traffic stop. The information received from the database was that the 2001 GMC SUV that the deputy observed as being *white* instead of *black* with the registrar. Based on this information alone, the officer initiated a traffic stop of the vehicle.

The officer provided no testimony of other behavior, indicia of criminal activity or anything else, other than the time of night (3:00 a.m.):

> Prosecutor: What if any concern to you have that a plate [sic], cause

it sounds like it matched the type of vehicle, but it didn't match the color of the vehicle. What reason would you have for any concern?

Officer: Yeah typically with my, with my experience when subjects will steal a vehicle and that is why BMV started implementing the colors is, in years past somebody would steal a vehicle.

* * *

In years past, with my experience, if someone would steal a vehicle, they would just go through a parking lot anywhere and find a vehicle that would match the vehicle in which they were driving. Throw that [plate] on there and then drive around.

Prosecutor: And have you had that experience personally with vehicles that have been stolen in and around Washington Court House?

Officer: Me personally, no. However, in our city, yes. We have license plates [that] have been taken off and done that, yes.

* * *

Defense Counsel: [You] talked a little bit about your experience investigating. How many car thefts have you investigated in your career?

Officer: Car thefts?

* * *

I can't put a number, but it's been quite a few.

Defense Counsel: As the, have you ever investigated them, or where you the officer on scene or how did it, how did that work?

Officer: I have both had investigations of vehicle thefts [sic], I have also had recovery of stolen vehicles and I have also had recovery of stolen license plates as well.

Defense Counsel: You said you've never experienced a situation like this. Where a, where as you said, where a plate may have been switched from a vehicle?

Officer: Me personally?

Defense Counsel: Yes.

> Officer: No.
>
> Defense Counsel: Okay.
>
> Officer: But yes, it is done.
>
> * * * *
>
> Defense Counsel: Just for clarification purposes, the only reason that [appellant] was stopped was due to the color the vehicle not matching registration?
>
> Officer: The, the vehicle did not match the vehicle [sic]. Which at the time I believed was [a] fictitious registration.
>
> Defense Counsel: What I asked was the sole reason you stopped Mr. Hawkins was because the color of the vehicle did not match the color that you were told by a dispatcher that the vehicle should have been on the registration?
>
> Officer: That would be correct.

The officer's observations and sworn testimony provide none of the other factors which would give his intrusion into the activities of the Appellant an air of reasonableness. He observed no other bad driving (in fact, he may have observed no driving at all, as the plate was captured by a dashboard camera), no accomplice or other indicators of criminal activity afoot.

In the absence of other factors to flesh out a "totality of the circumstances" this most basic *Terry* stop inquiry must be found in favor of the Appellant.

5. <u>This Court should approve the Fifth District's holding in State v. Unger, 5th Dist. Stark No. 2016 CA 00148, 2017-Ohio-5553, and overrule the Twelfth District's holding in State v. Hawkins, Fayette CA2017-07-013, 2018-Ohio-1983</u>.

The facts in the *Unger* case lend themselves to comparable analysis:

> On March 15, 2016, Appellant Unger was operating a white 2006 Chevrolet Trailblazer in the vicinity of West Tuscarawas Street and Interstate 77 in Canton, Ohio. At about 8:45 AM on that date, Sergeant Shane Cline of the Stark County Sheriffs Department was completing an unrelated traffic stop

> on a side street near West Tuscarawas, when he observed the aforesaid Trailblazer go past his position three times in a seven-to-eight minute period, moving slowly on the first pass.
>
> Sergeant Cline finished what he was doing, got in his cruiser, and pulled up behind appellant's Chevy Trailblazer. He then utilized his "I-Links" database system to check the license plate number on the Trailblazer. The database indicated that the license plate came back to a Chevrolet, but one with a different paint color.
>
> Sergeant Cline decided to initiate a traffic stop. He approached the Trailblazer and made contact with appellant and a passenger. Tr. at 11, 42. At that time, he could smell burnt marijuana. Tr. at 10. The passenger told Cline that he just got done smoking marijuana. Id. According to Cline, appellant also admitted that he had smoked marijuana that day. Id.

State v. Unger, 5th Dist. Stark No. 2016 CA 00148, 2017-Ohio-5553, ¶2-4.

Appellant Unger was ultimately charged with OVI and driving under suspension. Upon cross-examination, the officer admitted he had not observed any traffic violation committed by the Defendant, the officer "made no mention of observing an equipment violation or erratic or impaired driving. He noted he made the decision to run appellant's vehicle's license plate through I-Links because he found it suspicious that a vehicle would drive slowly by him three times while he was in the midst of another traffic stop (Tr. at 8-9), although he conceded that a motorist's behavior of driving past a police officer multiple times is not typical behavior by an individual driving a stolen vehicle (see Tr. at 38-40)." *Id*, ¶17.

Ultimately, the Fifth District was persuaded by the opinions and holdings found in the Florida and Arkansas Supreme Courts:

> The Supreme Court of Arkansas and the Supreme Court of Florida have both recently held that a discrepancy between the color of a defendant's vehicle and the color listed in registration records accessed by a police officer does not of itself provide the officer with reasonable suspicion to perform an investigatory traffic stop. See *Schneider v. State*, 2015 Ark. 152, 459 S.W.3d 296 (2015); *State v. Teamer*, 151 So.3d 421 (Fla. 2014).
>
> Upon review of the record and the circumstances presented herein, we find

> a discrepancy in an automobile's paint color found via a database check, particularly where the vehicle is already ten years old, even when combined with the fact of the vehicle passing a stationary police officer three times over the course of a few minutes, cannot be classified as a reasonable suspicion of motor vehicle theft sufficient to justify a warrantless stop, as maintained by the arresting officer in this case. We therefore hold the trial court erred in denying the motion to suppress in this regard.

Unger, ¶19-20.

CONCLUSION

In framing its question certified to this Court, the Twelfth District couched what it wants this Court to hold by phrasing question in such as manner as to suggest reasonableness on behalf of the officer's actions:

> Does the discrepancy between the paint color of a vehicle and the paint color listed in the vehicle registration records accessed by a police officer provide the officer with reasonable articulable suspicion to perform a lawful investigative traffic stop where the officer believes the vehicle or its displayed plates may be stolen?

It is worthwhile to mention, that in every one of the cases cited in this brief, the officer indicated that the decision to pull over the motorists in these cases was made because, given the color discrepancy apparent on the record, he wished to conducted further investigation to verify if the plates or the vehicle could possibly be stolen. Even the claim of verifying "registration compliance" is indicated in the *Uribe* case, could only mean verifying that the correct tags are on the vehicle in question. It is also worthwhile to note that, all of the cases which were relied upon the Twelfth District were reviewed and rejected by the Courts which have also had the opportunity to flesh out this legal issue.

This Court should AFFIRM the holding in *State v. Unger*, 5th Dist. Stark No. 2016 CA 00148, 2017-Ohio-5553, and OVERRULE the holding in *State v. Hawkins*, 12th Dist. Fayette No. CA 2017-07-013, 2018-Ohio-1983, REVERSE the denial of the motion to suppress and

DISCHARGE the Defendant/Appellant.

Respectfully submitted,

/s Shannon M. Treynor

Shannon M. Treynor, Esq. (0072813)
63 North Main Street / P.O. Box 735
London, Ohio 43140
(740) 845-1889 / (740) 845-2919 FAX
Counsel of Record for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the forgoing Brief of Appellant upon an Entry Certifying a Conflict between the Twelfth and Fifth Districts was served upon

Jess C. Weade, Prosecuting Attorney (0082415) (Counsel of Record)
John M Scott, Assistant Prosecuting Attorney (0064420)
110 East Court Street
Washington Courthouse, Ohio 43160
(740) 335-0888 / (740) 333-3539 FAX
Counsels Appellee State of Ohio

via ordinary U.S. Mail, postage prepaid and via email service to jess.weade@fayette-co-oh.com and john.scott@fayette-co-oh.com, this 12th day of November, 2018.

/s Shannon M. Treynor

Shannon M. Treynor, Esq.
Attorney of Record for Appellees

APPENDIX

ORIGINAL

THE SUPREME COURT OF OHIO

STATE OF OHIO, *Plaintiff-Appellee,*	:	Case No. CA2017-07-013
	:	On Appeal from the Fayette County
	:	Court of Appeals, Twelfth Appeal District
Vs.	:	
	:	18-1177
, Justin Hawkins: *Defendant-Appellant.* :		Case No. CRI20160145

NOTICE OF CERTIFIED CONFLICT

COUNSEL FOR APPELLANT,

Justin Hawkins (COUNSEL OF RECORD)
Inmate No. 736731
P.O. Box 56
3791 State Route 63
Lebanon, Ohio
45036

COUNSEL FOR APPELLEE, STATE OF OHIO

Jess C. Weade ESQ (0082415) (COUNSEL OF RECORD)
110 Court ST. 1st floor
Washington C. H, OH 43160

Now comes Appellant, Justin Hawkins, pursuant to S.Ct.Prac. R. 8.01., to serve notice of certified conflict to this Honorable Court.

The following is attached as Appendix:

1. A date-stamped copy of the court of appeals order certifying a conflict.
2. A copy of the certifying court's opinion.
3. A copy of conflicting court of appeals' opinion.

Further, please be aware that on or about 07/31/2018 appellant filed a motion for appointment of appellate counsel, in the Twelfth District Court of Appeals – to represent appellant during the determination of the "Conflict..." within the Supreme Court of Ohio. And to date the motion remains pending.

Sincerely submitted,

Justin Hawkins #736-731
Lebanon Corr. Inst.
P.O. Box 56
Lebanon, Ohio, 45036

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2017-07-013
	:	O P I N I O N
- vs -		5/21/2018
	:	
JUSTIN HAWKINS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. CRI20160145

Jess C. Weade, Fayette County Prosecuting Attorney, John M. Scott, Jr., 110 East Court Street, Washington C.H., Ohio 43160, for plaintiff-appellee

Steven H. Eckstein, 1208 Bramble Avenue, Washington C.H., Ohio 43160, for defendant-appellant

HENDRICKSON, P.J.

{¶ 1} Defendant-appellant, Justin Hawkins, appeals from his conviction for the failure to comply with an order or signal of a police officer, arguing the Fayette County Court of Common Pleas erred when it denied his motion to suppress. For the reasons stated below, we affirm the trial court's denial of appellant's motion to suppress and uphold his conviction.

{¶ 2} At approximately 3:00 a.m. on May 20, 2016, Patrolman Jeffery Heinz, a 14-

year veteran police officer with the city of Washington Court House, was finishing up a traffic stop on Draper Street when a black GMC SUV driven by appellant passed his patrol car. Heinz's onboard license plate reader captured the license plate of the vehicle, and Heinz ran the license plate number through dispatch to obtain the vehicle's registration information. Heinz was advised that the license plate was registered to a 2001 *white* GMC SUV. Heinz quickly concluded his original traffic stop before locating the black GMC SUV and pulling it over. Heinz initiated the traffic stop of the SUV because he was concerned that the vehicle might have been stolen or had a "fictitious registration."

{¶ 3} After stopping the SUV, Heinz explained to appellant that the color discrepancy was the reason for the stop and asked appellant for his license, registration, and proof of insurance. Appellant did not have any identification on him. While obtaining appellant's personal information, Heinz was able to verify the last six numbers of the GMC's VIN by providing the numbers to dispatch, who verified that the numbers matched the records of the Bureau of Motor Vehicles ("BMV").

{¶ 4} Heinz returned to his patrol car to write appellant a warning and to run the social security number appellant provided. The social security number belonged to a different individual. Heinz again approached appellant's vehicle and verified appellant's name, date of birth, and his social security number. Although Heinz instructed appellant to "sit tight" while Heinz ran the second social security number, appellant began to slowly drive away. Heinz followed in his patrol car.

{¶ 5} While Heinz followed appellant's vehicle, he ran the second social security number provided by appellant. This number also belonged to someone other than appellant. Heinz then ran appellant's name and date of birth through dispatch. He was advised that appellant did not have a valid driver's license and had a warrant for his arrest out of Delaware County. Heinz activated his patrol car's lights and sirens, and appellant pulled over the SUV

he was operating. However, after Heinz informed appellant there was a warrant out for his arrest, appellant "gunned the engine and took off at a rapid rate." Heinz called for assistance and set off in pursuit of appellant, with his vehicle's lights and sirens activated.

{¶ 6} After nearly hitting a police cruiser, appellant veered off the road and drove through yards before striking a bush or a small tree. Appellant then abandoned his vehicle and fled on foot. He was apprehended by Heinz and arrested. Appellant's vehicle was inventoried, and two credit cards were found in the glovebox of the SUV. The credit cards were not in appellant's name and had previously been reported stolen.

{¶ 7} On June 3, 2016, appellant was indicted on two counts of receiving stolen property in violation of R.C. 2913.51(A) and (C), felonies of the fifth degree, and one count of failing to comply with an order or signal of a police officer in violation of R.C. 2921.331(B) and (C)(5)(a)(ii), a felony of the third degree as appellant's operation of the motor vehicle caused a substantial risk of serious physical harm to persons or property. Appellant moved to suppress all evidence relating to his traffic stop on the basis that Heinz "lacked reasonable and articulable suspicion to make an investigatory stop." Appellant contended the "mismatch" between the SUV's color and the color listed on the vehicle's registration did not provide reasonable suspicion to justify the stop.

{¶ 8} The only witness to testify at the hearing on appellant's motion was Heinz, who testified as follows regarding the traffic stop:

> [Prosecutor]: What if any concern to you have that a plate [sic], cause it sounds like it matched the type of vehicle, but it didn't match the color of the vehicle. What reason would you have for any concern?
>
> Heinz: Yeah typically with my, with my experience when subjects will steal a vehicle and that is why BMV started implementing the colors is, in years past somebody would steal a vehicle.
>
> * * *

In years past, with my experience, if someone would steal a vehicle, they would just go through a parking lot anywhere and find a vehicle that would match the vehicle in which they were driving. Throw that [plate] on there and then drive around.

[Prosecutor]: And have you had that experience personally with vehicles that have been stolen in and around Washington Court House?

Heinz: Me personally, no. However, in our city, yes. We have license plates [that] have been taken off and done that, yes.

* * *

[Defense Counsel]: [You] talked a little bit about your experience investigating. How many car thefts have you investigated in your career?

Heinz: Car thefts?

* * *

I can't put a number, but it's been quite a few.

[Defense Counsel]: As the, have you ever investigated them, or where you the officer on the scene or how did it, how did that work?

Heinz: I have both had investigations of vehicle thefts [sic]. I have also had recovery of stolen vehicles and I have also had recovery of stolen license plates as well.

[Defense Counsel]: You said you've never experienced a situation like this. Where a, where as you said, where a plate may have been switched from a vehicle?

Heinz: Me personally?

[Defense Counsel]: Yes.

Heinz: No.

[Defense Counsel]: Okay.

Heinz: But yes, it is done.

* * *

[Defense Counsel]: [J]ust for clarification purposes, the only reason that [appellant] was stopped was due to the color of the

> vehicle not matching registration?
>
> Heinz: The, the vehicle did not match the vehicle [sic]. Which at the time I believed was [a] fictitious registration.
>
> [Defense Counsel]: What I asked was the sole reason you stopped Mr. Hawkins was because the color of the vehicle did not match the color that you were told by a dispatcher that the vehicle should have been on the registration?
>
> Heinz: That would be correct.

{¶ 9} When questioned about whether driving a vehicle that is a different color than the color listed on the vehicle's registration is, "in and of itself," a crime, Heinz initially testified he did not know. However, he then clarified that "[w]e have been told by our prosecutors yes, it is. It is. However, we do not charge for the color discrepancy." Heinz testified that a person could, however, be charged with "fictitious registration because the colors [do] not match."

{¶ 10} After considering Heinz's testimony, the trial court denied appellant's motion to suppress, stating that there was "nothing unreasonable or constitutionally infirm with the conduct of Officer Heinz in this case." The court found "reasonable and articulable suspicion sufficient to initiate the initial detention * * * to determine the validity of the * * * registration issue that was raised when * * * he ran the registration through the dispatcher and was notified that it was to a white vehicle."

{¶ 11} Following the denial of his motion to suppress, appellant was tried to a jury. Heinz was the sole witness to testify at trial. Following his testimony, appellant moved for acquittal pursuant to Crim.R. 29, and his motion was denied. The matter was submitted to the jury, who acquitted appellant of both counts of receiving stolen property but found him guilty of failing to comply with the order or signal of a police officer. The jury further found appellant's operation of the motor vehicle caused a substantial risk of serious physical harm. Appellant was sentenced to 36 months in prison.

{¶ 12} Appellant appealed, raising the following as his sole assignment of error:

{¶ 13} THE TRIAL COURT ERRED IN FINDING LAW ENFORCEMENT HAD A REASONABLE AND ARTICULABLE SUSPICION [APPELLANT] WAS ENGAGED IN CRIMINAL ACTIVITY OR OPERATING HIS VEHICLE IN VIOLATION OF THE LAW IN DENYING HIS MOTION TO SUPPRESS AND THEREBY ALLOWING IMPROPER EVIDENCE INTO THE TRIAL IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 14 OF THE OHIO CONSTITUTION.

{¶ 14} In his sole assignment of error, appellant argues the trial court erred in denying his motion to suppress as Patrolman Heinz lacked reasonable articulable suspicion to initiate the traffic stop. He contends the color discrepancy between the paint color of the SUV and the registration for the vehicle did not provide sufficient suspicion to justify the traffic stop. He also argues that because the stop was unlawful, all "derivative evidence" should be suppressed pursuant to the "fruit of the poisonous tree" doctrine and his Crim.R. 29 motion for acquittal should be granted for lack of sufficient evidence.

{¶ 15} Our review of a trial court's denial of a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, 12th Dist. Preble No. CA2006-10-023, 2007-Ohio-3353, ¶ 12. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, 12th Dist. Butler No. CA2005-03-074, 2005-Ohio-6038, ¶ 10. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶ 12.

{¶ 16} "The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution prohibit unreasonable searches and seizures, including unreasonable automobile stops." *Bowling Green v. Godwin*, 110 Ohio St.3d 58, 2006-Ohio-3563, ¶ 11. "Ohio recognizes two types of lawful traffic stops." *State v. Stover*, 12th Dist. Clinton No. CA2017-04-005, 2017-Ohio-9097, ¶ 8. The first involves a non-investigatory stop in which an officer has probable cause to stop a vehicle because the officer observed a traffic violation. *Id.*, citing *State v. Moore*, 12th Dist. Fayette No. CA2010-12-037, 2011-Ohio-4908, ¶ 31. "The second type of lawful traffic stop is an investigative stop, also known as a *Terry* stop, in which the officer has reasonable suspicion based on specific or articulable facts that criminal behavior is imminent or has occurred." *Id.*, citing *State v. Bullock*, 12th Dist. Clinton No. CA2016-07-018, 2017-Ohio-497, ¶ 7. *See also Moore* at ¶ 33, citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968). The present case involves the latter of the two stops.

{¶ 17} With respect to a *Terry* stop, the concept of "reasonable and articulable suspicion" has not been precisely defined; it has been described as something more than an undeveloped suspicion or hunch but less than probable cause. *State v. Baughman*, 192 Ohio App.3d 45, 2011-Ohio-162, ¶ 15, citing *Terry* at 20-21. The "reasonable suspicion standard" under *Terry* is an objective, not a subjective, one. *Stover* at ¶ 9, citing *State v. McCandlish*, 10th Dist. Franklin No. 11AP-913, 2012-Ohio-3765, ¶ 7. For this reason, the propriety of an investigative stop must be "viewed in light of the totality of the surrounding circumstances, from the perspective of a reasonably prudent police officer on the scene guided by his experience and training." *Baughman* at ¶ 15, citing *State v. Batchili*, 133 Ohio St.3d 403, 2007-Ohio-2204, paragraph two of the syllabus; and *State v. Bobo*, 37 Ohio St.3d 177 (1988), paragraph one of the syllabus.

{¶ 18} In the present case, Heinz testified he initiated a traffic stop because appellant was driving a black GMC SUV when the registration indicated the vehicle was white, and this

discrepancy led him to believe the vehicle had a fictitious registration or might have been stolen. This court has not previously addressed the issue of whether the discrepancy between the color of a defendant's vehicle and the color listed in registration records accessed by a police officer provides the officer with reasonable suspicion to perform an investigative traffic stop. Courts that have considered the issue are split.

{¶ 19} The Seventh Circuit Court of Appeals, the Arkansas Supreme Court, the Florida Supreme Court, and the Fifth District Court of Appeals have all determined that a discrepancy in an automobile's paint color found via a database check does not amount to reasonable suspicion of criminal activity sufficient to justify a warrantless investigatory stop. *See United States v. Uribe*, 709 F.3d 646 (7th Cir.2013); *Schneider v. State*, 459 S.W.3d 296 (Ark.2015); *State v. Teamer*, 151 So.3d 421 (Fla.2014); *State v. Unger*, 5th Dist. Stark No. 2016 CA 00148, 2017-Ohio-5553. In many of these cases, the courts considering the issue have noted that there was no requirement under state law to update a vehicle registration when an owner changes the color of his or her car. *Uribe* at 650 (noting "the color discrepancy itself was lawful, because neither Indiana nor Utah requires a driver to update his vehicle registration when he changes the color of his car"); *Schneider* at 299 (noting Arkansas has no requirement that the owner of a vehicle change the registration to reflect the color of a vehicle in the event it is painted or the color is otherwise altered); *Teamer* at 427-428 (finding a color discrepancy is not "'inherently suspicious' or 'unusual enough' or 'so out of the ordinary' as to provide an officer with a reasonable suspicion of criminal activity, especially given the fact that it is not against the law in Florida to change the color of your vehicle without notifying the DHSMV"). The courts concluded that the lawful color discrepancy alone was not probative of wrongdoing and therefore did not authorize a traffic stop. *Uribe* at 652; *Schneider* at 299-300; *Teamer* at 428 ("to find reasonable suspicion based on this single noncriminal factor would be to license investigatory stops on nothing

more than an officer's hunch").

{¶ 20} Other courts that have considered the issue have come out in the other direction. Appellate courts in Georgia, Indiana, and Idaho have all determined that the discrepancy between an automobile's paint color and the color reported on a vehicle's registration amounts to reasonable suspicion of criminal activity to authorize an investigatory stop when the officer believes the vehicle was stolen or has a fictitious plate. *See Smith v. State*, 713 N.E.2d 338, 342 (Ind.App.1999) (finding that the color discrepancy gave an officer "reasonable suspicion to believe that * * * vehicle had a mismatched plate, and as such, could be stolen or retagged"); *Andrews v. State*, 289 Ga. App. 679, 681 (2008) (finding the color discrepancy gave an officer reasonable and articulable suspicion for the investigatory stop where the officer had reason to believe the license plate had been improperly switched or transferred in violation of Georgia law); *State v. Creel*, 2012 Ida. App. Unpub. LEXIS 267, *4-5 (2012) (finding that the color discrepancy gave the officer reasonable and articulable suspicion to initiate the stop where the officer testified the vehicle "could have had fictitious license plates in violation of I.C. § 49-456(3) or the vehicle could have been stolen and the plates were from another S-10 pickup"). In these cases, the courts noted that the officer "was entitled to draw from the facts in light of his experience" and training. *Andrews* at 681. *See also Creel* at * 5.

{¶ 21} We are persuaded by the approach taken in *Smith, Andrews*, and *Creel* and find that under the facts of the present case, reasonable and articulable suspicion existed to authorize Heinz's stop of appellant's vehicle. The color discrepancy between the vehicle's actual paint color (black) and the BMV's registration (white) gave Heinz reason to believe that the vehicle may have been stolen or the license plate switched from another vehicle. Heinz testified that although he had not personally experienced a situation where a car thief had replaced a vehicle's original license plate with a stolen plate taken from a similar vehicle, from

his 14 years of law enforcement experience he knew that this type of criminal behavior occurred. He further testified that such criminal activity had occurred in and around Washington Court House.

{¶ 22} Accordingly, for the reasons set forth above, we find that the trial court did not err in denying appellant's motion to suppress. The discrepancy in the vehicle's color coupled with Heinz's experience and belief that the vehicle or its plates might have been stolen provided reasonable and articulable suspicion to authorize the investigatory stop of appellant's vehicle.

{¶ 23} Therefore, as the traffic stop was lawful, we find no merit to appellant's arguments that the evidence flowing from the stop must be suppressed pursuant to the "fruit of the poisonous tree" doctrine. Heinz trial testimony about the events that occurred leading up to, during, and after the traffic stop was properly admitted. Through Heinz's testimony the state presented sufficient evidence to sustain appellant's conviction for failing to comply with an order or signal of a police officer. Appellant fled from Heinz after being advised there was a warrant for his arrest. He ignored the police cruiser's lights and sirens – visible and audible signals to stop his vehicle – and in fleeing from Heinz, caused a substantial risk of harm to both property and persons. *See, e.g., State v. Monnin*, 12th Dist. Warren CA2016-07-058, 2017-Ohio-1095, ¶ 13-30.

{¶ 24} The arguments set forth in appellant's sole assignment of error are therefore without merit and his assignment of error is overruled.

{¶ 25} Judgment affirmed.

RINGLAND and PIPER, JJ., concur.

State v. Unger, 062617 OHCA5, 2016 CA 00148 /**/ div.c1 {text-align: center} /**/

2017-Ohio-5553

STATE OF OHIO Plaintiff-Appellee

v.

MIKEAL UNGER Defendant-Appellant

No. 2016 CA 00148

Court of Appeals of Ohio, Fifth District, Stark

June 26, 2017

Criminal Appeal from the Canton Municipal Court, Stark County, Case No. 2016 TRC 1871

For Plaintiff-Appellee JOSEPH MARTUCCIO CANTON LAW DIRECTOR TYRONE D. HAURITZ CANTON CITY PROSECUTOR KELLY PARKER ASSISTANT PROSECUTOR

For Defendant-Appellant STACEY ZIPAY

JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. John W. Wise, J.

OPINION

Wise, John, J.

{¶1} Appellant Mikeal Unger appeals his conviction, in the Canton Municipal Court, Stark County, for OVI and driving under a twelve-point suspension. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} On March 15, 2016, Appellant Unger was operating a white 2006 Chevrolet Trailblazer in the vicinity of West Tuscarawas Street and Interstate 77 in Canton, Ohio. At about 8:45 AM on that date, Sergeant Shane Cline of the Stark County Sheriffs Department was completing an unrelated traffic stop on a side street near West Tuscarawas, when he observed the aforesaid Trailblazer go past his position three times in a seven-to-eight minute period, moving slowly on the first pass.

{¶3} Sergeant Cline finished what he was doing, got in his cruiser, and pulled up behind appellant's Chevy Trailblazer. He then utilized his "I-Links" database system to check the license plate number on the Trailblazer. The database indicated that the license plate came back to a Chevrolet, but one with a different paint color.[1]

{¶4} Sergeant Cline decided to initiate a traffic stop. He approached the Trailblazer and made contact with appellant and a passenger. Tr. at 11, 42. At that time, he could smell burnt marijuana. Tr. at 10. The passenger told Cline that he just got done smoking marijuana. *Id.* According to Cline, appellant also admitted that he had smoked marijuana that day. *Id.*

{¶5} The officer returned to his cruiser, and by checking the vehicle identification number ("VIN") he confirmed the Trailblazer was not stolen. Tr. at 11. However, Sergeant Cline apparently initially determined that appellant "was valid, " giving no indication at that time that appellant was driving under suspension. Tr. at 11. Cline returned to the Trailblazer and asked appellant to exit and perform field sobriety tests ("FSTs"). Tr. at 12. He based his request on the odor of marijuana, appellant's admission to smoking earlier, and the observation he made that appellant's tongue had a yellow coating and raised taste buds, possible indicators of drug use. *Id.*

{¶6} Based on what he had observed and the results of his FSTs, Sergeant Cline arrested appellant for OVI (R.C. 4511.19(A)(1)(a)). Appellant then submitted to a chemical test. Tr. at 31. Appellant was also charged with driving under an OVI suspension, which was subsequently

amended to a charge of driving under a twelve-point suspension (R.C. 4510.037(J)).

{¶7} On June 13, 2016, appellant filed a motion to suppress, alleging that the arresting officer did not have: (1) reasonable articulable suspicion to stop appellant's vehicle; (2) reasonable articulable suspicion to detain appellant in order to perform field sobriety tests; or (3) probable cause to arrest appellant for OVI.

{¶8} A suppression hearing was conducted on June 15, 2016. The sole witness called was Sergeant Cline. The trial court denied appellant's motion to suppress via a judgment entry issued on June 17, 2016.

{¶9} On June 29, 2016, appellant pled no contest to OVI and driving under a twelve-point suspension. The trial court found him guilty on both counts. Appellant was thereafter sentenced *inter alia* to 180 days in jail on each count, with all but 10 days suspended on the OVI count and all but 3 days suspended on the DUS count.

{¶10} On July 29, 2016, appellant filed a notice of appeal. He herein raises the following three Assignments of Error:

{¶11} "I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS BECAUSE THE COURT FOUND PROBABLE CAUSE FOR APPELLANT'S ARREST BASED SOLELY ON EVIDENCE OF DRUG USE, WITHOUT THE PRESENCE OF IMPAIRMENT.

{¶12} "II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS BECAUSE SERGEANT CLINE'S STOP OF APPELLANT WAS NOT BASED ON REASONABLE ARTICULABLE SUSPICION.

{¶13} "III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS BECAUSE SERGEANT CLINE DID NOT HAVE REASONABLE ARTICULABLE SUSPICION TO DETAIN APPELLANT."

Standard of Review

{¶14} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's finding of fact. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this third type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in the given case. *See State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583; *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141; *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. The United States Supreme Court has held that as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. *See Ornelas v. United States* (1996), 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911.

II.

{¶15} In his Second Assignment of Error, which we find dispositive of this appeal, appellant contends the trial court erred in denying his motion to suppress on the question of the officer's reasonable articulable suspicion to make the traffic stop in question. We agree.

{¶16} The stop of a vehicle by law enforcement officers requires a balancing of the public's privacy interest against legitimate government interests to determine if the seizure was reasonable. *Delaware v. Prouse* (1979), 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660. "It is well-settled law in Ohio that reasonable and articulable suspicion is required for a police officer to make a warrantless stop." *State v. Bay,* Licking App.No. 06CA113, 2007-Ohio-3727, ¶ 65, citing *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. "* * * [Reasonable suspicion is not proof beyond a reasonable doubt, but is judged by all the surrounding circumstances." *State v. Boyd* (Oct. 10, 1996), Richland App.No. 96-CA-3, 1996 WL 608378.

{¶17} In the case *sub judice,* we first note Sergeant Cline did not indicate that appellant had committed any observed traffic violation. *See* Tr. at 41. Sergeant Cline further made no mention of observing an equipment violation or erratic or impaired driving. He noted he made the decision to run appellant's vehicle's license plate through I-Links because he found it suspicious that a vehicle would drive slowly by him three times while he was in the midst of another traffic stop (Tr. at 8-9), although he conceded that a motorist's behavior of driving past a police officer multiple times is not typical behavior by an individual driving a stolen vehicle (*see* Tr. at 38-40).

{¶18} On cross-examination, Sergeant Cline indicated that he had maintained his suspicion "based on the [vehicle's] color alone" being different than what the records system showed. *See* Tr. at 40. Cline was also asked by defense counsel if "the suspicion may have been in your head that the driver of the vehicle stole a Chevy Trailblazer, could be hatchback, and happened to have put a plate on it from another Chevy Trailblazer hatchback that was a different color?" He replied, "[t]hat is correct." Tr. at 40-41. Cline also stated, in regard to such suspected plate-switching tactics between similar vehicles, that "[w]e've had that numerous times this year" and that "[w]e've really been watching it." Tr. at 41. Cline also stated he did not know if a vehicle owner was required to report paint color changes to the Ohio Bureau of Motor Vehicles. Tr. at 41-42.

{¶19} We herein must again "recognize that these cases often present close calls, both for the courts and the law enforcement officers on the scene." *State v. Hall,* 5th Dist. Stark No. 2015 CA 00213, 2016-Ohio-5787, 70 N.E.3d 1154, ¶ 26. The briefs before us in the case *sub judice* provide no case law directly on point, and our research reveals somewhat limited discussion in Ohio of the role of a vehicle's paint scheme *per se* as it relates to a law enforcement officer's suspicion of criminal activity in connection with a traffic stop. One Ohio case references the existence of an "after-market" paint job on a late-model car, but the vehicle paint factor in that instance was accompanied by several other observations articulated by the arresting officer. *See State v. Wynter,* 2nd Dist. Miami No. 97 CA 36, 1998 WL 127092. However, the Supreme Court of Arkansas and the Supreme Court of Florida have both recently held that a discrepancy between the color of a defendant's vehicle and the color listed in registration records accessed by a police officer does not of itself provide the officer with reasonable suspicion to perform an investigatory traffic stop. *See Schneider v. State,* 2015 Ark. 152, 459 S.W.3d 296 (2015); *State v. Teamer,* 151 So.3d 421 (Fla. 2014).

{¶20} Upon review of the record and the circumstances presented herein, we find a discrepancy in an automobile's paint color found via a database check, particularly where the vehicle is already ten years old, even when combined with the fact of the vehicle passing a stationary police officer

three times over the course of a few minutes, cannot be classified as a reasonable suspicion of motor vehicle theft sufficient to justify a warrantless stop, as maintained by the arresting officer in this case. We therefore hold the trial court erred in denying the motion to suppress in this regard.

{¶21} Appellant's Second Assignment of Error is therefore sustained to the extent that all evidence obtained as a result of and subsequent to the stop of appellant's Trailblazer should have been suppressed.

I, III.

{¶22} Based on our above conclusions, appellant's remaining Assignments of Error are found to be moot. *See* App.R. 12(A)(1)(c).

{¶23} For the foregoing reasons, the judgment of the Canton Municipal Court, Stark County, Ohio, is hereby reversed and remanded.

Wise, John, J. Gwin, P. J., concurs

Hoffman, J., concurring

{¶24} I concur in the majority's analysis and disposition of Appellant's second assignment of error. And, I agree our ruling with respect thereto is dispositive of this appeal.

{¶25} Conceding it is unnecessary to address the first assignment of error and recognizing doing so is merely dicta on my part, I, nevertheless, chose to do so. I do so because I believe the issue raised therein is a significant one which can provide guidance in future cases.

{¶26} The trial court made a specific finding based upon the video of the stop, the results of all of the field sobriety tests and the arresting officer's generalized observations there was insufficient evidence to determine the Appellant was impaired. However, the trial court determined when there is otherwise sufficient probable cause a person has consumed, used and has a likely identifiable amount of marijuana, THC or metabolite in that person's system, that alone establishes probable cause to arrest for OMVI. I disagree.

{¶27} Just as it is not against the law to drink and drive, it is not against the law to use marijuana and drive. It is only a violation when certain levels of alcohol or THC exist in the defendant's body or the consumption or use results in impairment. Given the trial court's determination the evidence was insufficient to support a finding of impairment, I find no probable cause existed to arrest Appellant for OMVI, no more so than would the mere admission a defendant had consumed alcohol.

Notes:

[1] Sergeant Cline's testimony at the suppression hearing was somewhat limited on these points. At first he said he believed the make and model matched, but on cross-examination he indicated that the I-Links system would have just given the Chevrolet name. He added that "usually the S-U-V's come back as hatchbacks, " although he was unsure. *See* Tr. at 9, 39-40. Furthermore, Cline did not recall the color of the vehicle actually listed on the registration of appellant's vehicle, and he stated he had merely written "different color" on his paperwork. Tr. at 39.

033491

OHIO DEPARTMENT OF PUBLIC SAFETY
BUREAU OF MOTOR VEHICLES

VEHICLE RENEWAL APPLICATION

IF YOU NO LONGER OWN OR LEASE THIS VEHICLE, PLEASE DISREGARD THIS NOTICE.

MAIL	INTERNET
Allow 3 weeks (excluding mail time) to receive your registration. If address is incorrect, write the correct address in the space provided below. See instructions for completing this application. Checks or money orders are accepted.	Log on to **www.OPLATES.com**. Some vehicles may be excluded from registering online (see web site for restrictions). Credit cards and electronic checks accepted. You may also change your address via this web site.
DEPUTY REGISTRAR	**E✓CHECK**
If any of the vehicle information on this form has changed, you must take your Certificate of Title to a deputy registrar. Most credit cards, cash, checks, or money orders are accepted.	E✓CHECK is still required biennially during the multi-year registration period for qualifying vehicles. If you have questions concerning EPA requirements, call 1-800-CAR-TEST or visit www.ohioecheck.org.

BP25BZ PC SINGLE-OWNER

SHANNON TREYNOR
[redacted]
LONDON OH 43140-1151

Mail Renewal Instructions:

- **Multi-Year registrations are available for two (2) to five (5) years. To request a revised renewal notice contact our office at 1-614-752-7800 or 1-800-589-8247.**
- **If you have an Amateur Radio, Commercial Radio/TV license plate, you must submit a copy of your unexpired and unrevoked FCC Radio and/or TV license at the time of the renewal.**
- **Lease Vehicles:** If the **Power of Attorney** box below is marked YES, you must submit a Power of Attorney form signed by the lease company or your application will be returned to you unprocessed (photocopies accepted; originals not returned).
- **EPA Counties**: If the **E✓CHECK** box on the application below is marked **YES**, your vehicle is subject to EPA emission testing. (NOTE: This box reflects your status at the time of printing. Testing done immediately before or after *may* change your status). You must enclose an OHIO issued E✓CHECK Inspection Pass, Waiver or Exemption Certificate (photocopies accepted; originals not returned). E✓CHECK is still required biennially during the multi-year registration period for qualifying vehicles. If you have questions concerning EPA requirements, call 1-800-CAR-TEST or visit www.ohioecheck.org.
- **Address change**: If you have moved, this **may** result in a fee change due to differing local taxes. To verify your local taxes, or for any additional registration information, call **1-800-589-8247** or **1-614-752-7800.**
- **FEES:** Make check or money order payable to: **Ohio Treasurer of State. Your check must include your name and address; also print your license plate number on the check or money order. Online bill pay checks are not acceptable.** DO NOT SEND CASH. Fees and all documents must be sent together or your application will be returned. Registration will be cancelled and a $15.00 penalty assessed for any check returned unpaid by the financial institution. NOTE: The fees shown are valid for mail registration only. You can receive the same service from a deputy registrar, phone, or Internet, although fees may vary.
- **To avoid the $10.00 late fee, renew within 30 days after your expiration.**
- **Donations**: You may make donations to the children's **Save Our Sight** program by checking the box below and entering the amount you wish to donate ($1.00 increments). Add this to your total fees due. For more information on the children's **Save Our Sight** program, please call **1-800-755-GROW (4769)**.

Vehicle Expiration date: 08/10/2018
2012 CHEV SW PLATE # [redacted]

RENEWAL FEES	NEW PLATES	KEEP CURRENT PLATES
NEW PLATE FEE	8.25	
SPECIAL PLATE FEE		
STATE LICENSE TAX	31.00	31.00
LOCAL/COUNTY TAX	20.00	20.00
RTIP TAX		
SERVICE FEE	3.50	3.50
POSTAGE	3.02	.41
MAIL-IN TOTAL	65.77	54.91

You must sign on reverse side to complete processing of your application

BMV 4603 01/17 [17601148]

APPLICATION FOR RENEWAL REGISTRATION BY MAIL

YOU MUST SIGN ON REVERSE SIDE

PLATE CAT. **PASSENGER** PLATE #-TYPE [redacted]
TITLE NO. [redacted]
REG. EXP. **08/10/2018** VEHICLE **2012 CHEV SW**
RNW. EXP. **08/10/2019**
COUNTY **MADISON** TAX DIST./NAME **4901 LONDON**
VIN [redacted] Seat Cap. **000** WGT

POWER of ATTORNEY REQUIRED? **NO**

E✓CHECK REQUIRED? **NO**

- ☐ Keeping current plates pay: **$54.91**
- ☐ Requesting new plates pay: **$65.77**
- ☐ Requesting new plates with current plate number pay: **$75.77**

☐ I would like to donate $ ☐☐☐.☐☐ to the children's Save Our Sight program.

[redacted]
SHANNON TREYNOR
[redacted]
LONDON OH 43140-1151

Write name or address corrections here: _____

_____ County _____

4603 1125020511353636 BMV 4603 01/17 D

YOU WILL LOSE YOUR DRIVER LICENSE IF YOU DRIVE WITHOUT INSURANCE OR OTHER ACCEPTABLE FINANCIAL RESPONSIBILITY COVERAGE

- In Ohio, it is illegal to drive any motor vehicle without insurance or other financial responsibility (FR) coverage.
- It is also illegal for any motor vehicle owner to allow anyone else to drive the owner's vehicle without FR coverage.
- **PROOF OF COVERAGE IS REQUIRED:** • Whenever a police officer issues a traffic ticket • At all vehicle inspection stops • Upon traffic court appearances and • Upon random checks by the Registrar of Motor Vehicles.
- **ANY DRIVER OR OWNER WHO FAILS TO SHOW PROOF OF INSURANCE OR OTHER COVERAGE WILL** • Lose his or her driver license until requirements are met on first offense, ONE YEAR on second offense and TWO YEARS on additional offenses • Lose his or her license plates and vehicle registration • Pay reinstatement fees of $100.00 for first offense, $300.00 for second offense, and $600.00 third and subsequent offenses • Pay a $50.00 penalty for any failure to surrender his or her driver license, license plates, or registration AND • Be required to maintain special FR coverage ("High-risk" insurance or equivalent) on file with the Bureau of Motor Vehicles (BMV) for THREE or FIVE YEARS.
- **ONCE THIS SUSPENSION IS IN EFFECT:** Any driver or owner who violates the suspension will have his or her vehicle immobilized and his or her license plates confiscated for at least 30 DAYS first offense and 60 DAYS second offense. For a third or subsequent offense, the vehicle will be forfeited and sold and the person will not be permitted to register any motor vehicle in Ohio for FIVE YEARS.
- **IF YOU ARE INVOLVED IN AN ACCIDENT WITHOUT INSURANCE OR OTHER FR COVERAGE:** In addition to all the penalties listed above, you may have • A SECURITY SUSPENSION for TWO YEARS or more and • A JUDGMENT SUSPENSION INDEFINITELY (until all damages have been satisfied).
- **THESE PENALTIES ARE IN ADDITION TO ANY FINES OR PENALTIES IMPOSED BY A COURT OF LAW.**
- **WARNING: THESE LAWS DO NOT PREVENT THE POSSIBILITY THAT YOU MAY BE INVOLVED IN AN ACCIDENT WITH A PERSON WHO HAS NO INSURANCE OR OTHER FR COVERAGE.**
- **WHEN REQUIRED, PROOF OF COVERAGE MAY BE SHOWN BY ANY OF THE FOLLOWING:** • AN INSURANCE POLICY showing automobile liability insurance of at least $25,000 bodily injury per person, $50,000 injury two or more persons, and $25,000 property damage • AN INSURANCE IDENTIFICATION CARD (same coverage) • A SURETY BOND OF $30,000 issued by any authorized surety company or insurance company • A BMV BOND SECURED BY REAL ESTATE having equity of at least $60,000 • A BMV CERTIFICATE FOR MONEY OR GOVERNMENT BONDS in the amount of $30,000 on deposit with the Ohio Treasurer of State • A BMV CERTIFICATE OF SELF-INSURANCE, available only to companies or persons who own at least twenty-six motor vehicles.

FOR MORE INFORMATION, CALL 1-800-589-8247 OR 1-614-752-7800 OR GO TO WWW.OPLATES.COM

SIGN BELOW ***DETACH BOTTOM PORTION AND MAIL TO BMV*** ***KEEP UPPER PORTION FOR YOUR RECORDS***

YOU WILL LOSE YOUR DRIVER LICENSE IF YOU DRIVE WITHOUT INSURANCE OR OTHER ACCEPTABLE FINANCIAL RESPONSIBILITY COVERAGE

- In Ohio, it is illegal to drive any motor vehicle without insurance or other financial responsibility (FR) coverage.
- It is also illegal for any motor vehicle owner to allow anyone else to drive the owner's vehicle without FR coverage.
- PROOF OF COVERAGE IS REQUIRED: • Whenever a police officer issues a traffic ticket • At all vehicle inspection stops • Upon traffic court appearances and • Upon random checks by the Registrar of Motor Vehicles.
- ANY DRIVER OR OWNER WHO FAILS TO SHOW PROOF OF INSURANCE OR OTHER COVERAGE WILL • Lose his or her driver license until requirements are met on first offense, ONE YEAR on second offense and TWO YEARS on additional offenses • Lose his or her license plates and vehicle registration • Pay reinstatement fees of $100.00 for first offense, $300.00 for second offense, and $600.00 for third and subsequent offenses • Pay a $50.00 penalty for any failure to surrender his or her driver license, license plates, or registration AND • Be required to maintain special FR coverage ("High-risk" insurance or equivalent) on file with the Bureau of Motor Vehicles (BMV) for THREE or FIVE YEARS.
- ONCE THIS SUSPENSION IS IN EFFECT: Any driver or owner who violates the suspension will have his or her vehicle immobilized and his or her license plates confiscated for at least 30 DAYS first offense and 60 DAYS second offense. For a third or subsequent offense, the vehicle will be forfeited and sold and the person will not be permitted to register any motor vehicle in Ohio for FIVE YEARS.
- IF YOU ARE INVOLVED IN AN ACCIDENT WITHOUT INSURANCE OR OTHER FR COVERAGE: In addition to all the penalties listed above, you may have • A SECURITY SUSPENSION for TWO YEARS or more and • A JUDGMENT SUSPENSION INDEFINITELY (until all damages have been satisfied).
- THESE PENALTIES ARE IN ADDITION TO ANY FINES OR PENALTIES IMPOSED BY A COURT OF LAW.
- WARNING: THESE LAWS DO NOT PREVENT THE POSSIBILITY THAT YOU MAY BE INVOLVED IN AN ACCIDENT WITH A PERSON WHO HAS NO INSURANCE OR OTHER FR COVERAGE.

BMV 4603B

Make check or money order payable to: Ohio Treasurer of State

I affirm that the owners (or lessees of leased vehicle) now have insurance or other financial responsibility (FR) coverage covering this vehicle and will not operate or permit the operation of this vehicle without FR coverage; all previous registration fees have been paid; this plate category is correct; and this vehicle will not be used as a commercial vehicle unless so registered.

SIGNATURE(S) **DATE**

X

Daytime Phone Number: ( )

BUREAU OF MOTOR VEHICLES
NONEPA REGISTRATION RENEWAL
PO BOX 183089
COLUMBUS OH 43218-3089

A-18

NOTE: SIGNATURE IS REQUIRED FOR FURTHER PROCESSING OF YOUR APPLICATION

713 N.E.2d 338 (Ind.App. 1999)

Jermaine L. SMITH, Appellant-Defendant,

v.

STATE of Indiana, Appellee-Plaintiff.

No. 49A02-9809-CR-767.

Court of Appeals of Indiana

June 28, 1999

Transfer Denied Aug. 31, 1999.

[Copyrighted Material Omitted]

Stephen Gerald Gray, Indianapolis, Indiana, Attorney for Appellant.

Jeffrey A. Modisett, Attorney General of Indiana, Barbara Gasper Hines, Deputy Attorney General, Indianapolis, Indiana, Attorneys for Appellee.

OPINION

KIRSCH, Judge.

Appellant-Defendant, Jermaine L. Smith, appeals his conviction of theft, [1] a Class D felony, for using a "cloned" cellular telephone reprogrammed to have an internal electronic serial number ("ESN") different than its external ESN. Put in the vernacular, Smith was convicted of using an illegal cellular phone which had been modified such that, when in use, the charges would be billed to someone else's active cellular phone number.

Smith raises the following restated issue [2] for our consideration:

Whether the evidence gained by state troopers' field-test of the cellular phone to determine whether that phone was cloned was the product of an unreasonable search and seizure and therefore inadmissible.

We reverse.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the conviction establish that on February 19, 1998, at approximately 7:15 p.m., Indiana State Police Sergeant David Henson pulled over a blue and white Oldsmobile driven by Steve Martin, in which Smith was a front seat passenger. Trooper Henson initiated the traffic stop because a computer check on the vehicle's license plate revealed the plate was registered to a yellow Oldsmobile rather than a blue and white one. Trooper Henson approached the vehicle and asked Martin for his license and registration. Following the arrival of Troopers Troy Sunier and Patrick Spellman, Martin and Smith were asked to exit the vehicle, separated, and questioned in an effort to determine if the car was stolen. The troopers' inquiries revealed that the car belonged to Smith, who had painted it a different color, which explained the apparently mismatched license plate.

During the course of this investigatory stop, Trooper Dean Wildauer arrived on the scene and asked Smith if he and Trooper Spellman could search the vehicle for guns, drugs, money, or illegal contraband. [3] Smith consented to the search. While no guns, drugs, money, or illegal contraband were recovered as a result of the search, two cellular flip phones were retrieved from the front seat of Smith's car. One phone was found on the passenger's side of the vehicle where Smith had been sitting, and the other was found on the driver's side where Martin had been sitting. When asked whether the cellular phone found on the passenger's side was his, Smith stated that it was his girlfriend's; however, he could not recall the name of her service provider.

Trooper Wildauer then took both phones back to his police vehicle where he removed the batteries and performed a short-out technique on each device. The results of this field-test revealed that the cellular phones' internal ESNs did not match the external ESNs, indicating that the cellular phones had been illegally cloned, or reprogrammed such that, when in use, the charges would be billed to someone else's phone number. After discovering that the phones were cloned, Trooper Wildauer called a law enforcement hotline which informed him that the internal ESN of the cellular phone Smith claimed was his girlfriend's in fact belonged to GTE Mobilnet and was assigned to one of its legitimate service customers, Technology Marketing Corporation. Upon further questioning, Smith admitted that he had purchased the cloned phone on the street from an acquaintance and that he knew it was a clone. Thereafter, Smith agreed to cooperate with the police investigation, his car was impounded, and he and Martin were released.

The State filed its information against Smith on February 24, 1998, charging him with theft, a Class D felony. At a hearing held April 30, 1998, Smith moved to suppress the incriminating statements he had made to the officers at the scene and the cellular phone that was seized. The trial court ruled that Smith's statements would be suppressed, but that the phone was admissible. [4]

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At the bench trial on July 2, 1998, the trial court incorporated by reference the evidence received at the suppression hearing and deemed admissible. Record at 22. Smith stipulated that the internal ESN of the cloned cellular phone was not legally assigned to him, and further stipulated that no GTE Mobilnet ESN was assigned to him. In addition, copies of phone records containing many calls made during and around the time Smith was apprehended with the cloned cellular phone, which a Technology Marketing Corporation employee confirmed she had not made, were entered into evidence. As a result, GTE Mobilnet sustained a loss for the phone calls that were billed to Technology Marketing Corporation but did not originate from its phone. Thereafter, the trial court entered a judgment of conviction against Smith for the crime of theft and sentenced him accordingly. Smith now appeals.

DISCUSSION AND DECISION

Smith contends that the troopers engaged in an unreasonable search and seizure by detaining him, disassembling a cellular phone, and accessing its computer memory, all without reasonable suspicion or consent. In so doing, Smith invokes both the Fourth Amendment to the United States Constitution and Article One, Section Eleven of the Indiana Constitution. Because he raises the state constitutional arguments for the first time on appeal and only then in passing,

we find that he has waived those arguments, and thus confine our discussion to whether there was a violation of his federally protected rights. See *Coleman v. State,* 558 N.E.2d 1059, 1067 (Ind.1990).

Initially, we observe that Sergeant Henson's investigatory stop of Smith's vehicle was valid and supported by reasonable suspicion. Police officers may stop a vehicle when they observe minor traffic violations. *State v. Hollins,* 672 N.E.2d 427, 431 (Ind.Ct.App.1996) (citing *Whren v. United States,* 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996); *Small v. State,* 632 N.E.2d 779, 782 (Ind.Ct.App.1994), trans. denied), trans. denied. Indeed, because of the limited nature of the intrusion, brief investigative detentions may be justified on less than probable cause. *Jones v. State,* 655 N.E.2d 49, 55 (Ind.1995) (citing *United States v. Brignoni-Ponce,* 422 U.S. 873, 880, 95 S.Ct. 2574, 2579-80, 45 L.Ed.2d 607 (1975)). Moreover, a police officer's subjective motives in initiating an investigatory stop are irrelevant in Fourth Amendment analysis. "[A] stop will be valid provided there is an objectively justifiable reason for it. If there is an objectively justifiable reason for the stop, then the stop is valid whether or not the police officer would have otherwise made the stop but for ulterior suspicions or motives." *State v. Voit,* 679 N.E.2d 1360, 1362 (Ind.Ct.App.1997) (citing Hollins, 672 N.E.2d at 430-31). Here, the evidence was uncontroverted that the license plate on Smith's blue and white car was registered to a yellow car. Upon conducting a computer check, Sergeant Henson had reasonable suspicion to believe that Smith's vehicle had a mismatched plate, and as such, could be stolen or retagged. Sergeant Henson's traffic stop was valid and comported with the mandates of the Fourth Amendment.

Smith claims that the troopers' subsequent search of his car for guns, drugs, money, or illegal contraband was illegal because his consent to a full search was not freely or voluntarily given. Searches and seizures conducted without prior approval by a judge or magistrate and outside the judicial process are per se unreasonable under the Fourth Amendment, subject only to a few specific and well delineated exceptions. Hollins, 672 N.E.2d at 431 (citing *Minnesota v. Dickerson,* 508 U.S. 366, 372, 113 S.Ct. 2130, 2135, 124 L.Ed.2d 334 (1993)). One such exception occurs when consent is given to the search, under the theory that "when an individual gives permission to a search of either his person or property, governmental intrusion thereon is presumably not unreasonable." Jones, 655 N.E.2d at 54. We have previously set forth our standard on the voluntariness of a consent to search in *Thurman v. State,* 602 N.E.2d 548, 552 (Ind.Ct.App.1992), trans. denied:

" 'When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily

given.' *Bumper v. North Carolina,* 391 U.S. 543, 548, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968); see also *Snyder v. State,* 538 N.E.2d 961, 964 (Ind.Ct.App.1989), trans. denied. The voluntariness of a consent to search is a question of fact to be determined from the totality of the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854 (1973); *Martin v. State,* 490 N.E.2d 309, 313 (Ind.1986). A consent to search is valid except where it is procured by fraud, duress, fear, intimidation, or where it is merely a submission to the supremacy of the law. *Phillips v. State,* 492 N.E.2d 10, 18 (Ind.1986) (overruled on other grounds)."

There are no such indicators here that Smith's consent was in any way induced by fraud, fear, or intimidation. Although the number of officers was unusually high for a traffic stop, none of the officers touched Smith or physically restrained his freedom of movement before the moment he consented to the search of his car. See *Cooley v. State,* 682 N.E.2d 1277, 1279 (Ind.1997) (defendant's consent to search vehicle was valid where he was not in custody and neither handcuffed nor confined); Jones, 655 N.E.2d at 56 (defendant's consent to search vehicle was voluntary even in light of "unusually high" presence of three officers where defendant was not touched or physically restrained). No weapons were drawn and Smith was allowed to move freely about the scene. Under the totality of these circumstances, we conclude that Smith's consent to search his vehicle was voluntarily given.

Having held that Smith's consent to search was not constitutionally defective, we must then determine whether the troopers exceeded the scope of his consent. Because it comes within an established exception to the Fourth Amendment warrant requirement, the scope of the authority to search is strictly limited to the consent given, and a consensual search is reasonable only if it is kept within the bounds of that consent. *Covelli v. State,* 579 N.E.2d 466, 472 (Ind.Ct.App.1991) (citing *United States v. Dichiarinte,* 445 F.2d 126, 129-30 (7th Cir.1971)), trans. denied. "The Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container within the automobile." *Florida v. Jimeno,* 500 U.S. 248, 249, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297 (1991). The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness, in other words, "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Id., 500 U.S. at 251, 111 S.Ct. at 1803-04. In addition, the scope of a consensual search is generally defined by its expressed object. Id.

Here, the expressed objects of the troopers' search were guns, drugs, money, or illegal contraband. When Smith gave the troopers permission to search his car for guns, drugs, money, or illegal contraband, a reasonable person would have understood Smith's consent to include permission to search any containers inside the vehicle which might reasonably contain those specified items. See id. (consent to search vehicle for drugs would include consent to search containers within vehicle which might contain drugs, with no additional consent required to search closed containers within the vehicle); see also *United States v. Maldonado,* 38 F.3d 936, 940 (7th Cir.1994) (when permission to search luggage for illegal drugs is given, a reasonable person would have understood defendant's consent for the search of his luggage to include permission to search any items inside luggage which might contain drugs). A cellular phone is a container capable of hiding such items as drugs or money. Therefore, it was proper for the troopers to seize the cellular phone long enough to determine whether it was truly an operating cellular phone or merely a pretense for hiding the expressed objects of their search.

While we conclude that the seizure of the cellular phone itself was valid in this limited respect, any further action in accessing the computer memory of the phone to retrieve its electronic contents was invalid and exceeded the scope of Smith's consent to search. The courts have long recognized

that information, i.e., intangible items, may be seized within the meaning of the Fourth Amendment. See *Berger v. New York,* 388 U.S. 41, 59-60, 87 S.Ct. 1873, 1884, 18 L.Ed.2d 1040 (1967) (tape recording conversations); *United States v. Carey,* 172 F.3d 1268, 1999 WL 215669 (10th Cir. April 14, 1999) (to be reported at 172 F.3d 1268) (accessing and reading closed computer files); *United States v. Turner,* 169 F.3d 84, 87 (1st Cir.1999) (same); *United States v. Meriwether,* 917 F.2d 955, 958 (6th Cir.1990) (retrieving telephone numbers from an electronic display pager); *United States v. Marbury,* 732 F.2d 390, 399-400 (5th Cir.1984) (noting identification numbers from items of equipment); Dichiarinte, 445 F.2d at 130-31 (opening and reading tax returns); *United States v. David,* 756 F.Supp. 1385, 1389 (D.Nev.1991) (retrieving contents of computer memo book). Likewise, we conclude that the Fourth Amendment affords protection from the unreasonable search and seizure of the computer memory of a cellular phone to retrieve its electronic contents.

Here, the troopers had Smith's permission to search his vehicle and the containers contained therein which might reasonably contain the expressed items of the search: guns, drugs, money, or illegal contraband. However, Smith's consent did not authorize the troopers to access the computer memory of his cellular phone--an objectively reasonable person assessing in context Smith's verbal exchange with the troopers would have understood that the troopers intended to search only in places where Smith could have disposed of or hidden the specific items which they were looking for, namely, guns, drugs, money or other contraband. No objective person would believe that by performing a short-out technique on a cellular phone to retrieve its electronic contents, the troopers might reasonably find the expressed object of their search. "Government agents may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search." Dichiarinte, 445 F.2d at 129. As the Seventh Circuit has observed, "if government agents obtain consent or a warrant to search for a stolen television set, they must limit their activity to that which is necessary to search for such an item; they may not rummage through private documents and personal papers." Id. at n. 3. Thus, where the troopers here obtained consent to search Smith's car for guns, drugs, money, or contraband, they had to limit their activity to that which was necessary to search for such items. Accessing the computer memory of the cellular phone to retrieve its electronic contents was not within the scope of Smith's consent to search.

Nor do we find that Smith failed to object when the troopers exceeded the scope of his consent to search. See Maldonado, 38 F.3d at 940 (a suspect's failure to object can indicate consent); *United States v. Patterson,* 97 F.3d 192, 195 (7th Cir.1996) (if suspect had intended to limit scope of his consent in any manner, burden was upon him to do so). The Record reflects that Trooper Wildauer took the cellular phones back to his car while Trooper Spellman continued to search Smith's car for guns, drugs, money or contraband. While in the confines of his police vehicle, Trooper Wildauer performed the short-out technique and retrieved the electronic contents of the cellular phone. It was not until he returned to Smith's car that he advised Smith that he had accessed the computer memory of the phone and determined it was cloned. Under these

circumstances, Smith had no way of knowing what Trooper Wildauer was doing inside his police vehicle and thus, had no reasonable opportunity to object when Trooper Wildauer exceeded the scope of Smith's consent to search. See Turner, 169 F.3d at 89 (defendant had no meaningful opportunity to object before search of his computer files was completed, where he was not present and unaware of the search). [5]

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The State alternatively relies on the plain view doctrine in order to validate its warrantless search and seizure of the electronic contents of the cellular phone. However, the plain view doctrine requires that law enforcement officials have probable cause to believe the evidence will prove useful in solving a crime. *Taylor v. State,* 659 N.E.2d 535, 538 (Ind.1995). In other words, the criminal nature of the evidence must be "immediately apparent," such that a person of reasonable caution would believe the items could be useful as evidence of a crime. Id.; see also Dichiarinte, 445 F.2d at 130 (defendant's tax returns were not in plain view but had to be opened and read, their criminal character was not apparent on a mere surface inspection, and defendant's limited consent did not authorize the agents' opening and reading them); *Stanley v. Georgia,* 394 U.S. 557, 571, 89 S.Ct. 1243, 1251, 22 L.Ed.2d 542 (1969) (moving picture film found in desk drawer was not contraband, criminal activity, or criminal evidence in plain view, and officers could not put up a projector and examine the film in the hope that it would give some evidence of previously unsuspected criminal behavior). Given the widespread use of cellular phones today, the mere possession of one does not provide the basis for probable cause or even reasonable suspicion to believe the possessor has committed or may have committed a crime. "To conclude otherwise would be to ignore the ubiquity of cellular phones in our society." United States v. Romy, 1997 WL 1048901 (E.D.N.Y. April 24, 1997). As such, we reject the State's position on this point.

In view of the State's failure to justify the warrantless search and seizure of the electronic contents of the cellular phone, Smith's motion to suppress should have been granted, and neither the cellular phones nor the evidence flowing from their search and seizure should have been admitted into evidence. "In a trial in a state court, evidence which was discovered during a search prohibited by the Fourth Amendment is inadmissible." *Pirtle v. State,* 263 Ind. 16, 29, 323 N.E.2d 634, 640 (1975) (citing *Mapp v. Ohio,* 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961)).

Having found constitutional error, our inquiry turns to whether that error was prejudicial to the defendant. *Stinchfield v. State,* 174 Ind.App. 423, 432, 367 N.E.2d 1150, 1155 (1977). A Fourth Amendment error such as one which occurred in the instant case is subject to a constitutional harmless error analysis. *Esquerdo v. State,* 640 N.E.2d 1023, 1030 (Ind.1994) (citing

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Hawkins v. State, 626 N.E.2d 436, 440 (Ind.1993)). Only where we can state beyond a reasonable doubt that the improperly admitted evidence did not contribute to the defendant's conviction is the error harmless. Id. (citing *Rabadi v. State,* 541 N.E.2d 271, 276 (Ind.1989)). Here, in the absence of proof that the cellular phone's internal ESN did not match the external ESN, there was no evidence that Smith possessed or used an illegally cloned phone capable of exerting unauthorized control over another customer's ESN. Given the electronic contents of the cellular phone were

essential to the case against Smith, we cannot say that its erroneous introduction at trial was harmless beyond a reasonable doubt.

Reversed.

GARRARD, J., and NAJAM, J., concur.

Notes:

[1] See IC 35-43-4-2.

[2] Smith also contends that the State should have charged him with possession or use of an unlawful telecommunications device, a Class A misdemeanor, rather than theft, a Class D felony. See IC 35-45-13-7. Because the search and seizure issue is dispositive, we do not reach this issue.

[3] Smith's car matched the description of a vehicle known by Trooper Wildauer to be involved in gang activity. One of the alleged gang members whom Trooper Wildauer had been tracking as part of an ongoing criminal investigation apparently had the same name as Smith. However, it was later determined that neither Smith nor his car had any affiliation with the gang Trooper Wildauer was investigating.

[4] The trial court stated prior to trial that "[t]he phones were properly seized, the statements are suppressed." Record at 23. Throughout its brief, the State refers to and relies upon Smith's incriminating statements without clarification that such statements were suppressed and therefore are not properly of record before us.

[5] We note that the Record does contain a single but clouded reference to the troopers' seeking additional consent to search the electronic contents of the cellular phone. Specifically, we refer to the following colloquy between defense counsel and Trooper Wildauer at the suppression hearing:

"Q: What did you ask them? A: Are these your phones? Q: What did they say? A: Ah ... one of them stated that it was his girlfriends. Trooper Spellman ... Q: Okay. A: Did more of that (inaudible) conversation. Q: Okay. What did Mr. Smith say? A: Ah ... I don't recall. Q: Okay you don't recall what he said? A: (inaudible) Q: And ah ... what else did you ask him? A: Um ... who they had service through. Q: Okay you wanted to know who their provider was? A: Yes. Q: And did Mr. Smith say? A: I don't recall. Q: And then what did you ask him? A: Ah ... Trooper Spellman was asking the majority of these questions with me. Q: I'm asking only what you asked, I'm only asking what you asked. A: Okay. Um ... mind if I take a look at your phones, if you don't mind? Q: Okay. So then you wanted to look at the phones? A: Yeah. We had already received consent on the car. Q: Okay. A: Already been in the car. Q: Right. A: Ah ... found the phones. Q: Okay. A: I believe both were trying to deny the ownership at the start of the phones. Q: Um hum. A: Um ... got consent or not got consent located the phones. Q: Um hum. A: I then determined they were burnout phones, clone phones." Record at 142-44 (emphasis added). Nowhere else in the Record, either in the other troopers' testimony at the suppression hearing or at trial, is there mention that permission was requested of Smith to search the cellular phone, or that such permission was granted. In his testimony at trial, Trooper Wildauer did not indicate whether he received consent to search the phone. As such, the Record is insufficient to support any contention that Smith

consented to the search of the electronic contents of the cellular phone seized from his vehicle. The burden of proof was on the State to establish consent, and it failed to meet that burden.

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289 Ga.App. 679 (Ga.App. 2008), A07A1828, Andrews v. State /**/ div.c1 {text-align: center} /**/

289 Ga.App. 679 (Ga.App. 2008)

658 S.E.2d 126

ANDREWS

v.

The STATE.

Stanton

v.

The State.

Nos. A07A1828, A07A1829.

Court of Appeals of Georgia.

January 30, 2008

Reconsideration Dismissed Feb. 21, 2008.

Certiorari Denied June 2, 2008.

Jamie Thiel Roberts, Maryellen Simmons, for Appellant (case no. A07A1828).

W. Michael Maloof, Decatur, for Appellant (case no. A07A1829).

Peter J. Skandalakis , Dist. Atty., Melissa Lee Himes , Lynda S. Caldwell, Asst. Dist. Attys., for Appellee.

RUFFIN , Judge.

Michael Stanton and Jack Andrews were jointly indicted for trafficking in cocaine, and both defendants filed motions to suppress.[1] The trial court denied the motions and, following a bench trial on stipulated facts, found both men guilty. These appeals followed. As both cases involve the same operative **[658 S.E.2d 127]** facts, we have consolidated them on appeal. For reasons that follow, we affirm.

“In reviewing the grant or denial of a motion to suppress, we construe the evidence in [a] light most favorable to upholding the trial

court's findings and judgment." [2] When the trial court's findings are based upon conflicting evidence, we will not disturb the lower court's ruling if there is any evidence to support its findings, and we accept that court's credibility assessments unless clearly erroneous.[3] “The trial court's application of law to undisputed facts, however, is subject to de novo review." [4]

Viewed in this manner, the record reveals that in the late afternoon of March 21, 2006, Officer Jimmy Jones was patrolling a stretch of I-85 in Troup County. Jones ran a routine registration check of a vehicle traveling the highway and learned that the car was registered as silver in color. According to Jones, the car appeared greenish-gold. Thus, Jones was suspicious that someone had taken the tag from another vehicle, and he pulled the car over to determine if the tag matched the vehicle identification number.

After pulling the vehicle over, Jones asked Andrews-the driver-for his driver's license. Andrews promptly handed Jones his driver's license, which had expired. At that point, Jones asked Andrews to step out of the car, and the two walked to the front of the patrol car. While

Andrews appeared to be searching for another license, Jones asked where Andrews had been. Andrews responded that he and Stanton-the passenger in the car-had taken one of Stanton's relatives to the airport for a trip to California.

When Andrews was unable to produce a valid license, Jones walked to the passenger window to ask Stanton if he had a driver's license and could thus legally drive the car. Jones asked Stanton where he and Andrews had been, and Stanton responded that they had been to Jonesboro to look at a truck. Given the inconsistent responses Jones received, he became suspicious. He then took both drivers' licenses back to the patrol car to run checks and discovered that Andrews' license had been suspended. Upon exiting the patrol car, Jones walked back to the passenger window and asked Stanton-whose brother owned the car-for consent to search the vehicle. Stanton declined. Jones then informed Stanton that he was going to have his drug dog walk around the car. Within two minutes, Jones retrieved the dog from his patrol car and walked it around the perimeter of the car. After the dog alerted twice, Jones entered the car and smelled the odor of marijuana and found marijuana residue on the seat. At that point, both Andrews and Stanton were handcuffed.

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A more thorough search of the car yielded a bag containing over 250 grams of cocaine. Andrews and Stanton were arrested for trafficking in cocaine.

On appeal, both Andrews and Stanton assert that the trial court erred in denying their motions to suppress because Jones lacked a sufficient basis for instigating the initial traffic stop. According to the appellants, Jones' belief that the car was a different color than that listed on the registration was a mere “hunch" that did not give rise to reasonable, articulable suspicion of criminal conduct. As a threshold matter, we note that it is unlawful to transfer a license plate assigned to one vehicle to another vehicle and/or to knowingly operate a vehicle with such improperly transferred tag.[5] Thus, if Jones had reason to believe that the tag had been improperly transferred, he would have had a legitimate basis for stopping the car.[6]

In determining whether Jones' action was reasonable, we must consider the specific reasonable inferences that he was entitled to draw from the facts in light of his experience. **[658 S.E.2d 128]** [7] Pictures tendered at the hearing show that the car did in fact have a greenish hue. Accordingly, Jones had a basis for believing the car to be a different color than that listed on the registration, and it was reasonable for him to infer that the license plate may have been switched from another car. Under these circumstances, we cannot say that Jones acted on a mere hunch.

The fact that Jones was ultimately mistaken does not change the result. If an officer, acting in good faith, has reason to believe that an unlawful act has been committed, his subsequent actions are not automatically rendered improper by a later finding that no criminal act has occurred.[8] Rather, “[t]he question to be decided is whether the officer's motives and actions at the time and under all the circumstances, including the nature of the officer's mistake, if any, were reasonable and not arbitrary or harassing." [9] Again, Jones had reasonable suspicion that the license plate on the car Andrews was driving had been switched. It follows that the trial court did not err in finding the initial stop to be lawful.[10]

In a related argument, Stanton argues that the trial court erred in failing to find the stop pretextual. We note that " 'the trial court's

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decisions with regard to questions of fact and credibility must be accepted unless clearly erroneous.' " [11] Here, the trial court found Jones' testimony regarding the color of the car and his resulting suspicions to be credible, and we cannot gainsay that finding on appeal.[12]

The appellants also argue that Jones improperly expanded the traffic stop because the two men should have been free to leave as soon as Jones realized that he was mistaken about the car's color. However, before Jones was able to verify that the tag matched the registration, he asked for and received Andrews' driver's license, which is permitted as part of a routine traffic stop.[13] Jones noticed immediately that the license had expired, and Andrews began searching for a valid license. During this time, Jones engaged Andrews in small talk regarding the purpose of his trip, which is allowed during a traffic stop.[14] When Andrews was unable to produce a valid license, Jones obtained Stanton's license. At this point, Stanton gave his conflicting statement regarding the purpose of their trip.

According to Jones, he became suspicious "based upon the two totally different stories" he had been told. Although Jones had initially planned on ticketing Andrews for driving without a valid license, instead he asked Stanton for consent to search the car. When Stanton declined to give consent, Jones retrieved his drug dog from his patrol car and walked the dog around the perimeter of the car where the dog alerted. Approximately two minutes elapsed from the time Stanton declined to give consent until Jones performed the free air search, using the drug dog.

Under the circumstances of this case, we cannot say that Jones unlawfully expanded the traffic stop. Assuming for the sake of argument that the traffic stop had ended when Jones asked for consent to search the car,[15] Jones' conduct in performing a free air search using a drug dog was nonetheless reasonable. As we have repeatedly held, the touchstone for Fourth Amendment jurisprudence is reasonableness, which "is measured in objective terms by examining the totality of the circumstances." [16] During the traffic **[658 S.E.2d 129]** stop, Jones was given completely conflicting stories from both Andrews and Stanton, which is a basis for reasonable suspicion.[17]

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Although this fact alone may not have justified a prolonged extension of the traffic stop for another officer to bring a drug dog,[18] Jones had a drug dog with him and thus any further delay of Andrews and Stanton was minimal.[19] Under the totality of the circumstances, we find no error in the trial court's denial of Andrews' and Stanton's motions to suppress. [20]

Judgment affirmed.

BLACKBURN , P.J., and BERNES , J., concur.

Notes:

[1] Stanton was also charged with possessing marijuana and Andrews with driving while his license was suspended.

[2] *Thomas v. State,* 287 Ga.App. 262, 651 S.E.2d 183 (2007) .

[3] See *Glenn v. State,* 285 Ga.App. 872, 648 S.E.2d 177 (2007) .

[4] (Punctuation omitted.) *Thomas,* supra.
[5] See OCGA §§ 40-2-5 (a)(1), (4); 40-2-6.
[6] See *Green v. State,* 282 Ga.App. 5, 7(1), 637 S.E.2d 498 (2006) (" 'An officer may stop a car to conduct a brief investigation if specific, articulable facts give rise to a reasonable suspicion of criminal conduct.' ").
[7] See id.
[8] See *State v. Rheinlander,* 286 Ga.App. 625, 626, 649 S.E.2d 828 (2007) .
[9] Id.
[10] See id. at 626-627, 649 S.E.2d 828.
[11] *Soilberry v. State,* 282 Ga.App. 161, 162(1), 637 S.E.2d 861 (2006) .
[12] See id.
[13] *Salmeron v. State,* 280 Ga. 735, 737, 632 S.E.2d 645 (2006) .
[14] See id.
[15] In its briefs, the State appears to concede this point, although it is not entirely clear from Jones' testimony that he believed the traffic stop had ended.
[16] *Giles v. State,* 284 Ga.App. 1, 3, 642 S.E.2d 921 (2007) .
[17] See *Jones v. State,* 253 Ga.App. 870, 873, 560 S.E.2d 749 (2002) .
[18] Compare *Bennett v. State,* 285 Ga.App. 796, 797-798, 648 S.E.2d 126 (2007) .
[19] See *Jones,* supra; *Wesley v. State,* 275 Ga.App. 363, 364, 620 S.E.2d 580 (2005) .
[20] See id.

State v. Creel, 080712 IDCCA, 38658 /**/ div.c1 {text-align: center} /**/

STATE OF IDAHO, Plaintiff-Respondent,

v.

ALAN A. CREEL, Defendant-Appellant.

No. 38658

Court of Appeals of Idaho

August 7, 2012

UNPUBLISHED OPINION

2012 Unpublished Opinion No. 581

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Timothy Hansen, District Judge.

Order denying motion to suppress, *affirmed*.

Sara B. Thomas, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

GRATTON, Chief Judge.

Alan A. Creel appeals from the district court's denial of his motion to suppress and the judgment of conviction entered following his conditional guilty plea to possession of marijuana in excess of three ounces, Idaho Code § 37-2732.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A deputy conducted a traffic stop of Creel's vehicle, a black Chevrolet S-10 pickup. The deputy had been following the vehicle and ran its license plates on his mobile data terminal. The vehicle's registration information indicated that the pickup should have been red in color instead of black. Based upon this information, the deputy initiated the traffic stop. The deputy spoke to the driver, Creel, who explained that he had recently painted the vehicle by rolling on black truck-bed lining. While speaking with Creel, the deputy smelled the odor of marijuana. A subsequent search of Creel's vehicle resulted in the seizure of approximately seven ounces of marijuana.

Creel was charged with one count of possession of marijuana in excess of three ounces, I.C. § 37-2732(e). He filed a motion to suppress, asserting that the traffic stop was illegal. Creel argued that the fact his vehicle had been painted black did not provide the deputy with reasonable, articulable suspicion to conduct a traffic stop. The district court found that the deputy had an objectively reasonable and articulable suspicion to conduct the stop and denied Creel's motion to suppress. Creel subsequently entered a conditional guilty plea, reserving his right to appeal the denial of his motion to suppress. Creel timely appeals.

II.

ANALYSIS

Creel asserts that the district court erred by denying his motion to suppress. The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact that are supported by substantial evidence,

but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

A traffic stop by an officer constitutes a seizure of the vehicle's occupants and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. *Delaware v. Prouse* , 440 U.S. 648, 653 (1979); *Atkinson*, 128 Idaho at 561, 916 P.2d at 1286. Under the Fourth Amendment, an officer may stop a vehicle to investigate possible criminal behavior if there is a reasonable and articulable suspicion that the vehicle is being driven contrary to traffic laws. *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Flowers*, 131 Idaho 205, 208, 953 P.2d 645, 648 (Ct. App. 1998). The reasonableness of the suspicion must be evaluated upon the totality of the circumstances at the time of the stop. *State v. Ferreira*, 133 Idaho 474, 483, 988 P.2d 700, 709 (Ct. App. 1999). The reasonable suspicion standard requires less than probable cause but more than mere speculation or instinct on the part of the officer. *Id*. An officer may draw reasonable inferences from the facts in his or her possession, and those inferences may be drawn from the officer's experience and law enforcement training. *State v. Montague*, 114 Idaho 319, 321, 756 P.2d 1083, 1085 (Ct. App. 1988). Suspicion will not be found to be justified if the conduct observed by the officer fell within the broad range of what can be described as normal driving behavior. *Atkinson*, 128 Idaho at 561, 916 P.2d at 1286.

Creel contends that the district court erred by ruling that the deputy had reasonable suspicion to conduct the traffic stop simply because the color of the vehicle did not match the color listed on the vehicle's registration. The deputy testified at the evidentiary hearing that there was a color discrepancy between the vehicle he was following and the vehicle's registration. He further testified that, due to this discrepancy, the vehicle could have had fictitious license plates in violation of I.C. § 49-456(3), or the vehicle could have been stolen and the plates were from another S-10 pickup. Thus, the deputy had articulable facts within his knowledge and drew reasonable inferences based on his experience. Under a totality of the circumstances, the deputy had a reasonable and articulable suspicion to initiate the stop. We also note that our holding is in accord with other jurisdictions that have decided the precise question at issue here. *See, e.g.*, *Aders v. State*, 67 So.3d 368 (Fla. Dist. Ct. App. 2011); *Andrews v. State*, 658 S.E.2d 126, 127-28 (Ga.Ct.App. 2008); *Smith v. State*, 713 N.E.2d 338 (Ind.Ct.App. 1999). Therefore, the district court properly denied Creel's motion to suppress.

III.

CONCLUSION

The deputy had reasonable suspicion to stop Creel's vehicle. Therefore, the district court properly denied Creel's motion to suppress. Accordingly, the district court's denial of Creel's motion to suppress is affirmed.

GUTIERREZ, Judge and MELANSON, Judge Concur.

709 F.3d 646 (7th Cir. 2013)

UNITED STATES of America, Plaintiff-Appellant,

v.

Jesus URIBE, Defendant-Appellee.

No. 11-3590.

United States Court of Appeals, Seventh Circuit.

February 13, 2013

Argued April 11, 2012.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division. No. 2:10-cr-17-JMS-CMM—Jane E. Magnus-Stinson, Judge.

[Copyrighted Material Omitted]

William L. McCoskey (argued), Attorney, Office of the United States Attorney, Indianapolis, IN, for Plaintiff-Appellant.

Michael J. Donahoe (argued), Attorney, Indiana Federal Community Defenders, Inc., Indianapolis, IN, for Defendant-Appellee.

Before WOOD, WILLIAMS, and TINDER, Circuit Judges.

WILLIAMS, Circuit Judge.

Early one morning, Jesus Uribe was driving along Interstate 70 in Indiana. Apparently, he was not speeding or driving too slowly, weaving recklessly across lanes, crossing the dividing line, or giving any indication that he was intoxicated. Nor is there evidence that Uribe's vehicle, a blue Nissan Altima with Utah plates, was in violation of any of Indiana's numerous vehicle requirements— no malfunctioning brake lights, improperly tinted window, visibly altered muffler, or expired license plate. Only one aspect of Uribe's travel was interesting: the blue Nissan he was driving had a registration number that traced back to a white Nissan. Although this color discrepancy alone is not unlawful either in Indiana, where Uribe was driving, or in Utah, where the car was registered, the deputy following Uribe's car initiated a traffic stop " to check for registration compliance." That stop led to a search of the vehicle, nearly a pound of heroin, and a federal indictment.

Uribe filed a motion to suppress the evidence obtained following the stop, contending that the seizure violated the Fourth Amendment because the deputy had no reasonable suspicion or probable cause to detain him. Although the government offered no evidence to support its objection to the motion, it argued that there was reasonable suspicion that the car was stolen and that its driver was violating Indiana law by operating a vehicle displaying a different car's registration number. The district court granted Uribe's motion, finding the government's explanations insufficient to establish that at the time of the stop the deputy had a reasonable, articulable suspicion that Uribe was engaged in criminal activity.

In this interlocutory appeal, we must determine whether one lawful act in isolation— driving a

car of one color with a registration number attached to a car of a different color— gives rise to reasonable suspicion that a driver is engaged in criminal activity. Because on this record, investigatory stops based on color discrepancies alone are insufficient to give rise to reasonable suspicion, we affirm.

I. BACKGROUND

Shortly after two o'clock in the morning on July 14, 2010, Deputy Dwight Simmons of the Putnam County (Indiana) Sheriff's Department was working traffic enforcement and driving behind a blue Nissan Altima traveling eastbound on Interstate 70. When Deputy Simmons performed a Bureau of Motor Vehicles registration inquiry on the car's Utah license plate number, he received information for a white 2002 Nissan. In his narrative arrest report, Deputy Simmons stated that he initiated

an enforcement stop of the vehicle " to check for registration compliance." That report did not include any other description of the vehicle, and it did not mention the driver's pre-stop behavior. [1]

After Deputy Simmons pulled the car over, he observed that the driver, Jesus Uribe, appeared nervous. Eventually, another officer arrived with a canine, which gave a positive alert. Uribe gave Deputy Simmons permission to search the vehicle, and the officer with Deputy Simmons found two packages containing nearly a pound of heroin. Uribe was indicted for possessing with intent to distribute 100 grams or more of heroin, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(i).

Uribe moved to suppress the heroin, arguing that Deputy Simmons did not have reasonable suspicion to perform the traffic stop based on the color of the car alone. He also argued that no Indiana or Utah law requires car owners to amend their vehicle registration information to reflect a change in car color. So, according to Uribe, there was no reasonable suspicion for the stop. Uribe did not challenge the execution of the search or the validity of his consent to it.

The government did not request an evidentiary hearing or submit an affidavit to put Deputy Simmons's additional observations, suspicions, and experience in the record. (Uribe attached Deputy Simmons's post-arrest narrative to the motion to suppress.) Nonetheless, the government responded to Uribe's arguments by contending that Deputy Simmons's twelve years of experience taught him that stolen cars are often repainted to evade detection. The government also argued that because Indiana prohibits operating a vehicle with a registration number belonging to any other vehicle, Deputy Simmons could have reasonably suspected that Uribe was committing a registration violation.

The district court granted Uribe's motion to suppress, finding that the record did not support Deputy Simmons's alleged knowledge that stolen cars are painted different colors. The court also concluded that the Indiana traffic code provision the government cited only applied to vehicles registered to Indiana residents. The district court denied the government's motion for reconsideration and its belated request for an evidentiary hearing, deciding that the government was not entitled to a second chance after failing to meet its burden on the motion to suppress. This interlocutory appeal under 18 U.S.C. §§ 3231 and 3731 followed.

II. ANALYSIS

When reviewing a district court's decision on a motion to suppress, we consider questions of law de novo, the district court's determinations of reasonable suspicion and probable cause de novo, and questions of fact for clear error. *Ornelas v. United States,* 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *United States v. Brown,* 232 F.3d 589, 591-92 (7th Cir.2000).

An investigatory stop complies with the Fourth Amendment if the brief detention is based on reasonable suspicion that the detained individual has committed

or is about to commit a crime. *Terry v. Ohio,* 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *United States v. Grogg,* 534 F.3d 807, 810 (7th Cir.2008). An officer initiating an investigatory stop must be able to point to " specific and articulable facts" that suggest criminality so that he is not basing his actions on a mere hunch. *Terry,* 392 U.S. at 21, 88 S.Ct. 1868; *see also United States v. Dennis,* 115 F.3d 524, 532 (7th Cir.1997) (" [I]n reviewing a reasonable suspicion determination, we require law enforcement authorities to articulate the specific characteristics exhibited by the person or object to be detained which aroused the authorities' suspicion in the particular case before us...."). We evaluate reasonable suspicion based on the totality of the circumstances known to the officer at the time the stop is made. *United States v. Hicks,* 531 F.3d 555, 558 (7th Cir.2008). However, " [t]he officer's subjective motivations for stopping and detaining a suspect are not relevant to the reasonableness inquiry." *United States v. Bullock,* 632 F.3d 1004, 1012 (7th Cir.2011). The government bears the burden of establishing reasonable suspicion by a preponderance of the evidence. *United States v. Longmire,* 761 F.2d 411, 418 (7th Cir.1985).

Deputy Simmons's post-arrest narrative seems to identify only one fact that led him to conduct the investigatory stop: a discrepancy between the observed color of the car Uribe was driving and the color indicated on the car's registration. Both parties acknowledge that the color discrepancy itself was lawful, because neither Indiana nor Utah requires a driver to update his vehicle registration when he changes the color of his car.

In addition to the color discrepancy, the government argues that the timing of the stop— just after two o'clock in the morning— raises the level of suspicion.[2] The government did not present any evidence of Deputy Simmons's experience and expertise or of any officer's belief that the context of the stop made its timing suspicious.

From the record, we conclude that the timing of the stop in this context does not raise suspicion. Uribe's vehicle [3] was not, for example, exiting a scene following gunfire via the only available street, nor was Uribe acting suspiciously in an area known for criminal activity. *See United States v. Brewer,* 561 F.3d 676, 678 (7th Cir.2009) (finding the timing of a stop suspicious because it " reinforced the suspicion [that the vehicle was connected to reported gunfire] since few people are on the road at 2:30 a.m. and ... there was no other traffic" leaving the apartment complex immediately after the gunfire); *see also United States v. McHugh,* 639 F.3d 1250, 1257-58 (10th Cir.2011) (finding reasonable suspicion based on an early-morning detention in an area known for criminal activity, information from an armed private security officer and a police dispatcher that the defendants were suspected of having a weapon in their vehicle, and a report

from the security guard about the defendants' suspicious behavior prior to the detention); *United States v. Lender,* 985 F.2d 151, 154 (4th Cir.1993) (finding reasonable suspicion when officers observed the defendant appearing to engage in a hand-to-hand drug

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transaction in a known drug area at 1:00 a.m.). Rather, Uribe was in an out-of-state vehicle traveling on an interstate highway in Indiana at two o'clock in the morning— apparently without committing any traffic infractions. So, while we consider timing a part of the history of the detention decision, it does not raise the level of suspicion attached to the color discrepancy.

Uribe's motion to suppress presents an issue of first impression in this circuit and, apparently, in the federal courts: whether a discrepancy between the observed color of a car and the color listed on its registration alone is sufficient to give rise to reasonable suspicion of criminal activity. Where our sister circuits have considered color discrepancies, they have relied on the discrepancy as only one of several factors establishing reasonable suspicion.[4]

Although it appears that no federal court has addressed the exact issue presented in this case, several state courts have done so. In *Andrews v. State,* a Georgia appellate court held that it was reasonable for an officer to infer from a color discrepancy that a car's license plate had been switched in violation of Georgia law. 289 Ga.App. 679, 658 S.E.2d 126, 127-28 (2008); *see also Aders v. State,* 67 So.3d 368, 371 (Fla.Dist.Ct.App.2011) (finding a color discrepancy sufficient to create a reasonable suspicion that a driver committed a second-degree misdemeanor by improperly transferring a license plate). An Indiana appellate court found that a color discrepancy supported reasonable suspicion that a " vehicle had a mismatched plate, and as such, could be stolen or retagged." *Smith v. State,* 713 N.E.2d 338, 342 (Ind.Ct.App.1999).

State cases have also come out in the other direction. In *Commonwealth v. Mason,* a Virginia appellate court determined that color discrepancy alone is insufficient to establish reasonable suspicion because " the benefit gained from stopping individual vehicles based solely on a disparity in the color listed on the vehicle's registration ... is marginal when compared to the constitutional rights of drivers and their passengers who are seized during such a stop." No.1956-09-02, 2010 WL 768721, at *3 (Va.Ct.App. Mar. 9, 2010) (unpublished decision) (internal quotations omitted); *see also State v. O'Neill,* Nos. 06-S-3456, 06-S-3457, 2007 WL 2227131, 2007 N.H.Super. LEXIS 2, at *8 (N.H.Super.Ct. Apr. 17, 2007) (unpublished decision) (because the color discrepancy violated no law, the officer " could not possibly have suspected the defendant of any criminal wrongdoing").

A. No Reasonable Suspicion of Vehicle Theft

The government first contends that Deputy Simmons's investigatory stop was

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justified by the reasonable suspicion that Uribe was driving a stolen vehicle. Ordinarily, this is where we would review all the circumstances known to the officer that weigh in favor of or against a finding of reasonable suspicion and consider the officer's experience, expertise, and understanding of the context of the stop to determine whether the observed conduct was objectively, reasonably, and articulably suspicious. But the government provided no evidence to tip the scales from a mere hunch to something even approaching reasonable and articulable

suspicion, despite attempting to justify a detention based on one observed incident of completely innocent behavior in a non-suspicious context. Without testimony or an affidavit from Deputy Simmons (or anyone else), we know nothing about the extent of his experience with car theft, how the police department trains its officers to detect stolen vehicles, or whether anything about the context of the stop raises the level of suspicion.

Perhaps most importantly, the government provided no information on the correlation between stolen vehicles and repainted ones. We do not know whether ninety-nine percent of repainted cars are stolen, which would suggest a color discrepancy is highly probative of criminal activity, or whether less than one percent are, which would suggest a color discrepancy is completely innocuous. As we weigh Uribe's Fourth Amendment rights against the benefits of using investigatory stops to catch car thieves and recover stolen vehicles, these numbers matter. Without them, we cannot conclude that a color discrepancy alone is probative of wrongdoing without the risk of subjecting a substantial number of innocent drivers and passengers to detention. *See Reid v. Georgia,* 448 U.S. 438, 441, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980) (no reasonable suspicion where " circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure").

Although we focus on an " innocent" color discrepancy, ultimately " the relevant inquiry is not whether particular conduct is ‘ innocent’ or ‘ guilty,’ but the degree of suspicion that attaches to particular types of noncriminal acts." *United States v. Sokolow,* 490 U.S. 1, 10, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (quoting *Illinois v. Gates,* 462 U.S. 213, 243 n. 13, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Our review of the totality of the circumstances here leads us to conclude that no reasonable suspicion of vehicle theft attaches to a completely lawful color discrepancy in the absence of any evidence suggesting otherwise.[5] In light of that conclusion, Deputy Simmons's decision to stop Uribe's vehicle lacked reasonable suspicion that the vehicle was stolen.

B. No Reasonable Suspicion of Registration Violation

We turn next to the government's argument that Deputy Simmons could have believed that Uribe was in violation of an Indiana vehicle registration requirement.[6] As we discuss below, the government has not shown that the requirement applies to Uribe's Utah-registered vehicle.

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And because the suspected violation is not unlawful, it cannot form the basis of reasonable suspicion.

In *Delaware v. Prouse,* the Supreme Court held that a police officer may stop a vehicle when the officer has " at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law." 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). However, a registration compliance check without any suspicion of criminal activity violates the Fourth Amendment. *Id.* (in the absence of articulable and reasonable suspicion, " stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment."). Even when reasonable suspicion exists, the Supreme Court is wary of the compliance-check rationale because " [m]any violations of minimum

vehicle-safety requirements are observable," and license plates are " themselves evidence that the vehicle is properly registered." *Id.* at 660, 99 S.Ct. 1391; *see also id.* at 660-61, 99 S.Ct. 1391 (finding that randomly stopping registered vehicles for " document checks" is not " necessary in order to ascertain compliance with the State's registration requirements").

The government suggests that Deputy Simmons could have believed that Uribe was violating Indiana Code Section 9-18-2-27(a), which provides that " a vehicle required to be registered under this chapter may not be used or operated upon the highways if the motor vehicle displays ... [a] registration number belonging to any other vehicle...." The government asserts that when combined with other provisions of Article 18, Chapter 2, which governs motor vehicle registration, this requirement extends to vehicles driven by nonresidents on Indiana highways, including Uribe's. Specifically, the government points to Section 9-18-2-29, which provides that " motor vehicle[s]" are within the class of " [v]ehicles subject to registration," and Section 9-18-2-2, which allows nonresidents to operate vehicles in Indiana " if the vehicle is properly registered in the jurisdiction in which the nonresident is a resident." From these two provisions, the government concludes that nonresidents are subject to Indiana's registration-swapping prohibition.

The government's analysis is noticeably incomplete because the first part of the very provision it invokes limits the prohibition to vehicles " required to be registered under [Article 18, Chapter 2]." Ind.Code § 9-18-2-27. This raises a completely different issue from whether a nonresident can drive a vehicle registered in another state in Indiana, which is what Section 9-18-2-2 addresses.

Chapter 2 requires the registration of motor vehicles that " (1) are subject to the motor vehicle excise tax under [Section] 6-6-5; and (2) will be operated in Indiana," *id.* § 9-18-2-1(a), in addition to other vehicles not relevant here, such as commercial and recreational vehicles and those belonging to Indiana residents. When we assemble the pieces of the statutory puzzle relevant to Uribe, Section 9-18-2-27 prohibits registration swapping for motor vehicles, § 9-18-2-1(a), that are subject to Indiana's excise tax, § 9-18-2-1(a)(1), and are operated in Indiana, § 9-18-2-1(a)(2). Similarly, the nonresident provision the government cites only applies in these same situations, when " a nonresident ... owns a vehicle required to be registered under this article." *Id.* § 9-18-2-2.

The problem with the government's argument is that there is no evidence that a vehicle registered in Utah is subject to

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Indiana's motor vehicle excise tax simply because its driver travels on one of Indiana's many highways. (In fact, the excise tax chapter provides for refunds when " (1) the owner registers the vehicle for use in another state; and (2) the owner pays tax for use of the vehicle to another state for the same time period which the tax was paid under this chapter." Ind.Code § 6-6-5-7.4(a).)

The government simply has not shown that Section 9-18-2-27 applies in this situation. And since the registration provision asserted by the government does not apply to the Utah-registered vehicle Uribe was driving, a suspected violation of it could not be the criminal activity at the heart of the objective reasonable suspicion analysis. *See United States v. McDonald,* 453 F.3d 958, 961 (7th Cir.2006) (" An officer cannot have a reasonable belief that a violation of the law occurred

when the acts to which an officer points as supporting probable cause are not prohibited by law."). So, the government has failed to show that Deputy Simmons had reasonable suspicion to stop Uribe's vehicle to investigate its compliance with this registration provision.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's decision granting Uribe's motion to suppress.

Notes:

[1] The part of that narrative relevant to the investigatory stop reads, in its entirety:
On 7-14-10 while working traffic enforcement on I-70, Deputy Simmons of the Putnam County Sheriff's Office[ ] was traveling eastbound in the vicinity of the 45 mile marker behind a blue Nissan Altima[ ] bearing Utah license plates. Deputy Simmons performed a BMV registration inquiry on the license plate, and received a return on a white 2002 Nissan. Deputy Simmons initiated an enforcement stop of the vehicle in the vicinity of the 48 mile marker, to check for registration compliance.

[2] We note that the part of Deputy Simmons's narrative included in the record only mentions the time of the stop once, when he states that the canine unit arrived on the scene at 2:30 a.m.

[3] While we refer to the blue Nissan as " Uribe's vehicle," it was registered to someone else. Because Deputy Simmons was not aware of that fact at the time of the stop, it is not relevant to our analysis.

[4] In *United States v. Cooper,* the Sixth Circuit found reasonable suspicion from a color discrepancy and a vehicle's presence in a specific high-crime area known for frequent car thefts, along with officers' testimony that, in their experience, color discrepancy triggered a suspicion of car theft. 431 Fed.Appx. 399, 401-02 (6th Cir.2011). The Ninth Circuit assumed, but did not decide, that a color discrepancy and presence in a high-crime area was a " thin basis" for reasonable suspicion that a vehicle was stolen. *United States v. Rodgers,* 656 F.3d 1023, 1026-27 (9th Cir.2011). And in *United States v. Caro,* the Tenth Circuit found that an officer had reasonable suspicion to continue a detention initiated by a traffic stop due to a color discrepancy and the defendant's failure to recall the registered owner's last name. 248 F.3d 1240, 1246 (10th Cir.2001); *see also United States v. Clarke,* 881 F.Supp. 115, 117 (D.Del.1995) (reasonable suspicion from color discrepancy, out-of-state plate, high-crime area, and officer's knowledge that vehicles of that specific make and model were often subject to theft).

[5] Even if we were to consider the timing of the stop as an additional circumstance, nothing in the record suggests that a repainted vehicle observed at two o'clock in the morning on an interstate highway is any more suspicious than one observed at noon.

[6] The government did not argue that there was a reasonable suspicion that Uribe was in violation of any Utah registration provision.

Commonwealth v. Mason, 030910 VACA, 1956-09-2 /**/ div.c1 {text-align: center} /**/

COMMONWEALTH OF VIRGINIA

v.

WILLIAM JEFFERSON MASON

No. 1956-09-2

Court of Appeals of Virginia

March 9, 2010

FROM THE CIRCUIT COURT OF HANOVER COUNTY J. Overton Harris, Judge

Craig W. Stallard, Assistant Attorney General (William C. Mims, Attorney General, on brief), for appellant.

(Steven M. Marks, on brief), for appellee. Appellee submitting on brief.

Present: Judges Beales, Powell and Alston Argued by teleconference

MEMORANDUM OPINION[*]

RANDOLPH A. BEALES JUDGE

William Jefferson Mason (Mason) was indicted for driving while a habitual offender, second offense, in violation of Code § 46.2-357. He filed a motion to suppress various evidence collected after an officer stopped him, and the trial court granted that motion. Pursuant to Code § 19.2-398, the Commonwealth appealed the trial court's decision to this Court. After reviewing the record, we find that the trial court did not err in granting the motion to suppress.

BACKGROUND[1]

Deputy Sheriff Russell Snook was driving his marked patrol car in Hanover County on April 18, 2009. While patrolling, he observed a van, driving in the opposite direction down the two-way street, but he did not see a county registration sticker on its window. Deputy Snook did not observe anything illegal about the manner in which the vehicle was being operated.

The deputy turned his patrol car around to follow the van. As he was following the car, the deputy also "ran the tag," meaning he called the Division of Motor Vehicles (DMV) and, using the number on the license plate that was affixed to the van, tried to get additional information about the vehicle. The information that Deputy Snook received from the DMV indicated that the van registered to display that license plate was supposed to be maroon, yet the van that the deputy was following was blue. Deputy Snook did not "observe any violations of the law" by the van or its driver, and all the other registration information for the van appeared correct, except that a man was driving the van, but the vehicle was registered to a woman. Neither the vehicle, nor its license plates, nor anything else on the vehicle had been reported as stolen.

Based only on the difference in color between the van and its registration information,[2] Deputy Snook stopped the van, which William Mason was driving. The deputy explained at the hearing on Mason's motion to suppress that he made the stop because, although it is "not common practice, . . . a lot of people do take tags off of one vehicle, [and] put them on another vehicle." He also answered "yes" when the Commonwealth asked him if, in his experience, it was "possible" that "someone would want to steal license plates from a van or steal a van and use other license plates [in order] to put it on a similar make and model." Deputy Snook provided no other information regarding his experience or training with similar situations.

During argument on the motion to suppress, Mason argued that the officer acted only on a hunch and did not have reasonable suspicion that a violation of the law was occurring. The Commonwealth explained its argument in the following manner:

[The] defendant's obligation to update DMV on a change of color on his van . . . is not the issue here. Frankly, it's irrelevant, because the officer testified clearly that the reason for the stop was because he reasonably believed, frankly, that either the van and/or the license place could have been stolen.[3]

The trial court found that Deputy Snook did not have enough information to give him a reasonable suspicion for the stop. The court found the deputy "had nothing more to go on than the change in color and his knowledge is that sometimes in those instances it indicated to him that, or, in his experience, that sometimes that meant that the car could be stolen or the plate could be stolen."

ANALYSIS

The parties agree on the appropriate Fourth Amendment legal principles that are applicable in this case. As the Supreme Court of Virginia stated in *Moore v. Commonwealth*, 276 Va. 747, 757, 668 S.E.2d 150, 156 (2008):

the dispositive question is whether the officer's traffic stop was founded on a reasonable suspicion that criminal activity was afoot, a standard less stringent than probable cause. Nevertheless, reasonable suspicion, like probable cause, "is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330 (1990).

The Supreme Court of Virginia explained reasonable articulable suspicion in *Bass v. Commonwealth*, 259 Va. 470, 475, 525 S.E.2d 921, 923-24 (2000):

A reasonable suspicion is more than an "unparticularized suspicion or 'hunch.'" [*Terry v. Ohio*, 392 U.S. 1,] 27 [(1968)]. Reasonable suspicion, while requiring less of a showing than probable cause, requires at least a minimal level of objective justification for making the stop. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Accordingly, the stop of an automobile and the resulting detention of the driver is unreasonable under the Fourth Amendment absent a reasonable, articulable suspicion that the driver is unlicensed or that the automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law.

This Court reviews *de novo* the trial court's legal conclusion that Deputy Snook lacked reasonable articulable suspicion to stop Mason. *Asble v. Commonwealth*, 50 Va.App. 643, 645-46, 653 S.E.2d 285, 286 (2007) ("[W]e review *de novo* the ultimate questions of reasonable suspicion and probable cause . . . .").

The Commonwealth argues that the facts known to the deputy were sufficient for him to have a reasonable suspicion that Mason was committing a crime, and the Commonwealth lists several crimes that the deputy could have possibly believed that Mason had committed. However, Deputy Snook knew exceptionally little when he stopped the van that Mason was driving. He knew only that the color on the van's registration was not correct – everything else was correct, except that a man was driving a car that was registered to a woman (which the deputy did not say was unusual or created any inference that a crime was being committed). Deputy Snook testified that, it was "not common practice," but "a lot of people do take tags off of one vehicle, [and] put them on

another vehicle." He did not testify that he had ever seen a stolen car with license plates that differed only in color from the vehicle listed on the registration. This testimony regarding the stop, viewed in the light most favorable to Mason as the party who prevailed in the trial court on the motion to suppress, proved that Mason did not appear to be violating the law in any way while he was driving the van. Therefore, nothing confirmed the deputy's hunch, which the deputy stated was based solely on the discrepancy in the color listed on the registration, that either the van was stolen or the license plates were stolen.

This testimony supports the trial court's determination that the stop was not supported by reasonable articulable suspicion.

We find the analysis in *Commonwealth v. Spencer*, 21 Va.App. 156, 159, 462 S.E.2d 899, 901 (1995), is applicable here. As in *Spencer*, where the officer saw only that a registration sticker was missing, in the case currently before this Court the deputy had "no specific and objective facts [that] indicated that [the] vehicle was violating" any laws by having a different color indicated on its registration. *Id.* at 160, 462 S.E.2d at 901 (finding that the lack of a city or county decal did not provide sufficient information by itself to give an officer reasonable suspicion to stop a vehicle). In addition, pursuant to the Court's reasoning in *Spencer*, we find in this case that "the benefit gained from stopping individual vehicles" based solely on a disparity in the color listed on the vehicle's registration, and the fact that a man was driving a car registered to a woman,[4] "is marginal when compared to the constitutional rights of drivers and their passengers who are seized" during such a stop. *Id.* Therefore, based on the analysis and the holding of this Court in *Spencer*, we find that the deputy here did not have reasonable articulable suspicion, as defined in *Terry*, that a crime was being committed when he stopped Mason. Simply having a different color on a vehicle than the color listed on a DMV registration – without more indication of how a crime may have been committed or how criminal activity may be afoot – is not enough information to give a law enforcement officer reasonable suspicion to stop that vehicle.

CONCLUSION

We agree with the trial court that Deputy Snook had no more than a hunch that a crime was being committed when he stopped the van driven by Mason. Therefore, we affirm the trial court's order that granted Mason's motion to suppress the evidence that was collected as a result of that stop.

Affirmed.

Notes:

[*] Pursuant to Code § 17.1-413, this opinion is not designated for publication.

[1] "Upon appeal from a trial court's ruling on a motion to suppress, we must view the evidence in the light most favorable to the prevailing party, in this instance appellee, granting to him all reasonable inferences fairly deducible from the evidence." *Commonwealth v. Spencer*, 21 Va.App. 156, 159, 462 S.E.2d 899, 901 (1995).

[2] During oral argument before the trial court, the Commonwealth conceded that the deputy did not stop the van because of anything to do with a registration sticker.

[3] The prosecutor also argued about the applicability of *Herring v. United States*, 129 S.Ct. 695

(2009), and the good faith exception to the Fourth Amendment, but the Commonwealth in its brief on appeal has disavowed this argument.

[4] Of course, there are many reasons why a male spouse, relative or friend could legitimately be driving a vehicle that is registered to a woman, so this fact by itself would certainly not provide an officer with reasonable suspicion to stop such a driver.

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151 So.3d 421 (Fla. 2014)
39 Fla. L. Weekly S 478
STATE OF FLORIDA, Petitioner,
v.
KERRICK VAN TEAMER, Respondent
No. SC13-318
Supreme Court of Florida
July 3, 2014

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[Copyrighted Material Omitted]

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Application for Review of the Decision of the District Court of Appeal -- Direct Conflict of Decisions. (Escambia County). First District -- Case No. 1D11-3491.

Pamela Jo Bondi, Attorney General, Trisha Meggs Pate, Tallahassee Bureau Chief, Criminal Appeals, and Jay Kubica, Assistant Attorney General, Tallahassee, Florida, for Petitioner.

Nancy A. Daniels, Public Defender, and Richard M. Summa, Assistant Public Defender, Tallahassee, Florida, for Respondent.

QUINCE, J. LABARGA, C.J., and PARIENTE, LEWIS, and PERRY, JJ., concur. CANADY, J., dissents with an opinion in which POLSTON, J., concurs.

OPINION

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QUINCE, J.

This case is before the Court for review of the decision of the First District Court of Appeal in *Teamer v. State*, 108 So.3d 664 (Fla. 1st DCA 2013).[1] The district court certified that its decision is in direct conflict with the decision of the Fourth District Court of Appeal in *Aders v. State*, 67 So.3d 368 (Fla. 4th DCA 2011). We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. As we explain, we approve the First District's decision and disapprove that of the Fourth District.

FACTS AND PROCEDURAL HISTORY

On June 22, 2010, an Escambia County Deputy Sheriff observed Kerrick Teamer driving a *bright green* Chevrolet. *Teamer*, 108 So.3d at 665. After noticing the car, the deputy continued on his patrol, driving into one of the neighborhoods in that area. Upon traveling back to where he had first seen Teamer, the deputy again observed Teamer driving the same car. The deputy then " ran" the number from Teamer's license plate through the Florida Department of Highway Safety and Motor Vehicles (DHSMV) database, as is customary for him while on patrol, and learned that the vehicle was registered as a *blue* Chevrolet. *Id*. The database did not return any information regarding the model of the vehicle. Based only on the color inconsistency, the deputy pulled the car over to conduct a traffic stop.

" Upon interviewing the occupants, the deputy learned that the vehicle had recently been

painted, thus explaining the inconsistency." *Id*. However, during the stop, the deputy noticed a strong odor of marijuana emanating from the car and decided to conduct a search of the vehicle, Teamer, and the other passenger. *Id*. " Marijuana and crack cocaine were recovered from the vehicle, and about $1,100 in cash was recovered from [Teamer]. [He] was charged with trafficking in cocaine (between 28-200 grams), possession of marijuana (less than 20 grams), and possession of drug paraphernalia" (scales). *Id*.

On October 4, 2010, Teamer filed a motion to suppress the results of the stop as products of an unlawful, warrantless search. At the hearing on the motion to suppress, the deputy acknowledged that, in his training and experience, he had encountered individuals who would switch license plates and he could not verify a vehicle's identification number without pulling over the vehicle. *Id*. On cross-examination, the deputy acknowledged that the car was not reported stolen, he had not observed any other traffic violations or suspicious or furtive behavior, he was not " aware of any reports of stolen vehicles or swapped plates in the area," and " the only thing that was out of the ordinary was the inconsistency of the vehicle color from the registration." *Id*.

The trial court denied the motion to suppress, explaining that the rationale for the denial was that the deputy " had a legal right to conduct an investigatory stop when a registration search of the automobile license tag reflected a different color than the observed color of the vehicle." The trial court found that the deputy made the investigatory stop " because the registration was not consistent with the color of the vehicle" and that since " the vehicle was legally stopped for investigative purposes," the odor of marijuana that the officer smelled during the stop gave him probable cause to conduct a search. After a jury

trial, Teamer was convicted on all three counts as charged in the information. The trial judge sentenced him to six years on count one and time served on the other two counts.

Teamer appealed, and the First District reversed the trial court's denial of Teamer's motion to suppress, certifying conflict with the Fourth District in *Aders. Id*. at 670. The First District acknowledged " that any discrepancy between a vehicle's plates and the registration may legitimately raise a concern that the vehicle is stolen or the plates were swapped from another vehicle," but found that such concern must be weighed " against a citizen's right under the Fourth Amendment to travel on the roads free from governmental intrusions." *Id*. at 667. The district court cited several cases demonstrating that color discrepancy is typically one of *several* factors constituting reasonable suspicion. *Id*. at 668. The First District then cited two nonbinding cases[2] for the principle that a color discrepancy alone does not provide reasonable suspicion for a stop. *Id* . at 668-69. Relying on those cases and other " somewhat analogous cases involving investigations of 'temporary tags,'" the district court ruled that a color discrepancy alone did not warrant an investigatory stop. *Id*. at 669-70. The court found that under the converse ruling, " every person who changes the color of [his or her] vehicle is continually subject to an investigatory stop so long as the color inconsistency persists." *Id*. at 670. The First District stated that it was " hesitant to license an investigatory stop" under such circumstances. *Id*.

ANALYSIS

In reviewing a trial court's ruling on a motion to suppress, the trial court's determinations of

historical facts are reversed only if not supported by competent, substantial evidence. *Connor v. State*, 803 So.2d 598, 608 (Fla. 2001). However, the application of the law to those facts is subject to de novo review. *Id*. Further, this Court is required to construe Florida's constitutional right against unreasonable searches and seizures " in conformity with the [Fourth] Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const.; *Bernie v. State*, 524 So.2d 988, 990-91 (Fla. 1988) (" [W]e are bound to follow the interpretations of the United States Supreme Court with relation to the [F]ourth [A]mendment . . . .").

The United States Supreme Court has " held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); *Popple v. State*, 626 So.2d 185, 186 (Fla. 1993) (" [A] police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime." (citing § 901.151, Fla. Stat. (1991))). However, a " police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" an investigatory stop. *Terry*, 392 U.S. at 21. The Supreme Court has described reasonable suspicion as " a particularized and objective basis for suspecting the particular person

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stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). This standard requires " something more than an 'inchoate and unparticularized suspicion or hunch.'" *Sokolow*, 490 U.S. at 7 (quoting *Terry*, 392 U.S. at 27) (internal quotation marks omitted).

" Reasonableness, of course, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Pennsylvania v. Mimms*, 434 U.S. 106, 109, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)); *State v. Diaz* , 850 So.2d 435, 439 (Fla. 2003) (" The real test is one of reasonableness, which involves balancing the interests of the State with those of the motorist."). " When a search or seizure is conducted without a warrant, the government bears the burden of demonstrating that the search or seizure was reasonable." *Hilton v. State*, 961 So.2d 284, 296 (Fla. 2007) (citing *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995) (" As a general rule, the burden of proof is on the defendant who seeks to suppress evidence. However, once the defendant has established a basis for his motion, *i.e*., the search or seizure was conducted without a warrant, the burden shifts to the government to show that the search or seizure was reasonable." (citation omitted))).

Reasonable suspicion must also be assessed based on " the totality of the circumstances--the whole picture," *Cortez*, 449 U.S. at 417; *United States v. Arvizu*, 534 U.S. 266, 277, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002), and " from the standpoint of an objectively reasonable police officer," *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Arvizu*, 534 U.S. at 277. Thus, a police officer may draw inferences based on his own experience.

Ornelas, 517 U.S. at 700; *Cortez*, 449 U.S. at 418 (" [A] trained officer draws inferences and makes deductions--inferences and deductions that might well elude an untrained person."). However, " the officer's subjective intentions are not involved in the determination of reasonableness." *Hilton*, 961 So.2d at 294; *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (recognizing the rejection of " any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved").

" [I]nnocent behavior will frequently provide the basis" for reasonable suspicion. *Sokolow*, 490 U.S. at 10; *see also Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (acknowledging this fact and recognizing that an officer can detain an individual to resolve an ambiguity regarding suspicious yet lawful or innocent conduct). " [T]he relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts." *Sokolow*, 490 U.S. at 10 (internal quotation marks omitted). In the instant case, the State concedes that " the failure to update a vehicle registration to reflect a new color is not in specific violation of a Florida law." Thus, what degree of suspicion attaches to this noncriminal act?

To warrant an investigatory stop, the law requires not just a mere suspicion of criminal activity, but a reasonable, well-founded one. *Popple*, 626 So.2d at 186 (" [A]n investigatory stop requires a well-founded, articulable suspicion of criminal

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activity."). In *Terry*, the stop was found appropriate because the officer " had observed [three men] go [t]hrough a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation." *Terry*, 392 U.S. at 22. The U.S. Supreme Court described the scenario as follows:

There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away.

Id. at 22-23. The Supreme Court found that " [i]t would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further." *Id*. at 23. Thus each seemingly innocent activity in *Terry* had a cumulative effect of providing an officer with a reasonable suspicion.

Conversely, in *State v. Johnson*, 561 So.2d 1139, 1142 (Fla. 1990), this Court rejected an officer's use of a self-created drug courier profile because " Florida law does not permit a profile based on factors that are little more than mundane or unremarkable descriptions of everyday law-

abiding activities." We noted that a drug courier profile in a Supreme Court case[3] was upheld " precisely because it described *unusual* conduct that set the defendant apart from other travelers and that strongly suggested concealed criminal conduct." *Id*. We invalidated the profile used in *Johnson* because " there was nothing at all unusual or out of the ordinary about the conduct that" fit within the profile. *Id*. at 1142-43. In so holding, we stated that individuals fitting within the officer's profile " simply cannot be described as an inherently 'suspicious' bunch." *Id*. at 1143. The innocent factors within the profile failed to create a reasonable suspicion.

Turning to the instant case, the sole basis here for the investigatory stop is an observation of one completely noncriminal factor, not several incidents of innocent activity combining under a totality of the circumstances to arouse a reasonable suspicion--as was the case in *Terry*. The discrepancy between the vehicle registration and the color the deputy observed does present an ambiguous situation, and the Supreme Court has recognized that an officer can detain an individual to resolve an ambiguity regarding suspicious yet lawful or innocent conduct. *Wardlow*, 528 U.S. at 125. However, the suspicion still must be a reasonable one. *Popple*, 626 So.2d at 186 (" Mere suspicion is not enough to support a stop."). In this case, there simply are not enough facts to demonstrate reasonableness. Like the factors in *Johnson*, the color discrepancy here is not " inherently suspicious" or " unusual" enough or so " out of the ordinary" as to provide an officer with a reasonable

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suspicion of criminal activity, especially given the fact that it is not against the law in Florida to change the color of your vehicle without notifying the DHSMV.

The law allows officers to draw rational inferences, but to find reasonable suspicion based on this single noncriminal factor would be to license investigatory stops on nothing more than an officer's hunch. Doing so would be akin to finding reasonable suspicion for an officer to stop an individual for walking in a sparsely occupied area after midnight simply because that officer testified that, in his experience, people who walk in such areas after midnight tend to commit robberies. Without more, this one fact may provide a " mere suspicion," but it does not rise to the level of a reasonable suspicion.[4] Neither does the sole innocent factor here--a color discrepancy--rise to such level. The deputy may have had a suspicion, but it was not a reasonable or well-founded one, especially given the fact that the driver of the vehicle was not engaged in any suspicious activity. Moreover, " the government provided no evidence to tip the scales from a mere hunch to something even approaching reasonable and articulable suspicion, despite attempting to justify a detention based on one observed incident of completely innocent behavior in a non-suspicious context." *United States v. Uribe*, 709 F.3d 646, 652 (7th Cir. 2013).

Reasonableness also " depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Mimms*, 434 U.S. at 109 (quoting *Brignoni-Ponce*, 422 U.S. at 878); *Diaz*, 850 So.2d at 439 (" The real test is one of reasonableness, which involves balancing the interests of the State with those of the motorist."). In order to determine reasonableness, courts " must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703,

103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (" [T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."). Thus we must balance the nature and quality of the intrusion required to stop an individual and investigate a color discrepancy against the government's interest in finding stolen vehicles or enforcing vehicle registration laws.[5]

In *Brignoni-Ponce*, the Supreme Court invalidated a roving patrol stop by Border Patrol agents near a closed checkpoint operation at the Mexican border. 422 U.S. at 886. In stopping the vehicle, the agents had relied on a single factor--" the apparent Mexican ancestry of the occupants." *Id*. at 885-86. As part of balancing the public interest

with the motorist's rights, the Supreme Court outlined as the governmental interest preventing illegal aliens from entering this country. *Id*. at 878-80. However, despite the importance of that interest, the " modest" intrusion of a brief stop, and the absence of practical alternatives for policing the border, the Court found that the apparent Mexican heritage of the occupants did not provide reasonable suspicion for a stop. *Id*. at 881, 886. The Court stated, " The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens." *Id*. at 886-87; *cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 545, 557-59, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (upholding stops for brief questioning at fixed checkpoints even with no reasonable suspicion of illegal aliens because although the need for such stops is as great as that in *Brignoni-Ponce*, a checkpoint stop is much less intrusive since " the generating of concern or even fright on the part of lawful travelers is appreciably less").

Similarly, in *Prouse*, the Supreme Court invalidated a random vehicle stop by roving patrol officers *solely* to confirm a driver's compliance with licensure and registration requirements. 440 U.S. at 659. The Court described the intrusion on the motorist's interests as follows:

We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety. For Fourth Amendment purposes, we also see insufficient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.

Id. at 657 (internal quotation marks omitted). The Court balanced that intrusion with the state's interests in apprehending stolen vehicles--which the Court characterized as indistinguishable from a " general interest in crime control" --and promoting roadway safety. *Id*. at 658-59 & n.18. The

Supreme Court held that given the alternative mechanisms available for enforcing traffic and vehicle safety regulations--the foremost of which being to act only upon observed violations--the incremental contribution to highway safety of the random stops in that case did not justify their intrusion on Fourth Amendment rights. *Id*. at 659.

The intrusion involved in the instant case is similar to that described in *Prouse*, especially considering that anyone who chooses to paint his or her vehicle a different color could be pulled over by law enforcement every time he or she drives it. *Prouse*, 440 U.S. at 662-63 (" Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be

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seriously circumscribed."). Furthermore, the governmental interest here is not nearly as strong as that in *Brignoni-Ponce* of developing " effective measures to prevent the illegal entry of aliens at the Mexican border," 422 U.S. at 878-79, but is more like that in *Prouse* --" ensuring that . . . licensing, registration, and vehicle inspection requirements are being observed," 440 U.S. at 658. In fact, the Supreme Court described part of the interest at stake here--the apprehension of stolen vehicles--as indistinguishable " from the general interest in crime control." *Id*. at 659 n.18.

Even more relevant is the Supreme Court's finding in *Brignoni-Ponce* that a single factor--the apparent Mexican ancestry of the vehicle's occupants--was not enough to furnish a reasonable suspicion that the occupants were illegal aliens. 422 U.S. at 885-86. Likewise, the likelihood that a color discrepancy such as that at issue here indicates a stolen vehicle *may* be high enough to make it a relevant factor, but standing alone, it does not justify initiating a stop to determine if the law has been violated. The deputy here needed more indicia of a violation to distinguish between an illegal transfer of license plates, for example, and a legal decision to paint one's vehicle. Conducting an investigatory stop based on a color discrepancy only when that discrepancy exists *in conjunction with* additional factors indicating potential criminal activity still protects the government's interests, while also preserving a motorist's right of freedom from arbitrary interference by law enforcement. We find that the governmental interest in this case is outweighed by Teamer's constitutional rights, and the investigatory stop was not warranted.

" Under the exclusionary rule announced by the United States Supreme Court, 'the Fourth Amendment bar[s] the use of evidence secured through an illegal search and seizure.'" *Hilton*, 961 So.2d at 293 (alteration in original) (quoting *Mapp v. Ohio*, 367 U.S. 643, 648, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 86 Ohio Law Abs. 513 (1961) (holding that the federal exclusionary rule applies to the states as well)). " Whether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *United States v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 223, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

The primary rationale behind the exclusionary rule is to deter law enforcement from violating constitutional rights. *Terry*, 392 U.S. at 12; *see also United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (" [T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect."). The instant case is

not one in which the exclusionary rule " is powerless to deter invasions of constitutionally guaranteed rights [because] the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." *Terry*, 392 U.S. at 14. Applying the exclusionary rule here would have the required deterrent effect. *See, e.g., Prouse*, 440 U.S. at 651, 663 (affirming the trial court's judgment granting the defendant's motion to suppress).

Further, the State has not demonstrated that any exceptions apply. *Brown v. Illinois*, 422 U.S. 590, 604, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (discussing whether to apply an exception to the exclusionary rule and stating that " the burden of showing

admissibility rests, of course, on the prosecution"). The State argues a variation of the good faith exception to the exclusionary rule. This exception was first found to apply whenever a law enforcement officer conducts a search while relying, in good faith, upon a defective search warrant. *Leon*, 468 U.S. at 922; *Massachusetts v. Sheppard*, 468 U.S. 981, 987-89, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). Over time, however, the Supreme Court extended this exception to other factual scenarios, including searches where police acted in objectively reasonable reliance on binding judicial precedent. *Davis v. United States*, 131 S.Ct. 2419, 2428, 180 L.Ed.2d 285 (2011). However, the rule of *Davis* has no application to the present case because the *Aders* decision was issued on July 27, 2011--more than one year *after* the stop of Teamer's vehicle. Thus *Aders* was not binding precedent on which the deputy could have relied.

Despite this fact, the State argues that the good faith exception should still apply because the deputy here " arrived at a conclusion shared by non-binding courts in other jurisdictions,[6] and later shared by the Fourth District" in *Aders*. However, there are also nonbinding courts in other jurisdictions that have arrived at the exact opposite conclusion. *United States v. Uribe*, No. 2:10-cr-17-JMS-CMM, 2011 WL 4538407 (S.D. Ind. Sept. 28, 2011); *Commonwealth v. Mason*, 78 Va. 474 (Cir. Ct. 2009), *aff'd*, No. 1956-09-2, 2010 WL 768721 (Va. Ct. App. Mar. 9, 2010). We are satisfied that the exclusionary rule will have an appropriate deterrent effect in this case and that none of the exceptions to the rule apply.

CONCLUSION

Based on the foregoing, we disapprove the decision of the Fourth District in *Aders v. State*, 67 So.3d 368 (Fla. 4th DCA 2011), and approve the First District's decision in *Teamer v. State*, 108 So.3d 664 (Fla. 1st DCA 2013), reversing the trial court's judgment and sentence and ordering that Teamer be discharged.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and PERRY, JJ., concur.

CANADY, J., dissents with an opinion in which POLSTON, J., concurs.

DISSENT

CANADY, J., dissenting.

Because I conclude that the traffic stop of Kerrick Van Teamer's vehicle was based on a reasonable suspicion of criminal activity and that the trial court therefore correctly denied the motion to suppress, I dissent from the majority's approval of the First District Court of Appeal's decision reversing Teamer's judgment and sentence and ordering that he be discharged. I would

quash the decision of the First District on review and approve the decision of the Fourth District in *Aders v. State*, 67 So.3d 368 (Fla. 4th DCA 2011).

I.

" The Fourth Amendment permits brief investigative stops--such as the traffic stop in this case--when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Navarette v. California*, 134 S.Ct. 1683, 1687, 188 L.Ed.2d 680 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)).

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This rule is rooted in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), where " the [Supreme] Court implicitly acknowledged the authority of the police to make a *forcible stop* of a person when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." *United States v. Place*, 462 U.S. 696, 702, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983).

The *Terry* rule recognizes that " [t]he Fourth Amendment requires 'some minimal level of objective justification' for making the stop." *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (quoting *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 217, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984)). Reasonable suspicion thus requires " something more than an 'inchoate and unparticularized suspicion or " hunch." '" *Sokolow*, 490 U.S. at 7 (quoting *Terry*, 392 U.S. at 27). " A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *United States v. Arvizu*, 534 U.S. 266, 277, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). In permitting detentions based on reasonable suspicion, " *Terry* accepts the risk that officers may stop innocent people." *Illinois v. Wardlow*, 528 U.S. 119, 126, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). But when a stop lacks an objective basis, " the risk of arbitrary and abusive police practices exceeds tolerable limits." *Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). Courts making " reasonable-suspicion determinations . . . must look at the 'totality of the circumstances' of each case." *Arvizu*, 534 U.S. at 273.

The rule authorizing stops based on reasonable suspicion--which embodies an " exception to the probable-cause requirement" --rests on the Supreme Court's " balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of 'the Fourth Amendment's general proscription against unreasonable searches and seizures.'" *Place*, 462 U.S. at 703 (quoting *Terry*, 392 U.S. at 20). This balancing process involves weighing " the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id*. " A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown*, 443 U.S. at 51. The Supreme Court's categorical authorization of brief investigative detentions based on a reasonable suspicion of criminal activity flows from the conclusion that " [w]hen the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause." *Place*, 462 U.S. at 703.

II.

Here, the officer's suspicion was aroused by the discrepancy between the color of the vehicle driven by Teamer and the color that was indicated in the registration information for the vehicle associated with the license tag on Teamer's vehicle. Because of this discrepancy, a reasonable officer could suspect that the license tag may have been illegally transferred from the vehicle to which it was assigned. Although the color discrepancy was not necessarily indicative of illegality, it constituted " a particularized and objective basis for suspecting the particular person stopped

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of criminal activity." *Navarette*, 134 S.Ct. at 1687 (quoting *Cortez*, 449 U.S. at 417-18). The color discrepancy was " something more than an 'inchoate and unparticularized suspicion or " hunch." "' *Sokolow*, 490 U.S. at 7 (quoting *Terry*, 392 U.S. at 27). I would therefore conclude that the officer had the " minimal level of objective justification" necessary to conduct a stop for the purpose of further investigating the discrepancy. *Sokolow*, 490 U.S. at 7 (quoting *Delgado*, 466 U.S. at 217).

" It is not uncommon for members of the same court to disagree as to whether the proper threshold for reasonable suspicion has been reached." William E. Ringel, *Searches & Seizures Arrests & Confessions* § 11:12 (Westlaw database updated March 2014). On the issue presented by this case, different courts have disagreed regarding whether the color discrepancy was sufficient to establish reasonable suspicion. *Compare Aders*, 67 So.3d at 371 (holding that " [a] color discrepancy is enough to create a reasonable suspicion in the mind of a law enforcement officer of the violation of . . . criminal law"); *United States v. Uribe*, 709 F.3d 646 (7th Cir. 2013) (same); *Andrews v. State*, 289 Ga.App. 679, 658 S.E.2d 126 (Ga. Ct. App. 2008) (same); *Smith v. State*, 713 N.E.2d 338 (Ind.Ct.App. 1999) (same); with *Van Teamer*, 108 So.3d 664 (Fla. 1st DCA 2013) (holding that color discrepancy alone does not warrant an investigatory stop); *United States v. Uribe*, 2:10-cr-17-JMS-CMM, 2011 WL 4538407 (S.D. Ind. Sept. 28, 2011) (same); *Commonwealth v. Mason*, No. 1956-09-2, 2010 WL 768721 (Va. Ct. App. Mar. 9, 2010) (same). Different views on this question are no doubt influenced by divergent judgments regarding the likelihood that the color discrepancy had an innocent explanation--namely, the repainting of the vehicle after it was registered--and was not indicative of illegality. The courts in fact have no empirical basis for reaching a conclusion about that likelihood. But a stop predicated on such a color discrepancy unquestionably falls outside the category of " arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown*, 443 U.S. at 51. A stop in such circumstances cannot fairly be called an " arbitrary and abusive" police practice. *Id*. at 52.

The crux of the majority's decision in this case is its conclusion that finding " reasonable suspicion based on this single noncriminal factor would be to license investigatory stops on nothing more than an officer's hunch." Majority op. at 10. This conclusion suggests a categorical rule that is not consistent with the framework established in the Supreme Court's Fourth Amendment jurisprudence. Although the totality of the circumstances must be taken into account in every case, that does not mean that an officer's reliance on a " single noncriminal factor" --such as the vehicle color discrepancy here--is the equivalent of a " hunch." The majority is wholly unjustified in categorizing an undeniably objective factor as a hunch. The majority's " effort to

refine and elaborate the requirements of 'reasonable suspicion' in this case creates unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment." *Sokolow*, 490 U.S. at 7-8.

The two cases on which the majority places primary reliance do not support the majority's line of analysis. In *United States v. Brignoni-Ponce*, 422 U.S. 873, 876, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), the Supreme Court considered " whether a roving patrol may stop a vehicle in an area near the border and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican

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ancestry." The Supreme Court concluded that " Mexican appearance" " standing alone . . . does not justify stopping all Mexican-Americans to ask if they are aliens." *Id*. at 887. The Supreme Court's rejection of stops based purely on ethnic classification does not support the conclusion that all stops where the officer relies on " a single noncriminal factor" are unconstitutional. Nor does *Delaware v. Prouse*, 440 U.S. 648, 655, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), where the Supreme Court rejected Delaware's argument " that patrol officers be subject to no constraints in deciding which automobiles shall be stopped for a license and registration check because the State's interest in discretionary spot checks as a means of ensuring the safety of its roadways outweighs the resulting intrusion on the privacy and security of the persons detained." *Prouse* thus does not address the issue of reasonable suspicion, and it sheds no light on whether reasonable suspicion existed in the case on review here.

III.

The officer's stop of Teamer did not transgress the requirements of the Fourth Amendment. The decision of the First District should be quashed, and Teamer's conviction and sentence should remain undisturbed.

POLSTON, J., concurs.

Notes:

[1]The record presents some confusion regarding the Respondent's surname. Although his full name is " Kerrick Van Teamer," his surname is " Teamer," not " Van Teamer." This opinion refers to him and his case below accordingly.

[2] *United States v. Uribe*, No. 2:10-cr-17-JMS-CMM, 2011 WL 4538407 (S.D. Ind. Sept. 28, 2011); *Commonwealth v. Mason*, 78 Va. 474 (Cir. Ct. 2009), *aff'd*, No. 1956-09-2, 2010 WL 768721 (Va. Ct. App. Mar. 9, 2010).

[3] *Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1.

[4]The State conceded as much during oral argument in this case. When asked whether that scenario provided enough reasonable suspicion for a stop, the prosecutor responded, " It would depend on what else they were doing . . . ."

[5] *See* § 320.02(6), Fla. Stat. (2010) (" Any person who registers his or her motor vehicle by means of false or fraudulent representations made in any application for registration is guilty of a misdemeanor of the second degree . . . ."); § 320.261 (making it illegal to " knowingly attach[] to any motor vehicle" a license plate that was not " lawfully transferred to such vehicle"); §

320.0609(2)(a) (making it unlawful to transfer license plates to a different vehicle without notifying DHSMV).

[6] *Smith v. State*, 713 N.E.2d 338, 341 (Ind.Ct.App. 1999); *Andrews v. State*, 289 Ga.App. 679, 658 S.E.2d 126, 127-28 (Ga. Ct. App. 2008).

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67 So.3d 368 (Fla.App. 4 Dist. 2011)
36 Fla. L. Weekly D 1637
Joshua ADERS, Appellant,
v.
STATE of Florida, Appellee.
No. 4D10-2074.
Florida Court of Appeal, Fourth District.
July 27, 2011

Brian H. Mallonee, Fort Pierce, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

GROSS, J.

Does an officer have reasonable suspicion to effect a traffic stop when he conducts a computer check of a car's tag and learns that the tag is registered to the same make of car, but to one of a different color? We agree with courts in Indiana and Georgia and hold that under these circumstances an officer may lawfully make a traffic stop under the Fourth Amendment of the United States Constitution.

The facts leading up to the traffic stop in this case are undisputed. At about 1:00 a.m. on a Friday night, Deputy Jason Pickering observed a black two-door Honda. He learned that the Honda's color did not match the color reported on a law enforcement database, which indicated that the Honda should have been light-blue. Deputy Pickering activated his blue lights and stopped the Honda. The deputy explained his reason for making the stop. " [T]hat struck me as odd," the deputy stated. " I didn't know if that tag might not belong to that car or it could have been possibly a stolen vehicle I didn't know."

The only occupant in the vehicle was Joshua Aders. He gave Deputy Pickering his vehicle registration and insurance information, which also described the car as light blue. However, the VIN on the car and registration matched. Aders told

Deputy Pickering that he had spray painted the car when he bought it but had not yet changed the color on the registration. Deputy Pickering handed back Aders' license, registration, and insurance information, gave him a warning, and told him he was free to leave. Before Aders left the scene, however, the deputy requested his consent to search the car. Aders consented and volunteered that he had drug paraphernalia in the car's center console. The deputy's search also uncovered marijuana and pills.[1]

In the circuit court, Aders challenged the traffic stop, arguing that the deputy did not have a reasonable, articulable suspicion to justify an investigatory stop under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The circuit court ruled that the deputy was justified in making the stop to determine if the license plate was attached to the correct vehicle; the court

explained that

[i]t is reasonable for a law enforcement officer to conclude that a registration plate affixed to a vehicle which differs in color from the vehicle described on the registration information from the Florida Department of Highway Safety, Motor Vehicles Division, even if the make and Model are the same or similar, warrants further investigation.

Given the undisputed facts, this case presents a legal issue— the constitutionality of a traffic stop— so the standard of review is *de novo.*

The Fourth Amendment guarantees " [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. " Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘ seizure’ of ‘ persons' within the meaning of this provision." *Whren v. United States,* 517 U.S. 806, 809-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (citations omitted). Accordingly, the stop must be reasonable for it to comport with the Fourth Amendment. *Id.* at 810.

" [T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id.* (citing *Delaware v. Prouse,* 440 U.S. 648, 659, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Pennsylvania v. Mimms,* 434 U.S. 106, 109, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977)). " Probable cause exists where the totality of the facts known to the officer at the time would cause a reasonable person to believe that an offense has been committed." *State v. Hebert,* 8 So.3d 393, 395 (Fla. 4th DCA 2009) (citing *State v. Walker,* 991 So.2d 928, 931 (Fla. 2d DCA 2008)). At the very least, an officer must have an articulable and reasonable suspicion that the driver violated, is violating, or is about to violate a traffic law. *See United States v. Arvizu,* 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); *Prouse,* 440 U.S. at 654 & n. 11, 661, 663, 99 S.Ct. 1391.[2]

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In arguing that the traffic stop was invalid, Aders contends there could be no reasonable suspicion he violated state law if Deputy Pickering's sole reason was that the car's color did not match the color listed in state records, especially, he asserts, where there is no legal requirement that a driver notify the state of color changes. While the statutory and regulatory framework bears out the truth of Aders' assertion, we nonetheless agree with those courts from other states holding that a color discrepancy between a car and its computer registration creates sufficient reasonable suspicion to justify a traffic stop for further investigation.

Subsection 320.02(1), Florida Statutes (2010), requires an owner to register a vehicle that is " operated or driven on the roads of this state" and the owner " shall apply to the department" for registration " on a form prescribed by the department." Florida Administrative Code Rule 15-1.016 lists forms utilized by the Division of Motor Vehicles; there is no form for an owner to report a new paint job to the Department.[3] At least one form includes a space for the color as part of the information about a vehicle, but the purpose of the form is not for reporting a change in color.[4] Resort to the Florida Vehicle Registration that every driver must carry suggests that a registration may be renewed without having to note a change of color of a vehicle. The state has not and could not cite to a regulation or statute that Aders violated by failing to notify the department that he had

painted his blue car black.

But, Deputy Pickering suspected Aders of improperly transferring a license plate, which is a second-degree misdemeanor under section 320.261, Florida Statutes (2010).[5] A color discrepancy is enough to create a reasonable suspicion in the mind of a law enforcement officer of the violation of this criminal law. For example, in *Smith v. State*, a trooper " initiated [a] traffic stop because a computer check on the vehicle's license plate revealed that the plate was registered to a yellow Oldsmobile rather than a blue and white one." 713 N.E.2d 338, 341 (Ind.Ct.App.1999). After the stop, the trooper discovered that the car belonged to the passenger, " who had painted it a different color, which explained the apparently mismatched license plate." *Id.* The Indiana court held that the investigatory stop of the vehicle " was valid and supported by reasonable suspicion." *Id.* at 342. Similarly, in *Andrews v. State*, the court found reasonable suspicion to exist where an officer observed a greenish-gold car that a computer check revealed to be registered as silver in color; the court concluded that it was reasonable for the officer " to infer that the license plate may have been switched from another car." 289 Ga.App. 679, 658 S.E.2d 126, 127-28 (2008).[6] Applying *Smith* and

Andrews to this case, we affirm the circuit court's denial of the motion to suppress.

We acknowledge the case upon which Aders relies, *Commonwealth v. Mason,* 2010 WL 768721 (Va.Ct.App. Mar.9, 2010), which on similar facts held that a traffic stop violated the Fourth Amendment. The court in that case appeared to focus on the deputy's subjective intent in making the stop, rather than on an objective evaluation of the facts. " Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," so whether a stop is a pretext is irrelevant as long as it is otherwise justified. *Whren,* 517 U.S. at 811-13, 116 S.Ct. 1769.

Affirmed.

STEVENSON and GERBER, JJ., concur.

Notes:

[1] In the trial court, Aders did not challenge his consent to the search.

[2] *See also United States v. Harris,* 526 F.3d 1334, 1337-38 (11th Cir.2008) (" A traffic stop, however, is constitutional if it is either based upon probable cause to believe a traffic violation has occurred or justified by reasonable suspicion in accordance with *Terry [v. Ohio],* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 [(1968)]." (citation omitted)); *United States v. Botero-Ospina,* 71 F.3d 783, 787 (10th Cir.1995) (" [A] traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring." (footnote omitted)) (en banc).

[3] For example, the HSMV 82100 form is an affidavit for " Change/Alteration" of body, but it refers to the body of the vehicle and not its color. *See* Fla. Dep't of Highway Safety & Motor Vehicles (DHSMV), Affidavit for Change/Alteration of Body, HSMV 82100 (Rev.5/01), http:// www. flhsmv. gov/ dmv/ forms/ BTR/ 82100. pdf (last visited July 19, 2011).

[4] *See, e.g.,* DHSMV, Application for Replacement License Plate, Validation Decal or Parking Permit, HSMV 83146 (Rev.06/11) S, http:// www. flhsmv. gov/ dmv/ forms/ BTR/ 83146. pdf (last

visited July 19, 2011).

[5] In pertinent part, that statute provides:

Any person who knowingly attaches to any motor vehicle ... any registration license plate, ... which plate ... was not issued and assigned or lawfully transferred to such vehicle, is guilty of a misdemeanor of the second degree.... § 320.261.

[6] This case is distinguishable from *United States v. Clarke,* 881 F.Supp. 115, 116 (D.Del.1995), where there were facts other than the color discrepancy that supported the traffic stop; for example, the car was seen in a high crime area that had " a large number of stolen vehicles," the tag was from a state with high incidence of stolen vehicles, and the car was a model that was " commonly stolen."

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2015 Ark. 152 (Ark. 2015)

459 S.W.3d 296

JORDAN ARIE SCHNEIDER, APPELLANT

v.

STATE OF ARKANSAS, APPELLEE

No. CR-14-1104

Supreme Court of Arkansas

April 9, 2015

APPEAL FROM THE BENTON COUNTY CIRCUIT COURT. NO. CR-12-1434. HONORABLE ROBIN F. GREEN, JUDGE.

Norwood & Norwood, P.A., by: Alison Lee and Doug Norwood, for appellant.

Dustin McDaniel, Att'y Gen., by: Lauren Elizabeth Heil, Ass't Att'y Gen., for appellee.

OPINION

[459 S.W.3d 297]

ROBIN F. WYNNE, Associate Justice.

Jordan Arie Schneider appeals from his convictions on charges of possession of a controlled substance and possession of drug paraphernalia. He argues that the circuit court erred by denying his motion to suppress evidence seized following a stop of his vehicle that he claimed was illegal. Our court of appeals affirmed the decision of the circuit court. *Schneider v. State*, 2014 Ark.App. 711, 452 S.W.3d 601. Appellant petitioned this court for review, which was granted. When we grant a petition for review, we treat the appeal as if it had been originally filed in this court. *Fowler v. State*, 2010 Ark. 431, 371 S.W.3d 677. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(e) (2014). We reverse and remand the circuit court's sentencing order and vacate the opinion of the court of appeals.

Appellant pled guilty to charges of possession of a controlled substance and possession of drug paraphernalia in the Benton County District Court. The charges arose from a traffic stop of appellant's vehicle on November 24, 2011. Appellant appealed to the Benton County Circuit Court. In the circuit court, appellant filed a motion to suppress evidence seized by police, alleging that the stop of his vehicle was unlawful.

At the suppression hearing, Dustin Wiens with the Rogers Police Department testified that he was at the intersection of North Second Street and Wood Street at approximately 1:00 a.m. on November 24, 2011, when appellant drove past him. He pulled behind appellant and ran the vehicle's license plate. The license plate returned as being registered to a blue 1992 Chevrolet Camaro. Officer Wiens testified that he noticed that the car was red when it passed him and saw that the bumper was black while he was following it. Based solely on the color discrepancy, Officer Wiens stopped the vehicle and made contact with appellant. He testified that he performed the stop in order to investigate further, check the vehicle-identification number, and determine whether the vehicle had been painted or was stolen. Appellant introduced photographs of the vehicle that Officer Wiens described as showing a car with a red door, black bumper, and other parts that were

painted blue. Officer Wiens denied seeing any blue on the car before he stopped it. He repeated on cross-examination that the color of the vehicle was the only reason that he initiated the traffic stop.

The trial court denied appellant's motion to suppress. Appellant subsequently entered **[459 S.W.3d 298]** a conditional plea of guilty to the charges of possession of a controlled substance and possession of drug paraphernalia pursuant to Arkansas Rule of Criminal Procedure 24.3.[1] He was sentenced to ten days in jail, with seven days suspended, and assessed fines, fees, and court costs on the charge of possession of a controlled substance. He was sentenced to ten days in jail, with all ten days suspended, and assessed fines, fees, and costs on the charge of possession of drug paraphernalia. This appeal followed.

When reviewing a circuit court's denial of a motion to suppress evidence, the appellate court conducts a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to the inferences drawn by the trial court. *Pickering v. State*, 2012 Ark. 280, 412 S.W.3d 143. A finding is clearly erroneous, even if there is evidence to support it, when the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been made. *Id.* We defer to the circuit court's superior position in determining the credibility of the witnesses and resolving any conflicts in the testimony. *Id.*

Appellant argues that a discrepancy between the color of a vehicle and the color listed on the registration, standing alone, is insufficient to give rise to a reasonable suspicion of criminal activity necessary to justify the stop of his vehicle by Officer Wiens. Pursuant to Arkansas Rule of Criminal Procedure 3.1 (2014),

[a] law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger or forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

" Reasonable suspicion" is defined as a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion. Ark. R. Crim. P. 2.1 (2014). Whether there is reasonable suspicion depends upon whether, under the totality of the circumstances, the police have " specific, particularized, and articulable reasons indicating that the person may be involved in criminal activity." *Menne v. State*, 2012 Ark. 37, at 6, 386 S.W.3d 451, 455 (quoting *Malone v. State*, 364 Ark. 256, 263, 217 S.W.3d 810, 814 (2005)).

In making his argument, appellant urges this court to adopt the reasoning utilized by a district of the Florida Court of Appeals in *Van Teamer v. State*, 108 So.3d 664 (Fla.App. Dist. 2013). In *Van Teamer*, the Florida appellate court held that a discrepancy between the color of a vehicle and the color listed on the registration, standing alone, does not justify a traffic stop. Appellant also directs this court to the decision in

[459 S.W.3d 299] *United States v. Uribe*, 709 F.3d 646 (7th Cir. 2013), in which the United States Court of Appeals for the Seventh Circuit held that no reasonable suspicion of vehicle theft attached to a completely lawful color discrepancy in the absence of any evidence suggesting otherwise.

In arguing that the decision of the circuit court should be affirmed because the color discrepancy gave rise to a reasonable suspicion of criminal activity, the State relies on the decision of the Georgia Court of Appeals in *Andrews v. State*, 289 Ga.App. 679, 658 S.E.2d 126 (Ga. Ct. App. 2008) as well as the decision of the Indiana Court of Appeals in *Smith v. State*, 713 N.E.2d 338 (Ind.App. 1999). In both *Andrews* and *Smith*, the appellate court held that a color discrepancy gave rise to a reasonable suspicion of criminal activity sufficient to justify a stop of the vehicle because the discrepancy was an indication that the vehicle may have been retagged or stolen.

We conclude that the decisions in *Van Teamer* and *Uribe* are more persuasive given the facts presented in this case. In *Van Teamer*, the court noted that there was no requirement under Florida law for a registration to be updated to reflect a change in a vehicle's color. In affirming the court of appeals decision, the Florida Supreme Court stated that " the color discrepancy here is not 'inherently suspicious' or 'unusual' enough or so 'out of the ordinary' as to provide an officer with a reasonable suspicion of criminal activity, especially given the fact that it is not against the law in Florida to change the color of your vehicle without notifying the DHSMV." *State v. Teamer*, 151 So.3d 421, 427 (Fla. 2014).

Arkansas, like Florida, has no requirement that the owner of a vehicle change the registration to reflect the color of a vehicle in the event it is painted or the color otherwise altered. [2] It is also not prohibited in Arkansas to replace portions of a vehicle's body with new body pieces that do not match the vehicle's original color. The innocence of the conduct, however, is not determinative, as the United States Supreme Court has stated, in connection with a reasonable-suspicion inquiry, that " the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *United States v. Sokolow*, 490 U.S. 1, 10, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

Here, although Officer Wiens testified that he would conduct a stop in the event of a color discrepancy to determine whether the vehicle was stolen, he did not testify that, in his experience, car thieves would change the color of a vehicle after it had been stolen or that a discrepancy in color was indicative of any type of criminal conduct. There was, therefore, no evidence before the circuit court that a color discrepancy was indicative of any criminal activity that would possibly allow otherwise innocent behavior to give rise to a reasonable suspicion of criminal activity. *See Uribe*, 709 F.3d at 652 (stating that the government had provided no information on the correlation between repainted vehicles and stolen ones).

[459 S.W.3d 300] It is clear, based on the testimony at the suppression hearing, that Officer Wiens was acting on a purely conjectural suspicion that appellant was engaged in illegal activity at the time he initiated the traffic stop. Thus, the stop was not based on a reasonable suspicion that appellant was engaged in criminal activity, and the circuit court erred by denying appellant's motion to suppress. As a result, we reverse and remand the sentencing order of the circuit court.

Reversed and remanded; court of appeals opinion vacated.

Notes:

[1] With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review an adverse determination of a pretrial motion to suppress seized evidence or a custodial statement. Ark. R. Crim. P. 24.3(b)(i) (2014).

[2]The State asserts that Officer Wiens had probable cause to stop the vehicle pursuant to Arkansas Code Annotated section 27-14-306(a) (Repl. 2008), which prohibits the display on a vehicle of a registration plate not issued for the vehicle. However, a change in color need not be reflected on the registration linked to the plate. Also, Officer Wiens did not testify that he believed that a violation of section 27-14-306(a) had occurred when he stopped the vehicle. Therefore, Officer Wiens did not have probable cause to stop appellant's vehicle.
