FILED
United States Court of Appeals
Tenth Circuit

August 23, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDWIN JOSUE TORRES,

Defendant - Appellant.

No. 18-2026
(D.C. No. 1:16-CR-04138-JB-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **MATHESON**, **MURPHY**, and **CARSON**, Circuit Judges.

New Mexico State Police K-9 Officer Nathan Lucero ("Officer Lucero") stopped Plaintiff Edwin Josue Torres ("Torres") outside of Albuquerque, New Mexico for speeding. Torres agreed to permit Officer Lucero to search his vehicle. During the search of the vehicle, Officer Lucero uncovered 38.5 pounds of methamphetamine. Torres moved to suppress that evidence. The district court denied the motion in a written order, which Torres now appeals. Our jurisdiction arises under 28 U.S.C. § 1291. We affirm.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I.

On the morning of September 29, 2016, Officer Lucero stopped a vehicle driven by Torres on Interstate 40 outside of Albuquerque, New Mexico.[1] A passenger, Denise Guerra ("Guerra"), was lying in the back seat.

Officer Lucero exited his vehicle and approached Torres's vehicle from the passenger side. As he approached the passenger side window, he noticed a strong odor of air freshener. Speaking through the passenger side window, Officer Lucero requested Torres's license and registration, which Torres provided. Officer Lucero also requested that Torres walk with him back to the officer's vehicle, and Torres complied.

Back at his vehicle, Officer Lucero proceeded to fill out a citation. While he completed the citation, he asked Torres about his travel plans. Torres indicated that: (1) he and Guerra were traveling from California to Amarillo, Texas for a two-day vacation; (2) they had left California the previous evening at 8:00 p.m.; (3) they had not booked a hotel, but they would do so when they arrived in Amarillo; and (4) he had no family in Amarillo.

When the citation was almost complete, Officer Lucero asked Torres if he could inspect the vehicle identification number ("VIN") located on the vehicle's front

[1] A camera on Officer Lucero's vehicle videotaped the traffic stop. The audio from the videotape is not always clear because of background noise from the highway.

windshield and driver's side doorjamb. Torres agreed. Officer Lucero also asked, "And if I talk to her, is that okay?" Torres once again agreed.

Officer Lucero then approached Torres's vehicle. He walked around the vehicle from the passenger's side, briefly looking through the front windshield. He then opened the driver's side door and leaned into the interior of the vehicle. He spent only a few seconds inspecting the vehicle's VIN.

After inspecting the VIN, Officer Lucero proceeded to question Guerra for approximately 40 seconds.[2] While he questioned her, Officer Lucero continued to lean his upper body into the vehicle. During her conversation with Officer Lucero, Guerra told him that she and Torres were traveling to Texas for a two-day vacation, but she did know the name of their destination.[3]

Officer Lucero then returned to his vehicle. As he approached the vehicle, he returned Torres's documents to him. Shortly thereafter, Officer Lucero informed Torres that he was citing him for speeding. He then discussed with Torres whether Torres preferred to challenge the citation or pay the fine. Torres said he would pay the fine. After Torres signed the citation, Officer Lucero explained the payment

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[2] The district court did not clearly determine whether Officer Lucero finished inspecting the VIN before he leaned into the vehicle. It is also unclear from the video whether Officer Lucero inspected the VIN after entering the vehicle.

[3] Torres argues that Guerra said he thought their destination began with the letter "A." In support of that contention, she directs us to the suppression hearing transcript and the videotape of the traffic stop. Significantly, that testimony is not included in the cited portion of the transcript. Moreover, after reviewing the cited portion of the videotape, we are unable to discern that statement.

options and told Torres he was free to go. Torres then turned and began to walk away.

Approximately seven seconds later, Officer Lucero said, "Mr. Torres." Torres turned and walked back to Officer Lucero's vehicle. When Torres reached the vehicle, Officer Lucero asked Torres if he could ask him some additional questions. Torres agreed.

During the ensuing discussion, Torres indicated that: (1) he and Guerra were planning on traveling to Amarillo but he was thinking about traveling to Albuquerque[4]; (2) they were traveling to Albuquerque or Amarillo because they wanted to travel to either New Mexico or Texas because they already knew Arizona; and (3) they had not traveled to Las Vegas (or someplace similar) because there was too much drinking and partying there.

Officer Lucero then told Torres "Let me go talk to her real quick" and walked backed to Torres's vehicle to speak with Guerra. He initially spoke with her through the rear passenger window but almost immediately asked her to exit the vehicle. They then spoke near the front of Torres's vehicle. During this conversation, Guerra indicated that she believed they were traveling to "Armadillo." When Officer Lucero suggested that the name of the city might be Amarillo, she agreed. She also indicated

[4] It is not clear from the videotape whether Torres asserted that he was thinking about traveling to Albuquerque or that both he and Guerra were considering traveling to that destination. It is also unclear whether Torres indicated he was considering traveling to Albuquerque in addition to, or instead of, Amarillo—he employed the phrase "as well" and then shortly thereafter used the phrase "either/or."

that: (1) Torres had family and friends in Amarillo; (2) she only had one piece of luggage; and (3) they did not have a hotel reservation in Amarillo.

After speaking with Guerra, Officer Lucero walked back to Torres. Officer Lucero then asked Torres whether he had any family in Amarillo. Torres said "No." Officer Lucero also asked Torres how many pieces of luggage he had in the car. He first said he had five pieces of luggage, which he then revised downwards to four and then again to two.

Officer Lucero subsequently requested permission to search Torres's vehicle. Torres asked him what would happen if he refused to consent to the search. Officer Lucero indicated that he "would deploy the dog around the outside of the car" and, if the "dog alert[ed], then what I could do is detain you and the vehicle and her and apply for a search warrant for the vehicle." Torres then signed the consent form.[5] The ensuing search uncovered 38.5 pounds of methamphetamine in two duffle bags in the vehicle's trunk.

A federal grand jury indicted Torres on the charge of unlawful, knowing, and intentional possession of more than five hundred grams of methamphetamine with the intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2. Torres moved to suppress the evidence seized on the day of his traffic stop. The district court held a suppression hearing and denied that motion.

[5] Guerra also consented to a search and signed a consent form.

Torres pled guilty after the district court denied his motion. His plea agreement preserved his right to appeal the district court's order denying his motion to suppress. After his sentencing, Torres timely filed this appeal.

II.

Torres contends that the district court erred when it denied his motion to suppress. He argues that his consent to search his vehicle was ineffective because: (1) Officer Lucero violated his constitutional rights before he consented to the search and those violations tainted his consent; and (2) the totality of the circumstances indicate that his consent was involuntary.

"In reviewing the denial of a motion to suppress, we view the evidence in the light most favorable to the government, accept the district court's findings of fact unless clearly erroneous, and review the ultimate determination of reasonableness under the Fourth Amendment de novo." United States v. Marquez, 337 F.3d 1203, 1207 (10th Cir. 2003).

The Fourth Amendment protects individuals against unreasonable searches. See U.S. Const. amend. IV. Generally, an officer may only reasonably search a readily mobile vehicle based on facts that give rise to probable cause. See United States v. Ross, 456 U.S. 798, 809 (1982). But a search is not unreasonable if the party in control of the property consents to the search. See United States v. Diaz-Albertini, 772 F.2d 654, 658 (10th Cir. 1985).

"Before a district court may admit evidence resulting from a consent search, it must determine from the totality of circumstances that (1) the defendant's consent was

voluntary and (2) the search did not exceed the scope of the consent."[6] United States v. Dewitt, 946 F.2d 1497, 1500 (10th Cir. 1991). "The government bears the burden on the voluntariness issue." Id. (citing United States v. Abbott, 546 F.2d 883, 885 (10th Cir. 1977)). "First, it must present 'clear and positive testimony that consent was unequivocal and specific and freely and intelligently given.' Second, the government must show that the police did not coerce the defendant into granting his consent." United States v. Pena, 143 F.3d 1363, 1366 (10th Cir. 1998) (internal citation omitted) (quoting United States v. Angulo-Fernandez, 53 F.3d 1177, 1180 (10th Cir. 1995)).

When determining whether a defendant voluntarily consented to a search, we consider several factors, including:

> physical mistreatment, use of violence, threats, promises, inducements, deception, trickery, or an aggressive tone, the physical and mental condition and capacity of the defendant, the number of officers on the scene, and the display of police weapons. Whether an officer reads a defendant his Miranda rights, obtains consent pursuant to a claim of lawful authority, or informs a defendant of his or her right to refuse consent also are factors to consider in determining whether consent given was voluntary under the totality of the circumstances.

United States v. Jones, 701 F.3d 1300, 1318 (10th Cir. 2012) (quoting United States v. Harrison, 639 F.3d 1273, 1278 (10th Cir. 2011).

Furthermore, a defendant may contend that police violated his constitutional rights and those violations tainted his consent. If a defendant advances such an argument, he bears the initial burden to demonstrate a "factual nexus between the

[6] Torres does not argue that the search exceeded the scope of his consent.

illegality and the challenged evidence"—that is, to establish that any constitutional violation was a but-for cause of his consent to search. United States v. Chavira, 467 F.3d 1286, 1291 (10th Cir. 2006). If he satisfies his initial burden to establish causation, we must then determine whether the taint from that constitutional violation was sufficiently attenuated. See United States v. Nava-Ramirez, 210 F.3d 1128, 1131 (10th Cir. 2000). When determining attenuation, we consider three factors: "1) the temporal proximity between the police illegality and the consent to search; 2) the presence of intervening circumstances; and particularly 3) the purpose and flagrancy of the official misconduct." United States v. Melendez-Garcia, 28 F.3d 1046, 1054 (10th Cir. 1994).

A.

Torres asserts that Officer Lucero violated his constitutional rights before he consented to the search and those violations tainted his consent. Specifically, Torres contends that Officer Lucero violated his rights by unconstitutionally: (1) extending the traffic stop to enter his vehicle and question Guerra; (2) entering his vehicle to inspect his VIN; and (3) after resolving the speeding ticket, detaining him without reasonable suspicion.

1.

Torres frames Officer Lucero's questioning of Guerra and the officer's entry into the vehicle as one constitutional violation—entry into the vehicle to question Guerra for approximately 40 seconds. Nevertheless, we are satisfied that, under the circumstances presented here, Torres identifies two separate potential constitutional

violations: (1) the entry into Torres's vehicle, and (2) the extension of the stop to question Guerra.

We reach this conclusion because, although the facts underlying the two violations occurred contemporaneously, no evidence creates a causal link between them. Officer Lucero could have questioned Guerra through a window or asked her to exit the vehicle and questioned her outside the vehicle—indeed, he had just spoken with Torres outside the vehicle and did, in fact, ask Guerra to exit the vehicle the second time he spoke to her.[7] Furthermore, no evidence suggests that Officer Lucero's presence in the vehicle altered the questions that he asked or the answers provided by Guerra.

Thus, we will analyze these violations separately.

i.

Torres contends that Officer Lucero unconstitutionally extended the traffic stop when he questioned Guerra for approximately 40 seconds.

When a police officer observes a traffic violation, the officer may stop the vehicle for the time necessary "to address the traffic violation that warranted the stop and attend to related safety concerns." Rodriguez v. United States, 135 S. Ct. 1609,

[7] We note that Officer Lucero testified that he leaned into the vehicle during the conversation because the highway where he stopped Torres, "is so loud you can't hear." (Suppression Hearing Transcript at 15:11–15.) We also note that at times, Officer Lucero indicated he could not hear Guerra during their second conversation outside the vehicle. Nevertheless, in light of the conversations that did, in fact, occur outside the vehicle, we are still satisfied that no reasonable fact-finder could find a causal link between Officer Lucero's entry into the vehicle and his questioning of Guerra.

1614 (2015) (internal citations omitted). During the stop, the officer may also engage in "certain unrelated investigations that d[o] not lengthen the roadside detention," which can include questioning the driver and passengers or conducting a dog sniff of the vehicle. Id. Generally, those unrelated investigations may not prolong the stop beyond the time reasonably required to address the traffic violation. See id. The officer may, however, prolong the traffic stop for such unrelated investigations if the defendant consents to the extension or the officer's reasonable suspicion of other criminal activity justifies the extension of the stop. See United States v. Alcaraz-Arellano, 441 F.3d 1252, 1259 (10th Cir. 2006).

The government argues that the questioning was constitutionally sound for several reasons, including that Torres consented to the questioning.[8] We agree that Torres voluntarily consented to the questioning.

[8] The government did not argue to the district court that Torres consented to Officer Lucero's questioning of Guerra, and, as such, the district court did not determine whether that consent was voluntary. Regardless, "[w]e can affirm the decision of the district court on any basis supported by the record and the applicable law." Alameda Water & Sanitation Dist. v. Browner, 9 F.3d 88, 90–91 (10th Cir. 1993). Furthermore, we may resolve issues that turn on factual determinations—rather than remand to the district court—when, as here, the evidence is uncontested and the proceedings below "resulted in a record of amply sufficient detail and depth from which the determination may be made." Cf. United States v. Mendoza-Salgado, 964 F.2d 993, 1011–13 (10th Cir. 1992) (analyzing various factors, including the voluntariness of consent, when determining whether a constitutional violation tainted that consent); cf. also United States v. Betancur, 24 F.3d 73, 77–78 (10th Cir. 1994) (determining whether an officer pretextually stopped a vehicle). We also note that in this case, Torres was on notice to produce any evidence of involuntariness because the parties disputed whether his later consent to search his vehicle was voluntary.

The district court (when determining whether Torres consented to the search of his vehicle) found: (1) no "evidence of the threatening presence of several officers" [9]; (2) no evidence that, at any time, Officer "Lucero adopted an aggressive tone or used aggressive language when interacting with Torres"; (3) that the traffic stop occurred in a public place "on the shoulder of Interstate 40 in broad daylight"; (4) that Officer Lucero never unholstered or brandished his firearm; and (5) that Officer Lucero did not touch Torres until after Torres consented to the search of the vehicle (which occurred after Torres consented to Officer Lucero's questioning of Guerra). United States v. Torres, No. CR 16-4138 JB, 2017 WL 3149395, at *31–32 (D.N.M. June 9, 2017). In United States v. Soto, 988 F.2d 1548, 1558 (10th Cir. 1993), we determined under similar circumstances that the district court did not clearly err when it held that the defendant voluntarily consented to a search even though the officer "withheld [the] defendant's license and registration." We reasoned that: (1) only one officer was present; (2) the officer "did not use an insisting tone or manner," "did not physically harass defendant," and "did not unholster his weapon"; (3) "the incident occurred on the shoulder of an interstate highway, in public view"; and (4) "defendant's consent was unequivocal and specific." Id. Although in this case, unlike in Soto, we address voluntary consent in the first instance rather than reviewing a district court's finding of voluntary consent for clear error, we are

[9] The videotape reflects that another police vehicle was parked some distance in front of Torres's vehicle. But that vehicle was parked at that location before the traffic stop and no officer left the vehicle to assist with the traffic stop at issue.

satisfied that the factors we identified establish Torres voluntarily consented to Officer Lucero's questioning of Guerra.

Relying on our decision in United States v. Caro, 248 F.3d 1240 (10th Cir. 2001), Torres argues that if an officer requests consent to search and the search is beyond the scope of the investigation, then any consent is invalid. In Caro, unlike here, we determined that the officer had violated the defendant's constitutional rights before the defendant consented to the search by unlawfully detaining him and concluded that the prior constitutional violation tainted the defendant's consent.[10] 248 F.3d at 1247–48. We did not adopt a broad rule prohibiting officers from seeking consent to search while they retained the defendant's papers, unless they are otherwise authorized to search. Nor, under these circumstances, do we believe that there is anything in the Constitution that prohibits an officer from seeking consent to conduct a search he could not otherwise have conducted.

Here, no constitutional violations were a but-for cause of Torres's consent to question Guerra. Thus, unlike in Caro, we do not conduct a taint analysis. Accordingly, because Torres consented to Officer Lucero's conversation with Guerra, that conversation did not violate his constitutional rights.

[10] We determined the consent to search was not sufficiently attenuated from the prior constitutional violation because the officer retained possession of the defendant's documents and did not inform the defendant that he was free to leave or refuse consent. See 248 F.3d at 1247–48. We did not, however, determine that those factors require us to hold that a defendant did not voluntarily consent to a search when, as here, no constitutional violation precedes the consent.

ii.

Next, we assume, without deciding, that Officer Lucero violated Torres's Fourth Amendment rights by *entering the vehicle* when he questioned Guerra. That assumption requires us to consider whether Torres has shown that this violation was a but-for cause of his consent to search.

We previously addressed causation under substantially similar circumstances in United States v. Chavira, 467 F.3d 1286 (10th Cir. 2006). There, the defendant consented to a search of his vehicle after the officer unlawfully inspected his doorjamb VIN. Id. at 1288–89, 91. The search uncovered cocaine in the defendant's gas tank. Id. at 1289. The defendant subsequently moved to suppress the fruits of the search because his consent to search did not purge the taint from the illegal VIN inspection. Id. The district court denied the motion. Id. at 1289–90.

On appeal, we affirmed the district court because the defendant did not establish that the constitutional violation was a but-for cause of his consent. Id. at 1291–92. We stated:

> During a lawful stop and in the midst of a lawful VIN check on the dash, the trooper opened the door of Mr. Chavira's truck and checked the VIN on the doorjamb. The doorjamb inspection lasted fourteen seconds. It uncovered no contraband, and the second cell phone discovered by the trooper during that time has no demonstrated connection to what occurred next. Mr. Chavira was not confronted with the fruits of that search or questioned about anything that it revealed. There is no indication that the trooper would not have requested or obtained consent to search the truck but for the inspection of the VIN on the doorjamb. We may not suppress evidence without but-for causation. See Hudson, 126 S.Ct. at 2159 ("[B]ut-for causality is . . . a necessary . . . condition for suppression.").

Id. (footnote removed).

Here, as in Chavira, the officer's entry into the vehicle uncovered no contraband and has no demonstrated connection to subsequent events. In addition, no evidence suggests that Officer Lucero would not have requested or obtained consent to search Torres's vehicle if he had questioned Guerra from outside the vehicle. As such, this conduct did not taint Torres's consent to search.

2.

Torres next argues that Officer Lucero violated his rights when the officer entered his vehicle to inspect his VIN. We have held that:

> where the dashboard VIN plate is readable from outside the passenger compartment, that VIN matches the VIN listed on the registration, and there are no signs the plate has been tampered with, there is insufficient cause for an officer to extend the scope of a detention by entering a vehicle's passenger compartment for the purpose of further examining any VIN.

Caro, 248 F.3d at 1246.

We need not determine whether the officer violated Caro, however, because even if we assume that Officer Lucero entered Torres's vehicle to inspect the VIN, we conclude the officer's entry into the vehicle and inspection of the VIN was not the but-for cause of Torres's consent to search for the same reasons we determined that the officer's presence in Torres's vehicle while questioning Guerra did not cause Torres to consent to the search.

3.

Torres also contends that after Officer Lucero told him he was free to go, the officer impermissibly extended the traffic stop at one of two times: (1) when Officer Lucero said, "Let me go talk to her real quick," and went to speak with Guerra; or (2) if not then, when Officer Lucero asserted that if Torres did not consent to the search, the officer would deploy a drug-detection dog around Torres's car and seek a search warrant if the dog alerted. He further contends that at those times, no reasonable suspicion of other criminal activity supported his continued detention.[11]

After "an officer issues the citation and returns any materials provided," a "driver is . . . detained only if the driver has objectively reasonable cause to believe that he or she is not free to leave." United States v. Shareef, 100 F.3d 1491, 1501 (10th Cir. 1996). Assuming Officer Lucero detained Torres when he said, "Let me go talk to her real quick," we are satisfied that reasonable suspicion justified his detention.

We reach that conclusion for several reasons. First, when he initially approached Torres's vehicle, Officer Lucero smelled, at the very least, a strong smell of air freshener.[12] Although we have held that "the scent of a masking agent alone is

[11] Torres also argues that he was detained when Officer Lucero called him back after telling him he was free to go, but concedes that argument is foreclosed by United States v. Hernandez, 93 F.3d 1493, 1498–99 (10th Cir. 1996).

[12] At the suppression hearing, Officer Lucero first testified that the smell was overpowering. He subsequently retreated from that testimony and indicated he could not recall if the smell was properly characterized as overpowering. The district court nevertheless found that the smell was overpowering.

insufficient to establish reasonable suspicion," we have also "repeatedly held that air freshener coupled with other indicia of criminal activity supports a reasonable brief inquiry. . . . The fact that air freshener [or laundry detergent] may be used innocently does not mean that it cannot be used under other suspicious circumstances." United States v. Villa-Chaparro, 115 F.3d 797, 802 (10th Cir. 1997) (alterations in original).

Although Torres argues that this factor does not contribute to reasonable suspicion because his vehicle contained only one air freshener, we are not convinced. Multiple air fresheners may strengthen an officer's suspicion, but the presence of only one air freshener does not mean that the strong scent of air freshener cannot contribute to reasonable suspicion. Indeed, to mask the scent of drugs, drug traffickers could spray a similar scent.[13]

Second, we are satisfied that the district court determined that Torres displayed unusual nervousness, and we conclude that the district court's finding was not clear error. Unusual nervousness—rather than run-of-the-mill nervousness—may

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Torres appears to challenge that finding on appeal, but we need not resolve that challenge. In his testimony at the suppression hearing, Torres conceded that his car smelled strongly of air freshener (Suppression Hearing Transcript, at 40:25-41:2). A strong masking smell of air freshener still contributes to reasonable suspicion. See United States v. Salzano, 158 F.3d 1107, 1114 (10th Cir. 1998) ("[W]e agree with the government's assertion that a strong odor may give rise to reasonable suspicion on the part of law enforcement officials that the odor is being used to mask the smell of drugs.").

[13] That may have been the case here. At his sentencing hearing, Torres's sister testified that Torres "always would keep this kit where he had the cleaning supplies, the Febreze. We all do. We all keep our cleaning supplies in the car." (Sentencing Transcript at 45:11–13.) She also indicated that Torres's car smelled like Febreze "[a]ll the time." (Id. at 45:16–17.)

meaningfully contribute to reasonable suspicion. United States v. Santos, 403 F.3d 1120, 1127 (10th Cir. 2005) ("But nervousness is a sufficiently common—indeed natural—reaction to confrontation with the police that unless it is unusually severe or persistent, or accompanied by other, more probative, grounds for reasonable suspicion, it is "of limited significance in determining whether reasonable suspicion exists.'" (quoting United States v. Williams, 271 F.3d 1262, 1266 (10th Cir. 2001) (internal quotation marks omitted))).

We note that Torres argues that the district court only determined that he was nervous, not that he was unusually nervous. But the district court expressly found that when Officer Lucero initially approached Torres's vehicle, "Torres appeared to be very nervous." Torres, 2017 WL 3149395, at *2. Moreover, after considering the district court's opinion in its entirety, we conclude that the district court impliedly found additional facts related to nervousness.

In its order, the district court recounted Officer Lucero's testimony at the suppression hearing:

> Lucero then mentioned how nervous and fidgety Torres seemed to be throughout the stop, in contrast to motorists' normal behavioral arc—an inverse cosecant in which the first few moments of the stop involve peak nervousness that increasingly diminishes as the stop proceeds. See Tr. at 14:13-16:5 (Lucero, Torrez). Lucero asserted that Torres' nervousness manifested itself in awkward comments, such as looking at the patrol car's lights and saying "Wow, those are red lights," extreme sweating despite cold weather, and shaking. Tr. at 16:6-17:6 (Lucero, Torrez).

Id. at *10. The court also noted in its statement of the law that "*unusual* signs of nervousness during a stop" contributes to reasonable suspicion. Id. at *28 (emphasis added). The court then held that reasonable suspicion existed for the following reasons:

> Based on his experience and training as a patrol officer, Lucero determined that factors such as (i) a thirty-hour roundtrip car drive for a two-day vacation in a city with no discernible tourist attractions; (ii) Torres' rapid rate of travel from California to New Mexico; (iii) Torres' nervousness; (iv) Torres' and Guerra's lack of hotel accommodations for the coming evening; (v) Guerra's lack of knowledge where she and Torres were heading; and (vi) an overpowering smell of air freshener in [Torres's vehicle] all—when combined, constituted suspicious behavior. See Tr. at 70:5-72:6 (Lucero). If it were the patrol officer, the Court would not necessarily consider some of these factors to be indicia of hidden criminal conduct. For instance, many travelers wait until they reach their destination and then book a hotel room last minute to take advantage of hotels' willingness to drop their prices to fill empty rooms. The Tenth Circuit instructs, however, that district courts are to accord deference to an officer's ability to detect suspicious behavior during a traffic stop. See United States v. Gandara-Salinas, 327 F.3d at 1130. During the hearing, Torres' expert testified that patrol officers develop a sixth sense for suspicion as they stop hundreds of motorists over years on the job. See Tr. at 87:21 (Garcia). The Court therefore concludes that there is no sound reason to override the deference normally accorded to patrol officers in determining reasonable suspicion, and the Court consequently concludes that Lucero had reasonable suspicion to detain Torres even if Torres had not given his verbal consent to additional questioning.

Id. at *28.

Because the district court specifically indicated both that *unusual* nervousness supports reasonable suspicion and that it was deferring to Officer Lucero's conclusions, we are satisfied that the district court credited Officer Lucero's testimony regarding nervousness and that the court's use of the unadorned word "nervousness" was merely

shorthand for unusual nervousness. Cf. United States v. Porter, 928 F.3d 947, 965 (10th Cir. 2019) ("Whether the district court should have used aggravated assault as the 'underlying offense' under § 2H1.1(a) therefore turns on Mr. Porter's 'intent to cause bodily injury (i.e., not merely to frighten) with that weapon,' a question of fact. U.S.S.G. § 2A2.2 cmt. n.1. By sentencing Mr. Porter under the assault provision, the district court necessarily found that Mr. Porter did not have the requisite intent . . . We conclude . . . the court's implicit finding that Mr. Porter lacked intent to injure Mr. Waldvogel was not clearly erroneous.").

Torres also argues that the videotape of the traffic stop shows that he was not unusually nervous. But although the videotape does not clearly show unusual nervousness, Torres was not within view of the camera for most of the stop and the image is not clear enough to determine whether Torres was sweating. Under these circumstances, the district court was entitled to credit Officer Lucero's testimony and conclude that Torres was unusually nervous because, at the very least, he was very nervous at the start of the traffic stop, his nervousness increased during the encounter, and he was sweating profusely on a cool day. See United States v. Kitchell, 653 F.3d 1206, 1220–21 (10th Cir. 2011) (holding that although "[a] review of the videotape of [the defendant's interaction with the officer] . . . lends some credence to [the defendant's] argument that any nervousness he displayed was not unusual[,] . . . the district court was entitled to rely on [the officer's] testimony"). We have held that similar displays of nervousness can contribute to reasonable suspicion. See, e.g., United States v. Benitez, 899 F.2d 995, 998 (10th Cir. 1990) ("Appellant was gripping the steering

wheel tightly, his knuckles were white, his Adam's apple was moving up and down, he stuttered when he answered Dunlap's questions, and he was sweating although it was fairly cool that day. Appellant's nervousness gave rise to reasonable suspicion which justified Agent Dunlap's further questioning and request for consent to search." (internal citation omitted)); Soto, 988 F.2d at 1556 ("We recognize that in Walker and Guzman we stated the nervousness of either the driver or a passenger, by itself, was insufficient to generate a reasonable suspicion of illegal activity, and we recognize that defendant's shaking here may have been caused at least in part by the extreme cold. Nevertheless, Officer Barney testified that defendant appeared nervous, not merely cold, and this testimony was credited by the district court. Further, defendant's nervousness was not the only factor relied upon by the detaining officer." (footnote omitted)).

Third, Torres's statements were internally inconsistent and inconsistent with Guerra's statements. For example, Guerra indicated that Torres planned to visit friends and family in Amarillo, but Torres testified that none of his family lived there and never indicated that he was visiting friends when Officer Lucero asked Torres why he was traveling to Amarillo.[14] Furthermore, Guerra, unlike Torres, never mentioned any intent to visit Albuquerque. And Torres did not mention Albuquerque when he initially relayed his travel plans to Officer Lucero. When a driver gives

[14] Torres argues that Guerra said he had "family friends," in Amarillo, not "family and friends." But the district court found that Guerra said "family and friends." Torres, 2017 WL 3149395, at *3. Because the videotape's audio is unclear, and Officer Lucero testified at the suppression hearing that Guerra said "family and friends," (Sentencing Transcript at 27:10–18), the district court's finding was not clearly erroneous.

"internally inconsistent statements" or the "passenger and driver[]" give inconsistent statements "regarding travel plans," those inconsistencies contribute to reasonable suspicion. See United States v. Davis, 636 F.3d 1281, 1291 (10th Cir. 2011).

Fourth, Torres's travel plans were implausible. "We have noted numerous times that implausible travel plans can form a basis for reasonable suspicion." United States v. Contreras, 506 F.3d 1031, 1036 (10th Cir. 2007). Torres correctly notes that we have "been reluctant to deem travel plans implausible—and hence a factor supporting reasonable suspicion—where the plan is simply unusual or strange because it indicates a choice that the typical person, or the officer, would not make." See United States v. Simpson, 609 F.3d 1140, 1149 (10th Cir. 2010). Indeed, we have held that significant travel for a short visit is not the type of travel plan that arouses reasonable suspicion when the defendant provides a compelling explanation for that travel. See Courtney v. Oklahoma ex rel. Dep't of Pub. Safety, 722 F.3d 1216, 1220–21, 1225 (10th Cir. 2013) (holding travel plans were "wholly unremarkable" and did not support an inference of reasonable suspicion when defendant stated that that he could only find work in Tulsa and drove back to Tennessee to spend the weekend with his family every three weeks); United States v. Lopez, 849 F.3d 921, 925–28 (10th Cir. 2017) (holding that travel from California to "Kansas City or Nebraska" in a rental car rented for two days did not support reasonable suspicion because "[g]iven the purpose of the trip—to rescue a sister from an abusive boyfriend—the travel plans made sense").

But where a defendant does not provide such an explanation, significant travel for a short visit may give rise to reasonable suspicion. See, e.g., United States v. Sokolow, 490 U.S. 1, 9 (1989); United States v. Simpson, 609 F.3d 1140, 1151–52 (10th Cir. 2010). For example, in Sokolow, the Supreme Court noted that "[w]hile a trip from Honolulu to Miami, standing alone, is not a cause for any sort of suspicion, here there was more: surely few residents of Honolulu travel from that city for 20 hours to spend 48 hours in Miami during the month of July." Sokolow, 490 U.S. at 9.

Here, Torres told Officer Lucero that he and Guerra were driving to Amarillo for a two-day vacation. When prompted, he indicated that they were traveling to Amarillo because they had not been to Texas and they were not going somewhere like Las Vegas because there was too much drinking and partying there. At the suppression hearing, Officer Lucero testified that: (1) a round-trip drive between California and Amarillo would require thirty hours of driving if the driver only stopped for fast food and to quickly fill the gas tank; and (2) he had traveled to Amarillo and did not know of any tourist attractions in Amarillo, except for the 72-ounce steak, which did not justify driving from California for a two- or three-day vacation. Moreover, as we previously noted, Torres specifically stated that he was not traveling to Amarillo to see family and, unlike Guerra, never asserted that he was traveling to see friends, even when Officer Lucero asked Torres why he was traveling to Amarillo. Under these circumstances, we conclude that Torres's explanation of his travel plans would not ameliorate a reasonable officer's suspicions.

When we determine whether a defendant's detention was supported by reasonable suspicion, our analysis "does not depend upon any one factor"; instead, we consider "the totality of the circumstances." Soto, 988 F.2d at 1555. In this case, the totality of the circumstances provided Officer Lucero with reasonable suspicion to detain Torres.[15] Cf. United States v. Sanchez-Valderuten, 11 F.3d 985, 987, 989 (10th Cir. 1993) (affirming the district court's determination that reasonable suspicion existed that the defendant was transporting drugs because: (1) the officer smelled a heavy scent of air freshener and coffee; (2) the defendant did not tell the officer where he was driving from; and (3) the defendant was driving on an unusually southerly route to reach the state the officer believed was the defendant's destination (based on the states listed on the driver's documents)). Moreover, reasonable suspicion persisted through the search of Torres's vehicle because the record does not indicate that any of the factors we identified above materially changed.

Thus, because we conclude that no constitutional violations affected Torres's decision to consent to the search of his vehicle, no constitutional violations tainted that consent.

[15] Because the factors we identify suffice to establish reasonable suspicion, we do not consider whether any additional factors also contribute to reasonable suspicion. We also note that although Officer Lucero's testimony did not link each factor we identified to drug trafficking, the link between these factors and drug trafficking is well-established in our case law.

B.

Torres next argues that even if no constitutional violations tainted his consent, the totality of the circumstances establish that he did not voluntarily consent to the search of his vehicle. Torres's circumstances did not, however, materially change between when he consented to Officer Lucero's questioning of Guerra and when he consented to this search. Indeed, in the intervening time, Officer Lucero returned Torres's documents to him, removing one factor that could arguably weigh against a determination that Torres's consent was voluntary. Thus, we conclude that Torres's consent to search his vehicle was voluntary for the same reasons we conclude that he voluntarily consented to Officer Lucero's questioning of Guerra.

IV.

For the foregoing reasons, we AFFIRM the district court's order denying Torres's motion to suppress.

Entered for the Court

Joel M. Carson III
Circuit Judge