

TO BE PUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

PANTALEON CORONA-TORRES,

Defendant.

No. CR11-4039-DEO

**REPORT AND RECOMMENDATION
ON MOTION TO SUPPRESS**

On March 24, 2011, the grand jury returned an Indictment against the defendant Pantaleon Corona-Torres (“Corona”) charging him with conspiracy to distribute methamphetamine and possession with intent to distribute methamphetamine. Doc. No. 1. He promptly filed a motion to suppress methamphetamine and money seized from a pickup truck he was driving after it was stopped and searched on March 4, 2011. Doc. No. 10. The government resisted the motion. Doc. No. 21. The motion has been assigned to the undersigned for a report and recommendation. Doc. No. 22.

The court held an evidentiary hearing on April 13, 2011. Assistant United States Attorney Kevin C. Fletcher appeared on behalf of the government. The defendant appeared personally with his attorney, J. William Gallup. At the hearing, the government called the following witnesses: Chris Mumm and Michael Wight, power linemen for Denison Municipal Utilities; Sheriff James Steinkuehler, Lt. Troy Kluender, and Deputy Corey Utech, all employees of the Crawford County, Iowa, Sheriff’s Department; and Task Force Officer Juan Gonzalez, who testified solely to establish foundation for a Spanish/English translation. The defendant testified on his own behalf. The following government exhibits were admitted into evidence: **Gov’t Ex. 1**, a transcript of the audio portion of a DVD recording of the stop (prepared by Deputy Utech); **Gov’t Ex. 2**, the

DVD recording of the stop; **Gov't Ex. 3**, Corona's Mexican ID card; **Gov't Ex. 4**, a citation issued to Corona for driving without a driver's license; **Gov't Ex. 5a, b, and c**, photographs of methamphetamine and a laboratory report; **Gov't Ex. 6a, b, and c**, photographs of methamphetamine and money; **Gov't Ex. 7a and b**, photographs of Corona's pickup truck; **Gov't Ex. 8**, Crawford County Ordinance 2002-1; **Gov't Ex. 9**, an aerial map of locations pertinent to the stop; and **Gov't Ex. 10**, photographs of a gravel road in Crawford County.

I. BACKGROUND FACTS

On the morning of March 4, 2011, Mumm and Wight were driving a dump truck along a gravel road in rural Crawford County, Iowa, in the course of their employment as linemen for the local municipal utilities company. They came around a corner and saw a pickup truck parked "off on the side of the road" facing in their direction. *See* suppression hearing transcript ("Sup. Tr.") 8-9, 17, 22. They also saw an Hispanic male, later identified as Corona, standing behind the pickup, and another man sitting in the passenger's seat. As they approached the pickup, Corona got in the pickup and started driving toward them. As the trucks passed each other, Mumm and Wight saw that the back of the pickup was "full of garbage," including some old tires and trash bags and a bicycle. They suspected that Corona had either dumped or was planning to dump trash on the side of the road, although they did not actually see him dump any trash and did not see any trash along the side of the road or in the ditch. After the pickup passed them by, they saw it turn around at the next intersection and head back toward them. They assumed that Corona was intending to return to the same spot to dump trash, but again this did not happen. Instead, Corona followed their vehicle until they turned off onto another road.

When the pickup passed Mumm and Wight, Mumm called Sheriff Steinkuehler and told him what he had observed. Specifically, he told Steinkuehler, "I got this pickup I

believe was going to throw some garbage out in the road ditch” (Sup. Tr. 14), and then described the pickup. When Mumm saw the pickup turn around at the intersection, he told Steinkuehler the occupants of the pickup were “going to stop and throw the garbage out again.” *Id.* Although Steinkuehler knew that there had been no reports of any trash dumping in the area, and he knew there was no indication that anyone in the pickup actually had dumped any trash, he decided the pickup should be stopped. He headed in the direction of the pickup and called for assistance from other officers in the area.

Lt. Kluender located the pickup on a four-lane highway near a busy intersection in a commercial area. Sup. Tr. 34-37, 75-76. He pulled the pickup over without incident and obtained identification from the two occupants. He noticed that the identification provided by Corona (Gov’t Ex. 3) was a Mexican ID card and not a driver’s license.

Deputy Utech arrived next at the scene. Since he was a patrol officer and Kluender ordinarily was assigned to civil matters, Utech assumed primary responsibility over the stop. Kluender gave the IDs to Utech. While Utech was running the IDs, Kluender returned to the pickup and asked “what’s going on.” Sup. Tr. 80. He testified that the passenger appeared to be very nervous, “over and above what I normally see.” Supp. Tr. 81.

Sheriff Steinkuehler arrived at the scene a short time later. He approached the pickup and asked the occupants if they had been dumping trash. Corona responded that they had not dumped any trash, and explained that he had stopped on the gravel road to move a tire to keep trash from blowing out of the bed of the pickup. He also said that he was driving on a back road because he did not have a driver’s license. Sup. Tr. 39.

Utech realized he had seen the pickup truck earlier that day parked near a mechanic shop in Denison that was under surveillance for possible illegal drug activities (Sup. Tr. 106-109), so he activated the audio and video recording device in his patrol car. With the possible exception noted below, the court finds that the transcript Utech prepared of the

audio portion of the recording (Gov't Ex. 1) accurately reflects what can be heard on the DVD (Gov't Ex. 2). Steinkuehler's and Kluender's vehicles also had recording devices, but they were not activated.

Utech decided to seek consent to search the pickup to look for drugs. On the audio recording, Utech, Steinkuehler, and Kluender can be heard discussing their strategy for obtaining consent:

UTECH WE GOT IT GOING ON, IM JUST
GONNA ASK HIM

* * *

STEINY¹ JUST TELL HIM HE HAS, WE
THOUGHT THEY WERE DUMPING
OFF GARBAGE, WE WOULD LIKE
TO TAKE A LOOK IN THE PICKUP,
IF THEY DON'T MIND, AND
THROUGH THE GARBAGE, AND
MAKE SURE IT AINT SOMETHING
THAT.

UTECH YEAH, IM GOING TO, IM GOING TO.

STEINY AND IF HE SAYS WELL FUCK YOU,
THEN ARREST HIM.

UTECH YEAH, WELL I CALLED, I CALLED
[COUNTY NARCOTICS INVESTIGA-
TOR] PERDEW AND HE SAID GO
AHEAD AND TOSS IT,² JUST DON'T
SAY NOTHING ABOUT.

STEINY OK, IM GONNA WAIT

UTECH YEAH, THAT'S FINE

* * *

¹Sheriff James Steinkuehler.

²"Toss it" is slang for "search." Sup. Tr. 62.

UTECH IM GONNA, IM GONNA. HOW IM GONNA DO THIS ONE.

KLUENDER ILL JUST ILL JUST PLAY IT BY EAR

UTECH IM GONNA GO TO THE PASSENGER SIDE, PULL HIM OUT IN FRONT OF YOUR CAR, AND THEN UH, IM GONNA GIVE HIM HIS, THE TICKET AND EVERYTHING, AND THEN, ONCE HES FREE TO GO, THEN ASK HIM FOR CONSENT. DOES THAT WORK FOR YOU?

UTECH LETS GO DO THIS

Gov't Ex. 1, pp. 1-3 (the court retained the punctuation and capitalization used in the exhibit).

After this discussion, Utech had Corona get out of the pickup and stand behind it. Corona complied, and they had a short exchange, which can be heard on the audio recording (Gov't Ex. 2). Utech returned Corona's ID, and asked if he spoke English. Corona responded, "A little bit." Utech and Corona then continued their conversation in Spanish. Utech told Corona he was being cited for driving without a driver's license, and explained the procedures for going to court and paying the fine. He then asked if Corona had any questions. When Corona responded that he did not, Utech had Corona sign the ticket, gave him a copy, and cautioned him not to drive without a license. Corona then turned and started to walk toward the pickup.

At this point, the following can be heard on the recording:

UTECH Do you have any weapons or drugs in your car?

CORONA No.

UTECH No?

UTECH Can I search your car?

Gov't Ex. 2.³ Within a few seconds of this exchange, Utech commenced a search of the pickup, and within a minute he found methamphetamine in the bed of the pickup. Corona and the other occupant of the pickup were immediately placed under arrest. About fifteen minutes elapsed from the stop to the discovery of the methamphetamine.

A potentially crucial issue in this case is whether Corona consented to the search of the pickup. Utech testified that, when he asked Corona for consent to search, Corona answered "yes" before Utech could finish making the request, and then nodded his head affirmatively after Utech finished making the request. The verbal exchange is shown on Utech's transcript of the request, where the word "Sí" is shown between the words "search" and "your car." See Gov't Ex. 1, pp. 4-5. Kluender corroborated Utech testimony, stating that he was standing next to Utech when the request was made and heard Corona answer "Sí." Sup. Tr. 92. Utech also testified that he can hear Corona say "Sí" on the recording, although the court has listened to the recording numerous times and cannot hear any response to Utech's request.

II. DISCUSSION

A. *The Stop*

Corona argues that Crawford County law enforcement officers violated his Fourth Amendment rights when they stopped the pickup he was driving because the officers had neither probable cause nor a reasonable suspicion he was engaged in criminal activity to justify the stop. The government responds that the officers had both probable cause and reasonable suspicion. The government argues that the officers had probable cause to believe that Corona had unlawfully stopped on a highway, in violation of Iowa Code §321.254 (Doc. No. 21, pp. 4-5), and a reasonable suspicion that he had violated both

³The exchange was in Spanish, but the parties agree that this is an accurate translation.

Iowa Code § 321.369 and Crawford County Ordinance No. 2002-1 by throwing trash on the highway (Doc. No. 21, pp. 5-6).

The validity of a stop depends on whether the officer's actions were objectively reasonable in the circumstances. *United States v. Smart*, 393 F.3d 767, 770 (8th Cir. 2005). Even if the officer was mistaken, "the question is simply whether the mistake, whether of law or of fact, was an objectively reasonable one." *Id.*; accord *United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005).

1. *Did the officers have probable cause?*

Iowa Code § 321.354(2) provides that "a person shall not stop, park, or leave standing a vehicle, whether attended or unattended[,] . . . [u]pon the main traveled part of [an unpaved] highway . . . when it is practical to stop, park, or leave the vehicle off that part of the highway." The section further provides that "a clear and unobstructed width of that part of the highway opposite the standing vehicle shall be left to allow for the free passage of other vehicles." The government argues that, when Lt. Kluender stopped Corona's pickup truck, officers had probable cause to believe that Corona had violated this law.

The government's argument is without merit. The suggestion that Corona unlawfully stopped on a highway first surfaced in the government's brief to this court. None of the officers involved testified to any thought or belief that a violation of § 321.354(2) had occurred. It was not mentioned. The claim that Corona violated this statute is entirely a *post hoc* invention of the prosecutor. This is not a case where the officers conducted a valid pretextual stop. *See Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996)). Section 321.354(2) had nothing whatsoever to do with the stop, either as an actual or pretextual justification. Instead, the government is putting forward this alleged traffic violation as something the officers *could have used*

to stop the vehicle if they had thought of it, and then argue that this alleged traffic violation justified the stop. Such an argument runs afoul of the Fourth Amendment. *See United States v. Sharpe*, 470 U.S. 675, 686-87, 105 S. Ct. 1568, 1575-76 (1985) (“A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.”).

In any event, on the facts of this case, it would have been unreasonable for any officer to have believed that he had probable cause to stop Corona for a violation of § 321.354(2). When the stop occurred, the only information known to law enforcement officers that would have related to such a violation was what Mumm had told Steinkuehler on the telephone. Mumm only told Steinkuehler that he had seen a pickup truck on the county road, and he thought the occupants might be attempting to dump some trash. Sup. Tr. 14, 18-19, 31. Mumm did not say anything about the pickup being parked in the roadway, either lawfully or unlawfully.

“[P]robable cause exists when the totality of the circumstances justifies the belief that a crime has been committed and the person being seized committed it.” *United States v. Houston*, 548 F.3d 1151, 1153 (8th Cir. 2008). Here, for the law enforcement officers to have had probable cause, they would have had to have had a reasonable belief (1) that the pickup truck was parked on the main traveled part of the highway, and (2) that it was practical to have stopped the pickup off that part of the highway. *See* § 321.354(2). The officers had no information that either of these elements was satisfied. Mumm never told Steinkuehler that the pickup was parked on the road or on the “main traveled part” of the road. He also never said anything to Steinkuehler about whether it would have been practical to have stopped the pickup off that part of the highway.

There was no violation of § 321.354(2), nor was there any reasonable belief by Crawford County law enforcement officers that such a violation had occurred.

2. *Did the officers have a reasonable suspicion of criminal activity?*

When a law enforcement officer stops a motor vehicle and questions its occupants, the stop constitutes a search and seizure under the Fourth Amendment, “even though the purpose of the stop is limited and the resulting detention quite brief.” *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), an officer is permitted to conduct an investigative stop of a vehicle if he has “reasonable suspicion that the vehicle or its occupants are involved in criminal activity.” *United States v. Bell*, 183 F.3d 746, 749 (8th Cir.1999); *see also United States v. Green*, 442 F.3d 677, 680 (8th Cir. 2006).

These principles were explained by the Eighth Circuit Court of Appeals in *United States v. Coleman*, 603 F.3d 496 (8th Cir. 2010), as follows:

A stop based on reasonable suspicion must be supported by specific and articulable facts. *United States v. Hughes*, 517 F.3d 1013, 1016 (8th Cir.2008). In determining whether an officer had a “particularized and objective basis for suspecting legal wrongdoing,” reviewing courts must look at the totality of the circumstances, allowing officers to draw on their experience and training. *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). “Factors consistent with innocent travel, when taken together, can give rise to reasonable suspicion, even though some travelers exhibiting those factors will be innocent.” *United States v. Carpenter*, 462 F.3d 981, 986 (8th Cir.2006). Although reasonable suspicion must be more than a “hunch,” the Fourth Amendment only requires an officer to articulate “some, minimal objective justification for an investigatory stop.” *United States v. Fuse*, 391 F.3d 924, 929 (8th Cir.2004).

Coleman, 603 F.3d at 499-500; *see United States v. Martinez-Cortes*, 566 F.3d 767, 769 (8th Cir. 2009); *United States v. Brown*, 550 F.3d 724, 727 (8th Cir. 2008).

Iowa Code § 321.369 provides that “[a] person shall not throw or deposit upon a highway any . . . trash, garbage, rubbish, litter, . . . or any other debris.” Crawford

County Ordinance No. 2002-1 provides that “[i]t shall be unlawful for any person to use County right-of-ways for . . . disposal of trash or waste.” The government argues that, when Lt. Kluender stopped Corona’s pickup truck, law enforcement officers had a reasonable suspicion that Corona had violated one or both of these laws. The evidence does not support this argument.

The only information possessed by law enforcement at the time of the stop was what Mumm had told Sheriff Steinkuehler on the telephone. Mumm had said that he had seen a pickup truck on the county road, and he thought the occupants might be attempting to dump some trash. Sup. Tr. 14, 18-19, 31. A few minutes later, the pickup was located traveling on a busy four-lane highway near an intersection and stopped.

From this sparse information, it was not reasonable for law enforcement officers to conclude that they were authorized to conduct a *Terry* stop of the pickup to investigate possible violations of Iowa Code § 321.369 or Crawford County Ordinance No. 2002-1. The only information known to these officers at the time of the stop was that no violations of these laws had occurred. Mumm had specifically told Steinkuehler that the occupants of the pickup looked like they might dump trash, not that they were in the process of dumping trash or that they had dumped any trash. In fact, it is clear from the evidence that Mumm never saw Corona dump trash, and never saw any trash on the road or in the ditch. At most, the information known to law enforcement at the time of the stop suggested that the occupants of the pickup might have been thinking about dumping trash on a county road and then changed their mind. At the time the pickup was stopped, there was nothing to suggest that at that time its occupants were involved in criminal activity. The pickup was traveling on a four-lane highway near a busy intersection in a commercial area, with no suggestion that its occupants had dumped trash or were attempting to dump trash or engage in any other illegal activity.

An observation from a private citizen that an occupant of a vehicle looked like he might be planning to commit a crime, without more, does not provide law enforcement with reasonable suspicion to law enforcement to stop the vehicle. *Cf. United States v. Hambrick*, 630 F.3d 742, 746 (8th Cir. 2011) (“In forming an objective and particularized basis for a reasonable suspicion of criminal activity, officers may rely on an informant's tip if the tip is both reliable and corroborated.”).

The government also argues that the collective knowledge of the involved law enforcement officers justified the stop based on a reasonable suspicion that Corona was involved in illegal drug activities. Doc. No. 21, pp. 6-7. This argument is not supported by the record. When Lt. Kluender stopped the pickup truck, no officer had any reason to believe that the pickup truck, or its occupants, had any connection to illegal drug activities. Only after Deputy Utech arrived at the scene, which was after the stop had been completed, did he recognize the pickup and realize that he had seen the pickup truck earlier that day parked near a location that was under surveillance for possible illegal drug activities. At the time of the stop, no law enforcement officer could have had a reasonable suspicion that the pickup truck was involved in illegal drug activities.

Apparently, the government is arguing that, because Deputy Utech saw the pickup truck parked near a location under surveillance for possible illegal drug activities, he had a reasonable suspicion sufficient to make a *Terry* stop of the pickup if he later that day happened to see it somewhere else. There is no authority to support such a broad interpretation of *Terry*. In any event, the investigation of illegal drug activities was not the basis for the stop, either actual or pretextual.

B. Consent

1. Did the defendant consent to the search?

Corona claims in his motion to suppress that he did not consent to a search of the pickup truck. Doc. No. 10, pp. 1-2. The government claims that he did. In *United States v. Cedano-Medina*, 366 F.3d 682 (8th Cir. 2004), the Eighth Circuit Court set out the principles to be applied by the court in analyzing this issue :

Under the fourth and fourteenth amendments, searches conducted without a warrant issued upon probable cause are presumptively unreasonable, subject to a few specifically established exceptions. *See Katz v. United States*, 389 U.S. 347, 356-57, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). A search that is consented to is one of those exceptions. Thus, “[a] warrantless search is valid if conducted pursuant to the knowing and voluntary consent of the person subject to a search.” *United States v. Brown*, 763 F.2d 984, 987 (8th Cir.1985), *cert. denied*, 474 U.S. 905, 106 S.Ct. 273, 88 L.Ed.2d 234 (1985). The government has the burden of proving by a preponderance of the evidence that a subject’s alleged consent to a search was legally sufficient to warrant admitting the fruits of the search into evidence. *See United States v. Matlock*, 415 U.S. 164, 177, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). This burden “is not satisfied by showing a mere submission to a claim of lawful authority.” *United States v. \$404,905 in U.S. Currency*, 182 F.3d 643, 649 n.3 (8th Cir.1999) (quoting *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion)). Rather, the government must show that a reasonable person would have believed, *see United States v. Sanchez*, 156 F.3d 875, 878 (8th Cir.1998), that the subject of a search gave consent that was “the product of an essentially free and unconstrained choice,” *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), and that the subject comprehended the choice that he or she was making.

Cedano-Medina, 366 F.3d at 684.

The issue here is a simple one. Did the government sustain its burden of proving that Corona consented to the search? More specifically, did the government prove that a reasonable person in the position of Deputy Utech would have believed that Corona knowingly and voluntarily consented to the search of the pickup? *See Cedano-Medina*, 366 F.3d at 684-85 (the defendant's actual subjective state of mind at the time that he allegedly gave his consent is not determinative; the question is whether it was reasonable for the officer to believe that the defendant understood what the officer was asking and gave the officer permission to search the truck, and whether it was reasonable to believe that the consent was voluntary).

Corona has not argued that he did not understand Utech's request for consent to search the pickup truck or that he was coerced into giving consent. Instead, he argues that he did not give consent to Utech to search the pickup. If the only evidence in the record were the recording of Utech's request for consent to search (Gov't Ex. 2) and the testimony of the government's witnesses, the court likely would conclude that the government had failed to sustain its burden of proving that Corona had consented to the search. Corona's own testimony, however, tips the balance in the government's favor on this question. Corona testified as follows:

Q. Did . . . any police officer ever ask you in the Spanish language for permission to search your pickup truck?

A. He asked me in English if I didn't have any weapons or drugs in my car and I understood that and I said no. And then he asked me something else and I didn't understand.

Q. Did you ever give permission to the officers to search your car?

A. I don't recall very well. What I do remember is that he asked me if I had any weapons or drugs and I said no.

Q. Let me ask you again. This is real simple. Did you give the sheriff permission to search your car for drugs?

A. Well, probably, yes, but I couldn't say for sure because he was telling me things halfway.

Q. Did you understand my question?

A. Yes.

Q. The question, I'll repeat it one last time. Did you tell the officer he could search your car for drugs?

A. Well, I don't know exactly how things happened. I wish everything had been recorded exactly as it happened very well because I wouldn't want to lie. And I honestly don't remember, because I answered some questions no. And at the same time, I think that I might have given permission. So I don't know because sometimes I would answer with a yes or with a no, but at the same time, I perhaps think that I might have given consent to search since I was sure there was nothing in the truck. I was sure there were no drugs.

Sup. Tr. pp. 149-50.

After considering the totality of the circumstances, the court finds that Utech reasonably believed that Corona understood he was being asking for permission to search the pickup, and reasonably believed that Corona voluntarily gave permission for the search. Although in his testimony Corona expressed some confusion about what he and Utech had discussed, he did not refute the testimony that he had consented to the search. In fact, he confirmed that he "probably" gave permission for the search, and that he thought he "might have given permission." He emphasized that he did not "want to lie," and even gave a reason as to why he "might have given consent to search" – he was sure there were no drugs in the truck.

The court finds that the government has satisfied its burden of proof on this issue.

2. *Did the defendant's consent purge the taint of the illegal stop?*

The judicially created exclusionary rule to the Fourth Amendment “forbids the use of improperly obtained evidence at trial.” *United States v. Barnum*, 564 F.3d 964, 968 (8th Cir. 2009) (quoting *Herring v. United States*, 555 U.S. ___, 129 S. Ct. 695, 699 (2009)). Evidence subject to the exclusionary rule is still admissible, however, if it is obtained through “an act of free will unaffected by the initially illegality.” *Id.* at 969 (quoting *Brown v. Illinois*, 422 U.S. 590, 603, 95 S. Ct. 2254 (1975)). The Government must prove by a preponderance of the evidence that the defendant’s consent to search was voluntary and that the defendant’s consent was an act of free will sufficient to purge the taint of the Fourth Amendment violation. *Id.* (citing, *inter alia*, *United States v. Esquivel*, 507 F.3d 1154, 1160 (8th Cir. 2007)). For the purposes of this inquiry, the court assumes the existence of a Fourth Amendment violation, as found earlier in this report, in considering whether a defendant’s voluntary consent purged the taint of the violation. *Id.* (citing *United States v. Grajeda*, 497 F.3d 879, 882 (8th Cir. 2007)).

“[A] voluntary consent to search, which was preceded by an illegal police action, does not automatically purge the taint of an illegal detention.” *Barnum*, 564 F.3d at 971 (alteration in original) (quoting *Esquivel*, 507 F.3d at 1160) (internal quotation marks omitted). To purge the taint, the voluntary consent must be an independent, lawful cause of the search, as determined by the three factors discussed in *Brown v. Illinois*: (1) the temporal proximity between the Fourth Amendment violation and the grant of consent to search; (2) the presence of any intervening circumstances; and (3) the purpose and flagrancy of the officer’s Fourth Amendment violation. *Id.* (citing, *inter alia*, *Brown*, 422 U.S. at 603-04, 95 S. Ct. at 2261-62).

In considering the first *Brown* factor, the temporal proximity between the Fourth Amendment violation and the grant of consent to search, the Eighth Circuit recognizes that “the closer this period, the more likely the defendant’s consent was influenced by, or the

product of, the police misconduct.” *Barnum*, 564 F.3d at 972 (quoting *United States v. Simpson*, 439 F.3d 490, 495 n.3 (8th Cir. 2006)). Here, the interval was about fifteen minutes. An interval of twelve to fifteen minutes between an illegal traffic stop and a defendant’s grant of consent to search is sufficient to purge the taint of any illegality. *Id.*; see *Esquivel*, 507 F.3d at 1160 (finding that period of nine to ten minutes between “the time from which the stop became illegal to the time of the consent” suggested that taint was purged); *United States v. Palacios-Suarez*, 149 F.3d 770, 773 (8th Cir. 1998) (finding that nine-minute period between start of violation and consent suggested that taint was purged). *But see United States v. Herrera-Gonzalez*, 474 F.3d 1105, 1112 (8th Cir. 2007) (“While 10 minutes does not in itself suggest sufficient attenuation to purge the taint of the stop, neither does it compel the conclusion that the attenuation was insufficient. . . . [E]ven assuming [the defendant’s] consent was given only 10 minutes after the initial stop, that fact alone does not compel the conclusion that the consent was insufficient to purge the taint.”).

Under the second *Brown* factor, the presence of any intervening circumstances, the Eighth Circuit recognizes that an intervening circumstance between the Fourth Amendment violation and the defendant’s consent indicates that the consent was made of the defendant’s free will and “that the [officer] was not attempting to exploit an illegal situation.” *Barnum*, 564 F.3d at 972 (alteration in original) (quoting *Grajeda*, 497 F.3d at 882). Intervening circumstances can include an officer’s returning a defendant’s license and telling the defendant that the traffic stop is over before asking to search the defendant’s vehicle. See *id.*; *Esquivel*, 507 F.3d at 1160. Here, the defendant was given a traffic citation and started toward his vehicle, but he was not told he was free to go before he was asked for permission to search.

With respect to the third *Brown* factor, the purpose and flagrancy of the officer’s Fourth Amendment violation, the Eighth Circuit recognizes that a police officer’s

purposeful or flagrant misconduct may demonstrate a causal connection between the violation and the consent. *Barnum*, 564 F.3d at 973 (citing *Brown*, 422 U.S. at 603-04, 95 S. Ct. at 2261-62). A Fourth Amendment violation may be purposeful or flagrant under various circumstances, including where the violation was investigatory in design and purpose and executed in the hope that something might turn up. *Id.* (quoting *Herrera-Gonzalez*, 474 F.3d at 1113) (internal quotation marks omitted). A violation may also be purposeful or flagrant where the impropriety of the officer's misconduct was obvious or the officer knew at the time that his conduct was likely unconstitutional but engaged in it nevertheless. *Simpson*, 439 F.3d at 496. The purpose and flagrancy of the official misconduct is the most important factor because it is directly tied to the purpose of the exclusionary rule, which is deterring police misconduct. *Herrera-Gonzalez*, 474 F.3d at 1111 (quoting *Simpson*, 439 F.3d at 496) (internal quotation marks omitted).

In this regard, an officer's unreasonable mistake of fact that would not justify an investigative stop "does not constitute the type of blatantly unconstitutional or flagrant behavior condemned in *Brown*." *Simpson*, 439 F.3d at 496; see *Herrera-Gonzalez*, 474 F.3d at 1113 ("An unreasonable mistake alone is not sufficient to establish flagrant misconduct.").

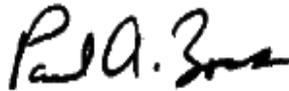
Here, the conduct of the officers was flagrant. There was no reasonable basis, in fact or in law, for the stop. Steinkuehler's decision to stop the pickup was not based on a reasonable or even an unreasonable mistake of fact – he decided to stop the pickup because he could, not because he suspected, mistakenly or otherwise, that any law had been or was about to be violated.

The court finds that the stop was illegal, and that the illegal stop was blatantly unconstitutional and the product of flagrant behavior, and that therefore Corona's consent to search was not an act of free will unaffected by the initially illegality.

Accordingly, for the reasons discussed above, IT IS RESPECTFULLY RECOMMENDED that Corona's motion to suppress be **granted**. Objections to this Report and Recommendation must be filed by **May 9, 2011**. Responses to objections must be filed by **May 20, 2011**.

IT IS SO ORDERED.

DATED this 20th day of April, 2011.



PAUL A. ZOSS
CHIEF MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT