

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 17-238
PEDRO RAMON PAYANO	:	

MEMORANDUM

SURRICK, J.

SEPTEMBER 26, 2017

Presently before the Court is Defendant's Motion to Suppress Physical Evidence and Statement. (ECF No. 28 (filed under seal).) For the following reasons, Defendant's Motion will be granted.

I. BACKGROUND

Defendant Pedro Ramon Payano seeks suppression of a kilogram of cocaine that was seized by Pennsylvania State Police during a traffic stop and vehicle search on April 3, 2017. Payano argues that the stop and subsequent investigation violated his Fourth Amendment rights. The traffic stop was based upon Pennsylvania State Trooper Thomas Fleisher's discovery when running a license plate check that the owner of the vehicle driven by Payano was a "license fraud suspect." Once Trooper Fleisher learned that Payano was not the owner of the vehicle, that he was therefore not the license fraud suspect, and that his license and insurance information were valid, the investigation that justified the traffic stop concluded. Trooper Fleisher nevertheless continued to interrogate Payano. Trooper Fleisher testified that the prolonged investigation and request for Payano's consent to search the vehicle was based upon a reasonable suspicion that Payano and the passenger of the vehicle were involved in criminal activity. The rationale provided by Trooper Fleisher to justify his reasonable suspicion was simply not credible.

Lacking a reasonable suspicion of criminal activity, the Trooper's prolonged investigation and subsequent search of the vehicle violated Payano's Fourth Amendment rights. As a result, all evidence seized during the traffic stop, including statements made and evidence seized during searches subsequent to the traffic stop, will be suppressed.

A. Procedural History

On May 3, 2017, a grand jury returned an Indictment charging Payano with one count of possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 841(a) and (b)(1)(B)(II), and one count of reentry after deportation, in violation of 8 U.S.C. § 1326(a) and (b)(1). (Indictment, ECF No. 10.)

On August 21, 2017, Defendant filed the instant Motion to Suppress Physical Evidence and Statement. (Def.'s Mot., ECF No. 28 (filed under seal).) On August 23, 2017, the Government filed a Response in Opposition to the Motion. (Gov't's Resp., ECF No. 29.) A suppression hearing was held on September 8, 2017. (*See* Min. Entry, ECF No. 31.) During the hearing, the Government presented a dash-cam video recording of the April 3, 2017 traffic stop and arrest. (Sept. 8, 2017 Hr'g Tr. 35.) The dash-cam video, together with documentary exhibits, were admitted into evidence at the hearing. The Government also presented the testimony of Trooper Fleisher. (*Id.* at 6.) Payano admitted two documentary exhibits and presented no testimony.

B. Findings of Fact

On the morning of April 3, 2017, Trooper Fleisher conducted a traffic stop of a black Ford Focus with the license plate "KHV4321." (Hr'g Tr. 20; Incident Report 1, Sept. 8 Hr'g Tr. Ex. D-2.) Prior to the traffic stop, Trooper Fleisher was parked at the on-ramp from the Schuylkill Expressway to the Pennsylvania Turnpike at the Valley Forge Interchange. (Hr'g Tr.

15-16.) Payano, who was driving the Ford Focus, merged onto the Pennsylvania Turnpike and passed Trooper Fleisher at approximately 9:30 a.m. (*Id.*) Trooper Fleisher testified that when the Ford Focus passed him, he became suspicious based on observations he made about the vehicle and its two male occupants. (*Id.* at 20.) First, Trooper Fleisher testified that the occupants were not wearing “suits or any kind of business attire” during that time of the morning. (*Id.*) He testified that “the fact that there were two males in the vehicle that time of day in the morning kind of drew my attention to the vehicle.” (*Id.*) He did not mention that the two occupants were dark-skinned African-American or Latino males. Second, he stated that the Ford Focus was an older model and that “drug trafficking organizations commonly use vehicles that are 10 to 15 years old.” (*Id.* at 21.) Finally, he noted that the Ford Focus was a two-door sedan, and that “a two door vehicle such as this is a common vehicle to have hidden compartments in it” to conceal drugs. (*Id.* at 22.)

Based on the suspicions raised by these observations, Trooper Fleisher ran a CLEAN/NCIC check on the license plate of the Ford Focus.¹ One thing Trooper Fleisher regularly looks for on the CLEAN/NCIC reports is where the vehicle is registered. For example, he testified that if a vehicle is registered in an area known for drug trafficking, such as Philadelphia or Pittsburgh, he becomes suspicious. (Hr’g Tr. 23-24.) When Trooper Fleisher ran the CLEAN/NCIC check on the Ford Focus license plate, he learned that the owner of the vehicle was Pablo Anton Rijos Velez. (CLEAN/NCIC Report, Hr’g Tr. Ex. G-1; Hr’g Tr. 24.) In the address line of the report, Trooper Fleisher observed a notation for “license fraud suspect.”

¹ “NCIC (National Crime Information Center) and CLEAN (Criminal Law Enforcement Assistant Network) are computer databases that law enforcement officers commonly use. NCIC reports wanted and missing persons nationwide and CLEAN is specific to the Commonwealth of Pennsylvania.” *Leidy v. Borough of Glenolden*, 277 F. Supp. 2d 547, 551 n.2 (E.D. Pa. 2003). Clean is used by Pennsylvania’s criminal justice system to access, among other things, driver license and motor vehicle information. (Def.’s Mot. 3 n.1.)

(CLEAN/NCIC Report.) To Trooper Fleisher, this meant that the owner of the vehicle is suspected of obtaining a driver's license from Pennsylvania or from another state under fraudulent means. (Hr'g Tr. 31.)

Trooper Fleisher pulled out onto the Turnpike to catch up to the Ford Focus. (*Id.* at 58-59.) Trooper Fleisher followed the Ford Focus for almost fourteen miles. During that time, there were no motor vehicle violations by the driver of the Ford Focus. Trooper Fleisher finally effectuated a traffic stop of the Ford Focus near the Downingtown Exit of the Turnpike. (*Id.*) The dash-cam video recorder installed on Trooper Fleisher's vehicle began to record when the emergency lights were activated. (*Id.* at 35.)² Trooper Fleisher testified that Payano took too long to pull over once Trooper Fleisher activated his emergency lights. (Hr'g Tr. 38.) He stated that Payano continued to travel for at least another tenth of a mile, passing by a safe area of the shoulder to pull over. (*Id.*) Contrary to Trooper Fleisher's testimony, on the dash-cam video, Defendant can be seen pulling over onto the side of the highway four to five seconds after Trooper Fleisher activated his emergency lights. (Video; *see also* Hr'g Tr. 63-64.)

Trooper Fleisher approached the passenger side of the vehicle and requested Payano's license and registration. (Hr'g Tr. 37.) Payano complied and provided a New Jersey Driver's License that identified himself as Joe Manuel Nunez-Suarez with an address in Elizabeth, New Jersey. (*Id.* at 40.) Trooper Fleisher testified that based on his training and experience, Elizabeth, New Jersey is a source area for narcotics. (*Id.* at 41.) The passenger of the Ford Focus, Francisco Alberto Acosta, provided Trooper Fleisher with identification from the Dominican Republic. (*Id.* at 41; Incident Report 2.)

² Upon activating the emergency lights, the dash-cam video recorder backtracks and records for a period of 30-45 seconds. (Hr'g Tr. 36.)

At Trooper Fleisher's request, Payano stepped out of the Ford Focus to speak with Trooper Fleisher. (Incident Report; Video.) Trooper Fleisher explained to Payano that he was being pulled over because the owner of the vehicle was a "license fraud suspect." (Incident Report.) Payano told Trooper Fleisher that the vehicle belonged to his friend, Pablo. (*Id.*; Video; Hr'g Tr. 68.) Trooper Fleisher asked Payano how long he had had the car, whether he still lived in Elizabeth, New Jersey, how he had come into possession of the car, and where he was going. (Video; Hr'g Tr. 47.) Payano responded that he was going to visit his girlfriend in Pittsburgh, that he intended to stay there for a couple of days, and that he had picked up the Ford Focus from his friend Pablo's house three days before. (Video; Hr'g Tr. 41.) Trooper Fleisher testified that Payano was "very cool, calm [and] collected" and was not "overly nervous" during the interrogation. (Hr'g Tr. 42.)

Trooper Fleisher told Payano to get back into the Ford Focus, and then asked Acosta to step out of the vehicle. (Video.) Noticing a bulge in his pocket, Trooper Fleisher performed a pat-down of Acosta's jeans, and determined that he had a cell phone in his pocket. Acosta had another cell phone in his hand. (Video.) When Trooper Fleisher began to question Acosta, he discovered that Acosta does not speak English. (Hr'g Tr. 41.) He told Acosta to wait in the Ford Focus. (*Id.*)

Trooper Fleisher returned to his vehicle and ran CLEAN/NCIC checks on Payano and Acosta, and ran a criminal history check on Payano. (Hr'g Tr. 44.) He also requested the assistance of the narcotics canine unit. (*Id.* at 45.) After running the CLEAN/NCIC checks, Trooper Fleisher learned that Defendant's driver's license, which indicated a name of Joe Manuel Nunez-Suarez, was legitimate, and that the insurance information provided was valid. The criminal history check revealed that Joe Manuel Nunez-Suarez did have a prior weapons

charge out of Puerto Rico. (*Id.*) At this point, Trooper Fleisher had confirmed that Payano was not the owner of the vehicle and thus not the “license fraud suspect.” Therefore, the investigation into the issue that precipitated the traffic stop had concluded. However, Trooper Fleisher testified that his observations of Defendant and Acosta caused him to have a “suspicion that there was criminal activity afoot here.” (*Id.* at 43.) Trooper Fleisher based his suspicion upon the following observations:

- After initiation of the traffic stop, Payano took a prolonged period of time to pull over to the shoulder of the highway.
- The time of day that Payano and Acosta were traveling, and the fact that they were not wearing business attire.
- The Ford Focus had tinted windows on the rear-wing.
- Payano’s driver’s license contained an address in Elizabeth, New Jersey, which Trooper Fleisher understood to be a source area for narcotics.
- Payano indicated that he and Acosta were heading to Pittsburgh, which Trooper Fleisher believed to be a destination area for narcotics.
- Payano and Acosta were utilizing a highway that is commonly used by narcotics traffickers when traveling east and west through Pennsylvania.
- Acosta had no United States identification, could only provide identification from the Dominican Republic, and did not speak English.
- Payano indicated that they were staying in Pittsburgh for a couple of days, which Trooper Fleisher believed to be a short amount of time given the distance they were driving.
- Defendant was driving a “third party vehicle,” which Trooper Fleisher testified is commonly used by individuals involved in criminal activity.

- The vehicle is an older model of a two-door sedan, which Trooper Fleisher testified is common for hiding drugs in secret compartments.
- Defendant changed his story about how he came into possession of the vehicle.

Originally he said he retrieved the vehicle from his friend's house, and then stated that his friend brought the vehicle to him.

(Hr'g Tr. 41-42; Incident Report.)

Based on these observations, Trooper Fleisher continued to interrogate Payano. (Video.)

The questions he asked during this second interrogation appeared to be calculated attempts to catch Payano in a lie. (*Id.*) Payano remained calm and compliant and answered every question asked by Trooper Fleisher. (*Id.*) Trooper Fleisher's questions during this second interrogation of Payano included: how long he has lived in Elizabeth, New Jersey; specifics about Acosta, including how long they had known each other; how long they were staying in Pittsburgh; whether he or Acosta had any bags of clothing in the car for their stay in Pittsburgh; how long it would take to get his car fixed; his girlfriend's last name; his girlfriend's address in Pittsburgh; and whether he had any weapons in the car. (Video.) Payano stated that he did not have weapons in the car, noting that he was not a "troublemaker." (Video; Hr'g Tr. 84.) Payano told Trooper Fleisher that although he did not know his girlfriend's address, he had it in his cell phone. (Video; Hr'g Tr. 47.) Trooper Fleisher testified that, at this point, he was "convinced" that Payano and Acosta were involved in criminal activity, particularly because individuals who traffic in narcotics "utilize their phones in the commission of deliveries." (Hr'g Tr. 47.) Trooper Fleisher's suspicion of criminal activity also became reinforced because Payano "hesitated" in providing his girlfriend's last name, did not know his girlfriend's last name, and did not know

the address of their destination in Pittsburgh off the top of his head, but instead stated that the information was in his cell phone. (*Id.*)

Based on this suspicion, Trooper Fleisher requested Payano's consent to search the Ford Focus, noting that he was specifically looking for weapons or contraband. (Video; Hr'g Tr. 48.) Trooper Fleisher also requested that Payano sign a written consent form. (Video; Hr'g Tr. 48.) Payano agreed to the search, both verbally and in writing. (Video.) The request for consent occurred approximately 20 to 25 minutes after the traffic stop was initiated. (*Id.*)

Trooper Fleisher, together with the back-up officer who arrived, Trooper Hook, conducted a search of the Ford Focus. (Hr'g Tr. 86; Video.) The search occurred nearly thirty minutes after initiation of the traffic stop. (Video.) The troopers searched every compartment and disassembled the interior panels of the vehicle. (Video.) Approximately ten minutes after they began the search, the Troopers located a kilogram of suspected cocaine in the inside rear panel of the vehicle. (Video.) Payano and Acosta were read their *Miranda* warnings. (Hr'g Tr. 49; Video.) Payano translated the *Miranda* warnings into Spanish for Acosta. (Video.) Payano and Acosta were placed in the police cruiser. (*Id.*) Trooper Fleisher began interrogating Payano about the drugs found in the Ford Focus. (*Id.*)

Approximately fifty minutes after initiation of the traffic stop, a canine narcotics unit arrived. (Video.) With Payano and Acosta still in the police cruiser, Trooper Fleisher offered to place the drugs back into the Ford Focus so that Trooper Jason Laudermill, the dog-handler, could walk his narcotics canine through a canine search for training purposes. (Video; Hr'g Tr. 78, 79.) Trooper Laudermill agreed, and retrieved his narcotics canine to perform a search of the vehicle. (Video.) During the training canine search, Trooper Fleisher can be overheard talking to Corporal Joseph Engling on the dash-cam recording. (Video; Hr'g Tr. 49, 75.) Corporal

Engling is a part of the vehicle fraud unit. (Hr’g Tr. 49, 75.) Trooper Fleisher inquired about the meaning of “license fraud suspect,” and whether it could mean that one is a victim of license fraud. (Video.)

Payano was subsequently interviewed by special agents with the Drug Enforcement Agency. Payano gave verbal and written consent to the agents to search his two cell phones and a room that he was renting in Philadelphia. Miscellaneous papers and telephone numbers and a suspected money ledger were recovered from the rented room.

II. DISCUSSION

Payano seeks suppression of the cocaine found in the vehicle, inculpatory statements he made to law enforcement after his arrest, and any evidence recovered during the search of his cell phones or the search of his rented room. Payano argues that: (1) Trooper Fleisher stopped him without a reasonable suspicion to believe that he was engaged in criminal activity or had committed a traffic violation, in violation of the Fourth Amendment; (2) Trooper Fleisher extended the detention of Payano beyond the scope of what was reasonable to investigate the alleged traffic violation; and (3) the inculpatory statements made by Defendant after he was arrested, including any evidence seized during subsequent searches of Defendant’s cell phones and his hotel, should be suppressed as fruit of the poisonous tree—the unlawful traffic stop and prolonged detention.

A. The Initial Stop

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV; *see also United States v. Ubiles*, 224 F.3d 213, 216 (3d Cir. 2000). “It is settled law that a traffic stop is a seizure of everyone in the stopped vehicle.” *United States v. Mosley*, 454 F.3d 249, 253 (3d Cir. 2006). If a car is stopped illegally, the passengers “may seek to suppress

the evidentiary fruits of that illegal seizure under the fruit of the poisonous tree doctrine.” *Id.* A traffic stop is lawful under the Fourth Amendment where a police officer observes a violation of the state traffic regulations. *United States v. Bonner*, 363 F.3d 213, 216 (3d Cir. 2004) (“A police officer who observes a violation of state traffic laws may lawfully stop the car committing the violation.” (citation omitted)). “[A]ny technical violation of a traffic code legitimizes a stop, even if the stop is merely pretext for an investigation of some other crime.” *Mosley*, 454 F.3d at 252.

In the absence of a traffic violation, an officer may conduct a traffic stop if he or she has a reasonable suspicion that the occupants are engaged in criminal activity. *United States v. Delfin-Colina*, 464 F.3d 392, 397 (3d Cir. 2006) (stating that “the *Terry* reasonable suspicion standard applies to routine traffic stops.”). In determining whether an officer possessed reasonable suspicion to conduct a traffic stop, a court must consider the totality of the circumstances. *United States v. Silveus*, 542 F.3d 993, 1000 (3d Cir. 2008). If initiation of the traffic stop is valid, the officer may “expand the scope of an inquiry beyond the reason for the stop and detain the vehicle and its occupants for further investigation,” but only if the officer “develops a reasonable, articulable suspicion of criminal activity.” *United States v. Givan*, 320 F.3d 452, 458 (3d Cir. 2003) (citation omitted). Where reasonable suspicion for the traffic stop is lacking, the evidentiary fruits of the traffic stop must be suppressed. *United States v. Johnson*, 592 F.3d 442, 447 (3d Cir. 2010).

Payano argues that Trooper Fleisher’s articulated reason for the traffic stop—the CLEAN/NCIC check revealed that the owner of the Ford Focus was a “license fraud suspect”—did not provide sufficient reasonable suspicion to justify the stop, and was merely a pretext for transparent racial profiling. As courts have recognized, the disproportionate use of traffic stops

to investigate crime among racial minorities is a widespread and troubling practice. *See Mosley*, 454 F.3d at 268 n.24. After hearing Trooper Fleisher’s testimony, we cannot ignore the fact that the ethnicity of Payano and Acosta very likely figured into Trooper Fleisher’s motivation for the traffic stop. However, the Supreme Court has made clear that a police officer’s actual motivation to conduct a traffic stop is irrelevant, so long as he had reasonable suspicion to conduct the stop. *Whren v. United States*, 517 U.S. 806, 813 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”); *see also United States v. Comegys*, 504 F. App’x 137, 142 (3d Cir. 2012) (rejecting argument that police officer’s “subjective motivation negates the reasonable suspicion” required to conduct a traffic stop).

Pennsylvania law provides that it is a crime for any person “[t]o exhibit or permit to be exhibited or have in possession a fictitious or fraudulently altered driver’s license.” 75 Pa. Cons. Stat. Ann. § 1571(a)(5). When Trooper Fleisher ran the CLEAN/NCIC check, the report indicated that the owner of the Ford Focus was a “license fraud suspect.” This provided him a reasonable suspicion to justify conducting a traffic stop to investigate the driver’s license fraud.

B. Prolonged Detention and Interrogation of Defendant After License Fraud Investigation Concluded

Payano also argues that once the investigation into license fraud concluded and Trooper Fleisher determined that Payano was not the owner of the vehicle who was the “license fraud suspect,” there was no longer a justification to continue to detain and interrogate him.

Police may lawfully extend a traffic stop for investigative purposes only if they have a reasonable articulable suspicion that the occupants are engaged in criminal activity. *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015) (holding that absent reasonable suspicion, “[a]uthority for the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed”); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (“A seizure that

is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.”); *Givan*, 320 F.3d at 458 (“After a traffic stop that was justified at its inception, an officer who develops a reasonable, articulable suspicion of criminal activity may expand the scope of an inquiry beyond the reason for the stop and detain the vehicle and its occupants for further investigation.”).

The Government and Payano do not dispute that Trooper Fleisher concluded his investigation into license fraud. The Government argues instead that Trooper Fleisher lawfully extended the duration of the detention beyond what was required to investigate license fraud based on a reasonable suspicion that Payano and Acosta were engaged in criminal activity. The Government contends that Trooper Fleisher’s observations of Payano and Acosta from the time of the traffic stop until the time he processed Defendant’s license form the basis of this reasonable suspicion.

Reasonable suspicion is an objective standard determined by the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411, 417 (1981). It requires a police officer to point to “specific articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21 (1968). It must be based on “something more substantial than an ‘inchoate and unparticularized suspicion or hunch.’” *Johnson v. Campbell*, 332 F.3d 199, 206 (3d Cir. 2003) (quoting *Terry*, 392 U.S. at 27). “The principal components of a determination of reasonable suspicion . . . will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion” *United States v. Mathurin*, 561 F.3d 170, 174 (3d Cir. 2009) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). In determining whether Trooper Fleisher had a

reasonable suspicion sufficient to warrant a prolonged investigation of Payano, relevant factors to consider include: (1) the presence of the suspect in a high crime area; (2) the suspect's presence on a street at a late hour; (3) the suspect's "nervous, evasive behavior" or flight from police; and (4) whether the suspect's behavior "conforms to police officers' specialized knowledge of criminal activity." *United States v. Brown*, 448 F.3d 239, 251 (3d Cir. 2006) (citations omitted).

None of the observations relied on by Trooper Fleisher—whether viewed separately or together—support a finding that he had a reasonable suspicion to suspect criminal activity adequate to prolong the investigation. The traffic stop occurred on a highway, and not in a high crime area. Trooper Fleisher conceded that Payano was calm and that he did not act nervous. There was no indication that Payano acted in any way that was consistent with criminal activity.

Moreover, all of Trooper Fleisher's observations that allegedly informed his reasonable suspicion were circumstances that appear too innocent to apply solely to individuals engaged in criminal conduct. In this respect, the Third Circuit has cautioned that:

it is not enough that law enforcement officials can articulate reasons why they stopped someone if those reasons are not probative of behavior in which few innocent people would engage—the factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied. This is a totality of the circumstances test.

Karnes v. Skrutski, 62 F.3d 485, 493 (3d Cir. 1995), *abrogated on other grounds by Curley v. Clem*, 499 F.3d 199 (3d Cir. 2007). In other words, "to rise to a reasonable suspicion, these factors combined must eliminate a substantial portion of innocent travelers or describe behavior in which few innocent people would engage." *Mathurin*, 561 F.3d at 178 (citation and internal quotation marks omitted).

In *Reid v. Georgia*, 448 U.S. 438 (1980), the Supreme Court concluded that a DEA agent did not have reasonable suspicion of criminal activity after seizing cocaine from the petitioner during an investigatory stop at an airport. In that case, the DEA agent had based his reasonable suspicion on observations that:

1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and (4) they apparently had no luggage other than their shoulder bags.

Id. at 441. The Court determined that most of the circumstances relied upon by the agent “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.” *Id.*

Similarly, most of the “observations” relied upon by Trooper Fleisher do not relate to Payano’s conduct specifically, but instead seem to broadly characterize what Trooper Fleisher believed to be a narcotics trafficking profile. For example, the observations that Payano was not wearing business attire at 9:30 a.m., was headed to Pittsburgh from Philadelphia, was traveling on a major highway, presented a license from Elizabeth, New Jersey, and was driving an older model two-door sedan that he borrowed from a friend, are in sufficient to form a reasonable suspicion of criminal behavior. All of these characteristics do not serve to “eliminate a substantial portion of innocent travelers.” *Mathurin*, 561 F.3d at 178. Nor do these characteristics “describe behavior in which few innocent people would engage.” *Id.* Even Trooper Fleisher’s observations of Payano and Acosta specifically, including that Acosta had two cell phones, and was not traveling with luggage, and Trooper Fleisher’s belief that Payano

took too long to pull over on the side of the highway, do not support a finding of reasonable suspicion of criminal activity.

Our conclusion that Trooper Fleisher lacked a reasonable suspicion to justify the continued investigation is based, in part, on our impression of Trooper Fleisher's testimony and credibility. Trooper Fleisher's credibility is called into question when his testimony during the hearing is compared to the actual dash-cam footage, which reveals Trooper Fleisher's various embellishments and mischaracterizations of the traffic stop. For example, contrary to Trooper Fleisher's testimony, Payano did not provide conflicting stories about how he came into possession of the Ford Focus. Instead, Payano stated that he got the car from his friend Pablo, which is accurate. At one point, Payano is heard correcting Trooper Fleisher's misunderstanding about whether Payano retrieved the car from Pablo, or Pablo brought the car to Payano. The misunderstanding is easily explained in light of the language barrier between Payano and Trooper Fleisher. In fact, Trooper Fleisher admitted that it was difficult to understand Payano due to his strong Spanish accent. In addition, Trooper Fleisher testified that he became suspicious based on the length of time it took Payano to pull over after Trooper Fleisher activated his emergency lights. However, the video shows that only four to five seconds elapsed before Payano safely pulled over to the side of the Turnpike. Finally, Trooper Fleisher testified confidently about his basis for the traffic stop, and in particular, that seeing "suspected license fraud" on the CLEAN/NCIC report immediately triggered his suspicion that Payano was guilty of a crime. However, the dash-cam recording reveals that Trooper Fleisher, in actuality, did not know what "suspected license fraud" meant, as he asked for clarification from Corporal Engling. Perhaps this is why Trooper Fleisher drove for fourteen miles before initiating the traffic stop; he

either was waiting for the Ford Focus to commit a traffic violation, or was mulling over whether “suspected license fraud” was enough to justify the stop.

Based on the evidence and testimony presented, we are not persuaded that a reasonable officer in Trooper Fleisher’s position would have objectively and reasonably suspected the occupants of the Ford Focus to be engaged in criminal activity. As a result, the prolonged detention of Payano to further investigate and request consent violated Payano’s Fourth Amendment rights.

C. Whether Consent is Valid Notwithstanding the Illegal Prolonged Detention

Even though we conclude that a Fourth Amendment violation occurred, this does not end the inquiry into whether suppression of the evidence is warranted. “Consent following an illegal seizure does not in itself purge the taint of the illegality for Fourth Amendment purposes; the government must show sufficient attenuation to causally disconnect the consent from the seizure.” *Mosley*, 454 F.3d at 261 n.19. In other words, the Government has the burden to show that Payano’s consent was sufficiently disconnected from the illegal detention. If it is, then the consent is deemed an independent act of the defendant’s free will. The Government has made no effort to establish this. In fact, neither party has addressed this analysis. In any event, we are satisfied that Payano’s consent was not sufficiently disconnected from the illegal detention, and is therefore invalid.

To determine whether an illegal seizure taints subsequently-obtained consent, we look to the following factors: (1) the temporal proximity of the constitutional violation and the subsequent consent; (2) the presence or absence of intervening circumstances, and (3) “particularly, the purpose and flagrancy of the official misconduct.” *United States v. Luna*, 76 F. App’x 411, 414 (3d Cir. 2003) (citing *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)).

Since the attenuation inquiry involves balancing the benefits and costs of exclusion, “[n]o single fact is dispositive.” *Brown*, 422 U.S. at 603. To avoid suppression, the Government bears the burden of proving attenuation by a preponderance of the evidence. *Brown*, 422 U.S. at 604; *United States v. Pelullo*, 173 F.3d 131, 137-38 (3d Cir.1999).

Here, the constitutional violation is the illegal prolonged detention of Payano after Trooper Fleisher had concluded his investigation into suspected license fraud. In order to assess the temporal proximity, we must determine when the illegal detention ended, if it ever did. After Trooper Fleisher completed the CLEAN/NCIC checks, he returned to the Ford Focus and requested that Payano get out of the car for further questioning. Payano complied, and was further interrogated for another five minutes. During the interrogation, Fleisher requested verbal and written consent from Payano to search the Ford Focus. Trooper Fleisher remained in possession of Payano’s license while he was interrogating Payano and while Payano gave his consent to search. Based on this, a reasonable person in Payano’s position would not have felt free to leave the interrogation. Therefore, the illegal seizure lasted through the time the consent was given. Payano’s consent was too closely connected to the illegal detention to be considered an independent act of his own free will. *See United States v. Macias*, 658 F.3d 509, 524 (5th Cir. 2011) (concluding that request for consent and illegal seizure after valid traffic stop was not attenuated enough to constitute a valid consent when the suspect was provided his identification card only thirty seconds prior to giving the consent to search the vehicle).

The second and third factors also weigh in favor of finding that Payano’s consent was not independent of the illegally prolonged detention. There were no intervening events between the detention and the consent. Finally, Trooper Fleisher’s subjective purpose for prolonging the detention was either to gather more information of suspicious behavior to justify a search, or to

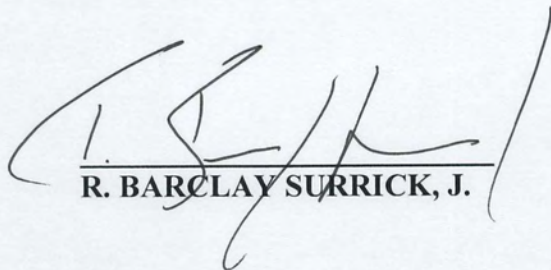
obtain consent from Payano. Accordingly, the consent given by Payano was invalid, and all evidence obtained during the search, and all evidence obtained as a result of the illegal detention and arrest, including statements made by Payano to DEA agents, and evidence seized on Payano's cell phones or in his rented room, will be suppressed.

III. CONCLUSION

For these reasons, Defendant's Motion to Suppress will be granted.

An appropriate Order follows.

BY THE COURT:



R. BARCLAY SURRECK, J.