

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0107

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL ALLEN ZEIMER,

Defendant and Appellant.

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**OPENING BRIEF OF APPELLANT**

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On Appeal from the Montana Seventh Judicial District Court, Dawson  
County, the Honorable Olivia Rieger, Presiding

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## **STATEMENT OF THE ISSUE**

I. Did the district court err by denying Zeimer's motion to suppress evidence that was collected following an unjustified and unconstitutionally prolonged stop?

## **STATEMENT OF THE CASE AND FACTS**

On Monday April 15, 2019, at around 9 o'clock in the morning, dispatch advised Sheriff Deputies John Spurgeon and Miles Baisch that an employee at the Glendive Town Pump called 911 because a person was sleeping in his truck. (D.C. Doc. 13, p. 1.) Baisch was first on the scene. When he arrived, he saw a brown pickup truck, and it appeared as if the truck's occupant was asleep. (D.C. Doc. 1 at p. 2.) Baisch drove closer to the pickup truck. Then, Baisch noticed that the driver looked up and checked his mirrors. (D.C. Doc. 1 at p. 2.) The driver "appeared" to see Baish and started the truck. The truck began driving slowly across the parking lot, made a wide but "slow" turn, and parked in front of the Town Pump. (D.C. Doc. 1 at p. 2). Baisch reported that he thought it was "strange" that the driver would leave the back side of the building to "just" pull up in front of the Town Pump.

The driver parked and exited the truck. Baisch got out of his patrol car and intercepted the driver on his way into the gas station.

Baisch initially said he was making this contact because it was a welfare check and he told the driver that he was parked in a “strange manner.” The driver acknowledged that he had indeed parked in a strange manner. (D.C. Doc. 1 at p. 2.) Then Spurgeon arrived. The driver was ordered to identify himself. Zeimer correctly identified himself and told the deputies that he had been sleeping in the truck. (D.C. Doc. 1, p. 3.)

Zeimer was then called upon to account for his presence in Glendive and what he was doing at the Town Pump gas station. Zeimer complied. He explained to the deputies that he lives in Glendive, that he travelled from Miles City the night previous and that he was meeting his sister. Baisch then asked if Zeimer had ever lived in Wibaux. Zeimer responded that he had not lived in Wibaux for 8 years. (D.C. Doc. 1 at p. 2.) Baisch then asked Zeimer if he knew when Zeimer’s sister would arrive at the Town Pump. Zeimer responded that she had not told him. (D.C. Doc. 1 at p. 2.)

Baisch had collected and kept Zeimer’s driver’s license, asked for and received his vehicle registration, and inquired about the truck’s insurance. Deputy Spurgeon had collected these documents and was

verifying these documents with dispatch. Baisch then continued his questioning:

Baisch: Well, . . . ah (sigh) . . . so . . .(inaudible) with the way you parked the pickup truck . . . I guess, like I said um . . . I am not sure why you did that. So . . . have you been drinking today?

Zeimer: No. I don't drink.

Baisch: You don't drink at all?

Zeimer: No.

Baisch: Well, that's good. . . . So what time did you drive this morning?

[Zeimer replies that he had driven from Glendive and arrived at the Town Pump at 3a.m., and fallen asleep.]

Baisch: Okay. Okay. Alright.

(State's Ex. 2 at 6:45.)

After these answers, Baisch concluded that Zeimer was hiding something. Apparently, Baisch had spoken to Zeimer's sister some months prior regarding an unrelated incident. During that incident, Zeimer's living arrangements had been discussed. Baisch remembered that Zeimer's sister told him (Baisch) that Zeimer used to live with her but that he (Zeimer) was now living in Wibaux. (D.C. Doc. 1 at p. 2.)



Baisch perceived deception. This sense of deception, combined with the facts that Zeimer was sleeping in his vehicle after returning from Miles City when he could have just have gone home (if he in fact was living in Glendive) and that Zeimer seemed unsure about whether his sister would be *inside* or *outside* the gas station when she purportedly was to meet him, necessitated further investigation. (D.C. Doc. 1 at p. 2.) Additionally, the State contends: “the Defendant consistently looked away from him [Baisch] while he was talking which based on his training and experiencing Deputy Baisch knows can indicate deception.” (DC. Doc. 1, p. 3.)

However, the reports and affidavit do not mention that there was a bulldog puppy in the truck. While Baisch is questioning Zeimer about his sister, Zeimer occasionally looks at the bulldog puppy sitting in his



*Bulldog puppy in the truck*

front seat. Zeimer said that he had had an argument with his sister and he was going to meet her to “straighten out things between them.”

After detecting these further “indicia” of deception, Baisch extended the stop and intensified his investigation. He asked Zeimer for his sister’s phone number. Zeimer complied and gave him the number. Baisch then called that number. Zeimer’s sister picked up the call. Baisch proceed to question Zeimer’s sister regarding the information that Zeimer had given to Baisch. Zeimer’s sister, according to the affidavit, contradicted Zeimer’s account of this purported family meeting at Town Pump in Glendive. After learning this, Baisch concluded the phone call with Zeimer’s sister. Now, armed with contradictory information about who Zeimer was supposed to meet at the Town Pump, Baisch confronted Zeimer about this irreconcilable contradiction in his account:

Baisch: Alright Mr. Zeimer, here is the deal, why are you bullshitting me?

Zeimer: I am not.

Baisch: You are, I just talked to Janet, she has no idea what you are talking about.

(State's Ex. 2 at 9:05.) When Zeimer was forced to contend with the full force of this "inconsistency," he still insisted that he was meeting his sister. (D.C. Doc. 1 at p. 3; State's Ex. 2 at 9:05.)

At this point, Baisch and Spurgeon escalated the stop by frisking Zeimer for weapons. (D.C. Doc. 1, p. 4.) After collecting a pocket knife, electrical tape, and a pen, Baisch again asks, "Why are you lying about why you are here?" The stop has now lasted 12 minutes. Baisch continues: "You better start telling me the truth or you are going to have more problems than just checking on ya." Spurgeon then orders Zeimer to pull up his sunglasses. (State's Ex. 2 at 12:50.)

The stop has now lasted 15 minutes, and the deputies are very concerned about why Zeimer and his sister differ about where they are supposed to meet. But the deputies are persuaded that it is Zeimer who is lying. Zeimer explained that he does not have a place to stay, that he was homeless, and that he feels ashamed about it and that he was hoping that his sister would take him in. (State's Ex. 2 at 12:50.)

After 15 minutes, the deputies conferred about what they should do. Baisch tells Spurgeon "I tried smelling him for alcohol, I

can't smell anything." (State's Ex. 2 at 15:50.) So the deputies continue the questioning:

Baisch: Mr. Zeimer . . . you uh . . . use drugs?

Zeimer: No. I do not.

[ . . . ]

Baisch: Well, I have heard from your family that you are into drugs, so I (inaudible) know that that's the deal.

(State's Ex. 2 at 16:05.)



*Zeimer denying recent drug use*

Zeimer continues to deny inferences by Baisch that he does drugs, but admitted the he did use two years ago. Baisch then exclaims, "You haven't told me the truth about anything that I have asked you about yet! . . . Absolutely nothing about what you are saying now makes

sense.” Spurgeon and Baisch have another conference: “Do you think we need to . . . uh . . . turn this into a narcotics thing or . . . ?” (State’s Ex. 2 at 16:20.) The deputies then return to questioning Zeimer about the presence of drugs in the truck. Spurgeon asks Zeimer: “Do you usually talk slurred and slow?” Zeimer explains that he does not have any teeth in the front of his mouth. Zeimer keeps denying using drugs or anything else.

Spurgeon then declares to Zeimer that he is going to do field sobriety tests. At this point Zeimer has been standing by the truck for about 20 minutes. Throughout these tests Zeimer tries to tell Spurgeon that he has problems with his right leg. They then put Zeimer in Baisch’ patrol car. (D.C. Doc. 1, p. 4.) Baisch asks Zeimer to consent to a search of the pickup truck. Zeimer hesitates and says it was not his truck. Baisch responds that “you are the one in possession of it.” (State’s Ex. 2 at 32:12.) Zeimer then consents. Zeimer is permitted to collect his dog and waits outside while Spurgeon searches the truck.



*Zeimer waiting with his dog*

Deputy Spurgeon conducted a search of the vehicle and located two glass pipes and a small plastic bag. Baisch then asked Zeimer if he would consent to a breathalyzer test. Zeimer complied. The result of that test showed a 0.000 blood alcohol content. Zeimer was read his rights and “formally” arrested. Since Zeimer did not have any prior Driving Under the Influence charges or convictions and did not consent to a blood draw, “a warrant was not obtained.” (D.C. Doc. 1, p. 4.)

As a consequence of the initial “welfare check,” the subsequent “suspicious” behavior, and the ultimate arrest of Zeimer and search of the truck, Zeimer was transported to the Dawson County Detention Center. He was then charged with Count I: Criminal Possession of Dangerous Drugs (Methamphetamine), a felony, in violation of § 45-9-

102, MCA, Count II: Driving While under the Influence – First Offense, a misdemeanor, in violation of § 61-8-401, MCA, and Count III: Criminal Possession of Drug Paraphernalia, a misdemeanor, in violation of § 45-10-103, MCA. (D.C. Doc. 3.)

On July 12, 2019, Zeimer filed a motion to suppress evidence. In his supporting brief, Zeimer asserted that Baisch exceeded the scope of the community caretaker doctrine and illegally detained and questioned Zeimer after he learned that Zeimer was not in peril and did not need assistance. After hearing arguments on the matter, the District Court denied the motion to suppress the fruits of the search conducted on April 15, 2019. (D.C. Doc. 25.) The District Court concluded that Baisch engaged in a routine encounter with Zeimer and, given Zeimer's answers to questions, Baisch had the requisite particularized suspicion to continue his investigation. (D.C. Doc. 25.) Zeimer pleaded guilty to Counts I and III, but reserved the right to appeal the denial of the suppression motion. (D.C. Docs. 28, 26.) The District Court sentenced him to five years with the Department of Corrections, all suspended, and ordered him to apply to the Seventh Judicial District Adult Treatment Court. (D.C. Doc. 35, p. 2; Tran. of

12/17/19 Sentencing Hearing at 10.) Zeimer timely appealed. (D.C. Doc. 37.)

### **STANDARD OF REVIEW**

This Court reviews a district court's grant or denial of a motion to suppress to determine whether the court's findings are clearly erroneous and whether those findings were applied correctly as a matter of law. *State v. Gill*, 2012 MT 36, ¶ 10, 364 Mont. 182, 272 P.3d 60. A district court's finding that particularized suspicion exists is a question of fact which is reviewed for clear error. *City of Missoula v. Moore*, 2011 MT 61, ¶ 10, 360 Mont. 22, 251 P.3d 679 (citing *State v. Clawson*, 2009 MT 228, ¶ 9, 351 Mont. 354, 212 P.3d 1056). A finding is clearly erroneous if it is not supported by substantial evidence, if the lower court has misapprehended the effect of the evidence, or if the review of the record leaves this Court with the firm conviction that a mistake has been made. *Moore*, ¶ 10 (citing *State v. Roberts*, 1999 MT 59, ¶ 11, 293 Mont. 476, 977 P.2d 974).

### **SUMMARY OF THE ARGUMENT**

Dawson County sheriff's deputies acted within their rights and the scope of the public welfare doctrine when they responded to a 911 call about a man sleeping in his truck in a parking lot. But as soon as



they confirmed that the man was neither in need of medical attention nor the perpetrator of a suspected crime, deputies were required to end their investigation. Instead, deputies transformed the stop into a generalized investigation of Zeimer's presence and family history, then into a DUI investigation, then into a drug investigation. Their chimeric investigation was not justified in the first place because they did not have a particularized suspicion that Zeimer has committed, is committing, or is about to commit a crime. But even if this Court believes the deputies had particularized suspicion initially, their stop of Zeimer was unconstitutionally prolonged because they continued to detain and question him after particularized suspicion ceased to exist. The proper remedy was for the district court to have suppressed the evidence obtained in violation of his constitutional rights.

### **ARGUMENT**

**I. The district court erred by denying Zeimer's motion to suppress evidence that was collected following an unjustified and unconstitutionally prolonged stop.**

The Fourth Amendment to the U.S. Constitution and Article 2, § 11 of the Montana Constitution guarantee that all people shall be free from unreasonable searches and seizures. Any warrant to search a

place or seize a person or property must be based upon probable cause. Mont. Const. art. II, § 11. For this reason, a warrantless seizure is presumed to be unreasonable, *State v. Fisher*, 2002 MT 335, ¶ 12, 313 Mont. 274, 60 P.3d 1004, as is a warrantless search, *State v. Olson*, 2002 MT 211, ¶ 9, 311 Mont. 270, 55 P.3d 935. Article II, § 10 of Montana’s Constitution provides that “[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.” The Montana Supreme Court has emphasized that “[t]his unique constitutional language assures citizens a greater right to privacy and broader protections than does the federal constitution.” *State v. Hardaway*, 2001 MT 252, ¶ 34, 307 Mont. 139, 36 P.3d 900. Sections 10 and 11 of Article II of the Montana Constitution are read together when analyzing search and seizure questions that specifically implicate the right to privacy. *State v. Boyer*, 2002 MT 33, ¶ 19, 308 Mont. 276, 42 P.3d 771. “This conjunction leads [courts] to examine the legality of a search or a seizure by determining whether there has been an unlawful governmental intrusion into one’s privacy.” *State v. Conley*, 2018 MT 83, ¶ 13, 391 Mont. 164, 415 P.3d 473.

**A. Deputy Baisch did not have particularized suspicion to justify stopping Zeimer.**

Montana Code Annotated § 46-5-401 grants police officers authority to “stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense.” Because a warrantless stop is presumed unreasonable notwithstanding this statute, the State bears the burden of proving the validity of the stop. *State v. Gilder*, 1999 MT 207, ¶ 10, 295 Mont. 483, 985 P.2d 147.

In order to show sufficient cause to effectuate a stop, the State must demonstrate: “(1) objective data from which an experienced police officer can make certain inferences; and (2) a resulting suspicion that the [person] is or has been engaged in wrongdoing or was witness to criminal activity.” *Gilder*, ¶ 10. In essence, “the totality of the circumstances must give law enforcement a particularized and objective basis for suspecting the person of criminal activity. In evaluating the totality of the circumstances, a court should consider the quantity, or content, and quality, or degree of reliability, of the information

available to the officer.” *Gilder*, ¶ 11 (internal quotations and citations omitted).

This Court has explained that “being in a high-crime zone and mere possible violations of the law are not sufficient to establish particularized suspicion.” *State v. Graham*, 2007 MT 358, ¶ 17, 340 Mont. 366, 175 P.3d 885 (citing *State v. Jarman*, 1998 MT 277, 291 Mont. 391, 967 P.2d 1099). An officer may not stop a person based on “nothing more substantial than inarticulate hunches.” *State v. Reynolds*, 272 Mont. 46, 49, 899 P.2d 540, 542 (1995) (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). When the totality of the circumstances does not support a particularized suspicion that the defendant has committed, is committing, or is about to commit a crime, this Court has held an investigatory stop to be unjustified. *See, e.g., Reynolds*, 272 Mont. 46, 899 P.2d 540; *State v. Anderson*, 258 Mont. 510, 853 P.2d 1245 (1993); *Grinde v. State*, 249 Mont. 77, 813 P.2d 473 (1991); *State v. Lahr*, 172 Mont. 32, 560 P.2d 527 (1977).

Baisch’s initial involvement with Zeimer was for a welfare check. But Baisch did not approach Zeimer solely to inquire about his wellbeing.

Q: Okay. You said the other, part of the reason you wanted to talk to him was for an investigation, correct?

Deputy Baisch: Uh, yes sir.

Q: A— an investigation into what?

Deputy Baisch: Uh, an investigation to determine, um, why he had, uh, conducted his driving behavior. So, the parking sideways, the slow driving after he left, and the fact that he'd left, uh, after, um, appearing to see me on scene.

(Transcript of 8/21/19 Motions Hearing at 25–26.) When asked on what information Baisch based his decision to stop Zeimer, Baisch explained:

Q: Now was the fact the he was sleeping in his vehicle the only reason you determined to follow him to the front of the Town Pump?

Deputy Baisch: No sir, it wasn't.

Q: K, what was the other reason?

Deputy Baisch: Uh, again, sir, the initial complaint. Um, because of the complaint, I knew that he had been, um, parked in such a manner and slumped over his steering wheel for a certain amount of time prior to my arrival, so, um, and upon my arrival, the fact that he decided to leave upon me approaching was suspicious. Um, in my experience, um, as well as, um, his parking, the slow driving, um, I guess all those things combined, sir.

(Transcript of 8/21/19 Motions Hearing at 30.) Baisch also had some difficulty developing a standard for what he thought was an appropriate

speed for parking at a gas station when one knows one is being observed by law enforcement:

Q: Okay. Let's focus on that slow driving, um. In your training experience does, I mean, does it tell you that someone driving slowing through a parking lot, that could be impaired?

Deputy Baisch: Well driving slowly through a parking lot, sir, would not in and of itself be, um, a sign of impairment. Um, unless it was abnormally slow, um, slow driving is a indication of impairment though.

Q: I guess, are people supposed to dr— speed through parking lots? Wouldn't that be a hazard?

Deputy Baisch: Well sir, when I say slow, I don't mean, um, the difference between slow and fast, sir, I mean slow, uh, compared to normal. Uh, slow driving behavior.

(Transcript of 8/21/19 Motions Hearing at 26.) Baisch ultimately conceded that sleeping in a parked car in the parking lot of a gas station is not uncommon. He also conceded that, on its own, sleeping in the parking lot of a gas station is not sufficient to engage in a DUI investigation. (Transcript of 8/21/19 Motions Hearing at 30.)

Baisch, it seems, suspected Zeimer of driving under the influence. The district court concluded that Deputy Baisch had particularized suspicion to stop Zeimer based on (1) the manner in which the truck was parked; (2) the fact that a person appeared to be sleeping in the

truck; and (3) the way Zeimer drove away slowly and parked in the front of the building.<sup>1</sup> The district court found Baisch had particularized suspicion of “wrongdoing,” but the court did not explain what crime Baisch reasonably suspected Zeimer of committing. (D.C. Doc. 25.)

Contrary to the district court’s conclusion, the *objective* data collected by Baisch do not create a reasonable inference that a crime had been committed. *Gilder*, ¶ 10. Baisch had not observed any illegal conduct. Zeimer did not violate any traffic laws, there were no bottles or cans of alcoholic beverages in his truck, and he did not appear impaired. There were no circumstances to contradict Zeimer’s account that he did anything other than fall asleep in a parking lot after a long night’s drive. Baisch conceded that sleeping at a gas station parking lot is a fairly common occurrence. Driving slowly after being woken up by law enforcement and making a careful turn in a parking lot is exactly the kind of behavior we expect from prudent people. And the facts that Zeimer parked the truck correctly and exited the vehicle without any

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<sup>1</sup> Both the State and the Defendant agreed below that Baisch’s reason to engage Zeimer under the community care take doctrine developed in *State v. Lovegren*, 2002 MT 153, 310 Mont. 358, 51 P.3d 471, ceased the moment the truck started driving. Accordingly, this justification is not an issue on appeal.

incident further undermine Baisch's suspicion that Zeimer had been driving under the influence. At best, Baisch had only a hunch that Zeimer was under the influence. Baisch persisted in that hunch, even when it was contradicted by the observable facts. This Court has been very clear that an officer may not stop a person based on "nothing more substantial than inarticulate hunches." *State v. Reynolds*, 272 Mont. 46, 49, 899 P.2d 540, 542 (1995) (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968)).

This Court has declined to uphold the existence of particularized suspicion under similar circumstances and on better facts for the State. For example, in *Reynolds*, the defendant had been observed by law enforcement as "bordering on traveling too fast" through an intersection, an articulable violation of the law. *Reynolds* at 272 Mont. 51, 899 P.2d 543. However, this Court concluded that absent other circumstances, such as erratic driving behavior, the totality of the circumstances did not justify a stop *Reynolds*. Here, Baisch cannot even articulate a possible violation of the law that would create an inference of ongoing criminal activity. In fact, Baisch used Zeimer's strict adherence to the law and cautious driving behavior as predicates to justify the stop.



Another analogous case is *State v. Fisher*, 2002 MT 335, 313 Mont. 274, 60 P.3d 1004. In *Fisher*, the State sought to justify a stop with the following: (1) a tip that several suspicious males were in an alley with a gun; (2) the officer searched the area and the only people he observed were in the defendant's vehicle; (3) the officer's testimony that it was a "dangerous" situation and that he "thought that [the vehicle] could have been the people [he] was looking for and they were trying to elude [him]." *Fisher*, ¶¶ 3–9. This Court found that a stop was not justified on these facts both because "neither [the defendant], his passenger, nor his vehicle matched any description of persons or vehicles in any report" and because "the report itself did not suggest a crime had been committed." *Fisher*, ¶ 17.

Just as in *Fisher*, when dispatch asked the sheriff's deputies to respond to a 911 call in this case, it was not for the investigation of any crime. A Town Pump employee was concerned that Zeimer might be unwell. The phone call for assistance was not to stop or report a crime; it was for help and to check whether the person in the truck was alright. Like in *Fisher*, Zeimer was not initially a suspect, nor was he a person who fit a description of a someone who had committed a crime.

In fact, the report from the Town Pump employee itself “did not suggest a crime had been committed.” *Fisher*, ¶ 17.

This Court’s decision in *State v. Anderson*, 258 Mont. 510, 853 P.2d 1245 (1993), is also instructive. In *Anderson*, officers received a tip that the defendant and another individual would be driving in a blue truck from Washington to Montana on a particular evening carrying a large quantity of marijuana. 258 Mont. at 511, 853 P.2d at 1246. Officers staked out the Montana border on Highway 2 and waited for a blue truck to pass them. *Anderson*, 258 Mont. at 511, 853 P.2d at 1246. When a blue truck passed them, the officers used the license plate numbers to confirm the truck was owned by Anderson. *Anderson*, 258 Mont. at 511, 853 P.2d at 1246. Officers stopped Anderson, even though he had not violated any traffic laws. *Anderson*, 258 Mont. at 512, 853 P.2d at 1246. A search of the vehicle revealed marijuana, and the officers arrested Anderson for possession. *Anderson*, 258 Mont. at 512, 853 P.2d at 1247. This Court directed that all evidence seized from Anderson’s pickup was to be suppressed as a result of the unlawful stop. *Anderson*, 258 Mont. at 516, 853 P.2d at 1249. The Court reasoned that “none of the observations made in this case prior to the stop of

Anderson’s vehicle suggested illegal activity,” and that “[i]nstead of conducting independent investigation to corroborate the tip, the officers relied on the tip to stop the pickup and gather information to justify the stop in the first place. . . . To condone a search of the defendant under these circumstances would render the right to be free from unreasonable searches and seizures meaningless.” *Anderson*, 258 Mont. at 516, 853 P.2d at 1249.

Here, law enforcement did not even receive a tip that a crime was being committed. They received a request for a welfare check. There were no facts to suggest that Zeimer was engaged in illegal activity, and Baisch conceded that Zeimer had not done anything illegal up until the point that he was stopped by Baisch. (Transcript of 8/21/19 Motions Hearing at 23–26.) *Compare Anderson*, 258 Mont. at 516, 853 P.2d at 1249. None of the activities that Deputy Baisch outlined “suggested illegal activity.” *Anderson*, 258 Mont. at 516, 853 P.2d at 1249. Like in *Anderson*, Baisch could have parked his vehicle and simply observed Zeimer for a few minutes to see if he would engage in criminal activity. He could have investigated further by looking through the windows and into the uncovered truck bed. But he chose instead to question Zeimer

until he uncovered enough evidence to justify the original stop. This Court should not condone a stop and search of Zeimer under these circumstances because to do so “would render the right to be free from unreasonable searches and seizures meaningless.” *Anderson*, 258 Mont. at 516, 853 P.2d at 1249.

**B. Even if Basich had particularized suspicion to stop Zeimer, the stop was unconstitutionally prolonged.**

In Zeimar’s case, the district court declined to do a progressive analysis of the existence of particularized suspicion. Instead, the district court concluded that particularized suspicion existed *generally* because of:

the manner in which the Defendant was parked; the fact that the Defendant was described as being passed out inside the vehicle; the fact that upon approach to the Defendant’s vehicle, the Defendant started the vehicle and drove away; the Defendant’s driving was very slow (slower than what the Deputy has experienced in the same parking lot) and the Defendant drove while making rounded turns indicating to the Deputy some impairment; that the Defendant drove from the rear of the building (where he was originally parked) to the front of the building to get out of the vehicle; that a door was available to the Defendant to access the building from where he was initially parked; that upon approach of the Defendant, his story did not seem to make sense to the Deputy based upon his experience coupled with what the Defendant’s sister had previously told the Deputy; that it was not logical that the Defendant would drive all night from Miles City just to sleep at the Town Pump when his final destination was the

Defendant's sister's home that was approximately one mile away; that the Defendant seemed to avoid looking at the deputy during conversation which the Deputy believed to be an indicator of untruthfulness based upon his training and experience.

(D.C. Doc. 25.)

However, these events did not occur simultaneously. Law enforcement officers in Montana require progressive particularized suspicion to continue investigations and engagements with persons they stop. Mont. Code Ann. § 46-5-401. Generally, a stop authorized under Mont. Code Ann. § 46-5-401 “may not last longer than is necessary to effectuate the purpose of the stop.” Mont. Code Ann. § 46-5-403. *See also State v. Martinez*, 2003 MT 65, 314 Mont. 434, 67 P.3d 207 (The lower court erred by denying defendant's motion to suppress where, although a police officer's inability to read the temporary sticker on defendant's vehicle justified a stop to check the sticker's validity, once that limited purpose of the stop had been accomplished, no further police intrusion was warranted, and the investigative stop related to drug possession was not justified.). The particularized suspicion necessary to justify an initial investigatory stop does not automatically extend to the particularized suspicion required for an alternative investigation into

another offense. *State v. Zimmerman*, 2018 MT 94, ¶ 16, 391 Mont. 210, 417 P.3d 289 (citing *Hulse v. Dep't of Justice, Motor Vehicle Div.*, 1998 MT 108, ¶¶ 39–42, 289 Mont. 1, 961 P.2d 75.)

For instance, in *State v. Kaufman*, 2002 MT 294, 313 Mont. 1, 59 P.3d 1166, a deputy observed a vehicle with unequal tail light brightness at night on Interstate 90. The deputy stopped the vehicle on suspicion of a violation of Mont. Code Ann. § 61-9-204(1) (requirement for two properly functioning tail lights). The deputy had followed the vehicle for several miles after observing several other suspicious circumstances. *Kaufman*, ¶¶ 6–7. However, as the vehicle pulled over, the deputy saw that its tail and brake lights were in fact functioning properly. Instead of breaking off the encounter, the officer completed the stop, approached on foot, and advised the driver that he stopped him for what appeared to be an equipment violation. The deputy then advised that it was no “big deal,” but recommended that the driver have his brake lights checked. The deputy then asked for the driver’s license and vehicle registration, questioned the driver “about the car’s ownership,” and inquired about the occupants’ “reasons for traveling on the Interstate that night.” *Kaufman*, ¶ 8.

The extended detention and questioning ultimately led to the discovery of two ounces of methamphetamine and the occupants' arrests. *Kaufman*, ¶ 2. On appeal, the Montana Supreme Court reversed the district court's denial of the defendants' motions to suppress, holding that any reasonable suspicion that the officer "may have had that the lighting system was malfunctioning" completely evaporated "prior to the actual stop." *Kaufman*, ¶ 20. The Court concluded that, since the officer no longer had any particularized suspicion of criminal activity to justify further investigation by the time he stopped the vehicle, no legal basis existed for further detention and questioning regarding the vehicle's ownership or the occupants' reasons for being on the road that night. *Kaufman*, ¶ 25. *Kaufman* stands for the proposition that once the initial particularized suspicion ceases to exist, further detention and questioning of the defendant needs to immediately stop.

This rule has been reaffirmed by this Court in *City of Missoula v. Kroschel*, 2018 MT 142, 391 Mont. 457, 419 P.3d 1208. In *Kroschel*, this Court emphasized that "[u]pon making a valid investigative stop, law enforcement officers must act with reasonable diligence to quickly

confirm or dispel the predicate suspicion for the stop,” and that “[t]he duration and scope of an investigative stop must be carefully limited to its ‘underlying justification’.” ¶ 13 (citing *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568 (1985)).

In this case, the district court erred insofar as it compressed all the events into a single incident that created particularized suspicion for Baisch to conduct the initial stop. Baisch intercepted Zeimer and stopped him from entering the gas station, and the only justification he had to do that were the events he had observed up to that point. *See Zimmerman*, ¶ 16. Neither the scope nor the duration of the officers’ investigative stop of Zeimer was limited to its underlying justification.

After concluding that Zeimer was not in need of medical attention, the deputies went on to collect his driver’s license and his vehicle registration and inquired about his insurance. When all of that was found to be in order, the deputies asked Zeimer where he came from and what he was doing. He answered those inquiries as well. He came from Miles City, to see his sister. They then asked him about his sister and what they were doing together. Zeimer answered those inquiries as well. Throughout this questioning, Zeimer wasn’t staggering, he did not



appear impaired, and even though Baisch sniffed Zeimer numerous times, he could not “smell anything.” (State’s Ex. 2 at 15:50.) There was no visible indication of the presence of alcohol or drugs. Zeimer adamantly denied drinking the night before and had a perfectly reasonable explanation for what he was doing at the gas station. Baisch and Spurgeon simply refused to conclude the stop each time their suspicions were dispelled by Zeimer’s answers or conduct.

Like in *Kaufman*, Baisch’s and Spurgeon’s reason to conduct a DUI investigation evaporated once they made contact with Zeimer and they could not smell alcohol, see any evidence of alcoholic beverages, or discern any other indicators of impairment. *Kaufman*, ¶ 25. But instead of breaking off the engagement, the deputies kept extending the stop in order to prolong an unwarranted investigation. Baisch went so far as to insert the long arm of the government into the private family affairs between Zeimer and his sister and persuaded himself that there was deception afoot. That Zeimer was seeking a rapprochement with his sister because he was homeless and ashamed of talking about it is simply none of the government’s business. *See Conley*, ¶ 13. Zeimer’s hesitancy regarding his private affairs and his relationship to his sister

is perfectly reasonable and is not related to whether he had been impaired or otherwise committed a crime. The State of Montana does not have a right to question persons about their family dynamics. On the contrary, persons in Montana have a right, that is above what is otherwise provided for in the 4th Amendment, to not have the State inquire into their private life. *Conley*, ¶ 13. When Deputy Baisch asked for Zeimer's sister's phone number and called her, Baisch had long since departed the outer bounds of his authority to investigate a DUI.

When Baisch confronted Zeimer about what his sister had said, he was not acting with “reasonable diligence to quickly confirm or dispel the predicate suspicion for the stop.” *Kroschel*, ¶ 13. Zeimer's living arrangements and his strained relationship to his sister have absolutely nothing to do with a DUI investigation. Even if there is an inconsistency or a falsehood about why Zeimer happened to be in Glendive, that is not relevant to whether Zeimer was driving impaired. The deputies simply had an inarticulate hunch that Zeimer was being untruthful, and they would not let him go until they had satisfied their curiosity.

The deputies' frustration with their inability to find a crime that they could pin on Zeimer is exhibited in their multiple conferences about what to do. After each conference, the deputies reengaged with Zeimer on a new topic. First, they engaged Zeimer on whether he had been drinking. When that proved fruitless, they engaged him on his relationship to his sister. And despite finding something to work with (perceived deception), the deputies pressed on to drugs. When Zeimer denied using drugs, Baisch simply said: "Well, I have heard from your family that you are into drugs, so I (inaudible) know that that's the deal. (State's Ex. 2 at 16:05.) When that didn't get any traction, Spurgeon declared that they were doing a field sobriety test. At this point the deputies simply gave up on getting any plain view or self-incriminating information from Zeimer. They detained him and asked him to sign a consent to search without any requisite justification for detaining him for almost 45 minutes. It was not until after this search that they finally discovered evidence of a crime. Deputies did not act with reasonable diligence to confirm or dispel the *predicate* suspicion for their stop of Zeimer, and the scope of their investigation vastly exceeded the underlying justification. *Kroschel*, ¶ 13. Accordingly, the district

court should have concluded that their conduct violated Mont. Code Ann. § 46-5-403.

**C. The evidence from the truck should have been suppressed because it was collected in violation of Zeimer's constitutional rights.**

“Evidence obtained through search and seizure in violation of the Fourth Amendment constitutes ‘fruit of the poisonous tree’ that falls under the exclusionary rule.” *In re B.A.M.*, 2008 MT 311, ¶ 11, 346 Mont. 49, 192 P.3d 1162. “The primary purpose of the exclusionary rule is to deter future unlawful police conduct by making evidence which the State obtains through a search and seizure in violation of the Fourth Amendment, inadmissible in criminal proceedings.” *State v. Therriault*, 2000 MT 286, ¶ 57, 302 Mont. 189, 14 P.3d 444 (internal citations and quotations omitted). Therefore, “[t]he ‘fruit of the poisonous tree’ doctrine forbids the use of evidence which comes to light as a result of the exploitation of an initial illegal act of the police.” *Therriault*, ¶ 57.

The Dawson County deputies engaged in an illegal stop that lasted over 45 minutes. As a consequence of the illegal stop and unwarranted and unjustified government intrusion into his privacy, Zeimer's truck was searched and evidence was discovered and seized.

The fruits of this search should have been suppressed as fruit of the poisonous tree. *Therriault*, ¶ 57.

### **CONCLUSION**

The deputies here had no legal reason to stop Zeimer because his behavior was nothing but law abiding and careful and it did not give rise to any indication of wrongdoing or criminal behavior. Even if the deputies had particularized suspicion to intercept Zeimer, they had no legal reason to continue the stop after they had satisfied themselves that he was not driving under the influence. Evidence was found in Zeimer's truck as a direct consequence of the illegal stop and the multiple illegal extensions of the stop. That evidence should have been suppressed. The district court erred when it declined to do so. Zeimer respectfully requests that his Court reverse the district court's denial of his motion to suppress.

Respectfully submitted this 18th day of April, 2021.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionally-spaced roman text, Century Schoolbook, and a typeface of 14 points, and is double-spaced except for footnotes and quoted, indented material. This brief contains 6,498 words, as calculated by Microsoft Word for Windows, excluding the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendix.

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## **APPENDIX**

Order Denying Defendant’s Motion to Suppress  
(October 1, 2019) .....App. A

Sentencing Order and Judgment  
(August 2, 2018) .....App. B



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