

¶2 Appellees were travelling eastbound on I-40 while Agent Wall of the Oklahoma Bureau of Narcotics and Dangerous Drugs [OBNDD] was conducting narcotics interdiction around mile marker 111 in Canadian County. He observed Appellees' minivan following "less than a second" behind the semi-truck in front of them. Appellees' minivan "appeared" to be a rental vehicle with a Florida license plate. According to Agent Wall, following too closely is "following closer than is reasonable and prudent." He explained that numerous studies and the

Oklahoma Driver's Manual recommend a following distance of three seconds, that Appellees were travelling "much less" than a three-second distance and that following too closely is one of the top three causes of Oklahoma accidents. He used his stationary vehicle in the median to count the time interval between the two vehicles passing him and he was unable to "even count a second." He estimated the vehicles' speed between 65 and 70 miles per hour.

¶3 Agent Wall pursued Appellees' minivan and conducted a traffic stop approximately two miles from the observed traffic violation. Agent Wall directed a canine handler agent with the OBNDD, who had arrived at the scene, to have his drug dog scan the minivan. The dog alerted to the odor of drugs and during a search of the minivan, the officers found 45 packages of marijuana totaling approximately 49 pounds inside a couch in the back of Appellees' minivan. The State charged Appellees Harris and Zungali by Information on March 5, 2014, with Trafficking in Illegal Drugs in violation of 63 O.S.2011, § 2-415, and with Conspiracy to Traffic in Illegal Drugs, in violation of 21 O.S.2011, § 421.¹

DISCUSSION

¶4 The State contends that the stop of Appellees' minivan for following too closely based on a violation of the "three second rule" was not an unreasonable seizure in violation of the Fourth Amendment to the United States Constitution, and we agree. Review of a district court's ruling on a motion to suppress evidence is a mixed question of law and fact; we consider the evidence in the light most favorable to the district court's ruling, accept those of the district court's factual

¹ Harris was charged in Case No. CF-2014-143 and Zungali in CF-2014-144.

determinations supported by evidence and review the ultimate determination of reasonableness under the Fourth Amendment *de novo*. See *United States v. Augustine*, 742 F.3d 1258, 1264-1265 (10th Cir. 2014); *Coffia v. State*, 2008 OK CR 24, ¶ 5, 191 P.3d 594, 596.

¶5 Both the United States and Oklahoma Constitutions guarantee the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Okla. Const. art. 2, § 30. To stop a vehicle, police must have reasonable, articulable suspicion that the car or its driver is in violation of the law. *McGaughey v. State*, 2001 OK CR 33, ¶ 24, 37 P.3d 130, 136. “[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.” *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000). To determine if a traffic stop violates the Fourth Amendment, we consider whether the officer’s action was justified at its inception and whether the officer’s subsequent actions were reasonably related in scope to the circumstances which justified the interference in the first place. *McGaughey*, 2001 OK CR 33, ¶ 24, 37 P.3d at 136.

¶6 This case concerns only whether the traffic stop was justified at its inception.² “The validity of a traffic stop under the Fourth Amendment turns on whether th[e] particular officer had reasonable suspicion that th[e] particular motorist violated any one of the multitude of applicable traffic and equipment

² The State argues that other issues raised for the first time during the hearing on the motion to suppress evidence were not properly before the district court and should not be considered on appeal because the district court made no finding on the allegations raised for the first time and confined its ruling to the justification for the traffic stop. Appellees address only the district court’s ruling in their brief.

regulations of the jurisdiction.” *United States v. Valenzuela*, 494 F.3d 886, 888 (10th Cir. 2007) (quoting *United States v. Tibbetts*, 396 F.3d 1132, 1137 (10th Cir. 2005)). See also *Lozoya v. State*, 1996 OK CR 55, ¶ 32, 932 P.2d 22, 32. An officer’s subjective motivation for stopping a particular vehicle is irrelevant. *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995). Agent Wall stopped Appellees for following too closely in violation of 47 O.S.2011, § 11-310(a) that provides a driver “shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.”

¶7 The Tenth Circuit has held that a trooper’s use of a two-second “rule of thumb” to determine that a car was following the vehicle in front of it too closely provided the necessary reasonable suspicion to effectuate a traffic stop under a Kansas statute identical to Oklahoma’s statute prohibiting following too closely.³ *United States v. Nichols*, 374 F.3d 959, 965 (10th Cir. 2004), cert. granted and opinion vacated to allow resentencing under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); opinion reinstated, 410 F.3d 1186 (10th Cir. 2005). The Tenth Circuit reaffirmed its holding in *Nichols* in *United States v. Hunter*, 663 F.3d 1136, 1143 (10th Cir. 2011). The trooper in *Hunter* stopped the defendant for following about one second behind a semi on an interstate highway, and the trooper testified that such an interval was a violation of the Kansas statute. *Id.* The Tenth Circuit rejected the defendant’s argument

³ Title 47 O.S.2011, § 11-310(a) provides in relevant part:

The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

that the stop was not justified because the trooper did not address other factors as a basis for the stop, namely speed and distance. The *Hunter* court approved timed intervals as an acceptable method for taking speed and distance into account and noted “we have specifically approved [in *Nichols*] the two-second rule as supporting reasonable suspicion to effect a traffic stop....” *Id.*

¶8 We find the reasoning in *Nichols* and *Hunter* persuasive.⁴ Agent Wall testified he had hours of training on “traffic stops, traffic violations, [and] the traffic laws of the state of Oklahoma.” He explained that following too closely is following at a distance that is not reasonable and prudent. He went on to say that numerous studies as well as the Oklahoma Driver’s Manual recommend a following distance of three seconds, which he obviously credits as one reliable measure of a reasonable and prudent distance between vehicles. He explained how he calculated the less than one second between Appellees’ minivan and the semi in front of them. We find that Agent Wall’s use of a three-second rule of thumb together with his calculation and observation of less than a one second interval in this case provided the minimal level of objective justification required

⁴ The district court relied on this Court’s non-binding unpublished decision in *State v. Lopez and Magana* to grant Appellees’ motion to suppress. See *State v. Lopez and Magana*, Case No. S-2013-103 (unpublished)(Oct. 2, 2013)(holding a two second rule violation was insufficient justification for a traffic stop). In making its ruling, the district court noted there was a conflict between a published federal case, *United States v. Nichols*, and this Court’s unpublished decision in *Lopez*. Although the district court seemingly credited Agent Wall’s testimony by acknowledging that a “less than one second” interval between cars was “concerning,” the district court followed *Lopez* solely because this Court did not adopt the older federal interpretation in *Lopez* “for whatever reason.” The district court in *Lopez* found that much of the trooper’s testimony was suspect, calling into question his assertion that the defendants were following the car in front of them too closely. Agent Wall’s testimony does not suffer from the same deficiencies as the trooper’s testimony in *Lopez*.

for reasonable suspicion justifying a traffic stop. The stop was justified at its outset.

DECISION

¶9 The Order of the District Court of October 9, 2014, sustaining Appellees' motion to suppress evidence is **REVERSED** and the matter **REMANDED** for further proceedings. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CANADIAN COUNTY
THE HONORABLE GARY E. MILLER, DISTRICT JUDGE

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OPINION BY: JOHNSON, J.
SMITH, P.J.: Concur
LUMPKIN, V.P.J.: Concur
LEWIS, J.: Concur
HUDSON, J.: Concur

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