



request for additional questioning based upon the officer's conduct. Therefore, the Appellee's consent was not voluntarily given. The State now appeals from the District Court's decision pursuant to 22 O.S.Supp.2007, § 1053 and raises the following propositions of error:<sup>1</sup>

- I. Sergeant Sellers possessed a reasonable articulable suspicion of illegal activity by Appellee based upon the totality of the circumstances and the roadside detention of Appellee did not exceed the scope and duration of a lawful traffic stop under the Fourth Amendment.
- II. Appellee freely and voluntarily gave Sergeant Sellers valid consent to search his truck and trailer.

After thorough consideration of the propositions of error and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we find the ruling of the District Court granting the motion to suppress should be affirmed and the case remanded to the District Court for further proceedings consistent with this opinion.

In appeals brought to this Court pursuant to 22 O.S.Supp. 2007, § 1053, this Court reviews the trial court's decision to determine if the trial court abused its discretion. *State v. Love*, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369. *See also State v. Pope*, 2009 OK CR 9, ¶ 4, 204 P.3d 1285, 1287. An abuse of

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<sup>1</sup> In response to Appellee's initial argument, the State's appeal is proper as it was timely filed with this Court. Pursuant to Rule 2.1(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008) the State's Notice of Intent to Appeal was filed in the District Court of Oklahoma County on February 26, 2009, which was within ten (10) days from the date of the District Court's February 17, 2009, order granting the motion to suppress. "The filing of the Notice of Intent to Appeal and Designation of Record in the District Court is jurisdictional and failure to timely file constitutes waiver of the right to appeal." Rule 2.1(D). The State's failure to also file a certified copy of the Notice of Intent to Appeal and Designation of Record with this Court within ten (10) days from the date the Notice of Intent was filed in the trial court (certified copies were not filed with this Court until March 16, 2009), is not jurisdictional and does not constitute a waiver of the right to appeal. *See* Rule 2.1(D).

discretion has been defined as a conclusion or judgment that is clearly against the logic and effect of the facts presented. *Love*, 1998 OK CR 32, ¶ 2, 960 P.2d at 369. *See also Slaughter v. State*, 1997 OK CR 78, ¶ 19, 950 P.2d 839, 848 - 849.

In Proposition I, we find the trial court did not abuse its discretion in finding the officer did not have reasonable articulable suspicion to detain Appellee after the traffic stop. Finding that the circumstances surrounding the traffic stop were not sufficient to give rise to reasonable suspicion that Appellee had committed, was committing, or was about to commit a crime was not a clearly erroneous conclusion based upon the law and the evidence. *See Seabolt v. State*, 2006 OK CR 50, ¶ 6, 152 P.3d 235, 237 (if the length of the investigative detention goes beyond the time necessary to reasonably effectuate the reason for the traffic stop, the Fourth Amendment requires reasonable suspicion that the person stopped has committed, is committing or is about to commit a crime). *See also State v. Paul*, 2003 OK CR 1, ¶ 3, 62 P.3d 389, 390.

In Proposition II, we find the trial court did not abuse its discretion in finding Appellee's consent for the officers to search his truck was not voluntarily given. *See State v. Goins*, 2004 OK CR 5, ¶ 21, 84 P.3d 767, 771 (“[w]e adopt the long standing rule that a valid stop may be extended if the encounter becomes consensual”). Based upon the record before us, the trial court's decision that a reasonable person in Appellee's position would not have understood that with the return of his paperwork and license, but without

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receiving a warning or citation or any indication from the officer that the traffic stop was concluded and in the presence of three police officers, that he was free to leave or decline the officer's request for additional questioning was not clearly erroneous. See *Goins*, 2004 OK CR 5, ¶ 18, 84 P.3d at 770-771 relying on *United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996) (a driver's consent is voluntary applying the test of whether a reasonable person in the driver's position would believe he was not free to leave). See also *United States v. Guerrero-Espinoza*, 462 F.3d 1302, 1308 (10th Cir. 2006) (“[a]n unlawful detention occurs only when the driver has an objective reason to believe he or she is not free to end the conversation with the officer and proceed on his or her own way”); *United States v. Gregoire*, 425 F.3d 872, 879 (10th Cir. 2005), (in determining whether an encounter is consensual, “[t]he issue is whether law enforcement conduct as perceived by a reasonable person would communicate that the person was not free to decline law enforcement requests or end the encounter”). Further, we cannot say that the trial court's decision finding that the State failed to prove by clear and convincing evidence that Appellee's consent was voluntary was clearly against the logic and effect of the facts presented. Therefore the District Court's order granting the motion to suppress should be affirmed.

### DECISION

**The ruling of the District Court granting the motion to suppress is AFFIRMED** and the case is **REMANDED** to the District Court for further proceedings consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is ORDERED issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY  
THE HONORABLE TAMMY BASS-LESURE, DISTRICT JUDGE

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**OPINION BY: LUMPKIN, J.**  
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CHAPEL, J.: CONCUR  
LEWIS, J.: CONCUR

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