STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

D[redacted] G[redacted] U[redacted],

Defendant.

MEMORANDUM IN SUPPORT OF MOTIONS TO SUPPRESS ALL EVIDENCE SUBSEQUENT TO THE PBT

Court File No.: T9-06-7843

TO: THE ABOVE-NAMED COURT; THE HONORABLE [redacted], PRESIDING JUDGE OF THE HENNEPIN COUNTY DISTRICT COURT; AND MR. J[redacted] M[redacted], ASSISTANT MINNEAPOLIS CITY ATTORNEY.

INTRODUCTION

Defendant, D[redacted] U[redacted], date of birth 06/11/75, was arrested on January 19, 2007 and charged with two counts of Gross Misdemeanor Second Degree Driving While Impaired, in violation of Minn. Stat. §§ 169A.20 and 169A.27. At the contested hearing on March 12, 2007, Defendant raised the following two arguments:

1. That Officer W[redacted] lacked reasonable justification under Minn. Stat. § 169A.41 to administer a preliminary breath test (PBT) to Defendant.
2. That Officer W[redacted] went beyond the scope of the stop and lacked reasonable articulable suspicion justifying the seizure of the Defendant when he ordered him to submit to a preliminary breath test (PBT) while seated in his vehicle.

STATEMENT OF THE CASE

On January 19, 2007 at approximately 12:15 a.m., Officer W[redacted] was monitoring traffic traveling northbound at the Hennepin Avenue Bridge in Minneapolis. Officer W[redacted] clocked Defendant's vehicle traveling 41 m.p.h. in a 30 m.p.h. zone. At the March 12, 2007 contested omnibus hearing, Officer W[redacted] first testified that he pulled in behind Defendant's vehicle and immediately activated his emergency lights. However, on cross-examination he changed his

mind, stating that he did in fact pull in behind Defendant's vehicle, which lawfully came to a stop at the red light at Hennepin Avenue and Main Street, but did not immediately turn on his emergency lights to effectuate a traffic stop. It was not until the light turned green when Officer W[redacted] activated his emergency lights. Defendant drove the vehicle northbound and when it came to 2nd Street NE, turned left and pulled over midblock on 2nd Street NE and Hennepin Avenue East. Officer W[redacted] testified that Defendant pulled his vehicle over in a lawful manner, and did not swerve at any point over the fog or centerline. On cross-examination, Officer W[redacted] testified that he was not concerned that Defendant was fleeing his squad car, nor was he concerned that Defendant was engaging in any more than a speeding violation. Later on re-direct examination by the prosecutor, Officer W[redacted] changed his mind, and testified that he thought Defendant was fleeing or drunk. Officer W[redacted] acknowledged that it was possible that Defendant did not notice his squad car lights behind him because he failed to activate those lights immediately. In addition, E[redacted] G[redacted], the passenger in Defendant's vehicle, who lives one block from the intersection of Hennepin Avenue and Second Street NE, testified that it is unlawful to park on Hennepin Avenue between Main Street and Second Street NE at that time of night.

Officer W[redacted] exited his squad car and approached Defendant's window. He testified that he did not remember how far down Defendant's window was lowered, as he failed to include it in the police report. Defendant had his driver's license and insurance card out and ready when Officer W[redacted] approached. Officer W[redacted] testified that he observed a strong odor of an alcohol beverage and asked Defendant if he had been drinking, to which Defendant responded "no." Mr. G[redacted], the passenger in Defendant's vehicle, testified that Officer W[redacted] then asked him if he had been drinking to which he responded "yes." At the evidentiary hearing, Officer W[redacted] acknowledged that he in fact failed to record this fact in his written police report.

Officer W[redacted] also testified that the Defendant was not "looking him in the eye," but conceded that on many traffic stops, drivers are often embarrassed, distressed, tense, nervous, and frightened when being pulled over by police, and that this may have been the reason Defendant was not maintaining strict eye contact.

Officer W[redacted] testified at the contested hearing that Defendant did not drive erratically, did not swerve over the fog or centerlines, parked his vehicle without telltale impairment, did not have slurred or stuttered speech, did not reveal cognitive impairment, had normal reactions to his instructions, did not reveal motor skill impairment, was not confused but rather coherent, did not fumble with his license or insurance card, talked in both manner and content without telltale impairment, and was polite and cooperative throughout the entire arrest process. In fact, Officer W[redacted] noted in his police report that Defendant was "very cooperative."

Officer W[redacted] then returned to his squad car with Defendant's driver's license. After a few minutes, he returned to Defendant's vehicle and instructed Defendant to blow into a PBT device. Officer W[redacted] testified that he told Defendant that if "he had nothing to drink," then the PBT would not indicate a "failed reading."[1] Defendant asked his passenger what he should do, and then declined the PBT. Officer W[redacted] ordered Defendant out of the vehicle, told him he was under arrest for DWI, and placed him in the rear of the squad car.

At no time did Officer W[redacted] have Defendant perform field sobriety tests to determine probable cause for arrest. Officer W[redacted] testified that he wanted to give the Defendant a "fair shot" at showing him he was not under the influence of alcohol, however he did not give the Defendant an opportunity to perform the walk and turn test, the one-leg stand test, the Romberg test, the alphabet test, various counting and dexterity tests, the HGN test, or any other field

[1] Officer W[redacted] could not remember exactly what he told Defendant, but in essence that Defendant could "prove" to him that he was not drinking by blowing in the PBT.

sobriety test for that matter. Officer W[redacted] admitted that he could have administered a number of these tests without having Defendant exit his vehicle, but chose not to.

ARGUMENTS

I. OFFICER W[redacted] DID NOT HAVE REASON OR JUSTIFICATION PURSUANT TO MINNESOTA STATUTE § 169A.41, SUBD. 1, TO ADMINISTER THE PRELIMINARY BREATH TEST TO DEFENDANT.

The Defendant contends that there was insufficient cause to use a preliminary breath test (PBT) in this case, and/or that the use of the PBT was premature and unreasonable. Minnesota's PBT statute authorizes the use of PBTs in limited situations. This is more than a statutory gift.2 The statute reads:

> **169A.41. Preliminary Screening Test**
>
> **Subdivision 1. When authorized.** When a peace officer has reason to believe from the manner in which a person is driving, operating, controlling, or acting upon departure from a motor vehicle, or has driven, operated, or controlled a motor vehicle, that the driver may be violating or has violated section 169A.20 (driving while impaired), 169A.31 (alcohol-related school bus or Head Start bus driving), or 169A.33 (underage drinking and driving), the officer may require the driver to provide a sample of the driver's breath for a preliminary screening test using a device approved by the commissioner for this purpose.

An officer may request a PBT if he possesses specific and articulable facts that form a basis to believe that a person is or has been driving a motor vehicle while under the influence of an intoxicating beverage. *State v. Vievering*, 383 N.W.2d 729, 730 (Minn. Ct. App. 1986), review denied (May 26, 1986). The standard is not whether one has been drinking and driving, but whether one is driving while "under the influence of an intoxicating beverage." *Id*. Enclosed with this brief is *State v. Robertson*, 2001 WL 481955 (Minn. Ct. App. 2001), because there the parties and the court all agreed on appeal that there had been at least an odor of alcohol. Odor alone does not mean what was smelled impaired the driver. It is not illegal simply to drink and

2 It is not just a statutory gift. In some instances, like in this case, PBTs are a search for probable cause without probable cause for a search. The limits set in the statute are the very least that must be required before such a search is legal, if it is legal.

then to drive. It is only illegal to drive while under the influence of alcohol. In *Robertson*, the court of appeals stated that the district court had applied the wrong standard in concluding the record evidence did not meet that quantum of evidence needed to invoke a PBT under the limiting statute (probable cause standard). They remanded for a ruling applying the reasonable suspicion standard. This teaches us two crucial things: First: there really is a ruling to be made - this statute really does limit the use of PBTs. It is a "limitation statute." Second: odor alone does not meet the required standard. Everyone agreed on appeal there had been an odor. If that alone were enough, there would have been no need to remand the case for a ruling.[3]

Minnesota is not a blow-and-you-may-be-on-your-way state. The law, for good reason, requires that something about the driving or the behavior after departing the vehicle indicates one is likely violating the DWI law. 4

A. **The "totality of the circumstances" test controls whether or not a PBT is authorized**.

[3] In addition to *Robertson*, enclosed with this memorandum are a number of district court orders finding that the police officer did not have reason or justification to invoke the PBT. Defendant concedes that these orders are not controlling, but submits the orders as persuasive authority: See enclosed:
M[redacted] E[redacted] D[redacted] v. Commissioner of Public Safety: Odor of alcohol, admitted drinking two beers, and red and watery eyes, based on the totality of the circumstances, did not give the arresting officer a basis to administer the PBT.
M[redacted] E[redacted] T[redacted] v. Commissioner of Public Safety: Speeding, odor of alcohol, no field sobriety tests, polite and cooperative, no deficit in defendant's coordination was not enough to order a PBT.
G[redacted] L[redacted] M[redacted] v. Commissioner of Public Safety: Speeding, littering, odor of alcohol coming from vehicle, admittance of a couple of drinks did not give officer a specific and articulable suspicion to administer the PBT.
K[redacted] L[redacted] H[redacted] v. Commissioner of Public Safety: Smell of alcohol, glassy and watery eyes did not give officers specific and articulable facts to believe the driver had violated Minn. Stat. § 169A.20 to require driver to take a PBT.
M[redacted] L[redacted] v. Commissioner of Public Safety: Right turn without signaling, watery bloodshot eyes, and odor of alcohol on breath not enough to conclude that a PBT should be administered where Petitioner had good motor function during field sobriety tests.
R[redacted] A[redacted] L[redacted] v. Commissioner of Public Safety: Traffic accident, admittance of having a "couple drinks," no field sobriety tests did not officer evidence of sufficient indicia of intoxication to form an articulable suspicion of a violation of the drunk driving statute.
S[redacted] P[redacted] v. Commissioner of Public Safety: Petitioner glided through stop sign, bloodshot eyes, and admittance of drinking one beer do not support a finding that the officer had a sufficient and reasonable basis to request that petitioner submit to a PBT.
M[redacted] S[redacted] S[redacted] v. Commissioner of Public Safety: Speeding (41mph in a 30 mph zone), satisfactory performance on FST not enough to order PBT.
4 The statute does not authorize a preliminary screening test without legal cause, and the officer knows this, even if Defendant does not.

An officer must have a specific and articulable suspicion that a driver was driving under the influence of alcohol before the officer may require a preliminary screening test. *Hager v. Commissioner of Public Safety*, 382 N.W.2d 907, 911 (Minn.App.1986). Articulable suspicion is an objective standard and is determined from the totality of the circumstances. *Paulson v. Commissioner of Public Safety*, 384 N.W.2d 244, 246 (Minn.App.1986). To be sure, there may be one good indicator of impairment, besides odor of alcohol, and that could be enough. On the other hand, it all depends on what a reasonable person would conclude from what was observed, and this is an objective standard, not a subjective one. This is the criticism the court of appeals levied at prosecutors who misused the broad language of *Holtz v. Commissioner of Public Safety*, 340 N.W.2d 363 (Minn. App. 1983). This misuse has been criticized more than once. An example is found in *Martin v. Commissioner of Public Safety*, 353 N.W.2d 202 (Minn. App. 1984), where the court wrote:

> The *Holtz* decision is misread if it is seen as authority to find probable grounds for implied consent testing whenever one objective indication of intoxication is proven. The cases cited in the *Holtz* decision establish that there are numerous signs indicating a person is under the influence of intoxicating liquor, and that an opinion on that condition can be reached without presence of all of the signs. *State v. Hicks, Id.*, 222 N.W.2d at 348. *Holtz* confirms that decision and makes it clear that even a single objective indication of intoxication may be sufficient, depending upon the circumstances in each case. Reiterating the quoted language from *State v. Olson, Id.*, it is fundamental that each case must be decided on its own facts and circumstances and without regard to any formula. [Emphasis added]

In this case, there is positive evidence to the contrary of what the officer concluded – that what was being smelled by Officer W[redacted] had not in fact impaired this driver - based both on the driving and how he stopped, and acted thereafter. In fact, in this case the Defendant denied drinking and the passenger in the vehicle admitted drinking, thereby giving the officer an objective basis for the smell of alcohol. The same is true in assessing the quantum of evidence needed for using a PBT, which is a reasonable suspicion that the driver has violated §169A.20

(the DWI law). The totality test requires that the inferences that favor the driver be considered as well. In other words, not only didn't Defendant exhibit drunken indicia; he exhibited behavior that showed he was not impaired:

1. He was speeding, and he did not do so erratically. Officer W[redacted] testified that this was a "speeding" stop and the Defendant had not engaged in erratic driving.
2. He had not swerved over the fog or centerlines.
3. He stopped without telltale impairment or sign of guilty state of mind. Officer W[redacted] first indicated to the Court that he approached Defendant's vehicle with the intention of investigating a speeding violation, and nothing else. It was not until later, during re-direct examination by the prosecutor, when Officer W[redacted] changed his mind and testified that he was concerned the Defendant was fleeing or driving "drunk."
4. He parked without telltale impairment.
5. He did not fumble with his license. Rather, he retrieved his license and insurance card without telltale impairment.5
6. He did not have slurred or stuttered speech. Officer W[redacted] noted on direct examination that his speech was "good."
7. He did not reveal cognitive impairment. In fact, the officer noted that his reactions to instructions were "normal."
8. He did not have motor skill impairment.
9. He was not confused, but rather coherent.
10. He talked without telltale impairment.
11. His pupils were "normal" according to the officer.

5 And again, retrieving well is a positive sign one is NOT impaired as well, i.e., that what has been smelled by the officer had not impaired this driver.

12. He was "polite" and "cooperative" according to the officer. In fact, the officer noted in his police report that Defendant was "very cooperative."
13. He denied drinking. In fact, regarding the odor of alcohol, the passenger testified that he had been drinking.
14. Defendant was not administered, and thereby did not fail, and field sobriety tests ordered by the officer.

In this case, nothing from the manner in which Defendant drove, or the manner in which he acted, authorized a PBT under our limiting statute. Officer W[redacted]' actions constituted a "blow-and-you-may-go procedure." He even testified at the contested hearing that he told the Defendant something along the lines of, "if you haven't been drinking, then blow in this machine and show me."[6]

Per *Holtz* and *Martin*, this case must be decided on its own facts and circumstances without any regard to a formula. In this case, nothing about the Defendant's driving or behavior thereafter indicates he was driving "while under the influence." In fact, Defendant did not even have the opportunity to exit the vehicle. The only "objective" criteria supporting the officer's order to make Defendant submit to a PBT was (1) an odor of alcohol coming from the interior of the vehicle; the odor which the Defendant denied, and the passenger admitted, and (2) the bloodshot and watery eyes (which the officer admitted he only saw from a "side" glance since the Defendant never directly looked at the officer). In this case, the trooper did not have reason or justification to require that Petitioner submit to the PBT. Defendant concedes that Officer W[redacted] had a basis to believe that he had drank alcoholic beverages before driving, however the officer did not possess, based upon the totality of the circumstances known to him, specific and

[6] Officer W[redacted] could not remember exactly what he told Defendant, but in essence that Defendant could "prove" to him that he was not drinking by blowing in the PBT. He later acknowledged that pursuant to the Fourth Amendment, the Defendant is not required to "prove" anything to the officer.

articulable facts to believe that he was “driving while under the influence” of intoxicating beverages.

II. WHEN DEFENDANT WAS ORDERED TO SUBMIT TO A PBT, AND CERTAINLY WHEN ORDERED OUT OF THE VEHICLE, DEFENDANT WAS SUBJECTED TO RESTRAINT CONSTITUTING A FOURTH AMENDMENT SEIZURE.

First, the Court must determine whether the Defendant was seized under Article I, Section 10, of the Minnesota Constitution and the Fourth Amendment of the United States Constitution. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Not all interaction among police officers and individuals involves a "seizure" of the person; rather, a "seizure" may occur when a police officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S.Ct. 1868, 1879 n.16 (1968). A restraint of one’s liberty occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would not believe she is free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980); *accord I.N.S. v. Delgado*, 466 U.S. 210, 220-21, 104 S.Ct. 1758, 1765 (1984). Otherwise stated, a “seizure” arises if a reasonable person, under the circumstances, would not feel free to disregard the police officer’s questions or to terminate the encounter. *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995); *see also Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979) (it is a seizure under the fourth amendment when an officer stops an automobile).

Courts generally have held that a seizure is likely if a person is ordered out of a vehicle, or if the police engage in some other action or show of authority, which one would not expect between two private citizens. *Klotz v. Comm’r of Public Safety*, 437 N.W.2d 663, 665 (Minn.App. 1989)(*emphasis added*), *pet. for review denied* (Minn. May 24, 1989) (citing 3 W.

LaFave, Search and Seizure § 9.2(h) (2d ed. 1987)); *see also State v. Day*, 461 N.W.2d 404 (Minn.App. 1990) (concluding that when the uniformed and armed police officer summoned the appellant to the officer's squad car, requiring him to provide identification and to respond to questioning, a restraint occurred constituting a Fourth Amendment "seizure").

In the instant case, a seizure occurred both when Officer W[redacted] ordered Defendant to exit the vehicle, however, also when Officer W[redacted] ordered Defendant to submit to a PBT while seated in his vehicle. Officer W[redacted] stopped Defendant's vehicle because he was speeding. There was absolutely no indication based on Defendant's driving conduct that Defendant was a suspected DWI driver. Officer W[redacted] testified on cross-examination that he was only investigating a speeding stop, and that he was not concerned about a DWI or Fleeing violation. Later, on re-direct by the prosecutor, Officer W[redacted] changed his mind and testified that given the fact that Defendant did not stop his vehicle for one block, he was concerned the Defendant was fleeing or driving drunk. It was obvious during the contested omnibus hearing that Officer W[redacted] was repeatedly changing his story and had a difficult time making up his mind about certain facts in this case.[7]

After the stop, Officer W[redacted] exited his squad car and approached Defendant's vehicle in full uniform, gun belt and mace, and told the Defendant why he was stopped, i.e., speeding. Defendant, being prepared for the officer's questioning, and had his driver's license and insurance card ready when Officer W[redacted] approached his window. Officer W[redacted] noted a strong odor of an alcohol beverage emitting from the vehicle. Officer W[redacted] asked Defendant, the driver, if he was drinking. Defendant replied, "no." Officer W[redacted] then asked the passenger, E[redacted] G[redacted], if he was drinking. Mr. G[redacted] responded "yes." Prior to the PBT, this was the only conversation between Officer W[redacted] and Defendant. Officer W[redacted] then

[7] At one point, Officer W[redacted] even stated that he was sorry about changing the story, and that he had been up from a police shift from the night before.

returned to his squad car and came back with a PBT device. He ordered Defendant to blow in the PBT while Defendant was seated in his vehicle. It was at this point in time, a seizure occurred. The officer engaged in conduct that two ordinary citizens would likely not engage in, and a *reasonable* person, under the circumstances in this case, would not feel free to disregard the officer's orders.

The question now becomes whether or not the Officer W[redacted] had specific and articulable facts justifying the seizure.

III. OFFICER W[redacted] DID NOT HAVE SPECIFIC AND ARTICULABLE FACTS JUSTIFYING THE INVESTIGATORY RESTRAINT AND SEIZURE OF DEFENDANT.

Unless an officer has a reasonable suspicion that a driver is unlicensed or is otherwise subject to seizure for violations of the law, a seizure for the purpose of checking identification is unreasonable under the Fourth Amendment. *See Prouse*, 440 U.S. 648, 663 (1979). To justify an intrusion such as a seizure, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21; *accord United States v. Cortez*, 449 U.S. 411, 417-418, 101 S.Ct. 690, 695 (1981). When a seizure occurs, "the police must be able to articulate reasonable suspicion justifying the seizure, else any evidence that is the fruit of the seizure is suppressible." *In re Welfare of E.D.J.*, 502 N.W.2d 779, 782 (Minn. 1993).

A. **The smell of alcohol, not talking or looking in the officer's direction, nervousness, shaking, and glossy eyes cannot be the basis of a vehicle search or seizure**.

The smell of alcohol alone cannot be the basis of a vehicle search. *See State v. Wiegand*, 645 N.W.2d 125, 131 (Minn.2002)(to allow a vehicle search solely because an adult passenger smelled of alcohol would be to permit highly speculative searches against a large group of entirely law-abiding motorists, including designated drivers. Such a rule would not comport with

the substantial privacy interest in motor vehicles that the Minnesota Constitution ensures). An officer may request that a driver take preliminary screening tests when the officer has "reason to believe" that the driver may be violating or has violated Minn. Stat. § 169A.20 (2006). *Hager v. Comm'r of Public Safety*, 382 N.W.2d 907, 910 (Minn.App. 1986). The Minnesota Supreme Court has held that this standard is met when the officer has specific and articulable facts to believe that the person has been driving while under the *influence of alcohol*. *State Dep't of Pub. Safety v. Juncewski*, 308 N.W.2d 316, 321 (Minn. 1981)(emphasis added).[8] Articulable suspicion is an objective standard and is determined from the totality of the circumstances. *Paulson v. Comm'r of Pub. Safety*, 384 N.W.2d 244, 246 (Minn.App. 1986).

In *State v. Wiegand*, 645 N.W.2d 125, 128 (Minn.2002), the officer stopped the defendant for having a burned out headlight. Upon stopping his motor vehicle the officer noticed that the driver "had very slow and quite speech, was somewhat nervous, was shaking, and had glossy eyes. The officer also testified at the suppression hearing that Wiegand was looking down and not talking in the officer's direction." *Id.* The Minnesota Supreme Court held that the officers impermissibly exceeded the scope of the initial detention and suppressed the drugs found. "Article I, Section 10 of the Minnesota Constitution also imposes a reasonableness limitation on both the duration and the scope of a Terry detention." *Id.* at 136.

> The officer initially stopped appellants' car for a burned-out headlight. A limited investigative stop is lawful if there is a particularized and objective basis for suspecting the person stopped of criminal activity. [A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Moreover, the scope of a stop must be strictly tied to and justified by the circumstances that rendered the initiation of the investigation permissible. Law enforcement may continue the detention "as long as the reasonable suspicion for the detention remains * * * provided they act diligently and reasonably." *Id.* at 135 (*citations omitted*)

[8] Again, the standard is driving "while under the influence." It is not illegal to drink and drive. It is only illegal to drive "while under the influence."

In *State v. Syhavong*, 661 N.W.2d 278 (Minn.App.2003), the officer stopped the defendant for having a burned-out taillight. Upon stopping the motor vehicle the officer stated that the driver "and his passenger appeared excessively nervous compared to what I normally encounter on an equipment violation traffic stop. The driver was unable to sit still and frequently was looking at the floorboards." *Id*. at 280. The Court of Appeals held that the officer impermissibly exceeded the scope of the initial detention and suppressed the drugs found after a consensual search *merely because the officer asked if there were any illegal drugs in the car*. The Court first reviewed the black letter law in this area:

> To be reasonable under the Minnesota and federal constitutions, an investigatory stop must be limited in both duration and scope. [A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Moreover, the scope of a stop must be strictly tied to and justified by the circumstances that rendered the initiation of the investigation permissible. *Id* at 281 (*citations omitted*).

The court clarified that the small amount of time it took to ask the question was immaterial to the analysis:

> Detention of an individual during the routine stop of an automobile, even for a brief period, constitutes a "seizure" protected by the Fourth Amendment. Activities that exceed the scope of a stop are not made reasonable because they are short in duration. *Id.* at 281 (*citations omitted*).

Upon review in *Syhavong*, the Minnesota Court of Appeals held that the state was unable to demonstrate a reasonable relationship between the purpose of the stop, i.e. the broken taillight, and the questioning and subsequent search. *Id.* at 281. Though the initial stop was justified, the further expansion of the search was impermissible because the officer lacked reasonable articulable suspicion that the driver was engaged in criminal activity based merely on the officer's observations that the driver appeared to be excessively nervous. *Id.* at 282.

B. **An odor of alcohol coming from the interior of a vehicle, to which the passenger volunteers that the smell came from him, cannot form the basis for a search or seizure**.

A case similar to Defendant's case is *State v. Burback*, 706 N.W.2d 484 (Minn. 2005), where the Minnesota Supreme Court held that under Minnesota state constitutional provisions prohibiting unreasonable searches and seizures, an officer's detection of the *odor of alcohol* coming from the vehicle (where the passenger volunteers the odor was coming from him), does not by itself, provide a reasonable, articulable suspicion of criminal activity sufficient to permit an officer to expand the traffic stop by requesting to search the vehicle. *Id.* at 489. In *Burback*, the defendant was pulled over for speeding. In addition, the officer recognized the defendant's name from a drug tip he had received from his sergeant one week earlier. As the officer spoke to the defendant who was seated in the driver's seat, he detected a strong odor of alcohol, but he could not tell if the smell came from the driver or her passenger, a middle-aged man seated next to the driver. The passenger volunteered that the alcohol smell came from him. At that point, the officer ordered the driver out of the vehicle, constituting a seizure. The Minnesota Supreme court held that under Article I, Section 10 of the Minnesota Constitution, an officer's detection of the odor of alcohol coming from an adult passenger during a traffic stop does not, by itself, provide reasonable articulable suspicion of an open-container violation sufficient to permit an officer to expand the traffic stop (which was speeding) by requesting to search the vehicle. *Id.* at 489.

In the present case, the evidence of Defendant's intoxication was discovered as a result of an unlawful seizure, and the arresting officer lacked probable cause or reasonable articulable suspicion to go beyond the scope of the traffic stop (speeding). Here, since Officer W[redacted]' request to have Defendant blow into the PBT was not justified by Defendant's speeding, to be valid under the Minnesota Constitution, the request must have been supported by criminal activity. And to be reasonable, any intrusion in a routine traffic stop must be supported by an "objective and fair balancing" of the government's need to search or seize "and the individual's

right to personal security free from arbitrary interference by law officers." *Id*. at 488. *State v. Askerooth*, 681 N.W.2d 353, 364-65 (Minn. 2004) (*quoting* Unit*ed States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.E.2d 607 (1975)). At the time of the PBT, Officer W had only two clues of intoxication. First, the odor of alcohol coming from the interior of the vehicle, to which he could not attribute the smell to either the driver or the passenger, which is why he asked both who had been drinking. Defendant denied drinking and the passenger admitted drinking.[9] Second, even though the officer testified that he could not see Defendant's eyes, he narrated in his report that Defendant's eyes were "bloodshot" and "watery." The officer later testified that it would be reasonable that one's eyes would be watery if cold air rushed into a warm car. Officer W then walked back to his squad car, obtained a PBT, returned and ordered that Defendant blow in the PBT.

Prior to the PBT, Officer W did not give the Defendant the opportunity to perform field sobriety test in the vehicle, such as counting or alphabet. Moreover, Officer W admitted that he could have ascertained with more detail whether or not Defendant was in fact "driving while intoxicated" prior to ordering him to submit to a PBT, but he did not. His request was so far removed from the purpose of the stop, i.e. speeding, that absent an indication that Defendant was engaged in criminal activity, Officer W exceeded the scope of the stop when he ordered Defendant to blow in the PBT.

Pursuant to the above-mentioned case law, and the Minnesota Supreme Court's recent decision in *State v. Burback*, Officer W' investigative conduct went well beyond the scope of a traffic stop, and Defendant's seizure was not supported by reasonable articulable suspicion.

[9] Of course, Officer W testified that the odor came from the driver, but failed to include that fact in the police report.

CONCLUSION

Although the initial stop was justified, Officer W[redacted] went beyond the scope of the traffic stop and lacked reasonable articulable suspicion to justify the seizure of the Defendant when he ordered him to submit to a preliminary breath test.

Defendant seeks a ruling that the record evidence does not support use of a PBT under our law, and without that PBT result, there clearly was insufficient cause to invoke the DWI arrest. There still are teeth in the PBT statute. It limits the use of PBTs, and the State bears the burden of proving they had the quantum of evidence needed which indicated the Defendant was likely a DWI violator, before requiring the PBT. Defendant requests that all evidence subsequent to the introduction of the PBT be suppressed.

Respectfully submitted,

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