STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

B[redacted] F[redacted] W[redacted],

Defendant.

Court File No.: 27-CR-14-[redacted]

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE AND DISMISS CASE DUE TO LACK OF REASONABLE ARTICULABLE SUSPICION TO ADMINISTER THE PBT

TO: THE HONORABLE JOHN Q. MCSHANE; MARTIN COSTELLO, RICHFIELD CITY ATTORNEY'S OFFICE.

INTRODUCTION

On January 31, 2014, Ms. W[redacted] was charged with *Fourth Degree DWI*, in violation of Minn. Stat. §§ 169A.20, subdivision 1(1), 169A.27. Ms. W[redacted] now submits her memorandum of law in support of her motion to suppress the evidence and dismiss the charges against her for lack of reasonable articulable suspicion to administer the preliminary breath test (PBT).

On April 10, 2014, the parties appeared before this Court for a *Contested Omnibus Hearing* where the sole issue was whether the arresting officer had reasonable articulable suspicion to administer the preliminary breath test. Officer A[redacted] J[redacted] was the only witness to testify. The squad DVD was admitted into evidence as Exhibit 1.

FACTS

According to the testimony at the hearing, Ms. W[redacted] was pulled over on January 19, 2014 at 2:55 a.m. because Richfield Police Officer A[redacted] J[redacted] observed Ms. W[redacted]' license plate light was not illuminated and the bottom half of her license plate was covered by

snow. On direct examination, Officer J[redacted] testified that she has been trained in assessing impairment. Such impairment, Officer J[redacted] testified, includes driving conduct such as weaving or abrupt turning, speech issues, fumbling, confusing items (for example if the officer asks for a driver's license and the driver gives a credit card), odor of alcohol, and the state of the driver's clothing. Officer J[redacted] testified that she followed Ms. W[redacted] for approximately two miles and that the reason for the stop in this case was because Ms. W[redacted]' license plate light was out and snow was covering the bottom half of the plate. She testified on cross-examination that in the two miles she followed Ms. W[redacted], there was no other driving conduct, such as weaving, speeding, or crossing fog lines that indicated impairment. Upon contact, Officer J[redacted] smelled a strong odor of alcohol, but could not tell if the odor came from Ms. W[redacted] or from the car. Specifically, Officer J[redacted] testified that her police report was accurate when it stated that "*I was unable to determine if the odor was coming from her breath or from inside of the vehicle*." Upon questioning by the Court, Officer J[redacted] said the odor of alcohol was consistent with spilled alcohol in the car, not from Ms. W[redacted]' breath.

On direct examination, Officer J[redacted] testified that Ms. W[redacted] had watery eyes. On cross-examination, she conceded that being tired could cause watery eyes, and that Ms. W[redacted]' eyes were not bloodshot. In fact, on the squad video, Officer J[redacted] tells Ms. W[redacted] that her eyes could be watery because she was tired.

Officer J[redacted] also testified that Ms. W[redacted] was fumbling with her documents, meaning she was having trouble holding onto items or taking them out of her purse. Upon questioning by the Court, Officer J[redacted] admitted that she did not have a clear recollection of how Ms. W[redacted] fumbled. Nor did she recall where Ms. W[redacted]' retrieved her driver's license or insurance, whether she retrieved those items from her coat, purse, or glove box. Despite not

remembering these important details, Officer J[redacted] put Ms. W[redacted]' fumbling at a 6 or 7 on range of 1 to 10, 10 being the most fumbling she has seen.

Finally, on direct examination, Officer J[redacted] testified that Ms. W[redacted] stated she had just come from dropping off several intoxicated people. She also testified that she gave Ms. W[redacted] the option to take the PBT or perform field sobriety tests, and that Ms. W[redacted] admitted to having one beer. However, the squad video shows that Officer J[redacted]'s testimony was wrong: that Ms. W[redacted] had perfect speech—no slurring of words or mush-mouth speech—and that the choice to take the PBT or field sobriety tests was not an immediate option.

Only upon cross-examination by defense counsel and a review of the squad video did Officer J[redacted] capitulate that immediately upon re-approaching the car she told Ms. W[redacted], "*because I do smell the alcohol, I'm just going to have you do the PBT and just make sure you blow zeros, which you're going to because you said you haven't had anything to drink*." Officer J[redacted] also admitted that she used the PBT to find out where the alcohol was coming from, stating that her police report was accurate when it said, "*I was unable to determine if the odor was coming from her breath or from inside of the vehicle*" and so ordered Ms. W[redacted] to submit to a PBT "*to rule out the alcohol coming from her person versus from the inside of the vehicle*."

The analysis ends here—everything that occurred after the first order to take the PBT is irrelevant to the issue before the Court.

ARGUMENT

The United States Constitution and the Minnesota Constitution protect against unreasonable searches and seizures. U.S. CONST. amend. IV; MINN. CONST. art. I, § 10. An investigatory traffic stop is lawful if the police officer has a reasonable articulable suspicion that the person stopped is engaged in criminal activity. *State v. Munson*, 594 N.W.2d 128, 136

(Minn. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). The officer must have objective support for her suspicion. *State v. Johnson*, 444 N.W.2d 824 (Minn. 1989). To be reasonable, a limited, investigatory seizure requires a "particularized and objective" suspicion, while a seizure amounting to an arrest generally requires probable cause. *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). The scope and duration of any traffic stop must be limited to the original justification for the stop. *State v. Diede*, 795 N.W.2d 836, 845 (Minn. 2011); *State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003); *State v. Syhavong*, 661 N.W.2d 278, 281 (Minn. Ct. App. 2003). Detention of an individual during the routine stop of an automobile, even for a brief period, constitutes a "seizure" protected by the Fourth Amendment. *Syhavong*, 661 N.W.2d at 281.

An officer may expand the scope of a stop only for offenses for which the officer possesses a reasonable, articulable suspicion within the time necessary to resolve the original offense. *Diede*, 795 N.W.2d at 845. In order to prolong a stop, there must exist particularized and objective facts that provide a basis for suspecting the person seized of criminal activity. *Id.* at 842–43. 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. Ct. App. 1986). A reasonable, articulable suspicion requires more than a mere hunch. *State v. Martinson*, 581 N.W.2d 846, 850 (Minn. 1998) (citations omitted). In order to be reasonable, the suspicion must be objectively appropriate in light of the facts available at the time of the search and seizure. *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004).

Minnesota Statutes section 169A.41 states:

> 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.

MINN. STAT. § 169A.41, subdiv. 1 (2012). **An officer can request a preliminary breath test when she possesses specific and articulable facts to believe that a person has been driving, operating, or controlling a motor vehicle while *under the influence* of alcohol.** *Department of Public Safety v. Juncewski*, 308 N.W.2d 316, 321 (Minn. 1981). Field sobriety tests and preliminary breath tests are intrusions that must be justified based on a suspicion that the driver is *under the influence* of alcohol. *Id.* at 320–21.[1] Thus, an officer must have 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. Ct. App. 1986).

Though an odor of alcohol is an indication of intoxication, it must be regarded with caution: "There was an odor of alcohol, but the recent drinking of one bottle of beer may leave an odor of alcohol on the breath." *State, City of Eagan v. Elmourabit*, 373 N.W.2d 290, 293 (Minn. 1985). In *Elmourabit*, the Minnesota Supreme Court affirmed the court of appeals' reversal of defendant's conviction. *Id.* at 294. The court noted that some indicia of intoxication, taken alone, are not enough to suspect intoxication. *Id.* at 293.

> Here the state lacked direct proof of actual consumption, except for defendant's admission of only one beer and a few sips of another. Consequently, the state relied primarily on outward manifestations of intoxication observed after the defendant was stopped. The inferences to be drawn from this evidence, however, are in somewhat uneasy equilibrium. Defendant was driving 13 miles over the speed limit, but this is not uncommon for sober drivers too. **There was an odor of alcohol, but the recent drinking of one bottle of beer may leave an odor of alcohol on the breath.** Defendant's speech was at times slurred, but English is not his native tongue. There was testimony of some lack of coordination, but the video-taped dexterity tests showed none. There was evidence of glassy,

[1] Indicia of consumption is not enough. The law requires indicia of impairment.

> bloodshot eyes, but also evidence of a heightened hyperventilative state. There was evidence defendant was not having a heart attack, but neither could the officers nor the paramedics say authoritatively that defendant had no medical problems or was not experiencing pain.

Id. (emphasis added). *See also State v. Graupmann*, No. C3-00-756, 2000 WL 1617835, *2 (Minn. Ct. App. Oct. 31, 2000)[2] (unpublished) ("The only objective sign [of intoxication] here was the smell of alcohol. While this certainly could be an indication that the driver had been drinking—a fact to which Graupmann admitted—whether it establishes probable cause for DWI is a more difficult question to answer. We are reluctant to second-guess the trial court's determination that these facts alone are not enough to form a reasonable belief that Graupmann was under the influence of alcohol."); *State v. Kier*, 678 N.W.2d 672, 678 (Minn. Ct. App. 2004) ("Common indicia of intoxication include an odor of alcohol, bloodshot and watery eyes, slurred speech, and an uncooperative attitude"; officer had probable cause to arrest when he observed a strong odor of alcohol from driver's breath, bloodshot and watery eyes, slurred speech, an open beer can in the car, and the driver failed the field sobriety tests); *State v. Vievering*, 383 N.W.2d 729, 730 (Minn. Ct. App. 1986) review denied (May 16, 1986) (speeding, odor of alcohol coming from both driver and passenger, and beer cans on floor of car amounted to reasonable articulable suspicion to administer the PBT).

The reasoning that an officer needs more than just an odor of alcohol to initiate field sobriety procedures makes logical sense. Allowing officers to initiate field sobriety tests based on the smell of alcohol alone interferes with the constitutional rights of countless innocent drivers, especially designated drivers and those who consume one beer before getting behind the wheel. It is illegal to drive while impaired but it is not illegal to drive after drinking.

[2] This case is attached, pursuant to MINN. STAT. § 480A.08(3).

Minnesota District Court Cases

It is clear that Officer J[redacted] had reason to pull Ms. W[redacted] over given that Ms. W[redacted]' license plate light was out and that the license plate was partially covered in snow. The only issue in this case is whether Officer J[redacted], under the totality of the circumstances, had reasonable articulable suspicion to administer the PBT without prior field sobriety tests or further clues of intoxication.[3] Based on the above caselaw and other persuasive district court orders below, it is clear that Officer J[redacted] did not have reasonable articulable suspicion to administer the PBT. The following chart summarizes the attached persuasive district court cases:

Case	Court File	Reason for stop	Reason for PBT	Result
State v. Hughley	CR-06-540	Unclear – vehicle pulled over and parked legally along highway	**"To rule out breath alcohol"**	Case dismissed
State v. Galab	19AV-CR-12-6461	Officer saw objects hanging from mirror	**D's attitude and demeanor (confrontational)**	PBT test suppressed, case dismissed
Schubach v. Comm'r of Public Safety	02-CV-10-8783	Officer checked on vehicle to see if it needed help (no criminal activity suspected)	**"Just to make sure [the petitioner was] safe to drive"**	License revocation rescinded
Little v. Comm'r of Public Safety	02-CV-10-2467	Front headlight on car was out	**To isolate source of alcohol (make sure it wasn't petitioner)**	License revocation rescinded
Holmen v. Comm'r of Public Safety	C6-06-14589	N/A – officer responded to domestic disturbance	**Petitioner smelled of alcohol**	License revocation rescinded
Duncan v. Comm'r of Public Safety	25-CV-06-3079	Speeding	**No reason, officer believed petitioner was not intoxicated**	License revocation rescinded
Mossler v. Comm'r of Public Safety	27-CV-07-22631	Speeding	**Odor of alcohol, admission to one drink**	License revocation rescinded

[3] Totality of the circumstances requires analysis of the "positive" clues as well as the "negative" ones. Here, lack of driving conduct, perfect speech, and unattributable odor of alcohol weigh in favor of Ms. W[redacted].

Warzeha v. Comm'r of Public Safety	27-CV-09-18740	N/A – officer responded to van in the ditch	**Odor of alcohol (not strong), petitioner admitted to drinking an hour prior to driving**	License revocation rescinded
Kottke v. Comm'r of Public Safety	27-CV-12-17091	Broken windshield, DWI warrant	**One officer believed he smelled alcohol**	License revocation rescinded
Tong v. Comm'r of Public Safety	C4-98-954	Speeding	**Odor of alcohol, to "shorten the process"**	License revocation rescinded
Davis v. Comm'r of Public Safety	CV-06-15766	Missing front license plate, car registration expired	**Odor of alcohol, admission to drinking two beers**	License revocation rescinded

In *State v. Hughley*, the case was dismissed due to lack of reasonable articulable suspicion to administer the PBT. File No.: CR-06-540, at p. 1 (Cook County District Court, Apr. 12, 2007) (attached). The court stated that a PBT may be administered when an officer believes a driver is guilty of a DWI, citing Minn. Stat. § 169A.41. *Id.* at p. 3. The officer approached the defendant after he had pulled over and parked legally along the highway. *Id.* at 1. The officer requested the defendant take the PBT to "rule out mouth alcohol." *Id.* "The Statute does not allow the use of the PBT [to rule out mouth alcohol]" when the officer has no other reason to believe the driver was driving impaired. *Id.* at 3. Such a "violation of the statute ought reasonably result in a[n] either flat out dismissal or the conclusion that everything obtained subsequent thereto was obtained as a result of the illegally conducted PBT test and thus is suppressed, and the dismissal occurs as a result of such." *Id.* at p. 4. Thus the court dismissed the case. *Id.*

In *State v. Galab*, the defendant was pulled over because the officer observed objects hanging from his mirror. Court File No.: 19AV-CR-12-6461, at p. 1 (Dakota County District Court, Nov. 26, 2012) (attached). Like Ms. W[redacted]' case, there was no improper driving

conduct. *Id*. The defendant did not have a valid license and was cited for such. *Id*. at p. 2. As the officer did not observe any indicia of intoxication or suspect the defendant was driving while intoxicated. *Id*. The officer drove the defendant to a gas station, the defendant was angry and confrontational. *Id*. When they arrived at the gas station, the officer testified, he smelled alcohol on the defendant and that the defendant had bloodshot and watery eyes, neither of which the officer noticed prior to arriving at the gas station. *Id*. at p. 2–3. The officer asked the defendant to submit to a PBT without any other field sobriety tests due to his "attitude and demeanor." *Id*. at p. 3. The court concluded that the officer did not have reasonable articulable suspicion to administer the PBT and so suppressed the PBT result and dismissed the case. *Id*. at 4.

In *Schubach v. Commissioner of Public Safety*, an officer saw the petitioner's vehicle parked on the side of a road and approached the petitioner to see if she needed help; the officer did not suspect criminal activity. Court File No.: 02-CV-10-8783, at p. 2 (Anoka County District Court, May 27, 2011). When the petitioner rolled down the window, the officer smelled a strong odor of alcohol but could not determine if the odor was coming from the petitioner or the two passengers. *Id*. The officer noticed that the petitioner had "slightly" slurred speech and, after initially denying drinking, the petitioner admitted to having a glass of wine. *Id*. Due to the snowstorm at the time, the officer skipped field sobriety tests and administered the PBT. *Id*. The officer testified that when he administered the PBT, he only observed the odor of alcohol from the car and the slightly slurred speech. *Id*. The reason for the PBT was "just to make sure [the petitioner was] safe to drive." *Id*. After the failed PBT, the officer had the petitioner perform alphabet and counting tests and the HGN test in the car. *Id*. at p. 3. The court determined that the PBT was illegally administered because the officer's only suspicions were the odor of alcohol coming from the car and the petitioner's slightly slurred speech. *Id*. at p. 4. The court

further concluded that **the subsequent field sobriety tests were only requested due to the failed PBT and were therefore fruit of the poisonous tree**. *Id*. at p. 5. The court ordered that the petitioner's license revocation be rescinded. *Id*. at p. 6.

In *Little v. Commissioner of Public Safety*, an officer stopped the petitioner because the petitioner's front headlight was out. Court File No.: 02-CV-10-2467, at p. 2 (Anoka County District Court, June 7, 2010) (attached). The officer smelled alcohol coming from the car but the passenger said it was from her, not the petitioner. *Id*. The officer testified that he noticed that the petitioner had bloodshot and watery eyes, though this observation was not in his police report. *Id*. at p. 3. The officer told the petitioner, "**I am not able to isolate the source of the alcohol, so for your safety, I'm going to ask you to blow and if you pass—you can be on your way**." *Id*. (emphasis added). The petitioner failed the PBT and was later arrested for DWI. *Id*. at p. 3–4. The court rescinded the petitioner's driver's license revocation because the officer "did not possess the requisite reasonable and articulable suspicion to administer the PBT." *Id*. at 6.

In *Holmen v. Commissioner of Public Safety*, an officer responded to a domestic disturbance and found the petitioner standing next to a car. Court File No.: C6-06-14589, at p. 2 (Dakota County District Court, Jan. 22, 2007) (attached). The petitioner told the officer she had driven to the residence. *Id*. The officer testified that he could smell alcohol coming from the petitioner and that her eyes were glassy and watery, but acknowledged she was the victim of a domestic assault. *Id*. The officer also testified that her speech was slurred and "mush mouth," but as that was not in the officer's report, the court did not determine that credible. *Id*. The officer did not see the petitioner driving. *Id*. The officer gave the petitioner a PBT. *Id*. The court found that the only true basis for the officer administering the PBT was the odor of alcohol;

the petitioner's glassy and watery eyes more likely than not were a result of crying due to the domestic assault. *Id*. at p. 3. The court said, "the facts that Petitioner had driven and that she had an odor of alcohol alone, do not rise to the level of a reasonable suspicion to believe she had driven while under the influence of alcohol." *Id*. at 4. The court, then, suppressed the PBT and all subsequent tests and rescinded her license revocation. *Id*.

In *Duncan v. Commissioner of Public Safety*, the petitioner was pulled over for speeding; no other erratic driving was observed. Court File No.: 25-CV-06-3079, at p. 1 (Goodhue County District Court, Apr. 10, 2007) (attached). The officer testified that he did not observe indicia of intoxication nor did he suspect intoxication, but he administered the PBT anyway. *Id*. "This was simply a blow-and-you-may-be-on-your-way PBT." *Id*. at p. 2. The officer clearly had no reason to administer the PBT and indeed did not believe the petitioner had violated the DWI laws. *Id*. at p. 3. The court rescinded the petitioner's driver's license revocation. *Id*.

In *Mossler v. Commissioner of Public Safety*, the petitioner was pulled over for speeding; no other erratic driving was observed. Court File No.: 27-CV-07-22631, at p. 1 (Hennepin County District Court, May 7, 2008) (attached). The officer smelled alcohol when the petitioner rolled down the window and the officer saw the petitioner fumbling for the requested documents. *Id*. at p. 1–2. The court attributed the fumbling for documents to the fact that the car did not belong to the petitioner—the petitioner told the officer that the car belonged to his parents—and that it was dark outside and the officer only stayed at the petitioner's window for less than a minute waiting. *Id*. at p. 5. The petitioner said, in answer to the officer's questions, that he had a drink two hours prior. *Id*. at p. 2. The court noted the squad video revealed that the petitioner did not slur his speech. *Id*. The officer administered the PBT. *Id*. The officer could not remember if any other tests were performed; the squad video showed that the petitioner did not

have trouble getting out of the car and nothing appeared to prevent field sobriety testing. *Id*. The court noted that there was no reason to complete other field sobriety testing. *Id*. at p. 5. The court concluded that the officer did not have reasonable articulable suspicion to administer the PBT and nothing prevented him from gaining such by administering other field sobriety tests. *Id*. at p. 3.

In *Warzeha v. Commissioner of Public Safety*, an officer responded to a van in a ditch; the petitioner said he veered off the road to avoid hitting a deer, which the officer knew were an issue in the area. Court File No.: 27-CV-09-18740, at p. 2 (Hennepin County District Court, Dec. 3, 2009) (attached). The officer could smell alcohol coming from the petitioner who said he had a drink an hour before driving. *Id*. at p. 3. The officer did not believe the petitioner's deer story—but could not explain why—and administered the PBT. *Id*. The petitioner failed the PBT and then the officer had him perform field sobriety tests. *Id*. The court stated:

> In this case, Sgt. Fischer based his conclusion that Petitioner was over the legal limit based on his prior experience with impaired drivers. However at the hearing, Sgt. Fischer was unable to articulate what objective information about Petitioner the Sergeant relied upon to reach his conclusion. A mere subjective conclusion lacking articulated facts is insufficient to support a reasonable suspicion of criminal activity—**even if subsequent tests establish the officer's initial hunch to be correct**.

Id. at p. 6 (emphasis added). The only objective criteria of impairment was the odor of alcohol, which the officer testified was not strong and could have been explained by the petitioner's admission to drinking an hour before driving; none of the other typical indicia of intoxication were present, such as slurred speech, stumbling, bloodshot and watery eyes, and so on. *Id*. at p. 7. The court determined that without the reasonable articulable suspicion for administering the PBT, the PBT must be suppressed. *Id*. at p. 8. Further, without the PBT, the officer had no reasonable articulable suspicion to administer the subsequent field sobriety tests and so those had

to be disregarded. *Id*. The court stated, "**once a PBT reflects a specific preliminary test result over the legal limit, an officer is not likely to objectively consider performance of the SFSTs to dispel suspicion of impairment**." *Id*. (emphasis added). The court rescinded the petitioner's license revocation. *Id*.

In *Kottke v. Commissioner of Public Safety*, Officer Goodwater pulled the petitioner over for a broken windshield and, as a license plate search revealed, an outstanding DWI warrant. Court File No.: 27-CV-12-17091, at p. 1 (Hennepin County District Court, Dec. 10, 2012) (attached). Officer Goodwater did not observe any erratic driving and did not suspect drinking when he approached the petitioner. *Id*. at p. 2. Officer Goodwater told the petitioner that he could post $50 to satisfy the warrant. *Id*. Officer Armbruster arrived to help with the warrant and had trouble determining if the petitioner smelled like alcohol or if it was the petitioner's cologne. *Id*. at p. 3. Officer Armbruster did not observe any other indicia of intoxication on the petitioner or in the petitioner's car. *Id*. Officer Armbruster then told the petitioner he suspected drinking, and Officer Goodwater told the petitioner he would administer a PBT, but the first attempt revealed dead batteries. *Id*. The petitioner admitted he had been drinking the night before but 10 hours had passed. *Id*. Officer Goodwater told the petitioner that "it smells like alcohol." *Id*. at p. 4. After the petitioner failed the PBT, the officers had him perform field sobriety tests, which the petitioner passed. *Id*. The petitioner was then arrested for DWI. *Id*. The court concluded that the officers did not have reasonable articulable suspicion for administering the PBT, as the only indication of impairment was the odor of alcohol, which one officer did not smell and the other admitted could have been cologne. *Id*. at p. 5. The petitioner's admission to drinking the night before was a fruit of the "unlawful PBT detention[,

which] cannot be used to justify the detention." *Id*. at p. 6. The court rescinded the petitioner's license revocation. *Id*.

In *Tong v. Commissioner of Public Safety*, the petitioner was pulled over for speeding; no other erratic driving conduct was observed. Court File No.: C4-98-954, p. 1 (Ramsey County District Court, Apr. 28, 1998) (attached). The officers noticed an odor of alcohol, but no other indicia of intoxication. *Id*. The officers administered the PBT, to "**shorten[] the process**," based upon the odor of alcohol alone but expected him to pass it. *Id*. at p. 2 (emphasis added). The court found that "[t]he indicia necessary to administer a preliminary screening test were not here present" and that the "shortening [of] the process" was not done with the petitioner's knowledge or consent. *Id*. The court rescinded the petitioner's license revocation. *Id*.

In *Davis v. Commissioner of Public Safety*, an officer pulled the petitioner over because he was missing the front license plate and the vehicle registration was expired; no erratic driving was observed. Court File No.: CV-06-15766, at p. 1 (Scott County District Court, Oct. 9, 2006) (attached). The officer smelled alcohol coming from the car, which also contained a passenger. *Id*. at p. 2. The officer noticed that the petitioner's eyes were red and watery, but her speech was not slurred; the petitioner admitted to having two beers. *Id*. The officer gave the petitioner a PBT. *Id*. After giving the PBT, the officer had the petitioner perform field sobriety tests and another PBT. *Id*. The court found that the officer did not have reasonable articulable suspicion for administering the PBT. *Id*. The court did say that while the officer "had a basis to believe that Petitioner had drunk alcoholic beverages before driving, he did not possess, based upon the totality of circumstances known to him, specific and articulable facts to believe that she was driving while under the influence of intoxicating beverages." *Id*. at p. 3. The court rescinded the petitioner's license revocation. *Id*.

Application to Ms. W[redacted]' Case

Officer J[redacted]'s testimony, the police reports, and the squad video all show that there was no erratic driving conduct, such as swerving, speeding, or crossing fog or centerlines, that would warrant a stop for DWI. The only reason for the stop was that Ms. W[redacted]' license plate light was out and the plate was partially covered in snow. Thus, nothing about Ms. W[redacted]' driving conduct can be included in "clues for intoxication." Rather, this lack of driving conduct supports Ms. W[redacted] in the "totality of the circumstances" test.

When Officer J[redacted] approached Ms. W[redacted], Officer J[redacted] reported and testified that she smelled an odor alcohol coming from the car but could not isolate it to Ms. W[redacted]. Ms. W[redacted] told Officer J[redacted] that she had just dropped off multiple intoxicated people, thus resulting in the odor of alcohol. Further, Officer J[redacted] testified that the smell she observed was consistent with spilled alcohol in a car—not with the odor an intoxicated person exhibits. Officer J[redacted] also noted that Ms. W[redacted]' eyes were watery, yet the squad video reveals that she told Ms. W[redacted] that watery eyes could be attributed to being tired. In the squad video, Ms. W[redacted] stated that she was tired from a long day of work. The final alleged indication was fumbled actions. However, it is very likely that a person who has never been pulled over by an armed police officer is going to be extremely nervous, which often results in fumbled actions. Importantly, Officer J[redacted] did not have any independent recollection whatsoever of Ms. W[redacted]' supposed fumbling.

Officer J[redacted] did not note that Ms. W[redacted] had slurred speech, bloodshot eyes, or any other indicia of intoxication. In fact, the squad video shows Ms. W[redacted]' speech was perfect. The only indication of intoxication was the odor of alcohol coming from the car, which Officer J[redacted] reported could not be tied to Ms. W[redacted]. In her police report, Officer J[redacted] wrote,

"*I was unable to determine if the odor was coming from her breath or from inside of the vehicle*."

Without any field sobriety tests, Officer J[redacted] ordered Ms. W[redacted] to submit to a PBT "*to rule out the alcohol coming from her person versus from the inside of the vehicle*." In the squad video, Officer J[redacted] can be heard saying, "*because I do smell the alcohol, I'm just going to have you do the PBT and just make sure you blow zeros, which you're going to do because you said you haven't had anything to drink*."

According to the persuasive case law above, Officer J[redacted] did not have reasonable articulable suspicion to administer the PBT. All evidence of the test and everything after the test must be suppressed as fruit of the poisonous tree.

CONCLUSION

For the foregoing reasons, Ms. W[redacted] respectfully requests that this Court suppress the evidence and dismiss the Complaint due to lack of reasonable articulable suspicion to administer the preliminary breath test.

Respectfully submitted,

LAW OFFICES OF RYAN GARRY, LLC

Dated: April 11, 2014

s/ Ryan Garry

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