[redacted]

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota, | Court File No.: [redacted]

Plaintiff,

vs. | **MEMORANDUM OF LAW IN SUPPORT OF MOTIONS TO SUPPRESS EVIDENCE AND DISMISS CHARGES**

[redacted],

Defendant.

INTRODUCTION

On [redacted], 2022, Mr. [redacted] filed the following motions in the above-captioned case:

1. For an Order suppressing the evidence because Hennepin County Sheriff's Deputies Wong and Peterson lacked reasonable, articulable suspicion to initiate the traffic stop.

2. For an Order suppressing the evidence because Hennepin County Sheriff's Deputies Wong and Peterson conducted a pretextual stop.

3. For an Order suppressing the evidence because Hennepin County Sheriff's Deputy Wong unlawfully expanded the scope and extended the duration of the traffic stop.

4. For an Order suppressing the evidence because Mr. [redacted] was placed under de facto arrest without probable cause.

5. For an Order suppressing the evidence because Hennepin County Sheriff's Deputy Wong and other officers unlawfully detained Mr. [redacted] during the traffic stop.

6. For an Order suppressing the evidence because Hennepin County Sheriff's Deputy Wong, Sgt. Lorentz, and other officers lacked probable cause to search the vehicle.

7. For an Order suppressing Mr. [redacted]'s statements taken because they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

8. For an Order dismissing the case for the foregoing reasons.

On [redacted] 2022, Mr. [redacted] filed his *Brady* motion as well.

At the contested hearing on [redacted] 2023, defense counsel narrowed the motions to (1) whether the traffic stop was lawful and (2) whether the subsequent order to exit the vehicle, Mr. [redacted]'s subsequent and immediate arrest, and search of Mr. [redacted] and his vehicle violated the Fourth Amendment to the United States Constitution and the parallel provision of the Minnesota Constitution. U.S. CONST. amend. IV; MINN. CONST. art. I, § 10. All other motions were waived. At the hearing, the Court received the following exhibits:

1. Exhibit 1: Body camera of Deputy Wong (submitted by the State)
2. Exhibit 2: Photo of bag with gun (submitted by the State)
3. Exhibit 3: Photo of gun in bag (submitted by the State)
4. Exhibit 4: Body camera of Sgt. Lorentz (submitted by the State)
5. Exhibit 5: Body camera of Deputy Peterson (submitted by the State)
6. Exhibit 6: Flash drive of body camera footage (submitted by Defense)
    a. Exhibit 6A: Body camera of Deputy Wong
    b. Exhibit 6B: Body camera of Deputy Peterson
    c. Exhibit 6C: Body camera of Sgt. Lorentz
    d. Exhibit 6D: Body camera of Lieutenant Kirchoff
7. Court Exhibit 7: Transcript of Deputy Wong body camera (submitted by Defense)
8. Court Exhibit 8: Transcript of Deputy Peterson body camera (submitted by Defense)
9. Court Exhibit 9: Transcript of Sgt. Lorentz body camera (submitted by Defense)
10. Court Exhibit 10: Transcript of Lieutenant Kirchoff body camera (submitted by Defense)
11. Exhibit 11: Driver's side interior car photo (submitted by Defense)
12. Exhibit 12: Driver's side interior car photo (submitted by Defense)
13. Exhibit 13: Driver's side interior car photo (submitted by Defense)
14. Exhibit 14: Body camera still photo of flashlight pointing into vehicle, driver's side (submitted by Defense)
15. Exhibit 15: Body camera still photo of flashlight pointing to floor of driver's side (submitted by Defense)
16. Exhibit 16: Body camera still photo of flashlight pointing to floor of driver's side (submitted by Defense)
17. Exhibit 17: Body camera still photo of flashlight pointing into vehicle, driver's side (submitted by Defense)
18. Exhibit 18: Hennepin County Sheriff's Office Supplemental Report by Deputy Peterson (submitted by Defense)

Four witnesses testified: Deputy Jason Wong, Sgt. Steven Lorentz, Deputy Nick Peterson, and Mr. [redacted].

FACTS

Reason for Patrol

On [redacted] 2022, Deputy Nick Peterson and Deputy Wong were patrolling in Minneapolis, Minnesota (Ex. 18, p. 1). Deputy Wong testified that he was on the violent offender task force, stating:

> We do a lot of different things at our task force from proactive details to like the one on the night of this incident, all the way down to chasing fugitives, or people with violent gun histories, things like that nature.

(Tr. 10).[1] After his arrest, Mr. [redacted] said, "No, you all just like fucking with black people" (Ex. 10, p. 5).

Traffic Stop

At approximately 12:05 a.m., Deputies Peterson and Wong claimed that they observed Mr. [redacted]'s vehicle run a red light (Ex. 18, p. 1; Tr. 11, 48). Mr. [redacted] denied running a red light at the scene multiple times:

DEPUTY WONG:	Sit in the car. There you go. What's up, man? Why you running lights?
MR. [redacted]:	You said what?
DEPUTY WONG:	Why you running red lights?
MR. [redacted]:	I didn't run a red light. I was going through green, and that car came through. You didn't see him?
DEPUTY WONG:	I saw you running a red light.
MR. [redacted]:	I was going through green, and then that car was coming through, and I almost hit him.

[1] This citation refers to the page number of the contested hearing transcript.

DEPUTY WONG: What are you doing with your hand? Okay. Well, dude, I saw you run a red light, so that's — that's kind of what's going on here. All right? That's why I stopped you.

MR. [redacted]: I was going through green. You ain't see all that traffic book — backed up [inaudible] intersection?

DEPUTY WONG: Yeah. I saw you run a red light, bro, so — not a huge deal, but that's why I'm standing here. Okay?

MR. [redacted]: Okay.

(Ex. 7, p. 1). Later, after being arrested, Mr. [redacted] continued, "No, I didn't run no fucking red light" (Ex. 10, p. 5).

Deputy Wong testified there was no equipment violation or other driving conduct that prompted the traffic stop (Tr. 23–25). There was no evidence—other than running the red light—that indicated impairment (Tr. 25). Mr. [redacted] pulled over appropriately and did not flee (Tr. 25). Deputy Wong also testified that Mr. [redacted] had no clues of impairment:

ATTORNEY GARRY: Did you notice -- did he have bloodshot eyes?

DEPUTY WONG: Not that I recall.

ATTORNEY GARRY: Watery eyes?

DEPUTY WONG: Not that I recall.

ATTORNEY GARRY: Was he being evasive?

DEPUTY WONG: Not that I recall.

ATTORNEY GARRY: Did he appear to be nervous?

DEPUTY WONG: Not that I recall.

ATTORNEY GARRY: Was he shaking?

DEPUTY WONG: Don't recall that.

ATTORNEY GARRY: You asked him questions, right?

DEPUTY WONG: Yep.

ATTORNEY GARRY: He answered your questions?

DEPUTY WONG: Yes.

ATTORNEY GARRY: He told you that he didn't run a red light?

DEPUTY WONG: Yes.

ATTORNEY GARRY: Okay. He wasn't slurring his words?

DEPUTY WONG: Nope.

ATTORNEY GARRY: He wasn't mumbling or talking slow?

DEPUTY WONG: Nope.

ATTORNEY GARRY: He was talking normal, in your opinion?

DEPUTY WONG: Yes.

ATTORNEY GARRY: Was there any indication whatsoever that he was impaired by alcohol?

DEPUTY WONG: Running a red light could definitely be one.

ATTORNEY GARRY: Did you smell the odor of alcohol?

DEPUTY WONG: No.

ATTORNEY GARRY: Besides the running of the red light, was there any other clues that he was intoxicated?

DEPUTY WONG: No.

ATTORNEY GARRY: And you didn't suspect him of DWI, correct?

DEPUTY WONG: I think at one point I asked him if he'd been drinking because of his behavior but that was after I pulled him out.

ATTORNEY GARRY: And had he been drinking?

DEPUTY WONG: I don't know. We didn't -- we didn't pursue that.

ATTORNEY GARRY: Certainly, if you suspected he was under the influence of alcohol, you would have expanded your investigation to include DWI investigation, right?

DEPUTY WONG: What is your question?

ATTORNEY GARRY: If you would have -- if you had suspected he was under the influence of alcohol, would you have conducted a DWI investigation?

DEPUTY WONG: Possibly.[2]

(Tr. 26–27).

Odor of Marijuana

Deputy Wong spoke with Mr. [redacted] while Deputy Peterson spoke with the female passenger (Ex. 18, p. 1). In his report, Deputy Peterson wrote:

> While talking to the female, I could smell the odor of marijuana coming from the vehicle. I could also hear Deputy Wong talking to the driver . . . . I could hear and observe Deputy Wong asking [Mr. [redacted] about the smell of marijuana coming from the car, and then I observed Deputy Wong ask [Mr. [redacted] to step out of the vehicle which [Mr. [redacted] did without incident.

(Ex. 18, p. 1).

During the contested hearing, Deputy Wong testified that when Mr. [redacted] "rolled the window down[,] I could immediately smell the odor of marijuana coming from the vehicle" (Tr. 11). Later, he clarified that he believed he smelled the odor of *burnt* marijuana (Tr. 33–34). He denied, however, finding any evidence of burnt marijuana; he did not find a joint, a blunt, a one-hitter, a pipe, a bong, a can with holes, or any device in the vehicle or on Mr. [redacted] wherein marijuana could have been smoked (Tr. 34). Deputy Wong stated, "I don't know if [Mr. [redacted]] directly was [smoking marijuana], but someone in that vehicle was at some point" (Tr. 34–35). No marijuana, other than the suspected shake, was found (Tr. 35). Deputy Peterson stated that he smelled both burnt and fresh marijuana (Tr. 53).

Nowhere in any of the body camera footage are the words "marijuana" or "odor" mentioned prior the officers removing Mr. [redacted] from his vehicle. Deputy Peterson admitted

[2] Deputy Wong was clearly being evasive with defense counsel. It is undeniable that if officers observed clues of impairment that they would have conducted a DWI investigation. They did not do so here.

that his police report describing that he could hear a conversation about the odor of marijuana was simply wrong. In his explanation about the discrepancy, Deputy Peterson stated,

> In my report I indicate I can hear Deputy Wong talking to the driver identified as [redacted] about the smell of marijuana in the vehicle. After reviewing body camera from this incident in the last couple of weeks, Detective Wong never made that statement. At the time I wrote the report, that's what I believed was the conversation they were having, and that's why I wrote it.

(Tr. 50). Deputy Peterson never corrected his report despite knowing it contained facts that did not exist (Tr. 55).

Mr. [redacted] testified that he had not smoked marijuana for over 10 years, that he does not smoke because it makes his paranoid, and denied that there was marijuana in the vehicle (Tr. 57). He stated that the suspected shake was not marijuana, and that his vehicle did not smell like burnt or fresh marijuana (Tr. 57–58).

Mr. [redacted] Removed from His Vehicle & Detention[3]

At the contested hearing, Deputy Wong testified why he removed Mr. [redacted] from his vehicle:

> Several reasons. To start, this time, uh, [redacted][4] back in -- of last year there was a lot of violent gun crime in Minneapolis, um, Downtown Minneapolis. Around this time and still up to now there's -- it's still a violent place where there's a lot of gun crime. So that, kind of, is always in my mind when I'm doing proactive details or traffic stops around the city of Minneapolis, North Minneapolis, downtown. It's just a little – being a little more -- I don't know the word -- a lot more alert of the possibility of firearms and narcotics in and around that area. So that was kind of -- that's, kind of, always in the back of my brain when I'm in Minneapolis and in these areas.
>
> . . .
>
> On top of that, downtown at bar close around midnight and going forward is, there's alcohol involved with a lot of folks that can contribute to incidences and reckless

[3] During the stop, the officers were extremely derogatory towards Mr. [redacted] and his passenger. Deputy Wong asked Mr. [redacted] "Is there a reason why you're acting stupid?" (Ex. 7, p. 3). Deputy Wong told another officer, "What a clown, that lady," when referring to the female passenger (Ex. 7, p. 4). Deputy Wong later stated, "Now I know why you're acting stupid. Clown" (Ex. 7, p. 5). Later, an officer asked if Mr. [redacted] is a felon, and Lt. Kirchoff stated, "I would think so" (Ex. 10, p. 4).

[4] Later, Deputy Wong clarified that he meant [redacted], not [redacted] (Tr. 15).

> driving, other decisions that people would make – poor choices that wouldn't normally, possibly if they weren't intoxicated.
>
> . . .
>
> So, all those things I just mentioned. And then, uh, walking up there, like I said before, smelling the odor of marijuana. I have multiple times in my job encountered the smell of marijuana, seeing marijuana, just encountering narcotics in general. And then later, uh, later or at some time or at some time finding a firearm. I know that they're used in conjunction fairly often. Also, um, while up -- I think you can see as I step forward and look into his car a little more, I could see shake on the floor, little pieces of marijuana. And then I could see a bag right next to his left leg. It was like a smaller bag. And I have, again in my training and experience, found that – I've located a lot of firearms in those bags. So, when I stepped forward and saw that, that was another factor that made me feel that our safety was a concern.

(Tr. 14–16).

On cross-examination, Deputy Wong said that prior to ordering Mr. [redacted] out of the vehicle, he observed "[m]arijuana shake, pieces of marijuana, on the floorboard" (Tr. 28). Deputy Wong denied seeing any other contraband (Tr. 28).

Deputy Wong asked Mr. [redacted] for his identification, asked if the car was in park, and then ordered him out of the vehicle (Ex. 7, pp. 1–2). Deputy Wong refused to explain why he detained Mr. [redacted] and put him in handcuffs (Ex. 7, p. 2). During the contested hearing, Deputy Wong testified that he put Mr. [redacted] in handcuffs because "he was tensing up very much" (Tr. 16).[5]

Observation of Firearm

Deputy Peterson wrote that when Sgt. Lorentz arrived, and after Mr. [redacted] had been arrested, he heard Sgt. Lorentz say "gun" (Ex. 18, p. 1). Deputy Peterson wrote that the firearm was "located in a brown fanny pack on the driver side of the vehicle" (Ex. 18, p. 2).

[5] Deputy Wong also testified that Mr. [redacted] was not under arrest after he was handcuffed and placed in the squad car (Tr. 31–32). Incredibly, he testified that Mr. [redacted] could have broken out of the squad car despite Mr. [redacted] being handcuffed in the back and being in the rear seat with the door shut (Tr. 32).

During the contested hearing, Deputy Wong testified about the zipped fanny pack containing the firearm:

ATTORNEY GARRY:	And you stated that you saw a bag, correct?
DEPUTY WONG:	Yes.
ATTORNEY GARRY:	And in your experience that bag sometimes hold firearms, correct?
DEPUTY WONG:	Yeah. I have many times in my job seen similar bags that had guns in them.
ATTORNEY GARRY:	And that bag, you couldn't see the gun through the bag, could you?
DEPUTY WONG:	No.
ATTORNEY GARRY:	That bag could hold a lot of things, right?
DEPUTY WONG:	Yes.
ATTORNEY GARRY:	Credit cards, right?
DEPUTY WONG:	Sure.
ATTORNEY GARRY:	Money, right?
DEPUTY WONG:	Sure.
ATTORNEY GARRY:	Snickers bar, right?
DEPUTY WONG:	Sure.
ATTORNEY GARRY:	Could be anything in that bag, right?
DEPUTY WONG:	Not anything. But something that would fit in there, sure.

(Tr. 28–29). On redirect examination, Deputy Wong was asked whether the bag was a specific type, to which Deputy Wong stated, "Just that size. Not like a, you know, a big backpack. I've heard it referred to by a lot of cops as 'gun bags.' It's just a bag, medium sized, that a lot of – a lot of people wear around their body even and a lot of times there's guns in them" (Tr. 38). On

re-cross examination, Deputy Wong agreed that the bag appeared to be a zipped fanny pack, not a holster (Tr. 39).

Marijuana Shake

After Mr. was removed from the vehicle, officers searched the vehicle; Deputy Peterson reported that it was at that point that "marijuana shake was observed on the floor board" (Ex. 18, p. 2). Deputy Wong testified that "shake" is "just pieces of marijuana. People use it or sell it. Marijuana pieces will fall off of larger pieces, and it just happens all the time with users and dealers" (Tr. 17). Notably, the suspected marijuana shake was never gathered or tested to determine if it was in fact marijuana (Tr. 35, 46). After being asked by defense counsel, Deputy Wong conceded that the suspected shake could have been oregano or grass clippings, and that he simply did not know (Tr. 36). The following exchange occurred:

MR. GARRY:	It could have been leaves from Mr. 's shoes, right?
MS. LEVINSON:	Your Honor, calls for speculation.
MR. GARRY:	Well, he's speculating that it's marijuana, so I'm --
THE COURT:	I've got the point.
MR. GARRY:	Okay.
THE COURT:	So, I'm good.
MR. GARRY:	All right. I have no further questions. Thank you, Your Honor.

(Tr. 36). Sgt. Lorentz testified that he could smell smoked marijuana and saw the marijuana shake (Tr. 44). Sgt. Lorentz denied finding any smoking devices, joints, blunts, or pipes in the vehicle (Tr. 45). He also denied finding any marijuana other than the suspected shake (Tr. 45). Notably, Sgt. Lorentz agreed that the minimal shake would *not* have an odor of marijuana (Tr. 45).

ARGUMENT

Mr. [redacted]'s argument is three-fold. First, officers did not have reasonable articulable suspicion to initiate the traffic stop of Mr. [redacted]

Second, that despite the three law enforcement officers' testimony at the contested hearing, no odor of marijuana emanated from Mr. [redacted]'s vehicle on the night he was arrested.

Third, in the alternative, even if an odor existed, that odor coupled with the alleged petty misdemeanor traffic violation did not establish probable cause to remove Mr. [redacted] from the vehicle, handcuff him, and search him and his vehicle. *See State v. Torgerson*, No. A22-0425, 2022 WL 6272042 (Minn. Ct. App. Oct. 10, 2022) (unpublished, attached) *review granted* (Minn. Dec. 28, 2022).

A. Deputies Peterson and Wong Lacked Reasonable, Articulable Reason to Initiate the Traffic Stop of Mr. [redacted]

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 his 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).

(1) Running a red light

Deputies Peterson and Wong both testified that Mr. [redacted] ran a red light. Mr. [redacted] repeatedly denied running a red light during the traffic stop. For an unknown reason, there is no squad video available; thus, there is no objective evidence of Mr. [redacted]'s driving conduct. Without a squad video, this Court must determine whether Deputies Peterson and Wong are credible given their inconsistent testimony on the other issues in this case. There are multiple reasons why the answer to that question is no.

First, the lack of a squad video depicting the violation, despite the fact that one should exist, makes the deputies not credible. The undersigned rarely has observed a case involving driving conduct where a squad video does not exist, and this typically occurs in suburban cases. The fact that Hennepin County deputies did not have a squad video running[6] calls their credibility into question. Having a squad video protects both the accused and the officers from providing false information, or simply making mistakes, which is exactly the issue here. Did Mr. [redacted] run a red light or not? If he did run the red light, defense counsel concedes that the deputies had a valid reason for the stop. But there is no video.

Second, Deputy Peterson's lie (or supposed mistake) in his police report about what he heard from Deputy Wong during the stop support defense counsel's position that he and Deputy Wong are not credible. Deputy Peterson wrote that he heard Deputy Wong discuss the odor of marijuana with Mr. [redacted]. No such conversation exists. Deputy Peterson testified and tried to explain this lie (or mistake) by stating he misremembered what occurred. But this does not make logical sense. The more logical explanation is that he later invented this conversation to justify the seizure, search, and arrest of Mr. [redacted]. Because they were partners and in the same squad

[6] In the undersigned's experience, the squad cameras provided to defense counsel typically start recording 30 seconds before the officer activates their squad lights.

car, they easily could have agreed on a story to justify their unconstitutional stop. Moreover, his own colleague, Sgt. Lorentz, conceded that minimal marijuana shake would not elicit an odor.

Third, Deputy Wong, for the first time at the contested hearing, tried to justify the seizure, search, and arrest by stating that Mr. [redacted] may have been intoxicated. A ridiculous allegation. While he may be correct that running a red light could be a sign of intoxication, there were no other indicia of intoxication, which he finally conceded on cross-examination. Mr. [redacted] did not drive erratically or have any equipment violations. Mr. [redacted] also pulled over lawfully and did not flee. Deputy Wong's first-time claim that Mr. [redacted] could have been intoxicated is negated by his own testimony. He was clearly grasping at straws, knowing that his credibility was being called into question when defense counsel cross-examined him.

For these reasons, Deputies Wong and Peterson are not credible, and this Court should disregard their testimony, statements, and report regarding the reason for the stop.

(2) The true reason for stopping Mr. [redacted]

Deputy Wong used the increasing crime rate in Minneapolis to justify an unconstitutional and invalid stop, seizure, and search; he testified that they were patrolling Minneapolis to conduct

> Proactive details to like the one on the night of this incident, all the way down to chasing fugitives, or people with violent gun histories, things like that nature.

(Tr. 10). The reason they stopped Mr. [redacted], however, is revealed in Deputy Wong's reasoning to pull Mr. [redacted] out of his vehicle: violent gun crime in Minneapolis and people being intoxicated after bar close. Deputy Wong, however, testified that other than allegedly running a red light, there was no indication that Mr. [redacted] was intoxicated, and no indication that he possessed a firearm. Thus, the only true reason for stopping Mr. [redacted] was the "gun violence" in Minneapolis. In other words: a Black man driving a nice car in Minneapolis at night. This

was the true reason for the stop, and it was completely pretextual and unconstitutional. The justification of Mr. [redacted] running a red light was invented by Deputies Wong and Peterson. They wanted to shake down a Black man, assuming he must have a gun and/or drugs. When the testimony is taken in whole, that is the only logical conclusion that can be made.

There was absolutely no legal or constitutional reason to pull Mr. [redacted] over. He is another man of color racially profiled by law enforcement. As depicted in the body cameras, and the "mistakenly written" police report, all of the *evidence* justifying the traffic stop and eventual seizure and arrest was manufactured after the arrest. Accordingly, all evidence should be suppressed and this case dismissed.

However, if this Court determines that the deputies are credible regarding Mr. [redacted] running a red light, there is still a basis for dismissal due to the illegal expansion of the stop.

B. Deputy Wong Lacked Reasonable, Articulable Suspicion to Expand the Stop

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). Evidence obtained as a

result of the unlawful expansion of a traffic stop must be suppressed. *Askerooth*, 681 N.W.2d at 370; *Syhavong*, 661 N.W.2d at 282–83.

(1) The officers are not credible when they claimed to smell marijuana

Deputies Wong and Peterson testified that they smelled the odor of marijuana. Notably, the three officers that testified at the contested hearing disagreed about what they smelled. Deputy Wong and Sgt. Lorentz stated they smelled burnt marijuana, but Deputy Peterson testified that he smelled both burnt and fresh marijuana. Even more telling, not a single officer involved in the arrest and search discussed amongst themselves the odor of burnt or fresh marijuana at the scene. The body camera videos are entirely devoid of any such discussion.

First, the officers did not find *any* evidence that the odor of burnt marijuana would have existed—no joint, blunt, one-hitter, pipe, bong, can with holes, or other smoking device either in the vehicle or on Mr. [redacted]. No marijuana. The only evidence of possible marijuana was the suspected shake, which Sgt. Lorentz testified would not have given off an odor. Second, as noted above, the fact that no officer mentioned the odor of marijuana on their body cameras shows that this was a fact that was invented after the arrest. Deputy Wong asked Mr. [redacted] if he was drunk, but he did not ask Mr. [redacted] if he was high. No one mentioned Mr. [redacted]'s pupils or an odor coming from him directly. Third, Deputy Peterson lied in his police report when he said Deputy Wong talked to Mr. [redacted] about the odor of marijuana. That was revealed when defense counsel reviewed the body cameras. A lie that he failed to correct when he discovered it. Fourth, Deputy Wong conceded that the suspected shake could have been something else, like oregano or grass, because no one gathered and tested the substance.

For these reasons, the officers are not credible.

However, if this Court finds that the officers are credible, the odor of marijuana is not sufficient to expand the scope of the traffic stop.

(2) Odor of marijuana is not sufficient to expand the scope of the stop

While Minnesota has found that the odor of marijuana coupled with other factors has been sufficient to justify a warrantless search, *see, e.g.*, *State v. Ortega*, 749 N.W.2d 851 (Minn. Ct. App. 2008) *affirmed but criticized* 770 N.W.2d 145 (Minn. 2009), it is expected that *Torgerson* will change the law given the legality of some cannabis products and the risk of abuse by law enforcement.

In *State v. Torgerson*, a case remarkably similar to the instant case, the defendant was pulled over for a suspected equipment violation. No. A22-0425, 2022 WL 6272042, *1 (Minn. Ct. App. Oct. 10, 2022) (unpublished, attached) *review granted* (Minn. Dec. 28, 2022). The officer claimed to smell the burnt odor of marijuana. *Id.* A second officer also claimed to smell the odor of burnt marijuana. *Id.* Both officers agreed the odor was strong but moderate. *Id.* The officers searched the vehicle, and they found a suspected controlled substance, but no marijuana. *Id.* The district court dismissed the charges, finding that the officers did not have probable cause to justify the search of the vehicle. *Id.* The State appealed. *Id.*

The Court of Appeals affirmed, stating, "We do not reach the issue of whether the odor of marijuana, alone, is enough to establish probable cause, because after evaluating the totality of the circumstances in this particular case, we agree that the state lacked probable cause to conduct a vehicle search." *Id.* at *2. The court noted that there was no evidence of a traffic violation or unsafe or erratic driving, no indicia of impairment (such as bloodshot eyes), and no nervousness, evasiveness, or furtive movements. *Id.* at *3. Further, the officers did not find any drugs or drug paraphernalia in plain sight. *Id.* Thus, the officers lacked probable cause to search. *Id.*

The State has appealed the case to the Minnesota Supreme Court. The Minnesota Association of Criminal Defense Attorneys has now filed an amicus brief.[7] The arguments in *Torgerson* apply to Mr. [redacted].

To begin, the odor of marijuana does not necessarily indicate criminality. Industrial hemp is legal in Minnesota. MINN. STAT. § 18K.02, subdiv. 3. Edibles containing 5 milligrams or less of tetrahydrocannabinol ("THC") recently became legal in Minnesota. MINN. STAT. § 151.72.

When officers smell cannabis, now legal in some forms, they should not act any differently than when they smell alcohol alone, which does not justify a vehicle search. *State v. Burbach*, 706 N.W. 2d 484, 489 (Minn. 2005). It may be, when coupled with other factors, reason to suspect someone is driving under the influence of alcohol. *Id.* The same should be true of cannabis. In *State v. Parker*, the North Carolina Court of Appeals stated:

> Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant.

State v. Parker, 860 S.E.2d 21, 28–29 (N.C. Ct. App. 2021) (not addressing the issue because there were other grounds for probable cause when a Defendant admitted he just smoked a joint and showed it to the officers). Massachusetts similarly found that smell is too subjective in its nature to note quality, amount, or kind of cannabis:

> The officers in this case detected what they described as a "strong" or "very strong" smell of unburnt marijuana. However, such characterizations of odors as strong or weak are inherently subjective; what one person believes to be a powerful scent may fail to register as potently for another. Moreover, the strength of the odor perceived likely will depend on a range of other factors, such as ambient temperature, the presence of other fragrant substances, and the pungency of the specific strain of marijuana present. As a subjective and variable measure, the

[7] Attached.

> strength of a smell is thus at best a dubious means for reliably detecting the presence of a criminal amount of marijuana.

Commonwealth v. Overmyer, 469 Mass. 16, 21–22, 11 N.E.3d 1054, 1059 (2014) (internal citations omitted).

Further, the odor of marijuana used as a pretextual reason to expand a stop to a search of a vehicle is at severe risk of misuse of police power. This is shown by the expansion of stops on 1,130 Black and East African people in a one-year period in Minneapolis where their vehicle was searched but no citation or charge was issued. *See State v. Isaac Early*, 27-CR-20-7960, Order, p. 6 (Hennepin County District Court Jan. 29, 2021).[8] The Court stated:

> Defendant presented certified data of all recorded Minneapolis Police Department ("MPD") traffic stops between June 1, 2019 and May 31, 2020 that involved Black or East African drivers who were stopped for a traffic violation and had their person or vehicle searched but did not receive a citation and were released under an "advised" or "all ok" disposition code—i.e., a search occurred resulting from a traffic stop but no arrests were made of citations issued.

Id. It is logical to conclude that if there was no additional crime discovered, regardless of the proffered justification for the search, then the reason given for the expansion of the stop was not legitimate. A nationwide study, analyzing 100 million police stops, found that Black and Hispanic persons are stopped more frequently than white persons and that those stops resulting in searches were less likely to reveal contraband:

> Our data shows that Black and Hispanic drivers are searched at higher rates, but those searches are less likely to find contraband, so the threshold test concludes that Black and Hispanic drivers are searched at lower thresholds, suggesting discrimination.

Emma Pierson, *Barr says there's no systemic racism in policing. Our data says the attorney general is wrong*, THE WASHINGTON POST (June 20, 2020).

[8] Attached.

This is also shown by the Minnesota Department of Human Rights' investigation into Minneapolis police, which found that Minneapolis police engaged in race-based policing. *Minnesota Department of Human Rights: Investigation into the City of Minneapolis and the Minneapolis Police Department, Findings issued April 27, 2022*. The report cited as evidence of what it called the department's pattern of unlawful, discriminatory practices: racial disparities in how officers "use force, stop, search, arrest, and cite people of color, particularly Black individuals, compared to white individuals in similar circumstances." *Id.* at p. 8.

Given these reasons, this Court should find that the alleged odor of marijuana did not justify Deputy Wong expanding the scope of the traffic stop.

C. Mr. [redacted] Was Detained and Placed Under De Facto Arrest, and His Car Was Searched, Without Probable Cause

Only after Mr. [redacted] was removed from the vehicle did officers see the suspected shake and the firearm. A brief timeline of events is as follows:

12:05:40	Deputy Wong approaches Mr. [redacted] and they discuss the reason for the stop (Ex. 6A)
12:06:10	Deputy Wong asks Mr. [redacted] for his identification (Ex. 6A)
12:06:23	Deputy Wong asks Mr. [redacted] if his car is in park (Ex. 6A)
12:06:26	Deputy Wong opens Mr. [redacted]'s car door (Ex. 6A)
12:06:28	Deputy Wong tells Mr. [redacted] to get out of the vehicle (Ex. 6A)
12:06:30	Deputy Wong tells Mr. [redacted] that he is being detained, but is not under arrest (Ex. 6A)
12:06:55	Deputy Wong tells Mr. [redacted] that he is getting handcuffed (Ex. 6A)
12:07:01	Deputy Wong handcuffs Mr. [redacted] (Ex. 6A)
12:07:52	Sgt. Lorentz looks in the car and says, "there's shake right there" (Ex. 6C).
12:08:34	Sgt. Lorentz says, "got a gun in here" (Ex. 6C)

Deputy Wong had absolutely no reason to detain Mr. [redacted], and Sgt. Lorentz had absolutely no reason to search the car. There was no mention of the suspected shake or a firearm at the time Mr. [redacted] was ordered out of his car and detained and the car searched.

"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 282; *State v. Bergerson*, 659 N.W.2d 791, 795 (Minn. Ct. App. 2003) ("Reasonable, articulable suspicion must be present at the moment a person is seized." (citations omitted)).

"[A] warrantless arrest is unreasonable unless it is supported by both probable cause and an exception to the warrant requirement." *State v. Velisek*, 971 N.W.2d 111, 114 (Minn. Ct. App. 2022) (citation omitted). "Minnesota caselaw recognizes that a 'de facto arrest' may occur if a person has not been formally arrested but effectively has been arrested because the person's liberty has been restrained to an extent that exceeds the scope of a lawful investigative detention." *State v. Thompson*, 929 N.W.2d 21, 27 n.1 (Minn. Ct. App. 2019). "Pretext arrests by the police cannot be used to justify and legitimate otherwise illegal searches and seizures." *State v. Hoven*, 269 N.W.2d 849, 852 (Minn. 1978); *State v. Curtis*, 190 N.W.2d 631, 635 (Minn. 1971) ("Courts uniformly have forbidden the use of a minor traffic offense as a pretext for searches directed at unrelated offenses.").

The United States and Minnesota Constitutions safeguard the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and mandate that "[n]o warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." U.S. CONST. amend. IV; MINN. CONST. art. I, § 10. Though a warrant is not needed to

search a vehicle, law enforcement still needs probable cause that the vehicle contains contraband in order to conduct a legal search. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007).

Probable cause to search exists if "a person of ordinary care and prudence [would] entertain an honest and strong suspicion that a crime has been committed" and "a 'fair probability [indicates] that contraband or evidence of a crime will be found in a particular place.'" *State v. Johnson*, 314 N.W.2d 229, 230 (Minn. 1982) (citation and inner quotation marks omitted); *Carter*, 697 N.W.2d at 204–05 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Minnesota has adopted the "totality of the circumstances" test for determining whether probable cause to issue a search warrant existed. *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985). Under the totality of the circumstances test, "[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (quoting *Gates*, 462 U.S. at 238).

When Mr. [redacted] was ordered out of the vehicle and handcuffed, there was no probable cause that he had committed a crime. While deputies claimed to smell marijuana, no evidence supports this. Further, Sgt. Lorentz testified that the suspected shake would not have given off any odor. Mr. [redacted] testified that his car would not have smelled of marijuana. No evidence of smoking or possessing or selling marijuana was found. Thus, there was no probable cause to detain or arrest Mr. [redacted] or search his vehicle.

D. All Evidence Should Be Suppressed as Fruit of the Poisonous Tree

"It is fundamental that 'all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.'" *State v. Mathison*, 263 N.W.2d 61, 63 (Minn. 1978) (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1963)). All evidence obtained as a result of an

illegal search or seizure must be suppressed as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471 (1963).

CONCLUSION

For the foregoing reasons, Mr. [redacted] respectfully requests that this Court suppress the evidence and dismiss the case.

Respectfully submitted,

RYAN GARRY, ATTORNEY, LLC

Dated: [redacted]2023

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Court of Appeals of Minnesota.

STATE of Minnesota, Appellant,

v.

Adam Lloyd TORGERSON, Respondent.

A22-0425

Filed October 10, 2022

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Meeker County District Court, File No. 47-CR-21-606

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Considered and decided by Reilly, Presiding Judge; Larkin, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

*1 In this pretrial appeal from the district court's order suppressing evidence and dismissing charges against respondent, appellant argues that the district court erred as a matter of law by ruling that the odor of marijuana did not provide probable cause for police to search respondent's vehicle. We affirm.

FACTS

In July 2021, a Litchfield Police Department police officer initiated a traffic stop for a suspected equipment violation for a vehicle carrying a light bar.[1] The officer identified respondent Adam Lloyd Torgerson as the driver. The officer also saw a woman and a minor child sitting in the front passenger seat. The officer testified that while speaking with Torgerson, he "could smell a strong odor of burnt marijuana." A second officer then arrived on the scene. The first officer told the second officer that he "could smell marijuana and it wasn't rolling out of the vehicle." The first officer explained that in some cases, an officer can smell the odor of burnt marijuana "before you even get to the window." Here, however, the first officer could not smell the odor of marijuana before he walked up to the vehicle. The state's counsel asked the first officer how strong the odor of marijuana was "in terms of ... a continuum." The first officer testified that the odor was neither overpowering nor faint. The first officer estimated that on a scale of one to ten, the odor was a "[f]ive." The second officer also testified that he could "immediately s[m]ell the odor of burnt marijuana coming from inside the vehicle." The second officer stated that it "definitely wasn't the faintest ... and it definitely wasn't the strongest," and agreed that the odor of marijuana was "somewhere in the middle."

The officers asked the occupants to step out of the vehicle and conducted a vehicle search. The officers found three pipes; a clear plastic baggie containing a white, powdery substance; and a container holding a brown, crystal-like substance in the center console of the vehicle. The officers did not find any marijuana in the vehicle. The white, powdery substance and the brown, crystal-like substance both field-tested positive for methamphetamine.

Appellant State of Minnesota charged Torgerson with felony possession of methamphetamine paraphernalia in the presence of a minor child and fifth-degree felony possession of a controlled substance. Torgerson moved to suppress the evidence and dismiss the complaint for lack of probable cause. At the omnibus hearing, Torgerson argued that the officers illegally expanded the stop based solely on the odor of marijuana. The district court determined that the search of the vehicle was "not reasonable," and that there "was not probable cause to believe criminal activity was afoot to justify a warrantless search of [Torgerson's] vehicle." The district

court determined that probable cause did not support the state's charges and dismissed the complaint. The state now appeals.

DECISION

I. Critical Impact

***2** We consider as a threshold question whether the state is entitled to appellate review. *State v. Lugo*, 887 N.W.2d 476, 481 (Minn. 2016). The state's ability to appeal in a criminal case is limited. *Id.* (citation omitted). Dismissal of a complaint satisfies the critical-impact requirement because it impairs the state's ability to prosecute the charged offense. *State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001), *rev. dismissed* (Minn. June 22, 2001). The district court's dismissal of the charge precludes any trial in this case; as a result, the critical-impact test is satisfied, and we proceed to a review on the merits. *See Lugo*, 887 N.W.2d at 481-86 (permitting appellate review on the merits once critical impact is established).

II. Probable Cause

The United States and Minnesota Constitutions protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. A warrantless search is presumptively unreasonable unless it falls within one of the recognized exceptions to the warrant requirement. *State v. Milton*, 821 N.W.2d 789, 798-99 (Minn. 2012). "The state bears the burden of establishing the applicability of an exception [to the warrant requirement]." *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003). Evidence obtained during an unconstitutional search or seizure must be suppressed. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011).

One exception to the warrant requirement is the "automobile exception," which allows police officers to search a vehicle, including closed containers, when "there are facts and circumstances sufficient to warrant a reasonably prudent [person] to believe that the vehicle contains contraband." *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016) (quotation omitted). Determining whether there is probable cause requires an objective inquiry that evaluates the totality of the circumstances in a particular case. *Id.* These circumstances include the reasonable inferences that law enforcement officers may make based on their training and experience. *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). Additionally, "each incremental intrusion during a stop must be strictly tied to and justified by the circumstances which rendered the initiation of the stop permissible." *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (quotations omitted). An intrusion not strictly tied to the circumstances that made the initial stop permissible must be supported by "at least a reasonable suspicion of additional illegal activity." *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012).

The state argues that the officers had probable cause to search Torgerson's vehicle for controlled substances because there was probable cause to believe he was driving while impaired. Both officers testified that when they approached the vehicle, they smelled a strong odor of burnt marijuana coming from inside the vehicle. Minnesota law recognizes that the odor of marijuana coming from a vehicle can establish probable cause for a vehicle search. *See State v. Schultz*, 271 N.W.2d 836, 837 (Minn. 1978) (stating that the automobile exception applies when an officer smells marijuana emanating from a car); *see also State v. Thiel*, 846 N.W.2d 605, 609 (Minn. App. 2014) (holding that a vehicle search was justified because the officer "detected a 'strong' and 'overwhelming' odor of marijuana emanating from the vehicle"), *rev. denied* (Minn. Aug. 5, 2014).

The district court rejected the state's argument, determining that while the police officers had an objective basis to stop the vehicle for an equipment violation, they "had no probable cause that a search of the automobile would result in the discovery of evidence or contraband." The district court determined that a smell of marijuana alone is not enough to support probable cause, particularly since the Minnesota Legislature decriminalized marijuana in 1976. We do not reach the issue of whether the odor of marijuana, alone, is enough to establish probable cause, because after evaluating the totality of the circumstances in this particular case, we agree that the state lacked probable cause to conduct a vehicle search.

***3** Here, the officer stopped Torgerson's vehicle because it had a light bar mounted to its grill and the officer believed the number of lights exceeded the number allowable by Minnesota law. The officer testified he did not see Torgerson commit a traffic violation or drive in an unsafe or erratic manner. *Cf. Thiel*, 846 N.W.2d at 609-11 (determining that officer had probable cause because defendant was speeding and handed officer a ceramic smoking pipe with a small amount of partially burnt marijuana). The first officer approached the vehicle and smelled a strong odor of

marijuana. He did not recall noticing whether Torgerson had bloodshot eyes or other indicia of impairment. The second officer also smelled the odor of burnt marijuana coming from inside the vehicle. Other than the smell, however, the second officer agreed that neither he, nor the first officer, had observed any indicia of impairment or intoxication of either Torgerson or his passenger. The record contains no evidence that Torgerson was nervous, evasive, or engaged in furtive gestures while inside the vehicle. *Cf. State v. Ortega*, 749 N.W.2d 851, 853-54 (Minn. 2009) (holding that officer had probable cause to search vehicle based on defendant's nervous and evasive conduct and because defendant handed officer a small amount of marijuana), *aff'd*, 770 N.W.2d 145 (Minn. 2009). And the officers testified they did not see any evidence of drugs or drug paraphernalia sitting in plain sight. Given the totality of the circumstances, the officers did not have the requisite probable cause to believe that a search of the vehicle would reveal evidence of a crime or contraband.

III. The District Court's Order

While we affirm the district court's suppression decision, we note some concerns with the district court's order. The district court judge's role is to act as an "impartial decision-maker and objective observer." *State v. Malone*, 963 N.W.2d 453, 468 (Minn. 2021). But here, the district court made several findings of fact that are based on information outside the record, based its conclusions of law on these improper findings, and drafted a memorandum that raises concerns regarding the judge's partiality.

The District Court's Findings of Fact

We review the district court's factual findings for clear error. *State v. Stavish*, 868 N.W.2d 670, 677 (Minn. 2015). A clear error occurs when there is no reasonable evidence supporting the finding. *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008) (quotation omitted). Here, the district court made several factual findings that are not supported by any evidence in the record and thus are clearly erroneous. For example, the district court made a factual finding that "different strains [of marijuana] have different odors," and that "[t]he quantity, strain[,] and quality have a lot more to do with odor than whether the marijuana has been burnt or not. The human nose simply does [not] have sufficient nerve endings to differentiate quality or quantity, smoked or unsmoked marijuana." The district court found that "[t]he odor of marijuana can linger on the clothes and hair of people who have smoked marijuana or been around someone who has smoked marijuana." And the district court discussed the policies of the Minnesota Department of Health and marijuana "flowers" for prescription use of marijuana. The district court also stated that "there are vast numbers of citizens who use and possess non-criminal amounts of marijuana." The record does not provide evidentiary support for these findings.

The District Court's Conclusions of Law

We review questions of law de novo. *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018). The district court's conclusions of law should be grounded in the facts in the record. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). Here, the district court stated several conclusions of law that are not meaningfully tied to its factual findings or are irrelevant to the issue presented. Specifically, the district court made conclusions of law related to dog-sniff searches in other jurisdictions and discussed "corroborated information provided by a confidential informant." Because the officers did not conduct a dog-sniff search or use information supplied by a confidential informant, we reject these conclusions as irrelevant.

The District Court's Memorandum

We note, finally, that the district court's memorandum is filled with statements that could reasonably cause a reader to question the court's impartiality. The district court begins by stating that the court "has watched in amazement as our society turns from the community policing model to paramilitary-style policing." The memorandum made a global statement faulting local police departments for failing to train their officers on "compassionate conflict resolution" and instead offering "SWAT training." The district court states that this difference is "obvious and concerning." The district court maligns the officers for conducting a traffic stop and search of a vehicle in the presence of a young child. The memorandum asks, "Does anyone involved think that this child will grow up to believe law enforcement is here to serve and protect? Can these officers see how their actions did not help and may have contributed to societal harm?" The district court made questionable statements about the integrity of the police officers generally and the two arresting police officers personally.

*4 We are troubled by these comments, which are highly subjective and cast doubt on the impartiality of the judiciary. We reject each of the district court's gratuitous comments. Yet despite our concerns about the district court's unconventional approach to the issue, for the reasons set forth above and based

on our review of the totality of the circumstances in this case, we affirm.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2022 WL 6272042

Footnotes

1 The facts in this section derive from the evidence presented at the suppression hearing.

End of Document

A22-0425

STATE OF MINNESOTA

SUPREME COURT

STATE OF MINNESOTA

Appellant,

vs.

Adam Lloyd Torgerson,

Respondent.

AMICUS BRIEF ON BEHALF OF THE MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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INTRODUCTION

The Minnesota Association of Criminal Defense Lawyers[1] ("MACDL") submits this brief in favor of Respondent. The Minnesota Association of Criminal Defense Lawyers is a non-profit state-wide organization of defense lawyers seeking to uphold Constitutional rights and ensure justice for all, particularly from unchecked power of the government against the rights of individuals.

The issue in this case is whether the warrantless search of a motor vehicle based on the smell of cannabis alone is unreasonable under Article 1, Section 10 of the Minnesota Constitution. The appellate and district courts correctly suppressed the search of a motor vehicle based on smell of marijuana alone- similar to the limits on searches based on the smell of alcohol. Cannabis is legal in Minnesota in small amounts of marijuana and in the form of hemp, neither of which a drug sniffing dog nor an officer could tell the difference of form nor amount by smell.

Furthermore, expanded traffic stops based on the smell of marijuana alone are ripe for abuse by law enforcement as a pretext to search motor vehicles.

MACDL submits this brief in support of Respondent.

[1] Undersigned counsel are the sole authors of this brief and received no monetary contributions to the preparation or submission of this brief.

ARGUMENTS

I. The smell of cannabis alone does not necessarily indicate criminality sufficient to justify a vehicle search. That which we call cannabis, by any other name would smell the same.

Industrial hemp has been legal and defined as not marijuana in Minnesota by statute since July 1, 2019. Minn. Stat. §18K.02 subd. 3. Marijuana that is 5 milligrams or less of tetrahydrocannabinol (herein after "THC") recently became legal in Minnesota. Even drug-sniffing dogs cannot distinguish between hemp and marijuana, nor the legal limit of THC, so how could a human? *See, for example*: Bill, Bush. (August 10, 2019), "Police Dogs Can't Tell the Difference Between Hemp and Marijuana." Akron Beacon Journal; Hermann, Peter and Jouvenal, Justin. (July 4, 2021),"Decriminalization of Marijuana is Pushing Pot-Sniffing Dogs into Retirement" The Washington Post.

In its Amicus Curie, the County Attorneys' Association points out that of 2,017 people who were seriously injured or killed in 2022, 26.5% tested positive for some form of cannabis. They note that 26.3% of that same population tested positive for alcohol.[2] The numbers are virtually the same, and the crime of being a driver while intoxicated

[2] Marijuana is arguably much less dangerous than alcohol, in that it can provide relief for certain medical conditions. For example: The State of Minnesota's Department of Health has a government operated website detailing what conditions are treatable with medical marijuana and how to obtain it. *See* https://www.health.state.mn.us/people/cannabis/patients/index.html. There are no medical benefits to alcohol, and there are no similar state operated websites enabling people to obtain access to alcohol. The State of Minnesota lists these conditions as treatable with prescribed marijuana: Alzheimer's disease, amyotrophic lateral sclerosis (ALS), autism spectrum disorder (must meet DSM-5), cancer, chronic motor or vocal tic disorder, chronic pain, glaucoma, HIV/AIDS, inflammatory bowel disease, including Crohn's disease, intractable pain, irritable bowel syndrome, obsessive-compulsive disorder, obstructive sleep apnea, post-traumatic stress disorder (PTSD), seizures, including those characteristic of epilepsy, severe and persistent muscle spasms, including those characteristic of multiple sclerosis (MS), sickle cell disease, terminal illness with a probable life expectancy of less than one year, and Tourette syndrome.

should be treated the same- but that is not the issue before the Court. The issue is whether the smell of cannabis, now legal in some forms and amounts, should be treated any differently than when an officer illegally searches a vehicle based on the smell of alcohol alone; it shouldn't.

In *Parker*, the North Carolina Court of Appeals noted, "Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant." *State v. Parker*, 860 S.E.2d 21, 28-29 (N.C. Ct. App. 2021) (not addressing the issue because there were other grounds for probable cause when a Defendant admitted he just smoked a joint and showed it to the officers).

In *Overmyer*, the Massachusetts Supreme Court also found that smell is too subjective in its nature to note quality, amount, or kind of cannabis:

> The officers in this case detected what they described as a "strong" or "very strong" smell of unburnt marijuana. However, such characterizations of odors as strong or weak are inherently subjective; what one person believes to be a powerful scent may fail to register as potently for another. See Doty, Wudarski, Marshall, & Hastings, Marijuana Odor Perception: Studies Modeled from Probable Cause Cases, 28 Law & Hum. Behav. 223, 232 (2004) (identifying traits such as gender and age that may influence ability to smell). Moreover, the strength of the odor perceived likely will depend on a range of other factors, such as ambient temperature, the presence of other fragrant substances, and the pungency of the specific strain of marijuana present. See State v. Pollman, 286 Kan. 881, 894 (2008) ("the strength of the smell is subjective and also depends on factors such as masking agents [chewing gum, mints, tobacco products] and the environment where the odor is detected"); Doty, Wudarski, Marshall, & Hastings, supra at 231-232 (participants in experiment displayed weaker ability to detect odor of immature female marijuana plant as compared to that of mature plant, and ability to discern smell was affected by presence of diesel exhaust fumes; temperature also can influence potency of odor perceived). As a subjective and

> variable measure, the strength of a smell is thus at best a dubious means for reliably detecting the presence of a criminal amount of marijuana.

Com. v. Overmyer, 469 Mass. 16, 20, 11 N.E.3d 1054, 1058 [at 21-22?] (2014).

The smell of alcohol alone does not justify a vehicle search. *State v. Burbach*, 706 N.W. 2d 484, 489 (Minn. S. Ct. 2005). It may be, coupled with behavior, reason to suspect someone is driving under the influence of alcohol to the point it affects their ability to drive safely, at which point, an officer has a justifiable reason to investigate whether that person is intoxicated to the point of impairment. The same should be true of cannabis.

The protections against unreasonable searches and seizures in Minnesota are broader than those under the Fourth Amendment to the U.S. Constitution. The Minnesota Supreme Court has held that under Article I, Section 10 of the Minnesota Constitution "the scope and duration of a traffic stop investigation must be limited to the justification for the stop." *Burbach* at 488 *quoting State v. Fort,* 660 N.W.2d 415, 418 (Minn. 2003). In Minnesota, any "intrusion not closely related to the initial justification for the search or seizure is invalid...unless there is independent probable cause or reasonableness to justify that particular intrusion." *State v. Askerooth,* 681 N.W.2d 353, 364 (Minn. 2004). Moreover, the basis for the intrusion must be "particularized" and "individualized to the driver." *Askerooth,* 681 N.W.2d at 364; *Fort,* 660 N.W.2d at 418.

Any request to search a vehicle must be justified by either (1) the original purpose of the stop; or (2) a "reasonable articulable suspicion of other criminal activity." *Fort,* 660 N.W.2d at 419. To be "reasonable," the intrusion must be supported by an

objective and fair balancing of the government's need to search against the individual's right to personal security. *Askerooth,* 681 N.W.2d at 364-65.

The Court of Appeals held that given the totality of the circumstances, the officers did not have probable cause to suspect that Mr. Torgerson's vehicle would reveal evidence of a crime or contain contraband. *State v. Torgerson*, No. A22-0425, 2022 WL 6272042, at *2 (Minn. Ct. App. Oct. 10, 2022), review granted (Dec. 28, 2022). The officers did not note any indica of impairment of Mr. Torgerson, but said they could smell marijuana, and that the smell alone was the reason for the vehicle search. *Id.*

In *Burbach*, the smell of alcohol alone, without other evidence of criminality, was held insufficient to justify the search of the car even for an open container:

> At best, these facts provide only an attenuated inference of an open container. 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.

Burbach at 489 citing *State v. Wiegand,* 645 N.W.2d 125, 131 (Minn. 2002). Under an individualized and particularized analysis of the totality of the circumstances here, the smell of cannabis alone cannot justify the infringement the substantial privacy interest in motor vehicles that the Minnesota Constitution ensures. *State v. Wiegand*, 645 N.W.2d 125, 131 (Minn. 2002).

II. In other states the smell of cannabis is not considered probable cause to search a vehicle.

The County Attorney's Association cites *Seckinger* to say, "most state and federal courts agree that the odor of marijuana alone furnishes probable cause for the warrantless search of a vehicle." *State v. Seckinger*, 920, N.W.2d 963, 970 (Neb. 2018) *citing Robinson v. State*, 451 Md. 94, 99, 152 A.3d 661, 667 (2017). The County Attorney's Association fails to note an important distinction in the rational by those lines of cases- *Robinson* held that decriminalization of marijuana, the state of the law in Maryland, was not the same as legalization in its decision to allow for a vehicle search. *Id.* In Massachusetts, the court held that decriminalization of marijuana meant that the odor of marijuana alone was not sufficient to permit the search of a vehicle. *Com. v. Overmyer*, 469 Mass. 16, 20, 11 N.E.3d 1054, 1058 (2014) *citing Commonwealth v. Cruz*, 459 Mass. 459 (2011).

In states like Minnesota, where marijuana is legal in some amounts, most state courts agree that the odor of marijuana alone does not establish probable cause to search a vehicle. *People v. Stribling*, No. 3-21-0098, 1-2 (Ill. App. Ct. 2022) appeal pending, (Jan. term 2023); *State v. Moore*, 311 Or. App. 13, 15, 488 P.3d 516, 818 (2021); *People v. Nguyen*, No. H049094, 2022 WL 16848402, at *1 (Cal. Ct. App. Nov. 10, 2022); *People v. Zuniga*, 372 P.3d 1052 (Supreme Court of Colorado, 2016).

In most states where marijuana is legal in some amounts, the smell of cannabis alone cannot be the basis for probable cause to search a vehicle. Furthermore, protections against unreasonable searches and seizures are broader under the Minnesota Constitution

than the Fourth Amendment. For these reasons, the Appellate court decision to suppress any evidence seized by an illegal search should be affirmed.

III. The smell of cannabis can be used a pretext to search the vehicles of Black and East African people.

In 1961, the United States Supreme Court held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in state court." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Justice Clark, in his opinion, quoted Justice Brandeis in *Olmstead v. United States*:

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

277 U.S. 438, 485 (1928). (J. Brandeis, dissenting). Over the course of the next decade, the federal government would pass the Civil Rights Act (1964), the Voting Rights Act (1965) and the Fair Housing Act (1968). Throughout the country, there was civil unrest, and the judiciary and Congress recognized a need to level the playing field between the government and its people. In the summer of 1967, the City of Minneapolis saw rioting along Plymouth Avenue North, due to a boiling up of tensions between North Minneapolis residents and their government.[3] The riots brought about community involvement, and educated white residents further of Black hardship within the city

[3] Marks, Susan. (July 24, 2017). "July 1967 Civil Unrest on Plymouth Avenue." Minnesota Post, retrieved from: https://www.minnpost.com/mnopedia/2017/07/july-1967-civil-unrest-plymouth-avenue/

limits.[4] But in the decades to come, both the local government and federal landscape would see a shift back to favoring "law and order" and the declaration of the War on Drugs. Our state's judiciary would, once again, initiate protections for the most marginalized in *State v. Russell*, 477 N.W.2d 886 (Minn. 1991), by striking down laws that sought to punish possession of crack cocaine (and thus, African American residents) more harshly than powder cocaine. When other branches of the government allow for unequal treatment under the law, our residents have found that it is the Court that has the power to protect them from their government's overreach.

Former police officer and now Minnesota Court of Appeals Judge Kevin Ross, wrote eloquently of the tension between policing while adhering to, and honoring, the Constitution:

> We appreciate that the people, through their legislature, have entrusted police with the difficult duty to find and remove [contraband] from [people] possessing [it]. We also recognize that hunch-based policing might sporadically and infrequently uncover contraband. In fact, we assume that an officer who stops enough people based only on conjecture will occasionally find someone who, like [defendant], apparently possesses evidence of a crime. But police officers are also entrusted with the higher duty to honor the constitutional rights of those they encounter…It is the court's duty to suppress evidence unconstitutionally obtained.

State v. Davis, 910 N.W.2d 50, 59-60 (Minn. Ct. App. 2018). Law enforcement stop and search many drivers. Presumably, oftentimes they don't find evidence to arrest or cite their suspects. They don't have to write a report in those instances, so there is very little oversight of those encounters. In most cases, challenges to contacts between these police

[4] Yuen, Laura. (July 19, 2017). "When Flames of Racial Strife Engulfed a Minneapolis Street" MPRNEWS. Retrieved at: https://www.mprnews.org/story/2017/07/19/minneapolis-plymouth-avenue-riots-anniversary

officers and residents don't occur until an attorney reviews the evidence. When evidence is recovered, then, the judiciary should examine these intrusions carefully and protect against unseen abuses largely impossible to challenge after they occur.

The smell of marijuana used as a pre-textual reason to expand a stop to a search of a vehicle is ripe for misuse. This is shown by the expansion of stops on over 1,000 Black and East African people in a one-year period in Minneapolis where their vehicle was searched but no citation or charge was issued. Certified data of all recorded Minneapolis Police Department ("MPD") traffic stops between June 1, 2019, and May 31, 2020 that involved Black or East African drivers who were stopped for a traffic violation and had their person or vehicle searched but did not receive a citation and were released under an "advised" or "all ok" disposition code (i.e., a search occurred resulting from a traffic stop but no arrests were made or citations issued) shows that 1,130 traffic stops fit the described parameters. *See* Unpublished, nonprecedential order: *State v. Isaac Early*, Hennepin County District Court dated January 29, 2021 by Hon. Judge Kerry Meyer accessible publicly under district court file number 27-CR-20-7960 at page 6.

It is a logical conclusion that because there was no additional crime found, regardless of the reason the officer listed for the further intrusion, that the reason given for the expansion of the stop was not legitimate. It is also shown in a nationwide study, analyzing 100 million police stops, that Black and Hispanic persons stopped more frequently than their white counterparts, and that those stops that resulted in searches were less likely to reveal contraband:

> Our data shows that Black and Hispanic drivers are searched at higher rates, but those searches are less likely to find contraband, so the threshold test concludes that Black and Hispanic drivers are searched at lower thresholds, suggesting discrimination.

Pierson, Emma. June 20, 2020, "Barr says there's no systemic racism in policing. Our data says the attorney general is wrong," The Washington Post.

This was also shown by the Minnesota Department of Human Rights' investigation into Minneapolis police which found Minneapolis police engaged in race-based policing. Minnesota Department of Human Rights: Investigation into the City of Minneapolis and the Minneapolis Police Department, Findings issued April 27, 2022. The Minnesota Department of Human Rights met with community leaders, law enforcement in Minneapolis, people who had been charged with crimes, county attorneys and public defenders to gather information, and reviewed over 700 hours of body worn cameras and over 480,000 pages of city and Minneapolis Police Department documents before making its findings. *Id.* at page 6. The report cited as evidence of what it called the department's pattern of unlawful, discriminatory practices: racial disparities in how officers "use force, stop, search, arrest, and cite people of color, particularly Black individuals, compared to white individuals in similar circumstances." *Id.* at page 8.

In 1991 the Minnesota Supreme Court recognized that there was no rational basis to treat the illegal substances of crack cocaine and cocaine differently in sentencing. *Russell* at 891. While Mr. Torgerson is not in a protected class and not claiming any equal protection claim, his case will affect Black and East African Minnesotans negatively as shown by data-based evidence if the Court were to reverse the appellate

court decision. Therefore, the Court should hold that there is no basis to treat the legal substances of alcohol and cannabis differently when officers are seeking to expand a stop and search a motor vehicle.

CONCLUSION

Respondent respectfully requests that the Court affirm the suppression of the evidence found in an illegal expansion of a stop of a motor vehicle.

RESPECTFULLY SUBMITTED,

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Dated: This 7th day of February, 2023.

A22-0425

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Appellant,

v.

Adam Lloyd Torgerson,

Respondent.

Certificate of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. App. P. 132.01, subd. 1 and 3, for a brief produced with proportional or monospaced font. The length of this brief is 3,614 words. This brief was prepared using Microsoft Word version 2301.

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Dated: This 7th day of February, 2023.

STATE OF MINNESOTA COUNTY OF HENNEPIN	DISTRICT COURT CRIMINAL DIVISION FOURTH JUDICIAL DISTRICT
State of Minnesota, Plaintiff, vs. Isaac Lorenzo Early, Defendant.	**ORDER GRANTING DEFENDANT'S MOTION TO SUPRESS EVIDENCE** Case No. 27-CR-20-7960

The above-captioned case came before the undersigned judge on a pretrial motion to suppress evidence. Defendant Isaac Lorenzo Early made his motion through his attorneys, Assistant Hennepin County Public Defenders Jay Wong and Amanda Brodhag. The state was represented by Assistant Hennepin County Attorney Joseph Paquette. During the in-person suppression hearing held on November 2, 2020, the Court heard testimony and received video, audio, photographic, and documentary evidence. On November 30, 2020, the Court reopened the record for the admission of three still photos from Officer Knuth's body worn camera video.[1] The parties brief the issues. This order is based on the evidence presented and the applicable law.

EXHIBITS

1. Body worn camera audio and video from Officer Jon Schliesing;
2. Photograph of suspected cannabis;
3. Photograph of suspected cannabis;
4. Minneapolis Police Department Policy Manual on Equipment and Supplies;
5. Audio and video from Officer Jon Schliesing's squad car camera;
6. Audio and video from Officer Joseph Grout's squad car camera;
7. Certified Minneapolis Police Department data set;
8. Affidavit of May Zensen describing Exhibit 7;
9. Still photo from Officer Knuth's body worn camera depicting rear view of license plate;
10. Still photo from Officer Knuth's body worn camera zoomed in to depict view of rear license plate light;

[1] The parties stipulated to the admission of the three still photographs. *State v. Early*, 27-CR-20-7960 (Minn. Dist. Ct. Nov. 20, 2020).

11. Still photo from Officer Knuth's body worn camera depicting driver side view of rear license plate light.

WITNESSES

1. Minneapolis Police Officer Jon Schliesing;
2. Minneapolis Police Officer Joseph Grout;
3. Public Defender Investigator Christopher Millard.

FINDINGS OF FACT

The stop and arrest of Defendant

In the early morning hours on January 17, 2020 Defendant Isaac Early was stopped by Minneapolis Police Officers Jon Schliesing and Brandon Knuth for alleged traffic and equipment violations. Officer Schliesing testified to observing Defendant's vehicle fail to signal prior to turning onto Plymouth Avenue North from North Second Street in Minneapolis. Officer Schliesing and his partner, Officer Knuth, followed Defendant's vehicle onto Plymouth Avenue North. Another car was temporarily between his squad car and Defendant's automobile on the I-94 overpass. After that vehicle moved left to turn to the on-ramp, the squad was directly behind Defendant's vehicle. Officer Schliesing noticed the driver's side of the rear license plate light was not working properly. During testimony, Officer Schliesing clarified he observed the rear license plate light as not being illuminated from the bulb on the driver's side and it appeared to be malfunctioning. Defendant produced a still photograph taken from Officer Knuth's body worn camera showing the rear license plate was illuminated from the driver's side after the stop occurred. The state offered two still indicating the same bulb was not illuminated during those moments of the stop.

Officer Schliesing's squad car video camera did not capture Defendant's alleged failure to signal before he turned onto Plymouth Avenue North. Minneapolis squad car video cameras can be turned on manually or by a triggering event such as an officer turning on the overhead lights.

When the squad car video camera is activated by the overhead lights, however, there is pre-event back recording feature that captures thirty seconds of video only before the activation of overhead lights. Officer Schliesing did not manually activate his squad video camera. Officer Schliesing waited until Defendant turned onto Lyndale Avenue to activate the light bar. (Ex. 5) This occurred more than thirty seconds after Defendant turned onto Plymouth Avenue. Defendant signaled his right turn onto Lyndale. (Ex. 5)

Officer Knuth radioed dispatch that he and Officer Schliesing initiated a traffic stop as Defendant pulled his vehicle to the right side of Lyndale Avenue North and stopped. Officer Knuth did not ask for back-up nor did he radio any threat to officer safety. Both Officer Schliesing and Officer Knuth exited their squad car and, as they walked along Defendant's vehicle, they shown their flashlights through the rear windows into the interior of the automobile. Moments after the stop, four officers from different squads arrived at the scene and approached the stopped vehicle with their flashlights on. The officers from the other squads fanned out around the vehicle, some of them jogging toward it, and were looking inside the passenger and cargo areas of the vehicle before Defendant was removed from the vehicle.

When Officer Schliesing arrived at the driver side door he knocked on the window and indicated he wanted Defendant to roll his window down. Defendant, a Black male, indicated he could not roll down his window at which point Officer Schliesing pulled the door handle. The door was locked and Officer Schliesing signaled for Defendant to unlock the door. Officer Schliesing immediately opened the door after it was unlocked. Officer Schliesing then asked Defendant for his license and told him to interlace his hands above his head and step out of the vehicle. As he exited the vehicle, Officer Schliesing told Defendant he had him step out of the car because he saw, what appeared to be, by sight and smell, a burnt marijuana cigarette, a "roach". The additional

officers were already standing near the stopped vehicle. Both officers testified they smelled the odor of burnt marijuana. During the search of Defendant's car, Officer Joseph Grout found tied-off sandwich baggies of what appeared to contain fist-size bunches of marijuana flowers,[2] a scale and a box of plastic baggies. The sight and smell of suspected marijuana provided the only articulated basis for removing Defendant from his car and the subsequent search of his vehicle.

After Officer Schliesing handcuffed Defendant immediately after he exited his car. The officer searched Defendant's clothing including every pocket and removed items found there. Defendant was then placed still handcuffed into a locked squad. Officers did the same thing with the passenger. Mr. Early and his passenger remained handcuffed in the squad while the six officers searched the vehicle and ran computer checks of them. Officer Schliesing told Defendant at the scene and testified during this hearing he was only being detained and not arrested until the gun was found. Twice Defendant asked why he was stopped and Officer Schliesing responded, "Something wrong with your license plate light, or something like that?" the first time and cited the faulty rear license plate light the second, but never mentioned the alleged moving violation. Officer Schliesing emphatically explained he could see the license plate light because he was right behind the vehicle. (Ex. 1)

Police continued to search Defendant's vehicle. Officers discovered multiple tied-off sandwich baggies containing what appeared to be cannabis flowers. There was no evidence that these tied-off baggies originated from packaging that would have identified them as being purchased from a licensed hemp seller nor did officers discover a receipt indicating the contents of the baggies, as well as the alleged burnt marijuana cigarette, were hemp or came from a lawful source. Officers also located a loaded Glock handgun and a loaded magazine in the vehicle.

[2] Officer Grout later testified that it would be more accurate to note he smelled the order of cannabis and discovered baggies containing cannabis.

Defendant is a prohibited from possessing firearms or ammunition. The state charged Defendant with two counts of unlawful possession of a firearm or ammunition in violation of Minnesota Statute 624.713, subd. 1(2).

Odor and Appearance of Cannabis

Defendant elicited testimony as to indistinguishability between hemp and marijuana by sight and smell alone. Public Defender Investigator Christopher Millard, testified he has over thirty years of law enforcement experience including undercover narcotics operations and hundreds of stops and investigations involving marijuana. He testified he is familiar with the odor and appearance of marijuana. In preparation for the evidentiary hearing, Investigator Millard purchased a hemp flower (bud) and a rolled hemp cigarette from "Nothing But Hemp," a licensed hemp retailer located in St. Paul, Minnesota. Both items were sold in pre-packaged containers that indicated they were hemp products that conformed with Minnesota law. Investigator Millard was also given a receipt of purchase.

Investigator Millard testified, based on his training and experience, the appearance and odor of the hemp flower looked and smelled like that of a marijuana flower. He testified further that the look and smell of the rolled hemp cigarette mirrored that of a marijuana cigarette. According to Investigator Millard, he would not have been able to distinguish the difference between the hemp products he purchased and illegal marijuana based on sight or smell alone and the only way he knew the products were hemp was by the packaging label. Investigator Millard stated, hemp is a cannabis product that has 0.3 percent of tetrahydrocannabinol ("THC") or less. Investigator Millard also testified he would not have been able to determine the THC concentration by sight or odor alone.

Data of Minneapolis Police Department Vehicle Stops

Defendant presented certified data of all recorded Minneapolis Police Department ("MPD") traffic stops between June 1, 2019 and May 31, 2020 that involved Black or East African drivers who were stopped for a traffic violation and had their person or vehicle searched but did not receive a citation and were released under an "advised" or "all ok" disposition code—i.e., a search occurred resulting from a traffic stop but no arrests were made or citations issued. (Ex. 7) This exhibit was received over objection for the limited purpose of supporting the defense's pretext argument. The MPD data admitted does not include drivers of any other race or ethnicity nor did it include narratives of the individual circumstances of any incident.

According to the data, 274 MPD officers conducted 1,130 traffic stops that fit the parameters. The vast majority of officers only made one vehicle stop of a Black or Eastern African driver during which a search occurred but no citation was issued and the driver was released. Officers Knuth and Schliesing, the officers who stopped Defendant's vehicle, however, had the second and fourth highest number of such stops recording 76 and 56, respectively. The six officers present for the search of this vehicle totaled 224 such stops and searches without citation or arrest.

Officers Schliesing and Knuth were members of the Gang Interdiction Team ("GIT"), now the Gun Violence Response Team, at the time the MPD data was recorded and at the time of Defendant's arrest. According to the testimony in this case, the purpose of GIT was to reduce the number of firearms and narcotics in the public by recovering these items from the streets using proactive patrolling. Five of the six officers involved in the search of this vehicle had significantly greater than average number of stops and searches of Black and East African drivers resulting in searches, but no arrest or citation.

CONCLUSIONS OF LAW

Law enforcement officers may conduct a limited warrantless investigative search when officers have reasonable articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968); *State v. Sargent*, 951 N.W.2d 121, 126 (Minn. App. 2020). The Minnesota Supreme Court adopted the principles and framework of *Terry* for evaluating the reasonableness of searches and seizures during traffic stops. *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004). In so doing, the Supreme Court held the Minnesota Constitution affords greater protection that the United States Constitution against unreasonable searches and seizures in the context of stops for minor traffic violations. *Id.* When assessing the validity of expanding a traffic stop, courts consider 1) "whether the stop was justified at its inception", and 2) "whether the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place." *Id.* at 364, Citing, *Terry,* 392 U.S. at 19-20.

Law enforcement must have particularized, objective, and articulable bases for suspecting a person of criminal activity to lawfully stop a motorist. *State v. Anderson*, 683 N.W.2d 818, 822–23 (Minn. 2004). The factual basis to support a stop for a routine traffic check is minimal. *State v. Beall*, 771 N.W.2d 41, 44 (Minn. App. 2009); *Anderson*, 683 N.W.2d at 23 ("Generally, if an officer observed a violation of a traffic law, no matter how insignificant the traffic law, that observation forms the requisite particularized and objective basis for conducting a traffic stop."); *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997) ("Ordinarily, if an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle.").

Officer Schliesing testified while he and Officer Knuth were on routine patrol he saw a vehicle, which was being driven by Defendant, fail to signal at least 100 feet prior to turning from North Second Street to Plymouth Avenue North. Officer Schliesing also testified after following

the vehicle across the Plymouth Avenue Bridge he also noticed the driver side rear license plate light was not illuminated. The failure to signal and non-functioning rear license plate light provided the only articulated bases for Officer Schliesing's traffic stop. Under Minnesota law, all drivers must signal their intention to turn right or left at least 100 feet prior to executing the turn. Minn. Stat. § 169.19, subd. 5. Every motor vehicle must have a white rear lamp placed as to illuminate the rear license plate "and render it legible from a distance of 50 feet to the rear." Minn. Stat. § 169.50, subd. 2.

Defendant argued Officer Schliesing's stated justifications were a mere pretext to conduct an unlawful search. In support of his argument, Defendant elicited testimony from Officer Schliesing that all Minneapolis Police squad car video cameras can be turned on manually or by a triggering event including the activation of the overhead light bar. When the squad car video camera is activated there is pre-event back recording feature that captures video from the thirty seconds before the overhead lights activated. Officer Schliesing knew of this back recording feature, but he waited more than 30 seconds to activate the camera (through turning on the squad lights, not manually starting the camera). His squad car video did not capture the alleged failure to signal. It did capture the vehicle's turn signal activated for the next turn, however.

Officer Schliesing testified, and clarified under questioning by the Court, that the driver side rear license plate light was not illuminated when he initiated the traffic stop. The video and still photo evidence admitted in this hearing is not conclusive. A malfunctioning light on one side of the license plate alone is not a violation of the statute. There was no evidence regarding whether the license plate was legible from 50 feet. There was also no testimony that the passenger side light on that plate was malfunctioning. This malfunctioning light is not a valid basis to stop the vehicle.

The only legal basis to stop this vehicle was if it failed to signal the turn properly from 2nd to Plymouth. Again, there is no video evidence of this. Although video evidence is not required, it is at least unfortunate the officer chose not to turn on the squad video in time to capture video of the turn. No officer mentions this alleged failure to signal on any of the exhibits submitted with this hearing. The officer tells both occupants of the vehicle about the license plate light not working, but never mentions an un-signaled turn. There was also no testimony about where the squad was at the time the vehicle turned from 2nd to Plymouth Avenue, so that context is missing to help the Court determine credibility regarding the 100 foot required distance.

The officers followed the vehicle for several blocks with at least one vehicle between them. Defendant signaled and turned right onto Lyndale Avenue after crossing over I-94. Officer Schliesing activated the squad lights as soon as Defendant completed that turn. It is clear the officer intended to stop that particular vehicle which would lend credence to the claim the officer saw a traffic violation earlier if the officer had not adamantly told the occupants he was able to see the license plate light problem because he was right behind the vehicle. On Exhibit 5, Defendant's vehicle is not in view of the squad camera until the truck between them moves left to take the on-ramp to I-94. Defendant has already signaled his right turn and moved forward at the light as the truck moved left. The 30 second of video-only captures this period on Plymouth Avenue.

The actions that followed support the argument this stop was pretextual: While the officers clearly intended to stop this particular vehicle, the stop was not really about the failure to signal a turn or a malfunctioning license plate light—that was merely an excuse to search the vehicle. Both officers approached the vehicle and shined their flashlights into the cargo and passenger compartments. While this makes sense for officer safety to know how many occupants were inside, it was closely followed by additional officers doing the same thing. When he made contact with

the driver, Officer Schliesing obtained his identification and almost immediately told him to put his hands on his head. Before he even removed him from the vehicle four additional officer from the GIT arrived and began shining their flashlights into the cargo and passenger areas of the vehicle. There were a total of four squads at the scene of this traffic stop. The number of officers at a stop is a legitimate inquiry in analyzing the escalation of a traffic stop, *see George*, 557 N.W.2d at 581; *State v. Flowers*, 734 N.W.2d 239, 257 (Minn. 2007). Here, officers arrived to assist before anything other than a minor traffic violation or equipment failure was known. This was not a routine traffic stop from the inception. The officers arriving to search was an intrusion.

The expansion of a stop must fit the parameter set by *Askerooth*, "each incremental intrusion during a stop must be '"strictly tied to and justified by" the circumstances which rendered [the initiation of the stop] permissible.'" *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004), quoting, *Terry,* 392 U.S. at 19.

The Supreme Court summarized the considerations:

> The basis for intrusion must be reasonable so as to comply with article I, section 10's general proscription against unreasonable searches and seizures. *Wiegand,* 645 N.W.2d at 136. To be reasonable, the basis must satisfy an objective test: "would the facts available to the officer at the moment of the seizure * * * 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Terry,* 392 U.S. at 21–22, 88 S.Ct. 1868 (quoting *Carroll v. United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925)); *accord* *365 *State v. Othoudt,* 482 N.W.2d 218, 221 (Minn.1992). The test for appropriateness, in turn, is based on a 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." *United States v. Brignoni–Ponce,* 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *accord State v. Ferrise,* 269 N.W.2d 888, 892 n. 1 (Minn.1978). Finally, it is the state's burden to show that a seizure was sufficiently limited to satisfy these conditions. *Florida v. Royer,* 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion).
>
> In essence, Article I, Section 10 of the Minnesota Constitution requires that each incremental intrusion during a traffic stop be tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent

> probable cause, or (3) reasonableness, as defined in *Terry*. Furthermore, the basis for the intrusion must be individualized to the person toward whom the intrusion is directed.

Askerooth, 681 N.W.2d at 364–65.

While the smell and sight of suspected burnt marijuana was present in this case, the GIT officers did not wait for that particularized fact to be known to them before approaching the vehicle, surrounding it and beginning a visual search of the stopped vehicle. The officers acted as though there was no doubt there would be an articulable reason to pull the occupants and search the vehicle. This situation violated the appropriateness test stated in *Askerooth* – the individuals in the vehicle were not offered the "right to personal security free from arbitrary interference by law officers."

Based on the smell and sight of burnt marijuana, the driver and passenger were removed, handcuffed, thoroughly searched and placed in a locked squad while the officers conducted a complete search of the vehicle. This "detention" of the occupants also shows a continuing disrespect for the spirit of the law. They were cuffed and searched and put in the squad car at a time when all the officers knew was there was a minor traffic, possible equipment and misdemeanor possession of marijuana in a motor vehicle violations. None of those offenses support an arrest under Rule 6 of the Minnesota Rules of Criminal Procedure.

The officers later found what they had hoped to find - a handgun, ammunition and suspected narcotics.

While the officers' instincts were correct in this case regarding the likelihood they would find a firearm, the Minneapolis Police Department statistics entered in this case show this group is not always right. The six officers involved in this case searched a combined 224 other people and/or vehicles driven by Black or East African people in the past year when they did not find

contraband. In those cases they did not issue citations for any conduct that led them to stop the vehicles. The occupants of this vehicle were Black. The vehicle was an older model and was not in pristine condition. This stop was based on a desire to look for weapons and drugs, not a desire to enforce traffic or equipment laws. That is pretext.

The State did not meet it burden to show either a failure to signal within 100 feet of the turn, or an equipment violation that broke the law. Because the stop was pretextual, it cannot be legitimately expanded by reasonable suspicion or probable cause. The issue of whether the smell of marijuana is still a legitimate basis to expand a traffic stop will not be addressed in this case.

ORDER

Defendant's motion to suppress evidence based on improper stop and search is granted.

Dated: January 29, 2021

Kerry W. Meyer
Judge of District Court