

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A22-0371**

State of Minnesota,  
Respondent,

vs.

Justin Lee Gomez,  
Appellant.

**Filed February 21, 2023  
Affirmed  
Frisch, Judge**

Crow Wing County District Court  
File No. 18-CR-19-3447

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Donald F. Ryan, Crow Wing County Attorney, Lindsey Lindstrom, Assistant County Attorney, Brainerd, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Luke P. de Leon, Todd A. Wind, Special Assistant Public Defenders, Fredrikson & Byron P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Slieter, Judge; and Smith, John, Judge.\*

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## **NONPRECEDENTIAL OPINION**

**FRISCH, Judge**

Appellant argues that the district court erred in denying his motion to suppress evidence discovered in his vehicle glove box following a dog sniff because (1) the search was based on improper pretext, (2) the trooper lacked reasonable, articulable suspicion to justify the expansion of the scope of the search, and (3) the dog sniff of the interior of the vehicle was not supported by probable cause. Because appellant's arguments regarding pretext and probable cause were not preserved at the district court, and the trooper had reasonable suspicion to expand the scope of the search, we affirm.

### **FACTS**

Following a stipulated-evidence trial, the district court found appellant Justin Lee Gomez guilty of a first-degree controlled-substance crime and entered judgment of conviction for that offense. *See* Minn. R. Crim. P. 26.01, subd. 4 (allowing defendant to waive jury trial and stipulate to state's evidence to obtain review of a pretrial dispositive issue). The district court's decision followed the denial of a motion to suppress evidence discovered from the interior of Gomez's vehicle. At the suppression hearing, the district court received photos of the vehicle interior, testimony from Trooper Nicholas Otterson who had stopped and searched Gomez's car, video from Trooper Otterson's squad car, and Trooper Otterson's field report. A summary of the evidence at the suppression hearing follows.

In the evening on September 2, 2019, Trooper Otterson approached a car parked at a boat landing at Mille Lacs Lake. Based on previous law-enforcement intelligence,

Trooper Otterson recognized the vehicle as being registered to Gomez. Trooper Otterson also knew that multiple sources had provided information to the Mille Lacs Tribal Police that Gomez had been selling drugs on the reservation. Previously, Trooper Otterson had personally observed people engaged in drug use and sales at that boat landing.

Trooper Otterson parked next to the right of Gomez's vehicle and approached the passenger-side door. The passenger window was open, and Trooper Otterson observed Gomez and a passenger in the car. He also observed, in relevant part, cigarettes, a cigarette lighter, a butane torch lighter on the center console, and, on the passenger-side floor, a vodka bottle with a broken top seal and approximately one quarter of the bottle contents missing.<sup>1</sup> Trooper Otterson is trained in drug interdiction and testified he noticed Gomez and the passenger exhibited signs of recent drug use, including dilated pupils, bloodshot eyes, and flushed skin tone.<sup>2</sup>

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<sup>1</sup> Gomez asserts some of Trooper Otterson's observations are verifiably incorrect, such as his observation of a "wood baton" that Trooper Otterson identified as a "weapon" and Trooper Otterson's observation of multiple cell phones, and that such incorrect observations cannot form the basis for reasonable suspicion. Our review of the record, including the photos of the interior of the vehicle, shows that the "wood baton" could be recognized as an umbrella handle, and while the record depicts multiple cell-phone chargers, the record does not show multiple cell phones. Regardless, because the remaining totality of the circumstances provide a sufficient basis to conclude that Trooper Otterson had reasonable suspicion to use a drug dog to search for drugs, we do not dwell on these findings or resolve whether they are clearly erroneous.

<sup>2</sup> Regarding Trooper Otterson's testimony that he observed signs of drug use, the district court stated it did "not find this information to be particularly compelling" because Trooper Otterson did not comment to Gomez or the passenger about these observations, nor did he expand the stop to include field sobriety testing. Although the district court cited the absence of comments or field sobriety testing as reasons why these circumstances were not "particularly compelling," we observe that a law-enforcement official is under no affirmative obligation to offer such comment or conduct field sobriety testing.

After Gomez confirmed his identity, Trooper Otterson asked Gomez and the passenger to exit the vehicle, stating “when you’ve got the open bottle of booze, it gives me probable cause to search the car.” Trooper Otterson noted Gomez became “visibly defensive and flustered.” Gomez then removed the keys from the ignition, locked the glove box, stated “I don’t want you to go through here,” and put the keys in his pants pocket. Once Gomez and the passenger exited the vehicle, Trooper Otterson frisked Gomez for weapons and took possession of Gomez’s keys. Trooper Otterson returned to his squad car, checked the law-enforcement database, and confirmed that Gomez was a reported gang member.

Trooper Otterson then took photos of the passenger side of Gomez’s car through the open passenger window. He asked Gomez and the passenger if they wanted the food and drink visible in the center console. The passenger appeared to respond affirmatively, and Trooper Otterson opened the passenger door and handed the passenger the items. Trooper Otterson left the vehicle door open.

A few minutes later, Mille Lacs Tribal Investigator Brad Gadbois arrived at the scene. Trooper Otterson stated to Investigator Gadbois that he’s “about to search it,” and Investigator Gadbois responded, “you should.” Trooper Otterson told Investigator Gadbois that Gomez had locked the glove box. Investigator Gadbois told Trooper Otterson that in

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Nevertheless, the district court ultimately appears to afford some limited credit to Trooper Otterson’s testimony about his observations of signs indicating recent drug use, although the district court notes “these observations must have been so subtle, that they likely did not strongly factor into Trooper Otterson’s conclusion that he had grounds to convert the initial encounter into an investigatory seizure.”

the morning that day, “we searched that same car.” Investigator Gadbois stated “we had information” that Gomez was in possession of a quantity of drugs that morning and that “it was said to be in that glovebox.” Investigator Gadbois stated that when he “caught up with [Gomez],” Gomez “had already made one stop and then he went to the casino, and I think he dropped whatever he had at this guy’s house.”

Trooper Otterson told Investigator Gadbois, “We’ve got an open bottle, so I’m going to search based on that, but I’m going to have my dog just sniff and see if he goes to that glovebox.” Investigator Gadbois replied that “the dog hit in there earlier, on the glovebox,” but that “it wasn’t locked.”

Trooper Otterson dispatched his dog to sniff the vehicle. The dog was not trained to detect alcoholic beverages. The dog sniff “start[ed] in the trunk on the passenger side and moved forward towards the open front passenger door” that Trooper Otterson had left open.<sup>3</sup> In the vehicle, the dog “indicated” on the “floor area under the glove box seam by scratching with both paws.”<sup>4</sup> Trooper Otterson unlocked the glove box. He found a grey

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<sup>3</sup> On appeal, Gomez also points to inconsistencies in Trooper Otterson’s testimony as to the manner in which the dog sniff was conducted and asserts that these inconsistencies compel a conclusion that Trooper Otterson generally was not a credible witness. Gomez does not cite to any authority that an inaccurate description of events by a witness about some details renders the entirety of their testimony unreliable. We defer to the district court’s credibility findings. *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *rev. denied* (Minn. July 15, 2003). Even so, the district court appears to have reconciled Trooper Otterson’s testimony with the video, and we defer to the district court’s credibility findings. *Id.*

<sup>4</sup> The audio on the squad video contains a sound that could be consistent with dog scratching, but the video does not clearly depict the dog’s actions inside of the vehicle because Trooper Otterson’s body blocked the view of the dog inside the vehicle.

zipper pouch that contained a digital scale, a large bag of suspected methamphetamine, numerous drug baggies, a used methamphetamine pipe, and a folding knife. Trooper Otterson arrested Gomez.

Following the parties' stipulation under Minn. R. Crim. P. 26.01, subd. 4, that the pretrial issue of Gomez's motion to suppress and dismiss was dispositive of the case, the district court issued its order finding Gomez guilty of both charges.

Gomez appeals.

## **DECISION**

Gomez argues that the district court erred in not suppressing evidence discovered from the warrantless dog sniff because the Trooper (1) conducted an unlawful pretextual search, (2) lacked reasonable, articulable suspicion to search the vehicle for drugs, and (3) lacked probable cause to conduct a dog sniff of the interior of the vehicle. We address each argument in turn.

### ***Pretext***

Gomez argues that the Trooper used the open-container violation as an unlawful pretext to search the vehicle for drugs. We disagree.

First, Gomez did not raise this pretext argument to the district court at the omnibus hearing. *See* Minn. R. Crim. P. 11.02 (scope of omnibus hearing). A defendant who requests an omnibus hearing waives any arguments that were not asserted at the hearing. *See State v. Merrill*, 274 N.W.2d 99, 109 (Minn. 1978). And raising such an issue for the first time on appeal is "particularly inappropriate" where the issue "involve[s] undeveloped questions of fact." *State v. Lieberg*, 553 N.W.2d 51, 56 (Minn. App. 1996). The failure to

raise this issue at the suppression hearing is consequential because the state was deprived of the opportunity to present evidence that might be relevant to the fair determination of the issue. At oral argument, the state suggested that an officer may choose not to disclose certain information as an investigative technique. Given the scope of the suppression hearing, the state did not introduce such evidence to the district court. We therefore decline to consider the pretext argument for the first time on appeal.

Second, even if we were to consider Gomez's pretext argument on its merits, we cannot conclude that any alleged pretext rendered the dog sniff unlawful. "[I]f there is an objective legal basis for an arrest or search, the arrest or search is lawful even if the officer making the arrest or conducting the search based his or her action on the wrong ground or had an improper motive." *State v. Everett*, 472 N.W.2d 864, 867 (Minn. 1991) (citing *Scott v. United States*, 436 U.S. 128 (1978)). While "fabricated pretexts" may be unlawful on a case-by-case basis, "'legal' pretext—i.e., activities which can be legally justified if the actual reason for the conduct is put aside—consistently pass constitutional muster." *Id.* Thus, while Trooper Otterson needed reasonable suspicion to expand the scope of the search beyond looking for open bottles, the fact that an objective violation of the open-container law may have served as a pretext for an opportunity to search for drugs does not invalidate the subsequent search.

Gomez argues that Minnesota law has recognized that pretextual searches are unlawful, but he overstates the consequences of a determination that a search may have been pretextual. Gomez cites *State v. Curtis*, 190 N.W.2d 631, 635 (Minn. 1971), for the proposition that Minnesota courts forbid "the use of a minor traffic offense as a pretext for

searches directed at unrelated offenses.” But *Curtis* held that the pat-down search of an individual following their arrest for failing to turn without signaling was illegal because the officer did not have reasonable grounds to believe it was necessary for his own safety or to prevent an escape. 190 N.W.2d at 635-36. In other words, the search in *Curtis* was illegal because it lacked any requisite reasonable basis.

Similarly, in *State v. Varnado*, the supreme court held that a frisk following a pretextual traffic stop was illegal because the officers did not have reasonable grounds to believe the individual was threatening or suspicious. 582 N.W.2d 886, 890 (Minn. 1998). While *Varnado* stated “[f]or intrusions that are not based on probable cause, such as the frisk here, we have held that the pretext factor is relevant to determining whether the intrusion is reasonable,” *id.* at 892, the court reached that conclusion in reference to the state’s alternative argument that the frisk was legal as part of the standard procedure of placing someone in a squad car. *Varnado* does not address the role of pretext for an intrusion that requires reasonable suspicion such as where police have particularized suspicion of illegal activity.

Rather, *Curtis* and *Varnado* are consistent with the principle in *Everett* that, while law enforcement must meet the probable-cause or reasonable-suspicion requirements to expand the scope of a search, the fact that law enforcement took a legally justified action as a pretext does not invalidate other subsequent legal activity. Accordingly, the dog sniff was not illegal even if the open-container violation was a pretext to search for other contraband because the open-container violation objectively justified searching for other open containers and, as discussed below, the totality of the circumstances gave Trooper

Otterson an objectively reasonable basis to expand the scope of the search to search for drugs.

### ***Reasonable Suspicion***

Both in his brief and at oral argument, Gomez conceded that Trooper Otterson had probable cause to search the car—including the glove box—for open containers based on the visible open container of alcohol. But Gomez argues Trooper Otterson did not have reasonable, articulable suspicion to expand the search to investigate for drugs, and therefore that search was unconstitutional. We disagree.

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). One exception to the warrant requirement is the “automobile exception,” under which the police may search a vehicle without a warrant, including closed containers inside, if there is “probable cause to believe the search will result in a discovery of evidence or contraband.” *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016) (quotation omitted). Further, the scope of a search under the automobile exception is “defined by the object of the search” and limited to “the places in which there is probable cause to believe [the object] may be found.” *State v. Gauster*, 752 N.W.2d 496, 508 (Minn. 2008) (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)).

To expand the scope of a stop to conduct a drug-dog sniff around the exterior of a vehicle, law enforcement must have a reasonable, articulable suspicion of drug-related criminal activity. *State v. Wiegand*, 645 N.W.2d 125, 137 (Minn. 2002). Reasonable suspicion is “a particularized and objective basis for suspecting the particular person

stopped of criminal activity.” *State v. Lugo*, 887 N.W.2d 476, 486 (Minn. 2016) (quotation omitted). It is enough that a law-enforcement officer can articulate specific facts which, taken together with rational inferences from those facts, objectively support the officer’s suspicion. *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007). An assessment of reasonable suspicion must be based on “the totality of the circumstances” and a trained police officer is entitled to draw inferences and deductions “that might well elude an untrained person.” *Lugo*, 887 N.W.2d at 486-87 (quotation omitted).

In reviewing the validity of a warrantless search, we review the district court’s factual findings for clear error and its legal conclusions de novo. *State v. Molnau*, 904 N.W.2d 449, 451 (Minn. 2017). We defer to the credibility determinations of the district court. *Miller*, 659 N.W.2d at 279.

By the time Trooper Otterson actually searched the vehicle and employed the use of his dog, the totality of the circumstances objectively supported particularized suspicions of drug activity. Trooper Otterson was patrolling an area where he had personally witnessed illegal drug activity, including use and sales. He recognized Gomez as a gang member and was aware that he was suspected of selling drugs on the nearby reservation. He observed from Gomez signs of recent drug use, albeit subtle, including dilated pupils, bloodshot eyes, and flushed skin tone. He observed Gomez to be nervous and avoiding eye contact. He observed a butane torch lighter that in his experience was used for illegal drug consumption. He learned from Investigator Gadbois that an informant had told police that Gomez had drugs in the glove box of his vehicle that morning and that during a search of Gomez’s car, a drug dog had “hit” on the glove box, but the glove box was unlocked

and empty at that time. Trooper Otterson also recalled Gomez had locked the glove box in front of Trooper Otterson.<sup>5</sup>

Gomez argues that these circumstances, taken individually, cannot form the basis of the officer's reasonable, articulable suspicion to search the vehicle. But we do not view the circumstances in isolation; we review the circumstances in their totality and, taken together with rational inferences, these circumstances gave Trooper Otterson reasonable suspicion that Gomez was presently involved in drug-related criminal activity. Thus, the totality of the circumstances provided reasonable suspicion for the dog sniff of the vehicle. *See State v. Askerooth*, 681 N.W.2d 353, 369 (Minn. 2004) (taking into consideration the totality of several weaker justifications of suspicion to determine if the circumstances “sufficiently supplement one another to make the sum any greater than the parts”); *see also State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366 (1993) (concluding (1) police had reasonable suspicion of criminal activity justifying a stop when defendant's conduct was evasive after making eye contact with the police and he had just exited a building that police knew had a history of drug activity, and (2) concluding a frisk of the defendant was justified by reasonable suspicion based on the defendant's behavior,

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<sup>5</sup> This fact is relevant for the limited purpose of comparing the information Investigator Gadbois provided to Trooper Otterson. We specifically do not include in the totality of circumstances Gomez's affirmative assertion of his privacy and property interest in the glove box. *Cf. State v. Diede*, 795 N.W.2d 836, 849 (Minn. 2011) (concluding individual's refusal of consent to search cigarette packet in her sweatshirt pocket could not be considered in establishing probable cause for a search); *State v. Jones*, 678 N.W.2d 1, 12 n.3 (Minn. 2004) (stating “passive refusal to consent to a search cannot be treated as evidence of a crime” and that “refusal to consent to a search cannot establish probable cause”).

the vicinity's history of drug activity, and the officer's personal experience seizing guns from the building defendant exited); *State v. Houston*, 654 N.W.2d 727, 733-34 (Minn. App. 2003) (concluding officers had reasonable suspicion to stop an individual when officers were in a high-crime area, investigating a possible gunshot, and the individual reacted to police nervously and evasively); *State v. West*, No. A14-1630, 2015 WL 4528895, at \*4 (Minn. App. July 6, 2015) (concluding that officer had reasonable suspicion to expand scope of the stop to conduct a dog sniff where officer relied on driving behavior, signs of nervousness associated with drug use, and presence of butane torch and mechanic's gloves, which in the officer's experience were items related to drug use, to justify search for drugs inside vehicle);<sup>6</sup> *cf. Wiegand*, 645 N.W.2d at 128-29, 137 (concluding that the officer's observation that the defendant was acting suspiciously based on the defendant's evasiveness, nervousness, and glossy eyes was "not an articulable basis to suspect criminal activity" when the officer did not *also* suspect narcotics-related activity or that the defendant was under the influence of drugs).<sup>7</sup>

Furthermore, we observe the district court's order denying suppression of the evidence may be affirmed on the alternative theory of inevitable discovery, or the related independent-source doctrine. *See State v. Richards*, 552 N.W.2d 197, 203 n.2 (Minn. 1996) (describing the related doctrines of inevitable discovery and independent source). Neither

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<sup>6</sup> We cite these nonprecedential opinions for their persuasive authority. Minn. R. Civ. App. P. 136.01, subd. 1(c).

<sup>7</sup> We emphasize our decision is limited to the issue of whether Trooper Otterson had reasonable suspicion based on the totality of the circumstances in this case.

doctrine is novel or questionable, and “it is the responsibility of appellate courts to decide cases in accordance with the law, and that responsibility is not to be diluted by counsel’s oversights, lack of research, failure to specify issues or to cite relevant authorities.” *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (quotation omitted) (considering the law of “severance” and “partial invalidity” in the Fourth Amendment context, despite neither party discussing their applicability, but concluding the doctrines were not “novel or questionable”); *see also State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003) (applying the inevitable-discovery doctrine); *State v. Hodges*, 287 N.W.2d 413, 415-16 (Minn. 1979) (applying the independent-source doctrine).

And though neither party raised the inevitable-discovery or independent-source doctrines on appeal, the state explicitly argued to the district court in its written submissions that the open container in plain view gave Trooper Otterson independent probable cause to search the vehicle pursuant to the automobile exception to the warrant requirement. The inevitable-discovery doctrine permits the admission of the fruits of a challenged search if the state establishes, without speculation, that the evidence “ultimately or inevitably would have been discovered by lawful means.” *Licari*, 659 N.W.2d at 254 (quotation omitted). Relatedly, the independent-source doctrine allows admission of evidence from an illegal search “if the police could have retrieved it on the basis of information obtained independent of their illegal activity.” *Richards*, 552 N.W.2d at 204 n.2. The state’s argument before the district court that the search of the glove box was justified for an independent reason already known to Trooper Otterson (i.e., the open-container violation) and the record the state created to support that reason allows us to affirm the district court’s

decision based on that independent reason. *See State v. Poehler*, 935 N.W.2d 729, 734 n.3 (Minn. 2019) (stating “an appellate court may affirm” a district court’s decision when “there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted”) (quoting *State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003)). It is not speculative to conclude the open container Trooper Otterson observed before conducting the dog sniff gave him an independent basis to search Gomez’s vehicle—including the glove box—and that Trooper Otterson would have inevitably discovered the evidence in the glove box on that basis. *See State v. Ellanson*, 198 N.W.2d 136, 137 (Minn. 1972) (concluding search of glove compartment was reasonable based on violation of open-bottle law). Thus, we also affirm the district court’s decision on the alternative bases that the evidence was admissible under the inevitable-discovery and independent-source doctrines.

### ***Probable Cause***

Alternatively, Gomez argues that the evidence discovered from the search should be suppressed because a dog sniff of a vehicle interior requires probable cause which was lacking here.<sup>8</sup> Again, however, Gomez did not challenge whether the dog sniff here required probable cause or whether probable cause for the interior dog sniff was lacking in

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<sup>8</sup> We recently decided *State v. Christianson*, No. A21-1138, 2022 WL 3149262, at \*2-4 (Minn. App. Aug. 8, 2022), which involved a drug-dog sniff on the interior of a vehicle, assuming without deciding that such a search required probable cause.

the district court, and he has thereby forfeited appellate review of these issues. *See Merrill*, 274 N.W.2d at 109.

Gomez asserts the probable-cause issue he now raises is “implicit in and closely akin” to the arguments in his brief for his motion to suppress evidence. We are unconvinced. Different legal standards apply to a determination of probable cause and reasonable suspicion. Gomez specifically questioned only the existence of reasonable suspicion to conduct the dog sniff, and neither the state nor the district court were on notice that probable cause may have been an issue in need of resolution. Indeed, at oral argument, the state argued that had it received notice of this issue, it would have developed the record to elicit “quite a bit of testimony” from the canine handler as to how the dog conducts alerts outside the vehicle and how alerts are discerned generally.

Gomez also argues that we should address his probable-cause argument because he raises “a novel legal issue of first impression” as to whether probable cause is required for a dog sniff of the interior of the vehicle, quoting *Watson v. United Servs. Auto. Ass’n*, 566 N.W.2d 683, 688 (Minn. 1997). But generally, we do not address novel legal issues that have not been raised before the district court, especially where one party has not had an opportunity to develop a complete record. Thus, Gomez has forfeited the probable-cause issue, and this case is not the appropriate circumstance to address a novel legal issue raised for the first time on appeal.

**Affirmed.**