

*This opinion is nonprecedential except as provided by  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  
A22-1438**

State of Minnesota,  
Respondent,

vs.

Lamont Shauntel Thomas, Jr.,  
Appellant.

**Filed July 3, 2023  
Reversed  
Larson, Judge**

Winona County District Court  
File No. 85-CR-20-406

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

Karin L. Sonneman, Winona County Attorney, Christina M. Galewski, Assistant County Attorney, Winona, Minnesota (for respondent)

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Considered and decided by Gaïtas, Presiding Judge; Larson, Judge; and Rodenberg, 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## **NONPRECEDENTIAL OPINION**

**LARSON**, Judge

Appellant Lamont Shauntel Thomas, Jr., challenges the district court's pretrial order denying his motion to suppress. Appellant argues the district court erred when it determined a Minnesota State Patrol Trooper (the trooper) had reasonable articulable suspicion to expand the scope of a traffic stop. Because we conclude that the district court legally erred when it determined the trooper had reasonable articulable suspicion to expand the scope of the stop, we reverse.

### **FACTS**

After a traffic stop for speeding, respondent State of Minnesota charged appellant with one count of first-degree sale of a controlled substance (500 or more dosage units of a hallucinogen while possessing a firearm), Minn. Stat. § 152.021, subds. 1(5), 3(c) (2018), and one count of first-degree possession of a controlled substance (25 grams or more of cocaine while possessing a firearm), Minn. Stat. § 152.021, subd. 2(a)(2)(i) (2018). Appellant filed a motion to suppress the evidence discovered during the traffic stop and dismiss the charges. The district court held a contested-omnibus hearing, in which it heard testimony exclusively from the trooper. At the start of the hearing, the state moved to admit the trooper's squad-car video, which was received without objection. The following facts were elicited at the contested-omnibus hearing.

In March 2020, the trooper observed appellant driving approximately ten miles per hour (mph) over the speed limit.<sup>1</sup> When the trooper activated his emergency lights, appellant immediately signaled that he would pull to the side of the road, then safely did so. Appellant activated his hazard lights when stopped, and the trooper parked behind him.

The trooper approached the vehicle's front passenger window on foot. The trooper observed appellant in the driver's seat and a second individual in the front passenger seat. When asked to provide identification, appellant produced a Wisconsin instruction permit. Because appellant produced an instruction permit, the trooper asked for the passenger's identification.<sup>2</sup> The passenger also produced a Wisconsin instruction permit.

Before returning to his squad car, the trooper observed multiple air fresheners in the vehicle and noticed appellant had a fresh, unlit cigarette in his mouth. The trooper later testified that these items are commonly used to mask odors. The trooper also shined his flashlight into the vehicle's backseat, where he did not observe any illegal contraband. While processing appellant's citation in his squad car, the trooper did not call for backup or a canine unit.

After several minutes, the trooper returned to the vehicle's front passenger window and stood in approximately the same location as his first approach. Upon reaching the vehicle, the trooper issued a citation for failing to comply with the instruction-permit

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<sup>1</sup> The trooper's radar registered appellant traveling 81 mph in a 70-mph zone.

<sup>2</sup> A person holding a driving instruction permit can only drive if the permit holder: (1) "has the permit in [their] immediate possession" and (2) "is driving the vehicle while *accompanied by an adult licensed driver* who is actually occupying a seat beside the driver." Minn. Stat. § 171.05, subd. 1(a) (2022) (emphasis added).

requirements but gave appellant a warning for speeding. The trooper explained that, because appellant had an instruction permit, appellant could not drive without a valid driver in the vehicle, that the trooper did not intend to “babysit” appellant until a valid driver arrived, and that if the trooper later stopped appellant driving “down the road” the result could be different. According to the trooper’s testimony, he smelled an odor of marijuana for the first time near the end of explaining the citation to appellant. On cross-examination, the trooper testified:

- Q: Okay. And then you also pointed out, it may be a different story if you stop him down the road?
- A: I told him if I stopped him down the road, I would act accordingly.
- Q: That would give the impression that he is going to leave the stop at this time?
- A: If that was his impression.
- Q: So he is free to go right now?
- A: At this moment in time, I don’t specifically recall if it is immediately taking place now or three seconds from now when I noted the odor of marijuana. . . .

The trooper also testified he could not tell whether the alleged odor was burnt or un-burnt marijuana.

After appellant confirmed he understood the citation, the trooper admittedly expanded the stop into a “narcotics investigation” by asking appellant “how much marijuana is in the vehicle?” Appellant responded that he had a blunt in the vehicle. The trooper then asked if appellant had any weapons in the car, to which appellant stated he had a handgun. Appellant provided the trooper with a Wisconsin permit to carry. The trooper then requested backup.

A few minutes later, a backup officer arrived and stood near the vehicle while the trooper retrieved the handgun. The trooper then secured appellant in the back of his squad car, before returning to appellant's vehicle to speak with the passenger. The trooper later testified that the backup officer observed the passenger making furtive movements while in the vehicle. The trooper instructed the passenger to exit the vehicle and patted her down. The passenger then admitted that appellant gave her cocaine to conceal in her pants. The officers searched appellant's vehicle, discovering marijuana and MDMA.<sup>3</sup> The officers arrested appellant.

The trooper's testimony at the hearing provided context to the events described above.<sup>4</sup> First, the trooper acknowledged that appellant "was calm" throughout the stop, that appellant answered all the trooper's questions "fully," and that the trooper did not observe "any bloodshot eyes or anything." Although, the trooper claimed he observed "indications that [appellant] was nervous[]" because appellant had an unlit cigarette in his mouth.<sup>5</sup> Second, the trooper noted that, generally, when he approaches a vehicle for the first time, officer safety is a "[h]igh" priority, so he focuses on the occupants in the vehicle. The trooper did not testify about how prioritizing certain aspects of a stop may affect an officer's perception of a situation or an officer's ability to detect smells.

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<sup>3</sup> MDMA is a hallucinogen, which is listed as a schedule I controlled substance. Minn. Stat. § 152.02, subd. 2(d)(2) (2018).

<sup>4</sup> The trooper testified he had been a peace officer in Minnesota for approximately five years and had received training related to controlled substances.

<sup>5</sup> The trooper admitted his written report did not mention appellant seemed nervous. But the trooper testified he "put in [his] report that [appellant] had a cigarette in his mouth that was not lit" which the trooper then stated "indicate[d] nervousness."

After the contested-omnibus hearing, the district court denied appellant's motion to suppress. To support its decision, the district court found:

It is *conceivable* that [the trooper] smelled the marijuana only after his second approach to the motor vehicle given the presence of the air fresheners and the *possibility* that [the trooper] *may* have been focusing on other aspects of the stop during the initial contact. . . . From the testimony, it is clear that [the trooper] smelled the marijuana in the car prior to concluding the original purpose of the stop.

(Emphasis added.)<sup>6</sup> The district court determined, “The odor of marijuana alone provided [the trooper] with probable cause<sup>7</sup> to suspect criminal activity.”

The parties requested a stipulated-facts bench trial, and the state agreed to dismiss count one (sale of hallucinogen). The stipulation noted appellant “enter[ed] into these stipulations to obtain appellate review of the District Court’s pre-trial ruling,” and that “[i]f [appellant] prevails on appeal, the judgment of conviction shall be reversed and the case dismissed.” See Minn. R. Crim. P. 26.01, subd. 4 (establishing the procedure to obtain appellate review of a pretrial ruling “[w]hen the parties agree that the court’s ruling on a specified pretrial issue is dispositive of the case”). The district court then found appellant

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<sup>6</sup> Regarding the air fresheners and the unlit cigarette, the district court stated, “Although use of air fresheners and cigarettes are legal, [the trooper] made note of it as he knew it often is, and *could be* in this instance, a tactic to mask odors.” (Emphasis added.)

<sup>7</sup> At points in its order, the district court incorrectly stated “probable cause” is the appropriate standard to review the expansion of this stop. The correct standard is “reasonable articulable suspicion.” See *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011).

guilty of count two (possession of cocaine). The district court sentenced appellant to a downward dispositional departure of 56 months in prison stayed for 15 years.<sup>8</sup>

This appeal follows.

## DECISION

Appellant challenges the district court's pretrial order denying his motion to suppress. Appellant argues the district court erred when it determined the trooper had reasonable articulable suspicion to expand the scope of the stop.<sup>9</sup> "When reviewing a district court's pretrial order on a motion to suppress evidence, we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted). "Findings of fact are clearly erroneous if, on the entire evidence, we are left with the definite and firm conviction that a mistake occurred." *State v. Andersen*, 784 N.W.2d 320, 334 (Minn. 2010). We will not disturb a district court's findings if there is "reasonable evidence to support the [district] court's findings." *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008) (emphasis added) (quotation omitted).

The United States and Minnesota Constitutions prohibit unreasonable search and seizure by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. An officer

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<sup>8</sup> The sentencing guidelines designated a 65-month presumptive commitment to prison, with a range of 56 months to 78 months. The departure report stated appellant was "[p]articularly amenable to probation."

<sup>9</sup> Appellant also argues the district court erred when it relied on statements from the backup officer despite the backup officer not testifying at the contested-omnibus hearing. Because we conclude the district court erred when it determined the trooper had reasonable articulable suspicion to expand the scope of the stop, we do not reach appellant's argument regarding the backup officer.

may, however, initiate a limited investigative seizure without a warrant if the officer has reasonable articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). Whether officers have reasonable articulable suspicion to conduct an investigative seizure depends on the totality of the circumstances, and a showing that the seizure was not “the product of mere whim, caprice, or idle curiosity.” *State v. Klamar*, 823 N.W.2d 687, 691 (Minn. App. 2012) (quotation omitted). The factual basis required to justify an investigative seizure is minimal. *Magnuson v. Comm’r of Pub. Safety*, 703 N.W.2d 557, 560 (Minn. App. 2005). But, “[p]olice must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity[;] [t]hey must articulate a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotations omitted). Additionally, appellate courts have noted that “by virtue of the special training they receive, police officers articulating a reasonable suspicion may make inferences and deductions that might well elude an untrained person.” *State v. Smith*, 814 N.W.2d 346, 352 (Minn. 2012) (quoting *State v. Flowers*, 734 N.W.2d 239, 251-52 (Minn. 2007)).

Minnesota has expressly adopted *Terry* to evaluate “the reasonableness of seizures during traffic stops even when a minor law has been violated.” *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004). Applying the *Terry* framework to a traffic stop involves a two-pronged analysis. *See id.* at 364. Under the first *Terry* prong, “we ask whether the stop was justified at its inception,” *id.*, by a showing of “reasonable articulable suspicion,” *Diede*, 795 N.W.2d at 842. If the officer had reasonable articulable suspicion to justify the initial stop, we turn to the second *Terry* prong and ask 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.* (quoting *Askerooth*, 681 N.W.2d at 364).

An initially valid vehicle stop may “become invalid if it becomes ‘intolerable’ in its ‘intensity or scope.’” *Askerooth*, 681 N.W.2d at 364 (quoting *Terry*, 392 U.S. at 17-18). “[E]ach incremental intrusion during a stop must be ‘strictly tied to and justified by the circumstances which rendered [the initial stop] permissible.’” *Id.* (quoting *Terry*, 392 U.S. at 19). Put another way, each step must “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*.” *Id.* at 365.

Here, the parties agree that the initial traffic stop was supported by “reasonable articulable suspicion.” *Diede*, 795 N.W.2d at 842. The parties dispute whether the trooper had “reasonable articulable suspicion” to expand the stop from one regarding a speeding violation to a narcotics investigation.

Appellant asserts that the district court’s findings do not support the ultimate determination that the trooper had reasonable articulable suspicion. We agree.

Upon reviewing the district court’s order, we are not convinced the district court found—either explicitly or implicitly—that the trooper actually smelled marijuana on the second approach. Instead, the district court repeatedly used hedged language when it made the following findings:

It is *conceivable* that [the trooper] smelled the marijuana only after his second approach to the motor vehicle given the presence of the air fresheners and the *possibility* that [the trooper] *may* have been focusing on other aspects of the stop during the initial contact.

(Emphasis added.) These findings speculate about the *possibility* that the trooper *could* have smelled marijuana on his second approach. Although the district court later concluded, “that [the trooper] smelled the marijuana in the car prior to concluding the original purpose of the stop,” the district court’s earlier speculative findings do not support that conclusion.

It is also noteworthy that the trooper did not testify that prioritizing other aspects of the stop affected his ability to detect odors during the first approach. Upon review of the record, the district court’s finding that the trooper “may have been focusing on other aspects of the stop during the initial contact,” in a manner that prevented his ability to detect the odor of marijuana, arose from the state’s written argument after the hearing, not any testimony elicited at the hearing. Thus, contrary to this finding being based on “reasonable evidence,” there is no evidence in the record to support this finding. *See Evans*, 756 N.W.2d at 870.

Even without the smell of marijuana, the state argues the trooper had reasonable articulable suspicion to expand the scope of the stop. In its order, the district court mentioned, “Although use of air fresheners and cigarettes are legal, [the trooper] made note of it as he knew it often is, and *could be* in this instance, a tactic to mask odors.” (Emphasis added.) The district court did not determine whether the presence of the multiple air fresheners and an unlit cigarette would independently provide reasonable articulable suspicion, only saying that the trooper “cited multiple circumstances to justify the expansion of the stop, the air fresheners, the cigarettes *and* the odor of marijuana.”

Our caselaw clearly indicates that the presence of “masking agents,” independent of other suspicious activity, is insufficient to support reasonable articulable suspicion. *See State v. Bell*, 557 N.W.2d 603, 606-08 (Minn. App. 1996), *rev. denied* (Minn. Mar. 18, 1997). In *Bell*, officers expanded a traffic stop based on Bell having cigars and cologne in the car, which the officers said could be “masking agents.” *Id.* at 606-07. The officers expanded the stop despite their own testimony indicating “that the traffic stop was routine, that Bell was cooperative throughout the stop, and that Bell did not exhibit signs of intoxication or other illegal drug use.” *Id.* at 607. We concluded the circumstances in *Bell* did not support the expansion of the stop. *Id.* at 607-08.

The current case is like *Bell*, in that appellant did not exhibit any other suspicious activity besides having multiple air fresheners and an unlit cigarette. When the trooper activated his lights, appellant immediately pulled to the side of the road using his blinker. Additionally, the trooper testified that appellant “was calm” throughout the stop, appellant answered all the trooper’s questions “fully,” and the trooper did not observe “any bloodshot eyes or anything.” Although, the trooper claimed he observed “indications that [appellant] was nervous[],” we have concluded that nervousness, even when combined with minorly suspicious activity, is not enough to expand a stop. *See State v. Syhavong*, 661 N.W.2d 278, 282 (Minn. App. 2003) (“While an officer’s perception of an individual’s nervousness may contribute to an officer’s reasonable suspicion, nervousness is not sufficient by itself and must be coupled with other particularized and objective facts.”); *State v. Tomaino*, 627 N.W.2d 338, 341 (Minn. App. 2001) (concluding that “[n]ervousness alone is not an objective fact, but rather a subjective assessment derived from the officer’s perceptions”

and that a marijuana keychain “while indiscreet, did not justify more than a hunch on [the officer]’s part that the van contained a controlled substance”).

In considering the totality of the circumstances, we conclude the trooper did not have reasonable articulable suspicion to expand the scope of the stop. *See Syhavong*, 661 N.W.2d at 281-83. Because the trooper stopped appellant for speeding, he expanded the scope of the stop when he asked about marijuana possession. *See Diede*, 795 N.W.2d at 845 (“Each intrusion during a stop must be strictly tied to and justified by the circumstances which rendered its initiation permissible. . . [but a] stop may be expanded . . . only if the expansion is supported by independent probable cause or reasonableness to justify that particular intrusion.” (quotations omitted)); *see also Syhavong*, 661 N.W.2d at 281 (“During a traffic stop, an officer’s questions must be limited to the purpose of the stop. . . . An officer may reasonably ask for the driver’s license and registration and ask the driver about his destination and the reason for the trip.”). Absent the odor of marijuana, solely observing multiple air fresheners and an unlit cigarette, coupled with the trooper’s perception of nervousness, did not give the trooper reasonable articulable suspicion to expand the stop into a narcotics investigation. *See Bell*, 557 N.W.2d at 606-08; *see also Askerooth*, 681 N.W.2d at 370 (holding an officer must “have reasonable articulable suspicion to expand the scope of a routine traffic stop in order to investigate other matters unrelated to the reason for the stop and to request consent to search”).

For these reasons, we conclude that the district court erred when it determined the trooper had reasonable articulable suspicion to expand the stop. Because the search was invalid, the evidence must be suppressed.

**Reversed.**