THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0647

State

v.

Miquel Francisco Perez

Appeal Pursuant to Rule 7 from Judgment of
the Rockingham County Superior Court

BRIEF FOR THE PETITIONER

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(Fifteen minutes oral argument)

ISSUES PRESENTED

1. The permissible duration of a traffic-stop is determined by the seizure's mission and it may last no longer than necessary to effectuate this purpose. The officer's questioning on matters unrelated to the stop and his order that Perez exit the vehicle expanded the duration of the stop without sufficient facts to establish reasonable suspicion that Perez was engaged in criminal conduct. Did the court err in denying the motion to suppress?
2. Under New Hampshire law, possession of less than ¾ of an ounce of marijuana is not a crime. Though he claimed to smell marijuana while at the passenger window of the car, the officer made no inquiries about the odor and did not have reasonable suspicion to believe there was a criminal quantity of marijuana in the car. Did the court err in finding that the odor of marijuana justified the extension of the stop and the officer's order that Perez exit his car?

Issue preserved by the motion to suppress and the trial court's order. A3[1] and Supp. 46. [2]

[1] "A" refers to the Appendix filed under separate cover with this brief.
[2] "Supp." refers to the documentary supplement attached to this brief.

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STATEMENT OF THE CASE

Miguel Francisco Perez was charged with two counts of possession of a controlled drug with the intent to distribute. A93. On June 22, 2018, Perez filed a motion to suppress evidence of the drugs that were the subject of the indictments against him. A3-15. The motion to suppress alleged that the police impermissibly prolonged the detention of the defendant and fundamentally changed the nature of the motor vehicle stop. A12.

The State filed an objection to the motion claiming that the arresting officer had a reasonable basis to extend the scope of the detention beyond the original observations of motor vehicle infractions because the officer smelled an odor of marijuana, saw three cell phones, learned that the vehicle was a rental vehicle, learned that Mr. Perez was on parole, and found various statements and mannerisms of the occupants of the vehicle suspicious. A16.

After a hearing on the merits of the motion on August 8, 2018, the trial court issued an order denying the motion to suppress on September 6, 2018. Supp. 46. After the court denied the motion to suppress, Mr. Perez waived his right to a jury trial and stipulated to sufficient facts to establish the elements of the charges. A88. Mr. Perez was sentenced to 15-30 years in prison with 5 years of the minimum suspended and 10 years of the maximum suspended on the condition of 5 years good behavior. A110.

STATEMENT OF FACTS

On April 15, 2018, Trooper Michael Arteaga was patrolling Interstate 95 near the Hampton toll plaza as a member of the Mobile Enforcement Team of the New Hampshire State Police. A27. As described by Trooper Arteaga, the Mobile Enforcement Team is a "proactive policing unit" that tries to "stop crimes before they actually occur." A26.

At approximately 10:40 p.m., Trooper Arteaga saw a black Nissan Altima with Colorado registration drive by his location and he pulled out and attempted to catch up and observe the vehicle further. A27-28. Trooper Arteaga did not offer any testimony that he observed the Altima commit any crime or motor vehicle infraction as it passed by his location. *Id*. Trooper Arteaga caught up with the Altima near the area of Exit 3. A28. When Trooper Arteaga caught up with the Altima, he observed that it was behind a tractor trailer truck and was following approximately one car length behind the truck. *Id*. Trooper Arteaga testified that the Altima was traveling at an unsafe distance behind the truck. *Id*. Trooper Arteaga then observed the Altima change lanes to pass the tractor trailer truck. A29. As the Altima was passing the tractor trailer, its side tires touched the white dotted lines on the highway at it used its turn signal to change lanes. *Id*.

Trooper Arteaga testified that he initiated a motor vehicle stop of the Altima for following too closely and failure to use required turn signal. A30. Trooper Arteaga testified that the manner in which the vehicle came to a stop was slower than usual. *Id*. After the Altima came to a stop, Trooper Arteaga approached the passenger side of the car. A30-31. Trooper Arteaga was wearing a uniform and operating an unmarked state police cruiser. A57. When he approached the car from the passenger side, Trooper Arteaga observed that there were two people in the car. A31. Trooper Arteaga observed that the driver of the car was male whom was later identified as Miguel Francisco Perez. A31-33. Trooper Arteaga also observed a female passenger whose seat was in the reclined position and he identified her as Jamelle Watson. *Id*.

When he arrived at the passenger window of the car, Trooper Arteaga announced that he was with the State Police and asked for the driver's license and the registration for the car. A32. Perez explained to the trooper that the car was a rental vehicle. *Id*.

Trooper Arteaga testified that Perez's hand was "visibly shaking" when he reached over to provide the license. *Id*. Trooper Arteaga then asked Perez for the rental agreement. *Id*. Perez instructed the female passenger to get the rental agreement out of the glove box, and after a second request from Perez, the passenger retrieved the rental agreement from the glove box. A32-33.

Trooper Arteaga testified that while he was at the passenger side of the car, he observed three cell phones. A35. He also testified that he noticed an odor of marijuana, but he could not remember if the odor was from burnt marijuana or fresh marijuana. A36. After the trooper made those observations, he went back to his patrol cruiser and ran a license and warrant check on the operator. *Id*. Trooper Arteaga's license check determined that Perez's license was valid. A58. Trooper Arteaga's warrant check determined that there were no warrants for Perez. A63. Trooper Arteaga's registration check determined that the car was a rental car from Hertz. A36. Although Trooper Arteaga testified that he found it suspicious that there were three cell phones in the car, he never asked Perez or Watson why there were three cell phones. A61. Trooper Arteaga testified that sometimes people who sell drugs sometimes have two cell phones, though the trooper admitted that he had two cell phones. A61. Trooper Arteaga also never asked Perez about the smell of marijuana in the car. A62. Trooper Arteaga did not ask Perez about the motor vehicle violations that were the basis the motor vehicle stop. A64.

After he determined Perez had a valid license and registration and no active warrants, Trooper Arteaga went to the driver's side of the car and asked Mr. Perez to exit the car. A37-38. Perez obeyed the trooper's instructions and immediately got out of the car. A38. When Perez got out of the car, Trooper Arteaga told him that he was only going to give him a warning for the motor vehicle infractions. A40. Trooper Arteaga still had Perez's license and registration in his hand when he asked Perez to get out of his vehicle. A67. Trooper Arteaga told Perez that he had learned that Perez was on parole for murder. A64. Trooper Arteaga asked Perez if he could pat him down for weapons and Perez complied with the request. A65.

Trooper Arteaga then questioned Perez about his prior record, his parole status and Perez's travel plans. A39. Perez told Trooper Arteaga that he and the female passenger were going to Portsmouth. *Id*. Trooper Arteaga asked additional questions about where Perez was going in Portsmouth. *Id*. Trooper Arteaga also asked Perez where he was coming from and Perez told him that he was coming from Providence. A40. At this point, Trooper Arteaga described Perez's demeanor as "[n]ervous, frantic." *Id*. Trooper Arteaga asked Perez additional questions about his plans to visit Portsmouth and Perez told the trooper that he "…could just search the vehicle." A41-43. Trooper Arteaga responded to Perez by jokingly stating, "Oh, I hadn't even thought about that." A42. Trooper Arteaga told Perez "to just hang" while he spoke to the passenger. *Id*.

Trooper Arteaga extended this roadside detention further by questioning the passenger, Jamelle Watson. He asked Watson where she and Perez had come from, where they were going, and what they were doing. *Id*.

After speaking with Ms. Watson, Trooper Arteaga went back to Perez and asked him if he had anything illegal in his car and Perez said that there was not anything illegal in the car. *Id*. Trooper Arteaga then asked Perez for permission to search his car and Perez said yes. A43. Trooper Arteaga then went back to his cruiser and retrieved a consent to search form and had Perez sign the form. *Id*.

After Perez signed the consent to search form, a second officer arrived, and the two troopers searched the vehicle that was operated by Mr. Perez. A44-45. The searched produced two plastic baggies that contained white powder that ultimately resulted in the convictions that are now before this Court. A19. The record below contains no evidence that the search of the car produced any marijuana, marijuana cigarettes or paraphernalia associated with using, smoking or storing marijuana.

SUMMARY OF THE ARGUMENT

The trial court erred in its analysis when it impermissibly combined a set of innocent and non-criminal factors to find that Trooper Arteaga had reasonable suspicion to extend the scope of the detention of Mr. Perez. The scope of Trooper Arteaga's investigative was not "carefully tailored to its underlying justification," which in this case were *de minimus* motor vehicle violations, and it lasted longer than necessary to effectuate the purpose of the stop. *State v. Hight*, 146 N.H. 746, 748 (2001), citing *State v. Wong*, 138 N.H. 56, 63, (1993). As Trooper Arteaga unlawfully detained Perez longer than necessary to investigate the original reason for the motor vehicle stop, Perez's subsequent consent to search was "tainted" by this unlawful detention. *Hight* at 746.

Further, in light of the statute decriminalizing possession of marijuana, the odor of marijuana detected by the police during a valid motor vehicle stop does not, when combined with other non-criminal factors, give rise to a reasonable suspicion that the defendant was engaged in criminal activity so as to justify prolonging the detention of the defendant and thereafter ordering him to exit his vehicle.

This Court should follow the reasoning set forth in *Commonwealth v. Cruz*, 945 N.E. 2d 899 (Mass. 2011) which held that the decriminalization of marijuana limits the ability of the police to use the odor of marijuana as a basis to expand motor vehicle stops by ordering persons out of their vehicles without evidence of other criminal activity.

ARGUMENT

I. The defendant's consent to search his vehicle was not voluntary because Trooper Arteaga asked questions unrelated to the initial justification for the stop, had no reasonable articulable suspicion justifying the extension of the stop and the questioning impermissibly prolonged the detention and changed the fundamental nature of the detention.

Stopping an automobile and detaining its occupants constitutes a "seizure" under the New Hampshire and United States Constitutions. *State v. McKinnon-Andrews*, 151 N.H. 19, 22 (2004), quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). This type of temporary detention or "*Terry* stop," is only lawful if the police have an articulable suspicion that the person detained has committed or is about to commit a crime." *State v. Wong*, 138 N.H. 56, 62–63 (1993), quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

For this type of stop to be constitutional, it "must be carefully tailored to its underlying justification" and the stop "must be temporary and last no longer than is necessary" to effectuate its purpose. *State v. McKinnon-Andrew*, 151 N.H. at 19, quoting *State v. Wong*, 138 N.H. at 63.

In *State v. McKinnon-Andrews*, this Court held that when analyzing whether the *Terry* scope requirement has been exceeded, a trial court should examine whether: (1) the police questioning was reasonably related to the initial justification for the stop; (2) the law enforcement officer had a reasonable articulable suspicion that would justify the questioning; and (3) in light of all the circumstances, the questioning impermissibly prolonged the detention or changed its fundamental nature. *Id*. 25.

The question before this Court is whether Trooper Arteaga had a reasonable articulable suspicion that would justify the questioning which expanded the length and scope of the detention of Mr. Perez. The trial court found that Trooper Arteaga's claim that he smelled marijuana, when combined with other factors, justified the expansion of the detention and questioning of Mr. Perez. Supp. 46. The trial court relied on *State v. Livingston*, 153 N.H. 399, 401 (2006) in finding that the odor of marijuana "…emanating

from a vehicle provides a police officer with reasonable articulable suspicion to detain and question an individual regarding the presence of marijuana." *Id*.

The critical flaw in the trial court's analysis is that, unlike the *Livingston* case, Trooper Arteaga's expansion of the detention of Mr. Perez was not premised on the odor of marijuana, but on an unsubstantiated hunch about illegal drug trafficking. In *Livingston*, the safety officer stopped a truck he believed to be a commercial vehicle for a routine inspection. *Id*. 401. When the safety officer approached the truck, he smelled a strong odor of burnt marijuana coming from inside it. *Id*. After determining that the truck did not come within the scope of the federal motor carrier safety regulations, the officer told the driver that he smelled marijuana and asked him whether he had any marijuana in the truck or on his person. *Id*. at 401. The driver responded, "No." *Id.* The safety officer explained to Livingston that he could refuse to consent to a search, in which case the officer would have a trained dog perform a canine sniff search of the exterior of the vehicle and seize the vehicle if warranted. *Id*.

The safety officer then asked the driver to get out of the truck and asked him to sign a consent to search form. *Id*. 402. Livingston signed the consent form. *Id*. The officer conducted a canine search of the interior and exterior of the vehicle and found a burnt marijuana cigarette in the driver's side door. *Id*. The officer then placed the defendant under arrest. During a subsequent search incident to the arrest, the officer then discovered a baggie containing cocaine in the defendant's pocket. *Id*.

The safety officer in *Livingston* complied with the test set forth in *McKinnon-Andrew* as he carefully tailored his detention to its underlying justification and the stop lasted no longer than was necessary to effectuate its purpose. The officer in *Livingston* stopped a vehicle with commercial license plates to conduct a routine commercial vehicle inspection. *Id*. at 401. While he was still asking the driver questions related to the initial justification for the stop, there developed reasonable suspicion that there was other criminal activity because of the "strong odor of burnt marijuana." *Id*. at 401. Carefully tailoring his questioning to the suspicion that developed during the questioning of the driver regarding the initial justification for the stop, the officer in *Livingston* then asked

the driver about the smell of marijuana. *Id*. The driver then consented to the search of his vehicle. *Id*. at 402. The officer in *Livingston* did not impermissibly extend the scope or duration of the detention nor did he change the fundamental nature of the detention. *See State v. McKinnon-Andrew*, 151 N.H. at 25.

The "…tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop…" and, in analyzing whether the officer impermissibly extended the scope of the detention, "it [is] appropriate to examine whether the police diligently pursued [the] investigation." *Rodriguez v. U.S.*, 135 S. Ct. 1609, 1614 (2015) (citations omitted).

Applying the standard in *Rodriguez*, Trooper Arteaga did not attend to the mission of the motor vehicle stop and did not diligently pursue the investigation of the facts developed in the stop. As contrasted to the officer in *Livingston*, Trooper Arteaga was patrolling Interstate 95 with a goal of stopping "crimes before they actually occur." A26. At 10:40 pm on April 15, 2018, Trooper Arteaga observed a black Nissan Altima pass his location. A27-28. The Altima was not speeding and was driving with the flow of traffic, yet Trooper Arteaga decided to follow this vehicle and observe it further. A52. The trooper followed the Altima for approximately 6 miles. A53. The defendant, a Hispanic male, was pulled over by Trooper Arteaga for following another vehicle at an unsafe distance and changing lanes while simultaneously using his directional signal. A30-31.

Once he stopped the vehicle, Trooper Arteaga did not ask Perez or the passenger any questions regarding the initial justification for the stop. A64. Although he testified that he smelled marijuana while on the passenger side of the car, the trooper never asked the driver or the passenger about the smell of marijuana in the vehicle. A62-63. Trooper Arteaga did not ask Perez if he had recently used marijuana or if he had been at a gathering where others used marijuana. Trooper Arteaga did not ask Perez if he used marijuana in Rhode Island and then drove to N.H. without the marijuana in his car. Trooper Arteaga did not ask Perez if he had a medical marijuana card. *See* RSA 126-X:1. Any of these questions would have established that Trooper Arteaga was attending to the mission of his stop and diligently investigating evidence revealed during this stop. The

failure to ask these questions supports a finding that the extension of the stop was not clearly tailored to the original reason for the stop or any of the evidence that the officer observed during the stop.

The trial court found that the totality of the facts, including the odor of marijuana, the tardiness of the stop, the nervous and odd behavior of the occupants, the extra cell phone, the rented vehicle and the fact that the defendant had a criminal record combined to "create a reasonable articulable suspicion of drug activity" warranting an expansion of the stop. Supp. 46.

As to the issue of the "slow stop," Trooper Arteaga did not ask Perez if there was a reason that he was slow to pull over, such as being unfamiliar with the area or looking for a safe place to pull over, and he therefore was not diligently pursuing the investigation on this issue. A56. It is entirely normal that a person from out of state would be extra cautious in finding a safe place to pull over on a busy multi-lane highway[3] when signaled to do so by the police.

As to the "nervous" or "odd" behavior of the occupants of the car, "[n]ervousness is a common and entirely natural reaction to police presence ..." and "is not enough by itself to establish reasonable suspicion." *U.S. v. Garcia*, 53 F.Supp.3d 502, 511 (D.N.H.,2014). The disparity in the answers of the driver and passenger as to where they were coming from also did not justify an extension of the traffic stop after the original reason for the stop had been resolved. *State v. Morrill*, 169 N.H. 709, 717 (2017).

As to there being three cell phones, as Trooper Arteaga did not question the occupants of the vehicle as to whether there was a plausible, legal explanation for having three cell phones, he was therefore not diligently pursuing the investigation in this case and the court improperly considered this factor. A61. Further, Trooper Arteaga himself admitted that he carried two cell phones. *Id*.

[3] Trooper Arteaga testified that the section of I-95 where he stopped the defendant had four north bound lanes. A28

As Trooper Arteaga did not question the occupants of the vehicle as to why they were driving a rental vehicle he was not diligently pursuing the investigation in this case and the court improperly considered this factor. A71.

As Mr. Perez's prior conviction was unrelated to drug activity, Trooper Arteaga's questioning him on this topic was inconsistent with his diligently pursuing the investigation in this case. Further, if the law were such that a prior criminal record automatically gave rise to reasonable suspicion, "any person with any sort of criminal record ... could be subjected to a *Terry*-type investigative stop by a law enforcement officer at any time without the need for any other justification at all." *U.S. v. Garcia*, 53 F.Supp.3d 502, 513 (D.N.H.,2014)(Held that defendants' nervousness, criminal record and non-credible story about their travel plans did not furnish reasonable suspicion to extend the scope of the detention), quoting *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997)(Held that defendant's nervousness, unusual travel plans, his briefly misstating where he rented his car, and his having prior drug convictions were not enough to support a reasonable and articulable suspicion of criminal activity.)

The trial court erred in its analysis by impermissibly combining a set of "wholly innocent factors" to into a "suspicious conglomeration" absent concrete reasons for such an interpretation. *State v. Blesdell–Moore*, 625, 166 N.H. 183, 189 (2014); quoting *United States v. Smith*, 263 F.3d 571, 594 (6th Cir. 2001). When Trooper Arteaga stopped Mr. Perez, he was on a fishing expedition and he used a combination of non-criminal activity to justify the expansion of the detention based on a hunch. Reasonable suspicion, as the term implies, requires more than a "naked hunch" that a particular person may be engaged in some illicit activity. *U.S. v. Chhien*, 266 F.3d 1, 6 (1st Cir. 2001).

Unlike the officer in *Livingston*, Trooper Arteaga did not "detain the defendant and question him regarding the presence of marijuana in his vehicle." *Id*. at 405. Trooper Arteaga did not detain Perez to ask him questions about the smell of marijuana, but instead detained the defendant to question him about drug trafficking without any reasonable suspicion to extend the detention for this purpose.

The facts in this case are more analogous to *State v. Hight*, 146 N.H. 746 (2001). In *Hight*, the defendant, an African American male, was pulled over by an officer for going 47 MPH in a 35 MPH zone and for having a defective taillight. *Id*. at 747. Hight was accompanied in the vehicle by two Caucasian passengers. *Id*. Upon approaching the defendant's vehicle, the officer asked Hight where he was going and where he was coming from. *Id.* Hight responded that he had just left Boston and was *en route* to a college in Vermont. *Id*. The officer asked Hight to produce his driver's license and automobile registration, which he did. *Id*. After determining that Hight's license and registration were valid, the officer returned to the defendant and asked him step out of the vehicle to answer some questions. *Id*. At this time, the officer still had possession of Hight's license and registration. *Id*.

The officer in *Hight* again asked the defendant to state his place of origin and his destination. *Id*. Hight again responded that he had come from Boston, where he and his passengers had been "hanging out," and that he was going to Vermont. *Id*. The officer told the defendant that he thought it was a long way to drive just to "hang out." *Id*. Hight responded that they had also gone to a "frat party" while in Boston. *Id*. The officer, indicating that he was concerned that Hight had picked up drugs in Boston, asked him for permission to search the vehicle for drugs. *Id*. Hight consented and the search yielded no contraband. *Id*. The officer then asked and was given permission to pat Hight for weapons and to search his person and his wallet for drugs. *Id*. at 747-748. The officer found a container that held a small amount of marijuana in Hight's back pocket. *Id*. at 748. He also found a package of rolling papers in his wallet. The two passengers were not searched. *Id*. Subsequently, the officer arrested Hight for possession of a controlled drug and returned the defendant's license and registration. *Id*.

In *Hight*, this Court found the consent to search was not voluntary as it was the product of an illegal detention where the officer had expanded the detention beyond the initial justification for the motor vehicle stop without reasonable and articulable suspicion of other criminal activity. *Id*. at 749. This Court also considered the fact that Mr. Hight

was an African American male accused of drug trafficking in deciding whether he voluntarily consented to the search. *Id*. at 751.

It is worth noting that in *U.S. v. Garcia* and *State v. Hight*, both courts considered the fact that being interrogated about drug activity during a stop for minor traffic violations may have contributed to both the nervousness of the drivers and/or their ability to freely consent to a request to search their vehicles. *State v. Hight* at 751; *U.S. v. Garcia* at 511-512.

The United State District Court of the District of New Hampshire recently followed the reasoning set forth in *U.S. v. Garcia* and *State v. Hight* when it found that the police impermissibly extended the length of the detention during a routine motor vehicle stop in *U.S. v. John Hernandez*, 2019 WL 2992045, at *1[4] (D.N.H., 2019). The *Hernandez* case is also noteworthy as it also involved Trooper Arteaga. *Id*.

In *Hernandez*, Trooper Arteaga stopped the driver because he observed the car following a tractor trailer "about one car length[5] away." *Id*. After Trooper Arteaga stopped the vehicle in *Hernandez* and asked for the license and registration, the driver gave him a rental agreement for the car. *Id*.

Trooper Arteaga did not further question Hernandez about his tailgating or issue him a citation for that traffic violation at this point, but instead questioned Hernandez about where he was headed and his itinerary. *Id*. at 2. The court in *Hernandez* found that these questions were not related to the traffic violation, but that Trooper Arteaga inquired about Hernandez's itinerary because he suspected that Hernandez was engaged in criminal activity—drug trafficking—and he wished to further investigate his suspicion.

After this questioning, Trooper Arteaga then ran Hernandez's license and registration and confirmed that Hernandez had a valid license and no warrants for his arrest. *Id*. at 6. At this point, the court found that the "tasks tied to the traffic infraction [were]—or reasonably should have been—completed" and the trooper should have, upon

[4] http://www.nhd.uscourts.gov/sites/default/files/Opinions/19/19NH109.pdf
[5] Officer Arteaga gave the identical testimony at the suppression hearing in Mr. Perez's case. A28.

his return to Hernandez's car, returned the license, registration, and rental agreement, and either issued Hernandez a citation/warning for the traffic violation or sent him on his way. *Id*. at 6, citing *Rodriguez*, 135 S. Ct. at 1614.

The court in *Hernandez* observed that Trooper Arteaga did not conclude the detention at that point and instead he continued to detain Hernandez and ultimately asked him to exit his car. *Id*. Once Hernandez was out of his car, the trooper noticed a bulge in his pocket and proceeded to do a pat-down search. *Id*. The bulge turned out to be a wad of cash, which fact added substance to—what at that point—was a mere hunch on the Trooper's part that Hernandez was engaged in drug trafficking. *Id*.

In *Hernandez*, the government argued that the request to exit the vehicle was supported by a reasonable and articulable suspicion of criminal conduct. The government pointed to the following facts to support Trooper Arteaga's suspicion—at the time he requested Hernandez exit the car—that criminal activity was afoot:

- Hernandez was driving a rental car, and, rental cars are "utilized for criminal activities, specifically drug trafficking"
- Hernandez was driving north on Interstate 95, a "known drug corridor"
- Hernandez had followed the car in front of him too closely for twenty to thirty seconds
- When the trooper pulled even with Hernandez, Hernandez had his hands on the steering wheel in a "ten and two" position, appeared "stiff," and was leaning far back from the steering wheel such that his profile was not visible due to the door frame
- There were two unopened packages of rubber bands next to car cleaning supplies in the back seat
- Hernandez was initially "standoffish" and gave "one-word answers" to the trooper's questions about his itinerary
- Hernandez said he had no arrest record and that the trooper could "look him up" and asked the trooper if he knew him from work

• Hernandez appeared "excessively nervous"

• Hernandez was traveling to the shopping outlets in Kittery, Maine, a "location... where drug transactions do occur"

• Hernandez said he was going shopping to buy Hollister jeans, but the trooper discovered that there is no Hollister store at the Kittery Outlets

• The rental agreement appeared to contradict Hernandez's statement about the date on which he rented the car

Id. at 7.

Several of the court's observation in *Hernandez* are instructive and applicable to this Court's analysis of whether the length and scope of the detention of Mr. Perez was impermissibly extended.

As to Trooper Arteaga's claim that Hernandez was initially acting "standoffish and giving quick answers," which gave the trooper the impression that Hernandez wanted to "hurry the interaction along," the court found that, viewed objectively, a reasonable officer would not find this suspicious, especially given that Hernandez is a member of a racial minority and may have had mixed experiences with the police in the past.[6] *Id*. at 8.

The *Hernandez* court found Trooper Arteaga's reliance upon the anxiety or nervousness of Hernandez (a non-Caucasian male whom he had just pulled over) lacked credibility as a legitimate basis to believe that Hernandez was engaged in criminal activity. *Id*. "In these times, it makes as much sense for a Trooper to be suspicious about a driver who appears perfectly calm after being pulled over, particularly where the driver is a non-Caucasian male." *Id*.

The *Hernandez* court dismissed the other factors cited by the government as "describ[ing] a considerable number of people traveling on our nation's highways for

[6] In making this finding, the *Hernandez* decision cited to *Illinois v. Wardlow*, 528 U.S. 119, 132 (2000) (Stevens, J. concurring in part and dissenting in part) (observing that, especially among minorities, flight may not indicate guilt but, rather, the minority's belief "that contact with the police can itself be dangerous"). *Id*. at 8.

perfectly legitimate reasons." *Id*. at 9. The *Hernandez* court found that the totality of the circumstances occurring prior to the Trooper Arteaga's request for Hernandez to exit the car, viewed from the perspective of a reasonable officer, did not provide a particularized and objective basis for reasonable suspicion that Hernandez was involved in drug-trafficking and granted his motion to suppress. *Id*. at 10.

Admittedly, there is one fact in this case that is different from the *Hernandez* case and that is Trooper Arteaga's claim that he smelled the odor marijuana in the car driven by Mr. Perez. This fact does not justify the extension of the stop for two reasons. The first is that Trooper Arteaga did not ask any questions of the occupants about the odor of marijuana in order to determine if there was a non-criminal explanation for the odor. Secondly, the decriminalization of marijuana in New Hampshire no longer makes it a permissible basis to suspect criminal activity without additional evidence.

II. The trial court erred when it found that the odor of marijuana emanating from a vehicle provides a police officer with reasonable articulable suspicion to detain and question the occupants of the vehicle.

After September of 2017, possession of ¾ of an ounce or less of marijuana was no longer a crime in New Hampshire. Supp. 42-43. *See* 318-B:2-c, II. The statement of purpose for the 2017 decriminalization of marijuana possession states the following reasons for this new law: 1) less time and resources spent on such cases; 2) convictions for marijuana use can lead to a lifetime of harsh consequences including denial of student financial aid, housing, employment, and professional licenses; and 3) reduced criminal penalties for the possession of 3/4 of an ounce or less of marijuana has the potential to address social and racial inequities in the New Hampshire criminal justice system. A114-116.

In furtherance of these goals, the new law not only addressed the penalties for possession of marijuana amounts under ¾ of an ounce, it also specifically stated "no person shall be subject to arrest for [possession of less than ¾ of an ounce of marijuana] and shall be released provided the law enforcement officer does not have lawful grounds

for arrest for a different offense." *See* RSA 318-B:2-c, VI. When interpreting a statute, this Court must interpret the statute in "the context of the overall statutory scheme and not in isolation" and "apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." *United States v. Howe*, 167 N.H. 143, 145 (2014); quoting *State v. Guay*, 164 N.H. 696, 700 (2013). The goal of this statute was that the citizens of New Hampshire would not be subjected to criminal type sanctions, including arrest and detention, when the police had nothing more than evidence that a person may have used marijuana at some point. A114-116. At a minimum, the new law requires that the police make inquiries as to the source of the odor of marijuana prior to assuming criminal activity is afoot.

The actions of Trooper Arteaga in this case are not only inconsistent with the U.S. and N.H. Hampshire Constitutions, but his actions are inconsistent with the purpose of the New Hampshire General Court's purpose and intent in decriminalizing marijuana. The legislative history of this case is clear that the purpose of this statute was to save the taxpayers of New Hampshire the expenses associated with the police spending time investigating marijuana possession. As was stated at the senate hearing on this law, "The harm we want to avoid in this bill…is the harm of being arrested." [7]

The actions of Trooper Arteaga are also inconsistent with the General Court's purpose to avoid social and racial inequities in the New Hampshire criminal justice system. Trooper Arteaga admitted that he started following Mr. Perez's vehicle before he witnessed Mr. Perez commit any motor vehicle violation. A27-28. Trooper Arteaga also admitted that while he was following the car driven by Mr. Perez, he witnessed other vehicles violating motor vehicle laws such as speeding. A53.

In denying the motion to suppress, the trial court rejected the reasoning in *Commonwealth v. Cruz*, 945 N.E. 2d 899 (Mass. 2011) which held that, in light of Massachusetts' statute decriminalizing possession of marijuana, the odor of burnt

[7] *See* Audio Recording of testimony on HB 650 at l:18:56 at http://www.gencourt.state.nh.us/bill_Status/BillStatus_Media.aspx?lsr=0069&sy=2017&sortoption=&txtsessionyear=2017&txtbillnumber=hb640

marijuana detected by the police during a motor vehicle stop vehicle did not, when combined with other factors, give rise to a reasonable suspicion the defendant was engaged in criminal activity so as to justify an order that the defendant exit his vehicle. *Id*. at 909-910. Similar to the stated purpose of the decriminalization of marijuana in New Hampshire, the stated purpose of decriminalization in Massachusetts was to remove the threat of various criminal "sanctions" for those who possess one ounce or less of marijuana and save police resources so that they could focus on serious crimes and save taxpayer money. *Id*. at 909. *Cruz* found that:

> Further, [the law decriminalizing marijuana to a violation level offense] provides a clear directive to police departments handling violators to treat commission of this offense as noncriminal. We conclude that the entire statutory scheme also implicates police conduct in the field. Ferreting out decriminalized conduct with the same fervor associated with the pursuit of serious criminal conduct is neither desired by the public nor in accord with the plain language of the statute. *Id*. at 910.

The trial court's reasoning in denying Mr. Perez's motion to suppress is not only contrary to the legislative intent but is also flawed in its reasoning. The trial court adopted the reasoning of the dissent in *Cruz*:

> Although the "possession of a small amount of marijuana is now no longer criminal, it may serve as the basis for a reasonable suspicion that activities involving marijuana, that are indeed criminal, are underway" (citations omitted). For example, the Court concludes that the odor of marijuana emanating from a vehicle provides reasonable suspicion that: (1) one or more of the vehicle's occupants is in possession of criminal amounts of marijuana; (2) one or more of the vehicle's occupants is distributing marijuana, or (3) that the vehicle's driver is operating under the influence of marijuana.
>
> Supp. 45-46.

Not only is this list of possibilities not exhaustive of the realm possibilities, it represents an extremely small subset of scenarios involving the smell of marijuana.

Research has shown that "It is surprisingly common to see cases involving an officer who conducted a search after 'smelling marijuana' only to find a weapon or a drug other than marijuana, but no actual marijuana." Kreit, Alex, *Marijuana Legalization and Pretextual Stops*, 50 U.C. Davis L. Rev. 741, 752 (2016). As observed by the Tenth Circuit, there are only a few possible "rational explanations" for cases where the officer claims to smell marijuana and no marijuana is found: (1) marijuana had previously been in the car and left a lingering odor that the officer smelled; (2) the officer "thought he smelled marijuana but was mistaken"; or (3) the officer "fabricated his testimony that he detected the smell of marijuana." *Id*. at 752, citing *United States v. Nielsen*, 9 F.3d 1487, 1489 (10th Cir. 1993).

These possibilities mitigate against allowing the police to extend the scope of motor vehicle detentions based upon the smell of marijuana, as the smell is marijuana is consistent with non-criminal activity unless there is evidence of drug trafficking and/or large amounts of marijuana. A person could drive a car driven by another family member[8] who used marijuana and, under the trial court's rational, the lingering smell of marijuana could justify the detention and search of that person who did not use marijuana.

Additionally, the trial court's reasoning is inconsistent with the privacy rights of our citizens as it gives the police the power to always assume the worst-case scenario from any given set of facts. If a driver is nervous and being nervous is both a normal reaction to police contact and consistent with criminal activity, then the police could assume that there is criminal activity afoot. As stated previously, this type of speculation is contrary to the law. *See State v. Blesdell–Moore, 166 N.H. at 189; State v. Hight*, 146 N.H. at 751; *U.S. v. Garcia*, 53 F.Supp.3d at 511. Under this type of thinking, the police could see a brownie on the passenger seat of a car, assume it is a marijuana infused product and then further assume there are more brownies that cannot be seen amounting to more than

[8] It is still a misdemeanor offense for any person between 18 and 21 to possess marijuana and if the police learn that the driver was in that age group, the officer would have reasonable suspicion to suspect that a crime was committed if he smelled marijuana. RSA 318-B:2-c, IV.

¾ of an ounce of marijuana. Our constitutions do not allow this type of speculative thinking and this type of reasoning is inconsistent with purpose of the statute.

This type of speculative thinking has previously been rejected by this Court. In *State v. Beauchesne*, 151 N.H. 803 (2005) this Court found the arresting officer did not witness sufficient facts to indicate that criminal activity was afoot when he observed two men standing in an alley and one man handing something small and "unidentifiable" to another man. *Id.* at 815. In *State v. Dodier*, 135 N.H. 134 (1991) this Court found no reasonable suspicion of criminal activity where the police officer observed two men talking in a truck who appeared nervous when the officer approached and the officer witnessed the driver made a furtive gesture. *Id*. at 139. Contrary to the trial court's reasoning, the police do not get to assume the worst-case scenario in determining if there is reasonable suspicion that criminal activity is afoot.

The trial court's reasoning is also flawed when it finds that the odor of marijuana may be evidence of drug distribution therefore justifying reasonable suspicion of criminal activity. Supp. 46. The smell of marijuana is sufficient to establish probable cause that a violation level offense of possession of marijuana may have been committed, but it is insufficient evidence to establish probable cause for drug trafficking. *U.S. v. Mongold*, 528 Fed. Appx. 944, 951 (10th Cir. 2013). Where no facts were articulated to support a finding that there was a criminal amount of contraband present in the car, the odor of marijuana did not justify the warrantless search of vehicle. *Com. v. Cruz*, 945 N.E.2d 899, 913, 459 Mass. 459, 476 (Mass.,2011).

At a minimum, this Court should hold that the odor of marijuana is not *carte blanche* for the police to detain the defendant for questioning unrelated to marijuana possession without investigating whether there is a non-criminal basis for the odor of marijuana. The smell of marijuana may justify additional questions as to the source of the smell, which questioning did not occur in this case. As the court in *Cruz* observed, "As citizens, we expect that if we commit a civil infraction, we will pay a fine; we do not expect a significant intrusion into our privacy and liberty." *Cruz* at Footnote 16, quoting *State v. Duncan*, 146 Wash.2d 166, 177, 43 P.3d 513 (2002).

The court's finding that when a police officer testifies that there is an odor of marijuana there is a reasonable basis to believe that criminal level activity may be afoot creates another concern for this Court because "[m]arijuana's distinct odor gives unscrupulous officers an easy way to justify a search during a pretextual stop--namely, falsely claiming to smell the odor of marijuana." Kreit, Alex, *Marijuana Legalization And Pretextual Stops*, 50 U.C. Davis L. Rev. at 752. This factor is a special concern in the present case where the officer, whose purpose was to "stop crimes before [they] actually occur,"[9] started following Perez before he witnessed Perez commit any crime. A27-28. Like many of the cases mentioned above, no marijuana was found during the search of Mr. Perez's vehicle. A19.

As the decriminalization of marijuana continues in this country, courts throughout the country continue to grapple with the issues set forth in this brief. In an opinion contrary to the holding in *Commonwealth v. Cruz*, the Court of Appeals of Oregon held that where there was a lawful traffic stop and the officer obtained the driver's consent to search the vehicle and observed an odor of "a large amount of marijuana," the warrantless search of the vehicle was justified based on the likely presence of contraband. *State v. Smalley,* 225 P.3d 844, 845 (Ore. 2010). Unlike *Cruz*, *Smalley* did not address the legislative purpose of the decriminalization of marijuana. *Id*. 844-848.

New Hampshire has a long tradition of placing a higher value on the right to be free from unreasonable searches and seizures because, "any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without [probable cause]." *State v. Ball*, 124 N.H. 226, 237 (1983), citing *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). This Court also has traditionally deferred to the judgment of the legislature. *See Opinion of the Justices (Furlough)*, 135 N.H. at 634–35 (1992). Both of these traditions and principles support this Court finding that the odor of marijuana does not justify the search and seizure of persons or property under the New Hampshire Constitution without additional evidence of criminal activity.

[9] A26.

CONCLUSION

The trial court erred in its analysis when it impermissibly combined a set of innocent and non-criminal factors to find that Trooper Arteaga had reasonable suspicion to extend the scope of the detention of Mr. Perez because the Trooper's investigation was not carefully tailored to its underlying justification and it lasted longer than necessary to effectuate the purpose of the stop. As Trooper Arteaga unlawfully detained Perez longer than necessary to investigate the original reason for the motor vehicle stop, Perez's subsequent consent to search was tainted by this unlawful detention and the trial court erred in denying the suppression of the fruits of this stop.

Further, in light of the statute decriminalizing possession of marijuana, the odor of marijuana detected by the police during a valid motor vehicle stop did not, when combined with other non-criminal factors, give rise to a reasonable suspicion that the defendant was engaged in criminal activity so as to justify an order that the defendant exit the vehicle and to extend the scope of the detention of the vehicle.

The defendant requests a fifteen-minute oral argument.

Under N.H. Supreme Court Rule 16(3)(i), the defendant certifies that the appealed decision is in writing and is appended to this brief. Supp. 31-46.

Pursuant to N.H. Supreme Court Rule 16(11), the defendant certifies that this brief does not exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters.

Respectfully submitted,

Miguel Francisco Perez

By his attorneys,

Wadleigh, Starr & Peters, P.L.L.C.

Dated: July 12, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I e-filed a copy of the Defendant's brief to counsel for the defendant, Stephen Fuller, Esquire, of the Office of the Attorney General.

_____/S/_____
Donna J. Brown

SUPPLEMENT

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Order of September 5, 2018…….31-46

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **State v. Miguel Francisco Perez**
Case Number: **218-2018-CR-00498**

Enclosed please find a copy of the court's order of September 05, 2018 relative to:

Order on Defendant's Motion to Suppress.

September 06, 2018

Maureen F. O'Neil
Clerk of Court

(695)

C: Donald L. Blaszka, Jr., ESQ; Calvin Lewis Skeirik, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

STATE OF NEW HAMPSHIRE

v.

MIGUEL PEREZ

Docket No. 218-2018-CR-00498

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

Defendant Miguel Perez is charged with two counts of Possession of a Controlled Drug with Intent to Distribute. He moves to suppress all evidence obtained as a result of a traffic stop, arguing that such evidence was obtained in violation of both the State and Federal Constitutions. The State objects. The Court held a suppression hearing on August 8, 2018. For the reasons that follow, Defendant's motion to suppress is **DENIED**.

Factual Findings

The following facts are derived from the testimony presented during the August 8, 2018 suppression hearing. On April 5, 2018, at approximately 10:40 p.m., Trooper Michael Arteaga of the New Hampshire State Police Mobile Enforcement Team was monitoring northbound traffic on Interstate 95 when he observed a black Nissan Altima with a Colorado registration pass by him. Trooper Arteaga entered the interstate and caught up to the Altima just south of exit three. When he did, he observed the Altima traveling in the second lane from the right (lane two)[1] and following approximately one car length behind a tractor trailer truck. Trooper Arteaga observed the Altima move

[1] During his testimony, Arteaga numbered the four lanes of Interstate 95 from right to left—the right-most lane being lane one and the left-most lane being lane four. For purposes of clarity, the Court will do the same.

from lane two to lane three. In doing so, the Altima's left directional signal did not go on until after its driver side tires had crossed over the dotted line.

After entering lane three, the Altima passed the truck on the left-hand side and moved back into lane two. This time, the Altima's right directional did not turn on until after the Altima's passenger side tires had crossed over the dotted line. When the Altima reentered lane two, Trooper Arteaga observed the Altima slow down, and the tractor trailer's brake lights go on and off in rapid succession. At this point, Trooper Arteaga, who was traveling in lane four, moved into lane three so he could observe the driver of the Altima. When he got close, the Altima changed from lane two to lane one. Thereafter, Trooper Arteaga pulled behind the Altima and stopped it for following too closely and for failing to use a required turn signal. The Altima came to a stop just south of exit five near Portsmouth, New Hampshire. Trooper Arteaga testified that the Altima pulled over in a safe manner but that it took longer than usual to stop.

Trooper Arteaga approached the passenger side of the Altima and observed a male driver, later identified as Defendant, and a female passenger who was reclining in the front passenger seat. Trooper Arteaga asked for Defendant's license and registration. Defendant handed over his license and explained that the Altima was a rental. Defendant's hand was visibly shaking when he handed his license to Trooper Arteaga. Trooper Arteaga also noticed that the tone of Defendant's voice was shaky and frantic.

Trooper Arteaga asked Defendant for the rental agreement. In response, Defendant asked the female passenger to retrieve the agreement from the Altima's glove compartment. The female passenger did not initially react to this request and,

instead, stared blankly ahead. About a minute later, Defendant again asked the passenger to retrieve the agreement and she did. When Trooper Arteaga received the agreement, he began matching the information on it to Defendant's license. While he was doing so, Defendant announced that he was traveling to Portsmouth, New Hampshire. Trooper Arteaga testified that he found it suspicious that Defendant would volunteer this information without being prompted.

While standing at the passenger side of the vehicle, Trooper Arteaga noticed that there were three cell phones in the Altima. He could also smell the odor of marijuana emanating from the vehicle.[2] According to Trooper Arteaga, the observation of three cell phones was significant because he has learned, through drug interdiction training, that drug traffickers often use separate cell phones (also known as "burner" cell phones) to conduct their drug related activities.

Trooper Arteaga returned to his cruiser and queried Defendant's license. He also queried the Altima's registration and learned that it was, in fact, a rental vehicle. According to Trooper Arteaga, drug traffickers prefer rental vehicles because: (1) they are mechanically reliable; and (2) if the registration is queried, the listed owner of the vehicle is the rental company and not the actual driver of the vehicle. Trooper Arteaga queried Defendant's license and learned that he lived in Manchester, New Hampshire. He also learned that Defendant was on parole for first degree murder.

Trooper Arteaga exited his cruiser and re-approached the Altima, this time from the driver side. He asked Defendant if he would exit the vehicle and speak with him. Defendant complied and stepped out. While speaking with Defendant, Trooper Arteaga

[2] Trooper Arteaga testified that he could not recall whether he smelled the odor of fresh or burnt marijuana.

noticed that he was nervous and visibly shaking. Due to Defendant's nervousness and his parole status, Trooper Arteaga asked if he could pat Defendant down for weapons. Defendant agreed and Trooper Arteaga found no weapons. Trooper Arteaga informed Defendant that he would be issuing him a warning for the traffic violations.

Trooper Arteaga then made small talk with Defendant about his parole status and Defendant explained that he had gotten caught up in a mess with his cousin in Rhode Island. Trooper Arteaga explained that it was ok and that the past was the past. Trooper Arteaga asked Defendant where he was coming from and where he was going. Defendant indicated that he was coming from Providence, Rhode Island and heading to Portsmouth, New Hampshire. Trooper Arteaga asked Defendant about his female companion and Defendant stated that they were friends and that they had known each other for about a year. Trooper Arteaga then asked Defendant where exactly he was going in Portsmouth. Defendant responded to this question by telling Trooper Arteaga that he could search the vehicle. Trooper Arteaga found this response suspicious because he had not previously mentioned searching the vehicle. He testified that he believed Defendant was trying to "call his bluff" by offering his consent in the hope that he would not accept the offer.

After this exchange, Trooper Arteaga told Defendant to stay at the rear of the vehicle while he spoke with the female passenger. When he asked the female passenger where they were coming from, she indicated that they were coming from Manchester, New Hampshire. This was not consistent with Defendant's answer of Providence, Rhode Island. Similarly, when Officer Arteaga asked the passenger how long she had known Defendant, she indicated that it had only been a few weeks.

Trooper Arteaga returned to Defendant and asked if there was anything illegal in the vehicle. Defendant stated that there was not. Trooper Arteaga asked Defendant if he could search the vehicle and Defendant replied that he had already said that Trooper Arteaga could. Trooper Arteaga retrieved a written consent form from his cruiser and attempted to review it with Defendant. However, Defendant was anxious and immediately asked to sign the form. After Defendant signed the form, Trooper Arteaga searched the vehicle. In the fuse box, he found two plastic bags: one containing fentanyl and the other containing cocaine.

Analysis

Defendant does not challenge the validity of the initial traffic stop. Rather, he argues—under the State and Federal Constitutions—that Trooper Arteaga unlawfully expanded the scope of the initial traffic stop without justification. Because the State Constitution is at least as protective as the Federal Constitution in this area, the Court addresses Defendant's claims under the State Constitution, citing to federal cases for guidance only. See State v. Ball, 124 N.H. 226, 231–33 (1983).

"Part I, Article 19 of the New Hampshire Constitution protects 'all people, their papers, their possessions and their homes from unreasonable searches and seizures.'" State v. Blesdell-Moore, 166 N.H. 183, 187 (2014) (quotation omitted). "A traffic stop is a seizure." Id. (citation omitted). During a traffic stop, "an officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." State v. Michelson, 160 N.H. 270, 274 (2010) (citation omitted). It is well settled, however, that "[t]he scope of . . . an investigative stop must be carefully tailored to its underlying justification, must be

temporary, and last no longer than is necessary to effectuate the purpose of the stop." Blesdell-Moore, 166 N.H. at 187 (quotation and brackets omitted). The State bears the burden of proving that the scope of the stop was not unlawfully expanded. State v. Morrill, 169 N.H. 709, 716 (2017) (citation omitted).

Whether a stop has been unlawfully expanded "depends upon the facts and circumstances of the particular case." Blesdell-Moore, 166 N.H. at 187 (quotation omitted). "To determine whether the scope of an otherwise valid stop has been exceeded by questioning, [the Court] must determine whether: (1) the question is reasonably related to the initial justification for the stop; (2) the law enforcement officer had a reasonable, articulable suspicion that would justify the question; and (3) in light of all the circumstances, the question impermissibly prolonged the detention or changed its fundamental nature." Id. In other words,

> If the question is reasonably related to the purpose of the stop, no constitutional violation occurs. If the question is not reasonably related to the purpose of the stop, [the Court] must consider whether the law enforcement officer had a reasonable, articulable suspicion that would justify the question. In the absence of a reasonable connection to the purpose of the stop or a reasonable, articulable suspicion, [the Court] must consider whether in light of all the circumstances and common sense, the question impermissibly prolonged the detention or changed the fundamental nature of the stop.

Id. at 188 (quotation omitted). The purpose of this test is to prevent law enforcement officials from converting routine traffic stops "into general inquisition[s] about past, present and future wrongdoing, absent an independent basis for reasonable suspicion or probable cause." McKinnon-Andrews, 151 N.H. at 25 (quotation and brackets omitted).

The State concedes that the scope of the initial stop was expanded. However, it

argues that such expansion was justified under prong two of McKinnon-Andrews because Trooper Arteaga had reasonable articulable suspicion of drug activity. See McKinnon-Andrews, 151 N.H. at 25. For the sake of clarity, the Court finds that Trooper Arteaga expanded the scope of the initial stop when he asked Defendant to step out of the vehicle. The Court now turns to whether the State has met its burden of proving that such an expansion was supported by reasonable articulable suspicion.

The New Hampshire Supreme Court has "explained that reasonable, articulable suspicion refers to suspicion based upon specific, articulable facts, taken together with rational inferences from those facts, that the particular person stopped has been, is, or is about to be, engaged in criminal activity." State v. Robbins, 170 N.H. 292, 297 (2017) (citation omitted). "To determine the sufficiency of an officer's suspicion, [the Court] considers the articulable facts in light of all surrounding circumstances, keeping in mind that a trained officer may make inferences and draw conclusions from conduct that may seem unremarkable to an untrained observer." Id. (quotation omitted).

It is well settled in this jurisdiction that a reasonable suspicion is more than a hunch, and that the facts articulated by the officer "must lead somewhere specific, not just to a general sense that this is probably a bad person who may have committed some kind of crime." Id. (quoting McKinnon-Andrews, 151 N.H. at 26). Although the Court defers to the perceptions of experienced officers, this deference is not blind. Blesdell-Moore, 166 N.H. at 188 (citing McKinnon-Andrews, 151 N.H. at 28 (Broderick, J., concurring)). To this point, a combination of wholly innocent observations will typically not combine to create reasonable articulable suspicion of criminal activity. See Blesdell-Moore, 166 N.H. at 189 ("We think it impossible for a combination of wholly

innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation." (quotation and brackets omitted)). With the above in mind, the Court now turns to the facts of this case.

As stated above, Defendant argues that Trooper Arteaga did not have reasonable articulable suspicion, unrelated to the initial traffic violations, and therefore impermissibly expanded the scope of the stop.[3] When Trooper Arteaga asked Defendant to step out of the vehicle, he had made the following relevant observations: (1) the vehicle was slow to stop; (2) Defendant was nervous and his passenger was acting odd;[4] (3) the vehicle contained three cell phones; (4) the vehicle was a rental; (5) the vehicle smelled of marijuana; and (6) Defendant was on parole for first degree murder. The Court will address the significance of each of these observations, in turn.

Turning first to observation one, the Court notes that Trooper Arteaga was not able to testify as to how far the vehicle traveled before pulling over. He also conceded that there are many different reactions to being pulled over and that, unlike some drivers, Defendant pulled over in a safe and orderly manner even if it took longer than normal to come to a complete stop. On the other hand, the Court agrees that an undue delay in pulling over may be indicative of the concealment of criminal activity. Thus, the

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[3] Defendant's motion is confined to whether Trooper Arteaga had a reasonable articulable suspicion to expand the scope of the stop from investigating a traffic violation to investigating suspected drug activity. In other words, Defendant does not make the alternative argument that—assuming there was reasonable articulable suspicion of drug activity—Trooper Arteaga's questioning regarding his parole status was not related to a drug investigation (i.e. the odor of marijuana). Defendant did ask Trooper Arteaga on cross examination whether Defendant's murder conviction had anything to do with drugs to which Trooper Arteaga responded "no." However, Defendant offered no substantive argument on this point. The Court agrees that this question—unless related to a suspected parole violation—was not related to a drug investigation. However, Defendant did not raise this argument and therefore the Court need not address it. Foley v. Wells Fargo Bank, N.A., 772 F.3d 63, 79 (noting that judge's "are not pigs hunting for truffles[] in the record."); State v. Chick, 141 N.H. 503, 504 (1996) ("[P]assing reference to 'due process,' without more, is not a substitute for valid constitutional argument."); State v. Blackmer, 149 N.H. 47, 49 (2003) ("[P]assing reference to constitutional claim renders argument waived.").

[4] Trooper Arteaga described the passenger's behavior as nervous. The Court disagrees and finds that her behavior was admittedly odd.

Court gives this observation marginal weight in its reasonable suspicion analysis. Cf. Morrill, 169 N.H. at 712, 716 (no reasonable articulable suspicion despite the fact that the trooper testified that the vehicle traveled approximately one-eighth of a mile before stopping and that such a delay can be indicative of an occupant in the car trying to hide something).

Similarly, the Court finds that nervousness on the behalf of Defendant and odd behavior on the behalf of the passenger, alone, does not give rise to reasonable articulable suspicion of drug activity. The case law is rather clear on this point. See Blesdell-Moore, 166 N.H at 189 ("[N]ervousness is entirely consistent with innocent behavior . . . . Absent additional facts, we decline to find that otherwise innocent factors like nervousness and bloodshot eyes are sufficient to support reasonable suspicion."); see also Morrill, 169 N.H. at 712–13 (no reasonable articulable suspicion despite the fact that the driver of the vehicle was unusually nervous, jittery, shaking uncontrollably, and at one point adopted a fight or flight stance). Accordingly, the Court assigns minimal weight to this observation.

As to observation three, the Court credits Trooper Arteaga's testimony that in his expertise drug traffickers often use a separate phone to conduct their drug transactions. This conclusion is supported in the case law. See, e.g., State v. Howard, No. 105327, 2017 WL 5903451, *1, *2 (Ohio Ct. App. Nov. 30, 2017) ("The number of cell phones found in the vehicle was consistent with the officer's experience that 'dealers will have multiple cell phones. That's their lifeline to that business.' The vice officer explained that multiple cell phones allowed drug dealers to have separate phone lines for family, buyers, and sellers."); United States v. Gorny, Cr. No. 13–70, 2014 WL 2860637, *1, *6

(W.D.Pa. Jun. 23, 2014) ("Cell phones and firearms are generally considered the 'tools of the trade' of drug traffickers, which the involved detectives fully understood and conveyed to the magistrate judge." (citing United States v. Jones, Cr. No. 07–258, 2009 WL 1855832, *1, *4 (E.D.Pa. Jun. 26, 2009) ("Cell phones are considered essential tools of the drug trade."). It goes without saying, however, that the observation of one extra cell phone—without other facts linking that cell phone to potential drug activity—is benign. See Gorny, Cr. No. 13–70, 2014 WL 2860637, at *6 ("But, the basis for the detectives' probable cause to search the cell phones seized from Gorny arises from the fact that they knew that Gorny himself used cell phones as a tool of his own drug trafficking rather than the suggested empty assertions about drug traffickers generally."). There are many legitimate reasons to have an extra cell phone. Indeed, Trooper Arteaga admitted on cross examination that, as a New Hampshire State Trooper, he is required to carry an extra cell phone. Accordingly, the Court attributes little weight to this observation in isolation.

The Court also credits Trooper Arteaga's conclusion that rental vehicles are often used by drug traffickers because they are reliable, and their registrations do not divulge the identity of their drivers. See, e.g., United States v. Cavazos, 542 Fed. Appx. 263, 268 (4th Cir. 2013) (noting that drug dealers commonly use rental vehicles); United States v. Abdul-Ganui, No. 2:10cr16, 2010 WL 5279948, *1, *9 (W.D.Pa. Dec., 2010) ("Courts have recognized that the use of rental vehicles is common in the drug trade because they are not subject to forfeiture." (collecting cases)). However, it is axiomatic that everyday people rent vehicles for a variety of valid reasons. Thus, without other facts linking this observation to drug activity, the Court attributes little weight to it.

Turning now to Defendant's parole status,[5] although the Court may take into account an individual's criminal record in determining whether a police officer had reasonable articulable suspicion, see State v. Doyle, 126 N.H. 153, 160 (1985) ("The facts remaining in the excised document concerning past criminal activity, as well as the observations of trained police officers . . . form a sufficient basis for a finding of probable cause."); Roe v. Attorney General, 750 N.E.2d 897, 914 (Mass. 2001) ("A person's prior criminal record is a legitimate factor to consider in determining whether there is reasonable suspicion for a stop or probable cause for a search or an arrest."); State v. Mack, 535 P.2d 766, 770 (Or. Ct. App. 1975) (consideration of defendant's recent arrest for involvement in illegal drug activity could be considered in probable cause analysis); State v. Carter, 697 N.W.2d 199, 205 (Minn. 2005) ("A person's criminal record is among the circumstances a judge may consider when determining whether probable cause exists for a search warrant." (citation omitted)), the Court finds that Defendant's parole status, albeit for a heinous crime, seems unrelated to drug activity. Although possible, the Court heard no testimony that Defendant's first degree murder conviction stemmed from his involvement in the drug trade. The Court also does not know the age of this conviction. Thus, the Court attributes very little or no weight to this observation.

Finally, the Court addresses Trooper Arteaga's most salient observation—the odor of marijuana—and determines whether that smell, combined with the observations outlined above, provided him with reasonable articulable suspicion of drug activity. At the outset, the Court notes that the legal significance of this odor is in flux.

As Defendant has accurately pointed out, since September of 2017, possession

[5] The Court notes that the State does not argue that Defendant had a reduced expectation of privacy because of his parole status.

of 3/4 of an ounce or less of marijuana is no longer a crime in New Hampshire. Compare RSA 318-B:2-c, II ("Except as provided in RSA 126-X,[6] any person who knowingly possesses 3/4 of an ounce or less of marijuana, including adulterants or dilutants, shall be guilty of a violation, and subject to the penalties provided in paragraph V."), with RSA 625:9, II(b) ("A violation does not constitute a crime . . . ."). Put another way, New Hampshire has decriminalized possession of small amounts of marijuana, and, for the most part, such possession amounts to a civil infraction as opposed to a criminal conviction. But see RSA 318-B:2-c, V(a) (stating that if a person receives four or more convictions in a three year period they shall be guilty of a class B misdemeanor).

Notwithstanding the fact that marijuana is now decriminalized, New Hampshire, unlike Massachusetts, Vermont, and Maine, has not legalized the recreational use of marijuana. Possession of more than 3/4 of an ounce of marijuana is still very much a crime in New Hampshire. See RSA 318-B:26, II(c); cf. Mass. Gen. Laws Ann. ch. 94G, § 7(a)(2) (legalizing the possession of up to 10 ounces of marijuana, as well as the cultivation of up to six marijuana plants, at a person's primary place of residence).

At the suppression hearing, Defendant argued that the odor of marijuana did not provide a reasonable articulable suspicion of criminal activity because possession of a small amount of marijuana is a civil offense. Therefore, Defendant argues, Trooper Arteaga had no legal basis to expand the scope of the stop. The New Hampshire Supreme Court has not had occasion to address this issue since the advent of decriminalization. Prior to that state's outright legalization of marijuana, this argument prevailed in Massachusetts. See Commonwealth v. Cruz, 945 N.E.2d 899, 908–09

[6] RSA 126-X is the New Hampshire Medical Marijuana statute.

(Mass. 2011).

In Cruz, officers observed two males in a parked vehicle in front of a fire hydrant. Id. at 902. When they passed by the vehicle, they observed the driver light up a small, inexpensive cigar that is commonly known to mask the odor of marijuana smoke. Id. at 903. The officers eventually approached the vehicle and, when they did, they smelled the faint odor of burnt marijuana. Id. They also observed that the occupants were extremely nervous. Id. The occupants were ordered out of the vehicle based upon the odor of marijuana and their nervous behavior. Id.

The Supreme Judicial Court of Massachusetts held that this exit order was not supported by reasonable articulable suspicion of criminal activity. Id. at 908–09. In doing so, the Cruz court reasoned that the reasonable suspicion standard "is tied, by its very definition, to the suspicion of criminal activity, as opposed to merely infractionary, conduct." Id. at 908 (citation omitted, emphasis in the original). It then reasoned that, to justify an exit order based upon the odor of marijuana, the police must have articulable facts suggesting that the passengers possess a criminal amount of marijuana. Id. This was so because, in decriminalizing marijuana, the voters of Massachusetts "intended to treat offenders who possess one ounce or less of marijuana differently from perpetrators of drug crimes . . . . [and] [f]erreting out decriminalized conduct with the same fervor associated with the pursuit of serious criminal conduct is neither desired by the public nor in accord with the plain language of the statue." Id. at 910. In sum, the Cruz court held that the odor of burnt marijuana alone cannot justify an exit order. Id.

The language of Part I, Article 19 is virtually identical to its Massachusetts counterpart. Given its language and our shared history, the New Hampshire Supreme

Court has given weight to the Supreme Judicial Court's interpretation of analogous provisions of the Massachusetts Constitution. See State v. Roache, 148 N.H. 45, 49 (2002). To state the obvious, however, this Court is not bound by decisions of the Supreme Judicial Court. The New Hampshire Supreme Court has, on occasion, declined to adopt that court's constitutional reasoning. See, e.g., State v. Burris, 170 N.H. ___, ___ (decided June 5, 2018) (slip op. at 9) (holding that Part I, Article 15 of the New Hampshire Constitution—unlike its identical Massachusetts counterpart—does not require transactional immunity). In short, this Court is unpersuaded by the Cruz holding and believes that the New Hampshire Supreme Court would not adopt its reasoning.

In this jurisdiction, the odor of marijuana emanating from a vehicle provides a police officer with reasonable articulable suspicion to detain and question an individual regarding the presence of marijuana. See State v. Livingston, 153 N.H. 399, 405 (2006). The Court finds that this holding has not been abrogated by RSA 318-B:2-c. Put simply, marijuana is still contraband in this state. See RSA 318-B:2-c, V(a) (stating that "[t]he offender shall forfeit the marijuana . . . ."). Cf. State v. Schulz, 164 N.H. 217, 221 (2012) ("To establish probable cause, the affiant need only present . . . sufficient facts and circumstances to demonstrate a substantial likelihood that . . . contraband . . . will be found in the place to be searched."). Although the "possession of a small amount of marijuana is now no longer criminal, it may serve as the basis for a reasonable suspicion that activities involving marijuana, that are indeed criminal, are underway." Cruz, 945 N.E.2d at 914–15 (Cowin, J. dissenting). For example, the Court concludes that the odor of marijuana emanating from a vehicle provides reasonable suspicion that: (1) one or more of the vehicle's occupants is in possession of criminal

amounts of marijuana; (2) one or more of the vehicle's occupants is distributing marijuana, or (3) that the vehicle's driver is operating under the influence of marijuana. See id. at 915 (Cowin, J. dissenting); Livingston, 153 N.H. at 404 ("A temporary detention is lawful . . . if the police have an articulable suspicion that the person detained has committed or is about to commit a crime."). For this reason, the Court affords this observation considerable weight.

After considering the totality of the above facts, and attributing the appropriate weight to each of them, the Court finds that Trooper Arteaga possessed a reasonable articulable suspicion of drug activity when he asked Defendant to step out of the vehicle. In short, the odor of marijuana combined with the tardiness of the stop, the nervous and odd behavior of the passengers, the extra cellphone, the fact that the vehicle was rented, and Defendant's criminal record, combined to create a reasonable articulable suspicion of drug activity. See Livingston, 153 N.H. at 405 (holding that the officer had reasonable articulable suspicion based upon the odor of marijuana, nervousness, and bloodshot eyes).[7] Accordingly, the Court finds that the State has met its burden of proving that the stop was not unlawfully expanded.

Conclusion

For the reasons set forth above, Defendant's motion to suppress is **DENIED**.

So Ordered

Sept 5, 2018
Date

Marguerite L. Wageling
Presiding Justice

[7] The Court also notes that the inconsistent itinerary statements that were given by Defendant and his passenger only confirmed Trooper Arteaga's suspicions of criminal activity in the moments leading up to the search of the vehicle.