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

REPLY BRIEF FOR THE DEFENDANT

Donna J. Brown
Wadleigh, Starr and Peters,
PLLC
95 Market Street
Manchester, NH 03101
NH Bar # 387
603-206-7234
(Fifteen minutes oral argument)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

SUMMARY OF ARGUMENT IN REPLY BRIEF

The defendant files this reply brief to address the State's preservation claim and to clarify his claim as to the relevance of marijuana decriminalization to the reasonableness of the search and seizure in this case.

New Hampshire's decriminalization of marijuana is a relevant factor in determining the reasonableness of a search and seizure and this claim was preserved at the trial court level by the defendant's motion to suppress, his questioning of Trooper Arteaga and his arguments at the hearing on the motion to suppress.

After the decriminalization of marijuana in New Hampshire, law enforcement may no longer justify a search and seizure by making a non-specific claim that they noticed an "odor of marijuana," but must instead give specific information establishing their efforts to determine whether this odor was related to criminal or non-criminal activity.

ARGUMENT

A. New Hampshire's decriminalization of marijuana is a relevant factor in determining the reasonableness of a search and seizure and this claim was preserved at the trial court level by the defendant's motion to suppress, his questioning of Trooper Arteaga and his arguments at the hearing on the motion to suppress.

The defendant files this reply brief to address the preservation issue raised in the State's brief. Specifically, the State asserts the defendant did not preserve his argument that marijuana decriminalization is relevant to whether the odor of marijuana is a sufficient basis to expand the scope of a motor vehicle detention. StBr.:22.[1] This argument fails for two reasons. The first is that this issue was clearly preserved as the trial court noted that "[a]t the suppression hearing, Defendant argued that the odor of marijuana did not provide reasonable articulable suspicion of criminal activity because possession of a small amount of marijuana is a civil offense." DBr.: 43.[2] The fact that four pages of the lower court's order were devoted to a detailed analysis of this issue is further evidence that this issue was preserved, thereby allowing the trial court an adequate opportunity[3] to rule on this issue. *Id*. at 42-46.

The second reason the State's preservation argument fails is that it misapprehends defendant's argument on this issue. The State's brief suggests that the defendant is making a novel claim that marijuana decriminalization now prohibits the police from ever considering the odor of marijuana in determining whether to expand the scope of a stop. StBr.: 22. The defendant's argument at the trial court level and on appeal is that Trooper Arteaga impermissibly prolonged the detention of the defendant as well as fundamentally changed the nature of the stop. AppDBr.: 9.[4] In response to this argument, the State

---

[1] StBr.: refers to State's brief.
[2] DBr.: refers to defendant's opening brief.
[3] "The preservation requirement recognizes that ordinarily, trial courts should have an opportunity to rule upon issues and to correct errors before they are presented to the appellate court." *State v. Brum*, 155 N.H. 408, 417 (2007).
[4] AppDBr.: refers to the appendix of the defendant's opening brief.

asserted that Trooper Arteaga's expansion of the detention of the defendant's vehicle was justified, in part, by the odor of marijuana. *Id*. at 20 & StBr.: 19-20.

At the hearing on the motion to suppress, the defendant challenged the State's reliance on the odor of marijuana to justify the expansion of the stop. This included extensive questioning of Trooper Arteaga about new state policies regarding the arrest and detention of persons found to be in possession of less than 3/4 of an ounce of marijuana. MHTr.: 28-30.[5] Trooper Arteaga conceded that New Hampshire's decriminalization of marijuana changed state police search and seizure policies when he acknowledged that the police should not "arrest, impound or search the vehicle" if the driver had less than 3/4 of an ounce of marijuana. *Id*. at 28. Trooper Arteaga's testimony suggested that he did not always follow these new rules because "you do have to investigate" referring to his practice of not believing people when they assert they had less than 3/4 of an ounce of marijuana. *Id*. at 29.

The defendant further challenged the State's reliance on the odor of marijuana on this issue by questioning the trooper about his failure to ask any questions about the odor of marijuana. *Id*. at 41-42. Despite his claim that he expanded the detention due in part to the odor of marijuana, Trooper Arteaga admitted he never asked the defendant any questions to determine if there was more than 3/4 of an ounce of marijuana in the car or if the occupants used marijuana earlier in the day. *Id*. at 17, 41-42. The trooper's failure to ask any questions about the source of odor of marijuana is consistent with Trooper Arteaga's search and seizure philosophy as he testified that "I personally would want to search the vehicle" and his mission was to "stop crimes before they actually occur." *Id*. at 29 and 5. Trooper Arteaga's philosophy and actions are not consistent with the law which requires that a motor vehicle stop be "carefully tailored to its underlying justification" and be "temporary and last no longer than is necessary" to effectuate its purpose. *State v. McKinnon-Andrews*, 151 N.H. 19 (2004).

[5] MHTr.: refers to the transcript of the hearing on the defendant's motion to suppress.

In support of their argument that the decriminalization issue was not preserved, the State asserts that the trial court acted *sua sponte* when it analyzed the application of *Commonwealth v. Cruz*, 945 N.E. 2d 899 (Mass. 2011) in New Hampshire. StBr.: 24-25. The defendant submits that the trial court's reliance on the dissent in *Cruz* was intended to minimize the trooper's concession that decriminalization had in fact changed the law and state police policies applicable to search and seizures involving marijuana. DBr.: 42-46. The trial court knew Trooper Arteaga had conceded the relevance of decriminalization on search and seizure practice and the court's reliance on the dissent in *Cruz* was an attempt to minimize this concession. The trial court erred in its reliance on the dissent in *Cruz* and its failure to consider the relevance of marijuana decriminalization on the reasonableness of the expansion of the stop and this issue was preserved by the defendant's motion, his questioning of the trooper at the hearing on the motion and his arguments at the hearing on the motion to suppress.

B. After the decriminalization of marijuana in New Hampshire, law enforcement may no longer justify a search and seizure by making a non-specific claim that they noticed an "odor of marijuana," but must instead give specific information establishing their efforts to determine whether this odor was related to criminal or non-criminal activity.

As the State's brief suggests that it is the defendant's position that the odor of marijuana may not be considered by law enforcement during motor vehicle stops, some clarification of the defendant's position is in order. There are circumstances where the odor of marijuana, when combined with other factors may permit the expansion of a motor vehicle stop. One example of the permissible expansion of a stop would be where an officer stops a vehicle for erratic driving, notices an odor of burnt marijuana upon greeting the driver and observes driver impairment. In this scenario, an officer would be justified in asking questions targeted at determining whether the driver was impaired.

If, on the other hand, an officer stops a car for having an expired inspection sticker and smells an odor of marijuana, without any further evidence of criminal activity an expansion of the stop would be impermissible. Assuming, arguendo, the officer was justified in expanding the search under this second fact pattern, his or her questioning

must be reasonably related to the initial justification for the stop, not impermissibly prolong the stop or change the fundamental nature of the stop. *State v. McKinnon-Andrews*, 151 N.H. at 25 (2004).

Post-decriminalization, law enforcement may no longer justify a search and seizure by making a non-specific claim that they noticed an "odor of marijuana," but must instead give specific information establishing their efforts to determine whether this odor was related to criminal or non-criminal activity.

It is important to note that the State's brief mistakenly asserts that the facts of this case involve the odor of "fresh marijuana." StBr.: 13. When Trooper Arteaga was asked about this issue at the suppression hearing, he responded, "I believe it was fresh; I can't really remember." MHTr.: 15. The State's brief also mistakenly asserts that Trooper Arteaga's observations of the defendant, when combined with the "presence of marijuana in the car" justified his suspicions of drug activity. StBr.: 15. 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. DBr.: 9.

These mistaken assumptions only serve to highlight the problem with equating the odor of marijuana with criminal activity without more specific information. The odor of marijuana can easily be associated with non-criminal activity. A motor vehicle stop near the Massachusetts state line involving the odor of marijuana is consistent with non-criminal activity such as the occupants attending a social event in Massachusetts where either they or others used marijuana or, alternatively, the passenger smoked marijuana while they were in Massachusetts. As the trooper did not testify to any impairment of the defendant, these possibilities would constitute non-criminal activity.

Another leap of logic in the State's brief is their assertion that the odor of marijuana "undermined the potentially innocent nature of other key observations that Trooper Arteaga's training and experience informed him were also indications of drug-related activity." StBr.: 20. These other key observations included the trooper's testimony about the two cell phones and rental agreement. *Id*. at 16. Trooper Arteaga did not testify that the cell phones and rental agreement are consistent with drug-related

activity, he testified that the cell phones and rental agreement were consistent with drug trafficking. MHTr.: 14-16. This is an important distinction. The odor of marijuana is not consistent with drug trafficking,[6] especially post decriminalization. Statutes decriminalizing the possession of small amounts of marijuana were passed with the intent to "treat offenders who possess [small amounts] of marijuana differently from perpetrators of drug crimes." *Commonwealth. v. Cruz*, 945 N.E.2d 899, (Mass., 2011). The decriminalization of marijuana undermines the State's arguments conflating the odor of marijuana with drug trafficking. The decriminalization of marijuana renders the trooper's claim that he smelled the odor of marijuana just one more factor relied on by the trial court that has a plausible, non-criminal explanation.

Neither the State's brief or the trial court's order assert that the factors other than marijuana odor were sufficient to justify the search and seizure in this case. StBr.: 20. Contrary to the State's assertion, the other factors are not "key observations,[7]" but instead were factors that "describe a considerable number of people traveling on our nation's highways for perfectly legitimate reasons." *U.S. v. Hernandez*, 2019 WL 2992045, at 1,9 (D.N.H., 2019). Likewise, there are numerous non-criminal reasons why law enforcement may observe an odor of marijuana emanating from a vehicle traveling a few miles north of the Massachusetts state line.

Trooper Arteaga's questioning was not reasonably related to the justification for the initial stop and impermissibly prolonged the stop because, unlike the officer in *State v. Livingston*, 151 N.H. 19 (2004), he did not ask any questions related to the odor of marijuana of the occupants of the vehicle. Instead, Trooper Arteaga impermissibly changed the fundamental nature of the stop based upon evidence of non-criminal activity.

---

[6] As the defendant asserted in his opening brief, this Court could reach a different conclusion if the facts were like those in *State v. Smalley*, 225 P.3d 844, 845 (Ore. 2010) where the officer observed a "strong" odor of marijuana and other facts consistent with a large amount of marijuana indicating a quantity of marijuana consistent with criminal activity. *See* DBr.: 25.

[7] *See* StBr.: 16.

CONCLUSION

The defendant preserved his claim that the decriminalization of marijuana was relevant to the reasonableness of Trooper Arteaga's expansion of the detention of the defendant's vehicle as demonstrated by the trial court's extensive analysis of this factor. Preservation was established where the defendant challenged the trooper on his expansion of the stop based upon the odor of marijuana and the trooper acknowledged the impact of decriminalization on the law and state police policies regarding arrest, search and seizure. The trooper's admission that he did not question the driver or the passenger about the odor of marijuana is evidence that the expansion of the detention was based upon an unsubstantiated hunch about drug trafficking and not the odor of marijuana.

Decriminalization of less than 3/4 of an ounce of marijuana does not mean that the police may never consider the odor of marijuana in determining whether criminal activity is afoot, but it does mean that law enforcement may not assume criminal activity from conduct that may be both criminal and non-criminal without additional evidence.

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.

Respectfully submitted,
Miguel Francisco Perez

By his attorneys,

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

Dated: October 21, 2019

By: */s/* Donna J. Brown_____
Donna J. Brown, NH Bar No. 387
95 Market Street
Manchester, NH 03101
(603) 206-7234
dbrown@wadleighlaw.com

CERTIFICATION OF COMPLIANCE

I, Donna J. Brown, hereby certify that pursuant to N.H. Supreme Court Rule 16(11), this brief contains approximately 2570 words, which is fewer that the words permitted by this Court's rules for reply briefs. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ Donna J. Brown
Donna J. Brown

CERTIFICATE OF SERVICE

I hereby certify that I e-filed a copy of the Defendant's brief to counsel for the State, Sean R. Locke, Esquire, of the Office of the Attorney General.

/s/ Donna J. Brown
Donna J. Brown