THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0647

The State of New Hampshire

v.

Miguel Francisco Perez

APPEAL PURSUANT TO RULE 7 JUDGMENT OF THE ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes)

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ISSUE PRESENTED

Whether an officer had reasonable, articulable suspicion, based upon the totality of the circumstances and the officer's training and experience, justifying expanding the scope of a traffic stop to investigate drug-related crimes.

STATEMENT OF THE CASE

A Rockingham County grand jury indicted the defendant, Miguel Francisco Perez, on two counts of the subsequent offense variant of possession of a controlled drug with the intent to distribute. Tr.: 10;[1] RSA 318-B:2 (2017); RSA 318-B:26 (Supp. 2018); RSA 318-B:27 (Supp. 2018). The first count alleged that on April 5, 2018, the defendant knowingly possessed heroin and/or fentanyl with the intent to distribute it and had a prior conviction for a drug-related charge. Tr.: 10. The second count alleged that on April 5, 2018, the defendant knowingly possessed five ounces or more of cocaine with the intent to distribute it and had a prior conviction for a drug-related charge. Tr.: 10.

On October 26, 2018, the defendant waived his rights and agreed to a stipulated facts bench trial. Tr.: 12. After hearing the State's offer of proof, the trial court (*Wageling*, J.) found the defendant guilty of both charges. Tr.: 17. The trial court sentenced the defendant to two, concurrent fifteen-to-thirty-year stand committed terms, with five years of the minimum and ten years of the maximum sentence suspended for five years upon the defendant's release. Tr.: 27. The trial court also imposed a five hundred dollar fine. Tr.: 27–28.

This appeal followed.

[1] DBr.: refers to the defendant's brief;
DApp.: refers to the defendant's appendix;
SApp.: refers to the appendix attached at the end of the State's brief;
Tr.: refers to the transcript of the bench trial on stipulated facts, held on October 26, 2018; and
MHTr.: refers to the transcript of the motion hearing held on August 8, 2018.

STATEMENT OF FACTS

1. The stop

On April 5, 2018, Trooper Michael Arteaga with the New Hampshire State Police was on patrol with the Mobile Enforcement Team ("MET"). MHTr.: 4–5; Tr.: 13. He had stationed himself on Interstate 95 and was monitoring northbound traffic near the Hampton tollbooth. MHTr.: 6; Tr.: 13. As part of the MET, Trooper Arteaga was responsible for detecting and preventing motor-vehicle-related crimes such as drunk driving, human trafficking, and drug trafficking. MHTr.: 5. He had received training both in- and out-of-state in recognizing the signs and indications of drug trafficking that "an untrained officer wouldn't be able to notice or would find insignificant." MHTr.: 5. Over the course of his four years with the New Hampshire State Police, Trooper Arteaga had participated in approximately eighty drug-related investigations. MHTr.: 5–6, 26.

At approximately 10:40 p.m., Trooper Arteaga saw a black Nissan Altima with Colorado license plates pass him traveling north. MHTr.: 6; Tr.: 13. He decided to monitor the Altima. MHTr.: 7; Tr.: 13. He watched the Altima travel an unsafe distance behind a tractor-trailer. MHTr.: 7; Tr.: 13. The Altima maintained less than a car's length of distance between it and the tractor-trailer. MHTr.: 7; Tr.: 13. The Altima then passed the tractor-trailer, but it failed to signal properly both times it changed lanes. MHTr.: 8; Tr.: 13. After passing the tractor-trailer, the Altima began to slow down, which caused the tractor-trailer to hit its breaks. MHTr.: 8.

Having observed several traffic violations, Trooper Arteaga, who was in an unmarked cruiser, initiated a traffic stop. MHTr.: 9; Tr.: 13. The

Altima slowed down, pulled over, and came to a stop south of Exit 5 in Portsmouth, but that process was exceptionally slow and struck Trooper Arteaga as “odd.” MHTr.: 9, 35; Tr.: 13. Trooper Arteaga stopped behind the Altima and approached it on the passenger’s side. MHTr.: 10; Tr.: 13. Upon reaching the passenger’s side, Trooper Arteaga saw a female passenger for the first time; she was reclined in her seat. MHTr.: 10; Tr.: 13. The driver was the defendant. MHTr.: 10; Tr.: 13.

Trooper Arteaga asked the defendant for his license and the car’s registration. MHTr.: 11; Tr.: 13. The defendant was more nervous than normal and visibly shaking as he produced the documents. MHTr.: 11; Tr.: 13. The defendant remained nervous and shaking despite Trooper Arteaga’s efforts to calm him and defuse the situation. MHTr.: 38–39.

The defendant told Trooper Arteaga that the Altima was a rental. MHTr.: 11; Tr.: 13. Trooper Arteaga—whose training informed him that drug traffickers routinely used rental cars because rental cars were more mechanically sound and provided for a discreet form of transportation—asked for the rental documents. MHTr.: 11, 15–16; Tr.: 13. The defendant told the passenger to get the rental agreement from the glove box, but the passenger froze until she made eye contact with the defendant, then she retrieved the rental agreement. MHTr.: 12; Tr.:13.

While interacting with the defendant and the passenger, Trooper Arteaga smelled the scent of fresh marijuana. MHTr.: 15; Tr.: 14. He also saw three cell phones in the car, which he knew from his training and experience that it was common for individuals involved in drug trafficking and sales to have extra “burner” phones with them. MHTr.: 14–15; Tr.: 14.

After the passenger provided him with the rental agreement, Trooper Arteaga reviewed the documents. MHTr.: 12–13; Tr.: 13. While doing this, the defendant volunteered without prompting that he and the passenger "were just going … to Portsmouth." MHTr.: 12–13; Tr.: 13. Trooper Arteaga found this unprompted declaration "odd and suspicious." MHTr.: 12–13; Tr.: 13. Trooper Arteaga's review informed him that the car was, in fact, a rental and that the defendant lived in Manchester, but also that he was on parole for a murder in Rhode Island. MHTr.: 15–16; Tr.: 14.

After reviewing the documentation and with his observations in mind, Trooper Arteaga resumed his interaction with the defendant and asked if the defendant would be willing to "voluntarily" step out of the car to speak with him more. MHTr.: 16–17; Tr.: 14. The defendant agreed, exited, and walked to meet Trooper Arteaga at the back of the car. MHTr.: 17; Tr.: 14. As the defendant approached, Trooper Arteaga saw that he was nervous and "visibly shaking." MHTr.: 17; Tr.: 14. Seeing this, Trooper Arteaga asked if he could pat-frisk the defendant to determine whether the defendant had any weapons. MHTr.: 17; Tr.: 14. The defendant consented and the pat-frisk did not reveal any weapons. MHTr.: 17–18; Tr.: 14.

Trooper Arteaga discussed the traffic violations he had observed, that he was going to give the defendant a warning, and questioned the defendant about his parole status. MHTr.: 18–19; Tr.: 14. Asked about where the two were going, the defendant claimed that he and the passenger were traveling from Rhode Island to Portsmouth to visit and had known each other for about a year. MHTr.: 18–19; Tr.: 14. When Trooper Arteaga asked what they hoped to do in Portsmouth at 11:00 p.m., the defendant

offered, abruptly and unprompted, to let Trooper Arteaga search the car. MHTr.: 18–20; Tr.: 14. The defendant told Trooper Arteaga that he could "even search [the car], if [he] want[ed]." MHTr.: 20. Trooper Arteaga considered this an effort "to call [his] bluff" and avoid further investigation. MHTr.: 20.

After speaking with the defendant, Trooper Arteaga spoke to the passenger. The passenger explained that she and the defendant were traveling to Portsmouth from Manchester and had known each other only a few weeks. MHTr.: 21; Tr.: 14.

With this additional information, Trooper Arteaga asked the defendant if he had anything illegal in the car. MHTr.: 21. The defendant denied having anything illegal in the car. MHTr.: 21. Trooper Arteaga then asked for the defendant's consent to search the car; the defendant replied that he had already said that Trooper Arteaga could search the car. MHTr.: 22; Tr.: 15. Trooper Arteaga went over the written consent form, and the defendant signed the form without any inquiry. MHTr.: 22.

Trooper Arteaga searched the "entire vehicle," including under the front hood and in the engine block. MHTr.: 23–24; Tr.: 15. Under the front hood, Trooper Arteaga found two bags of a white powder, which the defendant admitted was cocaine; upon testing, the powder was confirmed to be approximately eleven ounces of cocaine. MHTr.: 24; Tr.: 15. The defendant also admitted that he had approximately two hundred pills on him, but that they were fake. Tr.: 15. Testing revealed that the pills were heroin and fentanyl. Tr.: 16.

At trial, the State demonstrated that the defendant had a 2001 conviction for distribution of a controlled drug. Tr.: 16.

2. The suppression motion

On June 22, 2018, the defendant filed a motion to suppress. DApp.: 3–15. In his motion, he argued that the trial court should suppress "any and all evidence seized following the stop of his vehicle" because Trooper Arteaga did not have sufficient justification to prolong the stop. DApp.: 7–8.

In support of his argument, the defendant made three major points. First, he argued that Trooper Arteaga had no basis to suspect that he had committed a crime when Trooper Arteaga stopped his car. DApp.: 10−11. Second, he argued that Trooper Arteaga unreasonably expanded the scope of the stop through further questioning unrelated to the "original justification for the stop of [the defendant's] vehicle." DApp.: 11. And third, he argued that the traffic stop morphed into an unlawful detention when Trooper Arteaga began to ask about prior criminal activity and the defendant's itinerary. DApp.: 11–12. In the defendant's view, Trooper Arteaga's "actions were based on a mere hunch" that did not justify expanding the scope of the stop. DApp.: 12.

On July 17, 2018, the State filed an objection to the defendant's motion. DApp.: 16–21. In response, the State argued that Trooper Arteaga's observations, in light of his training and experience, were significant and caused Trooper Arteaga to develop reasonable suspicion to expand the scope of the stop. DApp.: 17. The State specifically pointed to, among other things, the odor of marijuana coming from the car. DApp.: 17. The State also emphasized that the defendant had volunteered to let Trooper Arteaga

search the car without being asked to do so, which undermined any claim that his consent was the product of an unlawful detention. DApp.: 17–18.

The trial court held a hearing on August 8, 2018, at which Trooper Arteaga testified, but the parties did not provide additional argument.[2] On September 6, 2018, the trial court issued an order and denied the defendant's motion to suppress. DBr.: 31–46. In support of its conclusion, the trial court made several findings. DBr.: 39–46.

The trial court acknowledged the merits of Trooper Arteaga's suspicions, but accorded little weight to four of the findings that supported expanding the scope of the stop: the delay in stopping, the defendant's nervousness, the additional cell phones, and the rental car, because each finding had both criminal and innocent explanations. DBr.: 39–42. The trial court accorded great weight to a final consideration, the odor of fresh marijuana. DBr.: 42–46.

The trial court acknowledged that possession of small quantities of marijuana had been decriminalized and that the Massachusetts Supreme Judicial Court had once concluded that possession of a decriminalized quantity of marijuana did not, absent other considerations, justify expanding the scope of a traffic stop. DBr.: 42–45. It rejected the reasoning of that court, however, and found that the odor of marijuana could provide reasonable suspicion for several crimes. DBr.: 45–46. Accordingly, the trial

[2] At the motion hearing, the defendant referred to an order from a different case, "*State v. Stephanie Berman and Yaakov Berman*." MHTr.: 53–54. The defendant did not discuss the substance of that order or develop any argument beyond the reference to that order. MHTr.: 53–54. The record reflects that the defendant provided a copy of that order to the trial court, MHTr.: 54, but the defendant has not produced a copy of that order for appellate review.

court concluded that the odor of marijuana justified Trooper Arteaga’s expansion of the stop. DBr.: 46.

SUMMARY OF THE ARGUMENT

The trial court correctly concluded that the circumstances provided Trooper Arteaga with reasonable, articulable suspicion that the defendant had engaged in drug-related criminal activity and that those suspicions justified asking the defendant to step out of his car. During the course of the traffic stop, Trooper Arteaga observed, among other things, multiple cell phones in the front portion of the car, the odor of marijuana coming from the car, extraordinary nervousness from the defendant, and odd behavior from the female passenger. The trooper also learned that the two were traveling in a rental car. These observations, especially in light of the presence of marijuana in the car, justified Trooper Arteaga's suspicion that the defendant had been engaged in drug-related activity.

To the extent that the defendant contends that the decriminalization of possession of small quantities of marijuana should change the outcome, he has not preserved those arguments and they are meritless. Accordingly, this Court must affirm.

ARGUMENT

Trooper Arteaga's observations, including the odor of marijuana, provided him with reasonable and articulable suspicion justifying expanding the scope of the traffic stop.

A. The odor of marijuana, the number of cell phones, the use of a rental car, and other considerations provided Trooper Arteaga with reasonable and articulable suspicion that the defendant was transporting drugs.

Trooper Arteaga had reasonable, articulable suspicion that the defendant had been engaged in drug-related offenses. He made several observations that training and experience informed him indicated drug-related activity, including the possession of multiple cell phones and use of a rental car. The defendant provided an implausible explanation that they were traveling to Portsmouth from Rhode Island late at night. The defendant was extraordinarily nervous and provided information unprompted. Most importantly, Trooper Arteaga noted the odor of fresh marijuana. This odor amplified the significance of his other observations and made any potentially innocent explanations less likely. Trooper Arteaga's efforts to dispel or confirm those suspicions led him to receive dramatically conflicting information about the defendant and the female passenger, which justified asking to search the rental car. Accordingly, the trial court correctly concluded that Trooper Arteaga was justified in expanding the scope of the traffic stop, and this Court must affirm.

Part I, article 19 of the New Hampshire Constitution provides that a person has the "right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." Similarly, the Fourth Amendment to the United States Constitution

provides that the people have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." "Evidence obtained in violation of a defendant's rights under Part I, Article 19 of the State Constitution is inadmissible under the exclusionary rule, though an exception to this rule may apply if the State proves that the taint of the primary illegality is purged." *State v. Blesdell-Moore*, 166 N.H. 183, 187 (2014).

"A traffic stop is a 'seizure' . . . even though the purpose of the stop is limited and the resulting detention quite brief." *State v. McKinnon-Andrews*, 151 N.H. 19, 22 (2004) (quotation omitted). A temporary seizure, such as a traffic stop, is lawful "if the police have an articulable suspicion that the person detained has committed or is about to commit a crime" because the law enforcement interests in detecting and preventing crime "warrant[] a limited intrusion on the personal security of the suspect." *Id*. at 22–23 (quotations omitted). To be constitutional, the scope of such a stop "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." *Id*. at 23 (quotations omitted).

A law enforcement officer may, however, expand the scope of a stop beyond the initial purpose or ask additional, unrelated questions if the officer develops "reasonable, articulable suspicion that would justify the question" or the question did not "impermissibly prolong[] the detention or change[] its fundamental nature." *Id*. at 24–25 (adopting the analysis established in *People v. Gonzalez*, 789 N.E.2d 260 (Ill. 2003)). Therefore, a constitutional violation does not occur if: (1) the question "is reasonably related to the purpose of the stop"; (2) the officer "had a reasonable,

articulable suspicion that would justify the question"; or (3) "in light of all the circumstances and common sense, the question [did not] impermissibly prolong[] the detention or change[] the fundamental nature of the stop." *Id*. at 25 (quoting *Gonzalez*, 789 N.E.2d at 270).

This approach strikes the appropriate balance between law enforcement's interests and the public's interest in being free from unreasonable governmental intrusions. *Id*. at 24. It does not prohibit an officer from expanding the scope of a stop as the circumstances require nor does it subject a person whom an officer has temporarily detained to unlimited examination. *Id*. So long as an officer has reasonable, articulable suspicion that additional criminal conduct has occurred or is about to occur, the officer may expand the scope of the stop. *Id*.

"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." *Id*. at 25–26 (quotation omitted). In determining whether an officer had reasonable, articulable suspicion, this Court considers "the facts [the officer] articulated, *not in isolation*, but 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." *State v. Pellicci*, 133 N.H. 523, 520 (1990) (emphasis added). "The articulated facts 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." *McKinnon-Andrews*, 151 N.H. at 26 (quotation omitted).

This Court has recognized that although activities and observations may "appear innocent in isolation," *taken together* and considered in light of the officer's training and experience, among other things, those activities and observations can "support a reasonable suspicion that the defendant was, had been, or was about to commit a crime." *State v. Wallace*, 146 N.H. 146, 149–50 (2001) (quotation omitted). Ultimately, "[a] reasonable suspicion must be more than a hunch." *McKinnon-Andrews*, 151 N.H. at 26. "The officer's suspicion must have a particularized and objective basis in order to warrant that intrusion into protected privacy rights." *Id*.

"The State bears the burden of establishing under this test that the scope of an otherwise valid stop was not exceeded." *State v. Morrill*, 169 N.H. 709, 716 (2017). In reviewing a trial court's ruling on a motion to suppress, this Court "accept[s] [the trial court's] factual findings unless they lack support in the record or are clearly erroneous, and [this Court] review[s] legal conclusions *de novo*." *Blesdell-Moore*, 166 N.H. at 187.

Trooper Arteaga's observations before asking the defendant to step out of the rental car, provided him with reasonable, articulable suspicion that the defendant had participated in drug-related crimes and justified Trooper Arteaga's decision to ask the defendant to step out of his rental car. Viewed in the context of all the other observations, the most significant observation was the odor of marijuana coming from the car. This indicated to Trooper Arteaga that the defendant had illegal drugs in the car with him, which could without question justify seeking a search warrant to search the car for at least contraband, if not a criminal quantity of marijuana.
RSA 595-A:1, III (2001) (authorizing the issuance of search warrant to search for and seize contraband).

This observation, the odor of marijuana, was also significant because it undermined the potentially innocent nature of several other key observations that Trooper Arteaga's training and experience informed him were also indications of drug-related criminal activity. The presence of multiple cell phones, including potential burner phones, was an indicator of drug-related activity. *See*, *e.g.*, *State v. Howard*, No. 105327, 2017 WL 5903451, at *1–*2 (Ohio Ct. App. Nov. 30, 2017). The presence of marijuana, an illegal drug, increased the link between the phones and potential drug-related criminal activity, which supported Trooper Arteaga's suspicion that at least one of the phones was linked to drug-related activity.

Similarly, the use of a rental car was an indicator of drug-related activity because rental cars are a more anonymous form of transportation and are more mechanically reliable. *See*, *e.g.*, *United States v. Cavazos*, 542 F. App'x 263, 268 (4th Cir. 2013). The presence of marijuana, an illegal drug, increased the link between the use of a rental car and potential drug-related criminal activity, which supported Trooper Arteaga's suspicion that the defendant was engaged in drug-related activity, likely drug trafficking.

In addition to these observations, Trooper Arteaga noted the defendant's delay in pulling over, his extraordinary nervousness, the female passenger's odd behavior—seemingly seeking leave to open the glove compartment—the defendant's unprompted offering of information, and the defendant's parole status as things that piqued his suspicions. Although these observations may have innocent explanations at times that would prevent Trooper Arteaga from relying upon them in other contexts, in this context, when coupled with the observed presence of marijuana, they

further support Trooper Arteaga's suspicions of drug-related activity. The present situation is distinct from situations like that in *Morrill* and its predecessors because Trooper Arteaga had concrete observations consistent with drug-related activity that prompted the suspicions that he sought to confirm or dispel. *See*, *e.g.*, *Morrill*, 169 N.H. at 716 (concluding that none of the officer's inquiries related to the securing of children in the car "established a reasonable suspicion that the vehicle contained illegal drugs").

By the time Trooper Arteaga asked the defendant to step out of the rental car, Trooper Arteaga had developed reasonable, articulable suspicion that the defendant was engaged in drug-related criminal activity. Trooper Arteaga could then seek to confirm or dispel those suspicions with further action or inquiry, including asking the defendant to step out of the rental car. Trooper Arteaga did just that and developed further suspicions while interacting with the defendant and the female passenger. The defendant had already consented to a search of the car before Trooper Arteaga asked, but the trooper's further suspicions warranted the request and the consent search.

In light of these circumstances, the trial court correctly concluded that the circumstances justified Trooper Arteaga's requests. Accordingly, this Court must affirm.

B. The defendant has failed to preserve his argument related to marijuana decriminalization. But in any event, officers can continue to consider the odor of marijuana in determining whether to expand the scope of a stop.

1. The defendant's argument related to the impact of marijuana decriminalization was not preserved because he did not develop the argument in his motion to suppress, at the suppression hearing, or in a motion for reconsideration.

As a threshold matter, this Court cannot consider the defendant's arguments that the recent decriminalization of marijuana or the Massachusetts Supreme Judicial Court's decision in *Commonwealth v. Cruz*, 945 N.E.2d 899 (Mass. 2011), limited Trooper Arteaga's ability to expand the scope of the initial traffic stop. The defendant never raised or developed these arguments in his motion to suppress, in arguments at the suppression hearing, or in a motion to reconsider after the trial court issued its decision. Accordingly, this Court may not consider them in the first instance on appeal.

"As the appealing party, the defendant has the burden of providing this court with a record sufficient to demonstrate that he raised all of his appeal issues before the trial court." *State v. Whittaker*, 158 N.H. 762, 767 (2009). The preservation requirement "is based on common sense and judicial economy, recognizes that trial forums should have an opportunity to rule on issues and to correct errors before they are presented to the appellate court." *State v. Blackmer*, 149 N.H. 47, 48 (2003).

"To preserve [an] issue for appellate review, the defendant was required to make a contemporaneous and specific objection below." *State v.*

Wood, 150 N.H. 233, 236 (2003). "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. Dilboy*, 160 N.H. 135, 157 (2010) (quotation omitted), *rev'd on other grounds sub nom*. *Dilboy v. New Hampshire*, 564 U.S. 1051 (2011). "This requirement is intended to discourage parties who are unhappy with the trial result to comb the record to find an alleged error never raised before the trial judge that might support a motion to set aside the verdict." *State v. Gross-Santos*, 169 N.H. 593, 598 (2017). "The objection must state explicitly the specific ground of objection." *Id*. (quotation omitted).

Moreover, the preservation requirement prevents appealing parties from raising alternative arguments or expanding arguments for the first time on appeal. *See*, *e.g.*, *id*. ("The record provided on appeal fails to demonstrate that the defendant ever raised the same arguments that he raises here. [This Court], therefore, decline[s] to address them."); *State v. Mouser*, 168 N.H. 19, 27–28 (2015) (holding that an appealing party cannot rely on a new theory that was not presented to or addressed by the trial court unless the theory is raised in a motion for reconsideration); *State v. Young*, 144 N.H. 477, 484 (1999) (concluding that a defendant cannot change arguments on appeal from those argued at trial); *State v. Croft*, 142 N.H. 76, 80 (1997) (refusing to permit the defendant to expand the scope of his Rule 404(b) objection to include more than just relevance on appeal). To raise new arguments, expand upon previously raised arguments, or respond to new considerations raised by the trial court, a defendant must have raised those arguments in a motion to reconsider, *see N.H. R. Crim. P.*

43(a); *New Hampshire Dep't of Corrections v. Butland*, 147 N.H. 676, 679 (2002), or invoke this Court's plain error rule,[3] *see Sup. Ct. R.* 16-A; *State v. Pennock*, 168 N.H. 294, 310 (2015) ("Because of the differences between his appellate and trial court arguments, the defendant invokes [this Court's] plain error rule. Accordingly, [this Court] confine[s] [its] review to plain error." (Citation omitted.)).

The defendant never raised or developed a detailed argument regarding marijuana decriminalization or the *Cruz* decision before the trial court. His motion to suppress does not refer to Trooper Arteaga's reliance upon the odor of marijuana nor does it discuss *Cruz*. At the motion hearing, the defendant questioned Trooper Arteaga about New Hampshire State Police practices in the wake of marijuana decriminalization, MHTr.: 28–30, but he never articulated an argument related to marijuana decriminalization, nor did he bring *Cruz* and its reasoning to the trial court's attention, MHTr.: 50–52.[4]

The extent of his discussion of marijuana possession at oral argument was that an odor "is a ticketable offense." MHTr.: 50. The trial court essentially acted *sua sponte* when it performed an analysis of the

[3] To the extent that the defendant may attempt to invoke this Court's plain error rule, *Sup. Ct. R.* 16-A, in his reply brief, that rule does not avail him because even if the trial court erred, *but see* Section B.2 below, the error was not, and cannot have been, plain because this Court has never considered the marijuana decriminalization statutes or their interaction with part I, article 19.

[4] To the extent that the defendant may claim that the superior court order from "*State v. Stephanie Berman and Yaakov Berman*," which he cited and provided to the trial court, raised this issue, MHTr.: 53–54—the State has attached a copy of that order to this brief despite being under no obligation to do so, as the defendant carries the burden to show when and where he preserved his arguments—that order does not address the question of a marijuana odor or the application of *Cruz* in New Hampshire. SApp.: 36-45.

impact of marijuana decriminalization on traffic stops and the application of *Cruz* in New Hampshire. The defendant did not ask the trial court to reconsider its order or argue that the trial court had misapplied the law. *See Butland*, 147 N.H. at 679 (explaining that a trial court's *sua sponte* action or incorrect application of law does not preserve an issue for appellate review *unless* the appellant filed a motion to reconsider and provided the trial court with an "opportunity to consider alleged errors and to take remedial measures when necessary" (quotation omitted)). Ultimately, the defendant failed to preserve his arguments related to the impact of marijuana decriminalization, and this Court may not consider them in the first instance. Accordingly, this Court must affirm.

2. Marijuana decriminalization does not prohibit law enforcement from expanding the scope of a traffic stop because the odor of marijuana can provide reasonable suspicion that motorists have engaged in or are about to engage in other criminal conduct.

The decriminalization of possession of "personal use" quantities of marijuana did not prevent law enforcement from expanding the scope of a stop, nor did it prohibit trial courts from considering the detection of marijuana when deciding whether an officer had adequate justification to expand the scope of a stop. The detection of marijuana, whether by sight or smell, and in conjunction with other observations, can still provide officers with reasonable suspicion that several types of crimes have occurred or are about to occur. Even alone, the detection of marijuana can provide officers with reasonable suspicion that several types of crimes have occurred or are about to occur. Accordingly, the trial court correctly concluded that the

Supreme Judicial Court's decision in *Cruz* does not change the *McKinnon-Andrews* analysis, and it properly considered the presence of marijuana when it concluded that Trooper Arteaga had reasonable, articulable suspicion of drug possession and drug trafficking.

In 2017, the General Court passed House Bill 640 titled, "An act relative to the penalties for possession of marijuana," which, among other things, decriminalized possession of small quantities of marijuana by making such possession a violation-level offense in several circumstances. *See generally* Laws 2017, ch. 248; *see also* RSA 318-B:2-c (Supp. 2018). HB 640 recognized that marijuana possession convictions created harsh consequences for those who were convicted, and it sought to reduce the impact of such convictions. Laws 2017, 248:1. To address these concerns, the bill created RSA 318-B:2-c, which reduced to a violation-level offense knowing possession of three-quarters of an ounce or less of marijuana or five grams or less of hashish by individuals who are eighteen or older. Laws 2017, 248:2; *see also* RSA 318-B:2-c, II, III; RSA 318-B:26, II(d) (Supp. 2018); RSA 625:9, II(b) (2016) ("A violation does not constitute a crime."). RSA 318-B:2-c, V(a) makes it clear, however, that although it is decriminalized, marijuana remains contraband because it requires those in possession of such marijuana to forfeit it to the State.

HB 640 did not completely decriminalize all marijuana possession, however. *See* Laws 2017, 248:3. After passage, for example, it remains a misdemeanor, and therefore a crime, to possess more than three-quarters of an ounce of marijuana or five grams of hashish. RSA 318-B:26, II(c) (Supp. 2018). It remains a felony, and therefore a crime, to transport or possess with the "intent to sell, dispense, compound, package or repackage"

any quantity of marijuana or hashish. RSA 318-B:26, I(c), I(d) (Supp. 2018). It remains a misdemeanor, and therefore a crime, to operate a motor vehicle while impaired by marijuana or hashish. RSA 265-A:2 (2014); RSA 265-A:18, I(a) (2014); *see also* Laws 2017, 248:2; RSA 318-B:2-c, VI(b) ("Nothing in this chapter shall be construed to prohibit a law enforcement agency from investigating or charging a person for a violation of RSA 265-A."). It remains a misdemeanor, and therefore a crime, to possess more than three-quarters of an ounce of marijuana or five grams of hashish in a motor vehicle. RSA 265-A:43 (Supp. 2018). Thus, even after marijuana decriminalization, the sight, smell, or other detection of marijuana can be indicative of criminal conduct.

This Court has not yet considered the impact of HB 640 on the ability of law enforcement to develop reasonable suspicion of criminal activity, but courts in at least five other jurisdictions have.[5] *See*, *e.g.*, *People v. Zuniga*, 372 P.3d 1052, 1058–59 (Colo. 2016); *In re O.S.*, 112 N.E.3d 621, 634 (Ill. App. Ct. 2018); *Cruz*, 945 N.E.2d at 913–14; *Zullo v. State*, 205 A.3d 466, 499–500 (Vt. 2019); *People v. Cannergeiter*, 65 V.I. 114, 132–33 (Super. Ct. 2016).

[5] The courts of at least two other jurisdictions, Maryland and Oregon, have considered the question of whether the odor of marijuana provides probable cause to perform a warrantless search of a motor vehicle under the motor-vehicle exception to the warrant requirement. *See Robinson v. State*, 152 A.3d 661, 665 (Md. 2017); *State v. Smalley*, 225 P.3d 844, 848 (Or. Ct. App. 2010). Both concluded that because marijuana remains contraband and their search and seizure law allows for the seizure of contraband or criminal evidence, the odor of marijuana could support probable cause in those circumstances. *Robinson*, 152 A.3d at 665; *Smalley*, 225 P.3d at 848. *But see Cruz*, 945 N.E.2d at 912–13 (distinguishing *Smalley* by explaining that searches under Massachusetts law can be performed only in the context of a criminal investigation).

In *Cruz*, the Supreme Judicial Court considered whether an officer had reasonable suspicion to order a suspect out of a car based on three observations: (1) the high-crime nature of the area, (2) the suspect shared a cigar with the driver, and (3) the odor of burnt marijuana coming from the car. *Cruz*, 945 N.E.2d at 902–03. The court dismissed the first two observations as having innocent explanations,[6] and instead, it focused on the odor of marijuana as the only factor worth considering. *Id.* at 907–08. Although the court concluded that an officer who smells marijuana may question the driver or occupants about the odor, it held that an officer must have reasonable suspicion of criminal activity—meaning misdemeanor or felony conduct—to order a suspect out of a vehicle. *Id.* at 906, 908. The court also held that officers could not perform a warrantless search of the automobile because Massachusetts law required them to be searching for evidence of criminal conduct rather than simply contraband. *Id*. at 912–13.

Justice Corwin dissented from the majority and explained that decriminalizing the possession of small quantities of marijuana did not

[6] As this dissent in *Cruz* explained, the majority misapplied the test to determine whether an officer had reasonable suspicion. *Cruz*, 945 N.E.2d at 914 (*Cowin*, J., dissenting) (explaining that the analysis is akin to a totality of the circumstances and that "even seemingly innocent activities taken together can give rise to reasonable suspicion" (quotation and brackets omitted)). Massachusetts's test for reasonable suspicion is similar to the one developed by this Court in that both require the trial court to perform a totality analysis and also recognize that in light of all the facts available and the officer's training and experience, seemingly innocent activities could form the basis for reasonable suspicion. *Compare Wallace*, 146 N.H. at 149–50; and *Pellicci*, 133 N.H. at 520 *with Commonwealth v. Grandison*, 741 N.E.2d 25, 31 (Mass. 2001) ("[S]eemingly innocent activities taken together can give rise to reasonable suspicion." (Quotation omitted.)). As explained in Section A, above, the trial court in this case also failed to perform the correct analysis because it considered each of Trooper Arteaga's observations in isolation and dismissed all those with seemingly innocent explanations. Fortunately, the trial court reached the correct conclusion.

change the fact that the odor of marijuana could provide officers with reasonable suspicion. *Id*. at 914–15 (*Corwin*, J., dissenting). She explained that the odor of marijuana "may serve as the basis for a reasonable suspicion that activities involving marijuana, that are indeed criminal, are underway." *Id*. at 914–15 (*Corwin*, J., dissenting). Specifically, she observed that the odor of marijuana could provide reasonable suspicion of possession of criminal quantities of marijuana, possession with intent to distribute, or driving while impaired. *Id*. at 915 (*Corwin*, J., dissenting). Accordingly, she concluded that the officers did not violate the defendant's rights by ordering him to step out of the vehicle. *Id*. (*Corwin*, J., dissenting).

Colorado, Illinois, Vermont, and the Virgin Islands have rejected the Supreme Judicial Court's reasoning in *Cruz* and concluded that the odor of marijuana is indicative of criminal activity and can justify an officer's reasonable suspicion. In *People v. Zuniga*, the Colorado Supreme Court concluded that, in the context of determining probable cause, an innocent explanation, specifically possession of a decriminalized quantity of marijuana, does not undermine the conclusion that the odor of marijuana provided probable cause to search for criminal quantities of marijuana. *Zuniga*, 373 P.3d at 1059.

In *In re O.S.*, the Appellate Court of Illinois held that because other offenses criminalize possession or use of marijuana, "case law holding that the odor of marijuana is indicative of criminal activity remains viable notwithstanding the recent decriminalization of the possession of not more than 10 grams of marijuana." *In re O.S.*, 112 N.E.3d at 634. In *Zullo v. State*, the Vermont Supreme Court recognized that the odor of burnt

marijuana, in conjunction with other observations, provided reasonable suspicion of impairment to support ordering a suspect out of his motor vehicle. *Zullo*, 205 A.3d at 499–500. And in *People v. Cannergeiter*, the Superior Court of the Virgin Islands concluded that the odor of marijuana coming from a motor vehicle justified stopping that vehicle to investigate the odor. *Cannergeiter*, 65 V.I. at 132–33.

This Court should join these other courts, along with Justice Cowin, and recognize that the odor of marijuana is indicative of criminal activity beyond possession for personal use and that the odor of marijuana, alone and especially when in conjunction with other appropriate observations, can support an officer's reasonable suspicion.

When the legislature passed House Bill 640 it did not legalize marijuana. Instead, it decriminalized possession of a small quantity to minimize the harmful impact that criminal convictions for possession of small quantities created. *See* Laws 2017, 248:1. In doing so, it left intact laws criminalizing possession of or transporting larger quantities, laws criminalizing selling or distributing marijuana, and laws criminalizing driving while impaired by marijuana. And it did not seek to interfere with law enforcement's ability to investigate those crimes.[7] The odor of marijuana alone supports a reasonable, articulable suspicion that a person

[7] The findings presented in HB 640 discuss the impact of possession convictions and the danger of exposing youth to marijuana, but they are silent on the investigation or detection of marijuana-related offenses. *See* Laws 2017, 248:1.

possesses an illegal quantity of marijuana, which this Court must allow an officer to either confirm or dispel.[8]

In the context of this case, however, Trooper Arteaga did not rely on the odor of marijuana alone to justify reasonable, articulable suspicion—which distinguishes this situation from *Cruz*. As discussed in Section A, above, Trooper Arteaga, based upon his training and experience, identified other indicators of drug-related crimes, including the presence of multiple cell phones stored in the front of the car, the fact that the defendant had been traveling in a rental car, which Trooper Arteaga knew to be commonly used in drug transportation, and the suspicious interactions between the defendant and the female passenger. The odor of marijuana enhanced the significance of these observations because it provided evidence that the car held drugs, in addition to these other indications of drug trafficking. Essentially, these potentially innocent observations became more suspicious in light of the defendant's unlawful conduct—possession of marijuana.

Taken together, this evidence supported Trooper Arteaga's request that the defendant step out the car, and the evidence developed from there, such as the conflicting accounts from the defendant and the female passenger, supported Trooper Arteaga's request to search the car. Accordingly, this Court must affirm.

[8] Should this Court conclude otherwise, it would create an incongruous situation where officers would be able to execute search warrants based upon probable cause to search for marijuana—or, pursuant to *State v. Cora*, 170 N.H. 186, 196 (2017), enter the vehicle and seize the marijuana, but may not be able to seek consent to search for marijuana or to inquire further.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute argument before the full court.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

The Office of the Attorney General

September 30, 2019

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CERTIFICATE OF COMPLIANCE

I, Sean R. Locke, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,795 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

September 30, 2019

/S/Sean R. Locke
Sean R. Locke

CERTIFICATE OF SERVICE

I, Sean R. Locke, hereby certify that a copy of the State's brief shall be served on Donna Brown, counsel for the defendant, through this Court's electronic filing system

September 30, 2019

/S/Sean R. Locke
Sean R. Locke

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2015 FEB 25 P 2: 16
ROCKINGHAM COUNTY ATTORNEYS OFFICE

Case Name: **State v. Yakov Berman**
Case Number: **218-2014-CR-01092**

Enclosed please find a copy of the court's order of February 24, 2015 relative to:

Order On Defendants' Motions To Suppress

February 24, 2015

Raymond W. Taylor
Clerk of Court

(503)

C: Christine C. List, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

STATE OF NEW HAMPSHIRE

v.

STEPHANIE BERMAN

Docket No.: 218-2014-CR-787

and[1]

STATE OF NEW HAMPSHIRE

v.

YAKOV BERMAN

Docket No.: 218-2014-CR-1092

ORDER ON DEFENDANTS' MOTIONS TO SUPPRESS

Defendants Stephanie Berman and Yakov Berman[2] each stand charged with drug crimes. Pursuant to the New Hampshire and United States constitutions, Defendants move to suppress evidence obtained on April 27, 2014 as a result of an encounter between the Bermans and the New Hampshire State Police. The State objects. A hearing was held on December 17, 2015 at which New Hampshire State Police Trooper Stephen McAulay testified. For the reasons discussed below, Defendants' motions to suppress are **GRANTED**.

[1] The two cases have been consolidated only for the purposes of this hearing
[2] For clarity, the Court will hereafter refer to each defendant by her or his first name and will refer to the pair collectively as "Defendants" or "the Bermans."

Facts

At approximately 9 p.m. on April 27, 2014, Trooper McAulay was in his marked patrol cruiser on Interstate 95 northbound. Trooper McAulay was traveling at approximately 73 miles per hour when he observed a Chevy Malibu in the left hand lane drift so that its left-most tires had crossed the solid white line then drift so its right-most tires had crossed the dashed line. The Malibu was driving at approximately 68-70[3] miles per hour, so Trooper McAulay was able to catch up to the vehicle. Trooper McAulay pulled alongside the vehicle and observed a woman—later identified as Stephanie—driving the vehicle. He also observed a man—later identified as Yakov—sitting in the front passenger seat and a small child in the back.

Trooper McAulay observed Stephanie looking down at a cellphone or other square electronic device in her lap. He also observed Yakov "doing something" in the center console—it looked like he had "just leaned over" and was "playing with something." Trooper McAulay then pulled behind the vehicle, activated his blue lights, and began a traffic stop.

At this point, Defendants' vehicle had made it as far as the 0.4 mile marker on Route 16 (heading towards Dover and Durham). Route 16 is accessed by taking a left exit from Interstate 95. The vehicle pulled over without incident, and Trooper McAulay approached the vehicle from the passenger side. Trooper McAulay asked Stephanie for her license and registration, which she provided without incident. Yakov refused to make eye contact with the trooper and appeared extremely nervous. Trooper McAulay told Stephanie why he stopped the car, and found, to his surprise, that Yakov's

[3] Trooper McAulay was unsure whether the speed limit in the area was 55 or 65 miles per hour but testified that 70 miles per hour is not an unusual rate of travel.

nervousness did not decrease with this explanation. Trooper McAulay explained that in his experience once the occupants are told of the reason for the stop, the occupant's anxiety markedly decrease.

Trooper McAulay asked Stephanie of their itinerary, and she replied they were going to "Technology Drive, UNH, Durham" or "Technology Drive, Durham." Trooper McAulay knows Technology Drive is on campus[4] because occasionally the State Police are asked to assist at the University of New Hampshire. His suspicions were raised because he thought it unusual that a family of three would be driving to the university so late at night accompanied by a young child. Trooper McAulay admitted on cross that he did not ask either of the Bermans whether they were students at UNH. During this time, Trooper McAulay noticed Yakov's nervousness had not decreased, observing his chest to be "fluttering" or visibly rising and falling. Yakov still had not made eye contact with the trooper. Trooper McAulay found this level of nervousness suspicious.

Trooper McAulay then turned to Yakov and asked him for his identification. Yakov claimed not to have one. Trooper McAulay then asked him for his name and date of birth. Yakov gave a fake first name and date of birth, but Trooper McAulay would not discover that until later. Trooper McAulay then turned his attention to a blue bag in the leg portion of the passenger's compartment.

Nestled between Yakov's left leg and the center console was an oblong blue zipped bag. It was partially covered by a ripped-open McDonald's bag such that Trooper McAulay could see only 15 to 20 percent of the blue bag. Trooper McAulay observed that Yakov's leg was touching the bag but was not using force to lift the bag

[4] Trooper McAulay testified that the road is "on campus" but was unsure whether non-student housing was available on the road.

off the floor. While the bag was partially obscured, Trooper McAulay could make out its approximate size through its height as apparently the top of the bag was not covered. While Trooper McAulay did not know what was in the bag, he thought it might contain weapons.

Trooper McAulay asked Yakov what was in the bag, to which Yakov replied, "an electronic vaporizer." Trooper McAulay asked Yakov to show him, and Yakov complied by unzipping the bag to display its contents. However, as he did so, two glass vials fell out and rolled onto the floor and out of sight. Yakov showed Trooper McAulay what was indeed an electronic vaporizer. Trooper McAulay acknowledged that it is possible to use an electronic vaporizer lawfully and had no reason to believe that this electronic vaporizer could, in particular, be used only for illicit purposes. Trooper McAulay then asked Yakov what was in the glass vials, to which Yakov replied "glycerin." Trooper McAulay asked Yakov to show him, and Yakov produced one of the tubes that did in fact contain glycerin. Trooper McAulay thought Yakov was "hesitant" in picking up the other vial, so he asked Yakov what was in the other vial. Yakov replied that it was marijuana for personal use, and handed over a vial that contained a green leafy substance.

Eventually, other troopers came for backup and a search warrant was obtained. During a search pursuant to the warrant, other evidence was uncovered which Defendants seek to suppress.

<u>Analysis</u>

Yakov points to six specific points at which he claims the scope of the stop was improperly expanded. Stephanie also argues that the police improperly expanded the

scope throughout the stop. The State objects. Because the Court finds that the police did impermissibly expand the scope of the stop when Trooper McAulay asked Yakov what was in the blue bag, it need not address other proffered illegalities.

The New Hampshire Constitution provides at least as much protection to defendants as its federal counterpart in this area of search and seizure jurisprudence. State v. Roach, 141 N.H. 64, 65-66 (1996). Accordingly, the motions are addressed under state law, using federal authority for guidance only. Id.; see State v. Ball, 124 N.H. 226, 231 (1983).

"During a detention, 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 suspicion. The scope of the stop must be carefully tailored to its underlying justification—to confirm or dispel the officer's particular suspicion—and must be temporary and last no longer than necessary to effectuate the purpose of this stop." Roach, 141 N.H. at 68. The Court must consider 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." State v. McKinnon-Andrews, 151 N.H. 19, 24 (2004).

"To determine the sufficiency of an officer's suspicion, [the Court will] consider 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." State v. Joyce, 159 N.H. 440, 446 (2009) (quotation omitted). "A reasonable suspicion must be more than a hunch," and "[t]he

articulated facts 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. (quotations omitted). "The officer's suspicion must have a particularized and objective basis in order to warrant that intrusion into protected privacy rights." Id. (quotation omitted).

Here, the question—"what's in that bag"—is so obviously unrelated to the lane-straddling justification for the stop that the first prong is unworthy of further discussion. The Court therefore turns to the second prong—whether law enforcement had reasonable articulable suspicion that would otherwise justify the stop. At this point, the trooper had observed: a) lane straddling, b) Stephanie's cellphone use, c) Yakov reaching into the center console, d) heightened nervousness from Yakov that did not diminish with time, e) Stephanie's "unusual" itinerary, and f) the "odd" location of the blue bag. Trooper McAulay testified that he did not know what was in the bag, but thought it could contain a weapon. The Court does not find that this constitutes reasonable suspicion.[5]

There was no evidence to suggest that lane straddling, cellphone use, or reaching into the console are in anyway indicative of the type of criminal behavior that Trooper McAulay feared. Lane straddling and cellphone use may be indicative of being lost or distracted driving, but there is no evidence that the armed and dangerous are any more likely than the public at large to act in this manner. Similarly the type of movement towards the console that Trooper McAulay saw was not criminal or suspicious. He did *not* see Yakov "furtively" moving towards the center console nor did he testify that he feared Yakov had attempted to hide anything in the console. Indeed,

[5] The Court pauses to emphasis that it found Trooper McAulay credible and appreciated his candor during testimony.

Trooper McAulay's testimony was that it looked like Yakov was merely "playing with something" in the console.

Nor does the Court find it suspicious that the Bermans were driving towards UNH at night. Trooper McAulay did not ask them if they were students, rather he testified that they were older than people he normally saw at UNH during his education which led him to believe they were not students. The Court takes judicial notice that more than 10 percent of UNH undergraduates are "non-traditional students" such as those over the age of 24 or a caregiver. See "Veterans and Non-Traditional Students"<http://admissions.unh.edu/apply/non-traditional-students> (last accessed February 18, 2015). Nor does the fact that a child was in the car raise sufficient suspicions. The child was asleep and the Court does not believe that taking a child on a car trip at nine at night is so unusual as to be other than innocuous.

This leaves Yakov's nervousness and the blue bag. "Nervousness is entirely consistent with innocent behavior." State v. Blesdell-Moore, 166 N.H. 183, 189 (2014) (citations and quotations omitted). It is true that here the trooper observed nervousness and Yakov's "fluttering chest" which did not diminish with time rather than nervousness alone, but this does not change the Court's analysis. In Blesdell-Moore, the New Hampshire Supreme Court held that nervousness and bloodshot eyes was not enough to support a reasonable suspicion. Id. In so holding, the Court acknowledged that it is "impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation." Id. (citations and quotations omitted). Here, the only such reason for an interpretation, and the strongest indicator of criminal activity, was that Yakov had given a fake name.

However, Trooper McAulay did not know this until later so it could not provide a basis for reasonable suspicion. Moreover, while it might be unusual to place a bag in that part of the compartment, it is not illegal to do so. The nervousness and presence of the bag are the sort of "innocent factors" the Blesdell-Moore Court was referring to when it warned against combining into a suspicious conglomeration. There was simply not sufficient reason for the trooper to suspect the bag contained a gun. The bag was not shaped like a gun, did not smell of gunpowder, and did not say "GUN" on it. In sum, the totality of the circumstances to not support a finding of reasonable articulable suspicion Yakov was armed. Cf. State v. Broadus, ___ N.H. ___, slip op. at *6 (Decided January 22, 2015) (that Trooper is outnumbered and backup is not "immediately available" does not support reasonable suspicion defendant is armed and dangerous justifying a pat search).

Finally, the Court notes that the question relating to the bag "changed the fundamental nature of the stop." McKinnon-Andrews, 151 N.H. at 24. The encounter began as a traffic stop for lane straddling. By asking Yakov, a passenger, what was in the blue bag, the encounter morphed from a traffic stop to a more generalized investigation of wrongdoing. See State v. Michelson, 160 N.H. 270, 273 (2010) ("A reasonable suspicion must be more than a hunch") (citations and quotations omitted). At the very least, later, when the trooper asked Yakov to physically show him the vaporizer, a reasonable person in Yakov's position would have understood the fundamental nature of the stop to have changed. See Blesdell-Moore, 166 N.H. at 190 (establishing standard). In this case, the fundamental nature of the stop changed when

the Trooper asked questions that were not supported by reasonable suspicion. Thus, the evidence must be suppressed.

Conclusion

For the reasons discussed above, Defendants' Motions to Suppress are **GRANTED**.

So Ordered.

February 24, 2015
Date

Marguerite L. Wageling
Presiding Justice