THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0081

State of New Hampshire

v.

LeeAnn O'Brien

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

and

ANTHONY J. GALDIERI
SOLICITOR GENERAL

Sam M. Gonyea, Bar No. 273264
Attorney
New Hampshire Department of Justice
Criminal Justice Bureau
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3671
sam.m.gonyea@doj.nh.gov

(Fifteen-minute oral argument requested)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

ISSUES PRESENTED

I. Whether the trial court erred in denying the defendant's motion to suppress evidence.

STATEMENT OF THE CASE

The defendant, LeeAnn O'Brien, was charged in the Merrimack County Superior Court with possession of buprenorphine, commonly known as suboxone, in violation of RSA 318-B:2, and knowingly controlling a motor vehicle in which a quantity of suboxone was illegally kept, in violation of RSA 318-B:2 and RSA 318-B:26, III(a). T at 4.[1]

On April 22, 2021, the defendant filed a motion to suppress evidence, to which the State objected. DA at 38-47 (Motion), 48-50 (Objection). After an evidentiary hearing held on June 4, 2021, the trial court (*Kissinger*, J.) denied the defendant's motion. DA at 32-37; SH at 1. The defendant stood trial on December 7, 2021. T at 1. Following trial, the jury convicted the defendant on both charges. T at 83.

The trial court sentenced the defendant to ninety days in the House of Corrections on both convictions, each suspended for four years upon good behavior and compliance with all terms and conditions, with the sentences to be served concurrently. DA at 51-56.

[1] Citations to the record are as follows:
"T" refers to the transcript of the jury trial held on December 7, 2021;
"SH" refers to the transcript of the suppression hearing on June 4, 2021;
"DB" refers to the defendant's brief; and
"DA" refers to the addendum to the defendant's brief.

STATEMENT OF FACTS

A. FACTUAL BACKGROUND.

The following facts were found by the trial court based upon "the credible testimony provided by Officer [Brandon] Carleton during the" hearing on the defendant's motion to suppress. DA at 32.

On March 1, 2020, at approximately 7:15 p.m., Officer Brandon Carleton was traveling on Bell Avenue in Hooksett near the Circle K gas station. *Id*. Officer Carleton observed an individual, later identified as the defendant, in the gas station parking lot looking at her license plate light. *Id*. Subsequently, Officer Carleton observed a white Acura with its left license plate light out. *Id*. On that basis, Officer Carleton pulled the Acura over. *Id*. When he approached the vehicle, Officer Carleton immediately noticed a strong odor of marijuana coming from the car. *Id*. at 32-33. Officer Carleton spoke to the defendant, who was the driver and sole occupant of the Acura. *Id*. at 33. He asked for the defendant's license and registration and informed her that her left license plate light was out. *Id*. The defendant replied that she was aware that the light was out because "someone was just looking at it at the gas station." *Id*.

Officer Carleton told the defendant that he smelt "freshly burned" marijuana coming from the vehicle and asked her if she had any marijuana in the car. *Id*. The defendant stated that she did not have any marijuana in the car, but she had smoked earlier in the day. *Id*. Officer Carleton then asked the defendant if he could search the car to ensure that there were no drugs inside. *Id*. In requesting the defendant's consent to search, Officer Carleton made it clear that he would search "everything inside" of the

vehicle. *Id*. The defendant agreed to let Officer Carleton search the car. *Id*. Officer Carleton then called for backup so that there would be a witness to the search. *Id*.

Once backup arrived, the defendant got out of the car and Officer Carleton conducted a search of the car. *Id*. During his search, Officer Carleton found a brown purse in the back of the car, inside of which was the defendant's social security card and two wrappers containing an orange pill that was split in half. *Id*. Officer Carleton recognized the pill as suboxone. *Id*. He asked the defendant if the purse belonged to her, and she said that it did. *Id*. When Officer Carleton asked the defendant what the two pieces of pill he had found was, the defendant confirmed that it was suboxone and stated that she was "holding it for her brother and it was not hers." *Id*. Officer Carleton then placed the defendant under arrest. *Id*.

During the suppression hearing, defense counsel asked whether Officer Carleton had "institutional knowledge" of the defendant recently "beat[ing] a case" by "having a search thrown out." SH at 13. Officer Carleton testified that he did not have any such knowledge. DA at 33.

B. DEFENDANT'S MOTION TO SUPPRESS AND COURT'S ORDER.

On April 22, 2021, the defendant filed a motion to suppress evidence arguing that the evidence was obtained in violation of the defendant's rights under the Fourth Amendment to the United States Constitution and Part I, Article 19 of the New Hampshire Constitution. DA at 38-47.

The defendant's motion argued that Officer Carleton lacked reasonable suspicion to stop the defendant. *Id*. at 39-40. The defendant

asserted that Officer Carleton "unimaginatively relie[d] upon the tried and true rationale regarding insufficient illumination of license plate lights, under circumstances where he had no problem reading the plate before stopping the vehicle." *Id*. at 39. The defendant acknowledged that an officer may stop a vehicle for "minor violations" and that "even pretextual stops can be deemed lawful if there is some actual offense objectively observable." *Id*. Nevertheless, the defendant contended that the "purported license plate violation" in this case was "false," "subterfuge," and a "pretext" for initiating contact with the defendant. *Id*. at 40.

The defendant further argued that Officer Carleton "had no problem reading the license plate" and "knew [the defendant] was aware" of the license plate light being out because he had just seen the defendant inspecting the plate at the Circle K. *Id*. The defendant asserted that Officer Carleton "waited nearby" with the intent to stop the defendant "after she left the gas station." *Id*. Under those circumstances, the defendant contended that "there was no lawful basis for the intrusion upon the privacy interests" of the defendant. *Id*.

The defendant also argued that Officer Carleton did not validly obtain the defendant's consent to search her car. *Id*. at 40-42. The defendant contended that there was no "documentation of [the defendant's] consent, despite the fact that law enforcement officers are known to carry consent forms in their cruisers." *Id*. at 41. The defendant averred that Officer Carleton "threatened to seize and impound the [defendant]'s car, in order to obtain a search warrant," *id*, although Officer Carleton denied making any such threat during the suppression hearing. SH at 15.

The defendant argued that she had "endured multiple intrusions by police," had been stopped for a "violation that barely qualified as *de minimis*," had been "deprived of her car for [an] extended period," and had empty threats to impound her car leveled against her. DA at 41. Therefore, the defendant contended that she "felt that she had no alternative but to consent" and that her consent was "not freely given." *Id*.

The State objected to the defendant's motion. *Id*. at 48-50. The State argued that Officer Carleton observed a motor vehicle infraction and that observation provided reasonable suspicion sufficient for an investigative stop. *Id*. at 48-49. The State also argued that the strong odor of marijuana justified Officer Carleton's inquiry into whether the defendant had drugs in the car. *Id*. at 49. Further, the State contended that Officer Carleton was under no obligation to inform the defendant that she could refuse consent to the search and that the defendant validly consented to the search of her car. *Id*.

Following a hearing on the motion conducted on June 4, 2021, the trial court found the facts laid out in the immediately preceding section of this brief and denied the defendant's motion. *Id*. at 32-33. The court ruled that Officer Carleton was justified in stopping the defendant because he observed the defendant driving with a defective license plate light in violation of RSA 266:44. *Id*. at 35. The court rejected the defendant's argument that Officer Carleton lacked reasonable suspicion for the stop because he had no difficulty reading the defendant's license plate and saw her looking at the broken license plate light in the Circle K parking lot. *Id*. The court explained that those facts did not render the defendant's defective license plate light "beyond the scope of RSA 266:44." *Id*.

The court also rejected the defendant's argument that her consent to search the car was not freely given. *Id*. at 35-37. The court stated that "the scent of marijuana emanating from the car was sufficient for Officer Carleton to ask for permission to search the car." *Id*. at 36. Additionally, the court observed that "it is not necessary for police officers to have a form filled out to obtain lawful consent" and that "it is well established that officers can rely on verbal consent." *Id*. Further, the court stated that the defendant's assertion that Officer Carleton threatened to seize and impound her car "and offered her no other options to the search, so that she was forced to consent to the search" was inconsistent "with the testimony provided to the Court at the hearing." *Id*. at 36-37. After observing "a strong odor of freshly burned marijuana," Officer Carleton asked the defendant if he could search the car to ensure that there were no drugs inside and the defendant "responded that he could." *Id*. Accordingly, the court ruled that the defendant's "consent was freely given." *Id*. at 37.

The defendant was found guilty on all charges at the conclusion of a jury trial, at which Officer Carleton, a drug chemist employed by the Department of Safety in the Division of State Police, and the defendant, testified. *See* T at 2, 10, 36, 47, 83-84. This appeal followed.

SUMMARY OF THE ARGUMENT

The final sentence of RSA 266:44 requires that, "[w]henever a vehicle is manufactured with multiple tail lamps or multiple bulbs or filaments in the tail lamps, each of the lamps, bulbs, or filaments *and any other exterior lighting equipment with which the vehicle was manufactured* shall be in working order." *Id* (emphasis added). Officer Carleton had reasonable suspicion to pull the defendant's car over when he observed the car operating with a defective license plate light in violation of RSA 266:44. *See State v. Francisco Perez*, 173 N.H. 251, 257 (2020) (stating that one exception to the warrant requirement "allows law enforcement to conduct traffic stops of motorists without a warrant.")

The defendant's argument that the final sentence of RSA 266:44 applies only to tail lamps and not to license plate lights should be rejected. The broad language of the final sentence is unambiguous and not so narrow as to only apply to tail lamps. After referring specifically to tail lamps, the plain language of the final sentence clearly requires "any *other* exterior lighting equipment with which the vehicle was manufactured" to be in working order. RSA 266:44 (emphasis added). Additionally, a sentence that appears earlier in the statute specifically pertains to license plate lights, clearly bringing such lights within the ambit of the statute's commands. *See* RSA 266:44. Accordingly, the defendant was in violation of RSA 266:44 when she was driving with a license plate light out.

The defendant subsequently consented to the search of her car and Officer Carleton did not impermissibly expand the scope of the investigatory stop when he inquired into the smell of burnt marijuana,

which he detected immediately upon approaching the defendant's car. In New Hampshire, possession of any amount of nonmedical marijuana is a violation pursuant to RSA 318-B:2-c. Further, it is a crime to possess more than three quarters of an ounce of marijuana or operate a motor vehicle while impaired by marijuana. *See Francisco Perez*, 173 N.H. at 260.

The smell of marijuana, on its own, is not enough to provide reasonable suspicion to justify an exit order. *See Francisco Perez*, 173 N.H. at 256, 258, 263. However, in light of Officer Carleton's authority to issue a citation for possession of any amount of marijuana, in conjunction with the fact that possession of marijuana in certain amounts and operating a vehicle while impaired by marijuana is still a crime, his mere inquiry into the strong odor of freshly burnt marijuana emanating from the car was reasonable and did not impermissibly expand the scope of the traffic stop. *See Commonwealth v. Buckley*, 478 Mass. 861, 874 (2018) (holding that a detective "did not exceed the scope of the stop when inquiring about the smell of marijuana emanating from the vehicle, given his authority to issue a civil citation.") "Once in the process of making a valid stop for a traffic violation," Officer Carleton was "not required to ignore" what he saw, smelt, or heard. *Id*.

Accordingly, the trial court's denial of the defendant's motion to suppress should be affirmed.

ARGUMENT

On appeal, the defendant challenges the trial court's denial of her motion to suppress. In reviewing a trial court's order on a motion to suppress, this Court accepts the trial court's factual findings unless they lack support in the record or are clearly erroneous. *State v. Francisco Perez*, 173 N.H. 251, 256 (2020). The trial court's legal conclusions are reviewed by this Court *de novo*. *Id*.

I. OFFICER CARLETON HAD REASONABLE SUSPICION TO PULL THE DEFENDANT OVER.

Part I, Article 19 of the New Hampshire Constitution protects "all people, their papers, their possessions and their homes from unreasonable searches and seizures." *Francisco Perez*, 173 N.H. at 257 (citations omitted). A traffic stop is a seizure for purposes of the State Constitution. *Id*. Warrantless seizures are *per se* unreasonable under Part I, Article 19 unless the State proves by a preponderance of the evidence that the seizure falls within the narrow confines of a judicially crafted exception. *Id*. "One such exception allows law enforcement to conduct traffic stops of motorists without a warrant." *Id*.

The trial court ruled that Officer Carleton had reasonable suspicion to stop the defendant's car because he observed her "driving with a defective license plate [light], which is a violation of RSA 266:44." DA at 35. The court further explained that the fact that Officer Carleton could read the defendant's license plate did not place her defective license plate light beyond the reach of the statute. *Id*.

On appeal, the defendant argues that the court erred in concluding that Officer Carleton had reasonable suspicion for stopping the defendant's car. DB at 12-22. The defendant contends that RSA 266:44 only requires one license plate light to be properly functioning such that the license plate is visible from a distance of fifty feet. *See* DB at 16-17. She argues that because one of her license plate lights was functioning properly and Officer Carleton did not testify that he had any difficulty reading her license plate, she did not violate RSA 266:44. *Id*. Therefore, the defendant asserts that Officer Carleton lacked reasonable suspicion for the stop. *Id*.

As a threshold matter, the defendant argued to the trial court that Officer Carleton lacked reasonable suspicion to stop her because he did not have difficulty reading her license plate. *See* DA at 35, 39-40. However, the defendant's argument that RSA 266:44 only requires one license plate light to be properly functioning is being made for the first time on appeal. *See* DA at 39-40; *see generally* SH at 1-24. Thus, the trial court did not have the opportunity to, and did not, rule on that argument. *See* DA at 35. Accordingly, that argument has not been preserved for appellate review and should not be considered by this Court in the first instance. *See Francisco Perez*, 173 N.H. at 258 (stating that the "purpose of [this Court's] preservation rule is to ensure that trial courts have an opportunity to rule on issues and correct errors before parties seek appellate review.") However, even if this argument has been preserved, the argument is without merit.

The defendant's argument requires this Court to engage in statutory interpretation. This Court reviews questions of statutory interpretation *de novo*. *State v. Proctor*, 171 N.H. 800, 805 (2019). This Court is the final arbiter of the intent of the legislature as expressed in the words of a statute

considered as a whole. *Id*. The Court first looks to the language of the statute itself and, if possible, construes that language according to its plain and ordinary meaning. *Id*. Legislative intent is interpreted from the statute as written and this Court will not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id*. Effect must be given to all words in a statute, and the Court must presume that the legislature did not enact superfluous or redundant words. *Id*. Finally, this Court interprets a statute in the context of the overall statutory scheme and not in isolation. *Id*.

II. Plain Language.

RSA 266:44 requires all motor vehicles to have "one lamp, displaying a red light visible for a distance of at least 1000 feet to the rear of such vehicle," except cars manufactured or assembled after January 1, 1952, which must have "2 tail lamps." The statute also requires all cars to have "a white light illuminating the registration plate of such vehicle so that the characters thereon shall be visible for a distance of at least 50 feet." RSA 266:44. The final sentence of the statute, which was added in 2002, reads: "[w]henever a vehicle is manufactured with multiple tail lamps or multiple bulbs or filaments in the tail lamps, each of the lamps, bulbs, or filaments *and any other exterior lighting equipment with which the vehicle was manufactured* shall be in working order." *Id* (emphasis added).

According to the plain and unambiguous language of RSA 266:44, any exterior lighting equipment, including license plate lights, with which the vehicle was manufactured must be in working order. That legislative command was not altered or eliminated by the fact that Officer Carleton

could read the defendant's license plate. Further, the defendant has not disputed that she had a license plate light out or contended that her car was not manufactured with the license plate light that was out. Therefore, the defendant's defective license plate light placed her in violation of RSA 266:44 and Officer Carleton was permitted to pull her over based on that traffic violation. *See Francisco Perez*, 173 N.H. at 257.

Arguing for a contrary conclusion, the defendant contends that the final sentence of RSA 266:44 does not include "plate lights within its mandate." DB at 18. The defendant avers that the structure of the sentence, the principle of *ejusdem generis*, and the statutory scheme "compel[] the conclusion that the final sentence does not apply to plate lights." DB at 17-20. The defendant's arguments are unavailing.

The defendant asserts that the structure of the sentence causes the final clause to "expand[] the list of equipment that must be in working order for those vehicles that have 'multiple tail lamps or multiple bulbs or filaments in the tail lamps.'" DB at 18. The State does not disagree with the defendant to that extent, but her point does not support her argument. The expanded category of equipment that must be working pursuant to the final sentence broadly includes "any other exterior lighting equipment with which the vehicle was manufactured," RSA 266:44, which includes license plate lights. Moreover, since the defendant's car had multiple tail lamps, the final clause applies to her. Accordingly, even accepting the defendant's grammatical analysis, she was still in violation of the statute.

Appealing to the principle of *ejusdem generis*, the defendant asserts that the final sentence of the statute describes "what types of equipment a

car must have in working order *as it relates to tail lamps*." DB at 18 (emphasis in original). This argument fails for at least three reasons.

First, the legislature made the final sentence applicable to "any other exterior lighting equipment with which the vehicle was manufactured." RSA 266:44. A prior sentence of the statute specifically applies to license plate lights, which clearly brings such lights within the ambit of RSA 266:44. The final sentence of the statute does not limit its scope to tail lamps, it extends to all exterior lighting. This Court does not consider what the legislature might have said or add language that the legislature did not see fit to include. *Proctor*, 171 N.H. at 805.

Second, the phrase "any other exterior lighting equipment," which begins the final clause of the sentence, is broad in its use of the word "any" and differentiating in its use of the word "other." Taken together, those words plainly contemplate all exterior lighting equipment aside from the tail lamps, bulbs, and filaments discussed in the first clause of the sentence.

Third, the final sentence of RSA 266:44 does not include an enumerated list of specific words that is preceded or followed by general words as the statute at issue in *Proctor* did. *See Proctor*, 171 N.H. at 805. The final sentence refers to tail lamps, including tail lamps with multiple bulbs or filaments, and to "any other exterior lighting equipment with which the vehicle was manufactured." RSA 266:44. Thus, the sentence refers to tail lamps specifically and to all other lighting equipment more generally, but does not include an enumerated list of various lighting equipment necessitating a determination of whether the list includes license plate lights. Accordingly, the principle of *ejusdem generis* is ill-suited and unnecessary to understanding the final sentence of the statute.

The defendant contends that the State's interpretation produces an absurd result because such a reading would apply only to vehicles manufactured with multiple tail lamps. DB at 19. The defendant argues that there is "no reason to only require a car to have all lights in working order if the car has multiple tail lamps." *Id*. The defendant's assertion contradicts her previous analysis of the sentence structure, which led her to conclude that the sentence "expands the list of equipment that must be in working order *for those vehicles that have 'multiple tail lamps* or multiple bulbs or filaments in the tail lamps.'" DB at 18 (emphasis added). Additionally, all modern-day vehicles are, and for decades have been, manufactured with multiple tail lamps. *See* Moore & Rumar, Historical Development and Current Effectiveness of Rear Lighting Systems, The University of Michigan Transportation Research Institute (October 1999), at 6 (stating that most cars in the United States had two tail lamps beginning between 1940-1949).[2] Accordingly, the State's interpretation is consistent with the statute's language and allows the statute to be applied to nearly every vehicle on the road today, which is not an absurd result.

The defendant also argues that the statutory scheme supports her reading of the statute because RSA 266:38, which governs stop lamps, includes similar requirements that would be unnecessary if the language in RSA 266:44 applied to "all lighting equipment of any kind." DB at 19. The defendant further observes that several other statutes allow for, but do

[2] Cited report can be accessed through the following link: untitled (psu.edu)

not require, additional lighting, and it would be "absurd to require . . . those types of optional lighting to be in working order." DB at 20.

This argument fails because RSA 266:38, by its plain language, is limited specifically to stop lamps. While the defendant's redundancy argument relying on the statutory scheme might vindicate the assertion that the final sentence of RSA 266:44 does not apply to exterior lighting equipment that is specifically governed by another statute, it cannot prevail here. It might be that, to avoid rendering the language of other statutes redundant, the final sentence of RSA 266:44 only applies to exterior lighting specifically mentioned in that statute or not specifically addressed by another statute, although the broad language of the sentence leaves significant room for debate. However, even assuming that to be the case, the final sentence of RSA 266:44 would still include license plate lights because such lights are not specifically addressed by any other statute and are brought within the ambit of RSA 266:44 by a prior sentence therein specifically governing license plate lights.

As to the defendant's observation about additional optional lighting, there is nothing absurd about requiring exterior lights with which a vehicle was manufactured to be in working order, *see* RSA 266:44, even if such lighting is not legally required to be included on a vehicle. For example, RSA 266:41 permits, but does not require, cars to be equipped with back-up lamps. By communicating to other drivers and pedestrians that a vehicle is in reverse, back-up lamps increase roadway safety. Accordingly, requiring all back-up lamps to be in working order if the vehicle was manufactured with such lamps is a sensible requirement for maximizing safety on the roads of New Hampshire.

In summary, the final sentence of RSA 266:44 plainly and unambiguously requires tail lamps, including tail lamps with multiple bulbs and filaments, and all other exterior lighting equipment with which a vehicle was manufactured, including license plate lights, to be in working order. At the very least, the statute applies to all exterior lighting which is specifically governed by the statute, which includes license plate lights. The defendant does not dispute that she had a license plate light out or contend that her car was not manufactured with the license plate light that was defective. Accordingly, the defendant was in violation of RSA 266:44 and Officer Carleton was justified in pulling her over on that basis. *See Francisco Perez*, 173 N.H. at 257.

III. Legislative History.

Should this Court reject the defendant's interpretation of the language of RSA 266:44, she asserts that her interpretation is at least reasonable and that "the statute only ambiguously applies to [her] situation: where a car has one working plate light." DB at 20. Therefore, the defendant asks this Court to resort to the legislative history of RSA 266:44 to interpret the language of the statute. *Id*. The defendant contends that the legislative history "demonstrates that the legislature's purpose in enacting the final sentence of RSA 266:44 was to require that all equipment related to tail lamps be functional" and that the provision "was not intended to apply to plate lights." *Id*.

The defendant's interpretation of the statute's language is not reasonable and its applicability to her is not ambiguous. The plain language of the first sentence of the statute does indeed only require one

functioning license plate light. *See* RSA 266:44. However, with the addition of the final sentence in 2002, the legislature required that every license plate light "with which the vehicle was manufactured" be in "working order." *Id*. The language imposing that requirement, and its applicability to all "exterior lighting equipment," is unmistakably clear and legislative history should not be consulted to interpret it.

The "problems with" looking to "legislative history" to interpret the text of a statute are "well rehearsed." *Wooden v. United States*, 142 S. Ct. 1063, 1077 (2022) (*Barret*, J. concurring in part and concurring in the judgment (citation omitted)). "Since [legislative] 'intent' apart from enacted text is a fiction to begin with, courts understandably allow themselves a good deal of poetic license in defining it." *Lawson v. FMR LLC*, 571 U.S. 429, 460 (2014) (*Scalia*, J. concurring in principal part and in the judgment). "Because we are a government of laws, not of men [and women], and are governed by what [the legislature] enacted rather than by what it intended, the sole object of the interpretative enterprise is to determine what a law *says*." *Id*. (emphasis in original). Indeed, many members of the legislature "almost certainly did not read the report[s] or hear the statement[s]" contained in the defendant's addendum, "much less agree[d] with [them]." *Id*. Because the plain language of RSA 266:44 is clear and unambiguous, this Court should "not look beyond the language of the statute to discern legislative intent." *State v. White*, 164 N.H. 418, 420 (2012).

If this Court looks to the legislative history of RSA 266:44, it will find the State's interpretation of the statute is supported by it. The defendant accurately observes that the legislative history included in her

addendum makes no explicit mention of license plate lights, but frequently references stop lamps and tail lamps. DB at 21. Thus, the defendant asks this Court to conclude that the final sentence of RSA 266:44 was intended to apply only to tail lamps. *Id*. However, a close read of the legislative history reveals that the legislature was not so narrowly focused as to exclude license plate lights from the language added to the statute.

Earl Sweeny, Director of the Police Standards and Training Council, requested the bill's introduction and explained that the bill "simply update[d] an old law that [went] along with the old vehicles." DA at 66, 71. Sweeny testified that the bill was introduced "to update one of our traffic laws and recognize the new lighting equipment on motor vehicles, and ensure that when an officer stops a vehicle to tell the motorist that the light is not working, that the officer has a legal right to do so." DA at 71. He further explained that "if an officer happen[ed] to discover a drunk driver or someone involved in a crime as a result of one of these defective equipment stops" under the prior version of the statute, "the stop is often challenged because the law is not clear that any lights on the vehicle should be in working order." *Id*. The proposed bill would "ensure that when a more serious crime is uncovered as a result of a routine brake or taillight stop, criminals do not go free on a technicality." *Id*.

In one fell swoop, the bill sought to update the law from a time when motor vehicles were manufactured with only one taillight and one brake light, and to ensure that defendants could not stymie prosecutions by making technical challenges to motor vehicle stops based upon an outdated law. *See id*. In this case, the defendant asks this Court to use this legislative history to torture the unambiguous language of RSA 266:44 so

that she can suppress evidence based on the exact sort of technical argument that the legislature sought to eliminate. The defendant's interpretation of RSA 266:44 would fly in the face of the plain language and legislative history of the statute, and this Court should reject it.

A. THE DEFENDANT CONSENTED TO THE SEARCH OF HER CAR AND OFFICER CARLETON DID NOT IMPERMISSIBLY EXPAND THE SCOPE OF THE STOP.

As Officer Carleton approached the defendant's car after pulling her over, "[r]ight away [he] noticed a strong odor of marijuana coming from the car." SH at 8. Officer Carleton received the defendant's license and registration, informed her of the reason for the stop, and told her that he could smell "the odor of marijuana coming out of the car." SH at 9. The defendant informed Officer Carleton that "she had smoked earlier in the day." *Id*. "At that point," Officer Carleton "asked the [defendant] if it would be okay if [he] made sure there was no other drugs or marijuana inside the car" and the defendant said "yeah, that would be fine." *Id*.

There is no evidence to suggest that Officer Carleton so much as ran the defendant's license through the mobile data terminal in his cruiser before asking for consent to search the defendant's car. Officer Carleton called for backup so there would be a witness to the search. *Id*. Only once backup arrived did the defendant exit the vehicle and Officer Carleton began his search of the car. *See id*.

In the trial court, the defendant argued that Officer Carleton made no effort to determine if the smell of marijuana was emanating from her clothing or hair; Officer Carleton did not have her sign a consent form; and

Officer Carleton gave her no other option but to consent to the search by threatening to impound her car if she refused. *See* DA at 40-42. Accordingly, the defendant asserted that her consent "was not freely given." DA at 41. The trial court rejected these arguments and ruled that the defendant's "consent was freely given." DA at 37.

On appeal, the defendant abandons her argument that her consent was not freely given and, for the first time, argues that Officer Carleton unreasonably expanded the scope of the stop, thereby constitutionally tainting the consent he received to search the car. DB at 22-28. Accordingly, rather than shoulder the burden of the argument she made in the trial court, the defendant seeks to shift the burden to the State to prove that the defendant's freely given consent was not constitutionally tainted.

The defendant's argument that Officer Carleton impermissibly expanded the scope of the stop has not been preserved for appellate review. The purpose of the preservation rule is to ensure that trial courts have an opportunity to rule on issues and to correct errors before parties seek appellate review. *Francisco Perez*, 173 N.H. at 258. This requirement is intended to discourage parties who are unhappy with the results in the trial court from combing the record to find alleged error never properly before the trial judge that might support a motion to set aside the judge's ruling. *Id*. An issue is preserved when the trial court understood, and therefore addressed, the substance of a particular argument or objection. *See id*.

Whether Officer Carleton impermissibly expanded the scope of the traffic stop by inquiring into the smell of freshly burnt marijuana and asking the defendant if she had any drugs in the car was not mentioned a single time in the defendant's motion to suppress or at the suppression

hearing. *See* DA at 38-42 (defendant's motion); *see generally* SH at 1-24. The closest the defendant came to even alluding to this argument was at one point in her motion in which she asserted that she "had been deprived of her car for [an] extended period." DA at 41. However, the defendant never pursued that point during the suppression hearing and passing reference to an issue that is otherwise ignored does not preserve the issue for appellate review. *See Boston and Maine Corp. v. Sprague Energy Corp.*, 151 N.H. 513, 518 (2004). Accordingly, this argument has not been preserved for appellate review and should not be addressed by this Court. *See Francisco Perez*, 173 N.H. at 258.

Should this Court address the defendant's argument, her argument should be rejected because Officer Carleton did not impermissibly expand the scope of the traffic stop by inquiring into the strong odor of marijuana that he immediately detected upon approaching the defendant's car.[3]

An investigative stop based upon a motor vehicle violation 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. *Perez*, 173 N.H. at 257. An investigatory stop may transform into an overly prolonged or intrusive detention and become unlawful. *Id*. (quotation omitted). Whether the detention is a lawful investigatory stop, or goes beyond the limits of such a stop, depends upon the facts and circumstances of the particular case. *Id*.

[3] The State notes that the defendant does not specifically raise the argument that Officer Carleton expanded the scope of the stop by requesting consent to search the vehicle or by conducting the search. The defendant only argues that Officer Carleton expanded the scope of the stop by inquiring into the smell of burnt marijuana and asking the defendant if she had any drugs in the car. *See* DB at 23-26.

To determine whether an officer's inquiry unlawfully expanded the scope of an otherwise valid traffic stop, this Court undertakes the following analysis:

> 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, [this Court] must consider whether the law enforcement officer had a reasonable, articulable suspicion that would justify the question. If the question is so justified, no constitutional violation occurs. In the absence of a reasonable connection to the purpose of the stop or a reasonable, articulable suspicion, [this 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.

Perez, 173 N.H. at 257.

The Supreme Court of the United States "has made plain" that an "officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *see Florida v. Royer*, 460 U.S. 491, 502 (1983) (officer would have been justified in asking for consent to search luggage without particularized suspicion without exceeding the permissible scope of the initial stop had they not substantially extended the duration and scope of the intrusion by directing defendant to isolated police room for additional questioning).

In Massachusetts, where marijuana was decriminalized and later legalized, the Massachusetts Supreme Judicial Court has concluded that an officer's inquiry into the smell of marijuana does not impermissibly expand the scope of a valid traffic stop. For example, in *Commonwealth v. Cruz*,

the Massachusetts Supreme Judicial Court held that "the odor of burnt marijuana alone cannot reasonably provide suspicion of criminal activity to justify *an exit order*." 459 Mass. 459, 472 (2011) (emphasis added). However, the Court held that when the officer "approached the driver's side window and detected the odor of burnt marijuana, asking the driver whether he had been smoking marijuana was permissible because the officers could potentially have issued the driver a civil citation." *Id*. at 466.

Seven years later, the Supreme Judicial Court addressed a set of facts analogous to those before this Court in this case. *See Commonwealth v. Buckley*, 478 Mass. 861 (2018). In *Buckley*, detectives observed two vehicle occupants enter a building which they suspected of drug activity. *Id*. at 862. The vehicle occupants reemerged minutes later and drove away. *Id*. The detectives instructed another officer to stop the vehicle and he did so a few minutes later "upon observing the vehicle traveling above the speed limit." *Id*. at 862-63. When the detectives arrived on the scene, the officer who stopped the car was standing at the driver's side of the car. *Id*. at 863. Upon approaching the car, one detective "noticed a strong odor of marijuana emanating from inside the vehicle" and "asked the driver if she had any marijuana in the vehicle." *Id*. The driver told him "she did not think so, and said that he could check." *Id*. Police found a gun and crack cocaine during a subsequent search of the car, and, prior to trial, the defendant moved to suppress evidence seized during the traffic stop. *Id*.

On appeal, the defendant argued that the police "exceeded the permissible scope of the stop when the plainclothes detectives joined" the officer that made the initial traffic stop "and asked the driver about the odor of marijuana emanating from the vehicle." *Id*. at 873. The Court observed

that the "stop at issue was justified based on [the officer's] observation of the vehicle speeding," and that justification "define[d] the permissible scope of the officers' inquiry." *Id*.

The Supreme Judicial Court rejected the defendant's argument that the detective's "question to the driver about the smell of marijuana fell beyond the permissible scope of the stop." *Id*. at 874. The Court stated that the argument was "foreclosed" by *Cruz*. *Id*. The Court explained that, under *Cruz*, the detective "did not exceed the scope of the stop when inquiring about the smell of marijuana emanating from the vehicle, given his authority to issue a civil citation." *Id*. The Court further stated that "[o]nce in the process of making a valid stop for a traffic violation, as here, officers are not required to ignore what they see, smell or hear." *Id*. (citation, quotation marks, and brackets omitted).

The Connecticut Supreme Court concluded that a traffic stop was not unreasonably prolonged by a request for consent to search a vehicle in *State v. Jenkins*, 298 Conn. 209 (2010). In *Jenkins*, a detective made a routine traffic stop after observing a car make two abrupt lane changes without signaling. *Id*. at 214. The officer retrieved the defendant's license and registration to the rental car the defendant was driving and questioned him regarding his travel itinerary before returning to his cruiser and running the defendant's information. *Id*. at 215. The defendant appeared "unusually nervous" and gave "quick answers" to questions without making eye contact, but had no "outstanding warrants, wants or cautions pertaining to [him]." *Id*.

Nevertheless, the officer called for backup "because he had decided that he was going to ask the defendant for consent to search his vehicle."

Id. Backup arrived by the time the officer "finished writing the ticket" and the officer returned to the vehicle, asked the defendant "to exit the car in order to explain the ticket," and asked the defendant if he had anything "illegal" in the car. *Id*. at 215-16. The defendant said he did not and told the officer to "go ahead and check." *Id*. at 216. The subsequent search of the car uncovered cocaine and heroin for which the defendant was arrested. *Id*. at 216.

On appeal, the defendant argued that the officer's order to exit the car "at a point when the traffic stop should have ended with the issuance of the traffic ticket" impermissibly expanded the scope of the stop "beyond the moving violation." *Id*. at 232. Analyzing the defendant's claim under the Fourth Amendment, the Court held that "questions permissible under *Terry* during a routine traffic stop include inquiries about whether the car or driver are carrying contraband, as well as concomitant requests for consent to search the vehicle." *Id*. at 237. The Court stated that these "inquiries are permissible even if they are irrelevant to the initial purpose of the stop, namely, the traffic violation, so long as they do not 'measurably extend' the stop beyond the time necessary to complete the investigation of the traffic violation and issue a citation or warning." *Id*. The Court further observed that, in the wake of the Supreme Court's holding in *Arizona v. Johnson*, courts "uniformly have emphasized the de minimis nature of the nontraffic related questioning and requests for consent to search within the context of the stop as a whole." *Id*. at 239.

Ultimately, the Court held that the traffic stop was not unreasonably prolonged because the "total relevant duration of the stop, namely, from the time that the defendant was pulled over until the time that he gave his

consent to the search of the Altima, was at most fifteen minutes." *Id*. at 246. The defendant was arrested within twenty minutes from the inception of the stop. *Id*. After analyzing Connecticut's law, the history of the State's Constitution, and case law from Alaska, Kansas, Massachusetts, Minnesota, New Jersey, Pennsylvania, and Wyoming, the Court reached the same conclusion under the Connecticut Constitution. *Id*. at 259-283.

The Supreme Court of Georgia reached the same result on similar facts where "the questioning and request for consent to search occurred before the purpose of the traffic stop was fulfilled." *Salmeron v. State*, 280 Ga. 735, 737 (2006). Similarly, the Court of Appeals for the Eighth Circuit has held that "[w]hen a motorist gives consent to search his vehicle, he necessarily consents to an extension of the traffic stop while the search is conducted." *U.S. v. Rivera*, 570 F.3d 1009, 1013 (8th Cir. 2009).

In New Hampshire, possession of any amount of nonmedical marijuana is still a violation pursuant to RSA 318-B:2-c. Further, as this Court has observed, it is a crime to possess more than three quarters of an ounce of marijuana or operate a motor vehicle while impaired by marijuana. *See Francisco Perez*, 173 N.H. at 260. Accordingly, Officer Carleton's mere inquiry into the odor of burnt marijuana, which he immediately detected when he approached the defendant's car, was permissible. *See Cruz*, 459 Mass. at 466. Officer Carleton was in the process of making a valid stop for a traffic offense and was not required to ignore what he saw, smelt, or heard. *See Buckley*, 478 Mass. at 847.

The defendant relies heavily on this Court's holding in *Francisco Perez* to support her argument. *See* DB at 22-26. But *Francisco Perez* cannot bear the weight that the defendant places upon it. Notably,

Francisco Perez addressed whether the officer's exit order impermissibly expanded the scope of the stop, not a mere inquiry into the odor of burnt marijuana. *See Francisco Perez*, 173 N.H. at 256, 258, 263; *compare Jenkins*, 298 Conn. at 239 (stating that courts "uniformly have emphasized the de minimis nature of the nontraffic related questioning and requests to consent to search within the context of the stop as a whole") *with Cruz*, 459 Mass. at 469 n. 16 (stating that "[a]n exit order is a further intrusion on a person's liberty, not to be taken lightly"). Accordingly, the issue before the Court in this case is one of first impression and *Francisco Perez* may be instructive, but it is not controlling.

The defendant argues that Officer Carleton's inquiry into the smell of burnt marijuana was unconstitutional because it "extended the length of time that an equipment malfunction motor vehicle stop would take." DB at 25. However, the "acceptable length of a routine traffic stop . . . cannot be stated with mathematical precision." *United States v. Hill*, 852 F.3d 377, 381 (4th Cir. 2017). Indeed, "judicial review of routine traffic stops goes beyond a strict stopwatch test; reasonableness is not measured solely by the temporal duration of the stop alone but, rather, requires scrupulous consideration of the reasonableness of the officers' actions during the time of the stop." *Jenkins*, 298 Conn. at 242-243.

Officer Carleton's inquiry was made, and the defendant's consent to the search had been given, before he even returned to his cruiser with the defendant's license and registration. Thus, the purpose for the traffic stop had barely begun, never mind concluded, at the time Officer Carleton's inquiries were made. Accordingly, Officer Carleton did not impermissibly prolong or expand the scope of the stop in the few moments between the

time he initiated the traffic stop and the time he inquired into the odor of burnt marijuana. *See Buckley*, 478 Mass. at 874; *Jenkins*, 298 Conn. at 246; *Salmeron*, 280 Ga. at 737. Likewise, the duration of time it took Officer Carleton to search the defendant's car did not unconstitutionally extend the length of the stop because the defendant "necessarily consent[ed] to [the] expansion of the traffic stop while the search [was] conducted." *Rivera*, 570 F.3d at 1013.

The defendant also argues that Officer Carleton's "inquiry into drugs changed the fundamental nature of the stop." DB at 26. The State does not concede this point. As previously noted, the Supreme Court of the United States has held that an "officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Johnson*, 555 U.S. at 333. However, even assuming that the defendant is correct in asserting Officer Carleton's inquiry changed the nature of the stop, Officer Carleton was nevertheless justified in changing the nature of the stop through his inquiry into the odor of burnt marijuana for all the reasons discussed above.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment of the trial court.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

ANTHONY J. GALDIERI
SOLICITOR GENERAL

October 10, 2022

/s/ Sam M. Gonyea

Sam M. Gonyea, Bar No. 273264
Attorney
Criminal Justice Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3671

CERTIFICATE OF COMPLIANCE

I, Sam M. Gonyea, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7,934 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.

October 10, 2022 *<u>/s/ Sam M. Gonyea</u>*
Sam M. Gonyea

CERTIFICATE OF SERVICE

I, Sam M. Gonyea, hereby certify that a copy of the State's brief shall be served on Christopher Johnson, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

October 10, 2022 *<u>/s/ Sam M. Gonyea</u>*
Sam M. Gonyea