NO. A19-1554

State of Minnesota
In Supreme Court

State of Minnesota,
Respondent

vs.

Carlos Ramone Sargent,
Appellant

# APPELLANT'S BRIEF

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## PROCEDURAL HISTORY

**September 25, 2017**: In Cass County District Court file no. 11-CR-17-833, Appellant Carlos Ramone Sargent is released from custody pending trial with court-ordered conditions including "random testing" and "no alcohol/controlled substance use."

**November 4, 2017**: Following traffic stop, Appellant, a vehicle passenger, is arrested on suspicion of violation of his conditions of pre-trial release. In executing a search subsequent to arrest, police uncover three shotgun shells on Appellant's person.

**January 22, 2018**: Criminal complaint filed in Cass County District Court charging Appellant with Count I: Ineligible Person in Possession of Ammunition in violation of Minn. Stat. § 624.713, Subd. 1(2) and Count II: Possession of Simulated Drugs in violation of Minn. Stat. § 152.097, Subd. 1(3).

**March 30, 2018**: Appellant files notice of motion and motion to suppress evidence on grounds that (1) the initial traffic stop was conducted without reasonable suspicion of criminal activity in violation of *Terry v. Ohio*, 392 U.S. 1 (1968), and (2) the subsequent expansion of the traffic stop to include the search and seizure of Appellant violated Appellant's constitutional rights.

**August 9, 2018**: Contested omnibus hearing held by Hon. David F. Harrington on Appellant's motion to suppress.

**October 8, 2018**: Omnibus order issued by Hon. David F. Harrington denying Appellant's motion to suppress evidence.

**May 1, 2019:** Appellant files a motion to reconsider in light of Court of Appeals decision in *State v. Cournoyer*, holding that reasonable suspicion is required to conduct a warrantless search of a probationer's person, property, workplace or home.

**May 6, 2019:** Judge Harrington files an Order Denying the Motion.

**June 6, 2019:** Stipulated facts trial held pursuant to Minn. R. Crim. Pro. 26.01, subd. 4. The State dismisses Count II (simulated drugs) and Appellant pleads guilty to Count I (ineligible person in possession of ammunition) reserving for appeal the rulings on Appellant's omnibus motions.

**June 11, 2019**: Sentencing hearing before Hon. David F. Harrington. Appellant is sentenced to mandatory minimum of 60 months and committed to the Commissioner of Corrections.

**September 27, 2019**: Notice of appeal filed with Clerk of Appellate Courts.

**December 20, 2019**: Transcripts delivered by Cass County District Court Reporter to the Office of the State Appellate Public Defender.

**September 28, 2020**: The Court of Appeals files a published decision affirming Appellant's conviction.

**October 28, 2020**: Appellant files petition for review on two issues.

**December 29, 2020**: The petition for review is granted on one issue by order of the Minnesota Supreme Court.

**January 28, 2021**: Appellant's brief to the Minnesota Supreme Court is filed.

## LEGAL ISSUES

1. Did the expansion of scope and duration of a traffic stop to include a search and seizure of Appellant satisfy the reasonableness requirement set forth in *Terry v. Ohio*, 392 U.S. 1 (1968)?

   The trial court denied Appellant's pretrial motion to suppress (Doc. ID # 25) and the Minnesota Court of Appeals affirmed in a published decision dated September 28, 2020. *State v. Sargent*, 951 N.W.2d 121 (Minn. Ct. App. 2020).

   *Apposite Authority:*

   *Cases:*

   *Terry v. Ohio*, 392 U.S. 1 (1968)
   *State v. Burbach*, 706 N.W.2d 484 (Minn. 2005).
   *State v. Fort*, 660 N.W.2d 415 (Minn. 2003).

   *Statutory and Constitutional Provisions*:

   U.S. Const. amend. IV
   Minn. Const. art. I, § 10

## STATEMENT OF THE CASE

On November 4, 2018, Appellant Carlos Sargent was a passenger in a vehicle stopped for an alleged moving violation in Cass County, Minnesota. At the time of the stop, Appellant was on pretrial release for charges in another file with court-ordered conditions including abstention from alcohol and random searches.

During the pendency of the stop, Officer Anthony Hanson of the Leech Lake Tribal Police Department noticed the smell of alcohol emanating from the vehicle. The driver denied drinking alcohol. From the video of the stop, it appears that her passengers, including Appellant, admitted to drinking alcohol. The video also indicates that Officer Hanson was familiar with Appellant and Officer Hanson testified that he knew that Appellant was on pretrial release.

After administering a breath test to the vehicle's driver to confirm sobriety, Officer Hanson returned to the vehicle to question Appellant. During Officer Hanson's questioning of Appellant, Appellant admitted that he was on a "no-drink" condition of release. Officer Hanson then ordered Appellant to take a breathalyzer test which indicated that Appellant had a blood alcohol content of 0.03.

Officer Hanson confirmed with his dispatch department that Appellant was on conditional pretrial release, including a court order mandating alcohol abstention. Officer Hanson contacted the Cass County Probation Department, who was supervising Appellant's release, to inquire as to whether Appellant should be arrested. Upon confirmation from the Probation Department, Appellant was arrested and, during a body

search subsequent to arrest, Officers discovered three shotgun shells. As Appellant is ineligible to possess ammunition, he was charged under Minn. Stat. § 624.713.1(2).

Arguing that officers had exceeded the permissible scope and duration of the traffic stop in violation of *Terry v. Ohio*, 392 U.S. 1 (1968), Appellant moved to suppress the evidence obtained as a result of his search and seizure. An omnibus hearing was held before the Honorable David F. Harrington on August 9, 2018, who, by order dated October 8, 2018, denied Appellant's motion.

On May 1, 2019, Appellant filed a motion to reconsider his motion to suppress. On May 6, 2019, Judge Harrington denied the motion to reconsider.

Appellant then waived his right to a jury trial and proceeded to a stipulated facts trial pursuant to Minn. R. Crim. Pro. 26.01, subd. 4. Appellant was found guilty by the District Court on June 6, 2019 and sentenced to the mandatory-minimum sentence of a five-year commitment to the Commissioner of Corrections.

Appellant submitted an appeal to the Court of Appeals arguing that officers had exceeded the permissible scope and duration of the traffic stop in violation of *Terry*. In a published opinion dated September 28, 2020, the Court of Appeals affirmed the District Court.

Appellant submitted a petition for review by this Court on October 28, 2020 seeking review on two issues—including the issue of whether the permissible scope and duration of the traffic stop had been exceeded. This Court, by order dated December 29, 2020, granted Appellant's petition for review on the *Terry* issue.

## STATEMENT OF THE FACTS

On the evening of November 4, 2018, Leech Lake Tribal Police Officer Anthony Hanson stopped a car driven by Elise Howard after an apparent failure to signal a turn. (Transcript of Proceedings from Multiple Dates (hereinafter, "T."), at 34). Officer Hanson approached the driver's side of the vehicle and Officer Oelke approached the passenger's side. (Officer Hanson's Squad Video Admitted as Exhibit 1 at the August 8, 2018 Contested Omnibus Hearing (hereinafter, "V."), at 02:05). In the car were three passengers, including Appellant Carlos Sargent. (T. at 35). Officer Hanson recognized the passengers from prior contacts with law enforcement. (T. at 35). Officer Hanson stated at the omnibus hearing that he knew that Appellant was on pretrial release but he did not state that he knew the release was conditional or what those conditions were. (T. at 35-36).

Shortly after the commencement of the stop, Officer Hanson noted the smell of alcohol and asked Ms. Howard if she had been drinking. (V. at 03:51). After Ms. Howard replied in the negative, Officer Hanson questioned the passengers, each of whom admitted that they had been drinking, including Appellant. (T. at 37-38; V. at 4:05).

Officer Hanson then obtained the consent of Ms. Howard to perform a breathalyzer test and removed her from the vehicle. (V. at 05:00). While Ms. Howard was removed from the vehicle and administered a breathalyzer test, Officer Oelke stood guard on the passenger side keeping a watchful eye on the vehicle's passengers. (V. at 05:10).

Upon confirming that Ms. Howard had not been drinking, Officer Hanson instructed Ms. Howard to stay next to his squad car and then he proceeded back to the passenger's side of Ms. Howard's vehicle to question Appellant. (V. at 7:30).

During Officer Hanson's questioning of Appellant, he asked Appellant if he was "on a no drink." (V. at 07:50). While most of Appellant's response is inaudible, it appears that Appellant mentioned his supervising agent with the Cass County Probation Department, Travis Fisher, by name. (V. at 08:10). Officer Hanson then stated to Appellant, "well, I made contact with you so you know I gotta PBT." (V. at 08:18). During the entire questioning of Appellant, Officer Hanson never told Appellant that he was free to leave, refuse to answer his questions, or to refuse to submit to the breathalyzer.

Upon administering the breathalyzer, Officer Hanson confirmed that Appellant had been drinking as Appellant's blood alcohol content registered as 0.03. (V. at 9:30). Officer Hanson justified the reason for his search by stating "well I can smell it pretty strong in the car so that's why I gotta do that." (V. at 9:30).

Officer Hanson confirmed with dispatch that Appellant's pretrial release was conditional and included a "no-drink" condition. (V. at 11:55). Officer Hanson then contacted Cass County Probation Department to confirm whether Appellant should be arrested for a condition violation. (V. at 15:58). Upon confirmation from Brad Mesenbrink with the Probation Department, Appellant was arrested.

In a search subsequent to arrest, officers discovered three shotgun shells. As Appellant is an ineligible person due to a prior conviction, Appellant was charged with a violation of Minn. Stat. § 624.713.1(2).

## ARGUMENT

### I. THE SEARCH AND SEIZURE OF SARGENT WAS UNCONSTITUTIONAL

The Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution guarantee "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." Searches and seizures conducted without a warrant issued upon a showing of probable cause are "generally unreasonable." *State v. Flowers*, 734 N.W.2d 239, 247-48 (Minn. 2007). In the absence of a warrant, the State has the burden of showing that the search or seizure falls within an exception to the warrant requirement. *Id.*

In this case, the State relies on the *Terry* exception to the warrant requirement. As will be demonstrated below, however, the State cannot meet its burden and avail itself of a warrant exception as the *Terry* stop was unreasonably expanded.

a. Standard of Review

This Court reviews de novo a district court's ruling on constitutional questions involving searches and seizures. *State v. Anderson*, 733 N.W.2d 128, 136 (Minn. 2007). Appellate courts must determine whether law enforcement "articulated an adequate basis for the search or seizure at issue." *Flowers*, 734 N.W.2d at 247-48. If the facts are in dispute, a lower court's factual findings are reviewed for clear error. *Anderson*, 733 N.W.2d at 136.

b. The Scope and Duration of the Terry Stop was Impermissibly Expanded.

*i. "Reasonableness" under Terry.*

Article I, Section 10 of the Minnesota Constitution mandates evaluation of the reasonableness of traffic stops with reference to the principles and framework set forth in *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny. *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004). Under the *Terry* framework, a law enforcement officer may temporarily detain an individual without probable cause if (1) the initial stop is justified by "reasonable articulable suspicion," and (2) "the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place." *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011) (quoting *Askerooth*, 681 N.W.2d at 364). Any evidence obtained as a result of a seizure unsupported by reasonable suspicion must be suppressed. *Id.*

The second prong of the *Terry* analysis acts to constrain "the scope and methods of a search or seizure." *Askerooth*, 681 N.W.2d at 364. An initially valid stop may become invalid if the "intensity or scope" of the stop becomes "intolerable". *Id. quoting Terry v. Ohio*, 392 U.S. 1, 6 (1968). Thus, each "incremental intrusion" during a stop should be "strictly tied to and justified by the circumstances which rendered the initiation of the stop permissible." *Id.* (internal quotations omitted). If each such incremental intrusion is not so tied to the initial and permissible justification for the stop, such intrusion must then be supported by either independent probable cause or "reasonableness." *Id.*

In order to be "reasonable," each such incremental intrusion must satisfy an objective test: "would the facts available to the officer at the moment of the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate." *Id.* (internal quotations omitted). In turn, the question of whether the action taken is "appropriate" is

measured by balancing "the government's need to search or seize and the individual's right to personal security free from arbitrary interference by law officers." *Id. citing United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (internal quotations omitted). The State holds the burden to demonstrate that a search or seizure was sufficiently limited. *Id., citing Florida v. Royer*, 460 US. 491 (1983).

Without independent probable cause or reasonableness as defined by *Terry*, an intrusion that is not closely related to the initial purpose of the stop is invalid under Article I, Section 10 of the Minnesota Constitution. *Askertooth*, 681 N.W.2d at 364. This includes prohibiting "the expansion of traffic stops to include intrusive police questioning when there was no reasonable articulable suspicion to justify the questioning." *State v. Fort*, 660 N.W.2d 415, 419 (Minn. 2003). Both probable cause and reasonableness are analyzed with reference to the "totality of circumstances." *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005). Analysis under these standards must be "particularized" and "individualized" to the individual defendant. *Id.*

The second prong of the *Terry* analysis also acts to invalidate searches with intolerable durations. *State v. Weigand*, 645 N.W.2d 125, 135-36 (Minn. 2002). A traffic stop may endure only as long as the reasonable suspicion of the traffic violation remains, provided that police act in a reasonable and diligent manner. *Id.* After the original purpose of the traffic stop has been accomplished, not even consent can cure a further search unless law enforcement acquired reasonable articulable suspicion during the pendency of the original purpose of the stop. *Id.* citing *United States v. Ramos*, 20 F.3d 348, 352 (8th Cir. 1994). Thus, an officer may not even request consent to expand the scope of a *Terry* stop

unless, at the time of the request, the officer has "reasonable articulable suspicion of other *criminal activity* going beyond the initial reason for the stop." *Burbach*, 706 N.W.2d at 488 (emphasis added; internal quotations omitted).

*ii. Law enforcement lacked reasonable, articulable suspicion to expand the scope and duration of the traffic stop.*

The fact pattern in this case is analogous to ones previously analyzed by this Court as lacking reasonable, articulable suspicion justifying the expansion of a traffic stop. In *Burbach*, law enforcement stopped a driver for speeding; during their initial questioning of the driver, officers noted the smell of alcohol emanating from the vehicle. *Burbach*, 706 N.W.2d at 486. While the vehicle's passenger volunteered that he was the source of the smell, officers removed the driver for further questioning and testing. *Id.* Officers administered a breathalyzer which indicated that the driver had not been drinking and the driver did not demonstrate any of the telltale symptoms of intoxication. *Id.* However, officers noted that the driver was "more nervous, fidgety, and talkative than a normal nervous person in a traffic stop" and wanted to search the vehicle for crack cocaine based on a tip from their shift-change meeting. *Id.* at 486-87. Officers sought and received the driver's consent to execute a vehicle search and, during the search, discovered "three baggies of crack cocaine sitting on the passenger seat." *Id.* at 487.

In reversing the Court of Appeals, this Court distinguished these facts from those set forth in *State v. Schinzing*, 342 N.W.2d 105 (Minn. 1983) upon which the Court of Appeals had relied. *Schinzing* upheld a search of a vehicle where officers detected the smell of alcohol and knew that the vehicle's passengers were minors; thus, there was "clear

evidence of underage drinking." *Id.* Meanwhile, *Burbach*'s circumstances were "very different" as an adult passenger had volunteered that he had been drinking and the officers knew, after performing sobriety tests, that the driver had not. *Id.* Finding that "these facts provide only an attenuated inference of an open container," the *Burbach* Court rejected the State's argument that the smell of alcohol in a vehicle in and of itself gives rise to reasonable articulable suspicion "sufficient to permit an officer to expand [a] traffic stop by requesting to search the vehicle." *Id.*

The same principal applies to the search and seizure of a vehicle's passengers. While it is clear that the driver of a vehicle is the subject of a seizure during a routine traffic stop, Minnesota courts have reserved the issue of "whether a passenger in a stopped vehicle is also seized." *See Fort*, 660 N.W.2d 415. Instead, this Court has found that a passenger is seized when "a reasonable person, under the circumstances, would not feel free to disregard...police questions or to terminate the encounter." *Id.* at 418.

In *Fort*, this Court again reversed the Court of Appeals finding that a suspicionless search of a vehicle passenger was an impermissible expansion of a traffic stop. *Id.* The relevant facts set forth in *Fort* are as follows: subsequent to a valid traffic stop for minor traffic violations, police decided to tow the vehicle as neither the driver nor Fort, the passenger, had valid driver's licenses. *Id.* Fort was then escorted from the vehicle and asked a series of questions regarding possession of drugs or weapons. *Id.* While officers obtained Fort's consent to execute a pat-down search for contraband, they did not inform Fort that he had the right to refuse the search request or that he was free to leave. *Id.*

On appeal, the State argued that the search of Fort was permissible as Fort, a mere passenger, had not been seized at the time of his consent. This Court rejected this argument, finding Fort was seized as he was specifically "approached" by a law enforcement officer and asked "particularly intrusive" questions "aimed at soliciting evidence of drugs and weapons." *Id.* Thus, the search of Fort represented an impermissible expansion of the traffic stop in violation of Article I, Section 10 of the Minnesota Constitution. *Id.*

The facts in the present case mirror those set forth in *Burbach* and *Fort*. Here, a vehicle was ostensibly stopped for a minor traffic violation—the apparent failure to signal a turn.[1] As with *Fort*, officers approached the vehicle from both sides: Officer Hanson approached the driver's side to speak with the driver, Elise Howard; Officer Oelke approached the passenger's side, where Sargent was sitting. (V. at 02:07). Two other passengers, John Arlo Omaha and Joseph Oothoudt, were in the vehicle's backseat. (T. at 35). Similar to *Burbach*, Officer Hanson smelled alcohol emanating from the vehicle and questioned the driver and the passengers as to its source; Howard indicated that she had not been drinking while her three passengers (including Sargent) appeared to indicate that they had been. (T. at 37-38).

At this time, the video makes clear that Officer Hanson recognized Sargent as he specifically identified him by name (V. at 02:48) but there is no indication that Officer Hanson was aware that (1) Sargent was on conditional pretrial release, or (2) a condition of Sargent's pre-trial release was to abstain from alcohol. (V. at 03:41).

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[1] The video evidence in the record on the underlying infraction is inconclusive and the vehicle driver offered testimony disputing the officers' accounts before the trial court.

As in *Burbach*, Officer Hanson then obtained the driver's consent to administer a breathalyzer to confirm that the driver was not under the influence; consenting, Howard willingly exited the vehicle. (V. at 05:09). Officer Hanson administered the test which confirmed Howard's sobriety. (T. at 37; V. at 07:03). During the entirety of Howard's field sobriety test, Officer Oelke remained on the passenger's side of the vehicle, keeping a watchful eye on the vehicle's occupants, including Sargent. (V. at 05:15-07:20).

Following the administration of Howard's breathalyzer, Officer Hanson did not proceed to write Howard a warning or citation for her traffic infraction[2]; instead, Officer Hanson left Howard alone with his squad car—specifically instructing her to remain there—while he walked back toward the passenger's side of the vehicle.

At that precise moment in time, law enforcement (1) had accomplished the original purpose of the stop and (2) had further confirmed that Howard had not been driving under the influence of alcohol. Further, and most importantly, the officers had no reasonable, articulable suspicion of additional criminal activity which could justify an extension of the scope or duration of the stop.

While the State may argue that the source of the alcohol had not yet been identified (and, thus, some form of reasonable, articulable suspicion remained), the *Burbach* Court specifically rejected the odor of alcohol as a stand-alone basis for reasonable, articulable suspicion in a strikingly-similar fact pattern. Rather than serving as grounds for suspicion of criminal activity (other than, of course, suspicion of an intoxicated driver), the Court

[2] It does not appear that Ms. Howard was given a warning or a citation.

reasoned that the smell of alcohol wafting from a vehicle is more indicative of innocuous or even commendable activity, like designated driving. *Burbach*, 706 N.W.2d at 489.

The fact pattern in this case breaks from *Burbach* in that the officers did not search Howard's vehicle; rather, when Officer Hanson returned to Howard's vehicle after administering Howard's field test, he immediately began to question Sargent, who had previously admitted to drinking alcohol, about potential illegal activity by asking Sargent if he is "on a no drink." (T. at 38).

At this point in the encounter, the facts are similar to those set forth in *Fort*. Sargent was a passenger in a stopped vehicle and was specifically "approached" by law enforcement. In fact, at all times prior to Officer Hanson's questioning of Sargent—including during Howard's field test—Officer Oelke stood immediately outside Sargent's passenger door. Second, upon Officer Hanson's return to the vehicle, Sargent (like Fort) is subjected to intrusive questioning aimed at soliciting evidence of illegal activity for which he could be subject to arrest. *See* Minn. R. Crim. Pro. 6.02, subd. 3. Under these circumstances, it is extremely likely that "an objectively reasonable person would not feel free to disregard the police officer's questions or to terminate the encounter" and, therefore, Sargent was seized. *Fort*, 660 N.W.2d at 418.

As the original purpose of the stop had been accomplished, the question then becomes whether the seizure of Sargent was "reasonably related to and justified by the circumstances that gave rise to the stop in the first place." *Diede*, 795 N.W.2d at 842. As Sargent is the subject of the seizure, this Court's analysis focuses on whether, under the totality of circumstances, Officers Hanson and Oelke obtained reasonable, articulable

suspicion that was both "particularized" and "individualized" to Sargent during the initial scope of the stop. *Burbach*, 706 N.W.2d at 488.

While *Burbach* does provide that, if an officer has specific knowledge that a vehicle's occupant is prohibited from consuming alcohol, that knowledge, combined with the smell of alcohol, could give rise to "reasonable, articulable suspicion of additional criminal activity beyond the original purpose of the stop," (*Id.*) the record here does not indicate that the officers had this specific knowledge regarding Sargent until after they engaged in intrusive questioning. The video of the encounter plainly shows that Officer Hanson did not ask Sargent whether he was "on a no drink" until after Officer Hanson had finished administering the breathalyzer on the vehicle's driver.

Further, while Officer Hanson testified that he learned ten days prior to the night in question that Sargent was on "pretrial release" (T. at 33), Officer Hanson does not articulate whether he knew that Sargent was to abstain from alcohol; moreover, Officer Hanson does not even articulate that he knew Sargent's pretrial release was *conditional*. In fact, the opposite appears to be true as, on cross examination, Officer Hanson concedes that he "found out that [Sargent] was being supervised by Cass County probation on pretrial conditions" during the pendency of the stop. (T. at 46).

Mere knowledge that an individual is on pretrial release, even when coupled with the smell of alcohol and admission of use, does not amount to reasonable, articulable suspicion of illegal activity. Before law enforcement can make the connection that an individual on pretrial release may be prohibited from drinking, they must make two logical leaps: (1) that the pretrial release is conditional, and (2) that one of those conditions is to

abstain from alcohol. These deductions themselves run contrary to the framework set forth in Minn. R. Crim. Pro. Rule 6.02, which presumes unconditional release, and in *State v. Martin*, which held that a court abuses its discretion by utilizing a blanket policy conditioning release on abstention from drugs and alcohol. 743 N.W.2d 261, 266-67 (Minn. 2008). Instead, when conditional release is, in fact, indicated, courts are expected to analyze the specific conditions on a "case-by-case basis" and consider how the "particular facts" of a given case fit within Rule 6.02. *Id.*

Upholding as reasonable a suspicion that an individual on pretrial release may be subject to conditions of release is a slippery slope of unintended consequences. Would it be reasonable, by way of example, for an officer to suspect that an individual seen earlier at a criminal arraignment hearing is on conditional pretrial release? What about an individually merely seen at the courthouse? Entertaining these hypotheticals illustrates the potential infringement that individuals merely accused of crimes—and still constitutionally-presumed innocent (*see, e.g.*, *Taylor v. Kentucky*, 436 U.S. 478, 486, (1978)) —could endure if the State's argument wins the day.

Here, neither Officer Hanson nor any other officer articulated that he had any direct knowledge of Sargent other than generally stating that Sargent had "a pretty good record with our department." (T. at 35). The officers offered no detail on what Sargent's record included, and only expressed general awareness that Sargent "was a suspect in an assault" (T. at 36), a charge which, at first blush, would not obviously warrant a "no-drink" condition of release.

Thus, during the initial scope of the stop—permissibly expanded to include investigation of a possible intoxicated driver—law enforcement did not uncover reasonable, articulable suspicion "particularized" and "individualized" to Sargent. While officers may have been aware that Sargent was on pretrial release, they did not appear aware that Sargent's release was conditional or that it included a "no drink." Therefore, the intrusive questioning of Sargent that followed amounted to an "incremental intrusion" which was not "strictly tied to and justified by the circumstances which rendered the initiation of the stop permissible" in violation of Article I, Section 10 of the Minnesota Constitution. *Askerooth,* 681 N.W.2d at 364.

*iii. Even if law enforcement had reasonable, articulable suspicion of a pretrial-release condition violation, that still could not support the expansion of a traffic stop.*

1. A violation of conditions of pretrial release is not a crime.

At oral argument before the Court of Appeals, the State argued that a violation of a condition of pretrial release could amount to criminal contempt of court. *State v. Sargent*, 951 N.W.2d 121, 128 (Minn. Ct. App. 2020). The Court of Appeals disagreed, citing this Court's thorough analysis rejecting a similar argument relating to violations of probation terms. *Id. citing State v. Jones*, 869 N.W.2d 24 (Minn. 2015).

Like the statute governing probation terms, the Rule of Criminal Procedure governing pretrial release conditions is not a "mandate of a court, the willful violation of which constitutes a new crime of criminal contempt prosecutable by the State." *Jones*, 869 N.W.2d at 27. Reference to the comments accompanying the Rules makes clear that a district court has limited discretion when presented with a defendant in violation of

conditions of pretrial release; in such circumstances, a court may determine "whether to continue or revise the possible release conditions" but it "is not authorized to revoke the defendant's release without setting bail" without violating the State constitution. Minn. R. Crim. Pro. Comment-Rule 6.

Thus, as Sargent was not engaged in the commission of a crime despite his noncompliance with the conditions of his pretrial release, the State must prove, as a threshold matter, that law enforcement may permissibly expand a traffic stop to investigate noncriminal infractions.

2. The State cannot expand the scope of a Terry stop to investigate noncriminal activity unless such activity involves contraband.

As noted by the Court of Appeals, law enforcement may lawfully execute a traffic stop when the underlying conduct being investigated is a noncriminal traffic offense. *Sargent*, 951 N.W.2d at 129. But while a traffic stop may be validly premised on suspicion of a non-criminal traffic violation, it appears to be an issue of first impression in Minnesota as to whether such a stop may be lawfully expanded on suspicion of noncriminal activity. Elsewhere, however, courts have held or implied that, in order to expand the scope of a traffic stop to investigate activity unrelated to the initial basis for the stop, law enforcement must have reasonable articulable suspicion of *criminal* activity or the presence of contraband.

With the recent national trend towards decriminalization of marijuana in certain quantities, courts have had a unique opportunity to develop analogous jurisprudence relating to the expansion of a traffic stop to investigate the source of a potentially, but not

necessarily, criminal substance. The Supreme Judicial Court of Massachusetts has held, in light of that State's decriminalization of possession of amounts of marijuana under one ounce, that a validly-executed traffic stop may not be expanded based on law enforcement's observation of the odor of burnt marijuana absent articulated facts "to support probable cause to believe that a *criminal* amount of contraband was present in the car." *Com. v. Cruz*, 945 N.E.2d 899, 913 (Mass. 2011).

In so holding, the court reasoned that the standard for a warrantless search must be the same as the standard "used by a magistrate considering the application of a search warrant" and no such warrant may issue absent evidence of *criminal* activity. *Id.* The court concluded by referencing its general principle of proportionality, stating that "without probable cause *that a crime is being committed*, we cannot condone such an intrusive measure as a warrantless search." *Id.* (emphasis added).

Similarly, the Supreme Court of New Hampshire recently held that, in light of that State's decriminalization of possession of certain amounts of marijuana, the mere detection of marijuana odor, without more, cannot serve as "reasonable, articulable suspicion that a person possesses an illegal quantity of marijuana" sufficient to justify the expansion of the scope and duration of a traffic stop. *State v. Francisco Perez*, 239 A.3d 975, 985 (N.H. 2020). While the court acknowledged that, given marijuana's dual status as both a criminalized and decriminalized substance depending on quantity, the odor of marijuana could remain a "factor" in determining whether "reasonable, articulable suspicion of criminal activity exists," the court expressly rejected application of a bright-line rule permitting the mere scent, standing alone, to always serve as reasonable, articulable

suspicion of criminal activity. *Id.* Holding otherwise would, in the court's view, amount to a failure to "adequately safeguard the privacy and security of individuals against arbitrary invasions." *Id.* (internal quotations omitted).

While other courts have reached a different conclusion on the issue, the distinguishing feature in each such case is that, under the totality of circumstances, the particular facts and applicable law leave open the possibility that the presence of marijuana odor is evidence of *criminal activity or contraband. See, e.g., State v. Sisco*, 373 P.3d 549, 553 (Ariz. 2016) (holding that odor of marijuana justifies expansion of search as marijuana possession remains criminal unless possessed lawfully for medical purposes but indicating the conclusion "may well be different" if Arizona eventually decriminalizes marijuana.); *People v. Zuniga*, 372 P.3d 1052, 1059 (Colo. 2016) ("[W]e note that while Amendment 64 allows possession of one ounce or less of marijuana, a substantial number of other marijuana-related activities remain unlawful under Colorado law. Given that state of affairs, the odor of marijuana is still suggestive of *criminal activity*. Hence, we hold that the odor of marijuana is relevant to the totality of the circumstances test and can contribute to a probable cause determination."); *State v. Brito*, 154 A.3d 535, 563 (Conn. Ct. App. 2017) ("[T]his case did not merely present facts related to the mere possession of less than one-half ounce of marijuana. Instead, the facts gave rise to a suspicion of *criminal activity*, specifically, that the defendant was driving while under the influence of marijuana."); *People v. Waxler*, 168 Cal. Rptr. 3d 822, 829 (Cal. App. 2014) (upholding search based on scent of marijuana as possession of nonmedical marijuana is still a crime and marijuana

remains "contraband"); *and United States v. Sanders*, 248 F. Supp. 3d 339, 347 (D.R.I. 2017) (upholding search as possession of marijuana criminal under federal law).

Some of the foregoing courts have reasoned that, while possession of marijuana may not necessarily be a "crime," it still—in any amount—constitutes "contraband." *See, e.g.*, *Waxler*, 168 Cal. Rptr. 3d at 829. However, this conclusion does not necessarily lend support for the argument that law enforcement may expand *Terry* stops to investigate other civil offenses unrelated to the possession of "contraband"; instead, the "contraband" exception is the one that proves the rule. The genesis of this exception is described at length in *Carroll v. U.S.*, 267 U.S. 132 (1925). Namely, the government has an independent interest in seizing contraband irrespective of its right to arrest; therefore, searches for and seizures of contraband "are not dependent on the right to arrest." *Id.* at 158.

The United States Supreme Court has further summarized its rationale for this limited exception to permit the search of a vehicle for contraband as follows: "*Carroll*...holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible." *Chambers v. Maroney*, 399 U.S. 42, 51 (1970). The State's interest in recovering contraband from vehicles is therefore distinct from the State's interest in apprehending the vehicle's occupants as the inanimate contraband may be lost forever upon the vehicle's departure whereas the same cannot be said for the living and breathing occupants.

Permitting law enforcement to expand a *Terry* stop to investigate noncriminal and non-contraband related infractions would be to expand the doctrine beyond its current scope. Yet, that is precisely the outcome this Court would need to reach in order to uphold the search and seizure of Sargent.

The Court of Appeals, in upholding the expanded search and seizure of Sargent, distinguished this case from *U.S. v. Santillanes* in which the Tenth Circuit ruled that officers may not execute a *Terry* stop to investigate a noncriminal violation of conditional pretrial release. 848 F.2d 1103 (10th Cir., 1988). In so doing, the Court of Appeals noted that the statute at issue in *Santillanes* did not permit officers to effectuate a warrantless arrest whereas the underlying procedural rule here specifically provides law enforcement such authority in Minnesota under certain circumstances[3]. *See* Minn. R. Crim. Pro. 6.02, subd. 3.

While the Rules of Criminal Procedure may set forth circumstances in which law enforcement can execute a custodial arrest of an individual on pretrial release, the State and federal constitutions afford citizens additional protection not set forth in the Rules—namely, law enforcement's incremental intrusions are still governed by the reasonableness framework set forth in *Terry*. *See, e.g.*, *Almeida-Sanchez v. United States*, 413 U.S. 266,

[3] While its analysis is admittedly not controlling on this Court, it is worth noting that the Tenth Circuit hung its hat on the noncriminal nature of the offense, as opposed to whether law enforcement may make a warrantless arrest. *Santillanes*, 848 F.2d at 1107. ("[I]n the case before us *since there was no crime involved* in the possible departure of appellant from the jurisdiction the reason advanced by the Government and the detective for the initial stop was not valid, and the initial pat-down and questions were in violation of appellant's rights.") (emphasis added).

272 (1973) ("It is clear, of course, that no Act of Congress can authorize a violation of the Constitution."). While the Court of Appeals relied on the Rules in distinguishing this case from the result in *Santillanes*, the fundamental inquiry in each case remains the same: whether law enforcement may execute an investigation of noncriminal (and non-contraband) acts. As the operative question rests on the constitutional rights of individuals, it is axiomatic that the answer cannot depend on whether a warrantless arrest is authorized by an act of the legislature.

The Court of Appeals' reliance on the Rules also conflicts with the majority opinion in *State v. Askerooth*, which specifically rejected the special concurrence's proposed reliance on the Rules as a means to constrain law enforcement's authority to execute a custodial arrest in light of a traffic violation. 681 N.W.2d 353, 363 at fn. 6 (Minn. 2004). Instead, this Court's majority found that the Minnesota constitution affords additional protection to citizens in that "only article I, section 10's reasonableness requirement explicitly applies to an officer's actions from the time the officer initiates an investigative detention and continues to apply throughout the detention by requiring reasonableness for any increase in the intrusiveness of the stop." *Id.*

The Rules must act merely as an additional safeguard on a citizen's rights to be free from arrest rather than a full recitation of the circumstances under which a defendant may be seized, searched, and arrested. Therefore, if the Court is disinclined to recognize a prohibition on the expansion of a traffic stop to investigate civil infractions—even ones that may subject an offender to arrest—the Court must apply the reasonableness balancing

test set forth in *Terry* rather than merely reference Rule 6.02, subd. 3, as the basis for law enforcement's search and seizure of Sargent.

*iv. If the State Can Expand A Terry Stop to Investigate Noncriminal, Non-Contraband Activity, the Expansion Must Still be "Reasonable."*

Assuming law enforcement may, without violating either the State or federal constitutional prohibitions on unreasonable searches and seizures, expand the scope and/or duration of a traffic stop to investigate noncriminal and non-contraband activity, the next step in this Court's inquiry is to determine whether the officers' expansion of the scope and duration of the search was "reasonable," as defined in *Terry*. *Terry*, 392 U.S. at 6.

As stated above, whether police act "reasonably" in expanding the scope or duration of a traffic stop is determined by objectively and fairly balancing "the government's need to search or seize and the individual's right to personal security free from arbitrary interference by law officers." *State v. Ferrise*, 269 N.W2d 888, 890-91 (Minn. 1978).

The government's interest in this case is clear as it is succinctly set forth in the Rules of Criminal Procedure: the State has an interest in (1) assuring Sargent's appearance at future court dates, and (2) public safety. Minn. R. Crim. Pro. Rule 6.02, subd. 1. Furthermore, officers are permitted to effectuate a warrantless arrest if, and only if, (1) they have probable cause to believe a pretrial release condition violation has occurred, (2) it "reasonably appears" that the individual's continued release "will endanger the safety of any person," and (3) it is not "possible" to obtain a warrant. *Id.* at Rule 6.03, subd. 2. It therefore follows that the government's interest in investigating Sargent on the night in question is best understood as one of public safety.

Accordingly, the question in this case is whether the State's interest in public safety outweighs Sargent's interest in remaining free from "arbitrary interference." In support of its conclusion that the government's interest in public safety outweighed Sargent's interests, the Court of Appeals cited this Court's opinion in *State v. Ferrise*, 269 N.W.2d 888 (Minn. 1978). *Sargent*, 951 N.W.2d at 130. Relying heavily on the United States Supreme Court's analysis in *Pennsylvania v. Mimms*, 434 US 106 (1977) which upheld the ordering of a driver out of a vehicle as reasonable due to concerns for officer safety, the *Ferrise* Court reasoned that an officer may lawfully open a passenger's car door to question a passenger. *Ferrise*, 269 N.W.2d at 891.

Recently, however, the United States Supreme Court has clarified that the governmental interest in assuring officer safety discussed in *Mimms* is distinguishable from other interests, like "the Government's endeavor to detect crime in general." *Rodriguez v. U.S.*, 575 U.S. 348, 357 (2015).[4] In *Rodriguez*, the Supreme Court rejected as unconstitutional the prolongation of a traffic stop by a mere "seven or eight minutes" after the original purpose of the stop had been accomplished to effectuate a dog sniff. *Id.* at 348. The dispositive question for the Court was "not whether the dog sniff occurs before or after the officer issues a ticket...but whether conduct the sniff prolongs—*i.e.*, adds time to—the stop." *Id.* (internal quotations omitted). The Court explicitly abrogated *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999), which had upheld as

[4] This Court has made a similar distinction, clarifying that officer safety is a unique and paramount concern. *See, e.g.*, *Fort*, 660 N.W.2d at 419, fn. 2 and *Wiegand*, 645. N.W.2d at 136.

constitutional a search that was a mere "thirty seconds or two minutes over" the time needed to complete a lawful traffic stop. *Id.*

Thus, any extension—even "*de minimis*" extensions—to the duration of a lawful traffic stop for the purpose of detecting crime fails the *Terry* reasonableness balancing test unless supported by reasonable, articulable suspicion obtained during the pendency of the initial purpose of the stop. The government's interest in this case in assuring "public safety"[5] is indistinguishable from the interest rejected in *Rodriguez* in "detecting crime" After all, the detection of crime is synonymous with public safety yet neither interest is sufficient to tip the scales in the State's favor when balanced against an individual's right to be free from even a *de minimis* extension of the duration of a traffic stop.

Here, it cannot be reasonably disputed that the stop persisted beyond the time period necessary to complete the original purpose of the stop. The stop was lawfully executed to investigate a potential moving violation and was then lawfully expanded to investigate the potential of an intoxicated driver. (V. at 05:00). For the reasons set forth in Section I.b.ii. above, upon confirmation that the vehicle's driver was sober, officer's lacked any reasonable, articulable suspicion of criminal activity. And yet, officers specifically instructed the vehicle's driver, Elise Howard, to remain unattended next to the officer's squad car while they proceeded to conduct a search of Sargent. (V. at 07:30). As this additional intrusion cannot be justified as "reasonable" as defined in Terry, the evidence

[5] While Sargent did not object to his arrest at trial, it remains unclear exactly why law enforcement believed the continued release of Sargent, a vehicle passenger with a blood alcohol content less than half of the legal limit for a vehicle operator (Minn. Stat. § 169A.20), posed any threat to public safety.

found on Sargent's person in the search subsequent to his arrest should have been suppressed.

## CONCLUSION

In summary and in closing, without an applicable exception to the warrant requirement, the search and seizure of Mr. Sargent represented an impermissible expansion of the scope and duration of a traffic stop. Officers did obtain reasonable, articulable suspicion that Sargent was in violation of a condition of pretrial release within the time period needed to effectuate the original purpose of the stop. Even if officers had obtained the requisite suspicion, however, the expansion of the scope and duration of the stop would still be impermissible as the underlying infraction to be investigated was noncriminal in nature, and the fact that a procedural rule authorizes arrest in certain circumstances cannot change the constitutional standard applicable to traffic stops.

For the foregoing reasons, Appellant respectfully requests the Court to reverse the district court's decision and find that the search and seizure of Mr. Sargent was invalid and remand with instructions to suppress the evidence obtained as a result of the impermissible search.

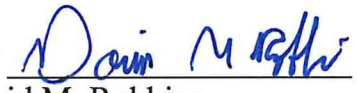
## ADDENDA

Addendum A: Omnibus Order (Doc ID # 25)

Addendum B: Order on Motion to Reconsider (Doc ID # 47)

Respectfully Submitted,

Dated: January 28, 2021.

By: 

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## APPELLANT'S CERTIFICATE OF COMPLIANCE

I hereby certify that appellant's brief in case no. A19-1554 complies with Minnesota Rules of Appellate Procedure 132.01 Subd.3(a)(1). I further certify that the brief contains 7,438 words and uses a 13-point font. It was prepared with Microsoft Word 2016. I hereby certify that the content of the accompanying paper brief and addendum or addenda, if applicable, is identical to the electronic version filed and served, except for any binding, colored cover, or colored back, and I understand that any corrections or alterations to a brief filed electronically must be separately served and filed in the form of an errata sheet.

Dated: January 28, 2021.

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