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NO. A19-1554

State of Minnesota
In Court of Appeals

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 Carlos Sargent'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 filed 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 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.

February 20, 2020: Appellant's brief 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)

   Apposite Authority:

   State v. Ortega, 770 N.W.2d 145 (Minn. 2009).
   State v. Burbach, 706 N.W.2d 484 (Minn. 2005).
   State v. Fort, 660 N.W.2d 415 (Minn. 2003).

2. Does a suspicionless search of a pretrial releasee subject to a random-search condition violate the individual's constitutional rights to privacy and liberty?

   The trial court denied Appellant's motion to reconsider its omnibus in light of *State v. Cournoyer*, 2019 WL 114198 (Minn. Ct. App. Jan. 7, 2019). (Doc. ID # 47)

   Apposite Authority:

   State v. Martin, 743 N.W.2d 261 (Minn. 2008).
   Samson v. California, 547 U.S. 843, 850 (2006).

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. It appears that her passengers, including Appellant, admitted to drinking alcohol. The video of the stop 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 in light of this Court's ruling in *State v. Cournoyer*, 2019 WL 114198 (Minn. Ct. App. Jan. 7, 2019) arguing that this Court's recognition of the invalidity of suspicionless searches as to probationers should also apply to individuals on pretrial release. 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. This appeal follows.

<u>**STATEMENT OF THE FACTS**</u>

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 discover 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 of Sargent is Unconstitutional

The Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution protect "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 fell within an exception to the warrant requirement. *Id*.

In this case, two potential exceptions to the warrant requirement merit further discussion: the *Terry* exception and a hypothetical exception for individuals on conditional pre-trial release. As will be demonstrated below, the state cannot meet their burden and avail itself of a warrant exception as the *Terry* stop was impermissibly expanded and as individuals on pre-trial release should not be subjected to diminished constitutional protection.

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 of the *Terry* Stop was Impermissibly Expanded.

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). 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. *Id.* 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 (internal quotations omitted).

It was precisely this principal that the Minnesota Supreme Court relied on in *Burbach* in reversing the Court of Appeals. *Id.* 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. *Id.* 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 its analysis of the search, the 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 axiomatic 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 State v. Fort*, 660 N.W.2d 415 (Minn. 2003). Instead, the Minnesota Supreme 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*, the Minnesota Supreme 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. The Minnesota Supreme 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 criminal activity. *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; Ms. 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 Mr. Sargent as he specifically identified him by name (V. at 02:48) but there is no indication that Officer Hanson was aware that (1) Mr. Sargent was on conditional pretrial release, or (2) a condition of Mr. Sargent's pre-trial release was to abstain from alcohol. (V. at 03:41)

As with *Burbach*, Officer Hanson then obtained the driver's consent to administer a breathalyzer to confirm that the driver was not under the influence; Consenting, Ms. Howard willingly exited the vehicle. (V. at 05:09). Officer Hanson administered the test which confirmed Ms. Howard's sobriety. (T. at 37; V. at 07:03). During the entirety of Ms. 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 Mr. Sargent. (V. at 05:15-07:20).

[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.

Following the administration of Ms. Howard's breathalyzer, Officer Hanson did not proceed to write Ms. Howard a warning or citation for her traffic infraction[2]; instead, Officer Hanson left Ms. 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 moment in time, law enforcement (1) had accomplished the original purpose of the stop and (2) had further confirmed that Ms. 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 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 do not search Ms. Howard's vehicle; rather, when Officer Hanson returned to Ms. Howard's vehicle after administering Ms. Howard's field test, he immediately began to question Mr.

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

Sargent, who had previously admitted to drinking alcohol, about potential criminal activity by asking Mr. 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*. Mr. 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 Mr. Sargent—including during Ms. Howard's field test—Officer Oelke stood immediately outside to Mr. Sargent's passenger door. Second, upon Officer Hanson's return to the vehicle, Mr. Sargent (like Mr. Fort) is subjected to intrusive questioning aimed at soliciting evidence of a crime. 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, Mr. Sargent was seized. *Fort*, 660 N.W.2d at 418.

As the original purpose of 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 Mr. Sargent until after they engaged in intrusive questioning. The video of the encounter plainly shows that Officer Hanson did not ask Mr. 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 Mr. Sargent was on "pretrial release" (T. at 33), Officer Hanson does not articulate whether he knew that Mr. Sargent was to abstain from alcohol; moreover, Officer Hanson does not even articulate that he knew Mr. 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 criminal 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 Minn. R. Crim. Proc. Rule 6.02. *Id*.

Here, neither Officer Hanson nor any other officer articulated that he had any direct knowledge of Mr. 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 Mr. Sargent's record included, and only expressed general awareness that Mr. Sargent "was a suspect in an assault" (T. at 36), a charge which, at first blush, would not reasonably 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 Mr. Sargent. While officers may have been aware that Sargent was on pretrial release, they did not appear aware that Mr. Sargent's release was conditional or that it included a "no drink." Therefore, the intrusive questioning of Mr. 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.

While Appellant will next address a potential warrant exception for individuals on conditional pre-trial release subject to random searches, even if this exception is recognized, the foregoing *Terry* analysis would still apply to the Court's analysis. As with other accepted exceptions to warrantless searches (e.g., consent), if law enforcement avails itself of an exception by means of an impermissible expansion of the scope or

duration of a *Terry* stop, any evidence uncovered as a result of the subsequent search or seizure remains fruit of the poisonous tree. *See, supra*, *Wiegand*.

c. <u>There Is No Exception to the Warrant Requirement for Individuals on Conditional Pretrial Release</u>.

Here, the lower court denied Mr. Sargent's motion to suppress evidence in reliance on Mr. Sargent's consent "random searches" as a condition of his pretrial release. The lower court reasoned that a court's order of random searches is akin to a magistrate's issuance of a warrant upon a showing of probable cause and, therefore, "a random test does not implicate the Fourth Amendment". (Order at P. 8).

In so holding, the lower court primarily relied on this Court's unpublished opinion in *State v. Clark*, which upheld a random urine-analysis condition of pretrial release. 2012 WL 171380 (Minn. Ct. App. Jan. 23, 2012). This Court has not, however, addressed this issue in a published opinion and three other and more recent unpublished opinions would seem to call *Clark*'s reasoning into doubt.

In *State v. Cournoyer*, this Court invalidated as unconstitutional random search conditions subjecting *probationers* to suspicionless searches conducted by law enforcement. 2019 WL 114198 (Minn. Ct. App. Jan. 7, 2019). Less than a year later, this Court noted that the analysis in *Cournoyer* was, while not precedential, "very persuasive." *State v. Reyes*, 2020 WL 132538 at *3, fn. 2 (Minn. Ct. App. Jan. 13, 2020). Thus, it would seem that this Court recognizes that random-search conditions violate probationers' Fourth Amendment and Article I, Section 10 rights to be free from unreasonable searches and seizures.

In between *Cournoyer* and *Reyes*, this Court was presented with the question of whether a warrantless search of a pretrial releasee's residence violated the Fourth Amendment without a showing of probable cause. *State v. Mattson*, 2019 WL 2079468, at *5 (Minn. Ct. App. May 13, 2019), review denied (Aug. 6, 2019). While this Court recognized that "the privacy and governmental interests, as outlined in the cases of a probationer and a parolee, may differ in the context of the search of a pretrial releasee", the Court did not reach the constitutional issue as Mattson failed to raise it below. *Id.* (citing *Samson v. California*, 547 U.S. 843, 850 (2006)). Whether a pretrial releasee is afforded greater constitutional protection than probationers or parolees was therefore reserved.

The question, however, is an important one as even though random-search conditions may be constitutionally invalid as to probationers and, possibly, parolees, neither probationers nor parolees enjoy the full panoply of constitutional rights. *See*, *State v. Heaton*, 812 N.W.2d 904, 909 (Minn. App. 2012), review denied (Minn. July 17, 2012) (search of a parolee's home requires only reasonable suspicion) *and State v. Anderson*, 733 N.W.2d 128, 140 (Minn. 2007) (no more than reasonable suspicion is needed to search a probationer's residence). Thus, the constitutional rights of individuals on pretrial release should be clarified.

This Court is now presented with a question similar to the one it confronted in *Mattson*: are individuals on pretrial subject to diminished constitutional rights and, if so, does a random search requirement imposed on pretrial releasees violate Article I, Section

10 of the Minnesota Constitution or the Fourth Amendment as it would if applied to probationers?

Most notably, the Ninth Circuit has addressed this issue at length holding that individuals on pretrial release are "different" than probationers in that they (1) have not been convicted of a crime, (2) are not subject to "any inference that [they are] more likely than any other citizen to commit a crime if [they are] released from custody, and (3) are constitutionally presumed innocent. *United States v. Scott,* 450 F.3d 863, 873-874 (9th Cir. 2006). The Court's majority specifically held that individuals on pretrial release are not subjected to diminished constitutional protections and invalidated random search conditions imposed on pretrial releasees. *Id.* Even in dissent, Judge Bybee expressed some support for this idea, explaining that while he would not have equated the privacy rights of individuals on pretrial release with those of "ordinary citizens," he might agree that pretrial releasees have a "greater" expectation of privacy "than that of a probationer, parolee, or pre-sentence release." *Id.* at 885 (Bybee, J., dissenting).

The Ninth Circuit's majority opinion relied heavily on the Supreme Court's explanation in *Samson v. California* of the "continuum" of state-imposed punishments. 547 U.S. 843, 850 (2006). As stated in *Samson*, "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." *Id*. The *Samson* Court further analyzed the California parolee statutes at issue, noting that they treat parolees consistent with the Court's observations: if a California inmate elects to complete his sentence out of physical custody, they do so in the legal custody of the California Department of Corrections and are subjected to a

broad spectrum of mandatory conditions, including mandatory drug testing. *Id*. Further, additional conditions may be set if "deemed necessary by the Board of Parole Hearings of the Department of Corrections and Rehabilitation." *Id*.

The Court further noted that the State had substantial interests in imposing random searches on parolees as "parolees are more likely to commit future criminal offenses" and the interest in combatting recidivism was the "very premise" behind the parole system. *Id*. (*quoting Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998)). The Court explained that these "privacy intrusions…*would not otherwise be tolerated* under the Fourth Amendment" but for the State's interest "in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees." *Id*. (emphasis added).

Notably, neither the key elements of the California parolee statutes nor the State interests discussed above are applicable in analyzing the status of Minnesota pretrial releasees. In fact, the pertinent Minnesota rules *presume* that an individual will be released before trial "on personal recognizance or an unsecured appearance bond." Minn. R. Crim. Pro. 6.02, Subd. 1. The presumption of release may only be rebutted by a judicial determination that "release will endanger the public safety or will not reasonably assure the defendant's appearance." *Id*. This is distinct from the California statute governing parolees which allows individuals to opt out of physical custody *only if* they

submit to mandatory conditions of release and subject themselves to supervision by the Department of Corrections. [3]

Further, prior to imposing conditions of release, Minnesota requires a judicial analysis of at least thirteen enumerated factors to ensure that the conditions of release are narrowly tailored to satisfy the state's interest in public safety or future hearing attendance while at the same time balancing the individual's right to liberty. *Id.* at Subd. 2 *and* Martin, 743 N.W.2d at 265-66. In direct contrast to the state interests in parole or probation release, neither recidivism nor reintegration is a permissible concern under Rule 6.02 or, for that matter, even relevant as individuals prior to trial (1) have not been convicted of a crime, so therefore, by definition, cannot be recidivists, and (2) have not been disintegrated from society.

The Eighth Circuit impliedly recognized this distinction in *U.S. v. Kills Enemy* in rejecting the argument of an offender challenging a warrantless search executed under a condition of his *presentence* release for another conviction. 3 F.3d 1201 (8th Cir. 1993). Kills Enemy attempted to equate the rights of individuals on presentence release with those on pretrial release as opposed to probationers or parolees. *Id.* at 1203. The Eighth Circuit roundly rejected this argument, stating that "[a] convicted person awaiting sentence is no longer entitled to a presumption of innocence or entitled to his freedom…. [A]uthorities supervising the convict must be able to act based upon a lesser degree of certainty that than Fourth Amendment would otherwise require in order to intervene

[3] Similarly, Rules 27.01 (presentence releasees) and 27.04, subd. 2 (3)(c) (probationers in revocation hearings) of the Minnesota Rules of Criminal Procedure do not presume release and shift the burden of release entitled to the defendant.

before the person does damage to himself or society." *Id.* (internal quotations omitted). In so holding, the Eighth Circuit clearly supported the idea that individuals on pretrial release are entitled to *greater* Fourth Amendment protection than individuals on presentence release, probation, or parole.

While Minnesota courts have yet to address this issue directly, the weight of authority clearly runs in favor of affording pretrial releasees with greater constitutional protection than probationers. See, e.g., *Blomstrom v. Tripp*, 402 P.3d 831, 847 (Wash. 2017); *United States v. Mitchell*, 652 F.3d 387, 413 (3d Cir. 2011) ("[T]he interests in supervising convicted individuals on release and deterring recidivism do not apply to arrestees or pretrial detainees."); *State v. Doe*, 233 P.3d 1275, 1280 (Idaho 2010) ("[T]he State has not overcome any formal procedural safeguards to diminish the Does' Fourth Amendment rights in their bodies. The Does therefore retain the full measure of Fourth Amendment privacy."); *Moreland v. United States*, 968 F.2d 655, 661 (8th Cir. 1992) (recognizing difference in legal rights of presentence and postsentence defendants) *and Dawson v. Scott*, 50 F.3d 884, 895 (11th Cir. 1995) ("We hold that pretrial, presentence defendants and postsentence convicts are not similarly situated because they [are] under significantly different legal conditions.").

While a minority of courts have declined to adopt this rule, they have not gone so far as holding that individuals on pre-trial release have a lesser expectation of privacy than probationers or parolees. *See, e.g.*, *United States v. Yeary*, 740 F.3d 569 (11th Cir. 2014) (pretrial releasee knowingly consented to warrantless search) *and Norris v.*

Premier Integrity Sols., Inc., 641 F.3d 695 (6th Cir. 2011) (intrusive method of search does not violate pretrial releasee's privacy rights after knowing consent).

The clear weight of authority runs in favor of affording Mr. Sargent at least the same privacy protections that this Court recognized for probationers in the aforementioned *Cournoyer* and *Reyes* opinions.

The statutory framework regulating release of probationers and pretrial releasees also indicates that, at the very least, pretrial releasees are entitled to the same safeguards as probationers. Mr. Sargent, like the defendants in *Cournoyer* and *Reyes*, was not under the supervision of law enforcement, but rather the Cass County Probation Department (T. at 64). Similar to the probation supervision statute analyzed in *Cournoyer*, Rule 6.02 does not contemplate supervision by police officers. Minn. R. Crim. Pro. 6.02, Subd. 1. (a) (defendant may be placed "under the supervision of a person who, or organization that, agrees to supervise"); *compare* Minn. Stat. § 609.135 (court may order supervision under "probation officer…the commissioner of corrections, or… by some other suitable and consenting person").

Simply put, there is a dearth of authority to support the argument that Mr. Sargent was entitled to a *lower* expectation of privacy than a probationer in Minnesota. While the relevant statutes and case law seem to indicate Mr. Sargent is entitled to greater constitutional scrutiny, this Court does not need to go so far to find that the search of Mr. Sargent was impermissible.

As analyzed in the prior section, officers did not have reasonable articulable suspicion to initiate a search or seizure of Mr. Sargent because, prior to Officer Hanson's

intrusive questioning of Mr. Sargent, the officers were not aware that Mr. Sargent was prohibited from drinking alcohol. The mere fact that Mr. Sargent was a passenger in a vehicle, driven by a sober individual, and volunteering that he had a drink does not give rise to suspicion of criminal activity; rather, it leads one to believe that Mr. Sargent is being prudent and electing to ride with a designated driver.

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. While the state will likely argue that one of two potential exceptions applies, it will be unable to meet its burden in demonstrating officer's search and seizure of Mr. Sargent satisfied the reasonableness requirement set forth in Terry or forwarding a hypothetical exception applicable to individuals on conditional pretrial release.

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: February 20, 2020.

By: [signature]

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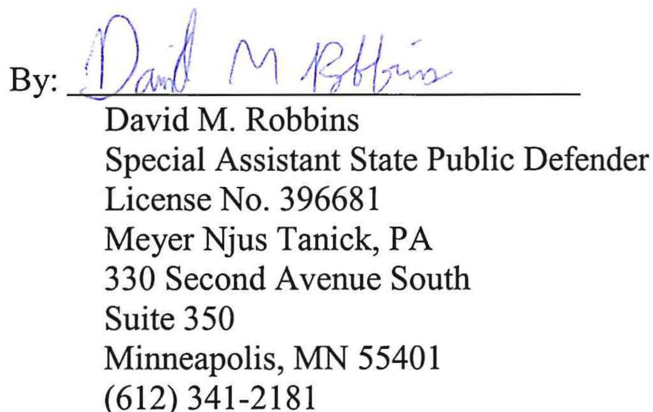
Appellant's Certificate of Compliance

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 6,432 words and uses a 13 point font. It was prepared with Microsoft Word 2010. 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: February 20, 2020.

By:



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