MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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MACDL VI Magazine

Features

President's Corner

Kelly Keegan

Greetings!

MACDL has been busy this fall. We have undertaken several projects to increase the value of our membership. Here is a snapshot of some of what we are working on:

First and foremost, we have contracted with a company to revamp our website to be a main point of contact for our members and to make it much more user friendly. Our membership renewal process will be more streamlined. We have an updated brief bank section on the website, with not only memorandum of law and pleadings, but also case law and research our members can access by topic. We have also undertaken a project to track bad practices by law enforcement in various jurisdictions across the state in order to help root out issues that may not be immediately apparent, and to better prepare defense attorneys for litigation.

We have undergone an audit of our books to ensure any future transitions of board members, the executive committee, or our executive director are smooth and easily manageable. Our accountant has cleaned up the entries in our books to make transactions more consistently noted and transparent. We have also created a repository of MACDL's historical documents.

Our annual fall CLE was held on November 1, 2019, at the new Canopy Hotel. The topic was defending drug cases. There were several exciting speakers lined up for a full day of topics that dealt with storytelling and sentencing, and we featured Michael Price from the NACDL on motions practice and the Fourth Amendment. The day concluded with a happy hour.

We also recently held an MACDL scholarship fundraiser at the Park Tavern in St. Louis Park where we watched a terrible day in Minnesota sports as the Twins and Vikings both lost. It was, however, still a good time, with games, food, and drinks for everyone coming together to raise funds to help cover the cost of CLEs and educational opportunities for our members.

We have been part of several discussions this fall on various policy issues at the legislature. MACDL has two seats on a Criminal Sexual Conduct Working Group that is looking to re-examine the criminal sexual conduct statutes on issues of consent, coercion, capacity, positions of authority, and age. The work will conclude in December, with possible legislation once session starts. A separate meeting with senate counsel was called to discuss the Threats of Violence statute after lawmakers renewed their interest in legislation addressing mass shootings. MACDL was an outspoken voice at the table expressing our concerns. Members of our legislative committee recently met with the chief author of legislation to legalize the recreational use of marijuana. In keeping with MACDL's "Up in Smoke" CLE in July, we offered insight as to prosecution concerns, the science behind impairment, and what has worked in other states. MACDL has also been involved in negotiations on forfeiture reform with the Minnesota County Attorney's Association, and we expect legislation this coming session to add to the reforms of the past few years.

We recently hired a new lobbying firm, Hylden Advocacy and Law. They come to us with decades of experience at

the state capitol on both sides of the aisle. We will be well-represented by Nancy Hylden, Amy Koch, Sarah Clarke, and their team. The legislative committee will be holding our annual legislative session agenda meeting in November. Check our website for details on the meeting. You are welcome to attend and help shape our efforts for the 2020 session.

Likewise, the full MACDL board meets the fourth Tuesday of the month at our new home, Umbra Restaurant and Event Center in the Canopy Hotel in downtown Minneapolis. Meetings are open to our members to attend. Feel free to stop by and see the work we are doing to keep our organization and the defense bar in Minnesota strong.

Thank you, all,

Kelly

TROUBLE IN PARADISE—A POLICE STATE COMES TO NORTHERN MINNESOTA

Ed Shaw

While out of my office in March, 2017, I got the call we all know, someone I knew was in a jam. The caller was the last person I would suspect of being in serious trouble, my long time client and friend, Jim Hunter. Jim was in his late 60s at the time, a small-town businessperson. He had no criminal record—I had done some business related work for him over the years. Jim called my office from the jail, he was charged with 4 felonies.

Jim also dabbled in politics. He had previously run for Mayor of Crosby, a small old mining town now famous for its mountain biking trails. Crosby is around 15 miles northeast of Brainerd, my hometown. Jim is one of the most generous people that I have ever known. He is always willing to help friends and just about anyone that he can. Every Thanksgiving, Jim will invite anybody that does not have a place to go to dine with him even if he hardly knows them. In the spring of 2016, Jim became concerned about the direction the City of Crosby was taking, especially the actions of the leadership of the police department. The Police Chief and Lieutenant, Kim Coughlin and Kevin Randolph, had become entangled in extremely contentious personnel disputes. A protracted battle involving two attempts to fire the same officer over ticky tacky personnel disputes cost Crosby over $200,000, and ended up with the City losing a week-long arbitration hearing concerning that officer, who was ordered reinstated with full back pay. Jim spoke out about the problems at the police department and called for change in how it was run. He announced that he would run for Mayor in the summer of 2016 for the November, 2016 election. Unknown to Jim at the time, Chief Coughlin and Lieutenant Randolph began working behind the scenes as soon as they knew he was running for Mayor to prevent him from winning. They were in touch with a disgruntled citizen, (hereafter citizen) whom I will not identify by name, who blamed Jim for his wife leaving him shortly after him and his wife purchased a small business from Jim in the summer of 2016. In any other town, the police department would have responded to this citizen's complaints by telling him there was nothing they could do as it was not a criminal matter. Lieutenant Randolph and Chief Coughlin, however, saw a golden opportunity to get Jim, and began working with the citizen and other members of his family, in order to build a case against Jim and to prevent Jim from winning the election.

The 2016 election was full of surprises as we all know, one of them was that Jim won the election for Mayor of Crosby. I was pleased to see Jim win the election. What he said made sense to me and I believed any city would benefit from being led by a man with such generosity and integrity. Jim and I were still blissfully unaware of the huge amount of City of Crosby resources being invested behind the scenes by Lieutenant Randolph and Chief Coughlin into derailing him. After the election, Lieutenant Randolph and Chief Coughlin stepped up their efforts to build a case against Jim, continuing to talk to individuals and to elicit information from people, with heavy coaching that they believed they could use against Jim. Their efforts came to a head in early March, 2017, after Jim had been in office for only two months, when they orchestrated a high profile arrest, and I got the call.

Jim was charged with Second Degree Assault, Theft by Swindle, Receiving Stolen Property, Lawful Gambling Fraud and Motor Vehicle Sales Finance Violation. To say I was surprised was an understatement. I had no idea where those type of bizarre accusations would come from. My associate attorney handled the arraignment, and when I got back in town the next day, I obtained a copy of the complaint and spoke to Jim about it. The complaint included a lengthy statement of probable cause that read like something out of a bad detective novel. The probable cause statement, prepared and signed by Lieutenant Randolph, accused Jim of engaging in an elaborate scheme to swindle the citizen by inducing him to buy a business. Jim was also accused of pulling a gun on the citizen's adult son, having a stolen gun in his possession, and engaging in gambling fraud, along with tax fraud, and just about every other crime one could imagine. The probable cause statement also contained accusations by Mr. Randolph that Jim had threatened witnesses and was likely to flee to Mexico, without any factual support whatsoever for those claims. A lay person reading these statements would think that Jim was a freewheeling James Bond type figure in an expensive suit, fleeing in a flashy sportscar, a briefcase full of cash in one hand and a stylish woman on the other, meeting a Learjet at a secluded airport, taking off just as police cars close in!

My experience with Jim, and simple common sense, told me immediately that this portrayal of him was completely false and that he had not committed any of these crimes, had never threatened any witnesses and was not going to flee to Mexico, or anywhere else. Lieutenant Randolph contacted several media outlets prior to the arrest resulting in extensive news coverage in the Brainerd area and in the twin cities. The coverage included print and televised media with lurid quotes from the complaint and probable cause statement and pictures of Jim's businesses. They also had pictures of Jim in his jail jumpsuit. Lieutenant Randolph planned to use the publicity to devastate Jim's business and reputation and force him to resign as Mayor, and it worked. Jim's sales plummeted at all of his businesses, a bank cancelled his line of credit, his accountant stopped doing business with him, and many people all over town assumed that he was a crook. Even after these charges were filed and Jim was devastated, I was heartened by the loyal support the community showed him. People called my office during those first few weeks, in his darkest hours, telling me how much Jim had helped them when they were down and offering to help him in any way they could. One man, who had virtually nothing, offered to contribute a portion of his meager disability check towards Jim's defense.

Amazingly, even though the local police investigated, filed a complaint against their own Mayor and arrested him, after he had been critical of the their leadership, the County Attorney pushed ahead with the charges. It is truly hard to believe that It was not obvious to the County Attorney, or anyone else, that there was something suspicious about the police investigating and arresting their own mayor.

The five charges against Jim were almost comically stuffed into the same complaint. A theft by swindle accusation involving the citizen, an assault charge involving the citizen's adult son, which happened months later, a stolen gun possession charge that did not involve anyone in the community, a gambling fraud charge, and a vehicle sales finance charge. Another mystery of the case was why the County Attorney would put all of these charges in the same complaint. My best guess would be, they were hoping that I would not request separate trials and that the jury would hear about all of the accusations and assume that Jim must be guilty of something. After several months of pre-trial proceedings I moved for severance, which was not opposed. The first trial on the Theft by Swindle Charge was held in June, 2018. The Theft by Swindle charge was based on the citizen's claim that he had purchased a business from Jim and that Jim had overcharged him for the business. Even if that accusation was true, and as far as I could see it was not, it would seem to me, and I believe most people out there, to be a civil issue not a criminal issue. If one of us thought we had gotten a bad deal buying a car at a dealership, we would not expect the local police to drag the dealer off in handcuffs, we would expect to take it up in

civil court. Another problem for the State's case is that the citizen never paid a nickel to Jim. It is tough to have a theft case if no money changes hands. Almost immediately after the purchase of the business, citizen and his wife separated, citizen's wife continued to operate the business and still does to this day and took care of any obligations owed to Jim. Citizen never paid any money to Jim. Citizen was angry about the end of his marriage and had a grudge against Jim. After a 2 ½ day acrimonious trial and a just over ½ hour deliberation, the jury came back with a not guilty verdict.

The next charge, Second-Degree Assault, was tried in August, 2018. This charge was even more absurd than the Theft by Swindle charge. Jim and a friend were in a vehicle on Jim's property, parked next to Jim's business. Citizen's adult son, who is in his 20s, and a friend of his of similar age, were driving by in the evening, in the dark after drinking heavily, observed Jim's truck on Jim's property by his business, and pulled up to confront Jim and his friend, the mother of adult son. They got out of their truck, went on either side of Jim's truck and called Jim, who was in his late 60s at the time, every name in the book and threatened to pull him out of the truck and assault him. They also called Jim's friend several obscenities, including the 'C' word. After this went on for some time, and the two drunk individuals showed no sign of leaving, Jim put his hand on a legally owned, holstered pistol sitting in the console of his truck and said words to the effect of 'that's enough'. Shortly after that, the two left. It is hard to believe that sort of charge being filed anywhere, and even harder to imagine it being filed in rural Minnesota, where gun ownership rates are high, and most people believe there is a reasonable right to self-defense. If you can't put your hand on your own legal gun, in your own vehicle, on your own property in response to threats of violence from two drunk individuals less than half your age, when can you? Lieutenant Randolph and Chief Coughlin did not want to bring the adult son's friend into court as a witness despite knowing his identity. I had my own investigator obtain a statement from him, and I subpoenaed him for the trial. Any normal investigation into an assault would have involved talking to all parties at the scene. It is clear that Randolph and Coughlin decided not to talk to this individual because they knew he would not help their agenda of seeing Jim convicted.

A sign of just how political the case was, during the first trial, several current and former Crosby City officials were present for the entire trial and Chief Coughlin, who was not a witness, was present for almost all of the first and second trials. When the verdict came in for the first charge, Theft by Swindle, to say that the City of Crosby audience was disappointed would be an understatement. Their side of the gallery looked about as cheery as a funeral home. Most of the same crew showed up for the second trial, still hoping to see Jim convicted and shipped off to prison. When the adult son's friend testified in the second trial, he was specific in his description of how drunk he and adult son had been, how much Bud Light® they had consumed, how much he liked Bud Light®, how he drank Bud Light® because it tasted great and not because it was less filling, and the colorful terms him and adult son had used to describe Jim and Jim's friend. My associate attorney, who was sitting second chair had a hard time keeping a straight face during his testimony. It was almost comical; one of those Perry Mason moments. The prosecutor was not having a good time, she looked like she would rather be having her fingernails pulled out than sitting through it. The friend looked the part: a big, menacing guy, over 6 feet tall, well over 200 pounds of muscle. The prosecution's case was on life support before he took the stand, and his testimony effectively pulled the plug. After the next recess following his testimony, the Crosby City officials who had been watching attentively up until then, did not come back. They headed for the parking lot like disgruntled football fans when their home team is down by three touchdowns in the fourth quarter. The jury was out again for barely a ½ hour and came back with another not guilty verdict.

After this trial, there was a personnel shift on the prosecution side. The Assistant County Attorney who handled the first two trials stepped aside, and for a while, it was not clear who in the office would be handling the case going forward. Eventually the County Attorney took it over for the last trial.

The next charge on the docket was Receiving Stolen Property. Jim had a gun collection with over fifty legally owned firearms. After the Crosby police searched Jim's house and office, they found one gun that at some point in the past had been stolen. The prosecution never introduced any evidence that Jim somehow knew that the gun was stolen or treated it like it was stolen, except to claim that it was in a file cabinet at Jim's commercial building, which they suggested meant it was stolen because it was not sitting out in the open? I am not aware of too many businesses, except for gun shops, where pistols are left sitting out in the open on counters, but maybe the prosecution shops at different stores than I do. The Crosby Police did not disclose the theft report. Only after I pressed the prosecution, was the report finally revealed in the fall of 2018, over a year and a half after the case had been charged out. The report revealed that the gun may have been stolen in 1994 from Oakdale, a St. Paul, MN suburb. How on earth would Jim have known over 20 years later when he purchased the gun legally in Crosby, that it may have been stolen in Oakdale in 1994? I was never able to verify that the gun was even stolen as the handwritten Oakdale police report appeared to contain discrepancies with the serial numbers and the State never produced any witness to verify the authenticity of the report. Shortly before trial, probably realizing that it was hopeless, the State dismissed the firearm charge.

Next up in the list was the Lawful Gambling Fraud charge, based on a claim that Jim was playing pull tabs at a small store that he owned and that he used someone else's driver's license to claim a cash prize. There was no claim that Jim had somehow rigged the game in his favor, that would not have been possible. Not surprisingly, the statement of probable cause did not disclose that the two complaining witnesses in the case were a former employee who owed Jim thousands of dollars for a vehicle she purchased from him and stopped paying on, and her mother, both of whom were on public assistance at the time of the alleged offense, giving them a reason to not report gambling winnings. The trial was held in March, 2019. An agent from the State Gambling Enforcement Division stated that there was no evidence after he had inspected the games involved that Jim or anyone else had tampered with or rigged any game. The jury returned a third not guilty verdict.

The remaining charge, Vehicle Sales Finance Violation which is a gross misdemeanor, and another misdemeanor charge of filing a false police report, which had been added while the other cases were pending, were dismissed in April, 2019. This finally brought an end to an over two-year saga involving seven charges, and three not guilty verdicts.

I have never handled a case as adversarial as this one. While the case was pending Lieutenant Randolph and Chief Coughlin sent out memos to Crosby police officers instructing them not to have any contact with Jim, and Mr. Randolph made statements to people in the community that they wanted to see Jim "dead", and that he was a terrible person.

Three ethics complaints were filed against me during the proceedings. One by the citizen, one by Lieutenant Randolph, and one by the Assistant County Attorney who prosecuted the first two trials. All three complaints were dismissed. The Assistant County Attorney's was filed within days after the jury returned the verdict of acquittal in the first trial. I will let you form your own conclusions as to the timing. The Crosby Police did their best to get as much media attention as possible on the arrest and charges, but, objected loudly to my from talking to the media while the case was pending, and sought to restrict my contact with the media as much as possible, even harassing a local reporter who was critical of them.

In my career, I have never seen an individual handle incredible adversity with such dignity and grace. Jim's marriage ended while the cases were pending, his businesses were hammered, and he had to live with the stress of possibly going to prison if he was convicted even though he had never violated the law in his life. Through it all, Jim was gracious with everyone including the prosecutors who were handling the case and never had a bad word to say about anyone. When the three not guilty verdicts came in, Jim shed tears of joy each time but was always polite and courteous and never gloated in or near the courtroom. I

will confess to some whoops of joy in the elevator after the third verdict came in. Jim has begun putting his life back together. He is grateful to still have his freedom and the clean record that he has worked hard to maintain his whole life.

The case has probably changed me just as much as it has changed Jim. I was never naïve. No one in the system is perfect and prosecutors and courts can make mistakes; however, I had a general faith in the system that most people who are brought into court are guilty of something, and that prosecutors and police officers can make mistakes but generally are acting in good faith. In Jim's case, the system went off the rails. Chief Coughlin and Lieutenant Randolph clearly had a political agenda and were out to get Jim because he threatened to hold them accountable. That the County Attorney's office did not realize immediately that something was fishy, given how frankly bizarre the probable cause statement was, and that the local police were prosecuting their own Mayor, amazes me. They should have put a stop to the case before it even got started. Even more amazing, was that after the case went on for several months and it was not materializing as the Chief and Lieutenant had promised, the County Attorney's office did not stop their efforts to convict Jim, and continued pursuing him until they had lost trials on all of the major charges. The case could have been dismissed by the Court prior to trial, and was not. After the case was all over, the County Attorney's office issued a press release showing no contrition whatsoever, claiming that the jury must have made a mistake. If what happened in Crosby happened in another country, a democratically elected leader arrested on trumped up, unfounded charges and forced to resign, we would call it a police state, and call for international intervention.

While it is easy to look at a case like this as a success, three jury trial wins, no convictions, seeing the good guys win, that feeling of hearing the words 'not guilty', three times, like winning the Super Bowl and the World Series at the same time, it is really a huge failure. The system put an innocent person through hell for no reason at all. None of the professionals in the system put an end to the circus, it took three separate juries of amateurs to do what the professionals should have done long before. No one should ever question the value of the right to a trial by jury, I certainly will not; it saved Jim's freedom, and quite possibly his life, I do not know if Jim could have survived incarceration.

By the time this article goes to press, there will be a civil defamation lawsuit pending in Crow Wing County against the City of Crosby, Mr. Randolph and Ms. Coughlin for their actions against Mr. Hunter. Mr. Hunter and I have taken this action because the City, and the former Chief and Lieutenant have shown no interest whatsoever in taking responsibility or being held accountable in any way for their actions. They are both continuing to lead comfortable lives, while Jim went through two years of hell and huge financial loss. The legal system preaches accountability, everyday hundreds of people are brought before judges in court houses all over this state to be held accountable for bad choices that they have made. For the system to have any credibility, the accountability must go both ways. We can not expect the powerless to be held accountable for their actions unless we ask the same from the powerful.

About Ed Shaw

Ed has been an attorney in private practice for 23 years in Brainerd helping people get through a variety of difficult situations. Ed handles a variety of cases, but, nothing beats the excitement of a criminal jury trial, and hearing the clerk read those two words, 'not guilty', at the end. He lives with his wife, Sarah and their twins, Marly and Ruby. He enjoys spending time with family, eating at his wife's restaurant, and long distance gravel bike races. You will often see him out in the mornings and afternoons with his dogs, Eleanor and Buffy walking between his office and his 125 year old home in north Brainerd.

An Onion: A Look at Arising Issues within the New Ignition Interlock Exception to the DWI Forfeiture Statute

Stephen Foertsch, Bruno Law, PLLC

I was waiting for a forfeiture hearing to be called, when I learned of the amended forfeiture statute via the MACDL list serve. Serendipity. I read the new statute with a mental fist pump ("Ron f-ing Latz!").

In researching this article, I spoke with Ron Latz, MACDL Member, criminal defense attorney extraordinaire, Minnesota State Senator for District 46, and the sponsor of the new ignition interlock exception to DWI forfeiture. Ron, being the lawyer he is, foresaw potential ambiguity within the statute. As he attempted to address every little potential issue that could arise under the new language, a colleague in the Senate cautioned him, opining that these laws are like onions: to address every potential issue would create an 18-page law. As Ron says, either any issues will be worked-out, or the legislature will fix them.

The new subdivision, subdivision 13, of section 169A.63 (the DWI forfeiture statute), mandates a stay of forfeiture proceedings "[i]f the driver who committed a designated offense or whose conduct resulted in a designated license revocation becomes a program participant in the ignition interlock program under section 171.306 at any time before the motor vehicle is forfeited." Minn. Stat. § 169A.63, subd. 13(a). Notwithstanding the stay, forfeiture may proceed if the program participant:

(1) subsequently operates a motor vehicle:

(i) to commit a violation of section 169A.20 (driving while impaired);

(ii) in a manner that results in a license revocation under section 169A.52 (license revocation for test failure or refusal) or 171.177(revocation; search warrant) or a license disqualification under section 171.165 (commercial driver's license disqualification) resulting from a violation of section 169A.52 or 171.177;

(iii) after tampering with, circumventing, or bypassing an ignition interlock device; or

(iv) without an ignition interlock device; or

(2) either voluntarily or involuntarily ceases to participate in the program for more than 30 days, or fails to successfully complete it as required by the Department of Public Safety due to:

(i) two or more occasions of the participant's driving privileges being withdrawn for violating the terms of the program, unless the withdrawal is determined to be caused by an error of the department or the interlock provider; or

(ii) violating the terms of the contract with the provider as determined by the provider.

Minn. Stat. § 169A.63, subd. 13(b). "Paragraph (b) applies only if the designated conduct occurs before the participant has been restored to full driving privileges or within three years of the original designated offense or designated license revocation, whichever occurs latest." Minn. Stat. § 169A.63, subd. 13 (c).

That statute requires a discounted rate to indigent program participants, requires an ignition interlock manufacturer be given access to the lot to install an ignition interlock device, and "an entity in possession of the vehicle is not required to release it until the reasonable costs of the towing, seizure, and storage of the vehicle have been paid by the vehicle owner." Minn. Stat. § 169A.63, subd. 13(d), (e), (f).

Prior to release of the vehicle, the appropriate agency may require security or a bond, payable to the agency in an amount "equal to the retail value of the seized vehicle." Minn. Stat. § 169A.63, subd. 13(g). If the owner gives security or posts a bond, any future forfeiture action against the vehicle must proceed against the security as if it were the vehicle. Id. In the future forfeiture action, the claimant retains the ability to demand judicial determination of the forfeiture. Minn. Stat. § 169A.63, subd. 13(k).

Upon successful completion of "program," the stayed forfeiture proceeding is terminated or dismissed and any vehicle, security, or bond held by an agency must be returned to the owner of the vehicle. Minn. Stat. § 169A.63, subd. 13(j).

In my case, when I approached the prosecutor with the new subdivision, his knee-jerk reaction was to, first, question whether I was telling the truth; then, second, challenge the retroactivity of the statute and whether the new law was in effect before August 1st.

The revisor of statutes vouched for my integrity, and we agreed to continue the hearing to discuss how the new subdivision applied to our case.

I was optimistic going into those discussion, hoping for an easy resolution, but a few issues emerged: (1) retroactivity; (2) the unavailability of a bond and the value thereof; and (3) whether ignition interlock is required on the defendant vehicle, or whether general enrollment in the ignition interlock program—in any vehicle—satisfies the statute; among other questions.

Retroactivity

First, regarding retroactivity, to quote Ron Latz in his email to the MACDL list serve, "Prosecutors who are claiming that the law is not retroactive are only partially correct." The language of the statute is clear that the forfeiture proceeding is stayed if the driver becomes a participant in the ignition interlock program, "at any time before the motor vehicle is forfeited." Minn. Stat. § 169.63, subd. 13(a). As Mr. Latz explained in his email to the group, forfeitures already complete, either through an order following a demand for judicial determination or those that were not challenged within the statutory timeline, cannot be reopened. But, where a vehicle has been seized but forfeiture is not yet final, the new law applies.

As to the effective date of the statute, which is now moot due to the passage of time but nonetheless instructive for future statutes, the new subdivision was enacted through a provision of the Omnibus Judiciary, Corrections and Public Safety Budget and Policy Act that did not contain an effective date. Where that is the case, and the act is either an "appropriation act" or "an act having appropriation items," section 645.02 governs the effective date. In relevant part, section 645.02 states as follows:

An appropriation act or an act having appropriation items enacted finally at any session of the legislature takes effect at the beginning of the first day of July next following it final enactment, unless a different date is specified in the act.

Because this particular act contained appropriations, and

because there was no particular effective date indicated within the new forfeiture subdivision, the new subdivision became effective July 1, 2019.

Bond

Since the new subdivision, many have encountered the issue I confronted myself: bonds are simply not available for these vehicles, due, anecdotally from conversations I have had with bonding agents, to the risk involved in a bond for the vehicle. In speaking with Mr. Latz, the hope is supply in this area will eventually meet demand. In fact, after a referral from Mr. Latz, I spoke with Nick Newton at Newton Bonding Co. in Stillwater, and his agency is now offering bonds for forfeited vehicles to qualified applicants. Of course, a given client may not be a "qualified applicant," and a bond may still be unavailable to these individuals.

I will discuss alternative options to a bond below, but first, there may be an argument that a court should interpret the statute in such a way that a bond is not required. Before offering this potential argument, it is important to note I am not aware of any caselaw addressing the issue, although I raised the issue in a district court case that is currently under advisement.

While section 169A.63, subdivision 13, subparts (g) and (h) allow an appropriate agency to require an owner or driver to give security or post bond payable to the agency in an amount equal to the retail value of the vehicle, one can argue this requirement leads to absurd results, completely inconsistent with the statute's purpose and in violation of the Constitution, thus allowing a court to look beyond the language in the statute to examine other indicia of legislative intent. That intent seems to be to allow the return of the Defendant vehicle upon the offending driver's enrollment in the ignition interlock program.

As we know, where a statute is free from ambiguity, courts look only to its plain language. Auto-Owners Insurance Company v. Second Chance Investments, LLC, 827 N.W.2d 766, 771 (Minn. 2013). However, courts are "equally obliged to reject a construction that leads to absurd results or unreasonable results which utterly depart from the purpose of the statute." Wegener v. Comm'r Revenue, 505 N.W.2d 612, 617 (Minn. 1993). If a literal reading of the statute produces absurd or unreasonable results, "it is necessary to look to the purpose for which the statute was enacted and recognize [a literal reading] is inapplicable under the circumstances presented here." Id. Further, pursuant to Minnesota Statutes, section 645.17:

In ascertaining the intention of the legislature the courts may be guided by the following presumptions:

> (1) The legislature does not intend that a result is absurd, impossible of execution, or unreasonable;
>
> (2) The legislature intends the entire statute to be effective and certain;
>
> (3) The legislature does not intend to violate the Constitution of the United States or of this state; …

To require a bond may render section 169A.63, subdivision 13 ineffective, impossible of execution, and it may produce an absurd result, because for many, the unavailability of a bond precludes return of the vehicle, even upon enrollment in ignition interlock.

Leading up to the new subdivision, the DWI forfeiture statute has been the topic of significant litigation, at one point being found unconstitutional due, in part, to a lack of a meaningful pre-hearing remedy. See Olson v. One 1999 Lexus, 910 N.W.2d 72 (Minn. Ct. App. 2019) (rev. granted Jun. 19, 2018); Olson v. One 1999 Lexus, 924 N.W.2d 594 (Minn. 2019) (aff'd in part, reversing in part). During the very next session following the Supreme Court's decision in Olson, the legislature enacted subdivision 13, which remedies the lack of a meaningful pre-hearing remedy discussed in Olson. One can argue the legislature's intent was to allow individuals to have their vehicles returned if they enrolled in ignition interlock. Subpart (g) can make that purpose impossible.

Next, requiring a bond in the amount of the "retail value" of some vehicles may produce an absurd, unconstitutional result. Some vehicles are completely, or almost completely, encumbered by a primary security interest. For example, if an offender purchases a new vehicle largely through financing, that vehicle is essentially worthless driving off the lot. This is the purpose of "gap" insurance coverage on a new vehicle.

In the past, if such a vehicle was subject to a forfeiture, the appropriate agency would have to return the vehicle to the lien holder. The appropriate agency would not be awarded any money, because the vehicle is completely encumbered. With subpart (g), if an offender is forced to post a bond, the appropriate agency would recover the bond for the retail value of the vehicle. The owner, on the other hand, would owe the bonding company for the bond, while still potentially owing the bank.

One can argue such a result absurdly, unjustly enriches the appropriate agency, and unduly, unreasonably, and unconstitutionally punishes the vehicle owner. If the purpose of the forfeiture statute is remedial, protecting the public from the known danger of drunk drivers, see Lukkason v. 1993 Chevrolet Extended Cab Pickup, 590 N.W.2d 803, 806 (Minn. Ct. App. 1999) (finding DWI forfeiture statute served remedial purpose and therefore did not violate substantive due process), to punish the owner so, not only violates the purpose of the statute, but also the Constitution. Id.; City of New Brighton v. 2000 Ford Excursion, 622 N.W.2d 364 (Minn. Ct. App. 2001) (Forfeiture does not violate double jeopardy provisions because, although partially punitive in nature, it is not so punitive so as to be characterized as criminal, as opposed to civil/remedial); U.S. v. Bajakajian, 524 U.S. 321 (1998) (Finding a grossly disproportionate forfeiture violates the excessive fines clause of the Eighth Amendment); Timbs v. Indiana, 139 S.Ct. 682 (2019) (Finding Eighth Amendment's excessive fines clause is an incorporated protection applicable to the States).

Courts must assume the legislature does not intend an absurd result and that the legislature does not intend to violate the Constitution. Minn. Stat. § 645.17 To require a bond under certain facts presents the potential for an unjust enrichment to the appropriate agency, which would be an absurd result, and punishes the vehicle owner, so as to contravene the purpose of the statute and violate the Constitution. Therefore, one can argue courts should give effect to subdivision 13's purpose, which is to return the vehicle, without the requirement of a bond.

Now, creative defense attorneys are considering alternatives to the bond requirement. Some offenders may have the means to simply finance the security themselves, which, obviously, solves the bond issue. In these instances, it should be noted that appropriate agencies should be required to place this security in trust; a length some agencies may not be willing to go. Other options include a private agreement with a confession of judgement, or a surety bond, like in Federal pretrial release, when a defendant simply signs his or her responsibility for a given amount.

Ignition Interlock

Although the new subdivision seems to unambiguously and simply require that the claimant be enrolled in the ignition interlock program, prosecutors may disagree, requesting ignition interlock in the defendant vehicle. In certain circumstances, where a claimant already has ignition interlock in one vehicle, this requirement would require multiple devices, or the added expense of removing ignition interlock from one vehicle and installation costs in the subject vehicle. Installation at the storage site may also increase a claimant's "costs of seizure" (to be discussed below).

As referenced above Minnesota Statutes, section 169A.63, subdivision 13(a) provides, "If the driver … becomes a program participant in the ignition interlock program under section 171.306…" Minn. Stat. § 169A.63, subd. 13(a) (emphasis added).

When referring to the ignition interlock exception, the legislature intentionally uses the word "program." See Minn. Stat. § 169A.63, subd. 13(a), (j) (supra). The

remainder of the subdivision does not contain any language requiring ignition interlock installed on the subject vehicle prior to release. See Minn. Stat. § 169A.63, subd. 13.
This issue presents a question of statutory interpretation. "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Auto-Owners Insurance Company v. Second Chance Investments, LLC, 827 N.W.2d at 771. The first inquiry is whether the statute is ambiguous, and if the language is unambiguous, the court's role is to give effect to the statute's plain meaning. Id. (internal citations omitted). If the language as applied is "clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursing the spirit." Minn. Stat. § 645.16.

Here, the legislature unambiguously referred to enrollment in the ignition interlock program under section 171.306. See Minn. Stat. § 169A.63, subd. 13(a). The statute—does not at any point—make mention of any requirement that ignition interlock be installed in a defendant vehicle prior to release. See Minn. Stat. § 169A.63, subd. 13. True, the statute allows for ignition interlock providers to have access to seized vehicles to install ignition interlock, but this allowance in no way creates a requirement. The allowance simply permits individuals who own one vehicle an opportunity to enroll in the program by installing ignition interlock in the seized vehicle, so as to not contravene the subdivision's purpose.

It seems clear ignition interlock is not currently required in the subject vehicle, which will hopefully be confirmed by the appellate courts.

Other Questions

First, "costs of seizure." Under the new subdivision, the appropriate agency is not required to release the subject vehicle "until the reasonable costs of the towing, seizure, and storage of the vehicle have been paid by the vehicle owner." Minn. Stat. § 169A.63, subd. 13 (f). One particular prosecutor, who will remain nameless, asserted dubiously that the "seizure costs" can be whatever the agency deems appropriate. This prosecutor requested additional payment for an officer's presence for the installation of ignition interlock. Such a payment for an officer's time opens the door to potentially problematic abuse, the reasonableness of which may need to be resolved by a court.

Next, timing. Subpart (j) provides that upon successful completion of the "program," the stayed forfeiture proceeding is terminated or dismissed. Minn. Stat. § 169A.63, subd. 13(j). Subpart (c) allows forfeiture proceedings to resume upon designated conduct occurring before the participant has been restored to full driving privileges, or within three years of the original designated offense or designated license revocation, whichever "occurs latest." Minn. Stat. § 169A.63, subd. 13(c).

A program participant, who committed an offense that qualifies for forfeiture, could complete the program after two years. See Minn. Stat. § 169A.54, subd. 1(4) (Two-year revocation for an offense occurring within ten years of a qualified prior impaired driving incident where the test results indicate an alcohol concentration of twice the legal limit or more); Minn. Stat. § 169A.25, subd. 1 (Second degree DWI described as a violation occurring with two or more aggravating factors, such as a prior qualified alcohol-related driving incident or an alcohol concentration of twice the legal limit or more); Minn. Stat. § 169A.63, subd. 1(e)(1) (Designated offense includes a violation of section 169A.25). In that scenario, a claimant could complete the "program" under subpart (j), thus requiring dismissal, but still be "on the hook" under subpart (c). If forfeiture is dismissed and security returned, but a designated violation occurs, under subpart (c), the state could argue they may proceed with forfeiture against the claimant. But, with no security or bond in the appropriate agency's possession, what will the state forfeit? We will see.

Lastly, if the forfeiture proceeding is automatically stayed upon a "driver['s]" enrollment in the ignition interlock program, will a non-driving, innocent owner be permitted to proceed with an innocent owner defense? Again, that is to be determined.

I am sure the majority of those subscribed to this particular publication will agree subdivision 13 is a great move in the right direction. To paraphrase Mr. Latz, as he has advocated in the Senate, "Law enforcement agencies cannot demonstrate the public is safer because of vehicle forfeitures." In Mr. Latz's view, the public is safer if DWI offenders have a means to safely and legally drive, thus alleviating a great deal of stress on them, their families, and the public.

Lastly, I cannot conclude this article without a sincere thank you to Mr. Latz, for taking the time to discuss this article with me. Also, thank you to the talented attorneys on MACDL's list serve for their lively discussion of this and other emerging issues. This discussion is important and raises our defense bar, allowing us to be better advocates for our clients. Thank you.

About Stephen Foertsch

Stephen Foertsch is a criminal defense attorney at Bruno Law, PLLC. He is the Editor in Chief of VI Magazine and a member of MACDL's Board of Directors. He presents CLEs on various topics, writes a monthly column for the Bench & Bar magazine, writes a yearly chapter in the Minnesota DWI Deskbook, and has been published in the Hennepin Lawyer magazine. He graduated from William Mitchell College of Law and is now an adjunct professor at Mitchell Hamline School of Law.

MACDL Summer Softball

It was less about the wins and more about the friends we made along the way.

Motion, Memorandum, & Order — Anoka County

Ryan Garry

Note from the editor:

The following is a motion, memorandum, and order, offered by MACDL member, Ryan Garry, to showcase the materials available in the macdl "Brief Bank," which is available to members on our website, www.macdl.legal

Note from Ryan Garry:

As you requested for the VI magazine, attached is a motion, memorandum and order dismissing my client's felony drug charges in Anoka County. As I am sure many of our readers are experiencing, law enforcement (particularly outstate State Patrol) are routinely violating Askertooth, etc. I have 4 to 5 pending felony drug cases all involving the same issues, the pre-textual nature of the traffic stop and/or the unlawful expansion of it after. I am happy to provide WORD documents to anyone that wants it.

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF ANOKA — TENTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

[redacted],

Defendant.

Court File No.: [redacted]

MEMORANDUM IN SUPPORT OF MOTIONS TO SUPPRESS AND DISMISS

FACTS

At the December [redacted], 2017 *Contested Omnibus Hearing*, Mr. [redacted] raised several Motions before the Honorable [redacted], Judge of the Anoka County District Court, all revolving around United States and Minnesota Fourth Amendment violations. Officer Jacob [redacted] was the only witness to testify. The parties agreed to admit Exhibit 1, a copy of the squad video, which documented the traffic stop and eventual conversation between Officer [redacted] and Mr. [redacted]. As agreed upon by both parties, attached to this letter is the transcript of the relevant portion of the squad video.

Officer [redacted] testified that on January [redacted], 2017 at approximately 7:57 pm, he was driving his marked squad car in the City of Ramsey, Anoka County, Minnesota, when he noticed a white Cadillac CTS, commit three petty misdemeanor traffic offenses. The traffic offenses included an abrupt lane change, following too close to another vehicle, and speeding. He testified that at no point did the driver swerve within or outside of his lane, drive erratically, flee the scene, or exhibit any other driving conduct that would suggest alcohol or drug intoxication.

Officer [redacted] activated his squad lights, and the driver pulled over lawfully and parked by the curb in a safe manner. Officer [redacted] approached the vehicle, obtained the driver's identification, and identified the driver as [redacted]. Mr. [redacted] handed Officer [redacted] his identification without any signs of impairment or intoxication. Officer [redacted] checked his driver's license and discovered that Mr. [redacted]'s license was valid and that he had no warrants for his arrest. Mr. [redacted] stated he was running late to meet a friend. Officer [redacted] then returned to his squad car at which point a second police officer appeared to be the passenger seat.[1] Officer [redacted] and the second officer had a brief conversation and shortly thereafter, both returned to Mr. [redacted]'s vehicle, with Officer [redacted] questioning Mr. [redacted] at the driver's window while the second officer shined his flashlight in the vehicle's windows.

Officer [redacted] testified that Mr. [redacted] was alert and cooperative, was not slurring his words, and was properly and completely answering his questions. He also testified that he observed no evidence of drug use or drug activity of any kind, such as air fresheners, drug paraphernalia, straws, rolling papers, marijuana, or white powder residue. Mr. [redacted] stated that he was a military veteran and had a conceal-and carry-permit, but there was no firearm in the vehicle.

Officer [redacted] testified that Mr. [redacted] told him that he was driving to Kwik Trip but had changed locations to Burger King, as his friend had changed the meeting location. He testified on direct examination that he thought this was suspicious because "drug dealers often change locations." Officer [redacted] conceded on cross-examination that Mr. [redacted] also had told him that he was going to Burger King to meet his friend rather than at his house because he was later meeting a friend at St. Paul. He also admitted on cross-examination that Mr.

[1] Ex. 1, squad video, at 8:03:56 (starts conversation between the two)

[redacted]'s friend could have merely wanted a "whopper" sandwich and that is why he changed locations from Kwik Trip to Burger King.[2]

Officer [redacted] also testified that in July of 2016, the Anoka-Hennepin Drug Task Force received an anonymous tip that Mr. [redacted] was engaged in the drug trafficking business. Officer [redacted] conceded that not a single police officer or police department followed up on this tip or initiated any additional investigation. He also acknowledged that the tip could have been from his disgruntled ex-wife or employee, and that the tip bore no evidence of being reliable.

Finally, Officer [redacted] testified that upon further questioning, Mr. [redacted] became nervous and his hands were shaking and his head was sweating. He acknowledged on cross-examination that it is not uncommon for drivers being pulled over to exhibit these physical mannerisms. He conceded that the traffic stop occurred in the middle of winter and Mr. [redacted] could have had the heat in his vehicle on high. At no point in time, either before or after the arrest, did Officer [redacted] believe that Mr. [redacted] was under the influence of drugs or alcohol. He finally admitted at the conclusion of the hearing that the only justification for asking Mr. [redacted] questions regarding drug activity were (1) the petty misdemeanor driving violations, (2) the change of location for meeting his friend, (3) his head sweating, (4) his hands slightly shaking, and (5) an anonymous, uninvestigated tip from over a year previous that could have been brought by his disgruntled ex-wife, where he conceded the tip bore no evidence of reliability. Officer [redacted] had no other evidence of drug-related activity whatsoever, and

[2] It was disingenuous for Officer [redacted] to testify under oath that this "clue" of changing locations was indicative of criminal activity. Officer [redacted] admitted on cross-examination that the only clues of criminal activity up to this point in the conversation were the petty misdemeanor driving violations. Unfortunately, and which should be discouraged by this Court, Officer [redacted] was trying to bolster his reasons supporting his eventual interrogation of drug activity. To testify that Mr. [redacted]'s decision to change his meeting spot from Kwik Trip to Burger king was a clue of "drug dealing" is absolutely ridiculous and undermines Officer [redacted]'s credibility.

admitted that it is "not uncommon" for drivers to exhibit nervous behavior such as shaking and sweating.

The parties agreed to submit simultaneous briefs on December 22, 2017.

ARGUMENT

The United States Constitution and the Minnesota Constitution protect against unreasonable searches and seizures. U.S. CONST. amend. IV; MINN. CONST. art. I, § 10. Officer [redacted] needed reasonable, articulable suspicion to initiate the traffic stop, to expand the stop's scope by asking questions unrelated to the reason for the stop, and to extend the stop's duration beyond that needed to issue a warning or citation. He further needed probable cause to request consent to search the vehicle and to search the vehicle. The defense concedes that Officer [redacted] had reasonable, articulable suspicion to initiate the traffic stop due to the above-discussed petty misdemeanor traffic violations. However, he lacked reasonable, articulable suspicion (or probable cause) for every other phase of the case. This lack of probable cause resulted in an illegal search and seizure requiring suppression and dismissal of the charges.

A. Reasonable, Articulable Suspicion for an Investigatory Traffic Stop.

An investigatory traffic stop is lawful if the police officer has a reasonable, articulable suspicion that the person stopped is engaged in criminal activity. *State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). The officer must have objective support for his suspicion. *State v. Johnson*, 444 N.W.2d 824 (Minn. 1989). To be reasonable, a limited, investigatory seizure requires a "particularized and objective" suspicion, while a seizure amounting to an arrest generally requires probable cause. *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996).

The scope and duration of any traffic stop must be limited to the original justification for the stop. *State v. Diede*, 795 N.W.2d 836, 845 (Minn. 2011); *State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003); *State v. Syhavong*, 661 N.W.2d 278, 281 (Minn. Ct. App. 2003). "Detention of an individual during the routine stop of an automobile, even for a brief period, constitutes a 'seizure' protected by the Fourth Amendment." *Syhavong*, 661 N.W.2d at 282. There must be a "a reasonable relationship between the purpose of the stop . . . and [the officer]'s question concerning contraband in the car. During a traffic stop, an officer's questions must be limited to the purpose of the stop. . . . Because [the officer]'s question about contraband was not related in scope to the circumstances that justified the stop, the resulting detention and inquiry were unreasonable." *Id.* at 281. Officers may ask for a driver's license and registration and about the driver's destination and reason for trip. *Id.* (citing *United States v. Bloomfield*, 40 F.3d 910, 915 (8th Cir. 1994) (en banc)).

B. Reasonable, Articulable Suspicion to Expand the Scope of the Stop and to Extend the Duration of the Stop.

An officer may expand the scope of a stop only for offenses for which the officer possesses a reasonable, articulable suspicion within the time necessary to resolve the original offense. *Diede*, 795 N.W.2d at 845; *State v. Wiegand*, 645 N.W.2d 125, 136 (Minn. 2002) ("the reasonableness requirement of the Fourth Amendment is not concerned only with the duration of a detention, but also with its scope"). In order to prolong a stop, there must exist particularized and objective facts that provide a basis for suspecting the person seized of criminal activity. *Id.* at 842–43. Articulable suspicion is an objective standard and is determined from the totality of the circumstances. *Paulson v. Commissioner of Public Safety*, 384 N.W.2d 244, 246 (Minn. Ct. App. 1986). A reasonable, articulable suspicion requires more than a mere hunch. *State v. Martinson*, 581 N.W.2d 846, 850 (Minn. 1998) (citations omitted). In order to be reasonable, the

suspicion must be objectively appropriate in light of the facts available at the time of the search and seizure. *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004).

"Expansion of the scope of the stop to include investigation of other suspected illegal activity is permissible under the Fourth Amendment only if the officer has reasonable, articulable suspicion of such other illegal activity." *Wiegand*, 645 N.W.2d at 135 (citing *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968); *United States v. Ramos*, 20 F.3d 348, 352 (8th Cir.1994) (holding consent to search was fruit of illegal detention, as it took place after the original purpose of the stop—a seat belt violation—had been accomplished)).

Evidence obtained as a result of the unlawful expansion of a traffic stop must be suppressed. *Askerooth*, 681 N.W.2d at 370; *Syhavong*, 661 N.W.2d at 282–83.

C. Questions After a Traffic Stop Investigation Ends.

Similar to illegal expansion of the stop, questioning after "the original purpose of the stop has been accomplished" violates the Fourth Amendment and corresponding provision of the Minnesota Constitution. *Syhavong*, 661 N.W.2d at 282. In *Syhavong*, the traffic investigation had been completed when the officer asked for consent to search the vehicle. *Id.* Because consent was given after the traffic stop was completed, "the consent [was] a product of an illegal detention" and the evidence was suppressed. *Id.*; *see also Ramos*, 20 F.3d 348 (officer lacked reasonable, articulable suspicion to continue detention after issuing traffic warning).

D. Probable Cause to Request Consent to Search or to Search a Vehicle.

The United States and Minnesota Constitutions safeguard the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and mandate that "[n]o warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." U.S. CONST. amend. IV; MINN. CONST. art. I, § 10. Though a warrant is not needed to search a vehicle, law enforcement still needs probable cause that the vehicle contains contraband in order to conduct a legal search. *Flowers*, 734 N.W.2d at 248.

Probable cause to search exists if "a person of ordinary care and prudence [would] entertain an honest and strong suspicion that a crime has been committed" and "a 'fair probability [indicates] that contraband or evidence of a crime will be found in a particular place.'" *State v. Johnson*, 314 N.W.2d 229, 230 (Minn. 1982) (citation and inner quotation marks omitted); *Carter*, 697 N.W.2d at 204–05 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Minnesota has adopted the "totality of the circumstances" test for determining whether probable cause to issue a search warrant existed. *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985). Under the totality of the circumstances test, "[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (quoting *Gates*, 462 U.S. at 238).

"It is fundamental that 'all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.'" *State v. Mathison*, 263 N.W.2d 61, 63 (Minn. 1978) (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1963)).

Consent given—or a request to consent—after a traffic stop is completed is the product of an illegal detention. *Syhavong*, 661 N.W.2d at 282; *Askerooth*, 681 N.W.2d at 370.

E. Caselaw.

Numerous Minnesota cases have addressed the foregoing laws and constitutional protections.

State v. Syhavong

In *State v. Syhavong*, the defendant was pulled over because he had a broken taillight, but because the defendant and the passenger appeared "excessively nervous compared to what [the officer] normally encounter[ed] on an equipment violation traffic stop," the officer asked if they had anything illegal in the car. 661 N.W.2d at 280. The defendant said no and the officer asked if he could search the car, to which the defendant consented. *Id.* The officer found meth in the car and the defendant was later convicted of felony possession of a drug. *Id.* at 280–81. The court stated:

> To be reasonable under the Minnesota and federal constitutions, an investigatory stop must be limited in both duration and scope. [A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Moreover, the scope of a stop must be strictly tied to and justified by the circumstances that rendered the initiation of the investigation permissible.

Id. at 281 (citations omitted).

Upon review in *Syhavong*, the Court of Appeals held that the government was unable to demonstrate a reasonable relationship between the purpose of the stop, i.e. the broken taillight, and the questioning and subsequent search. *Id.* at 281. Though the initial stop was justified, the further expansion of the search was impermissible because the officer lacked reasonable, articulable suspicion that the driver was engaged in criminal activity based merely on the officer's observations that the driver appeared to be excessively nervous. *Id.* at 282 (emphasis added). Further, where, "a consent to search is given after the original purpose of the stop has been accomplished, the consent is a product of an illegal detention . . ." *Id.* (emphasis added). The court held that the evidence obtained due to the unlawful expansion of the stop must be suppressed. *Id. See also State v. Fort*, 660 N.W.2d 415, 419 (Minn. 2003) (holding evidence must be suppressed where "investigative questioning, consent inquiry, and subsequent search went beyond the scope of the traffic stop and was unsupported by any reasonable articulable suspicion").

State v. Askerooth

In *Askerooth*, the defendant was pulled over for not stopping for a stop sign. 681 N.W.2d at 356–57. He did not have a driver's license, so the officer had him get out of the vehicle, did a pat-down search, and then put him in the squad car. *Id.* at 357. The officer then asked to search the vehicle to which the defendant consented. *Id.* After the search, the officer issued citations for the driving offenses. *Id.* The defendant was released and the officer searched the squad, finding a container with methamphetamine. *Id.* The defendant was charged with drug possession. *Id.*

The appellate court stated, "the focus of our analysis is whether [the officer]'s intensifying the intrusive nature of the seizure by confining [the defendant] in the squad car was justified by some governmental interest that outweighed [the defendant]'s interest in being free from arbitrary interference by law officers." *Id.* at 365 (inner quotation marks and citation omitted). The officer's justification for putting the defendant in the squad was supposedly due to procedure when a driver does not have a license so that the officer does not have to go back and forth between the vehicles during their conversation. *Id.* But law enforcement "convenience" and lack of a license "is not a reasonable basis for confining a driver in a squad car's locked back seat when the driver is stopped for a minor traffic offense." *Id.* This detention "at most only tangentially served a governmental interest" and "lacks any consideration for a driver's interest in being free from unnecessary intrusions." *Id.* at 366. The defendant's "interest in being free from unreasonable seizure in these circumstances outweighed [the officer]'s need for

convenience." *Id.* Thus, the "prolonged detention" of the defendant "beyond the time necessary to effectuate the purpose of the stop" violated the Minnesota Constitution. *Id.* at 371.

The court continued, stating that the officer's request to search and the search while the defendant was confined violated the Minnesota Constitution. *Id.* at 370. The officer asked the defendant for consent to search the vehicle when the defendant sat in the squad. *Id.* at 357. The defendant consented. *Id.* The request to search "was not supported by any reasonable articulable suspicion." *Id.* at 370–71. The officer claimed the purpose of the search was to make sure the defendant had no access to weapons in the vehicle. *Id.* at 371. But there was no evidence that there was anything in the vehicle that could be used as a weapon and the officer was going to allow the defendant to walk home rather than drive away. *Id.* The officer's "prolonging of [the defendant]'s detention in order to conduct the van search included both an expansion of the scope of the seizure—detaining [the defendant] in order to conduct a search—as well as an extension of the duration of the detention beyond the original purpose of the stop." *Id.* At the moment the officer could have issued the citations, he, "absent a reasonable articulable suspicion of some additional crime or danger, was required to issue the citations and allow [the defendant] to leave, but [the officer] did not issue the citations until after he finished searching [the defendant]'s van." *Id.* Further, the defendant was not released from the squad until after the search. *Id.* Thus, the request to search "exceeded the scope of the stop." *Id.*

State v. Fort

In *State v. Fort*, the defendant was a passenger in a car pulled over for speeding and having a cracked windshield in a "high drug" area. 660 N.W.2d at 416. Two officers approached either side of the car. *Id.* When the officers discovered that the defendant nor the driver had a valid driver's license, they decided to tow the vehicle. *Id.* at 417. One officer took the driver to the squad car to talk; the other officer had the defendant exit the car, go back to the squad car, and asked him about drugs or weapons. *Id.* The defendant denied any drugs or weapons in the vehicle or on his person. *Id.* The officer then asked to search the defendant for drugs or weapons, to which the defendant consented. *Id.* The officer found cocaine on the defendant. *Id.* at 416. At the suppression hearing, the officer testified that he observed the defendant to be nervous and avoid eye contact. *Id.* at 417. The officer testified that his intent was to drive the defendant home, but he did not tell the defendant that. *Id.*

The supreme court stated that the officers clearly had a particularized reason to stop the car and investigate the speeding and cracked windshield. *Id.* at 418. The court then determined that the defendant was seized even though he was a passenger because an officer in full uniform came over to him, escorted him to the squad car, and asked him questions about drugs and weapons. *Id.* The officer never stated he suspected any criminal offense besides the traffic violations. *Id.* at 419. "The purpose of this traffic stop was simply to process violations for speeding and a cracked windshield and there was no reasonable articulable suspicion of any other crime. Investigation of the presence of narcotics and weapons had no connection to the purpose for the stop." *Id.* Therefore, the "investigative questioning," asking for consent to search, and the search itself "went beyond the scope of the traffic stop and was unsupported by any reasonable articulable suspicion." *Id.* The court noted that this also may have "extended the duration of the traffic stop beyond that necessary for the stop," but the record was not clear enough to conclude as such. *Id.* n.1. The court reinstated the district court's order suppressing the drugs. *Id.*

United States v. Ramos

In *United States v. Ramos*, two men, Salvador and Servando Ramos, were pulled over because the passenger—Servando—was not wearing a seatbelt. 20 F.3d at 349. Both Servando and Salvador provided their driver's licenses upon request and their vehicle had out-of-state plates. *Id.* The trooper asked Salvador to sit in the squad car and Servando stayed in the car. *Id.* The trooper "testified that upon receiving Servando's identification he had all the information necessary to prepare a citation for the seatbelt violation . . ." *Id.* Further, "he had no reason to suspect that either defendant was engaged in criminal activity" when he had Salvador sit in the squad. *Id.* at 350. While in the squad, the trooper did a computer check on the defendants the vehicle while he worked on the seatbelt warning ticket. *Id.* The trooper asked Salvador about their destination to which Salvador said they were going to Chicago to visit a sick cousin but did not know the exact location in Chicago. *Id.* The trooper asked about employment and other "idle chit chat." *Id.* The computer check came back negative and the trooper issued the warning to Servando while leaving Salvador in the squad. *Id.* The trooper found it "suspicious" that Salvador did not know the location in Chicago they were headed, so he wanted to find out more." *Id.* The trooper asked Servando about their destination, to which Servando replied they were headed to Chicago to visit a sick cousin. *Id.* The trooper then asked if there were drugs or weapons in the vehicle. *Id.* The trooper returned to the squad and asked Salvador more about his destination and where he was from, and whether there were drugs or weapons in the vehicle. *Id.* Salvador said no. *Id.* The trooper asked to search the truck and Salvador agreed, signing a consent-to-search form. *Id.* The trooper called for another officer, had the defendants exit the vehicles, and proceeded to search the vehicle, finding bullets and a handgun, and noticed welds on the fuel tank. *Id.* At the trooper's request, Salvador drove the truck to a gas station for a search of the fuel tank as the trooper suspected it did not contain fuel. *Id.* Before leaving the station, Salvador admitted there was marijuana in the fuel tank and both defendants made other incriminating statements. *Id.* They were subsequently charged with both possession of marijuana with intent to distribute and using and carrying a firearm during and in relation to a drug trafficking crime. *Id.* at 349.

The traffic stop was valid. *Id.* at 351. In order to effectuate the traffic ticket, all the trooper needed was Servando's driver's license. *Id.* The trooper did not need Salvador's license as he had not committed a criminal offense; nor was there any basis to have Salvador sit in the squad car. *Id.* at 351–52. The trooper "then proceeded to question Salvador about his destination and employment—matters that were wholly unrelated to the purpose of the initial stop." *Id.* at 352 (emphasis added). After 40 minutes of Salvador sitting in the squad, the trooper issued the warning ticket to Servando and discovered that neither defendant was wanted for a crime. *Id.* The trooper's basis for expanding the stop was "the pickup truck with foreign plates on an interstate highway, the defendants' uncertainty about their destination, and [the trooper]'s observation of the welds on the fuel tank . . ." *Id.* The court found otherwise: out-of-state plates are clearly not suspicious, the defendants were consistent with their destination and "Salvador's lack of knowledge as to the particular vicinage within Chicago that he was going to created no more than an 'inchoate and unparticularized suspicion or "hunch"' that does not rise to the level of reasonable suspicion," citing *Terry*, 392 U.S. at 27, and the trooper's observation of the welds on the fuel tank occurred during his search. *Id.* Further, after the ticket was issued, the defendants, based upon the surrounding circumstances, could have felt unable to leave. *Id.* Notably, the "driver of the pickup truck, Salvador, was separated from his passenger shortly after the stop and the two remained apart until the search began." *Id.* The trooper's "repeated

interrogation about the defendants' destination" went beyond just a request for identification. *Id.* "Further, even after the original purpose of the stop had been accomplished, [the trooper] did not tell the defendants they could leave. Instead, he had Salvador remain in the patrol car for more questioning." *Id.* "After the ticket was prepared there was no reason for Salvador to remain in the patrol car other than [the trooper]'s desire to question him further about his destination and the presence of any drugs or guns in the truck. These events took place after the purpose of the traffic stop was satisfied . . ." *Id.* For these reasons, the evidence was suppressed. *Id.* at 353.

State v. Henry

In *State v. Henry*, a reliable informant told law enforcement that "Michael Lee Doering was driving a 2002 Ford Taurus bearing Minnesota License Plate 055-VMP and that there was methamphetamine located within that vehicle." 65-CR-17-47, Order pp. 1–2 (Renville County District Court, June 20, 2017) (attached). Law enforcement observed a vehicle matching the description and license plate. *Id.* at p. 2. After losing sight of the vehicle and seeing it again, law enforcement saw a second vehicle closely following it. *Id.* Law enforcement initiated a traffic stop of the trailing vehicle at about 9:34 pm for failing to signal a turn 100 feet ahead of the turn. *Id.* The defendant was the driver. *Id.* The defendant said he was following his father, Michael Doering, in the vehicle ahead of him to a farm site to get prescription medication from his father. *Id.* Law enforcement did not see any indicia of impairment or any contraband, though the defendant appeared more nervous than the typical driver. *Id.* Law enforcement "issued a verbal warning for the traffic violation and told the Defendant he was free to leave." *Id.* Because the defendant was free to leave, the court concluded that law enforcement "did not believe he had a basis to expand the vehicle stop at this point." *Id.* Then, law enforcement asked the defendant to answer some more questions to which the defendant agreed. *Id.* at p. 3. The defendant denied having any drugs in the vehicle but consented to a search of the vehicle revealing drugs. *Id.* The defendant was then charged with drug possession. *Id.*

The court concluded that law enforcement "lacked reasonable, articulable suspicion of criminal activity needed to request consent of the Defendant to expand the traffic stop." *Id.* The court also noted that "based upon the traffic stop expansion law, if the Deputy had possessed a legal basis to expand the stop to make further inquiry of the Defendant, seeking consent would be unnecessary. It follows that obtaining consent does not result in a legal authorization to expand a traffic stop eve if, as here, consent is provided." *Id.* at n.3. The court suppressed the drugs seized and the case was dismissed. *Id.* at p. 4.

F. Application to Mr. [redacted]'s Case

1. Traffic Stop

As stated above, the defense concedes that Officer [redacted] had reasonable, articulable suspicion to stop Mr. [redacted]'s vehicle for petty misdemeanor traffic violations. Everything beyond giving him a citation, however, violated Mr. [redacted]'s constitutional rights.

2. Questioning and Detention

Officer [redacted]'s questioning of Mr. [redacted] beyond the basic questions of requesting his driver's license and insurance went beyond the scope of the stop. *Ramos*, 20 F.3d at 352. Officer [redacted]'s questioning of Mr. [redacted]'s destination was completely unwarranted and not connected to any traffic stop issue. *Fort*, 660 N.W.2d at 419. His random inquiries about the contents of the car were simply a fishing expedition and unconnected to the reason for the stop. Officer [redacted] continued to question Mr. [redacted] about his destination for no legitimate reason:

> Officer 1: Got it. [redacted], look, you said you were meeting a friend at – you were going to meet him at QuikTrip?

Mr. [redacted]: Well, we were – I was – thought [unintelligible] QuikTrip, but it was Burger King he said, so…

Officer 1: Gotcha. Where does your friend live? Because you live in Maple Lake.

Mr. [redacted]: Yeah, I know. I live right down here.

Officer 1: That's what I'm saying.

Mr. [redacted]: I went to QuikTrip up there.

Officer 2: Gotcha. Why didn't he just come to your house? Save you a lot of the hassle.

Mr. [redacted]: **Because I was running to St. Paul to see a friend of mine too**.

Officer 1: Gotcha.

Mr. [redacted]: I was just out and about tonight, so [unintelligible]. Oh, yeah [unintelligible].

(Tr. 3–4, emphasis added). There was no reason to grill Mr. [redacted] about his legitimate activities that night. Nothing had occurred to objectively raise Officer [redacted]'s suspicions. There was certainly nothing suspicious about Mr. [redacted]'s change in destination and there was no need to justify his change in plans to law enforcement. It is clear what Officer [redacted]'s true motives were in this situation by examining his next question to Mr. [redacted]: "[redacted], ***you got anything illegal in the vehicle?***" (Tr. 4, emphasis added). This question violates Mr. [redacted]'s constitutional rights as discussed. Mr. [redacted] denied having any weapons or drugs in his car (Tr. 4–5). He explained what was in his car (Tr. 5–6). After stating that he was nervous simply by this encounter with law enforcement, Officer [redacted] asked him to exit the car to talk further (T. 6–7). Again, Officer [redacted] had no reason to expand the scope of the stop or to further detain Mr. [redacted] by separating him from his vehicle for further questioning. After

further discussion about Mr. [redacted]'s nervousness, Officer [redacted] asked to search the vehicle, and Mr. [redacted] states, "[Unintelligible.] I don't think I have anything illegal in there."[3]

None of Officer [redacted]'s questions related to the reason for the stop. *Fort*, 660 N.W.2d at 419. Beyond his initial questions of why Mr. [redacted] was speeding, nothing else related to Mr. [redacted]'s commission of the petty misdemeanor traffic violations. *Ramos*, 20 F.3d at 352. Mr. [redacted] told Officer [redacted] that he was late to meet his friend. A very valid explanation. This answered Officer [redacted]'s question of why Mr. [redacted] drove as he did. But Officer [redacted]'s detailed and persistent questions about why Mr. [redacted] would drive somewhere to meet his friend and then why they changed locations were in no way tied to the reason for the stop.

The question, then, is whether Officer [redacted] had reasonable, articulable suspicion to ask the questions thereby expanding the scope and duration of the traffic stop and illegally detaining Mr. [redacted].

At the hearing, Officer [redacted] admitted that the only justification for asking Mr. [redacted] questions regarding drug activity were (1) the petty misdemeanor driving violations, (2) the change of location for meeting his friend,[4] (3) his head sweating, (4) his hands shaking, and (5) an anonymous uninvestigated tip that could have been brought by his disgruntled ex-wife, where he conceded the trip bore no evidence of reliability. These reasons, separately or together, do not add up to reasonable, articulable suspicion.

First, petty misdemeanor driving offenses are committed every day by nearly every driver. Speeding one mile over the speed limit is a petty misdemeanor driving offense. Driving offenses are not indicative of drug activity. Second, the change of location for meeting his friend

[3] Officer [redacted] states this in his police report that Mr. [redacted] consented, but this is not supported by the video and audio of the squad video. Mr. [redacted] disputes that he consented to the search.
[4] Ridiculous.

stop. . . . Because [the officer]'s question about contraband was not related in scope to the circumstances that justified the stop, the resulting detention and inquiry were unreasonable."); *State v. Wiegand*, 645 N.W.2d 125, 136 (Minn. 2002) ("the reasonableness requirement of the Fourth Amendment is not concerned only with the duration of a detention, but also with its scope"). Officer [redacted]'s questions about why Mr. [redacted] was meeting a friend at a specific location and what was in the vehicle were beyond what was needed to issue a traffic citation.

2. For an **ORDER** suppressing the evidence because Officer [redacted] unlawfully detained Mr. [redacted] during the traffic stop. *State v. Syhavong*, 661 N.W.2d 278, 282 (Minn. Ct. App. 2003) ("Detention of an individual during the routine stop of an automobile, even for a brief period, constitutes a 'seizure' protected by the Fourth Amendment."). Upon confirming that Mr. [redacted] did not have outstanding warrants and had a valid license, Officer [redacted] continued to ask Mr. [redacted] questions unrelated to the traffic stop, thus detaining him longer than necessary to issue a citation.

3. For an **ORDER** suppressing the narcotics because Officer [redacted] asked Mr. [redacted] questions after the traffic stop should have ended, which violated his Fourth Amendment Constitutional rights. *Syhavong*, 661 N.W.2d at 282 ("Where, as here, a consent to search is given after the original purpose of the stop has been accomplished, the consent is a product of an illegal detention, and evidence subsequently discovered must be suppressed."). Officer [redacted] questions after he should have issued a citation were the product of an illegal detention, so the evidence must be suppressed. Upon returning to the car after confirming there were no outstanding warrants and Mr. [redacted] license was valid, Officer [redacted] asked detailed questions about why Mr. [redacted] was meeting his friend at Burger King rather than his house, he asked what was in the case on the passenger seat, and whether there were drugs in the car. None of these questions related to the traffic stop and violated Mr. [redacted] Fourth Amendment rights.

4. For an **ORDER** suppressing the evidence because Officer [redacted] lacked probable cause to search the vehicle and to request consent for the same. U.S. CONST. amend. IV; MINN. CONST. art. I, § 10. The only suspicion noted by Officer [redacted] was Mr. [redacted] nervousness, a "medium sized black and blue nylon zipper case" on the passenger seat, and an anonymous tip from July 2016 regarding Mr. [redacted] selling methamphetamine out of his home. *See Syhavong*, 661 N.W.2d at 282 (nervousness is not indicative of criminal activity).

5. For an **ORDER** dismissing the case for the foregoing reasons.

Respectfully submitted,

RYAN GARRY, ATTORNEY, LLC

Dated: _____ _____

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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF ANOKA | TENTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

[redacted]

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Ct. File No. [redacted]

On December [redacted], 2017, the above-entitled matter came on for a Contested Omnibus Hearing before the Honorable [redacted], Judge of District Court, pursuant to Defendant's August 2, 2017 Motion to Suppress and Dismiss. Assistant Anoka County Attorney [redacted], Esq., appeared on behalf of the State. Ryan Garry, Esq., appeared with and on behalf of Defendant.

The parties stipulated to the admission of the squad car video as Exhibit 1, and agreed defense counsel would attach a transcript of the stop to his written submission for this Court's convenience, but the transcript itself was not admitted as an Exhibit. The only witness to testify was Officer [redacted], of the Ramsey Police Department. The parties agreed to file their simultaneous written submission no later than December 22, 2017. Following both parties' timely submissions, this Court took the matter under advisement as of December 22, 2017. The parties waived the under advisement deadline.

The issue presented to this Court is whether Officer [redacted] had reasonable, articulable suspicion to expand a valid traffic (originally made for three petty misdemeanor driving offenses) to include questioning into narcotic-related activity and a search of Defendant's vehicle.

Based on the records, files, proceedings, and arguments of counsel, this Court makes the following:

FINDINGS OF FACT

1. On January [redacted], 2017, Officer [redacted] was on patrol duty when he observed a white Cadillac passenger car, traveling ahead of him, commit three (3) petty misdemeanor traffic offenses: (1) an abrupt lane change, (2) following another vehicle too closely, and (3) speeding (82mph in a 60mph zone).

2. Based on the observed infractions, Officer [redacted] initiated a traffic stop of the vehicle. Defense concedes the initial stop was valid.

3. Officer [redacted] approached the vehicle and identified the driver as [redacted] the defendant herein. Officer [redacted] testified that he asked Defendant why he was traveling so fast, to which Defendant replied that he was running late to meet a friend whom he planned to meet at Kwik Trip until his friend changed the location to Burger King. Officer [redacted] said he further questioned Defendant as to the reason for the change in meeting location, particularly when his home was just up the road from the agreed-upon Burger King. Defendant explained that he was later meeting a friend in St. Paul.

4. Officer [redacted] said that once he activated his squad lights, Mr. [redacted] pulled over in a lawful manner and he parked the vehicle in a lawful manner. Mr. [redacted] was cooperative during their conversation. Officer [redacted] did not smell alcohol or marijuana in the car nor did Officer [redacted] observe any drug residue or drug paraphernalia, such as pipes or rolling papers in Mr. [redacted]'s vehicle.

5. Officer [redacted] returned to his squad car to run Mr. [redacted]'s driver's license and is heard on the video talking to a second officer in his squad car while he was running Mr.

[redacted]'s drivers' license. Officer [redacted] testified that the second officer was not present on the scene when Mr. [redacted] was originally stopped, but had arrived on the scene as he had returned to his squad.

6. Officer [redacted] tells the unidentified officer that Mr. [redacted] had told him he was running late to meet a friend and that the meeting location had changed from Kwik Trip to Burger King. Officer [redacted] then states "which I kind of find a little suspicious" and then indicates that after they check his drivers' license they can "go talk to him some more. There's something in his back passenger seat … maybe like a case for a fancy alcohol bottle." There was no other discussion between the officers (while in the squad car) before both now approach Mr. [redacted]'s car. Officer [redacted] does not say why he finds Mr. [redacted]'s story suspicious and the unidentified officer does not ask. When asked during his testimony why he found it suspicious, Officer [redacted] stated "a lot of times in narcotic activity, locations will change based on whoever is making the decision of where they want to meet … due to, you know, diver law enforcement and such."

7. Upon returning to Mr. [redacted]'s vehicle, Mr. [redacted] is immediately asked by Officer [redacted] "what's that tub in your backseat?" and Mr. [redacted] says it is a speaker. Officer [redacted] questions Mr. [redacted] for more details on the planned meeting and changed location asking why his friend did not just come to Mr. [redacted]'s residence, as he lives nearby. Mr. [redacted] states "because I was running to St. Paul to see a friend of mine too" and that he'd been "out and about tonight."

8. Officer [redacted] then states "[redacted], you got anything illegal in the vehicle?" and proceeds to ask if he has marijuana, coke or meth in the car and Mr. [redacted] says he does not.

Officer [redacted] then asks Mr. [redacted] what the item was on the front passenger seat and Mr. [redacted] says it's his wallet/man purse.

9. Officer [redacted] then states: "The reason I'm asking you, [redacted], you were acting super nervous as I started asking those questions, you understand?" and asks Mr. [redacted] to step out of the car so they could talk some more.

10. At some point during the stop Officer [redacted] testified that he observed Mr. [redacted] appeared nervous as his hands were shaking and he began to sweat on his head, despite the fact that the temperature was approximately 30 degrees. Officer [redacted] testified he made those observations during his first encounter with Mr. [redacted], but the squad video appears to indicate he made the observations as he began asking Mr. [redacted] questions regarding drugs. In this case, this Court will presume he made the observations during his initial encounter with Mr. [redacted]

11. Officer [redacted] testified that at no point during the duration of the stop did he suspect Defendant was under the influence of alcohol or other narcotic. Indeed, Officer [redacted] testified that he did not observe any evidence of drug use or drug activity such as the scent of alcohol or marijuana, joint rolling papers, residue, or drug paraphernalia.

12. Officer [redacted] testified that about six-months prior, in July 2016, the Anoka-Hennepin Drug Task Force advised "his office" that an anonymous tip had been received indicating that Defendant was involved in "moving narcotics." Officer [redacted] confirmed he had done nothing to investigate tip and had he was unaware of anyone else in his department investigating the tip. Officer Hinnenkamp provided no testimony about how or when he learned of the anonymous tip.

13. Officer [redacted] testified that at the time he asked Mr. [redacted] questions regarding drug-related activity, the only information he had was: 1) Defendant's driving conduct;

(2) a change in the meeting location with his friend; (3) Defendant's hands shaking and head sweating; and (4) the anonymous tip from July 2016.

14. During the search of the vehicle, the officers seized three (3) zip lock bags containing a total of 18.549 grams of methamphetamine.

15. On June 28, 2017, Defendant was charged via Criminal Complaint with Third Degree Controlled Substance Crime, Possession of 10 Grams or More of Narcotic Other than Heroin, in violation of MINN. STAT. § 152.023, Subd. 2(a)(1), with reference to § 152.023, Subd. 3(a).

CONCLUSIONS OF LAW

I. THE EXPANSION OF THE INVESTIGATORY STOP OF DEFENDANT'S VEHICLE WAS UNLAWFUL

1. An individual has the right to be free from unreasonable searches and seizures. U.S. CONST. AMEND. IV, XIV; MINN. CONST. ART. I, § 10. A search occurs when a government intrusion on a person, place, paper, or effect is a government attempt to gather or obtain information. *U.S. v. Jones*, 132 S. Ct. 945, 953 (2012). Government action amounting to a search or seizure must be based on facts that objectively give rise to probable cause for the search or arrest. U.S. CONST. amend. IV; MINN. CONST. art. I, § 10. Generally, a search conducted without a warrant issued upon a finding of probable cause is *per se* unreasonable unless the search was permissible under one of the few specifically established and well-delineated exceptions to the warrant requirement. *California v. Acevedo*, 500 U.S. 565 (1991); *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003).

2. The burden of showing that an exception exists rests on the State. *State v. Johnson*, 689 N.W.2d 247, 251 (Minn. Ct. App. 2004); *State v. Metz*, 422 N.W.2d 754, 756 (Minn. Ct. App. 1988). An exception to the protection against warrantless searches and seizures exists for an investigatory seizure in situations where the totality of the circumstances provides an officer a reasonable, articulable basis for suspecting the particular person stopped of criminal activity. *State v. Syhavong*, 661 N.W.2d 278, 281 (Minn. Ct. App. 2003); *see also State v. Burbach*, 706 N.W.2d 484 (Minn. 2005) (analysis must be "individualized" and viewed under the "totality of the circumstances.").

3. The reasonable, articulable suspicion standard is not high, but to justify an intrusion, an officer must be able to state something more than an unarticulated "hunch;" the officer must be able to point to something objectively supporting that suspicion. *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007); *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). An investigative seizure may not be the result of mere whim, caprice, or idle curiosity, but rather must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Marben v. State, Dep't of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980).

4. "If an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle." *State v. Beardemphl*, 674 N.W.2d 430 (Minn. Ct. App. 2004) (quoting *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997)).

5. During an investigatory search and seizure of a motor vehicle, an officer's questions and actions must be limited to the initial purpose of the stop, or independent reasonable, articulable suspicion of the crime being inquired into must develop during the officer's lawful seizure of the Defendant. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011); *State v. Syhavong*, 661 N.W.2d, 278, 281 (Minn. Ct. App. 2003); *Terry v. Ohio*, 392 U.S. 1, 19-21 (1968).

6. In this case, the totality of the circumstances considered by Officer [redacted] at the time the stop and seizure of Defendant's vehicle was expanded to include questions into drug-related activity and a search of the vehicle were: (1) Defendant committed three petty misdemeanor driving infractions, including an abrupt lane change, following a vehicle too closely, and speeding; (2) Defendant was on his way to meet a friend at a Burger King down the road from Defendant's

house after his friend changed the initial plans to meet at Kwik Trip; (3) Defendant's hands were shaking and his head was sweating; (4) something that looked like a "fancy alcohol bottle in a case" was present in the back passenger seat of the vehicle; and (5) an anonymous tip was received six-months prior that Defendant was involved in "moving narcotics."

7. This Court concludes there was not a reasonable, articulable suspicion to justify expansion of the stop to investigate narcotic-related activity. This Court is not persuaded that changing locations where Defendant was to meet a friend is indicia of drug trafficking. *See State v. Bergerson*, 659 N.W.2d 791, 796 (Minn. Ct. App. 2003) (holding that absent additional information to corroborate drug manufacturing, merely purchasing items commonly used in the production of methamphetamine from a hardware store does not rise to the level of a reasonable, articulable suspicion of narcotic activity because the two generic items also have numerous legitimate uses). In this case, there are an infinite number of legitimate reasons for Defendant to change plans from meeting a friend at K to instead meet him at the Burger King down the road from his home. This Court concludes that the remaining evidence, including the anonymous tip, does not corroborate drug-related activity to make the change in plans suspicious.

8. When an informant is wholly anonymous and fails to provide any factual basis for the complaint, the informant's tip provides a sufficient basis for a stop or seizure only if the officer observes some minimal conduct that tends to corroborate the tip. *Klotz v. Commissioner of Public Safety*, 437 N.W.2d 663, 665 (Minn. Ct. App. 1989); *Norman v. Commissioner of Public Safety*, 409 N.W.2d 544, 546 (Minn. Ct. App. 1987). In this case, the stale, anonymous tip was too vague to allow for any corroborating observations to warrant any finding of reliability.

9. Generally, evidence procured through a violation of the Fourth Amendment is subject to the exclusionary rule, which prohibits evidence obtained as a result of a constitutional violation from being used against an individual in criminal proceedings. *Mapp v. Ohio*, 367 U.S. 643 (1961).

10. Because expansion of the stop to include questioning into drug-related activity and a search of Defendant's vehicle was not adequately supported by reasonable, articulable suspicion, the evidence obtained as a result thereof is subject to the exclusionary rule and is not admissible against Defendant in the present criminal proceedings and the charges arising therefrom must be dismissed.

ORDER

1. Defendant's motion to suppress and dismiss is **GRANTED**.

SO ORDERED.

BY THE COURT: [redacted] (Anoka Judge) 2018.01[redacted]

DATED: _____

The Honorable [redacted] -06'00'
JUDGE OF DISTRICT COURT