THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0688

The State Of New Hampshire

v.

Matthew Erdos

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

ISSUE PRESENTED

Whether the trial court properly denied the defendant's motion to suppress drugs found in his car, when after a legal traffic stop the officer smelled a strong odor of raw marijuana coming from the car, which combined with other suspicious behavior caused him to seize the car and subsequently search it pursuant to a search warrant.

STATEMENT OF THE CASE

In 2009, a Rockingham County grand jury indicted the defendant, Matthew Erdos, on one count of possession of marijuana with intent to distribute. DB 4; DBA 23.[1] *See* RSA 318-B:2 (2004) (amended 2008). He filed a motion to suppress the drugs that had been found in his car. DBA 10-22. The State objected, DBA 23-29, and the Rockingham County Superior Court (*Nicolosi*, J.) denied the motion after a hearing, DBA 1-9. The defendant then agreed to a bench trial on stipulated facts, at which the court (*Nadeau*, J.) found him guilty. DBA 4. The court deferred sentencing pending the outcome of this appeal. DBA 30.

[1] References to the record are as follows: "NOA" is the notice of appeal; "DB" is the defendant's brief; "DBA" is the appendix to the defendant's brief; "TS" is the transcript of the suppression hearing on August 25, 2009.

STATEMENT OF FACTS

These facts are taken from the testimony of New Hampshire State Trooper Gary Ingham at the suppression hearing on August 25, 2009. Ingham became a trooper upon graduation from the Police Academy in 2003, and was subsequently trained extensively in drug interdiction, including the handling of a drug-detecting canine. TS 6-8. Beginning in 2006 and continuing through the time of the hearing in August 2009, he worked with a dog continuously. TS 8.

On November 10, 2008, he was patrolling southbound on Interstate Route 95. TS 9. At about 10:45 p.m., while traveling through North Hampton, he pulled over a car that had no light on its rear license plate. *Id.*; *see* RSA 266:44 (2004). It was driven by the defendant, and there was a male passenger. TS 10.

As he approached the car on foot, Ingham detected "a strong odor of fresh marijuana coming from inside the vehicle." TS 10-11. Ingham was very familiar with the odors of fresh and burnt marijuana, which he described as "[t]otally two different smells." TS 11. When he reached the driver's window, Ingham also noted that the defendant's eyes were "extremely bloodshot and glassy." TS 10. After getting the defendant's identification, Ingham returned to his cruiser to write up the motor vehicle infraction; he noticed that the defendant kept looking at him in the side view mirror. TS 12. From long experience, Ingham thought this was

unusual. *Id.* It was also unusual that the passenger kept looking straight ahead, and did not converse with the driver. TS 12-13.

Ingham concluded that he needed to investigate the possibilities that the car was transporting marijuana, and that the driver was impaired. TS 13. He returned to the defendant and asked him to step out of the car. *Id.* He then mentioned his concern about the smell and asked the defendant where he was coming from and where he was going. TS 14. The defendant said that he was coming from Connecticut and had been going to Maine, but just as he entered Maine he had received a phone call from his girlfriend that caused him to turn around and head back toward Connecticut because of an emergency. *Id.* He said he had left Connecticut at 5:00 p.m. *Id.* A brief field sobriety test persuaded Ingham that the defendant was not impaired. TS 13-14.

Ingham asked him where he had been going in Maine, and he said to visit friends, but was unable to say where he had planned to meet them. *Id.* Finding this suspicious, Ingham then went to the passenger and immediately noticed that he had "green vegetative matter … all over his lap"; Ingham recognized it as marijuana. TS 15. He told the passenger this, and the passenger admitted that he and the defendant had smoked a joint earlier that night. TS 15-16. Ingham then asked him about their itinerary, and he said they had left Connecticut at noon and met with friends in Maine, where they had lunch and dinner. TS 16-17. He denied that they were returning because of an emergency. TS 17.

Ingham knew that the marijuana on the passenger's lap was not a sufficient quantity to produce the smell he had noticed. TS 18. He went back to the defendant and asked for consent to search the car. TS 17. The defendant never gave him a direct reply, but said there was nothing in the car. TS 18-19. After asking three times and still not getting a yes or no answer, Ingham told the defendant that he was seizing the car. TS 19. He said that he was going to take it to the Troop A barracks in Epping and hold it until a search warrant could be obtained. *Id.*

The defendant repeated that there was nothing in the car, and asked how he would get home. TS 20. Ingham called for another cruiser and had the defendant and his passenger driven to a rest area at the Massachusetts border, where they could use a telephone and arrange for a ride home. *Id.* Ingham then waited until a tow truck picked up the defendant's car, and followed it to the Troop A barracks. TS 20-21. Although his drug-detecting canine had been in his cruiser throughout this incident, Ingham elected to wait until they arrived at the barracks before having the dog check the car. TS 21.

Within an hour after his arrival, Ingham took the dog to the car, and the dog immediately "alerted" on the car's trunk. TS 23. Ingham then completed an affidavit and application for a search warrant, which was approved early in the morning of November 11, 2008. TS 31-32. Ingham searched the car's trunk and

found just under a pound of marijuana. TS 32-33. It was of a type that emits a more pungent odor than other varieties of the drug. TS 34-35.

Ingham testified that, if he had wished to do so, he could have arrested both occupants of the car for possession and transportation of the marijuana that was in the passenger's lap. TS 51. He would then have arranged for an inventory search of the car incidental to the arrest, and this search would have revealed the marijuana in the trunk. *Id.*

SUMMARY OF THE ARGUMENT

Because suppression is justified only when the challenged evidence is a product of illegal governmental activity, the defendant's argument that his detention was illegally prolonged can only be relevant if that detention led directly to the discovery of the drugs in the trunk of his car by tainting the search warrant affidavit. Although he does not make such a claim expressly in his brief, the State will assume that he is making the claim implicitly.

The officer had probable cause to search the entire car before he spoke to the defendant, because the strong odor of fresh marijuana is sufficient to provide probable cause. Even if it were not, that smell together with the defendant's glassy, bloodshot eyes and the nervous behavior by him and his passenger gave the officer reasonable suspicion that justified his asking questions and conducting a brief field sobriety test. The two men's conflicting stories, the presence of a small amount of marijuana on the passenger's lap, and his admission that both men had recently smoked marijuana, combined with the above facts to justify seizure of the car and its subsequent search pursuant to the warrant.

ARGUMENT

THE DRUGS WERE DISCOVERED PURSUANT TO A VALID SEARCH WARRANT, WITH AN AFFIDAVIT CONTAINING FACTS DISCOVERED DURING A LEGAL TRAFFIC STOP THAT WAS EXTENDED DUE TO REASONABLE SUSPICION BASED ON THE STRONG SMELL OF MARIJUANA AND SUSPICIOUS BEHAVIOR BY THE CAR'S OCCUPANTS.

The defendant argues that the trial court erred in denying his motion to suppress the marijuana found in the trunk of his car. This Court's "review of the trial court's order on a motion to suppress is *de novo*, except as to any controlling facts determined by the trial court." *State v. Corrado*, 154 N.H. 43, 44 (2006). Because Ingham had probable cause both to search the car and to detain the defendant even before speaking to him, the motion to suppress was properly denied.

The defendant argues that, while Trooper Ingham's stop of his car was concededly proper, Ingham illegally extended that stop when he ordered the defendant out of the car, again when he inquired about the defendant's itinerary, and yet again when he conducted a brief field sobriety test. DB 12-16. The defendant then argues that these allegedly improper actions should trigger application of the exclusionary rule under part I, article 19 of the New Hampshire Constitution and the Fourth Amendment to the United States Constitution, and should have caused the trial court to suppress the marijuana found in the trunk of his car. DB 18-19.

This argument, as the State pointed out in its objection to the motion to suppress, focuses on facts that have no constitutional significance, at least not in this case. DBA 28 n.2. The drugs in this case were not seized from the defendant's person, but from his car, and they were seized pursuant to a search warrant whose validity the defendant does not challenge in his brief, although in the superior court he appeared to argue that the warrant was tainted by the use of information obtained as a result of his illegal detention. DBA 16-18. Any illegality in the defendant's detention is irrelevant to the question of whether the drugs were illegally seized, unless the latter seizure depended on the former. "Suppression is not justified unless the challenged evidence is in some sense the product of illegal governmental activity." *Segura v. United States*, 468 U.S. 796, 815 (1984) (quotation omitted). The defendant does not make such a claim expressly, and this Court may therefore dismiss the appeal on that ground. This brief, however, will assume for purposes of argument that the defendant is making such a claim implicitly. Both the defendant's detention and the seizure and subsequent search of the car were legal.

If a search warrant is based on facts that were learned only as the result of an illegal search or seizure, then any evidence obtained as a result of the warrant is also tainted. *State v. Osborne*, 119 N.H. 427, 431 (1979). The trial court found that the warrant was properly issued because the car was legally seized and the affidavit established probable cause that drugs would be found in the car, even

without including the fact that a drug-detecting canine had indicated the presence of drugs. DBA 9. Although the court mentioned several facts observed by Ingham in addition to the strong smell of fresh marijuana, DBA 8-9, that smell alone was sufficient to establish probable cause to search the entire car, including the trunk.

The trial court credited Ingham's testimony "about his ability to distinguish between the smell of burnt and fresh marijuana and that certain types of marijuana are much more pungent than others." DBA 2. The defendant does not challenge this testimony. This Court has held that "[a]n officer with sufficient experience to recognize the odor of burning marijuana has probable cause to suspect its presence when he detects the odor within the confines of an automobile." *State v. Gilson*, 116 N.H. 230, 233 (1976). In *United States v. Johns*, 469 U.S. 478 (1985), the Court said: "After the officers came closer and detected the distinct odor of [fresh] marijuana, they had probable cause to believe that the vehicles contained contraband." *Id.* at 482.

While some courts hold that the odor of burnt marijuana only justifies a search of the passenger compartment, *see, e.g., United States v. Nielsen*, 9 F.3d 1487, 1491 (10th Cir. 1993), the same courts hold that the smell of fresh, or raw, marijuana justifies a search of the entire vehicle. *United States v. Downs*, 151 F.3d 1301, 1303 (10th Cir. 1998); *accord State v. Wright*, 977 P.2d 505, 507-08 (Utah Ct. App. 1999). Other courts make no such distinction, but hold that even

the smell of burnt marijuana is sufficient to search the entire car. *See, e.g., State v. Kazmierczak*, 605 N.W.2d 667, 671-75 & n.13 (Mich. 2000) ("the smell of burned, burning, and unburned marijuana, when immediately apparent, are equally incriminating"). Still other courts have held that the trunk may be searched if a legal search of the passenger compartment fails to turn up enough marijuana to account for the strength of the odor. *State v. Sarto*, 481 A.2d 281, 286 (N.J. Super. Ct. App. Div. 1984); *Commonwealth v. Stoner*, 344 A.2d 633, 635-36 (Pa. Super. Ct. 1975). *See generally* Andrea L. Ben-Yosef, Annotation, *Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana—State Cases*, 114 A.L.R.5th 173, 189 (2003) ("The majority of courts have found that the odor of marijuana alone supplies the probable cause for a warrantless search."); Andrea L. Ben-Yosef, Annotation, *Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana—Federal Cases*, 188 A.L.R. Fed. 487, 497 (2003) (same).

Here, Trooper Ingham, who had very extensive experience in the detection of drugs, smelled a strong odor of fresh marijuana as he approached the defendant's car. TS 10-11. At this point, he had probable cause to search the entire car for marijuana. *Downs*, 151 F.3d at 1303. This Court need not decide whether probable cause existed at this point, however, because there can be no doubt that Ingham had a reasonable suspicion of criminal activity sufficient to extend the stop of the defendant's car beyond its original purpose.

In *State v. McKinnon-Andrews*, 151 N.H. 19 (2004), this Court discussed the permissible reasons for extending a traffic stop by asking questions: "If the question is not reasonably related to the purpose of the stop, [this Court] must consider whether the law enforcement officer had a reasonable, articulable suspicion that would justify the question. If the question is so justified, no constitutional violation occurs." *Id.* at 25 (quotation and brackets omitted). Here, Ingham had both the smell of marijuana and his observation that the defendant had very bloodshot and glassy eyes. TS 10. He also had seen the defendant continually watch him through his side mirror, and the passenger stare straight ahead, both unusual acts that suggested they were nervous or apprehensive. TS 12-13. All this was sufficient to provide a reason to extend the traffic stop to confirm or dispel his suspicions, both as to the presence of marijuana, *cf. State v. Livingston*, 153 N.H. 399, 404-05 (2006) (smell of burnt marijuana as officer approached truck, plus driver's nervous behavior and bloodshot eyes, constituted "reasonable suspicion to detain the defendant and question him regarding the presence of marijuana in his vehicle"), and as to the possibility that the defendant was impaired, *cf. Cole v. State*, 562 S.E.2d 720, 721 (Ga. Ct. App. 2002) (smell of marijuana from vehicle, plus driver's nervous behavior and watery, bloodshot eyes created reasonable suspicion of both impairment and presence of marijuana).

Indeed, the act of asking the defendant to step out of the car and the questions addressed to him and to the passenger about their itinerary were

permissible even without reasonable suspicion. *Cf. State v. Turmel*, 150 N.H. 377, 384 (2003) ("[the officer] asked the defendant to step out of the car, a permissible request during an investigative stop"); *United States v. Linkous*, 285 F.3d 716, 719 (8th Cir. 2002) ("An officer making a traffic stop does not violate the Fourth Amendment by asking the driver his destination and purpose, checking the license and registration, or requesting the driver to step over to the patrol car. A police officer may undertake similar questioning of the vehicle's occupants to verify the information provided by the driver." (Citation omitted.)).

"Probable cause to search exists if the man of ordinary caution would be justified in believing that what is sought will be found in the place to be searched and that what is sought, if not contraband or fruits or implements of a crime, will aid in a particular apprehension or conviction." *State v. Doe*, 115 N.H. 682, 685 (1975) (citation and quotation omitted). Once the defendant and his passenger had given completely different accounts of their trip, TS 14-17, and Ingham had seen marijuana on the passenger's lap and obtained his admission that he and the defendant had smoked marijuana earlier, TS 15-16, he had ample probable cause to seize the car, as the trial court ruled. DBA 8-9; *cf. Gilson*, 116 N.H. at 233-34 (informant's tip plus officer's knowledge of driver's past marijuana use created probable cause that he and defendant possessed marijuana: "Certainly, the officer would have been justified in holding the vehicle to await a magistrate's warrant."). He also had probable cause to search the entire car, including the trunk, especially

in light of the fact that the marijuana he had seen was far too small a quantity to explain the strength of the odor. TS 18; *cf. Sarto*, 481 A.2d at 286; *Stoner*, 344 A.2d at 635-36.

The trial court was accordingly correct when it ruled that the affidavit was both untainted by illegally seized evidence and sufficient to establish probable cause to search the car, even if all references to the subsequent dog sniff were ignored. DBA 8-9. It follows that there are no grounds to suppress the drugs found as a result of that warrant. The trial court's order denying the motion to suppress should be upheld.

CONCLUSION

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

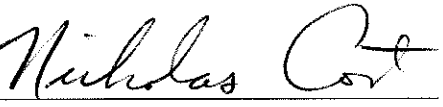
The State requests a 15-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Michael A. Delaney
Attorney General



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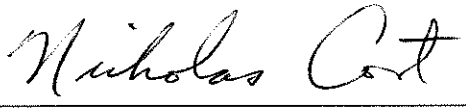
April 26, 2010

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Mark Stevens, Esq., counsel of record.



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