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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

FREDDIE WILKINS, III,

Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 367209
Circuit Court No. 23-02112-FH

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APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT OR ORDER APPEALED

Defendant-Appellant, Freddie Wilkins, III, moves this Court, through his appointed counsel,[1] for leave to appeal the opinion issued by the Court of Appeals on September 5, 2024 (the "Opinion").[2] In its Opinion, the Court of Appeals affirmed the order issued by the 17th Circuit Court on June 9, 2023 (the "Order"),[3] wherein the Honorable Scott A. Noto denied Mr. Wilkins' Motion to Suppress Evidence (the "Motion to Suppress").[4] The Court of Appeals held that although Trooper Tompkins exceeded the permissible scope of *Terry* when he searched Mr. Wilkins for marijuana during a traffic stop, the pistol later found in the vehicle – i.e., the pistol found after the *Terry* investigation had been unconstitutionally prolonged – should not be suppressed because it was not a "fruit" of the unlawful detention.[5] The Court of Appeals also held for what appears to be the first time in Michigan history that the automobile exception authorizes the warrantless search of a vehicle even if an officer only has probable cause to believe the vehicle contains evidence of a civil infraction – not a crime.[6] This Court has jurisdiction to hear this appeal as this is a criminal case, and this application was filed within 56 days of the Opinion. *See* MCR 7.303(B)(1); MCR 7.305(C)(2)(a).

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[1] Exhibit 1, Notice of Attorney Appointment Determination.
[2] Exhibit 2, Opinion.
[3] Exhibit 3, Order.
[4] Exhibit 4, Motion to Suppress.
[5] Ex. 2, p. 7-10.
[6] *Id.* at 4-7.

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QUESTIONS PRESENTED

A. WAS EVIDENCE FOUND BY TROOPER TOMPKINS AFTER HE EXCEEDED THE PERMISSIBLE SCOPE OF THE *TERRY* INVESTIGATION "FRUIT" OF THE UNCONSTITIONALLY PROLONGED *TERRY* INVESTIGATION AND THEREFORE SUBJECT TO SUPPRESSION?

Court of Appeals answers, "No."

Defendant-Appellant answers, "Yes."

B. SHOULD THE AUTOMOBILE EXCEPTION BE EXTENDED TO SEARCHES FOR EVIDENCE OF CIVIL INFRACTIONS?

Court of Appeals answers, "Yes."

Defendant-Appellant answers, "No."

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MATERIAL PROCEEDINGS AND FACTS

On January 16, 2023, Trooper Tompkins stopped Mr. Wilkins for speeding.[7] After smelling the odor of marijuana and learning that Mr. Wilkins and his passenger were under 21, Trooper Tompkins initiated a *Terry* investigation into whether either occupant possessed marijuana in violation of Section 15(3) the Michigan Regulation and Taxation of Marihuana Act (the "MRTMA").[8] Section 15(3) of the MRTMA makes it a ***civil infraction*** for anyone under 21 to possess not more than 2.5 ounces of marijuana.[9]

During the *Terry* investigation, Trooper Tompkins removed Mr. Wilkins from the vehicle and searched him.[10] ***This was an evidentiary search for marijuana – not a Terry pat down for weapons.***[11] Finding nothing, Trooper Tompkins removed the passenger from the vehicle, who then told him that she had some "shake" (a small amount of marijuana) in the vehicle.[12] "Given this information, Trooper Tompkins began a search of the vehicle."[13] In the vehicle, Trooper Tompkins found the pistol giving rise to the pending CCW charge against Mr. Wilkins.[14]

On May 10, 2023, Mr. Wilkins filed his Motion to Suppress in the trial court, wherein he argued that the pistol must be suppressed for two reasons.[15] First, Mr. Wilkins argued that Trooper Tompkins exceeded the permissible scope of *Terry* when he searched him and, by impermissibly searching him, unconstitutionally prolonged the *Terry* investigation rendering the detention unlawful from that point forward.[16] Thus, Mr. Wilkins argued that all evidence discovered thereafter (including the pistol) must be suppressed.[17] Second, Mr. Wilkins argued that even if Trooper Tompkins did not unconstitutionally prolong the *Terry* investigation by searching him,

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[7] Ex. 3, p. 1, 2.
[8] *Id.* at 1, 2, 4.
[9] MCL 333.27965(3). A typical "joint" contains about 0.32 grams of marijuana. *See* Christopher Ingraham, *One of the Big Questions in Marijuana Research has been Answered*, WASH. POST (Jul. 7, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/07/07/scientists-have-finally-figured-out-how-much-weed-is-in-a-joint. Thus, 2.5 ounces of marijuana is equivalent to well over 200 "joints."
[10] Ex. 3, p. 2.
[11] *Id.* at 2, 4; *see also* Exhibit 5, Preliminary Examination Transcript, p. 11-13. In lieu of a new evidentiary hearing, Mr. Wilkins stipulated to use of the preliminary examination testimony for purposes of resolving the Motion to Suppress. *See* Ex. 4, p. 1, 2, n.1.
[12] Ex. 3, p. 2.
[13] *Id.*
[14] *Id.*
[15] *See* Ex. 4.
[16] *Id.* at PP 8-10.
[17] *Id.* at P 10.

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the subsequent search of the vehicle was not justified by the automobile exception because Trooper Tompkins was searching for evidence of a civil infraction – not a crime.[18]

On June 2, 2023, the trial court heard oral arguments on the Motion to Suppress and took the matter under advisement.[19] On June 9, 2023, the trial court issued its Order denying the Motion to Suppress.[20] In its Order, the trial court first made the following findings of fact regarding the circumstances surrounding the warrantless search of the vehicle:

> The Parties agree on the relevant facts at issue in the motion. On January 16, 2023, Michigan State Trooper James Tompkins pulled over a Honda CR-V for speeding on Alpine Avenue near 7 Mile Road. **(See Def Ex 1, Tr p 4-5.)** Inside the vehicle was Defendant, who was driving, and a passenger sitting in the front passenger seat. **(Tr at 6, 13.)** Trooper Tompkins approached the vehicle on the passenger side. **(Tr at 10.)** The passenger side window was down. **(Id.)** As Trooper Tompkins approached, he smelled marijuana. **(Id.)** He did not see any marijuana and observed no visible signs that Defendant was intoxicated. **(Tr. At 10, 12.)** The Trooper then continued with the traffic stop, asking why he was speeding, where they were going, and checked their driver's licenses. **(Tr at 11.)** Upon review of their licenses, he noticed that Defendant and his passenger were both under the age of 21. **(Id.)**
>
> Trooper Tompkins returned to his patrol car and requested backup. **(Id.)** Once backup arrived, he reapproached the vehicle and asked Defendant to step out of the vehicle. **(Id.)** He searched Defendant but did not find anything. **(Tr at 11, 13.)** Trooper Tompkins then asked the passenger to exit the vehicle. **(Tr at 7, 13.)** In response to his questions, the passenger admitted she had some "shake" (a small quantity of marijuana) in the vehicle. **(Id.)** Given this information, Trooper Tompkins began a search of the vehicle. **(Tr at 7.)** On the floor by the passenger's seat, he found a backpack, which he searched. **(Tr at 8.)** Inside the backpack were Ziplock cellophane packages, which are commonly used for marijuana, and a Glock semiautomatic pistol with a loaded magazine **(Tr at 8.)** Trooper Tompkins read Defendant his Miranda rights, which he waived. **(Tr at 9.)** Defendant admitted that the firearm was his and that he did not possess a concealed pistol license. **(Id.)** Defendant was charged with one count of carrying a concealed weapon.[21]

In its Order, the trial court then held that Trooper Tompkins did not exceed the permissible scope of the *Terry* investigation and therefore did not unconstitutionally prolong it when he searched Mr. Wilkins because "Trooper Tompkins' actions were based on specific, reasonable inferences drawn from the initial smell of marijuana and the age of the vehicle's occupants" – i.e., he had reasonable suspicion "to extend the scope and duration of the stop to determine what amount of

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[18] *Id.* at ¶¶ 11, 12.
[19] Ex. 3, p. 1. The Motion to Suppress Transcript is attached as Exhibit 6.
[20] *Id.* at 5.
[21] *Id.* at 1, 2.

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marijuana, if any, was present."[22] The trial court also held that because he "did not observe any amount of marijuana that would make possession a civil infraction," but rather "smelled and recognized the odor of marijuana," which "did not give … any indication of the amount of marijuana," Trooper Tompkins "had probable cause under the automobile exception to search the vehicle and its contents."[23]

Believing the trial court had erred, Mr. Wilkins first filed a Motion to Reconsider on June 29, 2023.[24] However, the trial court summarily denied that motion without oral argument on July 21, 2023 in an Order Denying Reconsideration.[25] On August 8, 2023, Mr. Wilkins next filed an Application for Leave to Appeal in the Court of Appeals.[26] However, on December 11, 2023, the Court of Appeals issued an order denying leave to appeal with the Honorable Douglas B. Shapiro dissenting (the "COA Order").[27] On December 21, 2023, Mr. Wilkins then filed an Application for Leave to Appeal in this Court,[28] and, on April 10, 2024, this Court remanded this case to the Court of Appeals for consideration as on leave granted.[29] On September 5, 2024, the Court of Appeals issued its Opinion affirming the trial court's denial of the Motion to Suppress.[30]

In its Opinion, the Court of Appeals held that although "Trooper Tompkins exceeded the permissible scope of *Terry* by performing a pat-down search unjustified by any concerns for officer safety,"[31] the pistol found during the subsequent search of the vehicle "need not be suppressed because it was not derivative of an illegality, i.e., it was not fruit of the poisonous tree."[32] The Court of Appeals also held "that probable cause exists to support a warrantless vehicle search *so long as* facts adequately support that the suspected activity is generally unlawful,"[33] even if the suspected activity is a mere civil infraction – not a crime.[34] Mr. Wilkins now seeks leave to appeal.

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[22] *Id.* at 4.
[23] *Id.* at 5.
[24] Exhibit 7, Motion to Reconsider.
[25] Exhibit 8, Order Denying Reconsideration.
[26] *See* Case Information, COA 367209/MSC 166481.
[27] Exhibit 9, COA Order.
[28] *See* Case Information, COA 367209/MSC 166481.
[29] Exhibit 10, Supreme Court Order.
[30] *See* Ex. 2.
[31] *Id.* at 10.
[32] *Id.* at 9 (internal quotations omitted).
[33] *Id.* at 6 (emphasis in original).
[34] *See id.* at 6-8.

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ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE DENIAL OF MR. WILKINS' MOTION TO SUPPRESS.

Standard of Review

This Court reviews for clear error a trial court's finding of facts and reviews de novo questions of constitutional law. *People v. Trakhtenberg*, 493 Mich. 38, 47 (2012). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made," *People v. Johnson*, 466 Mich. 491, 497-98 (2002), while de novo review "gives no deference to the trial court" but considers the issue "with fresh eyes." *Buchanan v. City Council of Flint*, 231 Mich. App. 536, 542 n. 3 (1998).

Statement of Law

The Fourth Amendment of the U.S. Constitution, along with its counterpart, Article I, Section 11 of the Michigan Constitution, prohibits the police from conducting unreasonable searches and seizures. U.S. CONST. amend IV; MICH. CONST. art. 1, § 11. The Fourth Amendment prohibition against unreasonable searches and seizures is enforceable against the States through the Fourteenth Amendment of the U.S. Constitution. *Mapp v. Ohio*, 367 U.S 643, 655 (1961). Evidence collected during an unreasonable search or seizure ordinarily must be suppressed, *People v. Dagwan*, 269 Mich. App. 338, 342 (2005), along with the "fruit" thereof – i.e., evidence "come at by exploitation of that illegality." *Wong Sun v. U.S.*, 371 U.S. 471, 487-88 (1963).

A search or seizure conducted without a valid warrant "is unreasonable per se under the Fourth Amendment to the United States Constitution and violates art. 1, § 11 of the Michigan Constitution unless shown to fall within one of the various exceptions to the warrant requirement." *People v. Hentkowski*, 154 Mich. App. 171, 176 (1986). To overcome a defendant's motion to suppress, the prosecution bears the burden of proving that a warrantless search or seizure fell within a warrant exception, *People v. Martinez*, 192 Mich. App. 57, 62 (1991), or, alternatively, that the exclusionary rule should not apply. *Brown v. Illinois*, 422 U.S. 590, 604 (1975).

A. *Terry* Investigations

One exception to the warrant requirement is an investigative *Terry* stop. *People v. Lucynski*, 509 Mich. 618, 625 (2022). "If an officer has at least a reasonable suspicion of criminal activity, based on articulable facts, then a temporary warrantless seizure is constitutional." *Id.*

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Terry investigations, though, "are limited in both scope and duration." *Johnson v. VanderKooi*, 509 Mich. 524, 539 (2022).

The permissible scope of a *Terry* investigation is limited to: (1) reasonable inquiries aimed at confirming or dispelling an officer's reasonable suspicion of criminal activity; and (2) if (and only if) an officer has reasonable suspicion that the person is armed and dangerous, a pat down search for weapons. *Minnesota v. Dickerson*, 508 U.S. 366, 373-74 (1993). However, "[n]othing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons." *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979). Indeed, *Terry* does not allow an officer to conduct "a general exploratory search for whatever evidence of criminal activity he might find." *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *see also Sibron v. New York*, 392 U.S. 40, 65-66 (1968) (an evidentiary search of a person during a *Terry* investigation "violates the guarantee of the Fourth Amendment."); *Dickerson*, 508 U.S. at 378 (an evidentiary search during a *Terry* investigation is an "unrelated" inquiry and "condemned").

As to duration, "a brief detention such as a *Terry* stop may last no longer than necessary to address the reasons justifying the stop." *Johnson*, 509 Mich. at 540. Accordingly, a *Terry* investigation "remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop." *Rodriguez v. U.S.*, 575 U.S. 348, 355 (2015) (cleaned up). The critical inquiry is whether the unrelated inquiry "'prolongs—i.e., adds time to—'the stop.'" *Id.* at 357. Even if the officer has not yet completed the *Terry* stop, if police activity outside the permissible scope of the *Terry* investigation "causes that completion to be delayed, the delayed detention remains a constitutional violation." *People v. Kavanaugh*, 320 Mich. App. 293, 301, n.6 (2017).

B. The Automobile Exception

Another exception to the warrant requirement is the automobile exception, which was first articulated almost a century ago in *Carroll v. U.S.*, 267 U.S. 132 (1925). *See Collins v. Virginia*, 584 U.S. 586, 591 (2018). The automobile exception applies "when an automobile or other vehicle is stopped and the police have probable cause to believe it contains evidence of a crime." *Colorado v. Bannister*, 449 U.S. 1, 3 (1980). "Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in the stated place." *People v. Brzezinski*, 243 Mich. App. 431, 433 (2000).

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Prior to this case, there appears to be no decision (published or unpublished) from the Court of Appeals or this Court in the nearly 100 years since *Carroll* extending the automobile exception to searches for evidence of a civil infraction. And, recently, the Supreme Judicial Court of Massachusetts has refused to extend the automobile exception to situations where the police only have probable cause to believe a vehicle contains evidence of a civil infraction – but not a crime. *See Com. v. Sheridan*, 470 Mass. 752, 757 (2015) ("Absent articulable facts supporting a belief that the vehicle contained an additional, criminal quantity of marijuana, the officers lacked probable cause to believe that a crime was being committed, and the search was impermissible.").

Discussion

A. ALTHOUGH THE COURT OF APPEALS RIGHTLY HELD THAT TROOPER TOMPKINS EXCEEDED THE PERMISSIBLE SCOPE OF *TERRY* WHEN HE SEARCHED MR. WILKINS, IT ERRED BY HOLDING THAT EVIDENCE FOUND THEREAFTER – THAT IS, AFTER THE *TERRY* INVESTIGATION HAD BEEN UNCONSTITIONALLY PROLONGED – SHOULD NOT BE SUPPRESSED BECAUSE IT WAS NOT "FRUIT" OF THE UNLAWFUL DETENTION.

Trooper Tompkins initially stopped Mr. Wilkins for a simple traffic violation – speeding. Then, after smelling the odor of marijuana and learning that both occupants of the vehicle were under 21 years old, he initiated a *Terry* investigation into whether the occupants of the vehicle were in violation of Section 15(3) of the MRTMA.[35] Section 15(3) of the MRTMA provides that "a person under 21 years of age who possesses not more than 2.5 ounces of marihuana … is responsible for a civil infraction[.]" MCL 333.27965(3)(a). However, while investigating whether the occupants of the vehicle were in violation of Section 15(3) of the MRTMA, Trooper Tompkins exceeded the permissible scope and duration of the *Terry* investigation.

Although *Terry* authorizes a limited pat down search for weapons if an officer has reasonable suspicion that a legally seized person is armed and dangerous, *Dickerson*, 508 U.S. at 373-74, *Terry* does not authorize an officer to conduct "a general exploratory search for whatever evidence of criminal activity he might find." 392 U.S. at 30. In other words, evidentiary searches are outside the permissible scope of *Terry*. *See Sibron*, 392 U.S. at 65-66 (an evidentiary search

[35] Trooper Tompkins only suspected Mr. Wilkins of two civil infractions – speeding and possible possession of marijuana. *See* Ex. 5, p. 11, 12. The trial court explicitly found that Trooper Tompkins "observed no visible signs that Defendant was intoxicated." Ex. 3, p. 2.

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during a *Terry* investigation "violates the guarantee of the Fourth Amendment."); *Dickerson*, 508 U.S. at 378 (an evidentiary search during a *Terry* investigation is an "unrelated" inquiry and "condemned"). Yet, in this case, Trooper Tompkins conducted an evidentiary search of Mr. Wilkins and, by taking the time to do so, prolonged the *Terry* investigation. Because a *Terry* investigation "remains lawful only so long as" the police do not prolong its duration by deviating from its permissible scope, *Rodriguez*, 575 U.S. at 355 (internal quotation omitted), all evidence found after the evidentiary search of Mr. Wilkins – i.e., all evidence found after the *Terry* investigation had been unconstitutionally prolonged – must be suppressed as a "fruit" of that unlawful detention. *See Wong Sun*, 371 U.S. at 484-85.

In its Order, though, the trial court held that Trooper Tompkins did not exceed the permissible scope of the *Terry* investigation when he searched Mr. Wilkins because his "actions were based on specific, reasonable inferences drawn from the initial smell of marijuana and the age of the vehicle's occupants" – i.e., Trooper Tompkins had reasonable suspicion "to extend the scope and duration of the stop to determine what amount of marijuana, if any, was present."[36] However, the question is not, did Trooper Tompkins have reasonable suspicion to initiate a *Terry* investigation? The question is, did Trooper Tompkins exceed the permissible scope of the *Terry* investigation when he searched Mr. Wilkins? As the Court of Appeals noted, the trial court "neglected to evaluate" ***that*** question.[37]

To be sure, a valid *Terry* investigation ***always*** involves specific and articulable facts giving rise to at least reasonable suspicion. *Lucynski*, 509 Mich. at 625. However, even with the requisite reasonable suspicion, an evidentiary search of a person is ***never*** allowed during a *Terry* investigation, *see Dickerson*, 508 U.S. at 378 (an "evidentiary search" during a *Terry* investigation is "condemned"), *Ybarra*, 444 U.S. at 93-94 ("Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons."), and ***never*** has been. *See Sibron*, 392 U.S. at 65-66 (an evidentiary search of a person during a *Terry* investigation "violates the guarantee of the Fourth Amendment").[38]

Thus, even assuming *arguendo* that Trooper Tompkins had reasonable suspicion "to extend the scope and duration of the stop to determine what amount of marijuana, if any, was present,"[39] the evidentiary search of Mr. Wilkins' person was still outside the permissible scope of the *Terry*

[36] Ex. 3, p. 4.
[37] Ex. 2, p. 3, n.6.
[38] The Supreme Court decided *Sibron* the very same day as *Terry*.
[39] Ex. 3, p. 4.

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investigation. In short, the search of Mr. Wilkins was an "unrelated" inquiry, *Dickerson*, 508 U.S. at 378, which unconstitutionally prolonged the *Terry* investigation and rendered it unlawful from that point forward. *See Rodriguez*, 575 U.S. at 355 (a *Terry* investigation "remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop") (cleaned up); *Kavanaugh*, 320 Mich. App. at 301, n. 6 (even if the police have not yet completed their *Terry* investigation, if police activity outside its permissible scope "causes that completion to be delayed, the delayed detention remains a constitutional violation."). And because Trooper Tompkins found the pistol in the vehicle ***after*** he had unconstitutionally prolonged the *Terry* investigation – that is, ***after*** the *Terry* stop had become an unlawful seizure – the pistol must be suppressed.

Now, in its Opinion, the Court of Appeals agreed with Mr. Wilkins that Trooper Tompkins exceeded the permissible scope of *Terry* when he searched him, but it used the wrong analysis to reach that conclusion. According to the Court of Appeals, "Trooper Tompkins exceeded the permissible scope of *Terry* by performing a pat-down search unjustified by any concerns for officer safety."[40] The problem is, Trooper Tompkins conducted an evidentiary search of Mr. Wilkins for marijuana – not a *Terry* pat down for weapons.[41] Thus, even if Trooper Tompkins had had reasonable suspicion to believe Mr. Wilkins was armed and dangerous (as the Court of Appeals rightly held, he did not), the search of Mr. Wilkins would still have been outside the scope of *Terry*. *See Dickerson*, 508 U.S. at 373 (if a search "goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry*"); *see also Sibron*, 392 U.S. at 65-66.

Yet, despite finding that Trooper Tompkins exceeded the permissible scope of *Terry* when he searched Mr. Wilkins (albeit using the wrong analysis), the Court of Appeals ultimately held that the pistol found during the subsequent search of the vehicle "need not be suppressed because it was not derivative of an illegality, i.e., it was not fruit of the poisonous tree."[42] Respectfully, that's incorrect. Before explaining why, it is important to note that the Court of Appeals received no specific briefing on attenuation because the prosecution never raised it – not in the trial court, not in the Court of Appeals, and not in this Court the first time around. *See Brown*, 422 U.S. at 604

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[40] Ex. 2, p. 10 (emphasis added).
[41] *Id.* at 2, 4; *see also* Ex. 5, p. 11-13. Given Trooper Tompkins' testimony and the trial court's findings of fact, it is unclear why the Court of Appeals believed Trooper Tompkins conducted a pat-down search of Mr. Wilkins, especially as counsel for Mr. Wilkins advised the panel during oral arguments that Trooper Tompkins conducted an evidentiary search.
[42] Ex. 2, p. 9 (internal quotations omitted).

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(the prosecution has the burden of showing attenuation).[43] Instead, the Court of Appeals raised and decided the issue *sua sponte*, which is ironic given its self-declared reluctance to do just that.[44]

With that said, the fundamental flaw in the Court of Appeals' attenuation analysis is that it failed to recognize that the evidentiary search of Mr. Wilkins resulted in ***two*** analytically distinct Fourth Amendment violations. First, the evidentiary search of Mr. Wilkins was, in and of itself, an unreasonable search. *See Sibron*, 392 U.S. at 65-66. And, yes, as the Court of Appeals noted, the unreasonable search, ***as such***, "did not reveal any evidence, nor did it affect or otherwise lead to the vehicle search principally at issue here." However, because the evidentiary search of Mr. Wilkins was an inquiry outside the permissible scope of the *Terry* investigation that prolonged it, the evidentiary search of Mr. Wilkins also rendered his continued seizure unreasonable from that point forward. *See Rodriguez*, 575 U.S. at 355; *Kavanaugh*, 320 Mich. App. at 301, n. 6. And, to be sure, not only did the search of the vehicle occur during the unreasonable seizure of Mr. Wilkins, Trooper Tompkins based his decision to search the vehicle on the admission secured from the passenger during the unreasonable seizure.[45] Accordingly, the pistol was "come at by exploitation of" the unconstitutionally prolonged *Terry* investigation – i.e., the unreasonable seizure, *Wong Sun*, 371 U.S. at 487-88, and the Court of Appeals clearly erred by not suppressing it.[46]

B. TROOPER TOMPKINS LACKED AUTHORITY TO SEARCH THE VEHICLE AS HE DID NOT HAVE PROBABLE CAUSE TO BELIEVE THAT IT CONTAINED A CRIMINAL AMOUNT OF MARIJUANA AND THE COURT OF APPEALS ERRED BY EXTENDING THE AUTOMOBILE EXCEPTION TO SEARCHES FOR EVIDENCE OF CIVIL INFRACTIONS.

Even if Trooper Tompkins did not exceed the permissible scope and duration of the *Terry* investigation when he searched Mr. Wilkins (or even if the pistol subsequently found in the vehicle

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[43] In its Brief on Appeal, the prosecution argued that the inevitable discovery rule applied – not the attenuation doctrine. Because the prosecution actually raised inevitable discovery as an issue, Mr. Wilkins thoroughly addressed (and refuted) it in his Reply in Support of Appellant's Brief.

[44] *See* Ex. 2, p. 6, n.11.

[45] Ex. 3, p. 2.

[46] Had the inquiry that prolonged the *Terry* investigation not been an unconstitutional search (i.e., a Fourth Amendment violation itself), the Court of Appeals likely would not have erred. If instead of prolonging the *Terry* investigation to search Mr. Wilkins, Trooper Tompkins had prolonged it to smoke a cigarette, the Court of Appeals would not have held that because the smoke break "did not reveal any evidence, nor did it affect or otherwise lead to the vehicle search," the pistol need not be suppressed. To the contrary, it would have held that the smoke break unconstitutionally prolonged the *Terry* investigation, and the pistol was a "fruit" of the ***unreasonable seizure***.

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was not a "fruit" of the unconstitutionally prolonged *Terry* investigation), the subsequent search of the vehicle was not justified by the automobile exception. The automobile exception applies "when an automobile or other vehicle is stopped and the police have probable cause to believe it contains evidence of a crime." *Bannister*, 449 U.S. at 3.[47] In this case, Trooper Tompkins did not have probable cause to believe that the vehicle contained evidence of a crime – i.e., over 2.5 ounces of marijuana. Simply put, the generic odor of marijuana coupled with an admission by an occupant that the vehicle contains some "shake," i.e., a small amount of cannabis residue, does not give rise to probable cause to believe the vehicle contains over 2.5 ounces of marijuana.[48] *See People v. Armstrong*, 344 Mich. App. 286, 300 (2022).

In its Order, though, the trial court held that because the police "did not observe any amount of marijuana that would make possession a civil infraction," but rather "smelled and recognized the odor of marijuana," which "did not give … any indication of the amount of marijuana," the

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[47] As discussed in note 55, *infra*, there was a historically important distinction in the search and seizure context between "contraband" and mere "evidence of a crime." In short, "contraband" was subject to search and seizure, while mere "evidence of a crime" was not. In 1967, though, the U.S. Supreme Court rejected that distinction and held that both were subject to search and seizure. *See Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 300-01 (1967). After *Hayden*, the U.S. Supreme Court has, at times, used the phrase "contraband or evidence of a crime" to describe the scope of the automobile exception, *see, e.g., Arkansas v. Sanders*, 442 U.S. 753, 760 (1979), implicitly recognizing the historically relevant distinction between the two categories. However, it has also used the phrase "evidence of a crime" by itself in a broader, non-technical, modern sense that subsumes "contraband." Indeed, the "evidence of a crime" at issue in *Bannister* was wrenches and stolen lug nuts – i.e., derivative contraband. The fact that the U.S. Supreme Court has used the phrase "evidence of a ***crime***" as shorthand for "contraband" buttresses the argument fleshed out below that there must be a nexus between an item to be searched for and seized and ***criminal behavior***.

[48] In its Brief on Appeal, the prosecution also asserted that Mr. Wilkins and his passenger initially denied that the vehicle contained marijuana and, therefore, when the passenger admitted that she had some "shake" in the vehicle, Trooper Tompkins knew they had "lied." Brief on Appeal, p. 1, 6-7, 9-11. There are numerous problems with this. ***First***, the trial court did no find that Mr. Wilkins and his passenger denied that the vehicle contained marijuana. *See* Ex. 3, p. 1, 2. ***Second***, even if the trial court had made that finding, denying that one has "marijuana" is consistent with later admitting to having some "shake" as "marijuana" typically refers to smokeable cannabis, while "shake" is slang for cannabis residue. This is not some ad hoc distinction but aligns with what Trooper Tompkins actually found in the vehicle – empty dispensary bags. *See id.* at 2. ***Third***, the passenger did not admit that she had some "shake" in the vehicle until after Trooper Tompkins had searched Mr. Wilkins. As such, that admission, which allegedly exposed the "lie," was a "fruit" of the unconstitutional seizure. ***Fourth***, even if the trial court had found that Mr. Wilkins and his passenger had made the denial and even if the denial was a "lie" and even if the "lie" was not discovered during the unconstitutional seizure, it was a "lie" about the *unlawful* (albeit noncriminal) possession of marijuana. Hence, *People v. Moorman* is readily distinguishable. 331 Mich. App. 481, 488 (2020) ("if defendant's possession was *lawful*, it is reasonable to believe that he would simply admit to marijuana being in the vehicle") (emphasis added). A "lie" to avoid a citation for a civil infraction does not establish probable cause of a criminal amount of marijuana.

police "had probable cause under the automobile exception to search the vehicle and its contents."[49] Respectfully, that's incorrect. If Trooper Tompkins did not have "any indication of the amount of marijuana" in the vehicle as the trial court found,[50] then, *a fortiori*, Trooper Tompkins did not have probable cause to believe that the vehicle contained a criminal amount of marijuana (i.e., over 2.5 ounces of marijuana).

To its credit, the Court of Appeals ***did not*** find that Trooper Tompkins had probable cause to believe that the vehicle contained a criminal amount of marijuana. Instead, the Court of Appeals held that the search of the vehicle was nevertheless lawful, because: (1) the automobile exception authorizes the warrantless search of a vehicle if there is probable cause to believe it contains "evidence of a crime *or* contraband,"[51] (2) contraband refers to items "'not legally possessed,'"[52] including items the possession of which is only a civil infraction, and (3) Trooper Tompkins had probable cause to believe the vehicle contained "illegally possessed marijuana,"[53] even if in a noncriminal amount.

The critical premise in the Court of Appeals' syllogism is the second one – its definition of "contraband." In support of the second premise, the Court of Appeals relied on *American Eagle Fireworks v. City of Lansing*, an unpublished, non-precedential, civil case from over 25 years ago involving 42 USC §1983 and malicious prosecution claims arising out of the "seizure and destruction of certain fireworks sold by plaintiffs." 1999 WL 33441137, at *1 (Mich. Ct. App. Jun. 18, 1999).[54] Importantly, the underlying possession of fireworks giving rise to *American Eagle* was a crime – not a civil infraction, and the fireworks seized were seized pursuant to warrant – not a warrant exception. *Id.* at 2. In short, the Court of Appeals decided to expand the automobile exception to the civil infraction context for what appears to be the first time in Michigan history based on a particular exposition of the term "contraband" found in a 25 year-old, unpublished, non-binding, civil case in which officers had a warrant and the civil infraction/crime distinction of paramount importance in this case was not even at issue. A slender reed to say the least.

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[49] Ex. 3, p. 5.
[50] *Id.*
[51] Ex. 2, p. 6 (emphasis in original).
[52] *Id.* at 7 (quoting *American Eagle Fireworks v. City of Lansing*, No. 206713, 1999 WL 33441137, *1 (Mich. Ct. App. Jun. 18, 1999)). *American Eagle* is attached as Exhibit 11.
[53] *Id.*
[54] "An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority." MCR 7.215(C)(1).

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Now, had Mr. Wilkins not pointed to binding authority, the Court of Appeals' reliance on *American Eagle* might be easier to understand. However, Mr. Wilkins explicitly cited to *Hayden*, 387 U.S. 294 – ***a binding, U.S. Supreme Court decision*** – to show that "contraband," as used in the warrant exception context, means "property the possession of which is a *crime*" (contraband per se) and the "instrumentalities" and "fruits of a *crime*" (derivative contraband). *Id.* at 295-96 (emphasis added); *see One 1958 Plymouth Sedan v. Com. of Pa.*, 380 U.S. 693, 698-99 (1965) (explaining the distinction between contraband per se – i.e., "objects the possession of which, without more, constitutes a *crime*" – and derivative contraband) (emphasis added).

Then, relying on *Hayden*, Mr. Wilkins argued that the automobile exception authorizes the warrantless search of a vehicle if there is probable cause to believe it contains: (1) "property the possession of which is a *crime*," (contraband per se), (2) the "instrumentalities" and "fruits or a *crime*" (derivative contraband), or (3) mere "evidence of a *crime*."[55] Only this interpretation of the phrase 'contraband or evidence of a crime' makes sense of the requirement in *Hayden* that there must be "a nexus—automatically provided in the case of fruits, instrumentalities or contraband [per se]—between the item to be seized and *criminal behavior*." 387 U.S. at 307 (emphasis added). And because in this case there was no nexus to criminal behavior, the automobile exception was

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[55] As explained in note 47, *supra*, "contraband" was historically subject to search and seizure, while mere "evidence of a crime" was not. *See* Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 2.6(d) (6th ed. 2024); *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765). In 1967, though, the Supreme Court rejected "the distinction as based on premises no longer accepted as rules governing the application of the Fourth Amendment." *Hayden*, 387 U.S. at 300-01. Thus, the phrase "contraband or evidence of a crime," when used to describe the automobile exception, simply indicates that not just items that are criminal to possess (contraband per se) and instrumentalities and fruits of crime (derivative contraband) are subject to search and seizure, but so is mere "evidence of a crime," even though that was not always the case. Consistent with the foregoing, it appears that the phrase "contraband or evidence of a crime" was never used by the U.S. Supreme Court until after *Hayden*.

It is also important to note that interpretating "contraband" in the phrase "contraband or evidence of a crime" to include items that are ***not*** criminal to possess would create an irrational asymmetry. Indeed, if "contraband" means anything unlawful to possess (even if merely a civil infraction), why does the phrase purport to only authorize searches for "evidence of a crime" and not also evidence of a civil infraction? The question is critical as *Hayden* noted, "Nothing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband. … Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. … Indeed, the distinction is wholly irrational[.]" *Id.* at 301. The fact that the phrase only references "evidence of a crime," and not also evidence of a civil infraction, confirms that "contraband" means "property the possession of which a *crime*" (contraband per se) and "instrumentalities" and "fruits or a *crime*" (derivative contraband), *Id.* at 295-96 (emphasis added).

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inapplicable, the search of the vehicle was unconstitutional, and the pistol must be suppressed. *See Sheridan*, 470 Mass. at 757. The Court of Appeals, though, simply ignored *Hayden* and its implications – not even citing it in its Opinion and instead relied on *American Eagle* (which, in addition to its other problems, did not even address the civil infraction/crime distinction).

Moreover, not only did the Court of Appeals ignore *Hayden*, it also ignored three additional reasons offered by Mr. Wilkins for why the automobile exception does not apply in, and should not be extended to, the civil infraction context. First, "[i]n delineating the constitutional safeguards applicable in particular contexts," a court must weigh "the public interest against the Fourth Amendment interest of the individual." *U.S. v. Martinez-Fuerte*, 428 U.S 543, 555 (1976). And, unlike when it criminalizes an activity, when a state classifies a particular activity (like possession of not more than 2.5 ounces of marijuana by an individual under 21 years of age) as a civil infraction, it objectively indicates that the public interest at stake is negligible. *See Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984). On the other hand, "a motorist's privacy interest in his vehicle," although less substantial than in his home, "is nevertheless important." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). Given the negligible public interest and the "important" personal interest at stake, extension of the automobile exception from the criminal context to the civil context is unwarranted.

Second, the extension of the automobile exception to the civil infraction context would have far reaching consequences. Indeed, if the Opinion is not reversed and the automobile exception is extended to situations where the police only have probable cause to believe a vehicle contains evidence of a civil infraction, that decision will not be cabined to individuals under 21 years of age suspected of possessing not more than 2.5 ounces of marijuana. It will apply to all civil infractions. So, for example, a motorist suspected of speeding may have his vehicle's black box seized and searched. Or, a motorist suspected of texting while driving may have his phone seized and searched. Or, a motorist suspected of rolling through a stop sign may have his dash cam seized and searched. In short, the expansion of the automobile exception to civil infractions will vastly curtail personal privacy in a manner totally at odds with the reasonable expectation of this State's citizens.

Third, exceptions to the warrant requirement are "jealously and carefully drawn." *Jones v. U.S.*, 357 U.S. 493, 499 (1958). Accordingly, it is not surprising that the Supreme Judicial Court of Massachusetts has refused to extend the automobile exception to situations where the police

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only have probable cause to believe the vehicle contains evidence of a civil infraction – but not a crime. *See Sheridan*, 470 Mass. at 757. The Court of Appeals, though, redrew the "jealously and carefully drawn" automobile exception and did not even interact with *Sheridan*. Unlike the Court of Appeals, this Court should follow the lead of Massachusetts' highest court and explicitly refuse to greatly expand the automobile exception nearly a century after *Carroll*.

II. THE COURT SHOULD GRANT LEAVE AS THIS APPLICATION RAISES A LEGAL QUESTION OF SIGNIFICANT PUBLIC INTEREST AND MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE: SHOULD THE AUTOMOBILE EXCEPTION BE EXTENDED TO SEARCHES FOR EVIDENCE OF CIVIL INFRACTIONS?

Before December 6, 2018, the possession and use of marijuana was a crime in Michigan, and police officers routinely searched vehicles pursuant to the automobile exception based on the smell of marijuana alone. *See People v. Kazmierzak*, 461 Mich. 411, 424 (2000). That changed, though, after the electorate adopted the MRTMA. "Passage of the MRTMA decriminalized possession and use of marijuana," *Armstrong*, 344 Mich. App. at 299, and the smell of marijuana, by itself, no longer gives the police probable cause to believe a vehicle contains evidence of a crime. *See id.* at 299-300. However, having become accustomed to searching vehicles based on the smell of marijuana, police officers in this State are now invoking the automobile exception to search for noncriminal amounts of marijuana possessed by individuals under 21 years old – i.e., for evidence of a civil infraction.

The question whether the automobile exception should be extended to searches for evidence of civil infractions is a legal question of significant public interest and major significance to this State's jurisprudence. *See* MCR 7.305(B)(2); MCR 7.305(B)(3). As stated above, "a motorist's privacy interest in his vehicle," is "important," *Gant*, 556 U.S. at 345, and the ramifications of extending the automobile exception would be far-reaching. Especially given the fact that this Court has ordered oral arguments in *Armstrong*, this Court should grant leave in this case and definitively answer the question raised by Mr. Wilkins's application – i.e., should the automobile exception be extended to searches for evidence of civil infractions?[56]

[56] This Court should also grant leave because the Court of Appeal's holding that the pistol was not a "fruit" of the unconstitutionally prolonged *Terry* investigation is ***clearly erroneous*** and will cause a material injustice to Mr. Wilkins. *See* MCR 7.305(B)(5)(a).

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RELIEF REQUESTED

Mr. Wilkins requests this Court grant leave to appeal, vacate the Opinion issued by Court of Appeals on September 5, 2024 and the Order issued by the 17th Circuit Court on June 9, 2023, and remand this case to the trial court with instructions that it enter an order suppressing all evidence (including the pistol) discovered by the People during their unconstitutionally prolonged *Terry* investigation and unconstitutional vehicle search on January 16, 2023.*

Date: October 30, 2024

Respectfully submitted,

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*According to the word count of the word-processing system used to prepare this Application for Leave to Appeal, the "Material Proceedings and Facts," "Argument," and "Relief Requested" sections of this document contain 6,480 words.

Exhibit 1

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Kent County Indigent Defense Administration

NOTICE OF ATTORNEY APPOINTMENT DETERMINATION

Date: October 29, 2024

In the 17th Circuit Court, Case 23-02112-FH

Judge HONORABLE SCOTT A. NOTO

Defendant FREDDIE WILKINS III, of

750 MYRTLE ST NW APT 2 GRAND RAPIDS MI 49504

PH: 773-957-8487

is charged with:

WEAPONS-CARRYING CONCEALED

After review of Defendant's request for an appointed attorney, the request is APPROVED.

Attorney Appointed: LAURA JOYCE (P76649)
KENT COUNTY OFFICE OF THE PUBLIC DEFENDER
laura.joyce@kentcountymi.gov
PH 616-632-7434

_____

Deputy Public Defender - Administrator
Indigent-Defense@kentcountymi.gov

Exhibit 2

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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDDIE WILKINS III,

Defendant-Appellant.

UNPUBLISHED
September 5, 2024

No. 367209
Kent Circuit Court
LC No. 23-002112-FH

Before: SWARTZLE, P.J., and K. F. KELLY and YOUNG, JJ.

PER CURIAM

This interlocutory appeal has been remanded by our Supreme Court for consideration as on leave granted.[1] Freddie Wilkins III appeals the trial court's denial of his motion to suppress evidence discovered after a traffic stop of himself and another individual, when both were under the age of 21, during which the investigating officer smelled marijuana and the passenger later admitted that there was a small amount of marijuana in the vehicle. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The record here consists primarily of a preliminary examination transcript featuring testimony from one witness, Michigan State Police Trooper James Tompkins. Trooper Tompkins testified that on January 16, 2023, he observed a speeding vehicle and effectuated a traffic stop. The driver was defendant-appellant Freddie Wilkins III. Wilkins was driving with a passenger. Trooper Tompkins approached the passenger side of the vehicle and detected the odor of marijuana through the rolled-down window; based on the driver's licenses belonging to Wilkins and the passenger, neither was old enough to legally possess marijuana.[2] Neither Wilkins nor the

[1] *People v Wilkins III*, 4 NW3d 343 (Mich, 2024).

[2] The Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq.*, which was approved by voters in 2018, generally decriminalized the use and possession of marijuana by adults aged 21 years or older. See MCL 333.27952. Under the MRTMA, adults at

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passenger exhibited any signs of intoxication. Wilkins and the passenger both denied possessing any marijuana. At some point Trooper Tompkins returned to his cruiser to request a backup unit.

After requesting a second unit, Trooper Tompkins ordered Wilkins to exit the vehicle, and Wilkins denied having any firearms on his person.[3] Trooper Tompkins brought Wilkins back to his police cruiser, informed him that he was subject to a search, and performed a search of Wilkins' person and found nothing. Wilkins was not handcuffed at the time and was standing in front of Trooper Tompkins's police cruiser.

A second police unit arrived about 5 to 10 minutes after Trooper Tompkins requested assistance. Trooper Tompkins then asked the passenger to step out of the vehicle, and the passenger admitted that there was a small amount of marijuana in the vehicle.

Trooper Tomkins testified that he conducted a search of the vehicle based on the passenger's admission. He stated that he began his search based on the seeming civil infraction—a minor being in possession of marijuana—but thought that the search could reveal evidence of something more than a civil infraction. Trooper Tomkins did not seek consent to search. He searched the entire vehicle, including going through a backpack on the floorboard in front of the passenger's seat. In the backpack, Trooper Tomkins found plastic baggies consistent with those obtained from marijuana dispensaries and a Glock semiautomatic handgun with a 33-round magazine in it. Wilkins was then placed under arrest, handcuffed, and advised of his *Miranda*[4] rights. Wilkins admitted that he did not possess a concealed pistol license, the handgun belonged to him, and he knew the handgun was in the backpack.

Wilkins was charged with carrying a concealed weapon (CCW) in a vehicle, MCL 750.227. At the preliminary examination, defense counsel stated that the search was unconstitutional and Wilkins should not be bound over. When Wilkins was bound over to circuit

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least 21 years old may possess up to 2.5 ounces of marijuana. See MCL 333.27955(1)(a). But the MRTMA does not allow the use of marijuana in a public area, MCL 333.27954(1)(e); "smoking marihuana within the passenger area of a vehicle upon a public way," MCL 333.27954(1)(g); or operating a vehicle while under the influence of marijuana, MCL 333.27954(1)(a). Under MCL 333.27965(3), persons under 21 possessing 2.5 ounces or less of marijuana are guilty of a civil infraction. Anyone possessing between 2.5 to 5 ounces is also guilty of a civil infraction (or a misdemeanor for a third offense), MCL 333.27965(2), and possession of more than 5 ounces is always a misdemeanor, MCL 333.27965(4). As this Court observed in *People v Armstrong*, 344 Mich App 286, 297-298; 1 NW 3d 299 (2022), "analysis of search-and-seizure law is now much more complicated and nuanced than it was when marijuana was unlawful in all circumstances in Michigan."

[3] It is somewhat unclear from the record whether this occurred before or after backup arrived. At one point, Trooper Tompkins testified that "[o]nce [backup] arrived, I recontacted [Wilkins] and asked him out of the car." But Trooper Tompkins later seemed to confirm that he asked Wilkins out of the vehicle after requesting backup.

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

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court, he again raised the issue of the constitutionality of the search in a motion to suppress. Wilkins argued that the trooper's search of his person exceeded the permissible scope and duration of *Terry*,[5] the search of the vehicle was not justified by the automobile exception to the warrant requirement, and the automobile exception should not extend to suspected civil infractions.

The circuit court denied Wilkins' motion, finding that Trooper Tompkins's actions "were based on specific, reasonable inferences drawn from the initial smell of marijuana and the age of the vehicle's occupants." According to the circuit court, "Trooper Tompkins had no way of knowing what amount of marijuana was in the vehicle, if any. He therefore was entitled to extend the scope of and duration of the stop to determine what amount of marijuana, if any, was present." Therefore, the scope and duration of the *Terry* stop were not exceeded.[6]

Wilkins now appeals.

II. STANDARD OF REVIEW

"We review de novo questions of constitutional law and a trial court's decision on a motion to suppress evidence. When the issue is preserved, a trial court's factual findings made when ruling on a motion to suppress are reviewed for clear error." *People v Serges*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 355554); slip op at 5 (cleaned up). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Swirles*, 218 Mich App 133, 136; 553 NW2d 357 (1996). "It is the prosecutor's burden to show that a search and seizure challenged by a defendant were justified by a recognized exception to the warrant requirement." *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

III. ANALYSIS

Both the United States and Michigan Constitutions guarantee protection against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Steele*, 292 Mich App 308, 314; 806 NW2d 753 (2011). "Fourth Amendment search and seizure protections also apply to brief investigative detentions." *Steele*, 292 Mich App at 314. "Searches and seizures, according to the United States Constitution and the Michigan Constitution, must be conducted reasonably, and in most cases that requires issuance of a warrant supported by probable cause, in order for the results to be admissible." *People v Armstrong*, 344 Mich App 286, 295; 1 NW 3d 299 (2022) (quotation marks and citation omitted).

This case involves two distinct but related exceptions to the warrant requirement, which we address in turn. Also relevant here, the judicially created exclusionary rule encompasses both the evidence obtained as a direct result of an illegal search and seizure, as well as any "evidence later discovered and found to be derivative of an illegality," also known colloquially as "fruit of

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[5] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

[6] The circuit court neglected to evaluate the scope of *Terry* as it applies to Trooper Tompkins's pat-down of Wilkins.

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the poisonous tree," subject to the attenuation-doctrine analysis. *Utah v Strieff*, 579 US 232, 237-238; 136 S Ct 2056; 195 L Ed 2d 400 (2016) (quotation marks and citation omitted).

A. THE AUTOMOBILE EXCEPTION

Given binding authority from this Court concerning the automobile exception under similar circumstances after passage of the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq.*, and the MRTMA, we address this issue first. "[U]nder the automobile exception, the police may search a motor vehicle without the necessity of first obtaining a warrant if probable cause to support the search exists." *People v Kazmierczak*, 461 Mich 411, 418-419; 605 NW2d 667 (2000), overruled in part on other grounds by *Armstrong*, 344 Mich App 286. Probable cause to issue a search warrant exists when "there is a 'substantial basis' for inferring a 'fair probability' that contraband *or* evidence of a crime will be found in a particular place." *Id.* at 417-418 (emphasis added). That same probable-cause analysis applies to warrantless searches. *People v Levine*, 461 Mich 172, 182; 600 NW2d 622 (1999).

As particularly relevant here, this Court held as follows in the wake of Michigan legalizing recreational marijuana for those 21 years old and older:

> [T]he odor of marijuana is relevant to the totality of the circumstances test and can contribute to a probable cause determination, but the smell of marijuana, by itself, does not give rise to probable cause unless it is combined with other factors that bolster the concern about illegal activity that may flow from the smell of marijuana. [*Armstrong*, 344 Mich App at 300 (quotation marks and citation omitted).[7]]

The Court based its decision in large part on passage of the MRTMA and the associated change in law concerning possession and use of marijuana. *Id.* at 299. However, probable cause to effectuate

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[7] *Armstrong* overruled the pre-MRTMA case *People v Kazmierczak*, 461 Mich 411; 605 NW2d 667 (2000), to the extent *Kazmierczak* held that the smell of marijuana alone coming from a vehicle established probable cause for a search. *Armstrong*, 344 Mich App at 297, 299. *Armstrong* is currently pending before our Supreme Court. In November 2023, the Court scheduled oral arguments on the application for leave to appeal, instructing the parties to address

> (1) whether [the MRTMA] supersedes the rule that "the smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the warrant requirement," [*Kazmierczak*, 461 Mich at 426] (footnote omitted); (2) if so, whether the exclusionary rule applies to searches conducted in good-faith reliance upon *Kazmierczak* . . . (3) alternatively, if the holding of *Kazmierczak* has been superseded by the MRTMA, whether the smell of marijuana alone may establish reasonable suspicion to perform an investigatory stop pursuant to *Terry*[]; and (4) if so, whether the trial court clearly erred in concluding that the firearm recovered in this case was not in plain view during an otherwise constitutional *Terry* stop. [*People v Armstrong*, 513 Mich 892 (2023).]

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a search under the automobile exception may still exist when the smell of marijuana is combined with other suspicious facts, like a suspect "lying about his legal possession." *Id.* at 298, distinguishing *People v Moorman*, 331 Mich App 481, 487-488; 952 NW2d 597 (2020).

In *Moorman*, the suspect, having been stopped for speeding, denied that marijuana was present in his vehicle despite the police officer's detection of the odor of marijuana. *Moorman*, 331 Mich App at 483. The Court noted that the defendant could legally possess up to 2.5 ounces of marijuana under the MMMA, but it sought to answer whether "the trooper h[ad] probable cause to believe the possession was unlawful because of the quantity involved[.]" *Id.* at 487. The Court then determined that the defendant's "deception about the presence of marijuana in the vehicle would give rise to probable cause to believe that the amount possessed was greater than that permitted under the MMMA." *Id.* at 488.

> [W]e conclude that [the] defendant's behavior (denying the presence of marijuana) was inconsistent with being in lawful possession of marijuana under the MMMA. This behavior, in conjunction with the odor of marijuana, gave rise to probable cause to believe that [the] defendant was in possession of marijuana in a manner not consistent with the protections of the MMMA. Accordingly, the search of the vehicle was lawful. [*Id.* at 499 (footnote omitted).]

Notably, in both *Armstrong* and *Moorman*, it was unclear what—if any—amount of marijuana was discovered in the respective searches, but each defendant—like Wilkins here—was charged with CCW after unregistered weapons were discovered in their vehicles. See *Armstrong*, 344 Mich App at 290-294; *Moorman*, 331 Mich App at 482-484. Relatedly, neither case mentions the penalties of the MRTMA or the MMMA, nor makes any reference to or distinction between civil and criminal infractions under these acts.[8]

Nevertheless, on appeal, Wilkins argues that the vehicle search was not justified under the automobile exception because the facts did not give rise to probable cause that the vehicle contained a *criminal* amount of marijuana over 2.5 ounces, as opposed to a lesser amount punishable as a civil infraction.

As an initial matter, we acknowledge the distinction between civil and criminal infractions under the MRTMA and the related argument that facts must indicate some noncivil violation to support a likelihood of discovering contraband or evidence of a crime under the automobile exception (or relatedly to support reasonable suspicion of criminal activity under *Terry*). Indeed, at least one lower federal court[9] has made this precise distinction, albeit with respect only to *Terry* and reasonable suspicion of criminal activity. See *United States v Pavao*, ___ F Supp ___, ___ (D

[8] As related to the next issue, both cases also lack any discussion of *Terry* or related cases.

[9] Decisions of lower federal courts are nonbinding on this Court but may be considered for their persuasive value. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

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RI, 2023) (Docket No. 1:22-CR-00034-MSM-PAS), slip op at 1-3[10] (holding that the traffic stop at issue could be prolonged "only by a reasonable suspicion that there was additional marijuana in the car which exceeded the 1 oz. demarcation between a civil and criminal violation."). Michigan law also generally distinguishes crimes from civil infractions. See MCL 750.5 (" 'Crime' means an act or omission forbidden by law *which is not designed as a civil infraction* . . . .") (emphasis added). But we reject such a distinction as it applies to the MRTMA in Michigan, at least concerning the automobile exception. [11]

Again, neither *Armstrong* nor *Moorman* mentions the penalties of the MRTMA or the MMMA, nor makes any reference to or distinction between civil and criminal infractions under these acts. And neither defendant in those cases was charged with any marijuana-related offense, and this Court did not indicate what, if any, amount of marijuana was discovered in the respective searches. In our view, these omissions support that any distinction between civil and criminal penalties under the MRTMA is irrelevant, and we conclude that probable cause exists to support a warrantless vehicle search *so long as* facts adequately support that the suspected activity is generally unlawful.

Indeed, *Armstrong* only mentions "*illegal activity* that may flow from the smell of marijuana." *Armstrong*, 344 Mich App at 300 (emphasis added). *Moorman* similarly contemplated whether "possession was [generally] *unlawful* [for the over-21 defendant] because of the quantity involved[.]" *Moorman*, 331 Mich App at 487 (emphasis added). See also *id.* at 488 (characterizing unlawful possession as "greater than that permitted under the MMMA"); *id.* at 499 (The defendant's conduct was "inconsistent with being in lawful possession of marijuana under the MMMA. This behavior, in conjunction with the odor of marijuana, gave rise to probable cause to believe that [the] defendant was in possession of marijuana in a manner not consistent with the protections of the MMMA.)

Further, even though Michigan law clearly distinguishes crimes from civil infractions, MCL 750.5, the automobile exception applies to evidence of a crime *or* contraband, *Kazmierczak*, 461 Mich at 417-418. Notwithstanding the civil penalties applicable to Wilkins here for possessing a small amount of marijuana, we conclude that because it was generally illegal for him to possess any amount of marijuana, even such a small amount constituted contraband subject to search. See

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[10] Because no official reported decision is currently available for this case, we cite the page numbers from the slip opinion in this ease on Westlaw. See 2023 WL 3934555.

[11] We acknowledge that this distinction is arguably also applicable to whether there is reasonable suspicion of criminal activity under *Terry*. But Wilkins' argument on appeal only distinguishes between civil and criminal penalties with respect to the automobile exception. See *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 298 Mich App 192, 199; 826 NW2d 197 (2012) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give [an issue] only cursory treatment with little or no citation of supporting authority.") (quotation marks and citation omitted). We therefore decline to rule on this issue in the present case.

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American Eagle Fireworks v Lansing, unpublished[12] per curiam opinion of the Court of Appeals, issued June 18, 1999 (Docket No. 206713), p 2 ("Contraband per se refers to items of which the mere possession is contrary to public policy. . . . The fireworks in the instant case were not legally possessed . . . . Because the fireworks in this matter were contraband per se, their seizure and immediate forfeiture was authorized by MCL 780.652[.]").

Indeed, had the Legislature intended for the MRTMA to exclude from contraband lesser amounts of marijuana subject only to civil fines, it could have explicitly said so in the act. Contra *United States v Maffei*, 417 F Supp 3d 1212, 1224-1228 (ND Cal, 2019) (the smell of marijuana alone did not establish probable cause of criminal activity or the existence of contraband after California's decriminalization for possessing less than 28.5 grams of marijuana in part because the relevant statute "provide[d] that '[c]annabis and cannabis products involved in any way with conduct deemed lawful by this section are *not contraband* nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, *search*, or arrest.' ") (Emphasis added in original).

Applying the foregoing to the instant facts, we conclude that probable cause existed to support that Wilkins illegally possessed marijuana contrary to the protections of the MRTMA. In addition to the smell of marijuana, Trooper Tomkins became aware at the outset of the traffic stop that both Wilkins and the passenger were under 21. Wilkins and the passenger first denied the existence of any marijuana. But the passenger critically admitted that there was marijuana in the vehicle once she exited the car. Taken together, these facts supported that there a was a fair probability (and more like a guarantee given the admission from the passenger) that contraband would be recovered from the vehicle, therefore justifying the search under the automobile exception.[13]

B. *TERRY* STOP

We now turn to Wilkins' argument that the stop here was impermissible under *Terry* in scope and duration. He specifically argues that Trooper Tompkins' pat-down was improper and tainted any evidence later discovered.

In *Terry v Ohio*, 392 US 1, 21, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court held that the Fourth Amendment permits a police officer to make a brief investigative stop (a "*Terry* stop") and detain a person if the officer has a reasonable, articulable suspicion that criminal activity is afoot. "The police may . . . make a *Terry* stop and briefly detain a person who is in a motor vehicle if the officer has a reasonable, articulable suspicion that the person is engaged in criminal activity." *Steele*, 292 Mich App at 314. Further, "[a]s a general

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[12] "While [unpublished] opinions are not binding precedent . . . , [this Court] may consider them as instructive or persuasive." *People v Jamison*, 292 Mich App 440, 445; 807 NW2d 427 (2011).

[13] Given the passenger's admission, we need not decide today whether, because those under 21 cannot lawfully possess any amount of marijuana, there is probable cause to justify a search in cases involving such persons based on the smell of marijuana alone. This is a question for another day.

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matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v United States*, 517 US 806, 810; 116 S Ct 1769; 135 L Ed 2d 89 (1996).

A *Terry* stop is a "brief, on-the-scene detention of an individual [that] is not a violation of the Fourth Amendment as long as the officer can articulate a reasonable suspicion for the detention." *People v Pagano*, 507 Mich 26, 32; 967 NW2d 590 (2021) (quotation marks and citation omitted). "A seizure for a traffic violation justifies a police investigation of that violation. A relatively brief encounter, a routine traffic stop is more analogous to a so-called '*Terry* stop' than to a formal arrest." *Rodriguez v United States*, 575 US 348, 354; 135 S Ct 1609; 191 L Ed 2d 492 (2015) (quotation marks and citation omitted, alterations incorporated). "[O]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable seizures," and the same is true of passengers. *Maryland v Wilson*, 519 US 408, 412-415; 117 S Ct 882; 137 L Ed 2d 41 (1997) (quotation marks and citation omitted).

Further, "[a]n officer who makes a valid investigatory stop may perform a limited patdown search for weapons if the officer has reasonable suspicion that the individual stopped for questioning is armed and thus poses a danger to the officer." *People v Champion*, 452 Mich 92, 99; 549 NW2d 849 (1996). "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . ." *Adams v Williams*, 407 US 143, 146; 92 S Ct 1921; 32 L Ed 2d 612 (1972). The scope of a pat-down search must be limited and "reasonably designed to discover guns, knives, clubs, or other hidden instruments that could be issued to assault an officer." *Champion*, 452 Mich at 99. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 US at 27. "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Minnesota v Dickerson*, 508 US 366, 373; 113 S Ct 2130; 124 L Ed 2d 334 (1993).

The duration of a *Terry* stop may last only so long as necessary to address the reasons that justified the stop and unrelated inquiries that "do not measurably extend the duration of the stop." *Rodriguez*, 575 US at 355 (quotation marks and citation omitted). However, if the traffic stop reveals a new set of circumstances that lead to a "reasonably articulable suspicion that criminal activity [is] afoot," then continued detention of the suspect does not run afoul of the Fourth Amendment, subject to an analysis of the totality of the facts and circumstances. *People v Kavanaugh*, 320 Mich App 293, 301; 907 NW2d 845 (2017). "[W]hen a traffic stop reveals a new set of circumstances, an officer is justified in extending the detention long enough to resolve the suspicion raised." *Williams*, 472 Mich at 315.

Because Wilkins was speeding, Trooper Tompkins was justified in initiating the initial traffic stop and investigating this violation. Further, because Trooper Tompkins lawfully stopped Wilkins for a traffic violation, he did not violate the Fourth Amendment by ordering Wilkins and the passenger to step outside the vehicle. See *Wilson*, 519 US at 412-415. To the extent the stop was extended as Trooper Tompkins awaited backup, we similarly deem this warranted by officer safety and proper. Permissible tasks within the scope of a traffic stop include "checking the driver's license, determining whether there are outstanding warrants against the driver, and

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inspecting the automobile's registration and proof of insurance," as well as "certain negligibly burdensome precautions" related to officer safety. *Rodriguez*, 575 US at 355-56.

The United States Supreme Court has recognized "that traffic stops are especially fraught with danger to police officers." *Arizona v Johnson*, 555 US 323, 330, 129 S Ct 781, 172 L Ed 2d 694 (2009) (quotation marks and citation omitted); see also *Pennsylvania v Mimms*, 434 US 106, 110, 98 S Ct 330, 54 L Ed 2d 331 (1977) (recognizing "the inordinate risk confronting an officer" in a traffic stop). Because it is "unreasonable to require that police officers take unnecessary risks in the performance of their duties," *Terry*, 392 U.S. at 23, "officers are entitled to employ reasonable methods to protect themselves and others in potentially dangerous situations," *Allen v City of Los Angeles*, 66 F3d 1052, 1056 (CA 9, 1995). Because Trooper Tompkins was outnumbered here by Wilkins and the passenger, particularly given that the initially straightforward traffic stop was complicated once Trooper Tomkins suspected the prohibited possession of marijuana by persons under 21, we conclude that it was reasonable and proper for him to delay the stop for the 5 to 10 minutes it took for backup to arrive.

However, the record is lacking any support that Wilkins was armed and posed any danger to Trooper Tompkins, or that the pat-down was reasonably intended to discover hidden weapons. See *Champion*, 452 Mich at 99. Rather, Trooper Tompkins stated that Wilkins denied having any weapons, and Trooper Tompkins unequivocally testified that the pat-down was to search for marijuana, not weapons. Nothing in the record provides any basis to support that Wilkins was armed or dangerous in any way before the pat-down occurred. Accordingly, regardless of whether the pat-down occurred before or after backup arrived and added any time to the stop, it was an improper evidentiary pat-down unjustified by officer safety.

Nevertheless, the pat-down did not reveal any evidence, nor did it affect or otherwise lead to the vehicle search principally at issue here. As discussed, Trooper Tomkins had probable cause once smelling marijuana and discovering Wilkins' and the passenger's ages—particularly given the initial deception and the passenger's later admission[14]—to search Wilkins' vehicle for suspected contraband. And as explained below, the vehicle search was sufficiently distinct and severable from the improper pat-down. Under these circumstances, the gun found when searching Wilkins' vehicle need not be suppressed because it was not "derivative of an illegality," i.e., it was not "fruit of the poisonous tree." *Strieff*, 579 US at 237-238.

Importantly, this Court has described the inquiry at issue as follows:

> We need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. [*People v Mahdi*, 317 Mich App

[14] The record supports that this admission occurred without much if any delay once backup arrived, so we reject any *Terry/Rodriguez* violation concerning this questioning and the passenger's admission. See *Rodriguez*, 575 US at 355.

446, 471; 894 NW2d 732 (2016) (internal quotations omitted), quoting *Wong Sun v United States*, 371 US 471, 487-488; 83 S Ct 407; 9 L Ed 2d 441 (1963).]

See also *People v Coomer*, 245 Mich App 206, 223; 627 NW2d 612 (2001) (describing need for "a causal connection" between the illegality and the evidence at issue).

As discussed, Trooper Tomkins exceeded the permissible scope of *Terry* by preforming a pat-down search unjustified by any concerns for officer safety. But the recovered weapon was not discovered by police exploiting the illegal pat-down, nor were the two searches causally connected. Indeed, the pat-down did not reveal any evidence whatsoever. Nor is there any indication in the record that the initial pat-down in any way opened the door for the later vehicle search, which was justified as explained earlier. And the vehicle search notably occurred only after the passenger freely admitted that marijuana was present. Given these facts, we conclude that the vehicle search was sufficiently distinguishable from the pat-down such as to purge any taint from the initial illegality.

IV. CONCLUSION

Affirmed. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Kirsten Frank Kelly
/s/ Adrienne N. Young

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Exhibit 3

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STATE OF MICHIGAN
IN THE 17TH CIRCUIT COURT FOR KENT COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

FREDDIE WILKINS, III,

Defendant.

Case Number: 23-02112-FH

Hon. Scott A. Noto

ORDER

At a session of said Court, Kent County Courthouse, City of Grand Rapids, County of Kent, State of Michigan on June 9, 2023.

JUN 13 2023

Present: Hon. Scott A. Noto
Circuit Court Judge

Before the Court is Defendant Freddie Wilkins' Motion to Suppress Evidence. In his motion, Defendant requests that the Court suppress all evidence discovered by the People that was subject to a traffic stop of his vehicle on January 16, 2023. The People responded in opposition to the motion. Attached to Defendant's brief was the transcript of the preliminary examination, which took place on March 1, 2023.[1] On June 2, 2023, the Court heard oral argument on the motion and took the matter under advisement.

I. Relevant Facts

The Parties agree on the relevant facts at issue in the motion. On January 16, 2023, Michigan State Trooper James Tompkins pulled over a Honda CR-V for speeding on Alpine Avenue near 7 Mile Road. **(See Def Ex 1, Tr p 4-5.)** Inside the vehicle was Defendant, who

[1] For purposes of his motion, Defendant stipulated to the facts contained in the preliminary examination in lieu of a new evidentiary hearing. *People v Kaufman*, 457 Mich 266, 276; 577 NW2d 466 (1998).

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was driving, and a passenger sitting in the front passenger seat. **(Tr at 6, 13.)** Trooper Tompkins approached the vehicle on the passenger side. **(Tr at 10.)** The passenger side window was down. **(Id.)** As Trooper Tompkins approached, he smelled marijuana. **(Id.)** He did not see any marijuana and observed no visible signs that Defendant was intoxicated. **(Tr at 10, 12.)** The Trooper then continued with the traffic stop, asking why he was speeding, where they were going, and checked their driver's licenses. **(Tr at 11.)** Upon review of their licenses, he noticed that Defendant and his passenger were both under the age of 21. **(Id.)**

Trooper Tompkins returned to his patrol car and requested backup. **(Id.)** Once backup arrived, he reapproached the vehicle and asked Defendant to step out of the vehicle. **(Id.)** He searched Defendant but did not find anything. **(Tr at 11, 13.)** Trooper Tompkins then asked the passenger to exit the vehicle. **(Tr at 7, 13.)** In response to his questions, the passenger admitted she had some "shake" (a small quantity of marijuana) in the vehicle. **(Id.)** Given this information, Trooper Tompkins began a search of the vehicle. **(Tr at 7.)** On the floor by the passenger's seat, he found a backpack, which he searched. **(Tr at 8.)** Inside the backpack were Ziplock cellophane packages, which are commonly used for marijuana, and a Glock semiautomatic pistol with a loaded magazine. **(Tr at 8.)** Trooper Tompkins read Defendant his *Miranda* rights, which he waived. **(Tr at 9.)** Defendant admitted that the firearm was his and that he did not possess a concealed pistol license. **(Id.)** Defendant was charged with one count of carrying a concealed weapon.

II. Discussion

The United States Constitution and the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures. US Const, Am IV; Mich. Const 1963, art 1, § 11. See *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009). While a

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warrant supported by probable cause is generally required for the results of a search and seizure to be admissible, the United States Supreme Court has created a number of exceptions to the warrant requirement that satisfy the mandates of the Fourth Amendment. *People v Toohey*, 438 Mich 252, 270-71; 475 NW2d 16 (1991). When police officers are entitled to conduct a search and seizure without a warrant, the appropriate standard for determining the constitutionality of the police conduct is whether the search was reasonable. *Id.* at 272. Generally, any evidence collected because of an unreasonable search or seizure must be excluded from trial. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). Evaluation of the reasonableness of such a search and seizure depends upon the facts and circumstances of each case. *Id.* The prosecution bears the burden of proving that a warrantless search fell within one of the exceptions to the warrant requirement. *People v Martinez*, 192 Mich App 57, 62; 480 NW2d 302 (1991).

At issue in this case are two exceptions to the warrant requirement. The first exception is an investigative or *Terry* stop under *Terry v Ohio*, 392 US 1 (1968). A *Terry* stop allows an officer to conduct a brief, warrantless seizure when the officer has at least reasonable suspicion of criminal activity based on articulable facts. *People v Turner*, ___ Mich App ___, ___; ___ NW2d ___ (2022).[2] *Terry* stops are limited in both scope and duration. *Johnson v VanderKooi*, 509 Mich 524, 539; 983 NW2d 779 (2022). The scope of a *Terry* stop is limited to: (1) reasonable inquiries aimed at confirming or dispelling an officer's reasonable suspicion of criminal activity; and (2) if and only if an officer has reasonable suspicion that the person is armed and dangerous, a pat down search for weapon. *Turner*, ___ Mich App at ___. As for duration, a *Terry* stop may last no longer than necessary to address the reasons justifying the

[2] *People v Turner*, No. 357699, 2022 WL 3568677 (Mich Ct App Aug 18, 2022) is designated for publication, however the citation to the official reporter is not yet available.

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stop. *Id.* at 540. In determining whether a police officer acted reasonably in extending the detention, due weight must be given, not to his inchoate and unparticularized suspicion or hunch, but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. *People v Kavanaugh*, 320 Mich App 293, 301; 907 NW2d 845 (2017).

In his motion, Defendant argues that Trooper Tompkins exceeded the permissible scope and duration of the *Terry* stop by searching Defendant's person. As set forth at the preliminary examination, see *supra*, Trooper Tompkins stopped Defendant for speeding. He smelled marijuana when he approached the vehicle. When he checked the driver's licenses of Defendant and his passenger and discovered they were both under the age of 21, he extended the stop and ultimately ordered Defendant out of the vehicle. Far from a "general exploratory search," see *Turner*, ___ Mich App at ___, Trooper Tompkins' actions were based on specific, reasonable inferences drawn from the initial smell of marijuana and the age of the vehicle's occupants. While Defendant correctly argues that possession of less than 2.5 ounces of marijuana is a civil infraction under Michigan law for people under the age of 21, see MCL 333.27965(3)(a), Trooper Tompkins' actions were not based upon any detection of the amount of the marijuana, rather the presence of marijuana in the vehicle based solely upon its odor. Trooper Tompkins had no way of knowing what amount of marijuana was in the vehicle, if any. He therefore was entitled to extend the scope of and duration of the stop to determine what amount of marijuana, if any, was present. Trooper Tompkins' actions were reasonable under the totality of the circumstances. See *Kavanaugh*, 320 Mich App at 301.

The second exception at issue in this case is the automobile exception. See *People v Levine*, 461 Mich 172, 179; 600 NW2d 622 (1999). The automobile exception applies when an automobile or other vehicle is stopped, and the police have probable cause to believe it contains

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contraband or evidence of a crime. *People v Kazmierczak*, 461 Mich 411, 422; 600 NW2d 622 (1999). The determination of whether probable cause exists to support such a search should be made in a commonsense manner given the totality of the circumstances. *People v Garvin*, 235 Mich App 90, 102; 597 NW2d 194 (1999).

In this case, Defendant argues that Trooper Tompkins was investigating him for a mere civil infraction rather than a crime and therefore he was not justified under the automobile exception to conduct the search. Defendant cites a cases from the Massachusetts Supreme Court, *Commonwealth v Sheridan*, 25 NE3d 875 (2015), for the proposition that a police officer lacks probable cause to search a vehicle under the automobile exception based on observation of a noncriminal amount of marijuana. However, *Sheridan* is distinguishable from the facts of this case. As noted, Trooper Tompkins did not observe any amount of marijuana that would make possession a civil infraction. Rather, he smelled and recognized the odor of marijuana when he approached the vehicle. That odor did not give Trooper Tompkins any indication of the amount of marijuana, only that some of it was present in the vehicle. Moreover, he knew from the occupants' driver's licenses that both Defendant and his passenger were under the age of 21 years old. Accordingly, he had probable cause under the automobile exception to search the vehicle and its contents. See *People v Martinez*, 187 Mich App 160, 169; 466 NW2d 380 (1991).

For these reasons, Defendant's Motion to Suppress Evidence is DENIED.

IT IS SO ORDERED.

Date: 6-9-23

SCOTT A. NOTO

Honorable Scott A. Noto
Circuit Court Judge

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PROOF OF SERVICE

I certify this date that copies of the Order were served on the parties and/or their attorneys by ordinary mail at their last known addresses.

Date: 4·13·03

Deputy County Clerk

Exhibit 4

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STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR THE COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,
v.

Case No. 23-02112-FH

FREDDIE WILKINS, III,
Defendant.
_____/

HON. SCOTT A. NOTO

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MOTION TO SUPPRESS EVIDENCE

Defendant, Freddie Wilkins, III, by and through his undersigned attorney, Amanda J. Heys, moves this Court, pursuant to the Fourth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 11 of the Michigan Constitution, to suppress all evidence discovered by the People as a result of their unconstitutional *Terry* stop and subsequent search of a Honda CR-V on January 16, 2023, and in support states as follows:

BACKGROUND

1. Mr. Wilkins is charged with carrying a concealed weapon in a Honda CR-V, contrary to MCL 750.227. The People discovered the evidence giving rise to this charge following a warrantless search of that vehicle on January 16, 2023. At the preliminary examination held in this matter on March 1, 2023,[1] Trooper James Tompkins testified as follows regarding the circumstances surrounding the warrantless search of the vehicle:

[1] A transcript of the preliminary examination testimony is attached as Exhibit 1. In lieu of a new evidentiary hearing, Mr. Wilkins stipulates to use of the preliminary examination testimony solely for the purpose of resolving this Motion to Suppress Evidence. *See People v. Kaufman*, 457 Mich.

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a. On January 16, 2023, Trooper Tompkins pulled over a Honda CR-V for speeding along Alpine Avenue near 7 Mile Road. (Exhibit 1, p. 4-5).

b. The Honda CR-V had two occupants – (1) Mr. Wilkins (who was the driver of the vehicle); and (2) a passenger (who was the registered owner of the vehicle). (*Id.* at 6, 13).

c. When he made contact with the occupants, Trooper Tompkins noticed the odor of marijuana, (*Id.* at 6, 10.), but he did not see any marijuana. (*Id.* at 12).

d. Trooper Tompkins also did not see Mr. Wilkins smoking marijuana, did not see him throw any marijuana out the window, and did not see any marijuana smoke billowing out the windows. (*Id.* at 10).

e. Based on the odor, Trooper Tompkins did not believe that the occupants had recently smoked marijuana. (*Id.* at 10).

f. In addition, Trooper Tompkins did not observe any major signs that Mr. Wilkins was intoxicated. (*Id.* at 16.)

g. After obtaining their IDs, Trooper Tompkins discovered that both occupants of the vehicle were under 21 years old. (*Id.* at 11.).

h. Trooper Tompkins then returned to his vehicle and called for backup. (*Id.*).

i. After backup arrived (five to ten minutes later), Trooper Tompkins again made contact with Mr. Wilkins and asked him out of the vehicle. (*Id.* at 11, 13).

j. Trooper Tompkins then conducted a search of Mr. Wilkins without his consent, finding nothing. (*Id.* at 11-13).

k. Trooper Tompkins then asked the passenger to exit the vehicle and questioned her. (*Id.* at 7, 13).

l. The passenger told Trooper Tompkins that she had some "shake" in the vehicle – i.e., a small amount of marijuana. (*Id.*).

m. Trooper Tompkins then searched the Honda CR-V and found a hand gun and a loaded magazine within a backpack. (*Id.* at 7, 8.).

n. Trooper Tompkins then interrogated Mr. Wilkins – who admitted that the gun was his. (*Id.* at 9).

266, 276 (1998). If, however, the People attempt to supplement the preliminary examination testimony in their Response, Mr. Wilkins requests an evidentiary hearing. *Id.*

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LAW

2. The Fourth Amendment of the U.S. Constitution, along with its counterpart, Article I, Section 11 of the Michigan Constitution, prohibits the police from conducting unreasonable searches and seizures. U.S. CONST. amend IV; MICH. CONST. art. 1, § 11. The Fourth Amendment prohibition against unreasonable searches and seizures is enforceable against the States through the Fourteenth Amendment of the U.S. Constitution. *Mapp v. Ohio*, 367 U.S 643, 655 (1961). Evidence collected as a result of an unreasonable search or seizure generally must be suppressed, *People v. Dagwan*, 269 Mich. App. 338, 342 (2005), together with the direct and indirect "fruits" therefrom. *See Wong Sun v. U.S.*, 371 U.S. 471, 484-85 (1963).

3. A search or seizure conducted without a valid search warrant "is unreasonable per se under the Fourth Amendment to the United States Constitution and violates art. 1, § 11 of the Michigan Constitution unless shown to fall within one of the various exceptions to the warrant requirement." *People v. Hentkowski*, 154 Mich. App. 171, 176 (1986). To overcome a defendant's motion to suppress, the prosecution bears the burden of proving that a warrantless search or seizure fell within one of the exceptions to the warrant requirement. *See People v. Martinez*, 192 Mich. App. 57, 62 (1991).

A. Investigatory *Terry* Stops

4. One exception to the warrant requirement is an investigative *Terry* stop. *People v. Turner*, No. 357699, 2022 WL 3568677, * 3 (Mich. Ct. App. Aug. 18, 2022).[2] "A *Terry* stop allows an officer to conduct a brief, warrantless seizure when the officer has at least reasonable suspicion

[2] *Turner* is a published decision of the Michigan Court of Appeals. The Westlaw citation is provided because the citation to the official reporter is not yet available.

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of criminal activity based on articulable facts." *Id.* However, "*Terry* stops are limited in both scope and duration." *Johnson v. VanderKooi*, 509 Mich. 524, 539 (2022).

5. The scope of a *Terry* stop is limited to: (1) reasonable inquiries aimed at confirming or dispelling an officer's reasonable suspicion of criminal activity; and (2) if (and only if) an officer has reasonable suspicion that the person is armed and dangerous, a pat down search for weapons. *Turner*, 2022 WL 3568677 at * 3; However, "[n]othing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons." *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979). Simply put, "*Terry* does not authorize an officer to conduct 'a general exploratory search for whatever evidence of criminal activity he might find.'" *Turner*, 2022 WL 3568677 at * 3 (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

6. In regards to duration, "a brief detention such as a *Terry* stop may last no longer than necessary to address the reasons justifying the stop." *Johnson*, 509 Mich. at 540. Accordingly, a *Terry* stop "remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop." *Rodriguez v. U.S.*, 575 U.S. 348, 355 (2015) (cleaned up). The critical inquiry is whether the unrelated inquiry "'prolongs—i.e., adds time to—'the stop.'" *Id.* at 357. Even if the officer has not yet completed the *Terry* stop, if police activity outside the permissible scope of the *Terry* stop "causes that completion to be delayed, the delayed detention remains a constitutional violation." *People v. Kavanaugh*, 320 Mich. App. 293, 301 n. 6 (2017).

B. The "Automobile Exception"

7. Another exception to the warrant requirement is the "so-called automobile exception." *Collins v. Virginia*, 138 S.Ct. 1663, 1669 (2018). The automobile exception applies "when an automobile or other vehicle is stopped and the police have probable cause to believe it contains

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evidence of a crime." *Colorado v. Bannister*, 449 U.S. 1, 3 (1980). Although the issue has not yet been definitely resolved in Michigan, the Supreme Judicial Court of Massachusetts has refused to extend the automobile exception to situations where the police only have probable cause to believe the vehicle contains evidence of a civil infraction – but not a crime. *See Com. v. Sheridan*, 470 Mass. 752, 757 (2015) ("Absent articulable facts supporting a belief that the vehicle contained an additional, criminal quantity of marijuana, the officers lacked probable cause to believe that a crime was being committed, and the search was impermissible.").

DISCUSSION

8. Trooper Tompkins initially stopped Mr. Wilkins for a simple traffic violation – speeding. Then, after smelling the odor of marijuana and learning that both occupants of the vehicle were under 21 years old, Trooper Tompkins initiated a *Terry* stop to investigate whether the occupants of the vehicle were in violation of Section 15(3) of the Michigan Regulation and Taxation of Marihuana Act (the "MRTMA"). Section 15(3) of the MRTMA provides that "a person under 21 years of age who possesses not more than 2.5 ounces of marihuana … is responsible for a civil infraction[.]" MCL 333.27965(3)(a).

9. However, when investigating whether the occupants of the vehicle were in violation of Section 15(3) of the MRTMA, Trooper Tompkins exceeded the permissible scope and duration of the *Terry* stop. Again, "*Terry* does not authorize an officer to conduct 'a general exploratory search for whatever evidence of criminal activity he might find.'" *Turner*, 2022 WL 3568677 at * 3 (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Yet, here, Trooper Tompkins conducted an evidentiary search of Mr. Wilkins' person during the *Terry* stop.

10. Not only did this evidentiary search exceed the permissible scope of the *Terry* stop, this detour from the permissible scope of the *Terry* stop obviously prolonged its duration. *See Rodriguez*,

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575 U.S. at 355. Because a *Terry* stop remains lawful only so long as the police do not prolong its duration by deviating from its permissible scope, *see id.* at 355-57, all evidence discovered by the People after the evidentiary search of Mr. Wilkins' person must be suppressed. *See Dagwan*, 269 Mich. App. at 342; *Wong Sun*, 371 U.S. at 484-85.

11. Moreover, even if Trooper Tompkins had not exceeded the permissible scope and duration of the *Terry* stop by searching Mr. Wilkins' person (he did), his subsequent search of the Honda CR-V was not justified by the automobile exception to the warrant requirement. Here, Trooper Tompkins was investigating Mr. Wilkins for a mere civil infraction -- not a crime. Although the question has not yet been definitely answered in Michigan, the Supreme Judicial Court of Massachusetts has refused to extend the automobile exception to situations where the police only have probable cause to believe the vehicle contains evidence of a civil infraction. *See Sheridan*, 470 Mass. at 757.

12. And, to be sure, refusing to extend the automobile exception to warrantless searches outside the criminal context makes good sense. "In delineating the constitutional safeguards applicable in particular contexts," a court must weigh "the public interest against the Fourth Amendment interest of the individual." *U.S. v. Martinez-Fuerte*, 428 U.S 543, 555 (1976). Unlike when it criminalizes an activity, when a state classifies a particular activity (like possession of not more than 2.5 ounces of marihuana by an individual under 21 years of age) as a civil infraction, it objectively indicates that the public interest at stake is *de minimis*. *See Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984). Accordingly, given the *de minimis* public interest at stake, expansion of the automobile exception from the criminal context to the civil context is unwarranted. Indeed, exceptions to the warrant requirement are "jealously and carefully drawn." *Jones v. U.S.*, 357 U.S. 493, 499 (1958)

CONCLUSION

For the reasons herein, Defendant Freddie Wilkins, III moves this Court to suppress all evidence discovered by the People as a result of their unconstitutional *Terry* stop and subsequent search of a Honda CR-V on January 16, 2023.

Dated: May 8, 2023

Respectfully submitted,

AMANDA J. HEYS (P84163)
Kent County Office of the Defender
146 Monroe Center St., Ste. 920
Grand Rapids, MI 49503
(616) 774-8181

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Exhibit 5

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STATE OF MICHIGAN

63RD JUDICIAL DISTRICT COURT (GRAND RAPIDS, MICHIGAN)

THE PEOPLE OF THE STATE OF MICHIGAN,

v.

District File No. D2300161-FY
Circuit File No. 23-02112-FH

FREDDIE WILKINS, III,

Defendant.
_____/

PRELIMINARY EXAMINATION

BEFORE THE HONORABLE SARA J. SMOLENSKI - DISTRICT JUDGE

Grand Rapids, Michigan - Wednesday, March 1, 2023

APPEARANCES:

For the People:
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(None)

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Grand Rapids, Michigan

Wednesday, March 1, 2023 - 9:49 a.m.

THE COURT: Mr. Wilkins, my name is Judge Smolenski. We've met before. I talked to you last week when you came in. You've talked to Ms. Heys. Today she's from the -- well, she's your attorney from the Public Defender's Office on this case called carrying a concealed weapon.

If you run your exam, that's fine, we take testimony right now. It's not the trial, and I don't try to determine guilt or innocence, just whether there was a weapon in the vehicle or a weapon on your person or a weapon involved, then the case can move onto circuit court. Circuit court is the higher court, they handle all felonies; we handle all misdemeanors. If there's been any discussion about any offer or any plea agreement, that's off the table if you run your exam. You understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. Let's take the first witness, please.

MR. HELMER: Thank you, Your Honor. The People will call Trooper James Tompkins to the stand.

THE COURT: All right. Please come up, right around the half wall, go up there first, if you would. We'll have you start by stating your name, first and last, spelling.

TROOPER TOMPKINS: James, J-a-m-e-s, Tompkins,

T-o-m-p-k-i-n-s.

THE COURT: All right. Then I'll have you raise your right hand. Trooper, you do solemnly swear you'll tell the truth, the whole truth, and nothing but the truth, so help you God?

TROOPER TOMPKINS: I do.

THE COURT: Thank you. We do ask that you respond verbally to all questions, because this is being recorded.

Go ahead, Mr. Helmer.

MR. HELMER: Thank you.

TROOPER JAMES TOMPKINS

At 9:51 a.m., called as a witness by the People, having been duly sworn by the Court, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. HELMER:

Q. Sir, could you state your full name and current occupation?

A. James Tompkins. I'm a trooper with the Michigan State Police.

Q. How long have you been with the Michigan State Police, Trooper?

A. Twenty-two years.

Q. And were you working as a trooper on January 16th of this year?

A. Yes.

Q. And where were you working generally?

A. Alpine and 7 Mile area.

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Q. And at some point in that area on that date did you make contact with an individual named Freddie Wilkins, the Third?
A. Yes, sir.
Q. And do you see that individual in the courtroom today?
A. Yes, sir.
Q. And could you point out to the Court where he's seated and what he's wearing, please?
A. Next to his Defense Attorney, black shoes, blue jumpsuit, chain around his neck.

MR. HELMER: Thank you. Your Honor, I'd ask that the record reflect he's identified the Defendant.

THE COURT: All right. The witness has identified the Defendant.

BY MR. HELMER:
Q. And, Trooper, when you made contact with the Defendant, was he in a vehicle or was he not in a vehicle?
A. He was in a vehicle.
Q. And what drew your attention to that vehicle?
A. He was speeding.
Q. And what road was he speeding on?
A. Alpine.
Q. And how did you determine that that vehicle was speeding?
A. Laser radar device.
Q. And did you initiate a traffic stop on that vehicle?
A. Yes.

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Q. What kind of a vehicle was that?
A. A Honda.
Q. Was it a passenger car, SUV, pickup truck?
A. Smaller SUV.
Q. Okay. So safe to say front seat, middle seat, and like a cargo area?
A. I believe so.
Q. Okay. And when you make contact with that vehicle that you pull over, how many occupants are there?
A. Two.
Q. And was the Defendant the passenger or the driver?
A. The driver.
Q. And when you made contact with him, I assume you go through the whole traffic stop, license, registration, things like that?
A. Yes, sir.
Q. And while you were doing that, did anything else draw your attention to the vehicle?
A. Yes.
Q. What was that?
A. I noticed the odor of marijuana.
Q. And safe to say with your twenty years' experience with the Michigan State Police, you know what marijuana, both fresh and burnt, smells like?
A. Yes, sir.

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Q. And so you smell marijuana?
A. Yes.
Q. And at that point, as we all, I'm sure, are aware, for those twenty-one and older marijuana is legal in the state of Michigan, is that correct?
A. Yes.
Q. What about people under twenty-one?
A. Illegal.
Q. And you -- at this point when you smell that marijuana, do you have the Defendant's driver's license?
A. Yes.
Q. Do you have the passenger's driver's license?
A. Yes.
Q. Was there anybody in that vehicle that legally could possess marijuana?
A. No.
Q. So based on that, what did you do?
A. I recontacted him. I questioned him to see if I can get any incriminating statements, whether they had marijuana. They initially denied there was, but later when I had asked the passengers to step out, she told me she had some shake in there which is commonly referred to as some just small amount of marijuana.
Q. And based on that did you conduct a search of the vehicle?
A. Yes.

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Q. And the entire passenger compartment?
A. Yes.
Q. Was there a backpack in that vehicle?
A. Yes.
Q. Where was that backpack located?
A. Passenger's seat, floorboard.
Q. And so passenger's seat, floorboard, there is a backpack. Did you examine the contents of that backpack?
A. Yes.
Q. What was in that backpack, could you tell the Court?
A. There was a Ziploc cellophane packages commonly containing marijuana from -- if you go to a dispensary, they're typically sold in there, plastic baggies, there was also a gun in there.
Q A gun. Can you describe the gun that you found inside that backpack?
A. Yes. It was a glock semiautomatic, I believe it was Model 20. It had a 33-round magazine on it.
Q. So long --
A. Very long.
Q. For those people that, I guess, don't have glocks, not a standard magazine, but an extended magazine?
A. Correct.
Q. And that was loaded, the magazine?
A. It was -- it was -- yes, it had rounds in the magazine. It was not chambered.

Q. Okay. And that appeared to be an authentic Glock working weapon as far as you could tell, correct?
A. Yes, sir.
Q. Did you find out who that weapon belonged to?
A. I did.
Q. How did you find that out?
A. After handcuffing the Defendant, Mr. Wilkins, I placed him on a patrol car, I read him his Miranda rights and questioned him about it, and he admitted it was his.
Q. And did you ask him if he had a concealed pistol license?
A. I did.
Q. And what was his answer?
A. He did not.
Q. And based on your interview with him, did he know that pistol was in that backpack?
A. Yes.

MR. HELMER: Nothing further, Your Honor.

THE COURT: All right. Ms. Heys, your questions, if any, you want to ask?

MS. HEYS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. HEYS:
Q. Good morning?
A. Good morning, ma'am.
Q. All right. So you initiated this traffic stop because the

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allegation is that he was speeding?

A. Correct.

Q. Okay. And the vehicle pulls over immediately, correct?

A. Yes.

Q. Okay. So at what point when you approached the vehicle did you notice the smell of marijuana?

A. Immediately. I made a passenger's side approach. The passenger's window was down, standing inches from the passenger window, and I could smell it.

Q. Okay. So was that the smell of fresh marijuana or burnt marijuana?

A. It smelled like marijuana. It wasn't -- well, from my experience people often smoke in their cars. I mean, it could be minutes, it could be hours. I mean, it didn't smell like he had just smoked it, it just smelled like marijuana.

Q. Okay. Did you at any point see Mr. Wilkins smoking marijuana?

A. No, ma'am.

Q. Did you at any point see him throwing weed out of the window?

A. No, ma'am.

Q. Did you at any point see smoke billowing out of the vehicle?

A. No.

Q. Okay. Fair to say that when you stopped him, he was not free to leave, correct?

A. It was a traffic stop, right, and he's not free to leave.

Q. So he wouldn't be allowed to just end the interaction with you

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on his own?
A. Could you clarify that a little more?
Q. He was not free to drive away?
A. When I activated my lights, he's not free to leave, yes.
Q. And at what point did you remove him from the vehicle?
A. So just to explain, I made an initial approach, detected the odor of marijuana, asked him some basic questions, why he was speeding, where he was going, obtained their IDs, looked at their licenses, realized that they're both under twenty-one. I returned to my patrol car, asked for another backup unit. Once that arrived, I recontacted him and asked him out of the car.
Q. Okay. And the purpose for asking for another backup unit, would that be because there's two people there or --
A. Yeah. Yes.
Q. Okay. So at this point you suspected that there was at least a violation of Michigan law, correct?
A. Correct.
Q. And fair to say that either of them having possession of marijuana would be a civil infraction?
A. Correct.
Q. Okay. So you request that backup unit, and then at that point that's when you pulled him out of the vehicle or did you pull --
A. No, I asked him to step out. He was very cooperative. I

asked him if he had any firearms on him, and he said, "No." I brought him back to my car, explained to him that everything was on body cam and car camera, told him he is subject to a search. I searched him. I didn't find anything initially.

Q. Okay. So was he in handcuffs then when -- was he in the back of your patrol car?

A. No, he was standing in front of my patrol car.

Q. Okay. Is it Michigan State Police policy for you to search people when they're suspected of committing civil infractions?

A. I wouldn't say it's law. I mean, if I have probable cause, I can search somebody.

Q. So probable cause for the civil infraction?

A. Yes. He is in violation of Michigan law. I mean, he's in a motor vehicle. I have probable cause exigent circumstances --

Q. Okay. So at this point you didn't have any other -- were not suspecting him of any other crimes, correct?

A. I mean, at that point, I don't know. I mean, I detected the odor of marijuana. I don't know what's in that car.

Q. Okay. So from what you knew at that point, speeding and possible possession of marijuana?

A. Correct.

Q. Okay. Did you see marijuana when you looked into the vehicle?

A. I don't believe so, no.

Q. Okay. And you told him he was subject to search because of a suspicion of the civil infractions?

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A. The odor of marijuana, yes.
Q. Did you at any point ask him if he consented to the search?
A. No.
Q. Okay. Was the vehicle registered to him or was it registered to somebody else?
A. I believe it was his passenger.
Q. Okay. And at any point did you pull her out of the vehicle?
A. I did.
Q. Okay. So was that after --
A. Well, when you say "pull her out," I asked her out of the vehicle.
Q. Yeah, sorry, that's what I -- you asked her to get out of the vehicle and she got out of the vehicle. Was that when there was a second unit there?
A. Yes.
Q. Okay. And you're questioning her regarding this suspected civil infraction, correct?
A. Among other things, yes.
Q. Okay. About how soon would you say after -- after you asked for backup would you say backup arrived?
A. When I asked for backup, I believe he was at 96 and Alpine, so drive time there, five, ten minutes. Traffic is pretty heavy through there.
Q. When you ran Mr. Wilkins in LEIN -- let me back up. When you get somebody's driver's license, is it fair to say that you've

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been running them in LEIN to see if there's any warrants or anything that pop up?

A. Correct.

Q. Okay. So when you ran Mr. Wilkins in LEIN, did you find any warrants that were out for him?

A. No.

MS. HEYS: Okay. One moment, Your Honor.

THE COURT: Okay.

(At 10:01 a.m., brief off-the-record discussion between the Court and staff)

THE COURT: Go ahead, Ms. Heys. Any other questions?

MS. HEYS: Just one more -- hopefully one more.

BY MS. HEYS:

Q. During your interaction with Mr. Wilkins, did you at any point remove your firearm?

A. I did.

Q. Okay. And what was the purpose for that?

A. Just the -- we have -- it's called a low ready, you have it pointed down at the ground.

Q. Okay. What was the purpose of you removing your service weapon?

A. In reality of life, people miss things, weapons can be missed. I don't know, he's not handcuffed, he's free to do whatever he wants.

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MR. HELMER: Okay. Thank you. I have nothing further.

THE COURT: Mr. Helmer, do you have any other questions?

MR. HELMER: Briefly.

REDIRECT EXAMINATION

BY MR. HELMER:

Q. Trooper, I know we've heard a lot of talk about your investigating this civil infraction, a minor being in possession of marijuana, but safe to say you've got operation of a vehicle at that point, correct?

A. Yes.

Q. We've got at least one person operating a motor vehicle, and now you have the smell of marijuana, but you don't know when it's been consumed, is that correct?

A. Correct.

Q. Is it illegal in Michigan to drive under the influence of marijuana?

A. Yes.

Q. Is it possible that you were going to find evidence of that during your investigation?

A. Yes.

Q. When you started that investigation, did you know that all you would find is evidence of a civil infraction?

A. No.

MR. HELMER: Nothing further.

THE COURT: Okay. Any other questions, Ms. Heys?

MS. HEYS: Yes, Your Honor.

RECROSS-EXAMINATION

BY MS. HEYS:

Q. How long have you been employed with the Michigan State Police?

A. Twenty-two years.

Q. Okay. So is it fair to say that when you suspect somebody of driving under the influence of -- whether that's alcohol or another substance, you perform a series of tests with them?

A. Yes.

Q. Okay. Are you trained as somebody who can recognize the impacts of somebody who's under the influence of drugs?

A. That'd be a DRE. I mean --

Q. Okay. Are you trained in that or no?

A No, I'm not a DRE.

Q. Okay. And consistent with your testimony earlier at this point there were no major signs of intoxication from your perspective?

A. No, not really.

MS. HEYS: Thank you. I have nothing further.

THE COURT: Okay. You can step down, Trooper. Thank you for help and for waiting.

(At 10:03 a.m., witness excused)

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THE COURT: Next witness that you have, Mr. Helmer?

MR. HELMER: No further witnesses.

THE COURT: Ms. Heys, do you want to call any witnesses?

MS. HEYS: None, Your Honor. Thank you.

THE COURT: Okay. Any final argument you want to make briefly?

MR. HELMER: Your Honor, I'd move for bind-over based on the evidence presented.

THE COURT: Ms. Heys, your argument, if you will.

MS. HEYS: Thank you, Your Honor, I would just note that this search is essentially unconstitutional. There's not reason to search a vehicle when somebody is suspected of a civil infraction. I would venture to guess that it's probably outside of policy to be searching vehicles without getting either consent or a warrant.

I think this is a really huge implication on the Fourth Amendment. You don't get to search a vehicle just because you are suspecting somebody of speeding or a civil infraction of having marijuana in possession. There's been no testimony as far as any signs of intoxication or any belief that there was another crime that was being committed, aside from civil infractions.

With that, I would request that the Court find that the search was unconstitutional and dismiss this case. Thank

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you.

THE COURT: Okay. Mr. Wilkins, you're in good hands with your attorney as it relates to the Defense arguments, and those arguments will continue. This Court is holding what's called a probable cause conference to make a determination of whether there was a crime committed, whether there's probable cause to believe you committed it.

The argument, really, is all on the search is illegal, and there's going to be another decision on that. It won't come from me, because I think there was probable cause basis on this case to have it go the way it did. Now, if they never found a gun, if they never found any other drugs or anything else like -- you never -- like the officer said, you never know what is going to be found as it relates to it, and the issue of whether the search is allowed or not allowed, on my part with the probable cause conference, I think that there was sufficient evidence to allow the officer to make the investigation continue with the search even without the consent portion of it.

That will still be pursued, and your attorney will still be looking into that at the higher level court, but I'm binding you over to the circuit court on the five-year felony. The case moves onto circuit with a date that's uncertain, but Ms. Heys will be told when that date is, then you'll get that date and you'll have to be downtown. You don't want to miss

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anything. You've done everything we've asked you to ever since I've met you, and I appreciate that. You've shown up every time.

There is a document called the Waiver of the Circuit Court Arraignment. If you wish to waive the arraignment, then I just say "not guilty" on this case and you don't go downtown in front of the new judge. That document is in the lower level of the podium if you want to handle that, Ms. Heys. If not, I just go forward with the arraignment right now.

MS. HEYS: Your Honor, we would just request the Court arraign him right now.

THE COURT: Okay. Could I have the file back, please?

So you don't go downtown either way until they tell you what date it is, but I'll just go ahead and arraign you on this. So when I talked to you -- or, you talked to the very first person, the charge is called carrying a concealed weapon. They call it carrying a dangerous weapon; to wit, a pistol. They talk about it being some kind of -- you can sit, you can sit. Thank you, I appreciate that, but you can sit.

Amanda, can you give me the paperwork on -- and the pistol that was described as a Glock -- I don't know guns and I don't know what they are, but that's what they're talking about -- whether concealed or otherwise in a vehicle operated or occupied by you, they're talking about a 2015 Honda, they

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call it a CRV, and they're talking about January 16, 2023, in the area of M-37 near 7 Mile Road.

That is a felony offense. It carries with it the possible penalty of five years in prison. It doesn't mean it has to be five years, but it's zero to five years, five years is the maximum, or it can be a monetary fine, and the monetary fine can be $2,500.00. They also require, if you're convicted, a mandatory forfeiture of the weapon or device. As it relates to this, you had the right to remain silent, you don't need to say anything to anyone. I've never heard you speak about the details of the case and you're not required to.

That right to remain silent continues as the case moves onto to circuit court. You have an attorney and you have a right to have an attorney. Ms. Heys is your attorney from the Public Defender's Office. You should reach out to her if you have questions or concerns.

The next appointment will be downtown at the Kent County Circuit Court. I think they'll refer to it as a status conference, and that status conference will identify who's going to be the judge in your case, because once you leave district court, it's not our court anymore.

As it relates to this case, the information that I've read, that's the charge. Not new to you, because you already have heard that read to you. We enter a plea of not

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guilty, and the bond stays the way it was that was set originally. I don't change that bond. Even though you got bound over to circuit court, I don't change that.

The -- the cause now before this Court is really what we call the circuit court arraignment done with provisions that the district court judge can do it for the circuit judge, and they call it the reading of the information. So that's what I've done. We enter a plea of not guilty, and the case moves onto circuit court as I've ordered a moment ago.

You've bonded from jail, and the bond shall continue until further order of this Court, and I don't have the name of the Judge that's going to be assigned to you, but you'll find that out. And when Ms. Heys gets the contact from -- call or paperwork from circuit, it will have the judge's name and the date for that status conference, then she'll tell you. It's possible circuit court mails you directly, but I think they just talk to your attorney, and then you'll know who the judge is, what date it is, what time it is.

Do you have any questions for me?

THE DEFENDANT: No, ma'am.

THE COURT: You feel like you understand it?

THE DEFENDANT: Yes, ma'am.

THE COURT: It's not over. In fact, it's just beginning.

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THE DEFENDANT: Mm-hmm.

THE COURT: But stick to talking to your attorney if you have any questions, okay?

Ms. Heys, do you have any other questions?

MS. HEYS: None, Your Honor.

THE COURT: Okay. Then circuit court arraignment -- or, circuit court arraignment is finalized. Thank you for your courtesies. I appreciate it.

(At 10:10 a.m., proceedings concluded)

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STATE OF MICHIGAN)

) SS

COUNTY OF KENT)

I hereby certify that this transcript, consisting of 23 pages, is a complete, true, and correct transcript, transcribed to the best of my ability, of the proceedings taken in this case on Wednesday, March 1, 2023.

Dated: April 6, 2023

s/Amanda L. Dubay

Amanda L. Dubay, CER-5136
Certified Electronic Recorder

63rd District Court
1950 E. Beltline Avenue, N.E.
Grand Rapids, Michigan 49525
(616) 632-7820
amanda.dubay@kentcountymi.gov

Exhibit 6

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S T A T E O F M I C H I G A N

17TH JUDICIAL CIRCUIT COURT - (KENT COUNTY)

PEOPLE OF THE
STATE OF MICHIGAN,

Case No. 23-02112-FH

V

FREDDIE WILKINS

Defendant

/

MOTION TO SUPPRESS

BEFORE THE HONORABLE SCOTT A. NOTO, CIRCUIT COURT JUDGE

Grand Rapids, Michigan - Friday, June 2, 2023

APPEARANCES:

For the People:	MR. DAVID SLOTSEMA (P80420) Kent County Prosecutor's Office 82 Ionia Avenue Northwest Suite 450 Grand Rapids, Michigan 49503-3022 616-632-6710
For the Defendant:	MS. AMANDA HEYS (P84163) Kent County Office of the Defender 146 Monroe Center Street Northwest Suite 920 Grand Rapids, Michigan 49503 616-774-8181
RECORDED BY:	FTR.Gold
TRANSCRIBED BY:	MS. KRISTEN J. BRINK, CER 7740 Certified Electronic Recorder 616-632-5203

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WITNESSES FOR THE PEOPLE: PAGE

N/A

WITNESSES FOR DEFENDANT: PAGE

N/A

EXHIBITS: OFFERED RECEIVED

N/A

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Grand Rapids, Michigan

Friday, June 2, 2023 - 8:43 a.m.

THE CLERK: This is the matter of the People of the State Michigan versus Mr. Wilkins. Case number is 23-02112-FH. Will the parties please identify yourselves for the record?

MR. SLOTSEMA: Yes. David Slotsema on behalf of the People.

MS. HEYS: Amanda Heys on behalf of Mr. Wilkins, your Honor.

THE COURT: Okay. Good morning. Ms. Heys is your client going to join us?

MS. HEYS: I don't believe so, your Honor.

THE COURT: Okay. This is the defendant's motion to suppress evidence. The Court reviewed the motion. I got a response from the People late afternoon yesterday. I've looked that over briefly, I had other things to review. But let's -- let's take this up.

Ms. Heys, anything further this morning then as part of the motion?

MS. HEYS: Thank you, your Honor. I would just note for the record that I don't believe the Court should consider any response from the People.

THE COURT: I'm gonna.

MS. HEYS: Okay. Just for the record though,

they didn't comply with the court rules --

THE COURT: Okay.

MS. HEYS: -- so I respect the Court's decision to consider that.

THE COURT: Okay.

MS. HEYS: At the end of the day, we are looking at what started at -- an investigation for civil infractions. Civil infractions, as the Court is aware, are not criminal. They have been designated by the Legislature as essentially less -- less serious than even misdemeanors.

So as argued in our motion, the trooper has exceeded the stop, the permissible scope of a stop. He pulls my client out of a vehicle. Again, still suspecting civil infractions. Pulls him out of the vehicle and pats him down as part of a *Terry* stop. He did not indicate that he suspected any type of weapons on my client.

THE COURT: So he pulls him over for speeding.

MS. HEYS: Correct.

THE COURT: Think he says he smells marijuana or he checks their licenses first. Finds out they're under 21, right?

MS. HEYS: Correct.

THE COURT: Then he -- based on that and the smell of marijuana, then he proceeds with further extension of the stop, correct?

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MS. HEYS: Correct.

THE COURT: Okay.

MS. HEYS: And he -- he articulated that he did not believe it was something that maybe they had been just smoking. He indicated it could have been hours ago, which I think goes to the level of the smell that was present in the car, which would also go to the amount that was possibly present in the vehicle.

He pulls my client out of the vehicle. He then conducts a search of his person. At that point, he is extending the stop beyond the permissible scope which is allowed in *Terry*. He doesn't find anything illegal on my client. But he then pulls out the passenger and also questions her.

After the passenger indicates that she had some, she described it as a shake or a small amount of marijuana present in the vehicle, he then conducts a search of the entire vehicle. He never asked for consent. And he does not have any suspicion of any other crimes --

THE COURT: Can he search the vehicle based on the -- the odor that he detected and the fact that they're under 21?

MS. HEYS: Your Honor, these are both civil infractions. This is admitted by the officer. At that point, he said he did not suspect any other crimes. He

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just suspected speeding and possible possession of marijuana.

There are two occupants in this vehicle. And so knowing that the permissible amount for somebody over 21 is 2.5 ounces. Essentially, there's allowed to be five ounces in a vehicle and for it to still qualify as civil infraction for somebody who is under 21.

He did not suspect that my client was driving impaired. He noted that in the prelim transcript. He also does not articulate any suspicion that there was an unlawful amount outside of again, what would qualify as a civil infraction.

At the point where he is searching my client, he is again exceeding the scope of what's allowed in *Terry* and therefore violating the Fourth Amendment.

He did not, in the prelim transcript, indicate any suspicion of any other crime that he believed was happening outside of just the lawfulness of a possession.

In regards to --

THE COURT: So as I just -- as I understand it then, he -- he -- he pulls him over. He checks their licenses. Finds out they're under 21. He smells marijuana. He starts his search. You're arguing that that's beyond the scope of *Terry*, and as part of that search, he finds a weapon at some point. I believe it was

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in a backpack or somewhere in the backseat, correct?

MS. HEYS: That's correct, your Honor.

THE COURT: Okay.

MS. HEYS: It was in a backpack, you know, pre-legalization of marijuana just may have been permissible because possession would have been a crime. At this point, it is a civil infraction.

And while Michigan law is not clear necessarily on whether a civil infraction is enough to begin a search in the vehicle, there is some persuasive decisions that have been made out of Massachusetts which --

THE COURT: So we haven't addressed this issue?

MS. HEYS: The State of Michigan, no.

THE COURT: Okay.

MS. HEYS: The Supreme Court of Massachusetts indicated that absent any articulable facts supporting a belief that the vehicle can be additional -- an additional criminal amount of marijuana, the officers lack probable cause to believe that a crime was committed and the search was impermissible. That's from Massachusetts and that's cited in the motion. Thank you.

Now, turning over to the prosecution's argument that the automobile exception should apply, again they're referencing essentially that the officer had suspicion that there was more than five ounces of marijuana present in the

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vehicle. They say that it's articulated by the officer in the prelim testimony. I've read the prelim transcript multiple times. I was there. There's no articulation that he's suspected any criminal amount of marijuana in that vehicle.

I think we're kind of jumping to conclusions at that point and it's clearly wrong. If you review it, there's nothing where he says he suspected a criminal amount. It's all, I just smelled it.

THE COURT: Yeah, it was just based on the odor as I understand it.

MS. HEYS: Right. And he didn't indicate --

THE COURT: He had no -- he had no reason to suspect the amount --

MS. HEYS: Correct.

THE COURT: -- correct?

MS. HEYS: And he made no indication that he suspected other crimes. As I stated before, didn't even believe that he was intoxicated and so didn't even perform any type of sobriety tests during the stop. He simply pulls my client out of the vehicle, conducts a search, and is exceeding the scope of, again what's permissible. At that time, it's a -- becomes unlawful. And so any additional delay is unlawful.

The fact that he is pulled over for speeding, he

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could have been issued a speeding ticket, has insurance checked, checked for any warrants. But yet, it's delayed further to have an additional officer come to the scene so he can pull out both pass -- or both passengers of the vehicle and question both of them. Again, this is all for a civil infraction.

And so we are requesting that the Court find that this is unconstitutional pursuant to the Fourth Amendment and suppress this evidence as the officer does not have probable cause to search and he also did not have consent.

THE COURT: Okay.

MS. HEYS: Thank you.

THE COURT: Ms. Heys, thank you. Mr. Slotsema, I've read the People's response. Anything further?

MR. SLOTSEMA: No, your Honor. Just highlight on page three of that response quoting *People v Kavanaugh*, concerning the scope and duration at the stop where a traffic stop reveals new circumstances that lead to a reasonable suspicion of criminal activity, continued detention to investigate is not unconstitutional.

THE COURT: Okay.

MR. SLOTSEMA: Thank you.

THE COURT: All right. Well, I'll take this under advisement. I want to look at -- look over a few things and -- and get into some of the case law cited in

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the briefing. Thank you both. I'll issue order when I'm -- when I'm able to. Please allow me a few weeks, okay? Thank you.

MS. HEYS: Thank you, your Honor.

THE COURT: Yup.

(At 8:52 a.m., court adjourned)

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STATE OF MICHIGAN)

COUNTY OF KENT)

I certify that this transcript, consisting of 11 pages is a complete, true and correct transcript to the best of my ability of the hearing on the record held in this case on June 2, 2023.

June 28, 2023

Kristen J. Brink, CER 7740
Kent County Courthouse
180 Ottawa Avenue N.W.
Grand Rapids, Michigan 49503
616-632-5203

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Exhibit 7

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STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR THE COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,
v.

FREDDIE WILKINS, III,
Defendant.
_____/

Case No. 23-02112-FH
HON. SCOTT A. NOTO

Attorneys for Plaintiff:
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(616) 774-8181

MOTION TO RECONSIDER

Defendant, Freddie Wilkins, III, by and through his undersigned attorney, Amanda J. Heys, moves this Court, pursuant to the Fourth and Fourteenth Amendments of the U.S. Constitution, Article 1, Section 11 of the Michigan Constitution, and MCR 2.119(F), to reconsider its June 9, 2023 Order (the "Order"), wherein the Court denied his Motion to Suppress Evidence (the "Motion to Suppress"), and in support states as follows:

BACKGROUND

On January 16, 2023, the police stopped Mr. Wilkins for speeding. Based solely on his age, the age of his passenger, and the odor of marijuana, the police then initiated a *Terry* investigation into whether Mr. Wilkins or his passenger possessed marijuana in violation of Section 15(3) of the Michigan Regulation and Taxation of Marihuana Act (the "MRTMA"). Section 15(3) of the MRTMA is a civil infraction – not a crime. *See* MCL 333.27965(3).

During their *Terry* investigation, the police removed Mr. Wilkins from the vehicle and searched his person. This was a full evidentiary search – not a *Terry* pat down for weapons. Finding

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nothing, the police next removed his passenger from the vehicle, who told the police that she had some "shake" (a small amount of marijuana) in the vehicle. The police then conducted a search of the vehicle ostensibly pursuant to the automobile exception to the warrant requirement. In the vehicle, the police found the pistol giving rise to the pending CCW charge against Mr. Wilkins.

On May 10, 2023, Mr. Wilkins filed his Motion to Suppress. Therein, he argued that the pistol found in the vehicle must be suppressed for two reasons. ***First***, the police exceeded the permissible scope of their *Terry* investigation when they searched his person, *see Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993) (an evidentiary search during a *Terry* investigation is an "unrelated" inquiry and "condemned"); *Sibron v. New York*, 392 U.S. 40, 65-66 (1968) (accord), and, by so doing, they unconstitutionally prolonged the *Terry* investigation. *See Rodriguez v. U.S.*, 575 U.S. 348, 355 (2015) (a *Terry* investigation "remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop") (cleaned up); *People v. Kavanaugh*, 320 Mich. App. 293, 301 n. 6 (2017) (accord). ***Second***, even if the police did not unconstitutionally prolong the *Terry* investigation by searching him, their subsequent search of the vehicle was not justified by the automobile exception to the warrant requirement because they were searching for evidence of a civil infraction – not a crime. *See Com. v. Sheridan*, 470 Mass. 752, 757 (2015).

On June 9, 2023, this Court issued its Order denying Mr. Wilkins' Motion to Suppress. In that Order, the Court held that the police did not exceed the permissible scope of their *Terry* investigation by searching Mr. Wilkins' person because their "actions were based on specific, reasonable inferences drawn from the initial smell of marijuana and the age of the vehicle's occupants" – i.e., the police had reasonable suspicion "to extend the scope and duration of the stop to determine what amount of marijuana, if any, was present."[1] This Court also held that because the police "did not observe any

[1] Order, p. 4.

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amount of marijuana that would make possession a civil infraction," but rather "smelled and recognized the odor of marijuana," which "did not give … any indication of the amount of marijuana," the police "had probable cause under the automobile exception to search the vehicle and its contents."[2] For the reasons discussed more fully below, Mr. Wilkins now asks this Court to: (1) reconsider and vacate its Order; and (2) enter an order suppressing all evidence discovered by the police during the search of the vehicle on January 16, 2023.

STANDARD OF REVIEW

A trial court's decision to grant a motion to reconsider brought pursuant to MCR 2.119(F) is an exercise of judicial discretion. *Kokx v. Bylenga*, 241 Mich. App. 655, 658 (2000). If a trial court deems it appropriate to hear a motion to consider, "it has every right to do so, and [MCR 2.119(F)] does nothing to prevent this exercise of discretion." *Smith v. Sinai Hosp. of Detroit*, 152 Mich. App. 716, 723 (1986). "The purpose of MCR 2.119(F) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal, but at a much greater expense to the parties." *Bers v. Bers*, 161 Mich. App. 457, 462 (1987).

DISCUSSION

In its Order, this Court first held that the police did not exceed the permissible scope of their *Terry* investigation when they searched Mr. Wilkins' person because their "actions were based on specific, reasonable inferences drawn from the initial smell of marijuana and the age of the vehicle's occupants" – i.e., they had reasonable suspicion "to extend the scope and duration of the stop to determine what amount of marijuana, if any, was present."[3] Respectfully, that's error.

---

[2] Order, p. 5.
[3] Order, p. 4.

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A valid *Terry* investigation ***always*** involves specific and articulable facts giving rise to at least reasonable suspicion. *People v. Lucynski*, 509 Mich. 618, 625 (2022). Yet, even with the requisite reasonable suspicion, an evidentiary search of a person is ***never*** allowed during a *Terry* investigation, *see Dickerson*, 508 U.S. at 378 (such an "evidentiary search" is "condemned"), *see also Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979) ("Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons."), and, to be sure, ***never*** has been. *See Sibron*, 392 U.S. at 65-66 (holding that an evidentiary search of a person during a *Terry* investigation "violates the guarantee of the Fourth Amendment").[4]

Thus, even assuming *in arguendo* that the police had reasonable suspicion "to extend the scope and duration of the stop to determine what amount of marijuana, if any, was present,"[5] the evidentiary search of Mr. Wilkins' person was still outside the permissible scope of their *Terry* investigation. Instead, the search of his person was an unrelated inquiry that unconstitutionally prolonged the *Terry* investigation. *See Rodriguez*, 575 U.S. at 355 (a *Terry* investigation "remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop") (cleaned up); *Kavanaugh*, 320 Mich. App. at 301 n. 6 (2017) (even if the police have not yet completed their *Terry* investigation, if police activity outside its permissible scope "causes that completion to be delayed, the delayed detention remains a constitutional violation.").

In its Order, this Court also held that because the police "did not observe any amount of marijuana that would make possession a civil infraction," but rather "smelled and recognized the odor of marijuana," which "did not give … any indication of the amount of marijuana," the police "had probable cause under the automobile exception to search the vehicle and its contents."[6]

---

[4] The Supreme Court decided *Sibron* the very same day as *Terry v. Ohio*, 392 U.S. 1 (1968).
[5] Order, p. 4.
[6] Order, p. 5.

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Respectfully, that's also error. Simply put, if the police did not have "any indication of the amount of marijuana" in the vehicle,[7] then the police did not "any indication" – let alone probable cause to believe – that the vehicle contained a criminal quantity of marijuana (i.e., over 2.5 ounces of marijuana). "Absent articulable facts supporting a belief that the vehicle contained [a] criminal quantity of marijuana, the officers lacked probable cause to believe that a crime was being committed, and the search was impermissible." *Sheridan*, 470 Mass. at 757.

CONCLUSION

Accordingly, Mr. Wilkins moves this Court, pursuant to the Fourth and Fourteenth Amendments of the U.S. Constitution, Article 1, Section 11 of the Michigan Constitution, and MCR 2.119(F), to: (1) reconsider and vacate its June 9, 2023 Order denying his Motion to Suppress; and (2) enter an order suppressing all evidence discovered by the People as a result of their unconstitutionally prolonged *Terry* investigation and subsequent search of the vehicle on January 16, 2023.

Dated: June 27, 2023

Respectfully submitted,

AMANDA J. HEYS (P84163)
Kent County Office of the Defender
146 Monroe Center St., Ste. 920
Grand Rapids, MI 49503
(616) 774-8181

[7] Order, p. 5.

Exhibit 8

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STATE OF MICHIGAN
IN THE 17TH CIRCUIT COURT FOR KENT COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

FREDDIE WILKINS, III,

Defendant.
/

Case No. 23-02112-FH

Hon. Scott A. Noto

ORDER DENYING RECONSIDERATION

At a session of said Court, Kent County Courthouse, City of Grand Rapids, County of Kent, State of Michigan on July 21, 2023.

Present: Hon. Scott A. Noto
Circuit Court Judge

Defendant Freddie Wilkins III filed a Motion for Reconsideration concerning the Court's order on his Motion to Suppress Evidence. As set forth in MCR 2.119(F)(3), a motion for rehearing or reconsideration which merely presents the same issues ruled on by the Court, either expressly or by reasonable implication, will not be granted. MCR 2.119(F)(3); *Cason v Auto Owners Ins Co*, 181 Mich App 600, 605; 450 NW2d 6 (1989). The moving party must demonstrate a palpable error by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. *Id.*

Defendant's motion fails to satisfy the requirements of MCR 2.119(F)(3). Defendant's motion is therefore DENIED.

JUL 21 2023

IT IS SO ORDERED.

SCOTT A. NOTO

Hon. Scott A. Noto
Circuit Court Judge

PROOF OF SERVICE

I certify this date that copies of the Order were served on the parties and/or their attorneys by ordinary mail at their last known addresses.

Date: 7-25-23

Deputy County Clerk

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Exhibit 9

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Court of Appeals, State of Michigan

ORDER

People of MI v Freddie Wilkins III

Docket No. 367209

LC No. 23-002112-FH

Kathleen A. Feeney
Presiding Judge

Douglas B. Shapiro

James Robert Redford
Judges

The application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review.

Presiding Judge

Shapiro, J. would grant the application for leave to appeal.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC 11 2023
Date

Chief Clerk

Exhibit 10

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Order

Michigan Supreme Court
Lansing, Michigan

Elizabeth T. Clement
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden
Justices

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April 10, 2024

166481

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 166481
COA: 367209
Kent CC: 23-002112-FH

FREDDIE WILKINS, III,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the December 11, 2023 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

b0403

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 10, 2024

Clerk

Exhibit 11

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1999 WL 33441137
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

AMERICAN EAGLE FIREWORKS, William Stajos, and Jan Stajos, Plaintiffs-Appellants,
v.
CITY OF LANSING, Kirt Baker, Jeff Aviero, Kim Warren Eddie, and James Ballard, Defendants-Appellees.

No. 206713.
|
June 18, 1999.

Before: NEFF, P.J., and HOOD and MURPHY, JJ.

Opinion

PER CURIAM.

***1** This 42 USC § 1983 and malicious prosecution action arises out of defendants' seizure and destruction of certain fireworks sold by plaintiffs. Plaintiffs appeal as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(8). The trial court disposed of plaintiffs' claims on the grounds of governmental immunity and an earlier decision by this Court which found that plaintiffs' fireworks were illegal under Michigan's fireworks statute. We affirm.

Initially, plaintiffs claim that the trial court erred in granting summary disposition because the fireworks were not contraband subject to lawful seizure or destruction. A grant or denial of summary disposition based upon a failure to state a claim is reviewed de novo on appeal. *Beaty v. Hertzberg & Golden, PC*, 456 Mich. 247, 253; 571 NW2d 716 (1997). In this case, the trial court did not err in granting summary disposition for defendants because the fireworks were contraband per se and were therefore subject to immediate destruction. [1]

MCL 780.652; MSA 28.1259(2) authorizes the issuance of search warrants and permits officers to seize any property that is possessed in violation of any law of this state or property that is contraband. Some Michigan statutes specifically declare certain objects or substances to be contraband and permit their confiscation and/or destruction. [2] However, Michigan's fireworks statutes, M.C.L. § 750.243a *et seq.*; MSA 28.440(1) *et seq.*, do not contain a similar declaration that illegal fireworks may be destroyed as contraband. The fireworks in this instance were nevertheless contraband per se because the fireworks statute required plaintiffs to have a permit to possess them and because plaintiffs had no such permit. This was the holding of *Stajos v. City of Lansing*, 221 Mich.App 223, 234; 561 NW2d 116 (1997), where this Court ruled that these same fireworks were forbidden by Michigan's fireworks statute because they were not specifically permitted by a statutory exception.

Contraband per se refers to items of which the mere possession is contrary to public policy. *People v. Rosa*, 11 Mich.App 157, 161; 160 NW2d 747 (1968). Plaintiffs concede on appeal that contraband per se is subject to forfeiture without explicit statutory authority. The fireworks in the instant case were not legally possessed, and it therefore would have been improper to return them to plaintiffs. Because the fireworks in this matter were contraband per se, their seizure and immediate forfeiture was authorized by M.C.L. § 780.652; MSA 28.1259(2).

Plaintiffs also argue that the fireworks were merely derivative contraband and not contraband per se. The argument is without merit. An example of derivative contraband is money earned in a illegal drug sale. *People v. Washington*, 134 Mich.App 504, 510; 351 NW2d 577 (1984). The fireworks in question in this case were specifically found to be unlawfully possessed pursuant to statute. The items therefore were not merely incidentally connected to a statutory violation, but instead were themselves illegal and hence not derivative contraband. Plaintiffs also cite M.C.L. § 750.388; MSA 28.620, governing malicious destruction of property seized by legal process, as supporting their contention that defendants may be held liable for destruction of the fireworks. However, that statute does not apply to this case because it controls only executions on property to collect debts, not officers seizing goods in the course of a search warrant.

***2** Next, plaintiffs argue that the trial court erred in ruling that assistant prosecuting attorney Eddie was immune for his actions. The trial court committed no error because Eddie is immune from liability for claims arising under both 42 USC § 1983 and state law.

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Prosecuting attorneys are absolutely immune from a 42 USC § 1983 claim when initiating a prosecution and presenting the state's case. *Baldori v. Smith*, 219 Mich.App 713, 717; 558 NW2d 9 (1996) citing *Imbler v. Pachtman*, 424 U.S. 409, 431; 96 S Ct 984; 47 L.Ed.2d 128 (1976). Eddie's alleged acts of furthering a search warrant and ordering the disposal of the explosives are well within the usual functions of a prosecutor. Although Eddie's 42 USC § 1983 immunity does not govern plaintiffs' state law claims because Eddie's actions in furtherance of the search warrant and destruction of the fireworks as contraband per se were within the scope of his prosecutorial function, he is entitled to qualified immunity pursuant to M.C.L. § 691.1407(2); MSA 3.996(107)(2).

Next, plaintiffs argue that they established a prima facie case of malicious prosecution, so that summary disposition was improper. However, plaintiffs failed to state a claim for malicious prosecution because they cannot demonstrate that the prior criminal proceedings terminated in their favor. *Payton v. Detroit*, 211 Mich.App 375, 394-395; 536 NW2d 233 (1995). In the criminal matter involving plaintiffs' illegal possession of fireworks, plaintiffs' business, American Eagle, pleaded no contest to violating the fireworks statute. This cannot be deemed to be a termination in plaintiffs' favor.

Finally, plaintiffs argue that they established a prima facie case that the search warrant leading to the seizure and destruction of the fireworks was unconstitutionally invalid. This issue cannot be raised in an ancillary civil proceeding but, instead, should have been addressed to the court in the criminal case. Since American Eagle pleaded no contest to the charge, any objections to the warrant are deemed waived. *People v. New*, 427 Mich. 482, 485; 398 NW2d 358 (1986).

Affirmed.

All Citations

Not Reported in N.W.2d, 1999 WL 33441137

Footnotes

1 Plaintiffs have attached an extensive number of documents to their brief on appeal, including portions of depositions, affidavits, a search warrant, and a criminal charging information. However, the trial court decided defendants' motion on the basis of MCR 2.116(C)(8). Since plaintiffs have not moved to expand the record pursuant to MCR 7.210, these materials are outside the scope of the record and may not be considered on appeal. MCR 7.210(A)(1); *Tope v. Howe*, 179 Mich.App 91, 106; 445 NW2d 452 (1989).

2 The Tobacco Products Tax Act, M.C.L. § 205.429; MSA 7.411(39), for example, provides that any tobacco product held, owned, or possessed in violation of the act is contraband and may be seized and confiscated. The Natural Resources and Environmental Protection Act, M.C.L. § 324.61523; MSA 13A.61523, provides that any illegal oil or gas is subject to confiscation and seizure. The Controlled Substance Act, M.C.L. § 333.7525(1); MSA 14.15(7521), provides that illegally possessed schedule 1 narcotics are deemed contraband and are subject to summary forfeiture. Penal statutes governing forgery provide that any item of property bearing a counterfeit mark is subject to seizure under warrant or incident to arrest and is subject to forfeiture. MCL 750.263(6); MSA 28.474(6). Likewise, the statute barring gambling, M.C.L. § 750.308a; MSA 28.540(1), permits the destruction of illegal gaming devices upon request of the police and order of the court.

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