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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.

_____/

Michigan Supreme Court
No. 167737

Court of Appeals
No. 367209

Kent County Circuit Court
No. 23-02112-FH

PLAINTIFF-**APPELLEE'S SUPPLEMENTAL BRIEF**

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

DIRECTED QUESTIONS PRESENTED iv

INTRODUCTION 1

ARGUMENT 2

I. The Trooper did exceed the permissible scope of a *Terry* stop **by searching Defendant's person at the beginning of his** investigation. 2

II. Discovery of the recovered weapon was not causally **connected to the search of Defendant's person where nothing from the search was used to support the Trooper's probable cause** determination related to the vehicle. 5

III. **The search of Defendant's vehicle was permissible under the** automobile exception to the warrant requirement where the trooper had probable cause to believe that the vehicle contained contraband in the form of marijuana, which neither driver nor passenger could legally possess. 7

RELIEF REQUESTED 10

RECEIVED by MSC 5/31/2025 12:08:25 AM

INDEX OF AUTHORITIES

Cases

Chambers v Maroney, 399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970) 8

Hudson v Michigan, 547 US 586; 126 S Ct 2159; 165 L Ed 2d 56 (2006) 6

Maryland v Wilson, 519 US 408; 117 S Ct 882; 137 L Ed 2d 41 (1997).....4

Nix v Williams, 467 US 431, 444; 104 S Ct 2501; 81 L Ed 2d 377 (1984) 6

People v Armstrong, __ Mich __; __ NW3d __ (2025) (Docket No. 165233) 8

People v Armstrong, 344 Mich App 286; 1 NW3d 299 (2022).....8

People v Champion, 452 Mich 92; 549 Mich 849 (1996).....4

People v Custer, 465 Mich 319; 630 NW2d 870 (2001).....4

People v Freddie Wilkins, III, unpublished per curam opinion of the Court of Appeals, decided September 5, 2024 (Docket 367209) 5

People v Garvin, 235 Mich App 90; 597 NW2d 194 (1999).....8

People v Johnson, 502 Mich 541; 918 NW2d 676 (2018) 2

People v Kazmierczak, 461 Mich 411; 605 NW2d 667 (2000).....8

People v Levine, 461 Mich 172; 600 NW2d 622 (1999) 8

People v Martinez, 187 Mich App 160; 466 NW2d 380 (1991).....10

People v Moorman, 331 Mich App 481; 952 NW2d 597 (2020).....9, 10

People v Whalen, 390 Mich 672; 213 NW2d 116 (1973).....8

People v Williams, 472 Mich 308; 696 NW2d 636 (2005).....2

Segura v United States, 468 U.S. 796, 804; 104 S Ct 3380; 82 L Ed 2d 599 (1984)6

Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 LEd2d 889 (1968).....2, 3, 4

United States v Cortez, 449 US 411; 101 S Ct 690; 66 LEd2d 621 (1981) 3

United States v Ross, 456 US 798; 102 S Ct 2157; 72 L Ed 2d 72 (1982).....10

Utah v Strieff, 579 US 232; 136 S Ct 2056; 195 L Ed 2d 400 (2016).....5, 6

Statutes

MCL 333.26421 9

MCL 333.27951.....7

MCL 333.27954 9

MCL 333.27965 9

Other Authorities

Black's Law Dictionary (11th ed, 2019) 9

RECEIVED by MSC 5/31/2025 12:08:25 AM

RECEIVED by MSC 5/31/2025 12:08:25 AM

DIRECTED QUESTIONS PRESENTED

I. DID THE SEARCH OF DEFENDANT'S PERSON BY TROOPER TOMKINS EXCEED THE PERMISSIBLE SCOPE OF A *TERRY* STOP?

The Court of Appeals answered, "Yes."
Defendant-Appellant answers, "Yes."
Plaintiff-Appellee answers, "Yes."

II. WAS THE DISCOVERY OF THE RECOVERERD WEAPON CAUSALLY CONNECTED TO THE SEARCH OF THE DEFENDANT'S PERSON?

The Court of Appeals answered, "No."
Defendant-Appellant answers, "Yes."
Plaintiff-Appellee answers, "No."

III. WAS THE SEARCH OF THE DEFENDANT'S VEHICLE PERMISSIBLE UNDER THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT, WHERE THE TROOPER HAD PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT WAS RESPONSIBLE FOR A CIVIL INFRACTION FOR POSSESSING MARIJUANA WHILE UNDER 21 YEARS OF AGE?

The Court of Appeals did not answer this question.
Defendant-Appellant answers, "No."

Respectfully, Plaintiff-Appellee reframes the question as:

> Was the search of the Defendant's vehicle permissible under the automobile exception to the warrant requirement where the trooper had probable cause to believe that the defendant possessed contraband in the form of marijuana, which he could not *legally* possess?

Plaintiff-Appellee answers, "Yes."

RECEIVED by MSC 5/31/2025 12:08:25 AM

INTRODUCTION

Michigan's relationship with marijuana has evolved from all possession/use/distribution being illegal through first its partial decriminalization in the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.,* to further legalization with the passage of the Michigan Regulation and Taxation of Marijuana Act (MRTMA). As the legality surrounding marijuana changes, law enforcement officers continue to change how they treat discovery of marijuana during their patrols.

In the present case, during a traffic stop for a speeding violation, a state trooper quickly knew two things: 1) the odor of marijuana was coming from the stopped vehicle; and 2) no occupant of that vehicle could legally possess marijuana because they were both under the age of 21. What are the reasonable actions we expect officers to take under this situation?

Opposing counsel focuses on an argument that there is only probable cause to believe Defendant had committed a civil infraction by possessing marijuana while under 21 years of age. The People have focused instead on the trooper having probable cause to believe contraband – marijuana that no one in the SUV could legally possess – would be found inside Defendant's vehicle. In short, because no occupant could legally possess the marijuana, it was reasonable for law enforcement officers to search the vehicle for the marijuana under the automobile exception to the warrant requirement.

Relevant facts will be discussed as necessary within the argument sections. Additional preliminary examination testimony is also included in the statement of facts in the People's Brief on Appeal filed in the Court of Appeals, attached to the People's Answer in Opposition to Defendant's Application to this Court, previously submitted.

RECEIVED by MSC 5/31/2025 12:08:25 AM

ARGUMENT

I. The Trooper did exceed the permissible scope of a *Terry* stop by searching Defendant**'s person** at the beginning of his investigation.

Preservation of the Issue: Defendant argued that the Circuit Court erred in denying his motion to suppress based in part on his argument that the Trooper's search of his person violated the protections against unreasonable searches and seizures found in the Fourth Amendment of the U.S. Constitution and Article I, Section 11 of the Michigan Constitution. Defendant's motion to suppress filed in the trial court preserved this issue.

Standard of Review: This Court reviews a trial court's findings of fact at a motion to suppress hearing for clear error while its ultimate decision on the motion is reviewed *de novo*. *People v Williams,* 472 Mich 308, 313; 696 NW2d 636 (2005). "Clear error occurs if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Johnson*, 502 Mich 541, 565; 918 NW2d 676 (2018) (quotation marks and citation omitted)

Discussion: This Court has directed the parties to address "whether the search of the defendant's person by Trooper Tomkins exceeded the permissible scope of *Terry v Ohio,* 392 US 1, 21, 30-31; [88 S Ct 1868; 20 LEd2d 889] (1968)." As noted in the People's Brief on Appeal filed in the Court of Appeals, Issue I, the duration of the traffic stop was reasonable given the new circumstances confronted by the trooper when he noticed the marijuana odor and determined that both occupants of the vehicle were under 21 years old.[1] The People agree, however, that Trooper Tomkins's full search of Defendant's person exceeded *Terry* and any evidence discovered during that search would be inadmissible.

[1] The People have incorporated their Brief on Appeal filed in the Court of Appeals into their Answer in Opposition to the present application.

RECEIVED by MSC 5/31/2025 12:08:25 AM

During the traffic stop, Trooper Tompkins noticed the odor of marijuana coming from the vehicle and further discovered that both occupants were under 21 years of age, so *no one* in the vehicle could *legally* possess marijuana. Despite the odor, both occupants denied the presence of any marijuana. Defendant argues that since his possession of marijuana would only be a civil infraction, then there was no reason to even investigate further. In *Terry,* the United States Supreme Court explained that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry, supra,* at 21. Further, as noted in the People's Answer, the United States Supreme Court has warned against overly technical reviews of an officer's common-sense assessment that criminal activity is afoot. "[T]he evidence [in support of a stop pursuant to *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 LEd2d 889 (1968)] must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *United States v Cortez*, 449 US 411, 418; 101 S Ct 690; 66 LEd2d 621 (1981). Defendant's argument suggests that the officer must assume that any amount of marijuana in the vehicle would only result in a civil infraction; however, that is dependent upon the amount discovered. At this point in their interaction, due to the smell of marijuana and the underaged status of Defendant and his passenger, the trooper had probable cause to believe a search of the vehicle would result in the discovery of illegally possessed marijuana, and he further had reason to be concerned as to why the two would claim otherwise. One inference is that they would lie about having *any* marijuana if the amount they had was great enough to indicate trafficking.

Trooper Tompkins asked Defendant out of the vehicle. Generally, an officer/trooper conducting a traffic stop, "as a matter of course," may "order passengers to get out of the car pending completion of the stop" without running afoul of the Fourth Amendment. *Maryland v Wilson*, 519 US 408,

RECEIVED by MSC 5/31/2025 12:08:25 AM

410, 415; 117 S Ct 882; 137 L Ed 2d 41 (1997). Further, "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Terry, supra,* at 30.

Michigan has also recognized that where an officer has a reasonable suspicion that an individual is armed, a pat down search for weapons is appropriate. *People v Champion,* 452 Mich 92, 99; 549 Mich 849 (1996). "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." *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001) (quotation marks and citation omitted). It is possible that the trooper considered the odor of the drug coupled with the occupants' denial of any marijuana being present as a reason to believe an amount indicative of a criminal offense would be found. And where a larger quantity of drugs, including marijuana, is found, the trooper's experience would suggest caution due to the possibility that Defendant would be armed.

Had Trooper Tompkins merely patted down the outside of Defendant's clothing to ensure he was unarmed, this is the argument the People would make. However, it appears that, while brief, the trooper fully searched Defendant's person for marijuana rather than patting him down to search for weapons. Because of this, the search of Defendant's person exceeded the scope of *Terry v Ohio.*

RECEIVED by MSC 5/31/2025 12:08:25 AM

II. Discovery of the recovered weapon was not causally connected to the search of Defendant's person where nothing from the search was used to support the Trooper's probable cause determination related to the vehicle.

Preservation of the Issue/Standard of Review: See perseveration and standard of review noted in Issue I.

Discussion: This Court has further directed the parties to directly address: "whether the discovery of the recovered weapon was causally connected to the search of the defendant's person...." The People maintain that the odor of marijuana coupled with the fact that no one present could legally possess marijuana provided probable cause to believe contraband would be located within Defendant's vehicle.[2] Trooper Tompkins was aware of these two facts as soon as he reviewed the occupants' IDs showing their dates of birth. Nothing from the brief search of Defendant's person added to the basis for the trooper's search of Defendant's vehicle, the evidence discovered there – a loaded firearm – was not derivative of the search of Defendant's person.

To deter Fourth Amendment violations, Courts use the exclusionary rule to require the exclusion of unlawfully seized evidence from a criminal trial. *Utah v Strieff,* 579 US 232, 237; 136 S Ct 2056; 195 L Ed 2d 400 (2016). The rule covers both the evidence "obtained as a direct result of an illegal search or seizure" and "evidence later discovered and found to be derivative of an illegality," or "'fruit of the poisonous tree.'" *Id.,* quoting *Segura v United States,* 468 U.S. 796, 804; 104 S Ct 3380; 82 L Ed 2d 599

[2] The People recognize that the Court of Appeals declined to make that finding given the added facts of Defendant and his passenger first denying any marijuana was present and then the passenger admitting some small amount was in the vehicle. *People v Freddie Wilkins, III,* unpublished per curam opinion of the Court of Appeals, decided September 5, 2024 (Docket 367209), 7 FN 13, located at A8 of Appellant's Appendix.

RECEIVED by MSC 5/31/2025 12:08:25 AM

(1984). However, the exclusionary rule is "applicable only ... where its deterrence benefits outweigh its substantial social costs." *Strieff, supra,* quoting *Hudson v Michigan,* 547 US 586, 591; 126 S Ct 2159; 165 L Ed 2d 56 (2006) (internal quotation marks omitted). "Suppression of evidence ... has always been our last resort, not our first impulse." *Id.*

Three exceptions to the exclusionary rule concern "the causal relationship between the unconstitutional act and the discovery of evidence." *Strieff,* 579 US at 238. The Court explained:

> First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. Third, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. [Cleaned up.]

The second exception applies to the current case. "If the prosecution can establish by a preponderance of the evidence that the [evidence] ultimately or inevitably would have been discovered by lawful means [] then the deterrence rationale has so little basis that the evidence should be received." *Nix v Williams,* 467 US 431, 444; 104 S Ct 2501; 81 L Ed 2d 377 (1984). Before Trooper Tompkins searched Defendant's vehicle, he had recognized the odor of marijuana and determined that both occupants were too young to legally possess any marijuana. Both had denied there was any marijuana in the vehicle; however, the passenger, when asked out of the vehicle, admitted to the trooper that there was some "shake" – a small amount of marijuana inside. The probable cause that supported the search of the vehicle was based on the smell, the underaged Defendant and passenger, their initial denial, and the passenger's admission that some marijuana would be in the vehicle. The trooper's search of Defendant's person resulted

RECEIVED by MSC 5/31/2025 12:08:25 AM

in no evidence and added nothing to the probable cause already supporting the search of the vehicle. The search of Defendant's vehicle, based on probable cause, would have occurred regardless of the search of Defendant; therefore, the loaded firearm in his vehicle would have been inevitably discovered and seized.

III. The search of Defendant's vehicle was permissible under the automobile exception to the warrant requirement where the trooper had probable cause to believe that the vehicle contained contraband in the form of marijuana, which neither driver nor passenger could legally possess.

Preservation of the Issue/Standard of Review: Please see the preservation and standard of review for Issue I.

Discussion: Finally, this Court has directed the parties to address "whether the search of the defendant's vehicle was permissible under the automobile exception to the warrant requirement, where the trooper had probable cause to believe that the defendant was responsible for a civil infraction for possessing marijuana while under 21 years of age contrary to the protections of the Michigan Regulation and Taxation of Marihuana Act, MCL 333.27951 *et seq.*" The People submit that the Court's final question assumes a small amount of marijuana, covered by MRTMA, ignoring both the possibility that the amount would in fact be a criminal amount and the fact that the marijuana at issue was contraband given that no one in the vehicle could legally possess it.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [Emphasis added.]

RECEIVED by MSC 5/31/2025 12:08:25 AM

There are exceptions to the warrant requirement and one such "exception to the warrant requirement exists for searches of automobiles." *People v Levine*, 461 Mich 172, 179; 600 NW2d 622 (1999). The exception recognizes the mobility and "pervasive regulation" of automobiles, allowing officers to search without a warrant if they have probable cause to believe that contraband or evidence of a crime may be found within. *People v Kazmierczak*, 461 Mich 411, 418-419, 421; 605 NW2d 667 (2000); see also *Chambers v Maroney*, 399 US 42, 50-52; 90 S Ct 1975; 26 L Ed 2d 419 (1970). The exception also takes into consideration that people have a "lessened expectation of privacy in an automobile" than they do in their homes. *People v Garvin*, 235 Mich App 90, 102; 597 NW2d 194 (1999). For that reason, "[f]ewer foundation facts are necessary to support a finding of reasonableness when moving vehicles are involved, than if a house or home were involved." *People v Whalen*, 390 Mich 672, 682; 213 NW2d 116 (1973).

Before the decriminalization of marijuana in Michigan, the odor of marijuana alone provided probable cause to search a vehicle for the drug. *People v Armstrong,* __ Mich __; __ NW3d __ (2025) (Docket No. 165233), Slip Op, 4, citing *Kazmierczak, supra,* at 421-422, 424. However, since passage of the Michigan Regulation and Taxation of Marijuana Act (MRTMA), this Court recently determined that "'the smell of marijuana may be a factor, but not a stand-alone one, in determining whether the totality of the circumstances established probable cause to permit a police officer to conduct a warrantless search of a vehicle....'" *Id.* citing *People v Armstrong,* 344 Mich App 286, 300; 1 NW3d 299 (2022), quoting *Commonwealth v Barr,* 266 A 3d 25, 28 (PA, 2021). "The determination whether probable cause exists to support a search, including a search of an automobile without a warrant, should be made in a commonsense manner in light of the totality of the circumstances." *Garvin*, *supra*.

Much of Defendant's argument relies on his idea that Trooper Tompkins was only investigating him for a "mere civil infraction—not a

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crime." First, given the occupants' ages, any marijuana found within the vehicle was not legally possessed. MRTMA does not authorize anyone under the age of 21 to possess or consume marijuana, MCL 333.27954(1)(c), and any penalty for a violation of MRTMA, including its civil infractions, includes forfeiture of the marijuana, MCL 333.27965(3).[3]

Second, Defendant's argument again assumes the trooper is forced to accept the passenger's claim that she only had a small amount of marijuana; he does not have to do so. Trooper Tompkins had probable cause to believe that an amount of illegally possessed marijuana, i.e., contraband,[4] would be found within the vehicle based on the odor coming from the vehicle, the identification of the occupants as both being under the age of 21, their initial lie about no marijuana being present, and the passenger's admission that marijuana was inside the vehicle. This result is supported by the Court of Appeals' holding in *People v Moorman,* 331 Mich App 481; 952 NW2d 597 (2020), in which the Court addressed a similar issue concerning the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.* In *Moorman,* a trooper stopped the defendant's vehicle for speeding and, as in this case, smelled the order of marijuana coming from the vehicle during the traffic stop. *Moorman, supra,* at 483. Also, like Defendant, Moorman initially denied that any marijuana was in his vehicle then later admitted that he had harvested marijuana earlier that day, claiming to have a medical marijuana caregiver card, which would allow him to possess marijuana legally. *Id.* The Court considered whether the trooper then had probable cause to believe that the defendant possessed more than what he was legally allowed to possess under the MMMA. The

[3] Indeed, if this Court finds that the trooper's actions in this case were unreasonable, further direction from this Court as to how officers are to handle similar situations – in which no one can legally possess the marijuana – is requested.

[4] "Contraband" is generally understood to be goods that are unlawful to import, export, produce, or possess. Black's Law Dictionary (11th ed, 2019), p 402.

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Court found that, along with the trooper having smelled marijuana in the vehicle, Moorman's deception about the presence of marijuana gave rise to probable cause to believe that the amount of marijuana was greater than what was permitted at the time under the MMMA. *Id.* at 488.

Further, if a trooper has probable cause to search a lawfully stopped vehicle, "it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *People v Martinez*, 187 Mich App 160, 169; 466 NW2d 380 (1991), citing *United States v Ross*, 456 US 798, 825; 102 S Ct 2157; 72 L Ed 2d 72 (1982). It was during his search for the admittedly illegally possessed marijuana that Trooper Tompkins located the concealed firearm.

RELIEF REQUESTED

THEREFORE, for the reasons stated in herein, as well as the reasons articulated in our prior answer and the Court of Appeals' opinion, the People respectfully pray that Defendant's Application for Leave to Appeal the Court of Appeals' decision be DENIED.

Respectfully submitted,

Christopher R. Becker (P 53752)
Kent County Prosecuting Attorney

Dated: May 30, 2025

By: /s/ Kimberly M. Manns
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I certify that this document contains 3,137 countable words. The document is set in Georgia font, and the text is in 12-point type with 1.5-line spacing.

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