IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-39752

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

MARCUS COLEMAN,

Defendant-Appellee.

STATE OF NEW MEXICO'S BRIEF IN CHIEF

Appeal from the Eleventh Judicial District Court
McKinley County, New Mexico
The Honorable Robert A. Aragon

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SUMMARY OF PROCEEDINGS

INTRODUCTION

During a traffic stop, the police found more than 38 pounds of marijuana and a bag of psychedelic mushrooms in Defendant's car. The district court erroneously granted Defendant's motion to suppress and the Court of Appeals affirmed. The Court of Appeals' opinion is contrary to this Court's decisions holding that evolving circumstances during a traffic stop may permit an officer to ask limited questions relating to a driver's travel plans and thereby develop reasonable suspicion sufficient to expand the scope of the traffic stop. The Court of Appeals also did not adequately defer to the officer's training and experience. Because the officer had reasonable suspicion in this case, the Court of Appeals' decision should be reversed.

STATEMENT OF FACTS

The following testimony was presented at the hearing on Defendant's motion to suppress by McKinley County Sheriff's Deputy Brandon Salazar.

On April 16, 2021, Deputy Salazar observed a car with California license plates on I-40 following other vehicles too closely on two occasions. He executed a traffic stop. Defendant was driving and James McClendon was the passenger. **[Tr. 10:07:10-49, 10:08:02-29]**[1]

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[1] All transcript citations are to the audio transcript of the November 12, 2021 hearing on Defendant's motion to suppress.

When Deputy Salazar got to the passenger window, he immediately smelled the odor of marijuana coming from the car. McClendon started trying to "control the conversation" and "manage" Deputy Salazar's impression of the car's occupants by telling the Deputy that he was a veteran and that they were coming back from meeting other veterans who were dealing with post-traumatic stress issues. Deputy Salazar asked Defendant to come back to his patrol car while he wrote out the violation. In the patrol car, Deputy Salazar could smell the odor of marijuana on Defendant. Defendant admitted that he had been following other vehicles too closely and had to hit his brakes. **[Tr. 10:08:34-10:10:06]**

On the rental agreement for Defendant's car, Deputy Salazar noticed that the car had been rented around 12:30 p.m. on April 15, 2021. He asked Defendant about the purpose of their trip and how they got to California. Defendant initially said that they had been in California for a couple of days, but later admitted that they flew there on April 15. He had difficulty explaining why they flew to California but were driving back east. Deputy Salazar is the local narcotics and narcotics interdiction officer for the Sheriff's Office. From his training and experience, he knew that flying to a location and then driving back is now common in smuggling operations, and concluded that Defendant and McClendon were smuggling contraband. Deputy Salazar then asked Defendant about the odor of marijuana. **[Tr. 10:06:39-50, 10:10:07-10:12:04, 10:18:03-44, 10:33:45-10:34:16]**

Defendant denied that there was any marijuana in the car. When Deputy Salazar asked him for consent to search the car he declined, saying that McClendon had rented the car. Deputy Salazar went back to Defendant's car. McClendon showed him a small amount of marijuana and a Pennsylvania medical marijuana card. Deputy Salazar explained that, for an out-of-state medical marijuana card to be valid in New Mexico, the person has to go through a process with the New Mexico Department of Health. McClendon did not indicate that he had done that. When Deputy Salazar asked McClendon for consent to search, he called his lawyer. Defendant and McClendon then refused consent to search the car, so Deputy Salazar obtained a search warrant. **[Tr. 10:12:05-10:13:05, 10:48:35-40, 10:49:05-41]**

In addition to the small amount of marijuana that McClendon had shown Deputy Salazar, a search of the car revealed a bag of marijuana in the back seat and two duffel bags in the trunk containing 35 large heat-sealed bags of marijuana and one large bag of psilocybin (psychedelic) mushrooms. The total weight of the marijuana was 38.475 pounds and the mushrooms weighed 500.32 grams. After the search, Deputy Salazar placed Defendant and McClendon under arrest. **[Tr. 10:13:13-10:14:06, 11:15:32-53; RP 6]**

At the conclusion of the hearing, the district court orally granted the motion to suppress **[Tr. 11:15:57-11:17:10]** and then issued a terse written order with no analysis. **[RP 133-34]** The Court of Appeals affirmed.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE OFFICER DID NOT HAVE REASONABLE SUSPICION TO EXPAND THE SCOPE OF THE TRAFFIC STOP

A ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Rowell*, 2008-NMSC-041, ¶ 8, 144 N.M. 371. Appellate courts view the facts in the light "most favorable to the prevailing party and defer to the factual findings of the district court if substantial evidence exists to support those findings," but review the lower court's conclusions of law de novo. *Id.*

The U.S. Supreme Court has held that "police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,'" a standard that "is obviously less demanding than that for probable cause." *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). This Court has further held that: "'An officer may expand the scope of a traffic stop beyond the initial reason for the stop and prolong the detention if the driver's responses and the circumstances give rise to a reasonable suspicion that criminal activity unrelated to the stop is afoot.'" *State v. Leyva*, 2011-NMSC-009, ¶ 23, 149 N.M. 435 (citation omitted). For two reasons, Deputy Salazar had reasonable suspicion that justified expanding the scope of the initial traffic stop.

First, Deputy Salazar smelled the odor of marijuana coming from the car and later from Defendant. Under New Mexico law, this alone was enough to provide Deputy Salazar with reasonable suspicion and, indeed, with probable cause. *State v. Capps*, 1982-NMSC-009, ¶ 12, 97 N.M. 453 (the aroma of marijuana "gave the officer probable cause to search the car, including the trunk"); *State v. Goss*, 1991-NMCA-003, ¶ 19, 111 N.M. 530 ("It is settled law that detection of the odor of marijuana by law enforcement officers may provide probable cause for detention of an individual and constitute a valid basis for further investigation."). U.S. Supreme Court and U.S. Court of Appeals decisions follow the same rule. *See, e.g., United States v. Johns*, 469 U.S. 478, 482 (1985) ("After the officers came closer and detected the distinct odor of marijuana, they had probable cause to believe that the vehicles contained contraband."); *United States v. Scheetz*, 293 F.3d 175, 184 (4th Cir. 2002) ("Once the car was properly stopped and the narcotics officers smelled marijuana, the narcotics officers properly conducted a search of the car."); *United States v. Winters*, 221 F.3d 1039, 1042 (8th Cir. 2000) (the smell of marijuana "created probable cause to search the car and its containers for drugs"); *United States v. Morin*, 949 F.2d 297, 300 (10th Cir. 1991) ("This court has long recognized that marijuana has a distinct smell and that the odor of marijuana alone can satisfy the probable cause requirement to search a vehicle or baggage.").

The Court of Appeals stated that "the fact that the officer smelled marijuana, which we acknowledge was illegal for nonmedicinal purposes at the time of the stop, is not, on its own, dispositive to our reasonable suspicion analysis," and "the officer's testimony did not contain any articulation as to why the smell of marijuana, alone, justified expanding the scope of the stop to ask about Defendant's travel." Opinion ¶¶ 6-7. That is not the issue. "Reasonable suspicion is measured by an objective standard based on the totality of the circumstances." *State v. Leyva*, 2011-NMSC-009, ¶ 59, 149 N.M. 435. Courts must avoid a "divide-and-conquer analysis," *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (citations omitted), where each individual factor on which the officer relied is considered ""in a vacuum."" *State v. Olson*, 2012-NMSC-035, ¶ 13, 285 P.3d 1066 (citation omitted). The State did not contend that Deputy Salazar was justified in expanding the scope of the traffic stop based on the smell of marijuana "alone."

Second, Deputy Salazar was entitled to ask Defendant questions about his trip. The Court of Appeals stated that "although the marijuana odor may have justified an inquiry by the officer about whether Defendant had any marijuana in the car or on his person, such was not the focus of the officer's initial questioning in this case." Opinion ¶ 7. That is incorrect. By asking about the purpose of the trip and how Defendant and McClendon got to California, Deputy Salazar was trying to ascertain whether they were likely smuggling drugs. The car rental agreement alone raised

the suspicion that they had flown to California. If they did, Deputy Salazar knew it was suspicious that they were driving back east because this is now a common pattern in smuggling operations. Courts "must 'defer to the training and experience of the officer when determining whether particularized and objective indicia of criminal activity existed.'" *State v. Martinez*, 2020-NMSC-005, ¶ 27, 457 P.3d 254 (citation omitted). It makes no sense to say that Deputy Salazar could have asked a direct question about whether they were transporting drugs but could not ask indirect questions designed to obtain the same information.

The Court of Appeals recognized that, before Deputy Salazar asked Defendant anything about his travel, he smelled the odor of marijuana in the car; McClendon had tried to "control the conversation" and thereby "manage" his impression of the occupants by saying that they took the trip to meet other veterans; and he had observed that the car had been rented the previous day. Opinion ¶ 10. The Court concluded that all of this was still inadequate because "these facts alone were not the basis for the officer's articulated suspicions about Defendant," which "were formed based in large part on Defendant's answers to the officer's questions about travel." *Id.* ¶¶ 9-10. But all of that information comprised the totality of the circumstances that gave Deputy Salazar reasonable suspicion. "[T]he reasonableness of the officer's actions is determined by objectively evaluating the particular facts of the

stop within the context of all the attendant circumstances." *State v. Sewell*, 2009-NMSC-033, ¶ 16, 146 N.M. 428.

Even more importantly, the Court's decision ignores the principle that "evolving circumstances facing an officer may permit limited questioning relating to travel plans." *State v. Funderburg*, 2008-NMSC-026, ¶ 26, 144 N.M. 37. The information available to an officer during a traffic stop may increase as the investigation proceeds. Courts "must consider whether 'the officer's subsequent actions were fairly responsive to the emerging tableau—the circumstances originally warranting the stop, informed by what occurred, and what the officer learned, as the stop progressed.'" *Id.* ¶ 27. As in *Funderburg*, Deputy Salazar's actions "represent a graduated response to the evolving nature of the stop." *Id.* ¶ 28 (finding reasonable suspicion). *Accord, State v. Van Dang*, 2005-NMSC-033, ¶ 15, 138 N.M. 408 (questions about travel plans, while not directly related to the speeding ticket, became "reasonable" as the officer investigated whether the rental car was stolen).

As this Court has pointed out, "certain responses to routine questions and requests by a police officer may elicit a strange or suspicious response by a stopped motorist. . . . The police officer may ask follow up questions that will quickly confirm or dispel any suspicion brought on by those answers." *State v. Duran*, 2005-NMSC-034, ¶ 36, 138 N.M. 414, *overruled on other grounds by Leyva*, 2011-NMSC-009. The first strange thing in this case was not a response to a question by

Deputy Salazar, but the volunteered remarks by McClendon at the outset of the traffic stop. Deputy Salazar was entitled to ask Defendant limited "follow up" questions regarding his trip to see if the answers confirmed or dispelled his suspicions. *Id.* In particular, it would make no sense to hold that Deputy Salazar could not ask these individuals further questions about their trip when McClendon, unprompted, first raised the subject of the purpose of the trip.

The issue is not whether Deputy Salazar had reasonable suspicion to expand the scope of the traffic stop before he asked Defendant why they took the trip and how they got to California. The issue is whether, at that point, he had enough reasonable suspicion to be entitled to ask Defendant those questions. Based on *Funderburg*, *Van Dang* and *Duran*, the answer is yes.

The Court of Appeals cited *State v. Tuton*, 2020-NMCA-042, 472 P.3d 1214, which is distinguishable. There, all that the officers had to support expansion of the traffic stop was the driver's nervousness and hostility. Nervousness alone is not enough to give rise to reasonable suspicion, and "[n]either officer articulated a specific reason why Defendant's demeanor, in combination with other facts known at the time," provided a basis for reasonable suspicion. *Id.* ¶ 14. Conversely, Deputy Salazar articulated many reasons why he had reasonable suspicion.

The district court's order also does not support its ruling suppressing the evidence. It consists of four short paragraphs. It does not contain a single case

citation and does not even mention the key fact that Deputy Salazar smelled marijuana in the car and on Defendant. The court recognized that Deputy Salazar believed that some of Defendant's answers "were evasive or inconsistent" **[RP 133]**, but did not note that McClendon's story about meeting veterans also was inconsistent with the fact that he rented a car shortly after they landed in California. Nor did the court take into account Deputy Salazar's testimony that flying to a location and then driving home is common in smuggling operations. Again, "courts must 'defer to the training and experience of the officer when determining whether particularized and objective indicia of criminal activity existed.'" *Martinez*, 2020-NMSC-005, ¶ 27 (citation omitted). The order did not identify any part of Deputy Salazar's uncontradicted testimony that the court did not believe.

The court ended its order by stating that "Deputy Salazar lacked reasonable suspicion to expand the scope of the traffic stop by questioning [Defendant] regarding his travel." **[RP 133]** But the court never provided any legal or factual reason why the expansion of the traffic stop was impermissible. Because the order does not cite any "substantial evidence" to support that conclusion, which was the reason for granting the motion to suppress, and there is no such substantial evidence, there is no basis for this Court to give deference to that finding. *Rowell*, 2008-NMSC-041, ¶ 8.

CONCLUSION

"In weighing the officer's intrusion on Defendant's privacy, we should ask ourselves what other actions a reasonable officer would be expected to take under similar circumstances, if not those taken in this instance." *Funderburg*, 2008-NMSC-026, ¶ 32. If Deputy Salazar had not asked the questions of Defendant and McClendon that he asked, he would not have been doing his job. For all of the reasons set forth above, the Court of Appeals' decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on April 26, 2023, I filed a true and correct copy of the foregoing Brief in Chief electronically through the Odyssey E-File & Serve System and emailed a copy to opposing counsel Nicholas T. Hart at nick@harrisonhartlaw.com.

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