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JULY 17, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff-Appellee,	)	
	)	
-vs-	)	
	)	
Trevor Michael Bolme,	)	Supreme Ct. No. 20200090
	)	
Defendant-Appellant.	)	Dist. Ct. No. 08-2019-CR-03000

BRIEF OF PLAINTIFF-APPELLEE STATE OF NORTH DAKOTA

Appeal from Criminal Judgment Entered March 16, 2020

South Central Judicial District, Burleigh County
The Honorable Cynthia Feland, Presiding

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUE

Whether the district court erred in denying Bolme's motion to suppress.

STATEMENT OF THE CASE

[¶1] On October 4, 2019, the State charged Appellant Trevor Bolme with unlawful possession of methamphetamine and unlawful possession of drug paraphernalia for use with methamphetamine, each of which is a Class C felony. (Doc. 1). Bolme filed a motion to suppress in which he sought suppression of the methamphetamine and drug paraphernalia seized by Officer Jameson Seim of the Lincoln Police Department from Bolme's vehicle during a traffic stop. (Doc. 38). Following an evidentiary hearing at which Officer Seim testified, the district court denied Bolme's motion to suppress. (App. 11).

[¶2] Bolme entered a conditional guilty plea to each offense. (Doc. 90). As part of the conditional plea, Bolme reserved the right to appeal the district court's order denying his motion to suppress. (*Id.*). The criminal judgment was entered on March 16, 2020. (App. 19). Bolme timely filed a notice of appeal. (App. 22).

STATEMENT OF FACTS

[¶3] On October 3, 2019, Officer Jameson Seim of the Lincoln Police Department observed Appellant Trevor Bolme drive past Officer Seim as he was sitting stationary and running radar in his patrol vehicle. (Tr. 4:12-5:1). As Bolme drove by his location, Officer Seim observed "what appeared to be a large baseball-sized spiderweb crack in the passenger side" of the windshield of Bolme's vehicle. (Tr. 5:6-9). Officer Seim testified that when

Bolme's vehicle passed his location, he "got some glint from the sun, and the crack appeared to obstruct [Bolme's] view by the size and the glare [Seim] was getting from the crack[.]" (Tr. 5:9-12). At that time, Bolme's vehicle was traveling in the same direction Officer Seim's patrol vehicle was facing. (Tr. 5:19-6:3). Officer Seim testified that, from his vantage point, the crack appeared to interfere with Bolme's field of vision. (Tr. 6:7-6:9).

[¶4] Based on his observation of the cracked windshield and its apparent obstruction of Bolme's field of vision, Officer Seim stopped Bolme's vehicle. (Tr. 6:10-11). Officer Seim identified Bolme as the driver by his North Dakota driver's license. (Tr. 7:2-7). While speaking with Bolme, Officer Seim could smell the odor of raw marijuana coming from inside Bolme's vehicle. (Tr. 7:8-11). Based on having smelled raw marijuana, Officer Seim searched Bolme's vehicle. (Tr. 7:15-8:3). Inside Bolme's vehicle, Officer Seim found a methamphetamine smoking device, methamphetamine, and a marijuana grinder. (Tr. 8:5-12).

[¶5] Bolme moved to suppress the evidence seized from his vehicle. At the suppression hearing, Bolme introduced two photographs depicting the crack in his windshield. (Docs. 84, 85). On cross-examination, Officer Seim reiterated that the crack appeared to obstruct Bolme's view as he passed Officer Seim's location. (Tr. 15:4-10). And when asked whether it is illegal to have a cracked windshield, Officer Seim testified that "[i]f it obstructs your view, yes." (Tr. 15:17-18). That is because Officer Seim "believe[d] all

it has to do is pose an obstruction to your view, whether that be the entire windshield or anything that could be in front of you or approaching your vehicle that you may not see, whether it be a small child, a small dog, or another vehicle." (Tr. 15:21-25). When asked whether he "believe[d] that Mr. Bolme would have had a difficult time on October 3rd viewing the highway in front of him while driving his vehicle," Officer Seim testified that "[b]ased on what I saw when he passed my location, yes." (Tr. 16:9-13).

[¶6] The district court denied Bolme's motion to suppress (App. 11). The court found that the photographs Bolme submitted "do illustrate a crack with spiderwebs on the passenger side of the vehicle." (App. 14). Based on Officer Seim's testimony regarding the apparent effect of the crack on Bolme's view as he passed Officer Seim, the district court concluded that Officer Seim "had a reasonable suspicion that Bolme was driving in violation of the law based on what he observed at the time of the stop." (App. 14). And even if the crack did not, in fact, obstruct Bolme's view, the district court "ha[d] little difficulty in concluding that Officer Seim's belief that Bolme had a view-obstructing crack in his windshield, and that such crack was a violation of the law in North Dakota, were both objectively reasonable beliefs." (App 15).

[¶7] The district court also rejected Bolme's argument that the odor of marijuana no longer provides probable cause for the search of a motor vehicle. In upholding the constitutionality of the search, the district court

concluded that marijuana is still contraband despite that possession of a small amount of marijuana is now an infraction. (App. 17). As such, the odor of marijuana, the district court concluded, provides law enforcement officers probable cause to search a vehicle for that contraband. (App. 17-18).

REQUEST FOR ORAL ARGUMENT

[¶8] It is settled law that the odor of marijuana justifies the warrantless search of a motor vehicle. This case presents the important question whether the odor of marijuana provides law enforcement officers probable cause to search a vehicle without a warrant despite that the possession of a small amount of marijuana is now an infraction. The State therefore requests oral argument.

ARGUMENT

I. Standard of Review.

[¶9] This Court's standard of review in appeals involving a district court's ruling on a motion to suppress is well-established:

> When reviewing a district court's decision on a motion to suppress evidence, this Court will defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. A district court's decision on a motion to suppress will be affirmed if there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence. Any questions of law are fully reviewable on appeal.

State v. Pouliot, 2020 ND 144, ¶ 6. (citations omitted). That standard of review "reflects the importance of the district court's opportunity to observe

witnesses and assess their credibility." *State v. Morin*, 2012 ND 75, ¶ 5, 815 N.W.2d 299.

II. The District Court Did Not Err in Concluding Officer Seim's Stop of Bolme's Vehicle was Reasonable.

[¶10] The district court properly concluded that Officer Seim's investigatory stop of Bolme's vehicle did not violate the Fourth Amendment because it was reasonable. An investigatory stop of a vehicle is valid if the law enforcement officer has a reasonable and articulable suspicion that a motorist has violated or is violating the law. *State v. Kenner*, 1997 ND 1, ¶ 8, 559 N.W.2d 538. "Whether a driver committed a traffic violation does not control whether an officer had the reasonable suspicion necessary to justify a traffic stop." *State v. Hirschkorn*, 2016 ND 117, ¶ 14, 881 N.W.2d 244. This Court "use[s] an objective standard and look[s] to the totality of the circumstances when reviewing whether an investigative stop is valid. *State v. Olson*, 2007 ND 40, ¶ 11, 729 N.W.2d 132. "The reasonable and articulable suspicion standard requires more than a 'mere hunch,' but less than probable cause." *Gabel v. N.D. Dep't of Transp.*, 2006 ND 178, ¶ 20, 720 N.W.2d 433 (*quoting Lapp v. N.D. Dep't of Transp.*, 2001 ND 140, ¶ 11, 632 N.W.2d 419).

[¶11] "The reasonable suspicion standard does not require an officer to see a motorist violating a traffic law or to rule out every potential innocent excuse for the behavior in question before stopping a vehicle for

investigation." *Gabel*, 2006 ND 178, ¶ 20 (citation omitted). As such, the actual commission of criminal activity is not required to support a finding of reasonable suspicion. *State v. Morsette*, 2019 ND 84, ¶ 6, 924 N.W.2d 434. "The ultimate issue is whether a reasonable person in the officer's position would have been justified in stopping the vehicle because of some objective manifestation to suspect potential criminal activity." *State v. James*, 2016 ND 68, ¶ 7, 876 N.W.2d 720 (internal quotations and citations omitted).

[¶12] Moreover, "an officer's objectively reasonable mistake, whether of fact or law, may provide the reasonable suspicion necessary to justify a traffic stop[.]" *Hirschkorn*, 2016 ND 117, ¶ 14. That is because the Fourth Amendment tolerates reasonable mistakes:

> Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

Heien v. North Carolina, 574 U.S. 54, 61 (2014); *Hirschkorn*, 2016 ND 117, ¶ 14.

[¶13] Here, the district court concluded that Officer Seim reasonably believed the crack in Bolme's windshield obstructed his view and violated North Dakota law. (App. 15). In North Dakota, all vehicles must be equipped

with a windshield. N.D.C.C. § 39-21-39(1). The windshield must be in "proper condition." *Id*. § 39-21-46(1). And North Dakota law prohibits a person from driving a motor vehicle that is in an unsafe condition. N.D.C.C. § 39-21-46(2). As Bolme drove past Officer Seim's patrol vehicle, Officer Seim observed "a baseball-sized crack" on the windshield of Bolme's vehicle. (App. 12). That crack caused glare from the sun and "appeared to obstruct [Bolme's] view by the size and the glare [Officer Seim] was getting from the crack[.]" (Tr. 5:9-12; App. 12). Officer Seim testified that, from his vantage point, facing the same direction as Bolme's direction of travel, the crack appeared to interfere with Bolme's field of vision. (Tr. 6:7-6:9; App. 12). Based on those observations, Officer Seim stopped Bolme's vehicle for the "obstructed view." (Tr. 6:14-16).

[¶14] The district court concluded that "Officer Seim had a reasonable suspicion that Bolme was driving in violation of the law based on what he observed at the time of the stop." (App. 14). And the district court had "little difficulty in concluding that Officer Seim's belief that Bolme had a view-obstructing crack in his windshield, and that such crack was a violation of the law of North Dakota, were both objectively reasonable beliefs." (App. 15). Those objectively reasonable beliefs—including the belief that North Dakota law prohibits driving a motor vehicle with a cracked windshield that affects the driver's ability to safely view the roadway—provided Officer

Seim reasonable suspicion to stop Bolme's vehicle. *United States v. Walker*, 840 F.3d 477, 483 (8th Cir. 2016).

[¶15] In *Walker*, police officers observed a crack in the windshield of a passing vehicle. 840 F.3d at 481-82. The officers stopped the vehicle and searched it after smelling marijuana. *Id*. at 482. The defendant moved to suppress evidence found during the search and argued on appeal that the stop was invalid because the "windshield was not cracked to such an extent that it impeded the driver's view[.]" *Id*. In affirming the district court's denial of the motion to suppress, the Eighth Circuit Court of Appeals noted that the district court "accepted as credible [the officer's] testimony that he believed, based on his observations, that the crack in the . . . windshield obstructed the driver's view." *Id*. at 483. Because "[a] credibility determination made by a district court after a hearing on the merits of a motion to suppress is 'virtually unassailable on appeal[,]" and because even if mistaken, the officer's mistake was reasonable, the court affirmed the denial of the defendant's motion to suppress. *Id*. at 484.

[¶16] The same result is warranted here. The district court accepted as credible Officer Seim's testimony that he observed a crack that appeared to obstruct Bolme's view of the roadway. (App. 15). Bolme argues that "the crack on Bolme's windshield was minimal, on the lower passenger-side of the windshield, and in no way obstructed Bolme's view of the roadway." Appellant's Br., ¶ 9. In making the argument that Officer Seim was mistaken

about the size or effect of the crack in Bolme's windshield, Bolme ignores that the determination whether an officer was reasonably mistaken about a fact "is not to be made with the vision of hindsight, but instead by looking to what the officer reasonably knew at the time." *United States v. Smart*, 393 F.3d 767, 770 (8th Cir. 2005). That is because, "in mistake cases the question is simply whether the mistake, whether of law or fact, was an objectively reasonable one." *Id*.

[¶17] As the district court noted, "[w]hile pictures in retrospect may show a crack that seems less significant, this does not change the fact that at the time of the stop, Officer Seim observed a crack that he believed obstructed the driver's view out of the windshield." (App. 14-15). That observation, which the district court found was reasonable—even if mistaken—provided reasonable suspicion for the stop. *Heien*, 574 U.S. at 61; *Walker*, 840 F.3d at 484. This Court should therefore affirm the district court's conclusion that Officer Seim's stop of Bolme's vehicle supported by reasonable suspicion.

III. The Odor of Marijuana Provided Officer Seim Probable Cause to Search Bolme's Vehicle.

[¶18] Officer Seim had probable cause to search Bolme's vehicle for marijuana once he smelled the odor of marijuana. Under N.D.C.C. § 19-03.1-23(7)(d)(1), a person who possesses less than one-half ounce of marijuana is guilty of an infraction. Before August 1, 2019, possession of a similar amount of marijuana was a Class B misdemeanor. S.L. 2019, ch. 186

(H.B. 1050), § 3. Bolme argues that this legislative change alone makes unconstitutional a warrantless vehicle search based on the odor of marijuana unless the officer has probable cause to believe the vehicle contains more than an infraction-level amount of marijuana. Appellant's Br., ¶ 38 ("[T]his Court should conclude that the alleged odor of marijuana alone, without any other indicators, should not support a warrantless vehicle search."). Bolme's argument fails for three reasons.

[¶19] First, marijuana is contraband, regardless of the offense level for possessing it. N.D.C.C. § 19-03.1-23(7)(a) ("It is unlawful for any person to willfully . . . possess a controlled substance[.]"); *id.* § 19-03.1-05(5)(h) (categorizing "Marijuana" as a Schedule I controlled substance). Because marijuana is contraband, and because Officer Seim smelled the odor of marijuana coming from Bolme's vehicle, Officer Seim had probable cause to search the vehicle for that contraband. *State v. Reis*, 2014 ND 30, ¶ 21, 842 N.W.2d 845 (upholding warrantless search of vehicle because officers had probable cause to believe the vehicle contained contraband); *Florida v. Harris*, 568 U.S. 237, 243 (2013) (holding that a search may be conducted under the Fourth Amendment if there is probable cause to believe that "contraband *or* evidence of a crime" will be found) (emphasis added). That the prohibited act of possessing marijuana is now an infraction—in some instances—does not make marijuana legal to possess; it is still contraband. Black's Law Dictionary (11th ed. 2019) (defining "contraband" as "goods

that are unlawful to import, export, produce, or possess."). Because probable cause that a vehicle contains contraband is sufficient to justify a warrantless search of the vehicle, the district court properly denied Bolme's motion to suppress.

[¶20] Second, an infraction is a criminal offense, as it was before the legislature modified the offense level for possessing small amounts of marijuana. *State v. Brown*, 2009 ND 150, ¶ 48, 771 N.W.2d 267 ("In 1975, the legislature created a new, lower level of *criminal* offense, denoted as an infraction, with its own procedures and penalty provisions.") (emphasis added). Thus, a law enforcement officer who has probable cause to believe that a vehicle contains *any* marijuana has probable cause to believe the vehicle contains evidence of a crime. *Id.* That probable cause justifies the warrantless search of a vehicle for such evidence. *United States v. Wells*, 347 F.3d 280, 287 (8th Cir. 2003) ("The warrantless search of a vehicle is constitutional pursuant to the 'automobile exception' to the warrant requirement, if law enforcement had probable cause to believe the vehicle contained contraband *or other evidence of a crime* before the search began.") (citing *Carroll v. United States*, 267 U.S. 132, 158-59 (1925)) (emphasis added). And the legislature has made clear that "all provisions of law and rules of criminal procedure relating to misdemeanors shall apply to infractions, including, but not limited to, the powers of law enforcement officers[.]" N.D.C.C. § 12.1-32-03.1(3). Thus, this Court should reject the

argument that the amendment of offense level for some marijuana crimes precludes a warrantless search of a vehicle based on the odor of marijuana.

[¶21] Third, the decisions from other states on which Bolme relies do not require reversal here. For example, in *Commonwealth v. Cruz*, the Massachusetts Supreme Court granted a motion to suppress evidence obtained following a search based on the odor of marijuana. 945 N.E.2d 899, 902 (Mass. 2011). In doing so, the court "reconsidered [its] jurisprudence in light of . . . [the] status of the possession of one ounce of less of marijuana from a criminal to a *civil* offense." *Id*. at 904-05 (emphasis added). Possession of marijuana is never a civil offense in North Dakota, and the court's rationale in *Cruz* therefore does not apply here.

[¶22] Moreover, the court in *Cruz* reasoned, as Bolme does, that an officer must have probable cause to believe a vehicle contains a "criminally punishable amount of marijuana" before searching the vehicle for marijuana. Appellant's Br., ¶ 39; *Cruz*, 945 N.E.2d at 911-913. But Bolme cites no decision of this Court or of the United States Supreme Court limiting the automobile exception to cases in which an officer has probable cause to believe a vehicle contains a "criminal amount" of contraband. *See People v. Waxler*, 168 Cal. Rptr. 3d 822, 829 (Ct. App. 2014) (declining to follow *Cruz* and noting that "neither the California Supreme Court nor the United States Supreme Court has limited the automobile exception to situations where the defendant possesses a '*criminal* amount of contraband.'")

(emphasis in original). This Court's Fourth Amendment cases have established no such threshold. *State v. Otto*, 2013 ND 239, ¶ 18, 840 N.W.2d 589 ("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more.") (*quoting Maryland v. Dyson*, 527 U.S. 465, 467 (1999)); *State v. Gefroh*, 2011 ND 153, ¶ 8, 801 N.W.2d 429 ("Once probable cause that a vehicle contains contraband is established, officers may search the vehicle because the ready mobility of the vehicle is an exigent circumstance justifying the exception to the warrant requirement."). This Court should therefore decline to apply the rationale in *Cruz* here.

[¶23] As for the facts establishing probable cause to search Bolme's vehicle, the district court found that "Officer Seim was trained in identifying the odor of marijuana, both in its raw and burnt form." (App. 18). That finding is supported by the record. (Tr. 3:21 – 4:4). The district court also found that Officer Seim smelled the odor of raw marijuana coming from Bolme's vehicle. (App. 18). That finding is also supported by the record. (Tr. 7:8-14). As the district court concluded, "Officer Seim was not required to know how much marijuana was present in the vehicle." (App. 18). That is because marijuana is contraband, and probable cause to believe a vehicle contains contraband is sufficient to justify a warrantless search of any part of the vehicle where the contraband could be found. *Reis*, 2014 ND 30, ¶ 21; *State v. Zwicke*, 2009 ND 129, ¶ 9, 767 N.W.2d 869 ("If a warrantless search

of an automobile is made with probable cause, based on a reasonable belief arising out of the circumstances known to the officer that the automobile contains articles which are subject to seizure, the search is valid."). Because the odor of marijuana continues to provide officers probable cause to search a motor vehicle, this Court should affirm the district court's denial of Bolme's motion to suppress.

CONCLUSION

[¶24] For the foregoing reasons, the judgment below should be affirmed.

Dated this 17th day of July, 2020.

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IN THE SUPREME COURT

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-vs-	)	
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Trevor Michael Bolme,	)	Supreme Ct. No. 20200090
	)	
Defendant-Appellant.	)	Dist. Ct. No. 08-2019-CR-03000

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee in the above matter, and as the author of this brief, hereby certifies that this brief complies with the page limitation in N.D.R.App.P. 32(a)(8).

Dated this 17th day of July, 2020.

/s Dennis H. Ingold

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STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF BURLEIGH SOUTH CENTRAL JUDICIAL DISTRICT

State of North Dakota	)	
	)	**UNSWORN DECLARATION OF SERVICE**
Plaintiff,	)	**BY ELECTRONIC FILING**
vs.	)	
	)	**Supreme Court No. 20200090**
Trevor Michael Bolme,	)	**Dist. Ct. No. 08-2019-CR-03000**
	)	
Defendant.	)	

[¶1] I, Michelle E, Leary, declare that I am a United States citizen over 21 years of age, and on the 17th day of July, 2020, I served the following:

1. Brief of Plaintiff-Appellee State of North Dakota;
2. Certificate of Compliance; and
3. Unsworn Declaration of Service by Electronic Filing

via electronic service through Odyssey to the following:

Tatum O'Brien
Attorney at Law
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Which is the last reasonable ascertainable email address of the addressee.

[¶2] I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the 17th day of July, 2020 at Bismarck, North Dakota.

/s/ Michelle E. Leary
_____
Michelle E. Leary