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STATE OF NORTH DAKOTA

In the Supreme Court
State of North Dakota

Supreme Court No. 20210041
Barnes County District Court No. 2020-CR-00138

State of North Dakota
Plaintiff/Appellee,

vs.

Dylan Marsolek
Defendant/Appellant

Appeal from the Order Denying Motion to Suppress and/or Dismiss dated 08/07/2020, the Criminal Judgment dated February 4, 2021, and the Amended Criminal Judgment dated February 8, 2021 by the Honorable Jay A. Schmitz, District Court Judge, Barnes County, Southeast Judicial District

APPELLANT'S BRIEF

Oral Argument Requested

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STATEMENT OF THE ISSUES

[¶1] Whether the District Court incorrectly interpreted and applied the law in denying the Appellant/Defendant's Motion to Suppress Evidence.

STATEMENT OF THE CASE

[¶2] Dylan Marsolek ("Marsolek") was charged with one count of Possession with Intent to Deliver Methamphetamine in violation of N.D.C.C. § 19-03.1-23(1)(a), a B Felony, and Unlawful Possession of Drug Paraphernalia in violation of N.D.C.C. § 19-03.4-03(2), a C Felony, by way of a Criminal Information dated April 17, 2020. Appx. 6. A preliminary hearing was held on June 9, 2021, and a finding of probable cause was made for both counts after Marsolek waived his right to a preliminary hearing.

[¶3] On June 26, 2020, Marsolek filed and served a Motion to Suppress Evidence and accompanying Brief in Support of Motion to Suppress Evidence. Appx. 10-17. On July 9, 2020, the State filed its Response to Defendant's Motion to Suppress Evidence. Appx. 18-22. A motion hearing was held on July 21, 2021 at which Deputy Nathan Morten of the Barnes County Sheriff's Department testified. The matter was taken under advisement and with the permission of the District Court, Marsolek submitted a supplemental brief along with an index of cited cases on July 28, 2021. Appx. 23-29. The State did not file any further briefs.

[¶4] On August 6, 2020, the District Court called a hearing to provide a verbal order as to Marsolek's Motion to Suppress Evidence and denied said motion. In providing his verbal order after review of the video footage from the stop and consideration of the briefs, Judge Schmitz found "as a fact that nothing occurred during that time that would give rise to a reasonable suspicion to search or to detain Howard Larson, Jr. ("Larson") or his passengers

for a drug investigation." Tr. Hr'g Aug. 6, 2020, 13:8-14. Also, *Id.* at 15: 11-15. Notwithstanding, Judge Schmitz found that the traffic stop had not been inappropriately elongated or otherwise exceeded what was constitutionally permissible, *Id.* at 4:21 – 5:18, 13:4-16, and that Morten was unconditionally permitted to require Larson to exit his vehicle during a routine traffic stop, *Id.* at 5:19-23, 13:17-14:21. Judge Schmitz concluded that once Larson stepped out from the vehicle and the unused hypodermic needles was observed, law enforcement officers have enough for an objective basis for reasonable suspicion, and enough information in the aggregate to support probable cause to search the vehicle. *Id.* at 15:5-17:5.

[¶5] A proposed order was prepared by the State and signed by Judge Jay Schmitz on August 6, 2020. Appx. 30.

[¶6] On September 2, 2020 a hearing was held for a conditional change of plea, however, the issue was continued to provide Marsolek an opportunity to consider drug court. Marsolek ultimately declined to pursue drug court, a proposed plea agreement was filed with the court on September 23, 2020. Appx. 31-37. A conditional change of plea and sentencing hearing was held on February 2, 2021, and the District Court accepted Marsolek's conditional guilty plea. A criminal judgment was entered on February 4, 2021, Appx. 38-40, however, said judgment lacked the language regarding Marsolek's plea being conditional and his preservation of the right to appeal. An amended criminal judgment was entered on February 8, 2021 which included the omitted language. Appx. 44-46.

[¶7] Marsolek filed a Notice of Appeal and Order for Transcripts on February 10, 2021. Appx. 47-49.

STATEMENT OF THE FACTS

[¶8] On April 16, 2020, Deputy Nathan Morten ("Morten") of the Barnes County Sheriff's Department stopped a vehicle on County Road 22 near Highway 1 for an obstructed view in the windshield due to multiple "spider-webbed cracks" and a rear passenger not being properly seated. Tr. Hr'g July 21, 2020, 7:4-8:2. Initially Morten engaged his lights; the vehicle did not make any effort to stop at this point, however, it was later discovered by Morten that his lights were non-functional. *Id*. at 8:3-9. Morten then engaged his siren and the vehicle stopped. *Id.* Upon initiating the stop Morten observed what he believed to be the driver placing an item underneath the passenger seat, but Morten was not able to see with sufficient clarity and that conclusion was solely a speculation. *Id.* at 33:5 – 34:16.

[¶9] Inside the vehicle were Larson, the driver; Marsolek in the passenger seat; and Esther Cruz ("Cruz") who was seated in the rear. *Id.* at 8:10-18

[¶10] Morten approached the vehicle and requested identification from Larson, who had both his license and insurance card already collected and on the dashboard in front of him by the time that Morten was at the door of the vehicle. *Id.* at 8:19-9:7; 35:4-13. Larson handed these documents to Morten. *Id.* Morten noted that the insurance card for the vehicle was in a plastic sleeve and not something that would be carried in a wallet, and therefore the card would have been retrieved by Larson from somewhere in the car prior to Morten arriving at the driver-side window. *Id.* at 35:19-36:3.

[¶11] Larson was not able to provide a registration card for the vehicle but informed Morten that if he ran the plates the vehicle would come back as being in Larson's name. *Id.* at 35:19-36:3. While Morten had Larson's license and insurance card in his hand,

Morten stood next to the vehicle and asked Larson a series of unrelated questions, namely "[w]hat are you up to tonight?;" "[w]hat are you guys doing in this area?;" "[s]ee anything cool?" Video, Doc. Index #22, 4:21 – 4:35. During this conversation, Larson explained that he and his passengers were travelling from Jamestown to Fargo and drove that direction to do some sightseeing. *Id.* Morten delineated that his banter and follow-up questions is part of his general practice during a traffic stop to fill the time while individuals are gathering the documents which he has requested. Tr. Hr'g July 21, 2020, 37:12-19.

[¶12] Seemingly as an afterthought, upon completing his string of questioning, Morten requested ID's from both Marsolek and Cruz. *Id.* at 10:9-19. Cruz and Marsolek told Morten that they did not have their ID's. *Id.* Morten then requested that Cruz and Marsolek provide their names and dates of birth which both provided. *Id.*

[¶13] From the time Morten was handed Larson's license and insurance until finally departing to run Larson's driver's license in his patrol vehicle two minutes and twenty-four seconds had elapsed.

[¶14] Morten described in his affidavit of probable cause that he observed that Larson was "acting nervously," "twitching," "confrontational," and "short with his replies." Appx. 8. During his testimony, Morten further described Larson as "jumpy" and "evading questions," and having a "shaky" voice. Tr. Hr'g July 21, 2020, 9:22-23; 11:3-13, 38:7-15. Notwithstanding, during cross examination Morten stated that it was common for all people to be nervous during traffic stops, that their nervousness is commonly expressed through a shaky voice or quick cadence, and that nervousness is expressed differently in all people. *Id.* at 37:20-38:6. Morten further acknowledged that there was nothing about Larson's behavior that was different than the general nervousness that he commonly witnessed in

drivers during a routine traffic stop, *Id.* at 38:7-39:5. A review of the video shows a deficit of dramatic behaviors by Larson; the only body movements by Larson other than handing over his license and insurance were placing his hands on the steering wheel, a few small gestures while speaking, and tapping the wallet sitting in his lap on his hand for approximately 10 to 12 seconds. Video, Doc. Index #22, *3:50-6:32.*

[¶15] Morten turned up the volume on his state radio when he returned to his patrol vehicle and overheard dispatch saying that the vehicle was registered to Larson, *Id.* at 6:48-6:53, and that Larson's license was suspended, and that his criminal history had "several 97 things on there," i.e. drug related convictions. Tr. Hr'g July 21, 2020, 13:21-14:4. Dispatch did not provide any additional information regarding the charges such as date, location, type of narcotics, or level of offense. *Id.* at 40:22-41:11. Dispatch also gave directions to the scene to an unidentified officer, presumably Trooper Kelly "Kelly" of the North Dakota Highway Patrol. At some point, Deputy Magnuson and Sergeant Loibl of the Barnes County Sheriff's department arrived. Appx. 6.

[¶16] Morten then called into dispatch with the identifying information for both Marsolek and Cruz. Video, Doc. Index #22, 8:30-11:00. Kelly showed up during Morten's call to dispatch; while talking to Kelly, Morten stated "Well, I'll keep going and see what I can get here." *Id.* at 12:20-12:30. Morten clarified during his testimony that he made that statement because "I knew there was something going on, but I didn't know what." Tr. Hr'g July 21, 2020, 42:16-43:3.

[¶17] Morten returned to the stopped vehicle with Trooper Kelly and informed Larson that his license was suspended. *Id.* at 14:21-15:11; 45:23-46:3; Video, Doc. Index #22, 12:52-13:53. At the time of his second approach to the vehicle, Morten had sufficient

information to issue a citation for driving under suspension. Tr. Hr'g July 21, 2020, 49:7-17. Additionally, he had sufficient information to issue a citation for care required. *Id.* at 49: 4-59:8. Larson was surprised because he thought that the COVID-19 Governor's proclamation regarding driver's licenses applied to him. *Id.* Morten told him that he would not be allowed to drive to which Larson explained that neither Cruz or Marsolek had valid licenses. Video, Doc. Index #22, 13:54-14:18. Larson then stated that they would call someone to come out and get the car and drive them back. *Id.* Marsolek immediately pulled out his phone to start calling people. *Id.* Morten then informed Larson that he was not going to take him to jail, and that he would be returning to his patrol car to write him a citation for driving under suspension and have him sign a promise to appear. Tr. Hr'g July 21, 2020, 15:12-18. Video, Doc. Index #22, 14:18- 14:25.

[¶18] Instead of leaving to write the citation, Morten continued talking to Larson, explaining that he was having an issue with his patrol vehicle lights and lingered for about half a minute. During this exchange, Morten, Kelly, and the three additional officers were all standing around Larson's vehicle. Morten acknowledged that he would expect a normal driver to be nervous when seeing this many law enforcement officers arrive at the traffic stop. Tr. Hr'g July 21, 2020, 47:13-20.

[¶19] Loibl, Magnuson, and Morten then had a side conversation between the stopped vehicle and Morten's patrol vehicle. *Id.* at 17:15; Video, Doc. Index #22, 15:24 – 16:56. Initially, the concern was that the officers did not believe the reason Larson and the other passengers might be in the area made sense. Tr. Hr'g July 21, 2020, 18:16-22. Law enforcement, in two sentences, reached a consensus that "there is something in the car" and immediately began to discuss the availability of a drug dog. When it was clear that

there was not one in the area, Magnuson/Loibl suggested handcuffing Larson and placing him in the patrol vehicle to look for "indicators of meth use or something like that," so that they would have reasonable suspicion to search. At no time during the conversation was there any iota of a suggestion that the reason for pulling Larson from the vehicle and handcuffing him was for a purpose other than trying to get reasonable suspicion for narcotics.[1] At the point that that decision was made, Morten had not observed anything in Larson's vehicle which he believed to be illegal. *Id.* at 25:20-26:21; 54:24- 55:15.

[¶20] When asked about his typical practice when issuing a citation for driving under suspension, Morten stated that it is atypical to ask people to leave their vehicle for questioning. *Id.* at 48:24-49:2; 54:15-23.

[¶21] Morten then returned to his own patrol vehicle and began to try to reboot his car light system which was not operating properly. Video, Doc. Index #22, 16:56 – 17:23. It is unclear why this process in the middle of a patrol stop was appropriate or necessary. After adjusting his system, Morten then went to have a second conference with law enforcement. *Id.* at 17:24 – 18:40.

[¶22] Approximately four minutes after telling Morten that he was going to his vehicle to issue the driving under suspension citation, Morten returned to Larson's vehicle a third time without drafting/entering any part of the citation. Morten directed Larson to leave the vehicle, which he promptly did, and handcuffed Larson. *Id.* at 18:48 – 19:40. While Morten discovered a clean an unused needle was discovered Larson's his pocket, which Larson stated was for insulin. *Id.* at 19:40 – 21:30. Larson was placed in the back of Morten's car

[1] Morten testified at the suppression hearing that the purpose was to "talk to [Larson] so [Morten] could issue up a citation," Trans. 18:25-19:1, however, this testimony is irreconcilable with the candid conversation captured on Morten's bodycam.

and read his Miranda rights. *Id.* at 21:30 – 22:10. When Larson asked why he was being read his Miranda rights, the officer told him that he had failed to show care required by not mandating that Cruz remain seated. *Id.* Morten then indicated to Morten that a drug dog was on its way, even though Morten knew personally that that clearly was not the case. *Id.* at 23:02 – 23:12.

[¶23] Law enforcement then proceeded to search the entire vehicle, during which time they discovered the evidence on which Marsolek was charged. There is no evidence that either Larson, Cruz, or Marsolek made any statement between the time that Larson was removed from the vehicle and the vehicle was searched which would support probable cause for the presence of narcotics within the vehicle, and the only additional fact gleaned by law enforcement was the presence of an un-used hypodermic needle.

[¶24] Morten was never cited for failure to show care required, nor was he cited for a windshield violation.

I. JURISDICTIONAL STATEMENT

[¶25] Marsolek timely filed a notice of appeal in accordance with Rule 4 of the North Dakota Rules of Appellate Procedure.

[¶26] The Barnes County District Court had jurisdiction to hear this matter under N.D.C.C. § 29-03-01 and was the correct venue as the situs of the crime. This Court has jurisdiction to hear this appeal under N.D. Const. art. VI, § 6, and N.D.C.C. § 29-28-06.

II. THE DISTRICT COURT ERRORED WHEN DENIED MARSOLEK'S MOTION FOR SUPPRESSION OF EVIDENCE

a. Standard of Review.

[¶27] In reviewing a trial court's ruling on a motion to dismiss, this Court "defer[s] to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. [This Court] will affirm a district court's decision on a motion to suppress 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. [This Court's] standard of review recognizes the importance of the district court's opportunity to observe the witnesses and assess their credibility. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law." *State v. Odom*, 2006 ND 209, ¶ 8, 722 N.W.2d 370 (quoting *State v. Graf*, 2006 ND 196, ¶ 7, 721 N.W.2d 381).

b. The District Court Incorrectly Applied the Law When It Concluded that Asking A Driver to Step Out of A Vehicle for a Routine Traffic Stop Was Constitutionaly Permissible When the Overt Purpose of Law Enforcement's Request Was to Conduct an Investigation for Narcotics for Which Law Enforcement Did Not Otherwise Have Reasonable Suspicion.

[¶28] A stop by law enforcement is a temporary restraint of a person's freedom resulting in a seizure within the meaning of the Fourth Amendment, and occurs when an officer, by means of physical force of a show of authority, has in some way restrained the liberty of a citizen. See *Terry v. Ohio*, 392 U.S. 1, 16-17, 88 S.Ct. 1868 (1968). *Also, City of Jamestown v. Jerome*, 2002 ND 34, ¶5, 639 N.W.2d 478. A passenger in a vehicle has standing to challenge an unconstitutionally expansive seizure. *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400 (2007).

1. A Traffic Stop Which Exceeds Its Mission is a Violation of the Fourth Amendment.

[¶29] "For the purposes of constitutional analysis, a traffic stop is characterized as an investigative detention rather than a custodial arrest." *U.S. v. Jones,* 269 F.3d 919, 924 (8th Cir. 2001)(citation omitted). Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop. *Illinois v. Caballes*, 543 U. S. 405, 407, 125 S.Ct. 834 (2005). A police stop which, although lawful at its inception, can violate the Fourth Amended when it exceeds the time needed to handle the matter is an unreasonable seizure prohibited by the Fourth Amendment. *See, e.g. Id*; *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319 (1983) ("The scope of the detention must be carefully tailored to its underlying justification. […] [It is clear that] an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.").

[¶30] The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S., at 7, 88 S.Ct. 1868 (citations omitted)(emphasis added). An intrusion upon the Fourth Amendment protections against unreasonable search and seizure must be justified by "specific and articulable facts which, taken together with rational inference from those facts, reasonably warrant the intrusion." *Id.* at 20,21. Accordingly, the analysis is a two part test, i.e whether the officer's detention was justified at its inception; and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Id*. at 7. The analysis is guided by the following objective standard: "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in

the belief' that the action taken was appropriate?" *Id.* at 21,22. ("[S]imple 'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police.")(citation omitted).

[¶31] Many decisions have utilized language substantially similar to "improperly prolonging the stop" in their Fourth Amendment analysis. See, e.g. *Rodriguez v. U.S.*, 575 U.S. 348, 135 S.Ct. 1609 (2015) (While some unrelated investigations may be permissible, they are only permissible under the Fourth Amendment if they "do not elongate the length of the roadside detention."). Notwithstanding, the determination of whether a Fourth Amendment violation occurred is not evaluated through an algorithm that provides a constitutional stopwatch. Instead, use of language describing time as the metric of constitutionality is convenient parlance which, as an umbrella, embodies the full consideration, namely, whether the stop extended beyond the "'mission,' which is to address the traffic violation that warranted the stop […] and attend to related safety concerns" and "when tasks tied to the traffic infraction are--or reasonably should have been—completed." *Id.* at 348-49. *See also, e.g., U.S. v. Sharpe*, 470 U.S. 675, 680, 105 S.Ct. 1568 (1985) ("while the brevity of an investigative detention is an important factor in determining whether the detention is unreasonable, courts must also consider the purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes."); *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319 (1983) ("The scope of the detention must be carefully tailored to its underlying justification. […] [It is clear that] an investigative detention must be temporary and last no longer than is necessary to

effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."). Because each act of any person takes a period of time to complete, prolonging the time and adding additional actions are inherently interchangeable expressions.

[¶32] In accordance with the above, once the purpose of the stop is completed, it would be an unreasonable extension of the scope of the investigation for an officer to further detain a driver or their vehicle, "unless something that occurred during the traffic stop led to the necessary reasonable suspicion to justify a further detention." *Jones,* 269 F.3d at 925 (citation omitted). "Only when an officer develops a reasonable, articulable suspicion that criminal activity is afoot does he have 'justification for a greater intrusion unrelated to the traffic offense.'" *Id.* at 927 (citation omitted). "The officer's reasonable suspicion cannot be, however, just a mere hunch or based on circumstances which 'describe a very large category of presumably innocent travelers.'" *Id.* (citing *Reid v. Georgia*, 448 U.S. 438, 441, 100 S.Ct. 2752 (1980) (holding that permitting the use of a "drug courier profile" which would apply to a very large category of presumably innocent travelers would unconstitutionally subject innocent travelers to de facto random seizures)). "[W]hen the officer's actions are such that any driver, whether innocent or guilty, would be preoccupied with his presence, then any inference that might be drawn from the driver's behavior is destroyed." *Id.* at 927, 928 (citation omitted) (there is nothing suspicious about a vehicle slowing when being approached from the rear, a large camper having some difficulty remaining in its lane, or slowing when an officer follows the driver for three miles; although these may constitute basis for traffic law violations, they create very little

suspicion of criminal activity). Generally, "'nervousness is of limited significance in determining reasonable suspicion' unless accompanied by other significant revealing facts." *Id.* at 929 *(citing* U.S. v. Foley, 206 F.3d 802, 804 (8th Cir. 1999)(finding that the following facts could generate reasonable suspicion: motorist was nervous, motorist was speeding, vehicle was rented, car contained two air fresheners and masking odor, motorist gave inconsistent answers regarding destination and purpose, vehicle was rented in a name other than the driver or passenger although the driver had stated that they had rented the vehicle, motorist failed to remember name of daughter-in-law whom motorist claimed he had just visited); and U.S. v. Lebrun, 261 F.3d 731, 733 (8th Cir. 2001) (the vehicle was rented, driver and passengers provided vague and confusing answers to routine questions, motorist sweating profusely on a cold day, passengers' hands trembled excessively, and there was visible indication that the car was travelling a long distance without making any stops).

[¶33] Evidence that is the "fruit" of an illegal search or seizure is not admissible, and "the exclusionary prohibition extends as well to the indirect as the direct products of such invasions." Wong Sun v. U.S., 371 U.S. 471, 484-85, 83 S.Ct. 407 (1963). The controlling question 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.'" *Id*. at 488.

2. *The District Court Improperly Analyzed and Applied the Law in Concluding That Law Enforcement Is Ubiquitously Permitted to Request a Driver Exit Their Vehicle During a Routine Traffic Stop.*

[¶34] The District Court relied principally on three cases in its holding: Rodriguez v. U.S., 575 U.S. 348, 135 S.Ct. 1609(2015); Muehler v. Mena, 544 U.S. 93, 125 S.Ct. 1465 (2005); and *Interest of K.V.,* 2020 ND 169, 946 N.W.2d 518. In its analysis, the District

Court made errors as to all three cases.

[¶35] The District Court concluded that *Rodriguez* stands for the proposition that law enforcement may always require a lawfully stopped individual to leave their vehicle. Tr. Hr'g Aug. 6, 2020 13:17-23. The *Rodriguez* Court, however, stated that while "negligibly burdensome precautions in order to complete his mission safely" are permissible extensions of the stop, "[o]n-scene investigation into other crimes, however, detours from that mission" and cannot be justified on the same basis. *Id.* at 500. Accordingly, elongations which serve an officer's safety interest are acceptable, but pursuing ulterior motives is not. The *Rodriquez* court emphasized that "[i]f an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time reasonably required to complete [the stop's] mission' and any traffic stop "'prolonged beyond' that point is 'unlawful.'" *Id*. (citing *Caballes*, 543 U. S., at 407, 125 S. Ct. 834). In the immediate case, it was expressly discussed and contemplated that Larson was to be removed from the vehicle to try to glean information which would support reasonable suspicion for a search of the vehicle and clearly not for any public safety purpose. Accordingly, *Rodriguez* stands in direct opposition to the conclusion that asking a driver to leave a vehicle is ubiquitously permissible, and also to the constitutionality of Morten's extension of the stop.

[¶36] The same interpretation was applied to the District Court's understanding of *Interest of K.V.*, 2020 ND 169, 946 N.W.2d 518. Tr. Hr'g Aug. 6, 2020, 14:9-21. *Interest of K.V.* states generally "[f]ollowing a traffic stop, an officer may order a driver and any passengers out of a vehicle." In support of this proposition, this Court cited *Knowles v. Iowa,* 525 U.S. 113, 118-19, S.Ct. 484 (1998) in which the United States Supreme Court stated that ordering individuals out of a vehicle, terry patdowns, and search passenger

compartments is permissible *if* law enforcement believes that the individuals in the vehicle are armed and dangerous. *Knowles* expressly denounces any such action during a routine traffic stop which is premised on the basis that the driver may destroy evidence of other crimes and not on any concern for officer safety. *Id.*

[¶37] The District Court's reliance on *Muehler v. Mena*, 544 U.S. 93, 125 S.Ct. 1465 (2005) likewise appears misapplied to the immediate case. *Mena* was identified by the District Court as a traffic stop case, Tr. Hr'g Aug. 6, 2020, 5:24-6:8, however, this case deals with the detention of an individual residing at a home which was believed to be shared with a member of a gang implicated in a drive-by shooting for the duration of the execution of a search warrant. *Id* at 95. The house was identified to be high risk, and the SWAT team was involved in execution of the search warrant. *Id.* Mena argued that she was detained for an unreasonable time and for an unreasonable manner in violation of her fourth amendment rights after being handcuffed and forced to remain in the garage while the search was conducted. *Id*. at 96-97. The *Mena* Court reiterated the holding in *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587 (1981), another search warrant case, in reaching a conclusion that the duration of the detainment was reasonable, namely, that it was supported by three substantial justifications: "'preventing flight in the event that incriminating evidence is found'; 'minimizing the risk of harm to the officers'; and facilitating 'the orderly completion of the search,' as detainees' 'self-interest may induce them to open locked doors or locked containers to avoid the use of force.'" *Id*. at 98. The *Mena* Court emphasized the serious governmental interests in detainment and using handcuffs in that case the warrant authorized a search for weapons and a wanted gang member resided on the premises. *Id.*

3. *Morten's Request for Larson to Leave His Vehicle Solely for the Purpose of Attempting to Procure Evidence of an Unrelated Crime for Which there Was no Reasonable, Articulable Suspicions was Unconstitutional.*

[¶38] In the immediate case, it is abundantly clear from the actions and words of the officers that they intended to use the arrest and handcuffing of Larson as a mechanism for beginning a fishing expedition for reasonably articulable suspicion in support of their hunch that there were drugs within Larson's vehicle. We are not left to our own imaginations or speculations to ascertain law enforcement's reasoning – law enforcement explicitly stated its rationale. On its face, this fishing expedition has nothing to do whatsoever with a driving under suspension citation, and clearly is far beyond the mission of stopping a vehicle for a cracked windshield and non-seated passenger. After Morten's first interaction with Larson, Morten had sufficient evidence to charge Larson with all three of the aforementioned offenses. Morten never experienced any concern for his safety due to the occupants of the vehicle or the overall conditions of the stop which would justify more than promptly issuing the appropriate citations and releasing the driver and occupants of the vehicle. Notwithstanding, simply following the standard (and constitutionally prescribed) protocol and issuing a citation based on known violations was unpalatable to Morten because he wanted to see what more he could get.

[¶39] Although initially acting on a valid basis for initiating a traffic stop, Morten used his authority to command citizens compliance to side-step constitutional protections against unreasonable search and seizure. Morten elongated the stop to varying degrees at almost every juncture, from having multiple consultations with law enforcement, asking unnecessary questions of the Larson and the passengers, repeating topics of conversation, and solving technical difficulties with his equipment which did not impact his ability to complete the stop. While these actions did not add hours to the length of the stop, they

nevertheless were capitalized upon to widen the possibility of discovering some other basis for reasonable suspicion of criminal activity. Moreover, what is even more disconcerting is that Morten expressly and intentionally misused his authority to command a driver to leave their vehicle during a traffic stop which was bestowed upon him by the law for his own protection and in contemplation of the need for the safety of law enforcement. Both individually and in aggregate, these acts were unconstitutional seizures of Larson and, by extension, Marsolek.

[¶40] It is troubling that law enforcement overtly recognized that they lacked reasonable suspicion, and with express recognition of their lack of reasonable suspicion attempted to circumvent Larson, Marsolek, and Cruz's constitutional rights. While the minds of law enforcement may not have been driven by pure malicious intent, the iterated intent was nevertheless constitutionally impermissible. The appropriate remedy in such a case is suppression of all evidence resulting from the inappropriate extension which, in this case, is any and all evidence which was obtained after the point when Morten told Larson that he was going back to his vehicle to write the citation and would include the discovery of any narcotics and drug paraphernalia. The District Court errored in denying Marsolek with this remedy.

CONCLUSION

[¶41] For the reasons outlined above, the Appellant respectfully requests that this Court conclude that the District Court errored in finding that the actions by law enforcement were not an infringement on the Appellant's constitutional rights warranting suppression, reverse the criminal judgment, and remand the issue to the District court for entry of an order consistent with this Court's opinion.

BASIS FOR ORAL ARGUMENT

[¶42] Oral argument is being requested so that the Appellant may provide supplemental emphasis as to the factual and legal basis of the Appellant's argument, and to provide clarification as to the Appellant's argument to the extent that clarification would be helpful to the Court in its adjudication.

Dated May 10, 2021.

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certifies pursuant to Rule 25(d) of the North Dakota Rules of Appellate Procedure that on May 10, 2021 the following documents:

1. The forgoing Appellant's Brief; and
2. Appendix
3.

were filed with the North Dakota Supreme Court through the North Dakota Supreme Court E-Filing Portal and were e-served through said portal upon the following people as indicated below:

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Dated this 10th day of May, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Appellant's Brief complies with the page limitations imposed by Rule 32 of the North Dakota Rules of Appellate Procedure in that it does not exceed 38 pages.

Dated May 10, 2021.

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