STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1515

State of Minnesota,
Respondent,

vs.

Dominic Allan Babineau,
Appellant.

Filed May 19, 2025
Reversed
Frisch, Chief Judge
Concurring specially, Connolly, Judge

Sibley County District Court
File No. 72-CR-22-326

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Donald E. Lannoye, Sibley County Attorney, Casey J. Swansson, Assistant County Attorney, Gaylord, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Frisch, Chief Judge; and Connolly, Judge.

SYLLABUS

Under the Minnesota Constitution, the odor of marijuana emanating from a vehicle does not, on its own, provide reasonable, articulable suspicion of criminal activity sufficient to expand the scope of an equipment-violation vehicle stop given the cannabis laws in effect at the time of the charged offense.

OPINION

FRISCH, Chief Judge

In this direct appeal from the judgment of conviction for first-degree driving while impaired (DWI), and from a related denial of postconviction relief, appellant argues that his conviction must be reversed because law enforcement expanded the scope of an equipment-violation vehicle stop without reasonable, articulable suspicion of criminal activity, and because his trial counsel rendered ineffective assistance by failing to raise a meritorious suppression claim on that basis. Because the odor of marijuana, by itself, does not constitute reasonable, articulable suspicion of criminal activity sufficient to constitutionally justify expanding the scope of an equipment-violation vehicle stop given the cannabis laws then in effect, and because trial counsel failed to raise a meritorious and dispositive motion to suppress on that basis, we reverse.

FACTS

Respondent State of Minnesota charged appellant Dominic Allan Babineau with (1) first-degree DWI—driving under the influence of a controlled substance in violation of Minn. Stat. § 169A.20, subd. 1(2) (2022); (2) driving after revocation in violation of Minn. Stat. § 171.24, subd. 2 (2022); and (3) first-degree DWI—any amount of controlled substance in the person's body in violation of Minn. Stat. § 169A.20, subd. 1(7) (2022). These charges stemmed from a December 17, 2022, equipment-violation stop of the vehicle driven by Babineau.[1] At Babineau's jury trial, the state presented evidence that a

[1] Before trial, Babineau pleaded guilty to driving after revocation and does not challenge that conviction on appeal.

blood sample had been taken from Babineau pursuant to a search warrant and that testing on the sample showed the presence of amphetamine and methamphetamine. The jury found Babineau not guilty of driving under the influence, but guilty of driving with a controlled substance in his body.

Babineau timely appealed his conviction and then moved to stay the appeal to allow him to pursue postconviction relief. We stayed the appeal and remanded the matter for postconviction proceedings. In his petition for postconviction relief, Babineau argued that law enforcement lacked reasonable suspicion to expand the scope of the equipment-violation vehicle stop in violation of the Minnesota Constitution, that all evidence gathered after the illegal expansion of the stop should have been suppressed, and that trial counsel's failure to move to suppress that evidence violated Babineau's constitutional right to effective assistance of counsel.

At an evidentiary hearing on Babineau's petition, the Sibley County Sheriff's Deputy and Sergeant who initiated the stop testified that they pulled over Babineau's vehicle because the passenger-side headlight was not working.[2] At the time of the stop, the deputy was training under the sergeant's supervision. The deputy testified that he and the sergeant followed behind Babineau for several blocks and waited to initiate the stop at a location where they were protected from the wind. During that time, the officers did not observe Babineau swerve or cross any lane lines, and Babineau safely stopped his vehicle after the officers activated the squad-car emergency lights. The sergeant testified that as

[2] By the time he testified at the evidentiary hearing, the sergeant's rank had changed to deputy. For the sake of clarity and consistency, we refer to him as "the sergeant."

the squad car came to a stop, "the rear seat passenger appeared to be making furtive movements in the back seat." The sergeant did not "remember exactly what the movements were," but he stated that there was "more movement in a vehicle than what [he] typically see[s] on a traffic stop."

The deputy approached the driver's side of the car while the sergeant approached the passenger's side. Babineau was in the driver's seat and a passenger was seated in the back seat next to an infant child. The deputy asked Babineau for his license and registration. Neither officer observed anything illegal in the car or any signs of impairment from Babineau. The officers returned to their squad car, and the deputy then told the sergeant—his training officer—that he thought he may have smelled marijuana. The sergeant testified that he decided to reapproach the vehicle to "verify [the deputy's] findings or suspicion of odor of marijuana inside the vehicle." The sergeant testified that the crime he suspected had been committed was possession of marijuana. While speaking with Babineau, the sergeant testified that he smelled marijuana in the vehicle and observed that Babineau's pupils appeared to be dilated and that his eyes appeared to be glossy. The sergeant told Babineau to exit the car, questioned him about the odor of marijuana and his drug use, conducted field sobriety testing, and ultimately obtained a search warrant to draw a blood sample from Babineau for chemical testing.

The postconviction court received into evidence the squad-car video, a copy of the search-warrant application and warrant, and an email from Babineau's trial counsel explaining why he did not raise a suppression claim. The postconviction court also

accepted the parties' stipulation that "marijuana and hemp cannot be differentiated by appearance or aroma."

The postconviction court denied Babineau's petition for postconviction relief, concluding that the initial expansion of the scope of the stop was warranted based on the deputy's "detection of an odor of marijuana" and the sergeant's "observations of furtive movements inside the vehicle."

We then dissolved the stay and reinstated this appeal.

ISSUES

I. Does the odor of marijuana, on its own, provide reasonable, articulable suspicion of criminal activity sufficient to expand the scope of an equipment-violation vehicle stop under the Minnesota Constitution given the cannabis laws in effect at the time of the charged offense?

II. Did Babineau's trial counsel render ineffective assistance by failing to move to suppress evidence obtained following the expansion of the scope of the vehicle stop?

ANALYSIS

Babineau argues that his conviction must be reversed because he received ineffective assistance of counsel. Specifically, he argues that his trial counsel was ineffective for failing to move to suppress evidence obtained as a result of an illegal expansion of an equipment-violation vehicle stop because law enforcement had no reasonable, articulable basis to suspect that Babineau had been involved in criminal activity. He asserts that the perceived odor of marijuana alone did not afford a reasonable, articulable basis to expand the stop, that a suppression motion would have been meritorious, and that counsel's failure to seek suppression of illegally obtained evidence

both fell below an objective standard of reasonableness and was dispositive of the outcome of the case.

We review the denial of postconviction relief for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). "A postconviction court abuses its discretion when it has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Ries v. State*, 920 N.W.2d 620, 627 (Minn. 2018) (quotation omitted). Because claims of ineffective assistance of counsel "present mixed questions of law and fact," we review the postconviction court's legal conclusions on such questions de novo. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013).

Against this backdrop, we begin by addressing Babineau's argument that the expansion of the scope of the vehicle stop was unconstitutional. We then consider his ineffective-assistance-of-counsel claim.

I. Law enforcement lacked reasonable, articulable suspicion of criminal activity sufficient to expand the scope of the equipment-violation vehicle stop.

Babineau argues that the deputy's stated belief that he might have smelled marijuana coming from Babineau's vehicle did not provide the sergeant with a reasonable, articulable suspicion of criminal activity sufficient to expand the scope of the vehicle stop under the Minnesota Constitution. "Whether there is reasonable suspicion is a mixed question of fact and constitutional law." *State v. Lugo*, 887 N.W.2d 476, 487 (Minn. 2016). When, as here, the relevant facts are undisputed, we review whether police had reasonable suspicion to expand the scope of a limited investigatory stop de novo. *Id.*

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures by government officials. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Under the Minnesota Constitution, "a person has been seized if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). There is no dispute that Babineau was lawfully seized when the officers turned on their squad car's emergency lights based on the vehicle's burnt-out headlight. *See State v. Bergerson*, 659 N.W.2d 791, 795-96 (Minn. App. 2003) (holding seizure occurred when an officer activated their squad car's flashing lights to initiate a stop); *see also State v. George*, 557 N.W.2d 575, 578 (Minn. 1997) ("Ordinarily, if an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle.").

Generally, warrantless searches and seizures are unreasonable. *State v. Pauli*, 979 N.W.2d 39, 46 (Minn. 2022). However, a police officer may "conduct a brief, investigatory stop of a motor vehicle when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *State v. Taylor*, 965 N.W.2d 747, 752 (Minn. 2021) (quotation omitted). But the scope of an investigatory vehicle stop "must be limited to the justification for the stop." *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005) (quotation omitted). Under article I, section 10 of the Minnesota Constitution, any expansion of the scope of the stop "not strictly tied to the circumstances that rendered the initiation of the stop permissible must be supported by at least a reasonable suspicion of additional illegal activity." *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012) (citing *State v. Askerooth*,

681 N.W.2d 353, 364-65 (Minn. 2004)); *see also State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002) (explaining that "[e]xpansion of the scope of the stop to include investigation of other suspected illegal activity" requires "reasonable, articulable suspicion of such other illegal activity"). To be reasonable, any additional intrusion unrelated to the initial purpose of the stop "must be supported by an objective and fair balancing of the government's need to search or seize and the individual's right to personal security free from arbitrary interference by law officers." *State v. Sargent*, 968 N.W.2d 32, 38 (Minn. 2021) (quotation omitted). Additionally, article I, section 10 of the Minnesota Constitution requires that "the basis for justifying an intrusion during a minor traffic stop be individualized to the driver toward whom the intrusion is directed." *Askerooth*, 681 N.W.2d at 364.

"Reasonable suspicion must be 'particularized' and based on 'specific and articulable *facts* which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Taylor*, 965 N.W.2d at 752 (emphasis added) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). An officer's subjective good-faith belief that criminal activity is afoot is not enough to establish reasonable suspicion—rather, on review, we must "examine whether the suspicion was objectively reasonable." *State v. Britton*, 604 N.W.2d 84, 88 (Minn. 2000). And while the reasonable-suspicion standard is "less demanding" than the probable-cause standard, it still "requires at least a minimal level of objective justification." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). An officer "must be able to point to objective facts" to support a suspicion of criminal activity, "and may not base his or her

conclusion on a 'hunch.'" *Cripps*, 533 N.W.2d at 391-92 (quoting *State v. Johnson*, 444 N.W.2d 824, 825-26 (Minn. 1989)).

We consider the totality of the circumstances in determining whether reasonable suspicion existed to expand the scope of a vehicle stop. *State v. Flowers*, 734 N.W.2d 239, 251 (Minn. 2007). The state bears the burden to demonstrate that an investigatory stop was "sufficiently limited" in scope and duration. *Askerooth*, 681 N.W.2d at 365.

A. The sergeant expanded the scope of the vehicle stop when he reapproached Babineau's vehicle to investigate the odor of marijuana.

Babineau argues that the sergeant expanded the scope of the stop when he "decided to leave [the] squad car, re-approach Babineau's vehicle, and re-initiate questioning to investigate the marijuana odor." We agree.

"Each incremental intrusion during a stop must be strictly tied to and justified by the circumstances which rendered the initiation of the stop permissible." *Sargent*, 968 N.W.2d at 38 (quotations omitted). While conducting a vehicle stop, "an officer's questions must be limited to the purpose of the stop." *State v. Syhavong*, 661 N.W.2d 278, 281 (Minn. App. 2003) (citing *Florida v. Royer*, 460 U.S. 491, 498-500 (1983)). And "even a single question, depending on its content, could expand the scope of a traffic stop." *Smith*, 814 N.W.2d at 351 n.1.

Here, law enforcement stopped Babineau for an equipment violation. When the officers returned to their squad car, the deputy informed his supervising sergeant that he thought he may have smelled marijuana coming from the vehicle. The sergeant testified that because the deputy was in field training and unable to provide "a definite yes or no"

as to whether he had smelled marijuana, the sergeant decided to "investigate further." The sergeant's decision to reapproach the car to ask Babineau questions specifically to investigate the odor of marijuana was an additional intrusion that expanded the scope of the initial equipment-violation vehicle stop. *See State v. Fort*, 660 N.W.2d 415, 419 (Minn. 2003) (concluding that "investigative questioning" related to the presence of weapons and narcotics expanded the scope of a routine traffic stop); *Syhavong*, 661 N.W.2d at 281 (concluding that officer unlawfully expanded the scope of an equipment-violation stop by asking the driver if there was anything illegal in the car).

The state argues that because the officers would necessarily have been required to make further contact with Babineau to return his driver's license, the sergeant's "level of intrusion" in reapproaching the vehicle "can only be described as de minimis." The state appears to suggest that such a "de minimis" intrusion does not require reasonable suspicion. The state does not cite to any authority in support of this proposition, and we find no constitutional support or justification for such a novel distinction. To the contrary, we expressly rejected a similar position in *Syhavong*, in which the state argued that because the officer's "questions were not overly intrusive, and because the stop was relatively brief, no suspicion of criminal activity was necessary to justify the questioning." 661 N.W.2d at 282. In rejecting the state's argument, we explained that "[a]ctivities that exceed the scope of a stop are not made reasonable because they are short in duration." *Id.* And the supreme court has made clear that reasonable suspicion is required to support "*any increase* in the intrusiveness" of a vehicle stop. *Sargent*, 968 N.W.2d at 42 (emphasis added) (quotation omitted).

Here, the sergeant's stated purpose in reapproaching Babineau's vehicle was to expand the stop to investigate the odor of marijuana coming from the vehicle. The sergeant further confirmed that his decision to reapproach was not to return the license but instead, to investigate the deputy's report that the deputy *may* have smelled marijuana. Otherwise, according to the sergeant, the deputy—and not the sergeant—would have reinitiated contact to return the license. Stated differently, the undisputed record establishes that *the sergeant* expanded the stop in a manner unrelated to the initial justification for the stop. In sum, because the officers stopped Babineau for an equipment violation, the sergeant's decision to reapproach the vehicle to investigate the odor of marijuana constituted an expansion of the scope of the stop requiring reasonable suspicion of additional criminal activity.

B. The deputy's report that he thought he may have smelled marijuana emanating from the vehicle did not establish reasonable, articulable suspicion of criminal activity sufficient to expand the scope of the stop.

Babineau argues that the odor of marijuana, on its own, did not provide the sergeant with reasonable, articulable suspicion sufficient to expand the scope of the equipment-violation stop because at the time of alleged offense, there were several ways in which a person could possess cannabis without committing a crime. We agree.

At the time of Babineau's arrest, marijuana was listed as a Schedule I controlled substance. Minn. Stat. § 152.02, subd. 2(h) (2022). Marijuana was defined as "all parts of the plant of any species of the genus Cannabis." Minn. Stat. § 152.01, subd. 9 (2022). Minnesota law provided three exceptions that made cannabis possession noncriminal. *See State v. Torgerson*, 995 N.W.2d 164, 169-70 (Minn. 2023). The first exception was for

"hemp," defined as having a delta-9 tetrahydrocannabinol concentration of less than 0.3 percent. *See* Minn. Stat. § 152.22, subd. 5a (2022) (defining "hemp" by reference to the definition of "industrial hemp" set forth in Minn. Stat. § 18K.02, subd. 3 (2022)). The second exception was for medical cannabis possessed pursuant to Minnesota's medical cannabis registry program. Minn. Stat. § 152.32, subd. 2 (2022). And the third exception made possession of a "small amount"—"42.5 grams or less"—of marijuana a noncriminal petty misdemeanor. Minn. Stat. §§ 152.027, subd. 4(a); .01, subd. 16 (2022). Under certain circumstances, possession of over 1.4 grams or more of marijuana in a motor vehicle was a misdemeanor, but possession of 1.4 grams or less was a noncriminal offense. Minn. Stat. § 152.027, subd. 3 (2022); *Torgerson*, 995 N.W.2d at 170. Consequently, under this statutory scheme, possession of marijuana was "not always a crime." *Torgerson*, 995 N.W.2d at 170.

Our precedential caselaw does not directly addresses whether, given the cannabis laws in effect at the time of Babineau's arrest, the odor of marijuana by itself may have provided reasonable suspicion of criminal activity sufficient to expand the scope of a vehicle stop. In *Torgerson*, the supreme court held that "[i]n the absence of any other evidence as part of the totality of the circumstances analysis, the evidence of the medium-strength odor of marijuana, on its own, is insufficient" to establish probable cause justifying a warrantless vehicle search. *Id.* at 175. But the supreme court explicitly declined to address whether, under the same circumstances, the odor of marijuana may give rise to reasonable suspicion of criminal activity, concluding that Torgerson had forfeited the argument by failing to raise the issue in the proceedings below. *Id.* at 169 n.4.

While *Torgerson* addressed only whether the odor of marijuana alone established probable cause to expand the scope of a vehicle stop, its reasoning provides useful guidance for addressing the issue presented here. First, in *Torgerson*, the supreme court rejected the state's argument "that the odor of marijuana emanating from a vehicle, on its own, will *always* create the requisite probable cause to search a vehicle," emphasizing that such a bright-line rule was inconsistent with a totality-of-the-circumstances analysis required to determine probable cause. *Id.* at 173. But the supreme court also declined to impose "a bright-line rule in the other direction that probable cause cannot exist if there is *any* legal explanation for the marijuana odor." *Id.* Instead, the supreme court concluded that the odor of marijuana may be considered as one of the circumstances informing the totality-of-the-circumstances analysis. *Id.* Because the reasonable-suspicion inquiry likewise requires application of a totality-of-the-circumstances test, *Flowers*, 734 N.W.2d at 251, the application of a bright-line rule is also inappropriate in this context. Rather, following the logic of *Torgerson*, in determining whether reasonable suspicion exists, the odor of marijuana may be considered as a relevant factor among the totality of the circumstances and not as a dispositive factor.

Second, in *Torgerson*, the supreme court relied heavily on its holding in *Burbach* that under the Minnesota Constitution, "an officer's detection of the odor of alcohol coming from an adult passenger during a traffic stop does not, by itself, provide a reasonable, articulable suspicion of an open-container violation sufficient" to expand the scope of a routine traffic stop. *Burbach*, 706 N.W.2d at 489. In *Burbach*, a police officer stopped a vehicle for speeding. *Id.* at 486. While talking to Burbach, the officer detected a "strong

odor of alcohol." *Id.* A passenger in the vehicle volunteered that the smell came from him. *Id.* The officer testified that Burbach's nervousness suggested impairment, but Burbach otherwise displayed no signs of impairment. *Id.* at 486-87. The officer eventually obtained Burbach's consent to search the vehicle and discovered contraband. *Id.* at 487. The supreme court determined that the request for consent to search improperly expanded the scope of the stop because it was unsupported by reasonable suspicion of additional criminal activity. *Id.* at 489. In *Torgerson*, the supreme court explained that *Burbach* was helpful to its analysis "because it shows that reasonable suspicion—which requires a lesser showing than probable cause—did not exist when the only evidence of wrongdoing was the odor of alcohol." 995 N.W.2d at 172-73.

To summarize, *Burbach* held that the odor of alcohol alone does not provide reasonable suspicion sufficient to expand the scope of a vehicle stop. And *Torgerson*'s adoption of *Burbach*'s analytical framework established that, for purposes of a totality-of-the-circumstances inquiry, the odor of alcohol and the odor of marijuana are analogous circumstances. *Torgerson* therefore confirms that the principles set forth in *Burbach* inform our consideration of the issue here—whether the odor of marijuana on its own may amount to reasonable suspicion sufficient to expand the scope of an equipment-violation stop.

In a recent nonprecedential opinion, we applied *Torgerson* and *Burbach* to conclude that "[t]he odor of marijuana emanating from" a vehicle failed "to support reasonable, articulable suspicion" of criminal activity. *State v. Dawson*, No. A24-0573, 2024 WL 4481412, at *7-9 (Minn. App. Oct. 14, 2024), *rev. denied* (Minn. Feb. 18, 2025). In

Dawson, an officer on routine patrol received a tip that Dawson's vehicle was parked in a "high-crime area" along with another car and that one of the vehicles potentially contained a large amount of cocaine. *Id.* at *1. The officer approached Dawson's already-stopped vehicle and engaged him in conversation, at which point he detected the odor of marijuana and initiated a seizure by asking Dawson to exit the vehicle. *Id.* at *1-2, *4-5. In concluding that the officer unlawfully seized Dawson, we reasoned that "[i]f an officer's detection of the odor of alcohol coming from an adult passenger is not enough to support reasonable, articulable suspicion of an open-container violation, then . . . the odor of marijuana likewise cannot support such reasonable suspicion here." *Id.* at *9. The reasoning set forth in *Dawson* is persuasive. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c). Accordingly, we hold that under the Minnesota Constitution, the odor of marijuana emanating from a vehicle does not, on its own, provide reasonable, articulable suspicion of criminal activity sufficient to expand the scope of an equipment-violation vehicle stop given the cannabis laws in effect at the time of the charged offense.[3]

Applying the above-stated principles to the case before us, we conclude that the sergeant lacked reasonable, articulable suspicion to expand the scope of the equipment-violation vehicle stop to investigate the odor of marijuana. At the time of the expansion, the only objective and particularized information supporting the sergeant's suspicion of criminal activity was the deputy's report that he thought he may have smelled

[3] Our holding is expressly tied to Minnesota's legal framework for cannabis possession in existence at the time of the charged offense. We express no opinion as to whether subsequent changes to Minnesota's cannabis laws might warrant a different outcome.

marijuana coming from the vehicle. But as the parties stipulated, the odor of marijuana and legal hemp are indistinguishable. And the deputy articulated no other basis to support a reasonable suspicion that the odor he detected indicated the presence of criminal quantities of marijuana, as opposed to legal hemp or legal marijuana. Moreover, Babineau had not been speeding or exhibiting any signs of erratic driving, and when the officers initiated the vehicle stop, Babineau pulled the car over safely and without incident. Prior to expanding the stop, neither the deputy nor the sergeant observed any signs of impairment or anything illegal in the car, further undermining the state's argument that the totality of the circumstances gave rise to objectively reasonable suspicion of criminal activity.[4] *See Dawson*, 2024 WL 4481412, at *9 (noting that the defendant "displayed no signs of impairment and that no illegal substances or paraphernalia were in plain view" as support for conclusion that the investigating officer lacked reasonable suspicion); *cf. Torgerson*, 995 N.W.2d at 175 (concluding that the absence of signs of impairment, drug paraphernalia, or other evidence indicating that marijuana "was being used in a manner, or was of such a quantity, so as to be criminally illegal" weighed against a finding of probable cause).

[4] Although the sergeant testified that Babineau's pupils appeared to be dilated and his eyes appeared to be glossy, those observations occurred only *after* the sergeant had reapproached the vehicle and expanded the scope of the stop. Accordingly, these potential indicators of impairment cannot be considered in the totality-of-the-circumstances test to determine whether the expansion itself was supported by reasonable suspicion. *See State v. Diede*, 795 N.W.2d 836, 843-44 (Minn. 2011) (concluding that factual circumstances that "did not yet exist when Diede was seized" could not serve as objective basis to justify seizure).

Additionally, the deputy's detection of the odor of marijuana was equivocal. He stated that he *thought* he *may* have smelled the odor of marijuana coming from the vehicle, but could not provide "a definite yes or no." Nor could the deputy remember how strong or weak the odor of marijuana was. While the odor of marijuana can support an officer's suspicion of criminal activity, the deputy's equivocal report that he thought he may have smelled marijuana, without more, did not provide reasonable, articulable suspicion of additional criminal activity justifying Babineau's continued detention for investigative purposes. *Cf. Burbach*, 706 N.W.2d at 489 (holding that officer's unequivocal detection of odor of alcohol did not give rise to reasonable suspicion of criminal activity); *Torgerson*, 995 N.W.2d at 175 (holding that unequivocal evidence of "medium-strength odor of marijuana" emanating from vehicle was insufficient to establish probable cause).

The state argues that, in addition to the odor of marijuana, the sergeant's observation of "furtive movements" within the car supported a reasonable suspicion of criminal activity. But at the evidentiary hearing, the sergeant could not specify or otherwise describe these supposedly "furtive movements." As previously noted, an officer "must demonstrate objective facts to justify" a reasonable suspicion of criminal activity. *Syhavong*, 661 N.W.2d at 282. "[A] subjective assessment derived from the officer's perceptions," devoid of any particularized description of the individual's actions, cannot serve as the type of objective fact necessary to support reasonable suspicion. *Id.*; *cf. Flowers*, 734 N.W.2d at 245, 252 (concluding that driver's actions over the course of 45 seconds—including making a distinct lunging motion toward the passenger door, leaning fully into the passenger's seat, and slamming his hand on the driver's door panel

as if he was trying to pull it apart—constituted furtive movements giving rise to reasonable suspicion of illegal activity).

The sergeant testified that as the squad car came to a stop behind Babineau, he observed that the "rear seat passenger appeared to be making furtive movements," and that these movements factored into his suspicions concerning illegal possession of marijuana. But when asked to detail what he observed, the sergeant testified: "Again, I don't recall exactly the movements that I saw but, again, it was just more than . . . what I would typically see out of a standard traffic stop." The sergeant failed to provide any factual description of what he observed from which any rational inference could be drawn to support a reasonable, articulable suspicion of criminal activity. *See Terry*, 392 U.S. at 21. We therefore conclude that because the sergeant's conclusory characterization of the movements as "furtive"—without any factual description—was a subjective and conclusory assessment unsupported by any specific and articulable facts indicating criminal activity, it cannot serve as a basis for reasonable, articulable suspicion. *See Syhavong*, 661 N.W.2d at 282; *accord Joshua v. DeWitt*, 341 F.3d 430, 444-48 (6th Cir. 2003) (concluding that appellate court's "finding of furtive gestures [was] not supported by objective facts" and therefore could not support reasonable suspicion of criminal activity).

And even assuming that the sergeant's original observations gave rise to some modicum of suspicion, that suspicion was dispelled well before the sergeant decided to expand the vehicle stop. *See State v. Mahr*, 701 N.W.2d 286, 290 (Minn. App. 2005) (explaining that reasonable suspicion no longer exists when an "officer's initial reasonable

suspicion is dispelled by further investigation"). When the sergeant first approached the vehicle, he saw an infant in the back seat of the car next to the passenger. At the evidentiary hearing, the sergeant testified that during his initial approach, he did not observe anything illegal in the vehicle and admitted that the movements he observed might have been attributable to the passenger tending to the child. And although the sergeant maintained that his observation of furtive movements contributed to his suspicion of illegal marijuana possession, his subjective assessment must be considered against an objective standard of reasonableness. *See Britton*, 604 N.W.2d at 88. We conclude that, from the perspective of a reasonable police officer, any suspicion associated with the passenger's allegedly furtive movements would have been dispelled after seeing the infant child in the back seat next to the passenger. Under the totality of circumstances, including the sergeant's conclusory assertion of "furtive movements," which he conceded could have been attributable to infant care, the state has not established an objectively reasonable, articulable suspicion of criminal activity.

For all these reasons, we conclude that the state has failed to meet its burden to show that the totality of the circumstances established objectively reasonable suspicion of additional criminal activity sufficient to expand the scope of the equipment-violation vehicle stop.

C. The evidence obtained after the unlawful expansion of the vehicle stop would have been excluded had trial counsel moved to suppress.

Generally, evidence obtained through an unlawful expansion of the scope of a vehicle stop must be suppressed. *See Fort*, 660 N.W.2d at 416; *Syhavong*, 661 N.W.2d at

282. This rule extends to any evidentiary "fruits" derived from an unlawful government intrusion. *State v. Horst*, 880 N.W.2d 24, 36 (Minn. 2016). After expanding the scope of the stop, the officers observed some signs suggesting Babineau was impaired, discovered that Babineau's tongue "appeared to have a green color to it," and obtained admissions from Babineau and the passenger that they had both smoked marijuana prior to driving. Had trial counsel moved to suppress, these observations and admissions would have been excluded as unlawfully obtained evidence because the evidence was discovered only after the sergeant illegally expanded the scope of the stop to investigate the odor of marijuana. And the sergeant relied on these same facts to establish probable cause to effect an arrest for driving while impaired and obtain a search warrant for Babineau's blood sample. In sum, all of the evidence used to convict Babineau would have been suppressed as the fruit of the unconstitutional expansion of the scope of the stop. *See Burbach*, 706 N.W.2d at 491 (concluding that all evidence obtained subsequent to unlawful expansion of vehicle stop must be suppressed); *Syhavong*, 661 N.W.2d at 282 (same).

II. Babineau's trial counsel rendered ineffective assistance by failing to move to suppress evidence.

Babineau argues that his trial counsel was ineffective for failing to raise a suppression challenge that would have resulted in exclusion of the evidence necessary to support his conviction for driving with any amount of controlled substance in his body. We agree.

The Sixth Amendment of the United States Constitution and article I, section 6 of the Minnesota Constitution guarantee a criminal defendant the right to effective assistance

of counsel. *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016) (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). To establish that counsel was ineffective under the two-prong *Strickland* test, Babineau must show (1) that his trial counsel's performance "fell below an objective standard of reasonableness" and (2) that but for counsel's unreasonable performance, there is a reasonable probability that the result of the proceeding would have been different. 466 U.S. at 687-88, 694. In reviewing a claim of ineffective assistance of counsel, our "scrutiny of counsel's performance must be highly deferential." *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003) (quotation omitted).

Trial counsel's failure to raise a suppression claim "does not constitute *per se* ineffective assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). But "a single, serious error may support" an ineffective-assistance-of-counsel claim. *Id.* at 383. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014); *see also State v. Beecroft*, 813 N.W.2d 814, 855 (Minn. 2012) (Anderson, J., concurring) (explaining that deference to counsel "is unwarranted" when counsel's error did not result from strategy, "but was instead the result of a misunderstanding of facts or law or an inexcusable oversight" (citing *Kimmelman*, 477 U.S. at 385)).

Trial counsel's performance was objectively unreasonable for three reasons. First, we have already determined that law enforcement unconstitutionally expanded the scope of the vehicle stop and that the evidence obtained following that expansion would have been excluded had trial counsel filed a motion to suppress. Trial counsel therefore failed

to raise a meritorious, outcome-determinative claim, and the failure to bring such a claim is objectively unreasonable. *See Kimmelman*, 477 U.S. at 383.

Second, trial counsel's decision to forgo a suppression challenge was not the product of reasonable strategic considerations. *See id.* at 385. Rather, it was based on a misunderstanding of the facts and the law. In a statement admitted into evidence during the postconviction hearing, trial counsel stated that he did not move to suppress because "[t]he smell of marijuana plus the admission of . . . Babineau that he had smoked just prior to driving and physically exhibited some signs of possible impairment" provided the officers with reasonable suspicion to expand the scope of the stop. But, as previously explained, Babineau's admission and the officer's observations of the signs of possible impairment arose only *after* the unlawful expansion of the stop. Therefore, as a matter of law, those facts could not serve as an objective basis to expand the scope of the stop. *See Diede*, 795 N.W.2d at 843-44. And trial counsel did not articulate any other strategic considerations motivating his decision to forgo a suppression challenge.

Finally, trial counsel waived all suppression issues *before* the state completed chemical testing on the blood sample. Trial counsel's decision to forgo a suppression challenge before learning the import of potentially critical evidence reinforces our conclusion that this decision was not the product of reasonable strategic considerations. In sum, because trial counsel failed to raise a meritorious, outcome-determinative claim based on a misunderstanding of the law rather than reasonable strategic considerations, Babineau has met his burden to establish objectively unreasonable performance. *See Kimmelman*, 477 U.S. at 383-85.

Babineau has also satisfied his burden to demonstrate prejudice based on trial counsel's deficient performance. Babineau pleaded guilty to driving with a revoked license prior to trial, was acquitted of driving under the influence, and was convicted only of driving with any amount of controlled substance in his body. The blood-test results—which we conclude should have been suppressed—were the state's only available means to meet its burden to obtain a conviction on that count. Had that evidence been suppressed, the state would not have met its burden.

In sum, Babineau established a violation of his right to effective counsel because trial counsel's failure to move to suppress fell below an objective standard of reasonable representation and because there is a reasonable probability that absent counsel's error the only charge for which Babineau was ultimately convicted would have been dismissed. *See Strickland*, 466 U.S. at 687-88, 694.

DECISION

Under the Minnesota Constitution, the odor of marijuana emanating from a vehicle does not, on its own, constitute reasonable, articulable suspicion of criminal activity sufficient to expand the scope of an equipment-violation vehicle stop given the cannabis laws in effect at the time of the charged offense. The sergeant therefore lacked reasonable suspicion to expand the scope of the vehicle stop based solely on the deputy's report that he may have smelled marijuana coming from Babineau's vehicle. And because trial counsel's decision not to move to suppress evidence obtained from an illegal stop was objectively unreasonable and because such a motion would have resulted in the dismissal of the only charge for which Babineau was convicted, Babineau was deprived of his

constitutional right to effective assistance of counsel. For these reasons, we conclude that the postconviction court abused its discretion in denying Babineau's petition for postconviction relief.

Reversed.

CONNOLLY, Judge (concurring specially)

I agree that under the unique facts and circumstances of this case, there was an illegal expansion of the stop under the Minnesota Constitution.

I write separately to emphasize two points.

First, I do not believe there was an illegal expansion of the stop when the sergeant reapproached the vehicle. The stop was expanded *only* when he began to question appellant after reapproaching the vehicle. What made that expansion illegal is that the deputy who was in "field training" thought only that "he *may* have smelled the odor of marijuana" and the sergeant admitted under oath that he returned to the vehicle for the sole purpose of investigating the crime of "possession of marijuana," which in 2022 may not have been a crime given the state of the law. (Emphasis added.)[1]

Second, the future precedential value of this opinion is limited: it does not apply to investigative seizures occurring on or after August 1, 2023.

As the majority points out, marijuana was listed as a Schedule I controlled substance at the time of appellant's arrest. Minn. Stat. § 152.02, subd. 2(h) (2022). Marijuana was defined as "all parts of the plant of any species of the genus Cannabis." Minn. Stat. § 152.01, subd. 9 (2022). Minnesota law provided three exceptions that made certain cannabis possession noncriminal. *See State v. Torgerson*, 995 N.W.2d 164, 169-70 (Minn. 2023). The first exception was for "hemp," defined as having a delta-9

[1] The record is unclear as to what questions were asked by the sergeant, as the sergeant testified that he did not recall the type of conversation he had with appellant, but assumed that it related to the smell of marijuana because the search warrant application states that the "[d]river admitted to smoking marijuana just prior to driving."

tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. *See* Minn. Stat. § 152.22, subd. 5a (2022) (defining "hemp" by reference to the definition of "industrial hemp" set forth in Minn. Stat. § 18K.02, subd. 3 (2022)); *State v. Loveless*, 987 N.W.2d 224, 232 (Minn. 2023). The second exception was for medical cannabis possessed pursuant to Minnesota's medical cannabis registry program. Minn. Stat. § 152.32, subd. 2 (2022). And the third exception made possession of a "small amount" of marijuana a noncriminal petty misdemeanor. Minn. Stat. § 152.027, subd. 4(a) (2022). "Small amount" was defined as "42.5 grams or less." Minn. Stat. § 152.01, subd. 16 (2022). Possession of over 1.4 grams of marijuana in a motor vehicle was a misdemeanor, but possession of 1.4 grams or less was a noncriminal offense. Minn. Stat. § 152.027, subd. 3 (2022); *Torgerson*, 995 N.W.2d at 170.[2] Consequently, under the statutory scheme in place at the time of appellant's arrest, possession of marijuana was "not always a crime." *Torgerson*, 995 N.W.2d at 170.

The statutory scheme in place today is quite different. Minn. Stat. § 169A.36, subd. 2 (2024) provides:

> **Use; crime described.** It is a crime for a person to use cannabis flower, a cannabis product, a lower-potency hemp edible, a hemp-derived consumer product, or any other product containing an artificially derived cannabinoid in a motor vehicle when the vehicle is on a street or highway.

And Minn. Stat. § 169A.36, subd. 3 (2024), provides:

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[2] Pursuant to Minn. Stat. § 152.027, subd. 3, a "person is guilty of a misdemeanor if the person is the owner of a private motor vehicle, or is the driver of the motor vehicle if the owner is not present, and possesses" more than 1.4 grams of marijuana either on their person or "within the area of the vehicle normally occupied by the driver or passengers." This provision has since been repealed. 2023 Minn. Laws ch. 63, art. 6, § 73, at 2900.

> **Possession; crime described.** It is a crime for a person to have in possession, while in a private motor vehicle on a street or highway, any cannabis flower, a cannabis product, a lower-potency hemp edible, a hemp-derived consumer product, or any other product containing an artificially derived cannabinoid that:
>
> (1) is in a packaging or another container that does not comply with the relevant packaging requirements in chapter 152 or 342;
> (2) has been removed from the packaging in which it was sold;
> (3) is in packaging that has been opened or the seal has been broken; or
> (4) is in packaging of which the contents have been partially removed.

A violation of subdivision 2 or 3 is a misdemeanor. Minn. Stat. § 169A.36, subd. 5 (2024). The effective date of this statute was August 1, 2023. 2023 Minn. Laws ch. 63, art. 4, § 30, at 2837.

Thus, if a driver is stopped for an equipment violation, speeding, or other traffic violation, on or after August 1, 2023, and the officer smells an odor of marijuana emanating from the *driver*, that odor may provide reasonable suspicion of additional criminal activity and a constitutional basis to expand the stop to investigate the suspected marijuana-related offense.[3]

The majority relies primarily on three cases. First, in *Torgerson*, the supreme court concluded that the odor of marijuana emanating from a vehicle, without more, is

[3] To be clear, there is no indication that the law enforcement officers in this case initially detected a smell of marijuana specifically emanating from appellant.

insufficient to create the requisite probable cause to search a vehicle under the automobile exception to the warrant requirement. 995 N.W.2d at 174-75. But this case involves reasonable suspicion, which is a much lower standard than probable cause. *See State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (acknowledging that the "reasonable suspicion standard is not high" and is "less demanding than probable cause" (quotation omitted)). And the marijuana laws have now changed since *Torgerson*.

Second, the supreme court, in *State v. Burbach*, determined that the "odor of alcohol *coming from an adult passenger* during a traffic stop does not, by itself, provide a reasonable, articulable suspicion of an open-container violation sufficient to permit an officer to expand the traffic stop by requesting to search the vehicle." 706 N.W.2d 484, 489 (Minn. 2005) (emphasis added). But the intrusion in *Burbach* involved searching a vehicle, whereas the intrusion in this case involves asking a question. Moreover, in *Burbach*, the odor of alcohol emanated from the passenger. *See id.* This is readily distinguishable from a situation where an odor of marijuana emanates from the driver, particularly in light of the recent changes to the marijuana laws.

Third, in *State v. Dawson*, this court determined that the "odor of marijuana *coming from the SUV* did not provide a reasonable, articulable suspicion of an open-package violation subject to permit an objective police officer to seize [the defendant]." No. A24-0573, 2024 WL 4481412, at *9 (Minn. App. Oct. 14, 2024) (emphasis added), *rev. denied* (Minn. Feb. 18, 2025). But *Dawson* is a nonprecedential opinion with no binding authority. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) ("Nonprecedential opinions . . . are not binding authority except as law of the case, res judicata or collateral estoppel . . . .").

Moreover, like *Burbach*, the facts in *Dawson* involved a greater intrusion—a seizure that involved police ordering the defendant out of the vehicle when there had been no traffic stop. *Dawson*, 2024 WL 4481412, at *2. And there is nothing in *Dawson* indicating that the smell of marijuana emanated from the driver.

Because *Torgerson*, *Burbach*, and *Dawson*, involve facts and circumstances significantly different from a situation in which a driver is stopped for a traffic or equipment violation, and an officer detects an odor of marijuana emanating from the driver (or the vehicle if the driver is alone), they are not dispositive regarding whether it would be reasonable for the officer to suspect marijuana use in the motor vehicle and to inquire about the suspected use. Given the recent changes to the marijuana laws, such an inquiry would be reasonable. Common sense tells us that the smell of marijuana suggests that the driver has smoked marijuana in the car. *See State v. Taylor*, 965 N.W.2d 747, 752 (Minn. 2021) (emphasizing that "an analysis of reasonable suspicion is a 'common-sense' and 'nontechnical' approach that considers the factual and practical considerations of everyday life; this standard is not readily, or even usefully, reduced to a neat set of legal rules" (quotations omitted)). Such use is a crime. *See* Minn. Stat. § 169A.36, subd. 2.

Nonetheless, at the time of this stop in 2022, the law was different. Consequently, I concur in the holding of this opinion.