IN THE SUPREME COURT OF THE STATE OF VERMONT

GREGORY W. ZULLO, APPELLANT

v.

STATE OF VERMONT, APPELLEE

SUPREME COURT DOCKET NO. 2017-284

APPEAL FROM THE

SUPERIOR COURT OF VERMONT – CIVIL DIVISION
RUTLAND COUNTY
DOCKET NO. 555-9-14 Rdcv

BRIEF OF THE AMICUS CURIAE OFFICE OF THE DEFENDER GENERAL

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STATEMENT OF FACTS

A. The unlawful seizures.

It was otherwise an unexceptional afternoon in late winter. Mr. Gregory Zullo, a man of African descent, was driving on a public roadway in Wallingford, Vermont. He was going to hang out with a friend, who lived on Route 7 south of Wallingford. Amicus Curiae ODG's P.C. 98-99. He had just gotten off from work at Pico Mountain and his snowboard gear was still in the backseat of his car, along with a brand-new GoPro camera, which he had just purchased at the ski shop that day. Id. at 99-100. He also had his backpack on the front passenger seat, which contained his sports bag for a fitness class. Id. at 102.

He was driving his mother's car, a 2005 Pontiac Sunfire. Id. at 98. It was about 3 p.m. on Thursday, March 6, 2014 when he drove past the Vermont state trooper, who was in a marked cruiser and about to pull out of a Cumberland Farms gas station in Wallingford. Id. at 6, 106. He locked eyes with the law enforcement officer, a white male later identified as Lewis Hatch. Id. at 106.

Mr. Zullo continued driving. The trooper pulled out directly behind him and followed him for about a mile or more before activating the police car's blue lights for what seemed to Mr. Zullo to be for no reason at all. Id. at 73, 106. He had not been speeding or otherwise driving erratically. There was nothing obstructing his windshield. His mother's vehicle registration was all in order. There was no faulty equipment. See id. at 73-74. Mr. Zullo stopped his car.

When the trooper walked up to the passenger side window, he asked to see Mr. Zullo's driver's license and vehicle registration, which were produced. Id. at 106-107. The trooper asked him where he was going, but Mr. Zullo declined to tell him. Id. at 6, 107. He explained later when asked by the government's attorney at the subsequent deposition why he did not answer the trooper's question: "I didn't have to." Id. at 108. When the trooper asked him where he was coming from, Mr. Zullo, who still had his Pico Mountain badge on, responded that he was coming home from work. Id. at 108.

The trooper noticed an air freshener shaped like a tree or square that was clipped onto the air vent. Id. at 105. He asked Mr. Zullo about this innocuous object too. He wanted to know why Mr. Zullo had an air freshener in his vehicle. Mr. Zullo replied that his friend smoked cigarettes in the car and he wanted to get rid of the smell. Id. at 6, 105-106.

The trooper saw a small Visine bottle in the central console of the car and asked why Mr. Zullo had it. Id. at 57-58. Mr. Zullo explained that he kept the bottle in case he needed to keep redness from his eyes. Id. at 6, 58. The trooper then asked Mr. Zullo "if he used Visine due to smoking marijuana." Mr. Zullo said no. Id. at 127. Apparently there was no need to use the Visine bottle at that moment; there was no indication that the trooper noticed any red eyes. Id. at 57-58.

The trooper continued to ask pointed questions about marijuana use. He asked Mr. Zullo "when he last smoked marijuana." The record showed minor differences in the response to this question—ultimately the court found that Mr.

Zullo admitted that he "smoked marijuana within the past few days, but not that day." Id. at 6; see also id. at 58, 113-114, 127. The trooper had caught a "faint odor of burnt marijuana" on his initial approach to the vehicle. Id. at 6, 57, 78, 127. But there was no indication how long the smell had been there. The officer did not see a fresh plume of smoke or otherwise notice an increase in the smell as he got closer to the car or when Mr. Zullo spoke with him. Id. at 78-79. There was no evidence that marijuana had been smoked that day. Id.

Trooper Hatch did not tell Mr. Zullo why he had stopped the vehicle. Id. at 108. At that point, he had no articulable facts to support a suspicion of a crime. There was no evidence of visible drugs or weapons. The trooper confirmed Mr. Zullo's identification through Mr. Zullo's production of a valid Vermont's driver's license. Id. at 127. There was nothing of interest learned from police dispatch after the trooper submitted relevant information for a vehicle inquiry. Id. at 66-69.

Nevertheless, the trooper ordered Mr. Zullo out of the car. Id. at 108. The trooper explained later that he wanted Mr Zullo to get out "[t]o speak with him about consenting to a search of his person and the vehicle." Id. at 6, 77. The trooper admitted that he could have done that without asking Mr. Zullo to exit his car. Id. at 77. He could not recall whether he told Mr. Zullo beforehand that exiting his vehicle was voluntary. Id. After Mr. Zullo complied, the trooper asked him to agree to an officer roadside patdown. Id. Mr. Zullo consented. The trooper patted him down and made him take his shoes off. Id. at 109. Again, no evidence of a crime was found. Id.

The trooper eventually told Mr. Zullo that he had stopped the car because the registration sticker on the license plate had not been visible. P.C. 108. The letters and numbers on the plate itself, however, were visible. Trooper Hatch readily admitted that he could read the license plate and called in a vehicle identification inquiry to police dispatch based on the plate information he acquired without having to exit his vehicle. Id. at 74.

Mr. Zullo looked at the sticker at the bottom of the license plate and brushed off some snow, but the registration sticker had been visible. P.C. 108. The court reviewed photographic evidence and found it inconclusive whether the sticker was unobscured. Id. at 19. In the end, this factual question was inconsequential; the court assumed the trooper "was wrong about how much snow covered the license place[.]" Id. Instead, the critical question was whether there was a traffic law requiring the registration sticker be visible. Id.

Though "Trooper Hatch suspected, at the beginning of the stop, that [Mr.] Zullo may have recently used marijuana[,] [b]y the end of the encounter, Trooper Hatch's suspicions had been allayed." P.C. 6 (court's findings and citing Trpr Hatch's deposition at 88).

Nonetheless, the trooper asked Mr. Zullo if he would consent to a search of his vehicle, but he did not. Id. at 7. The trooper seized the car while he applied for a warrant. Id. at 7. After a warrant issued, the subsequent search proved fruitless for the Government. Only a metal grinder and a broken pipe with marijuana residue were found. Id. Possession of paraphernalia related to marijuana was specifically

decriminalized in the same statute. 18 V.S.A. § 4230a(b)(1). Mr. Zullo was never arrested or cited for any infraction.

The State later conceded that "Trooper Hatch did not know whether he would find evidence of a crime or evidence of a civil offense, because he did not know how much marijuana was in [Mr.] Zullo's vehicle." P.C. 59, 79-80, 86-87. Specifically, when asked what crime he was investigating when he seized Mr. Zullo's car, the trooper responded: "I didn't say I did." Id. at 79. When pressed whether the trooper suspected a crime at the time of the seizure, the trooper again declined to commit one way or another: "It's possible that a crime was being committed[.]" Id. Though he was aware that possessing a small amount of marijuana was no longer a crime in Vermont, the trooper acknowledged that there might be less than an ounce of marijuana in the car. Id. at 80, 86-87.

On the side of the road, after the troopers seized his car, Mr. Zullo asked to be able to get his wallet or phone, which were still inside. P.C. 92. The trooper refused to let him get them. Instead, the trooper offered to drive Mr. Zullo to the police barracks or the nearly Cumberland gas station. Id. at 92. Mr. Zullo declined. The trooper offered to place a call on his personal cell phone if Mr. Zullo gave him a number to call, though Mr. Zullo did not recall that offer. Id. at 92, 110. At that point, Mr. Zullo had become extraordinarily weary of the trooper. Without money or a phone, Mr. Zullo hitchhiked and walked home. Id. at 7, 111.

B. The filing of the civil rights lawsuit.

Mr. Zullo filed a civil rights action against the State for unlawful seizures by its employee, Trooper Hatch in the Vermont Civil Division in Rutland County. P.C. 5. He sought compensatory damages and a declaratory judgment pronouncing the violation of his civil rights when the trooper "pulled him over, ordered him to exit his car, and towed his car without the reasonable suspicion or probable cause necessary to justify each of these seizures." Id. 5, 7.

In response, the Government moved for summary judgment, arguing that the initial traffic stop was lawful because the statute in effect at the time, 23 V.S.A. § 511 (2014), required the registration sticker be kept unobscured. P.C. 27, 31, 33-35. But the statute does not mention registration stickers. Id. This Court had already determined that the statute was concerned with the readability of license plate numbers and letters *for purposes of vehicle identification*. It had found the Legislature's intent on this traffic law readily apparent, "no delving into the annals of the Vermont Legislature" was required as the statute was unambiguous. State v. Tuma, 2013 VT 70, ¶ 12, 194 Vt. 345, 349, 79 A.3d 883, 886.

Though acknowledging that the statute did not require the registration sticker to be unobstructed at the time of the stop, and identifying no other law broken at the time of the warrantless stop, the court refused to find a violation of the Vermont Constitution under Article 11. P.C. 19. Without any explanation, the court held the trooper's mistaken belief that a law had been violated was "reasonable." Id. Citing Heien v. North Carolina, 135 S. Ct. 530, 534 (2014), a

decision reviewing Fourth Amendment jurisprudence, the court summarily concluded that the trooper had the authority to conduct the baseless warrantless stop. Id. The court held: "[E]ven if stopping [Mr.] Zullo's car because of an obstructed validation sticker was a mistake of law, that mistake does not rise to an actionable violation of Article 11." Id. No further analysis was provided. There was no acknowledgment of this Court's long-developed independent state constitutional jurisprudence and controlling precedent concerning Article 11's significant departures from the Fourth Amendment. Id.

Determining that the baseless traffic stop was not unlawful, the court next considered whether extension of that stop, including the exit order, was justified. P.C. 19-25. The court reviewed the information that the trooper had at the time: eyedrops, an air freshener, the faint odor upon initial approach, and admission to smoking marijuana in recent days, but not that day. Id. at 20. The court confirmed: "Trooper Hatch uncovered no further indicia of possession after he ordered [Mr.] Zullo to exit the vehicle." Id. at 22. "[Mr.] Zullo consented to a search of his person, and that search revealed no evidence." Id. It further determined that "[t]he conversation between [M]r. Zullo and Trooper Hatch dispelled any suspicion that [Mr.] Zullo was currently under the influence of marijuana." Id.

Based on this, the court dismissed the Visine bottle and air freshener as not relevant to the Article 11 analysis. Citing State v. Hurley, 2015 VT 46, ¶ 46, the court found these "ever-present, mundane objects—lost their probative value." Id.

"All that remained was 'the faint odor of burnt marijuana,' and the admission to prior marijuana use." P.C. 22. But even here, the court found "[t]he record is void of any evidence as to how many days or weeks the smell of marijuana lingers, and an officer generally needs to have some evidence marijuana used in a location remains there." Id. Still, in the court's final analysis, "[t]here was no doubt that marijuana had been in the car in the recent past." Id. at 23. Mr. Zullo had admitted that he had smoked "in the past day or in the past few days. And there was the faint smell detected at one point at the beginning of the stop coming from the car. Id.

In the end, the court found this was enough to support both reasonable suspicion of possession of marijuana for the exit order and probable cause of the same to seize the vehicle and apply for a search warrant. Id. at 20-21, 25. The court determined that "mere indicia of previous marijuana use" standing alone was sufficient basis to support reasonable suspicion of possession. Id. at 20. The court held that the mere smell of marijuana was enough to support reasonable suspicion, citing State v. Ford, 2007 VT 107, ¶ 8, a decision that predated the Legislature's de-criminalization of small amounts of marijuana. P.C. 20; see 18 V.S.A. § 4230a(c)(2).

Acknowledging that longstanding law required reasonable suspicion or probable cause of the current commission of a *crime* and that the Legislature had decriminalized possession of one ounce or less of marijuana, the court nonetheless held that the smell of marijuana alone supplied probable cause to seize the vehicle to seek a warrant. P.C. 20, 21, 24, 25. The court rested its decision on the following

language contained in the new decriminalization statute, which confirmed the Legislature's intent that the statute be enforced consistent with Article 11 of the Vermont Constitution:

> This section is not intended to affect the search and seizure laws afforded to duly authorized law enforcement officers under the laws of this State. Marijuana is contraband pursuant to section 4242 of this title and subject to seizure and forfeiture unless possessed in compliance with chapter 86 of this title (therapeutic use of cannabis).

18 V.S.A. § 4230a(c)(2) (eff. Jul 1, 2013). P.C. 25.

The court determined that it "must presume that the Legislature knew what the statute quo [of search and seizure laws as set out by Article 11] was when deciding to maintain it. It is beyond the province of this court to challenge that decision." P.C. 25. The court granted the government's motion for summary judgment and this appeal followed. Id. at 26.

ARGUMENT

I. The trooper violated Mr. Zullo's Article 11 right against unlawful seizure by stopping him without reasonable suspicion of a crime or traffic infraction.

Article 11 of the Vermont Constitution requires police have, "at minimum, a reasonable and articulable suspicion of wrongdoing before making even a brief, investigatory stop." State v. Lussier, 171 Vt. 19, 34, n.2, 757 A.2d 1017, 1027, n.2 (citing State v. Siergiey, 155 Vt. 78, 80–81, 582 A.2d 119, 121 (1990)). Accord State v. Paro, 2012 VT 53, ¶ 6, 192 Vt. 619, 621, 54 A.3d 516, 518 ("We begin by repeating our refrain that for a police officer to effect a warrantless traffic stop the officer must have a reasonable and articulable suspicion of criminal activity."). This

uncontroversial and longstanding constitutional requirement is nonetheless at the heart of the court's decision, which held that there was no Article 11 violation, though it presumed the trooper conducted a warrantless stop of Mr. Zullo's car based on asserted facts that did not support any finding of unlawful activity.

A. There was no crime or traffic infraction at the time of the stop.

Snow, or rather whether there was anything covering the registration validation sticker on Mr. Zullo's rear license plate, was the purported reason for stopping the car. But at the time of the stop, no traffic law required the sticker be unobscured. The Government claimed that 23 V.S.A. § 511, the statute in effect at the time of the stop, was the relevant law purportedly violated. However, that statute was concerned with the ability to identify the vehicle through the assigned numbers and numerals on the plate. State v. Tuma, 2013 VT 70, ¶ 12, 194 Vt. 345, 349, 79 A.3d 883, 886 (determining that "all of the mandates in § 511 governing the manner of display of license plates are related to visibility and readability of the plate"); accord 23 V.S.A. § 304(b)(2)(B) ("[T]he primary purpose of motor vehicle number plates is vehicle identification.").

There's no question the license-plate statutes were not violated. The undisputed record below established that the trooper could read the license plate and identify the vehicle while still in his own vehicle behind Mr. Zullo's car. P.C. 74. There was no violation of 23 V.S.A. § 511.

The statute, which does not reference registration validation stickers, reads in full:

> A motor vehicle operated on any highway shall have displayed in a conspicuous place either one or two number plates at the commissioner of motor vehicles may require. Such number plates shall be furnished by the commissioner of motor vehicles, showing the number assigned to such vehicle by the commissioner. If only one number plate is furnished, the same shall be securely attached to the rear of the vehicle. If two are furnished, one shall be securely attached to the rear and one to the front of the vehicle. The number plates shall be kept entirely unobscured, the numerals and the letters thereon shall be kept entirely unobscured, the numerals and the letters thereon shall be plainly legible at all times. They shall be kept horizontal, shall be so fastened as not to swing, excepting however there may be installed on a motor truck or truck tractor a device which would, upon contact with a substantial object, permit the rear number plate to swing toward the front of the vehicle, provided such device automatically returns the number plate to its original rigid position after contact is released, and the ground clearance of the lower edges thereof shall be established by the commissioner pursuant to the provisions of chapter 25 of Title 3. A person shall not operate a motor vehicle unless number plates are displayed as provided in this section.

23 V.S.A. § 511 (2014).

This Court previously reviewed the Legislature's intent in enacting this statute and, finding it straightforward, held that "no delving into the annals of the Vermont Legislature" was required as the statute was unambiguous. Tuma, 2013 VT 70, ¶ 12, 194 Vt. at 349, 79 A.3d at 886. Its purpose was set out in the motor vehicle code itself: to ensure the ability to identify vehicles. 23 V.S.A. § 304(b)(2)(B). "Naturally enough, then, ***all*** of the mandates in § 511 governing the manner of display of license plates are related to visibility and readability of the plate: the license plate must be unobscured, legible[.]" Tuma, 2013 VT 70, ¶¶ 12-13, 194 Vt. at

349, 79 A.3d at 886 (citing cases where the Court had "previously analyzed license-plate statutes as related to visibility or readability") (emphasis added).

Here, the court acknowledged the statute "did not explicitly require that the validation sticker be unobstructed at the time he was pulled over, and that the statute was amended later to so require." Id. at 15; cf. 23 V.S.A. § 511 (2013, Adj. Sess.) (adding a new subsection specifically addressing registration validation stickers). Applying long-standing principals of statutory construction, the court correctly determined that the subsequent explicit legislative amendment (post-dating the stop at issue here) requiring an unobscured registration sticker was "a new statutory obligation, rather than clarify[ing] a pre-existing one." Id. at 15 (citing Doe v. Vermont Office of Health Access, 2012 VT 15A, ¶ 26, 191 Vt. 517, 530, 54 A.3d 474, 483); accord Tarrant v. Dep't of Taxes, 169 Vt. 189, 198, 733 A.2d 733, 740, 1999 WL 194620 (1999) ("[W]e presume that the Legislature intends to change the meaning of a statute, unless 'the circumstances clearly indicate clarification to be intended.'") (quoting Town of Cambridge v. Town of Underhill, 124 Vt. 237, 241, 204 A.2d 155, 158 (1964)).

The subsequent legislative amendment requiring registration stickers remain unobscured further confirms what this Court had already determined in State v. Tuma: at the time that Mr. Zullo was stopped, 23 V.S.A. § 511 only required the numerals or letters on the plate be unobscured so that the vehicle could be identified.

B. It is longstanding law in Vermont that a warrantless stop without any suspicion of wrongdoing violates Article 11.

Because the Government's own evidence showed that Mr. Zullo's vehicle was readily identifiable by the trooper before he even had exited his cruiser, it failed to establish a reasonable and objective basis of any wrongdoing at the time of the traffic stop contrary to Article 11 requirements. State v. Pitts, 2009 VT 51, ¶ 19, 186 Vt. 71, 83, 978 A.2d 14, 23 (determining that when a person is seized under the Vermont Constitution, the police are "required [to demonstrate] a reasonable and objectively based suspicion that he was engaged in criminal activity").

This Court has long held that a traffic stop requires a *constitutional* stop, "a necessary predicate for a finding that an officer" acted reasonably under the Vermont Constitution. Lussier, 171 Vt. at 28, 757 A.2d at 1023 (recognizing this was necessary "to protect Vermont motorists from unwarranted governmental intrusions that are not based on articulable suspicion, let alone probable cause."). The requirement implements the state constitutional drafter's intent that there be "essential checks on unrestrained government" based "on the fundamental principle of limited government" embodied in Article 11. State v. Bauder, 2007 VT 16, ¶ 13, 181 Vt. 392, 397, 924 A.2d 38, 43. See State v. Savva, 159 Vt. 75, 86, 616 A.2d 774, 780 (1991) (holding that Article 11 serves to protect everyone, particularly law-abiding citizens).

Since the Court's landmark decision in State v. Badger, 141 Vt. 430, 450 A.2d 336, (1982), the Court has repeatedly interpreted Article 11 as requiring broader and more demanding judicial oversight than that required by the Fourth

Amendment. State v. Wood, 148 Vt. 479, 487, 536 A.2d 902, 907 (1987) (noting that in focusing away from judicial review and curtailing scope of protected right to be free from unlawful governmental conduct, federal law is incompatible with Article 11).

Fundamentally, any curtailment with "the right to be free from unlawful government conduct is incompatible with Article 11." Savva, 159 Vt. At 85-86, 616 A.2d at 780. It is a basic state constitutional rule that warrantless searches and seizures are per se unreasonable "except in a few 'jealously and carefully drawn' exceptional circumstances." State v. Meunier, 137 Vt. 586, 588, 409 A.2d 583, 584 (1979) (quoting United States v. Watson, 423 U.S. 411, 427 (1976) (Powell, J., concurring); Katz v. United States, 389 U.S. 347, 357 (1967)).

Though the United States Supreme Court has since retreated from this, subsequently limiting the Fourth Amendment to those instances involving only *unreasonable* government search and seizures, this Court has continued to make clear that under the Vermont Constitution, warrantless searches and seizures remain "per se unreasonable." State v. Medina, 2014 VT 69, ¶ 13, 197 Vt. 63, 72, 102 A.3d 661, 667 (citing Meunier, 137 Vt. at 588, 409 A.2d at 584); accord State v. Bryant, 2008 VT 39, ¶ 10, 183 Vt. 355, 362, 950 A.2d 467, 472 ("When government conducts a warrantless search, the law presumes that the intrusion is unreasonable.").

C. The court's ruling, resting entirely on Fourth Amendment law, was fundamentally flawed given that the challenge raised an Article 11 violation.

Ignoring this Court's entire Article 11 jurisprudence, the civil court determined that a warrantless traffic stop based on lawful conduct did not violate the Vermont Constitution. P.C. 19. Importing Fourth Amendment law and its shifting reasonableness framework without any analysis to its applicability to Article 11, the court ruled that reasonable mistakes of law do not constitute Article 11 violations, making passing reference to the United States Supreme Court's decision in Heien v. North Carolina, 135 S. Ct. 530, 534 (2014). P.C. 19. In Heien v. North Carolina, the United States Supreme Court determined that the Fourth Amendment tolerates objectively reasonable mistakes of law by the police. However, that decision rested on the fundamental principle that *reasonable* mistakes of law do not constitute Fourth Amendment violations because the federal constitution only protects against *unreasonable* searches and seizure. This does not carry over to Article 11.

D. Article 11 provides broader protections than the Fourth Amendment and is not set to the same "reasonableness" standard.

A warrantless traffic stop based on lawful conduct is in open conflict with the requirements of Article 11—it is *per se* unreasonable and has always been determined by this Court to be a state constitutional violation. See e.g., State v. Paro, 2012 VT 53, ¶ 7, 192 Vt. 619, 621, 54 A.3d 516, 518; State v. Emilo, 144 Vt. 477, 484, 479 A.2d 169, 173 (1984) (determining the stop unconstitutional, as the officer "had no articulable and reasonable suspicion that the car he had stopped, or its occupants, were in any way connected or associated with any wrongdoing").

That the trooper was mistaken that a law was broken does not change the fact that he lacked authority to conduct the warrantless traffic stop under the Vermont Constitution. Article 11, embodying the core values of Vermont, does not rise or fall on a reasonable police misconduct standard. Instead this Court has determined: "Liberty comes not from officials by grace but from the Constitution by right." State v. Sprague, 2003 VT 20, ¶ 19, 175 Vt. 123, 130, 824 A.2d 539, 546) (quoting Maryland v. Wilson, 519 U.S. 408, 424 (1997) (Kennedy, J., dissenting)).

Article 11 remains fundamentally different from the Fourth Amendment on the matter of reasonableness. While Article 11 imports the "reasonableness" criterion of the Fourth Amendment, it is not limited to it as is the Fourth Amendment. As this Court explained: "The language of Article 11 does not expressly limit its protection to 'unreasonable' searches and seizures as does the Fourth Amendment to the United States Constitution." State v. Berard, 154 Vt. 306, 309, 576 A.2d 118, 120 (1990). It merely sets the floor below which the scope of the right guaranteed by the Vermont Constitution may not fall.

Consequently, the Court does not hesitate to repeatedly reject federal Fourth Amendment jurisprudence when it is inconsistent with the underlying values of Article 11. See e.g., Pitts, 2009 VT 51, ¶ 19, 186 Vt. at 83, 978 A.2d at 23 (recognizing that the Court has consistently held that Article 11 "provides a defense against invasions of privacy equal to or, in some cases greater than, the Fourth Amendment to the United States Constitution, and we have regularly invoked this principle to place reasonable restrictions on the scope of police authority to detain

and search citizens"); State v. Bauder, 2007 VT 16, ¶ 10, 181 Vt. 392, 396, 924 A.2d 38, 42 ("[W]e have also long held that our traditional Vermont values of privacy and individual freedom—embodied in Article 11—may require greater protection than that afforded by the federal Constitution."). Indeed, it is the Court's duty to uphold the fundamental constitutional rights provided therein. State v. Wood, 148 Vt. 479, 487, 536 A.2d 902, 907 (1987); Lussier, 171 Vt. at 24, n.1, 757 A.2d at 1021, n.1.

> It is the [] obligation of the [] Court, when state constitutional questions of possible merit have been raised, to address them.... If we breach this duty, we fail to live up to our oath to defend our constitution and we help to destroy the federalism that must be so carefully safeguarded by our people.
>
> State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985) (internal quotations omitted).

Heien v. North Carolina rested on a balancing of interest analysis, but the balance between competing interests of privacy rights and public safety has already been struck by the Vermont Constitution. Article 11 rules in favor of privacy and liberty interests. "Constitutional rights are not based on speculations. Whatever frightening scenarios may be imagined by police officers or appellate judges, the Framers of our Constitution struck a balance between individual privacy and the intrusive power of government, a balance that we have a duty to protect." State v. Boyea, 171 Vt. 401, 423, 765 A.2d 862, 877 (2000) (Johnson and Dooley, JJ., dissenting).

E. The federal "reasonableness" standard adopted in Heien v. North Carolina is fundamentally incompatible with Article 11 and Vermont's exclusionary rule.

A stop, unlawful from the start, is not rendered lawful by *post hoc* rationalization that the officer's mistakes on the law should be excused. See Emilo, 144 Vt. at 484, 479 A.2d at 173 ("Nor may the stopping of the car and detention of the defendant, unlawful at its inception, be made lawful by what developed subsequent to the stop."). "The [state constitutional] requirement is that such incursions must be supported, *before the fact*[.]" State v. Oakes, 129 Vt. 241, 250, 276 A.2d 18, 24 (1971) (emphasis added). This Court has since affirmed this:

> Although criminal defendants may seek court review of searches and seizures, these after-the-fact challenges do not serve Article 11's purpose of protecting the rights of everyone-law-abiding as well as criminal-by involving judicial oversight before would-be invasions of privacy.

Savva, 159 Vt. at 86 (emphasis added) (citing United States v. Ross, 456 U.S. 798, 829 (1982) (Marshall, J., dissenting)).

Contrasting Article 11 with the Fourth Amendment, this Court identified the fundamental departure point when reviewing respective violations under the state and federal constitutions: "[The federal exclusionary rule] does not focus on an individual's constitutional rights; rather it weighs the additional deterrent effect on official misconduct that excluding the unlawfully obtained evidence will achieve against the cost of excluding this evidence." Oakes, 157 Vt. at 174, 598 A.2d at 121. However, under the Article 11 two wrongs have never made an unconstitutional stop right.

Independent and fundamentally different from the federal exclusionary rule, (a judicially created remedy available to correct only certain types of police

misconduct and violations of the Fourth Amendment), Vermont's exclusionary rule is significantly broader. It is a substantive personal right, constitutionally mandated to effectuate the guarantees and protections set out in the Vermont Constitution. Vermont's exclusionary rule "was adopted because '[i]ntroduction of [illegally obtained] evidence at trial eviscerates our most sacred rights, impinges on individual privacy, perverts our judicial process, distorts any notion of fairness, and encourages official misconduct." Oakes, 157 Vt. at 173.

It is the "enforcement mechanism for [state] constitutional rights that protect citizens against unlawful government intrusions." Lussier, 171 Vt. at 33, 757 A.2d at 1027. That the exclusionary rule is a constitutional right itself requires state courts to focus on the interpretation of the Vermont Constitution and not on the "an attempted empirical assessment of the costs and benefits" to find exceptions to the rule. Id. "The need here is not to deter; instead, it is to give defendant the benefit" of [his rights] and to enforce procedures created to protect [those rights]." State v. Peterson, 2007 VT 24, ¶ 23, 181 Vt. 436, 445, 923 A.2d 585, 592 (2007) (quoting State v. Bean, 163 Vt. 457, 465-66, 658 A.2d 940, 946 (1995)).

The rule has been "extended to cover the indirect as well as the direct products of the unlawful arrest." State v. Dupaw, 134 Vt. 451, 453, 365 A.2d 967, 968 (1976). See also Lussier, (applying the exclusionary rule to civil proceedings); State v. Nickerson, 170 Vt. 654, 654, 756 A.2d 1240, 1241 (2000) (same); Peterson (applying the exclusionary rule to violations of Article 10 of the Vermont Constitution); Bean, 163 Vt. at 462-466, 658 A.2d at 943-945 (determining that

suppression of evidence for violation of court rule relating to right to counsel was still proper remedy even though the rationale for the remedy was not based on constitutional grounds or "deterrence of police misconduct").

Vermont's expansive constitutional exclusionary rule serves three purposes: "to protect the core value of privacy embraced in Article 11, to promote the public's trust in the judicial system, and to assure that unlawful police conduct is not encouraged." Lussier, 171 Vt. at 32, 757 A.2d at 1026. Explaining the rationale for a constitutional exclusionary rule in Vermont, as laid out in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), the Court held:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source that may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

State v. Dupaw, 134 Vt. 451, 454, 365 A.2d 967, 968 (1976) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

All three of these purposes would be directly disserved if the reasoning employed in Heien v. North Carolina were adopted. Accordingly, the Court should reject that decision as being in direct conflict with the Vermont Constitution.

F. Even under the Fourth Amendment, the warrantless traffic stop was unlawful: the trooper's mistake was not objectively reasonable.

Justice Kagan's concurrence in Heien v. North Carolina sets the bar high for determining when such mistakes are tolerated under the federal constitution. "[T]he test is satisfied when the law at issue is 'so doubtful in construction' that a

reasonable judge could agree with the officer's view. Heien, 135 S. Ct. at 541 (concurring, Kagan, J.). The statute must be "genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not." Id. Adopting the United States Solicitor General's language at oral argument, Justice Kagan determined: "[T]he statute must pose a 'really difficult' or 'very hard question of statutory interpretation'....[S]uch cases will be 'exceedingly rare.'" Id.

The statute here, a straightforward law concerned entirely with vehicle identification, plainly fails to meet this high bar for ambiguity. Mr. Zullo's license plate was readable and his vehicle identifiable. There was no violation of 23 V.S.A. § 511 as there was no unlawful conduct asserted. The license plate letters and numerals were unobscured. Compare Tuma, with State v. Hurley, (applying Heien v. North Carolina's Fourth Amendment analysis in case not raising Article 11 after determining vehicle equipment statute was genuinely ambiguous: judges had been split on the very question, the law vague enough to require application of the rule of lenity).

Trooper Hatch admitted to potentially regular misapprehension of this clear-cut law. When asked how many times he had pulled over a driver for a purported 23 V.S.A. § 511 violation, he responded: "Maybe close to 50 or a hundred." P.C. 74. Mistakes of law, however, are not generally an accepted defense for violations of Vermont laws. See e.g., State v. Woods, 107 Vt. 354, 179 A. 1, 2 (1935) ("The maxim, 'Ignorantia legis non excusat,' and the corresponding presumption that every one is

conclusively presumed to know the law, are of unquestioned application in Vermont as elsewhere, both in civil and in criminal cases."). Carving out an exception for police, charged with enforcing the law, would create disincentives to learning it and risk greater constitutional violations. Article 11 requires more precision when police conduct warrantless searches and seizures, not less. Here, the unreasonable police misconduct violated even the Fourth Amendment.

II. Extending the already unlawful traffic stop based on a mere hunch that Mr. Zullo might have engaged in criminal conduct further violated his rights under Article 11.

The unwarranted and warrantless traffic stop tainted the remainder of the extended roadside detention and seizure of Mr. Zullo's car. But for stopping Mr. Zullo's vehicle, the trooper would never have acquired the subsequent information relied upon to suspect marijuana possession. There was no independent source of this information and no intervening events. See e.g., Sprague, 2003 VT 20, ¶ 32, 175 Vt. 123, 824 A.2d 539 (invalidating subsequent search where there were no attenuating circumstances or "intervening events" between driver's illegal detention and subsequent consent to obviate the taint of illegality).

Certainly, the extension of an already unlawful detention based only on a mere hunch that criminal activity was possibly afoot was further violation of the state constitution. It is well established that an officer may not extend a traffic stop for a drug investigation without separate and articulable reasonable suspicion of drug activity. In State v. Cunningham, the Court held that an "officer could have

properly detained defendant for long enough to 'effectuate the purpose of the stop,' which was to write citations for the traffic violations committed. [However,] [t]he officer's expansion of the stop into a drug investigation required a reasonable, articulable suspicion that defendant was committing a drug-related crime." 2008 VT 43, ¶ 19, 183 Vt. at 411-12, 954 A.2d at 1296 (quoting State v. Sprague, 2003 VT 20, ¶ 17, 175 Vt. 123, 824 A.2d 539) (internal citations omitted).

This Court most recently affirmed this fundamental principle in State v. Winters, 2015 VT 116, ¶ 14, holding that the "the detention must be temporary and last no longer than necessary to effectuate the purpose of the stop." Id. (citing Florida v. Rover, 460 U.S. 491, 500 (1983); Sprague, 2003 VT 20, ¶ 17, 175 Vt. 123, 824 A.2d 539). "Authority for the seizure thus ends when tasks tied to the traffic infraction are - or reasonably should have been - completed."

Because the traffic stop here was prolonged in duration and expanded in scope to investigate a possible drug crime, the officer was required to have individualized suspicion of that particular criminal activity. Id.; accord Winters, 2015 VT 116, ¶ 27 (determining that similarly pointed questions about drug use at the outset of the encounter "was accusatory, intrusive, and it presupposed criminal activity related to drugs" and required reasonable suspicion to render the seizure lawful). But even the government conceded the trooper did not know whether a crime was occurring because there was no information as to how much marijuana was in Mr. Zullo's vehicle. P.C. 59, 79-80, 86-87. The court found that while the

trooper initially suspected Mr. Zullo recently used marijuana, by the end of the encounter his suspicions were allayed. P.C. 6.

A. Under both the Fourth Amendment and Article 11, Mr. Zullo's rights were violated when his warrantless detention was extended without reasonable suspicion of criminal activity.

Without any suspicion of criminal activity at the time that Mr. Zullo's roadside detention was extended, the requirements under both the Fourth Amendment and Article 11 were violated, (the government did not argue that it had reasonable suspicion or probable cause to support an arrest for past crimes). Justice Ginsburg, writing for the majority in Rodriguez v. United States, 135 S. Ct. 1609, 1614 (2015), recently clarified that "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....Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. Authority for the seizure thus ends when tasks tied to the traffic infraction are - or reasonably should have been - completed." Id. at 1614. "Absent individualized suspicion of defendant's criminal activity, the [trooper] had no authority to continue defendant's detention." State v. Alcide, 2016 VT 4, ¶ 14, 201 Vt. 103, 109, 136 A.3d 207, 212 (determining that a reasonable detention was lawful for as long as was required "to effectuate the purpose of the stop, which was to write citations for the traffic violations committed.").

> That means an officer may make "ordinary inquiries incident to the traffic stop" and related to ensuring roadway safety, such as checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's

> registration and proof of insurance. Rodrieguez, 135 S.Ct. at 1615; see also Delaware v. Prouse, 440 U.S. 648, 658–60, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (noting that during a traffic stop, "licenses and registration papers are subject to inspection"). The officer may check for outstanding warrants. Rodriguez, 135 S.Ct. at 1615. And, of course, the officer may issue a ticket for the traffic violation. But the officer may not prolong a traffic stop "to pursue an unrelated criminal investigation." Id. at 1616.

State v. Alexander, 2016 VT 19, ¶ 17, 201 Vt. 329, 335–36, 139 A.3d 574, 579.

That did not happen here. Instead, the trooper immediately converted the initial stop into a drug investigation even before speaking with Mr. Zullo based only on the faint odor of burnt marijuana upon approach to the vehicle. But with the decriminalization of possession of one ounce or less of marijuana in 18 V.S.A. § 4230a, a faint smell, standing alone, was not enough to supply the required additional reasonable and articulable suspicion of criminal activity to justify prolonging the initial stop beyond the time necessary to effectuate the purpose of the traffic stop. See State v. Paro, 2012 VT 53, ¶ 6, 192 Vt. 619, 621, 54 A.3d 516, 518 ("We begin by repeating our refrain that for a police officer to effect a warrantless traffic stop the officer must have a reasonable and articulable suspicion of criminal activity."); Alexander, 2016 VT 19, ¶ 21, 201 Vt. at 336, 139 A.3d at 579 ("Reasonable suspicion of criminal wrongdoing must be based on "specific and articulable facts" and not on an officer's "inchoate and unparticularized suspicion or 'hunch.' ") (quoting Terry v. Ohio, 392 U.S. at 21, 27).

B. At the time of the exit order, the information known by the trooper failed to support reasonable suspicion that Mr. Zullo was then in criminal possession of marijuana.

At the time that the trooper asked Mr. Zullo to get out of the car, he knew (1) there had been a faint odor of burnt marijuana upon initial approach; (2) there was no further smell of marijuana from either inside the car or from Mr. Zullo; (3) Mr. Zullo did not exhibit any physical signs of impairment; (4) there were no visible signs of marijuana use in the car; (5) there was an air freshener and Visine bottle, the explanation of which was consistent with innocent behavior; (6) Mr. Zullo would not tell the trooper where he was going, but provided his driver's license and vehicle registration when asked; (7) Mr. Zullo answered all other questions asked by the trooper though they were drug use-related and not connected to the initial basis for the traffic stop; (7) Mr. Zullo admitted to smoking marijuana within the past three days, but not the day of the stop, corroborating information already before the trooper that Mr. Zullo was not in possession of marijuana at the time of the stop; and (8) Mr. Zullo was a man of African descent.

These factors, separately or in total, do not provide reasonable suspicion of current criminal activity. This Court has repeatedly determined that mere presence in a high-crime neighborhood is not enough to support reasonable suspicion of criminal behavior. Paro, 2012 VT 53, ¶¶ 11–14, 192 Vt. 619, 54 A.3d 516 (mem.) (finding officer lacked reasonable suspicion to suspect driver of idling car was engaged in criminal activity merely because she was idling in the parking lot of a business where several burglaries had taken place over the years); Alexander, 2016 VT 19, ¶ 21, 201 Vt. at 337, 139 A.3d at 580. Certainly, not telling the police where you are going carries no probative value of criminal possession of marijuana. See

State v. Scales, 2017 VT 6, ¶ 7, 164 A.3d 652, 654 (reviewing defendant's limited disclosure of information to an officer when asked for his name and determining the statements had no probative value as to consciousness-of-guilt); State v. Perrillo, 162 Vt. 566, 570, 649 A.2d 1031, 1034 (1994) (criticizing evidence of flight as probative of guilt, calling such evidence "inherently ambiguous and dependent upon multiple inferential steps")

The lower court already dismissed the air freshener and Visine bottle as too ubiquitous and mundane to be of any probative value of criminal activity. Relying on conduct "engaged in by a very large category of presumably innocent travelers" fails to support reasonable suspicion of criminal activity. Alexander, 2016 VT 19, ¶ 24, 201 Vt. at 338, 139 A.3d at 581 (citing Reid v. Georgia, 448 U.S. 438 (1980)).

Neither was the fact that Mr. Zullo is a male of African descent probative of criminal wrongdoing. Race, standing alone, has never been an acceptable factor in weighing suspicion of criminal activity; it is too generic to be probative for identification purposes. See e.g., Alexander, 2016 VT 19, ¶ 29, 201 Vt. 329, 340, 139 A.3d 574, 582 (determining that the officers' suspicion of defendant was based on a description "so broad and vague as to sweep in any large black male getting off a bus at the station in downtown Bennington, or arriving in Bennington via taxi, and thus too general and vague to exclude a large number of presumably innocent individuals").

Mr. Zullo's admissions to having smoked pot sometime within the last three days, but not that day was also not probative of criminal activity occurring at the

time. Rather, it was specific information establishing that no current crime was afoot.

The faint smell of burnt marijuana upon initial approach also had no probative value. This vague piece of information, standing alone, did not tell the trooper how much marijuana had been smoked or confirm that any marijuana was still inside the vehicle. Neither did any of the information known by the trooper at the time support any particular amount or presence of marijuana in the car. The record did not include any evidence establishing that the infinitesimal scent, perhaps suggestive of past presence of marijuana in the vehicle, was proof of current possession of marijuana. The court confirmed that the record was "void of any evidence as to how many days or weeks the smell of marijuana lingers, and an officer generally needs to have some evidence marijuana used in a location remains there." P.C. 22. The government conceded no amount could be known based on the limited information available to the trooper. The court found no suspicion of a crime existed by the end of the encounter. These findings and legal conclusions directly conflict with the court's ultimate legal conclusion that no violation of Article 11 occurred.

"[I]t is not enough that law enforcement officials can articulate reasons why they stopped someone if those reasons are not probative of behavior in which few innocent people would engage—*the factors together must serve to eliminate a substantial portion of innocent travelers* before the requirement of reasonable suspicion will be satisfied." Alexander, 2016 VT 19, ¶ 29, 201 Vt. 329, 340, 139 A.3d

574, 582 (citing and quoting Karnes v. Skrutski, 62 F.3d 485, 493 (3d Cir.1995) (emphasis added). The factors relied on here failed to eliminate a substantial portion of travelers who otherwise may have also smoked marijuana within the past three days without committing a crime at the time of the stop. See 18 V.S.A. 4230a (specifically decriminalizing possession of "one ounce or less of marijuana or five grams or less of hashish or... [possession of] paraphernalia for marijuana"). Separately, and in total, the pieces of information known by the trooper did not support reasonable suspicion or probable cause of then occurring criminal activity.

C. The mere possibility of a civil infraction of a marijuana law is not enough to support an extended warrantless roadside detention under the Fourth Amendment or Article 11.

Article 11 and the Fourth Amendment require reasonable and articulable suspicion of *criminal activity*, or violation of *traffic regulations in the case of warrantless traffic stops*. Lussier, 171 Vt. at 34, 757 A.2d at 1027 (2000) (affirming that reasonable and articulable suspicions of motor-vehicle violations are sufficient to justify traffic stops); Delaware v. Prouse, 440 U.S. 648, 662 (1979) (holding that "[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation" and requiring articulable and reasonable suspicion of traffic law or equipment failure violations, not merely suspicion of any government regulation). The mere possibility of a civil violation of 18 V.S.A. § 4230a was not sufficient grounds to extend the warrantless roadside detention of Mr. Zullo.

The civil regulation at issue here, pertaining to the possession of small amounts of marijuana, having no connection to the traffic laws, extended the detention based on the mere inchoate suspicion that Mr. Zullo was possibly in violation of a nontraffic civil infraction. Under the Fourth Amendment and Article 11, this was not sufficient basis to have detained Mr. Zullo. Even the Fourth Amendment requires a warrant for searches and seizures related to the enforcement of marijuana civil regulations. See Marshall v. Barlow's, Inc., 436 U.S. 307, 323 -24 (1978) (affirming that the warrant requirement of the Fourth Amendment "applies to inspections for compliance with regulatory statutes." (citing Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967)).

Even if there had been probable cause of a civil law violation (there was not), Rodriguez v. United States and State v. Alcide establish under the Fourth Amendment that a detention is only lawful for as long as was required to effectuate the purpose of the seizure—here the writing of a citation for the purported marijuana civil violation. There is no indication any citation was ever issued by the trooper.

Under this constitutional framework, the statutory language in 18 V.S.A. 4230a(c)(2) confirming that "[m]arijuana is contraband pursuant to section 4242 of this title and subject to seizure and forfeiture unless possessed in compliance with chapter 86 of this title (therapeutic use of cannabis)" cannot be read as establishing a constitutional exception per se. Such interpretation would directly conflict with

the Fourth Amendment and Article 11. See State v. Medina, 2014 VT 69, ¶ 13, 197 Vt. 63, 73, 102 A.3d 661, 668 ("We generally afford legislative enactments the presumption of constitutionality...however, the presumptive unconstitutionality of warrantless searches and seizures [expressly set out in a statute] trumps our baseline deference to the Legislature."). Instead, the Legislature expressly acknowledged that the civil law was subject to constitutional search and seizure laws. 18 V.S.A. § 4230a(c)(2) ("This section is not intended to affect the search and seizure laws afforded to duly authorized law enforcement offices under the laws of this State.").

This Court has already recognized that motorists are afforded greater protection under Article 11 than the Fourth Amendment. See e.g., Bauder, 2007 VT 16, ¶ 10, 181 Vt. at 396, 924 A.2d at 42–43 (rejecting New York v. Belton, 453 U.S. 454 (1981), which automatically permits the warrantless search of a motor vehicle following the arrest of its operator under the search-incident-to-arrest doctrine). It limits law enforcement's authority to issue vehicle exit orders after a valid traffic stop, requiring police to establish a reasonable basis to believe that their safety was at risk *or a crime* required investigation before a driver may be ordered from his vehicle. Sprague, 2003 VT 20, ¶¶ 16, 20, 175 Vt. 123, 824 A.2d 539 (rejecting Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977)). Quoting Justice Kennedy Justice Kennedy, the Court reasoned "[i]t does no disservice to police officers ... to insist upon [the] exercise of reasoned judgment." Sprague, 2003 VT 20, ¶ 20, 175 Vt. 123, 130, 824 A.2d 539, 546, 2003 WL 367459 (2003) (quoting Maryland v. Wilson,

519 U.S. 408, 423 (Kennedy, J., dissenting)). Restricting extended warrantless traffic stops to instances where the police have the requisite reasonable suspicion of criminal activity or violation of traffic law, the baseline in Fourth Amendment jurisprudence, is entirely consistent with Article 11's heightened protections for motorists.

Nor did the Legislature contemplate such warrantless roadside detention. Instead, the Legislature requires that "(A) the officer has reasonable grounds to believe the person has violated this section; and (B) the person refuses to identify himself or herself satisfactorily to the officer when request by the officer" prior to having the authority to detain a person under this statute. 18 V.S.A. § 4230a(e)(1). Neither of these factors were met here. "Reasonable grounds," considered equivalent to probable cause, did not exist here. See e.g., State v. Perley, 2015 VT 102, ¶ 18, 200 Vt. 84, 91, 129 A.3d 93, 99 (interpreting the meaning of the term in 23 V.S.A. § 1201(b) and determining "that the term "reasonable grounds" is akin to probable cause"); accord V.R.Cr.P. 3(c)(2) (authorizing warrantless arrests for nonwitnessed misdemeanors "if the officer has probable cause to believe...[that] [t]he person has failed to provide satisfactory proof of identity"). Nor did Mr. Zullo refuse to identify himself to the trooper. Instead, the record is undisputed that he cooperated by giving his license and registration at the trooper's request.

Without reasonable suspicion, let alone probable cause, of any criminal activity, the exit order and temporary seizure to apply for a warrant violated Article 11.

CONCLUSION

For the forgoing reasons, this Honorable Court should reverse the civil court's summary judgment decision.

Dated at Montpelier in the County of Washington and the State of Vermont this 12th day of February, 2018.

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CERTIFICATE OF COMPLIANCE

I certify that the above brief submitted under Rule 32(a)(7)(B) was typed using Microsoft Office Word 2010 and the word count is 8.934.

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