STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss.

STATE OF NEW HAMPSHIRE

v.

ERIC MURPHY

218-2017-CR-1049

There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest.

-Thurgood Marshall, *Skinner v. Railway Labor Executives Association*, *489 U.S. 602, 641 (1989)*

ORDER

The matter before the court is defendant Eric Murphy's motion to suppress (Docket Document 17). Murphy seeks to suppress evidence obtained during a frisk of his person. The frisk occurred during a motor vehicle stop. Murphy argues that (a) the motor vehicle stop was unconstitutionally expanded into a drug investigation in the absence of reasonable and articulable suspicion for the expansion, see State v. McKinnon-Andrews, 151 N.H. 19, 26 (2004), and (b) the frisk was unconstitutional because it was not supported by a reasonable and articulable suspicion that Murphy was armed and dangerous. See State v. Broadus, 167 N.H. 307, 310-311 (2015).

The court agrees with both of Murphy's arguments. Therefore, the motion to suppress is GRANTED.

Preface

This court usually gives the benefit of the doubt to a New Hampshire State Police trooper who sees the need for a protective, non-investigatory roadside frisk during a traffic stop. "Traffic stops . . . are especially fraught with danger to police officers. . . . The risk of harm to both the police and the occupants of a stopped vehicle is minimized . . . if the officers routinely exercise unquestioned command of the situation." Arizona v. Johnson, 555 U.S. 323, 330–31 (2009) (internal citations, quotation marks and bracketed material omitted).

The only requirement for a protective frisk of either a driver or a passenger, aside from a lawful motor vehicle stop in the first place, is that the officer must have an objectively reasonable suspicion, based on articulable facts, that the detained individual is armed and dangerous. Terry v. Ohio, 392 U.S. 1, 27 (1968); State v. Broadus, 167 N.H. 307, 310 (2015). The courts apply this standard generously, understanding that police officers must make quick decisions in the moment, that they have learned through formal training and day-to-day experience the warning signs of danger, and that they may ground their reasonable suspicion in the totality of circumstances.

Yet this generosity is not a blank check. The authority to order a motorist (or as in this case a passenger) to splay himself, arms and legs wide, against a cruiser, in full public view on the side of the highway, and to searchingly feel all portions of that individual's body, is limited by our constitutions. One reason for this limit is to prevent *investigative* searches in the absence of a lawful arrest or probable cause.

In this case, there were no facts suggesting that defendant Eric Murphy was either armed or dangerous. The motion to suppress must be granted for this reason alone.

However, the motion to suppress must be granted for a second reason as well. Under our State Constitution, a police officer cannot use the fortuity of a traffic stop to interrogate motorists without reasonable suspicion. To be sure, an officer making a traffic stop is allowed to engage in facially innocuous conversation about matters unrelated to the purpose of the stop, so long as the duration of the stop is not extended. The permissible topics of conversation certainly include prosaic questions about the detainee's itinerary. But our State Constitution forbids questions and tactics that alter the fundamental nature of the traffic stop without at least reasonable suspicion. Reasonable suspicion was lacking in this case.

Facts

A trooper stopped a car on Interstate 95 North in Portsmouth on the afternoon of August 29, 2017. The driver was operating erratically. The trooper observed the car tailgating other vehicles, drifting within its lane, crossing over the right and left dotted lane lines, and abruptly varying its speed. There is no dispute that the trooper had grounds to pull the car over. There was ample reason to suspect that the driver might be impaired or distracted or suffering from a medical condition.

The stop itself occurred without incident. The trooper turned on his blue lights and signaled for the driver to pull over. The driver complied and pulled over in a normal, safe and prompt fashion.

There were two men and a dog (a pit bull) in the car. Defendant Eric Murphy was in the front passenger seat. The dog was in the back seat during the entire stop. Presumably the dog was quiet and well-behaved throughout the stop because nothing was said to the contrary at the suppression hearing.

The driver, Herbert Lewen, suffers from diabetes. It turned out that he was driving erratically due to a hypoglycemic (i.e. low blood sugar) incident. When the trooper told Lewen the reason for the stop, Lewen explained his condition. The trooper suggested that Lewen test his blood sugar level. When the test revealed a blood sugar level of 57,[1] the trooper asked whether Lewen had a snack that might raise his blood sugar level. Lewen had some cookies and soda with him. Shortly after consuming this snack, Lewen completely regained his health and was once again safe to drive.

In the meantime, the trooper established that the car had valid Maine plates and that it was registered to the passenger, Murphy. Although not expressly discussed at the evidentiary suppression hearing, there is no dispute that Lewen held a valid license. Likewise, from the silence in the record, the court takes the logical inference that neither Murphy nor Lewen were subject to outstanding warrants.

As the trooper conceded, his initial suspicion of impairment was dissipated and resolved. The trooper had no plans (or at least he did not testify to any plans) to issue Lewen either a citation or a written warning for the erratic driving that occurred during his hypoglycemic incident.

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[1]Although the record does not indicate the units of measurement, the court takes judicial notice that in the United States blood sugar levels are generally expressed in terms of milligrams per deciliter. A blood sugar level of 57 mg/dl is very low.

During the stop, the trooper looked inside the car and did not observe any evidence of drug or alcohol use by either Lewen or Murphy. There was nothing amiss or suspicious about the inside or outside of the car. There was no drug paraphernalia or possible paraphernalia, no apparent drug packaging, no odor of alcohol or marijuana, no odor masking devices (such as air fresheners or breath fresheners), and nothing out of place. There were no weapons, no ammunition and no packaging or paraphernalia for either.

The trooper nonetheless took the opportunity to ask Murphy, and later the driver, about their travels. The trooper questioned Murphy while Lewen was testing his blood sugar level. At first the trooper claimed that he broached the topic to "make conversation," Hearing Audio at 1:36:43, and abate the awkward silence while Lewen was testing his blood sugar. Id., at 36:56. However, the trooper quickly admitted that his questions were designed to serve investigative rather than social purposes. As the trooper testified, he was "seeking information about their travels," Id., 1:37:22.

When asked why he wished to learn about the pair's doings, the trooper's demeanor changed and he said simply, "Nothing says I can't [ask]." Id, 1:37:33. As explained below, the trooper was correct on this point because he had not yet altered the fundamental nature of the traffic stop. Still, the court finds that, while the questions were clearly permissible, the trooper's goal was unmistakably clear: He wished to either develop or dispel reasonable suspicion that the two men were bringing drugs from Connecticut to Maine on I-95. That this was so becomes apparent as the narrative continues.

Murphy said that they were coming from a casino in Connecticut, where he played slot machines but did not win. Because the car was traveling north on I-95, and because both men lived in northern Maine, the fair inference would be that they were that heading home.

The trooper was skeptical of Murphy's account because Murphy could not recall the name of the casino he visited. Additionally, the trooper doubted that two men would travel from northern Maine, where they lived, to a Connecticut casino with a dog. The trooper opined that the casino would not allow the dog inside and that the two men would not leave the dog in their car. (The trooper thus seemingly overlooked the possibility of staying the night in a dog-friendly hotel or motel).

The trooper did not follow up on these purported incongruities with Murphy. For example, there is no evidence that he asked Murphy what the men did with the dog while gambling. There is no evidence that he inquired as to how many days or nights the trip lasted. There is no evidence that the trooper asked about any other stopping points during the trip.

The trooper then returned to the driver, Lewen, and asked him where they were coming from. At this point, Lewen was still hypoglycemic. See Hearing Audio at 1:26:28 (trooper stating that Lewen's blood sugar was still low but he could answer "simple questions "); Audio at 1:47:48 (trooper stating that Lewen's behavior could be unpredictable because he still had a low blood sugar level). Lewen told the trooper that he was coming from Boston, which, of course, lies midway between the Connecticut casinos and the Maine state line. The trooper then asked Lewen to get out of the car,

along with his soda and cookies, so that the trooper could question him privately. Lewin complied without incident.

By this point, by his own admission, the trooper had embarked upon a drug trafficking investigation. See Hearing Audio at 1:41:12 and 1:42:54 (trooper twice stating that the stop had "shifted" into a drug trafficking investigation). The trooper's suspicions of drug trafficking were "raised greatly," see Hearing Audio at 1:24:35, because (a) Murphy's account was suspicious (to the trooper at least), (b) Murphy said they visited Connecticut which is a drug source for northern Maine, (c) Lewen said they were coming from Boston, and (d) the two men were traveling north on I-95 to their homes in northern Maine.

The trooper explained that a large amount of the controlled drugs coming into Maine are purchased in Massachusetts, Connecticut and New York. The only interstate highway connection between those source states and Maine is I-95. Thus, the short section of I-95 that runs through New Hampshire is part of an interstate drug corridor that connects source cities south of New Hampshire with destination localities in New Hampshire and Maine. Additionally, while nearby Lawrence, Massachusetts is a source city for traffickers who live in southern and mid-coast Maine, traffickers who live further north often (a) purchase drugs in larger quantities (due to the time and distance required for purchasing trips) and (b) travel to New York or Connecticut where the drugs are cheaper. The court has no reason to doubt the trooper on these points.[2]

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[2]However, as explained below, the fact that many Maine drug traffickers use I-95 in New Hampshire says nothing about the percentage of vehicles on I-95 North that contain drugs. All persons who visit the Rockingham County Courthouse necessarily travel on Route 125 in Brentwood, yet even on a jury selection day the courthouse

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After Lewen got out of the car, the trooper frisked him. The trooper claimed that he conducted the frisk because (a) Lewen wore baggy clothing that covered his waistband, and (b) Lewen's blood sugar level was still low and, therefore, his behavior might be unpredictable. The trooper did not discover any weapons, drugs or unexplained objects during his frisk of Lewen. Lewen then sat down on the front of the trooper's cruiser and continued to eat his snack.

The trooper interrogated Lewen further about his travels. Lewen again stated that he and Murphy were coming from Boston. He said he was at a bar and then at a casino. Lewen could not say where either the bar or the casino were. However, he said that he was never in Connecticut. There is not yet an operating casino in Boston, although there are two casinos in Connecticut and two casinos in Rhode Island. Lewen avoided eye contact with the trooper while discussing his travels. The trooper formed the belief that Lewen was not being honest.

The trooper then refocused his attention on defendant Murphy. He asked Murphy to step out of the car. Murphy complied. Murphy remained polite. He did not raise his voice, or make any threatening gestures, or reach for his pockets, or crouch into a fighting stance, or "blade" his body towards the trooper, or otherwise display any signs of aggression, resistance or anger. As the trooper put it, Murphy "complied with everything I asked him to do."

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traffic is only a small fraction of the traffic that passes by. Needless to add, Connecticut, New York and Massachusetts are large states with enormous economies and a combined population measured in the tens of millions. As the authorities cited below suggest, driving from one American state to another is not, in itself, suspicious.

The trooper then had Murphy turn around in order to be frisked. The trooper identified the following reasons to believe that Murphy might be armed and dangerous, and therefore, properly subjected to a frisk on the side of the road:

(a) his clothes were baggy and his waistband was hidden;

(b) Lewen was a diabetic and diabetics are unpredictable;

(c) There was a pit bull in the car;

(d) This was a drug investigation and drug traffickers are often armed; and

(e) Murphy is very tall (6'5") and very large (300 pounds).

The trooper had Murphy place his hands on the car and separate his feet. The trooper then searched Murphy's person by quadrants, methodically feeling all parts of his body. When the trooper ran his hand between Murphy's upper thigh and his groin, he felt an object.

The trooper did not believe that the object in Murphy's groin was consistent with a weapon. The object was hard and lumpy. The trooper believed the object was likely narcotics.

The trooper gave Murphy the option of either producing the object or being detained while the trooper applied for an arrest warrant. Murphy produced the object and said it was cocaine.

Analysis

I. The Stop

When a motor vehicle is pulled over by a police officer, both the driver and any passengers are "seized" within the meaning of Part 1, Article 19 of the New Hampshire Constitution and the Fourth Amendment. State v. Hunt, 155 N.H. 465, 470 (2007);

Whren v. United States, 517 U.S. 806, 809 (1996); Delaware v. Prouse, 440 U.S. 648, 653 (1979). Thus, as both parties agree, Murphy was seized when the trooper pulled Lewen over for driving erratically. See e.g. State v. Beauschesne, 151 N.H. 803 (2005); California v. Hodari D., 499 U.S. 621 (1991).

In order to survive constitutional scrutiny, a roadside detention such as this must be supported by reasonable and articulable suspicion of either a motor vehicle infraction or criminal activity. State v. Hight, 146 N.H. 746, 748 (2001); see also, State v. McKinnon-Andrews, 151 N.H. 19, 25–26 (2004); Terry v. Ohio, 392 U.S. 1, 21 (1968). In this case, there was more than reasonable suspicion of impaired or distracted driving. Additionally, the trooper observed several motor vehicle infractions including speeding (RSA 265:60) and following too close (RSA 265:25). The trooper personally observed erratic operation, tailgating, drifting within a lane, drifting over the right and left lane lines and sudden changes in speed.[3]

II. Ordering Murphy Out Of The Car For Additional Questioning About His Travels

A. Governing Law

During a traffic stop, the officer has the unquestioned authority to order the driver and any passengers to get out of their vehicle for the purpose of officer safety. Arizona v. Johnson, 555 U.S. 323, 331 (2009); see also Pennsylvania v. Mims, 434 U.S. 106, 111 (1977):

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[3]An officer may also pull a driver over based on a reasonable and good faith belief that the driver may be ill and physically unfit to drive. State v. Craveiro, 155 N.H. 423, 427 (2007). However, the trooper did not cite a health concern as the reason for the stop and neither party argued the applicability of the community caretaking doctrine.

> Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both.
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> . . .[W]e are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car. We think this additional intrusion can only be described as *de minimis*. The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. . . . What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.

Maryland v. Wilson, 519 U.S. 408, 415 (1997) ("[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop.").

However, Part 1, Article 19 of the New Hampshire Constitution parts ways with the Fourth Amendment when it comes to ordering a passenger, such as Murphy, out of the car for purely *investigative* rather than safety purposes. Under our State Constitution, absent a safety concern, the officer needs reasonable and articulable suspicion to order the passenger outside. See e.g., State v. Moore, 151 N.H. 288, 291, 78 (2004) (The ". . . objective facts were sufficient to create an independent basis for having reasonable, articulable suspicion that the [passenger] had been, was, or was about to engage in criminal activity and thus allow an expansion of the scope of the initial stop. Thus, these facts justified the officer's request that the [passenger] exit the vehicle without violating her State constitutional rights."). Under the federal constitution, the officer can order a passenger to leave the vehicle for any reason, so long as the duration of the stop is not extended in the absence of additional reasonable and articulable suspicion.

This rift between the state and federal constitutions results from the slight, but materially different, ways the two constitutions limit the permissible scope of investigative motor vehicle stops:

-Under both constitutions, a traffic stop "must be carefully tailored to its underlying justification . . . must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 500 (1983); see also Rodriguez v. United States, 135 S. Ct. 1609, 1614 (2015); McKinnon-Andrews, 151 N.H. at 22; State v. Michelson, 160 N.H. 270, 274 (2011).

-Under both constitutions, the scope and duration of the stop can be expanded to include the investigation of any past, present, imminent or planned criminal activity, or community caretaking need, if the officer happens to stumble across reasonable and articulable suspicion for such matters. See e.g., State v. Sage, ___ N.H. ___,180 A.3d 1098 (N.H. 2018) (stop for speeding was lawfully expanded into a DUI investigation because the officer gained reasonable and articulable suspicion of that offense); State v. Blesdell-Moore, 166 N.H. 183, 187 (2014); Mckinnon-Andrews, 151 N.H. at 25.

-Under both constitutions, in the absence of such new reasonable and articulable suspicion, the stop cannot be prolonged beyond its natural duration. Illinois v. Caballes, 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."); Rodriguez, 135 S. Ct. at 1612 ("We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures."); Arizona v. Johnson, 555 U.S. at 333; McKinnon-Andrews, 151 N.H. at 25.

-However, under the federal constitution, so long as the stop is not extended beyond its inherent duration, the officer is free to inquire into unrelated matters in an effort to develop reasonable and articulable suspicion. See Arizona v. Johnson, 555 U.S. at 333 ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."); United States v. Fernandez, 600 F.3d 56, 60 (1st Cir. 2010); United States v. Chaney, 584 F.3d 20, 26 (1st Cir. 2009). Thus, under the Fourth Amendment, the scope of questioning is limited only because the duration of the stop is limited. It follows that under federal law the officer conducting the stop may routinely ask for the passenger's identification[4], Chaney, and question the passenger outside of the driver's presence about any matter.

-In contrast, under Part 1, Article 19, the scope of police questioning cannot either (a) prolong the stop or (b) "change the fundamental nature of the stop" in the absence of newly developed reasonable and articulable suspicion. Mickinnon-Andrews, 151 N.H. at 25:

> If the question is reasonably related to the purpose of the stop, no constitutional violation occurs. If the question is not reasonably related to the purpose of the stop, we must consider whether the law enforcement officer had a reasonable, articulable suspicion that would justify the question. If the question is so justified, no constitutional violation occurs.

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[4]Under both constitutions, the officer is free to demand the driver's license, verify that it is valid, and verify that the driver is not subject to any warrants. See State v. Dalton, 165 N.H. 263, 266 (2013) ("The bare essentials of a 'routine traffic stop' consist of causing the vehicle to stop, explaining to the driver the reason for the stop, verifying the credentials of the driver and the vehicle, and then issuing a citation or a warning." (quoting 4 W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 9.3(c), at 507 (5th ed.2012)).

> In the absence of a reasonable connection to the purpose of the stop or a reasonable, articulable suspicion, we must consider whether in light of all the circumstances and common sense, the question impermissibly prolonged the detention or changed the fundamental nature of the stop.

(emphasis added and internal bracketing removed). Thus, for example, in Blesdell-Moore, the New Hampshire Supreme Court held that an officer transgressed Article 19 by asking a driver who was stopped for a defective taillight to stick out his tongue. This request was made to determine whether the driver's tongue was coated in a manner the officer believed could reveal recent marijuana use. The court found that there was no reasonable suspicion for such an investigation. The court then found that, while inspecting the driver's tongue did not prolong the stop, it did change its fundamental nature:

> Although the brief inspection of the defendant's tongue did not prolong the stop, we conclude that the search altered the fundamental nature of the stop by transforming a routine traffic stop into an investigation of potential drug activity. By asking to see the defendant's tongue, the officer set out to determine whether the defendant had, in fact, consumed or was in possession of marijuana. Although a reasonable motorist may not understand that a green film on the tongue may be indicative of marijuana consumption, he would certainly recognize that the officer's request to see his tongue changed the fundamental nature of an otherwise routine traffic stop.

Blesdell-Moore, 166 N.H. at 190 (internal citation omitted).

Accordingly, under Part 1, Article 19 in the absence of either (a) reasonable and articulable suspicion or (b) a safety concern, an officer cannot generally ask a passenger for identification or to get out of the car. See e.g., Robbins (upholding the request for passenger identification because the officer articulated an objectively reasonable safety concern).

To be sure, even under Part 1, Article 19 an officer may engage in "facially innocuous" dialog that the detainees "would not reasonably perceive as altering the

fundamental nature of the stop." McKinnon-Andrews, 151 N.H. 25. Such dialog includes, as pertinent to this case, "a few prosaic questions" about the detainees' itinerary. Id., at 28-29 (Broderick, concurring).

B. Application Of Governing Law

(1) The Trooper Lacked Reasonable And Articulable Suspicion Of Drug Trafficking When The Trooper Had Murphy Get Out Of The Car For Questioning

The trooper lacked reasonable and articulable suspicion to launch what he described as a "drug trafficking investigation." All that he knew was that (a) Lewen and Murphy were travelling north on I-95 to northern Maine where they lived, (b) Murphy could not name the casino he visited in Connecticut and (c) Lewen, who still had low blood sugar, and who was recovering from an incident of acute hypoglycemia that made him disoriented and unsafe to drive, claimed that he was coming from Boston, where he visited a casino, and never stopped in Connecticut.

Beyond the apparent discrepancies in the two men's accounts, there was nothing out of the ordinary. There were no indicia of past, present or planned drug use. There were no apparent objects in the vehicle even arguably connected to drugs (such as, for example, hypodermic needle covers, cut straws, pipes, spoons, burnt or unburnt aluminum foil, knotted plastic bags, strong odors, odor masking devices, multiple cell phones, etc.). Additionally, while nervousness may not be a strong indicator of something to hide, in this case neither the driver nor the passenger were nervous, anxious, shaking or outwardly fearful. The driver was disoriented due to illness. The passenger, Murphy, was calm.

Traveling round trip by car between northern Maine and Connecticut is not in itself suspicious. The court takes judicial notice that Maine, like New Hampshire, is in the midst of an opioid crisis. The court credits the trooper's testimony that most of the controlled drugs consumed in Maine come from points south, including most notably Massachusetts, Connecticut and New York. The court further credits the trooper's testimony that traffickers from northern Maine tend to drive to Connecticut or New York to purchase controlled drugs in quantity at a discount to Massachusetts prices. Finally, the court infers from these facts that a large amount of the controlled drugs that reach northern Maine do so via I-95 in New Hampshire.

That said, as anybody who ever travelled on I-95 on a summer weekend can attest, there are tens of thousands of vehicles that travel to and from source states (i.e. Massachusetts, Connecticut, New York, etc.) and Maine. Indeed, most Maine drivers who wish to visit these States must do so via New Hampshire I-95 (because there are no other interstates). It is absurd on its face to suggest that drug couriers make up more than a small fraction of drivers on I-95 with Maine license plates. See United States v. Wisniewski, 358 F.Supp.2d 1074, 1093 (D. Utah 2005) ("[T]raveling on a 'drug corridor' cannot reasonably support a suspicion that the traveler is carrying contraband. To so hold would give law enforcement officers reasonable suspicion that every vehicle on every major-and many minor-thoroughfares throughout this country was transporting drugs."); United States v. Beck, 140 F.3d 1129, 1138 n. 3 (8th Cir.1998) (citing cases recognizing that, among other places, Colorado, Texas, Florida, Arizona, the entire West Coast, New Jersey, New York City, Phoenix, Fort Lauderdale, Houston, Chicago, and Dallas are drug source cities or states); State v. Quirk, 842 N.E.2d 334, 343

(Ind.2006) ("[C]onsidering the substantial number of states and cities that have been designated as sources of drugs, a motorist, in our highly mobile society, would be hard pressed not to travel either from, to, or through a drug-source jurisdiction. We conclude the 'source state' designation is a non-factor to support reasonable suspicion of criminal activity.")

Murphy's initial statements were hardly problematic. The trooper initially asked Murphy where he was coming from. He said that he and Lewen visited a Connecticut casino. As the trooper noted during his testimony, Connecticut has two very large casinos.

Murphy forgot the name of the casino he visited. This is surprising, but both casinos have peculiar names (i.e. Mohegan Sun and Foxwoods). A first time or occasional visitor might forget the brand name. Murphy's inability to name the casino he visited was, therefore, only slightly troubling and was certainly not an indication that he was a drug trafficker.

Murphy and Lewen had a dog with them and the trooper did not believe that a casino would have allowed the dog inside. Yet the Connecticut casinos are sufficiently distant from northern Maine to suggest that Murphy and Lewen would have stayed at least one night. It is no longer uncommon to travel with pets and it is not difficult to find pet-friendly hotels or motels. The presence of the dog in the car did not make Murphy's account less likely.

Lewen's account was different than Murphy's, but by the trooper's own admission, Lewen was still recovering from a bout of hypoglycemia that left him disoriented and unable to drive. Indeed, the trooper cited Lewen's ongoing low blood

sugar level, and the associated risk of unpredictable behavior, as one factor that prompted him to frisk Lewen. That Lewen was not fully recovered is further apparent form the fact that he was still eating crackers and drinking soda when he was questioned. The purpose of this snack was to bring his blood sugar up. The trooper testified that Lewen was able to answer "simple questions," thereby suggesting that he was not yet able to answer more complex questions.

Lewen told the trooper that he was coming from Boston (which is midway between the Connecticut casinos and Maine), that he visited a casino in Boston (but there are not yet any) and that he did not go to Connecticut. The latter two responses certainly raise an eyebrow.

But in the absence of other evidence, they did not establish reasonable and articulable suspicion to believe that Lewen and Murphy were drug couriers or traffickers. Neither man had any reason to believe that their statements about their trip were material to the matter at hand (i.e. the medical emergency brought on by low blood sugar). Therefore, they had no reason to give the trooper a blow-by-blow account of their days, as if they were providing an alibi. Further, there are a great many lawful but embarrassing pursuits that some people would not want to share with a trooper.[5]

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[5]Although this case does not seemingly involve any particular embarrassing but lawful pursuit, it is easy to think of destinations that some individuals would prefer not to advertise to a State Trooper, e.g., a meeting of a disfavored political organization such as a communist, white nationalist or anarchist group; an event for an unpopular minority religion; a "swingers" event; an LGBTQ event if the attendee remains closeted; a rally to prevent police violence; a visit to an imprisoned felon; treatment for an embarrassing disease or condition; an extramarital affair; a court proceeding for a wayward relative, and, of course, a Star Trek convention.

"Reasonable, articulable suspicion refers to suspicion based upon specific, articulable facts, taken together with rational inferences from those facts, that the particular person stopped has been, is, or is about to be, engaged in criminal activity." Robbins, 170 N.H. at 297; see also Mckinnon-Andrews, 151 N.H. at 25-26. "The articulated facts must lead somewhere specific, not just to a general sense that this is probably a bad person who may have committed some kind of crime." Id.

The court has given careful consideration to all of the facts known to the trooper at the time that he had Murphy get out of the car. The court has also viewed those facts cognizant of the trooper's special training in drug trafficking in New England and substantial experience in drug interdiction. However, even giving substantial deference to the trooper's views, the court still cannot find anything more than a hunch. See State v. Michelson, 160 N.H. 270, 273 (2010) ("A reasonable suspicion must be more than a hunch[.]"); Sage, 180 A.3d at 1102, ("Although we recognize that experienced officers' perceptions are entitled to deference, this deference should not be blind.")

(3) Removing Murphy From The Car Did Not Extend The Duration Of The Stop

The trooper initiated the traffic stop for law enforcement purposes. However, he quickly determined that the driver was suffering from a medical condition. Because the trooper did not plan on issuing either a citation or a warning, the stop was transformed into a community caretaking operation. The natural duration of the stop would come to a close once (a) the trooper established that Lewen was validly licensed and the car validly registered and (b) Lewen's blood sugar level returned to normal and he was fit to drive.

By the time the trooper had Murphy get out of the car, he had already confirmed Lewen's status as a licensed driver of a properly registered vehicle. However, according to the trooper's testimony, Lewen was still hypoglycemic. Just moments earlier he was sitting on the front of the trooper's cruiser, eating a snack and waiting for his blood sugar level to return to normal. The trooper was concerned that Lewen might behave in an unpredictable manner because his blood sugar had not yet stabilized. Put simply, while the natural duration of the stop was drawing to a close, Lewen had not yet been cleared to drive.

As explained above, the Fourth Amendment analysis ends here with respect to ordering Murphy to get out of the car for questioning. The analysis under Part 1, Article 19, however, requires an additional step.

(4) Removing Murphy From The Car For Questioning Altered The Fundamental Nature Of The Stop

The trooper was certainly entitled to continue speaking briefly with Murphy and Lewen about their travels. In other words, he could have continued to have a facially innocuous conversation with the pair, even as he sought to clear up the perceived discrepancies. However, once Murphy was removed from the car for questioning, and once he was frisked with his hands against the cruiser, the fundamental nature of the detention had changed.

From the trooper's perspective, it had become a drug trafficking investigation and Murphy was no longer a mere passenger but a criminal suspect. From the perspective of a reasonable passenger, it would have been clear that the trooper's focus had moved beyond the driver's well-being. The passenger would know that (a) a law enforcement

investigation was afoot and (b) the focus of the investigation was his travels (i.e. where he drove, each place he stopped, how long he stayed, etc. etc.).

In Blesdell-Moore, 166 N.H. at 190, the New Hampshire Supreme Court held that merely asking a driver to stick out her tongue for inspection altered the fundamental nature of the stop. As the Supreme Court explained in McKinnon-Andrews, the "fundamental nature" rule was adopted because "[g]iving police unfettered discretion with respect to the questions they may pose to suspects in a Terry stop is overly permissive," and because a traffic stop should not be "convert[ed] . . . into a general inquisition about past, present and future wrongdoing, absent an independent basis for reasonable suspicion or probable cause." McKinnon-Andrews, 151 N.H. at 24–25. Indeed, it is one thing to chat with a detained driver and passenger about their itinerary, and another thing altogether to interrogate a suspect on the side of an interstate highway about all of his doings.

It is true that in Robbins the New Hampshire Supreme Court expressed some openness to reconsidering the "fundamental nature" rule that it recognized in McKinnon-Andrews. Robbins, 170 N.H. at 297 n. 2. This was due to the fact that the U.S. Supreme Court has since clarified the Fourth Amendment standard. However, McKinnon-Andrews remains binding and authoritative state constitutional precedent that this court must apply.

5. Conclusion

The motion to suppress must be granted because the trooper unconstitutionally expanded the scope of the traffic stop in violation of Part 1, Article 19 of the New Hampshire Constitution.

B. The Frisk

Under both the Fourth Amendment and Article 19, an officer can frisk a detainee during a traffic stop only if the officer has reasonable and articulable suspicion that the detainee is armed and dangerous. See Terry v. Ohio, 392 U.S. 1, 27 (1968):

> [T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. [citations omitted]. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

see also United States v. Sanchez, 817 F.3d 38, 42 (1st Cir. 2016); United States v. Orth, 873 F.3d 349, 354 (1st Cir. 2017); Broadus, 167 N.H. at 310 ("Once an officer is justified in making an investigatory stop, he may also conduct a protective frisk if the officer reasonably believes the individual is armed and presently dangerous. The purpose of a protective frisk is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence. Therefore, the frisk must be strictly confined to what is minimally necessary to discover the presence of a weapon." (internal bracketing, quotation marks and citations omitted)); State v. Michelson, 160 N.H. 270, 272 (2010); State v. Roach, 141 N.H. 64, 67 (1996).

When asked why he frisked Murphy the trooper cited the following:

-Murphy's baggy clothes;

-Murphy's large size;

-Lewen's low blood sugar;

-The pit bull in the car;

-The trooper's belief that Murphy had lied about his travels; and

The fact that this was a drug investigation and drug traffickers are often armed.

These facts do not add up to suspicion that Murphy was armed and dangerous.

While the fact that Murphy was wearing baggy clothes militates in favor of reasonable suspicion, it is entitled to only minimal weight. The trooper did not notice anything else remarkable about Murphy's clothes. Compare, e.g., Robbins (purported gang members wearing gang colors). It is unremarkable to see a man with an untucked shirt that covers his belt area. Indeed, outside of a professional setting or an upscale social gathering, covered belts may be more common than tucked shirts. In Broadus the New Hampshire Supreme Court had no difficulty concluding that the officer lacked reasonable and articulable suspicion for a frisk even though the detainee was wearing extremely baggy jeans and a sweatshirt.

Murphy's large size also militates in the State's favor, but barely so. A detainee's size, standing alone is not suggestive of weapons possession. See e.g. United States v. Thomas, 863 F.2d 622, 629 (9th Cir.1987) (officer cannot frisk suspect merely because he is "pretty big"). Murphy may have been large, but he was calm, cooperative and compliant. His demeanor was not threatening. He did not display any signs of anger. In light of the absence of any real evidence connecting him to any criminal activity or violence, Murphy's size is hardly suggestive of either weapons possession or danger.

Lewen's low blood sugar was not evidence that Murphy might be armed or dangerous. Lewen's medical condition is not relevant.

The dog in the car was not suggestive of weapons possession. It is true that (a) a dog can be deployed as a weapon and (b) the possession of a weapon in a car is a factor to be considered in determining whether a detainee may possess an additional weapon on his person. Thus, for example, in Michaelson, the court upheld a frisk when a bloodied driver claimed that he had just been a fight and had a bat in his car for self-defense. However, in this case, there was no evidence from which the trooper could have inferred that the dog was trained to be used as a weapon.

The fact that the trooper believed Murphy lied about his travels, and the ensuing drug investigation are entitled to only minimal weight. As noted above, the trooper lacked reasonable and articulable suspicion that Murphy was a drug trafficker. Furthermore, as explained above, there was nothing particularly implausible about Murphy's account. More important, Murphy was not under investigation for a crime of violence and the trooper had no reason to believe that he had ever used violence or threatened anybody with violence. In order to frisk a detainee an officer needs specific reasons to believe that the individual may be armed, not merely reasonable suspicion to question the individual about drugs.

Thus, regardless of whether the trooper unconstitutionally expanded the scope of the traffic stop, the motion to suppress must be granted because the trooper lacked reasonable and articulable suspicion to believe that Murphy was armed and dangerous.

Epilogue

Stepping back, we see two interstate travelers using the public highway. One has a medical condition. They are both immediately questioned, as a way of screening to determine whether they are possible drug traffickers. This screening is based solely

on where they live and the road they are on. When they fail to completely account for their travels (for which they have no obligation to account), they are both removed from their car to be frisked and interrogated on the side of the road. All of this is done without any observation of anything specific to drug use or drug possession.

The motion to suppress is GRANTED.

July 16, 2018

Andrew R. Schulman,
Presiding Justice