IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Supreme Court Appeal No. 28725

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

-vs-

CURTIS TENOLD,

Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE COMER
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Throughout this brief, Counsel will refer to Appellant Curtis Tenold as "Appellant" or "Tenold." Appellee, the State of South Dakota, will be referred to as the "State." References to the Court's settled record will be cited as "SR," followed by the corresponding title and page number(s). References to transcripts will be referred to as "TR" followed by the corresponding title, page number(s), and line number(s). References to the Court's Findings of Fact and Conclusions of Law on Defendants' Motions to Suppress Evidence will be referred to as "FFCL" followed by the corresponding paragraph number(s).

JURISDICTIONAL STATEMENT

Tenold appeals from a Judgment of Conviction, filed on August 21, 2018, adjudging him guilty, after trial by jury, of one count of Possession of a Controlled Drug or Substance in violation of SDCL § 22-42-5 and § 34-20B and one count of Unauthorized Ingestion of a Controlled Substance in violation of SDCL § 22-42-5.1 and § 34-20B. Tenold timely filed his Notice of Appeal on September 14, 2018. This Court has jurisdiction pursuant to SDCL § 23A-32-2.

STATEMENT OF THE LEGAL ISSUE

1. Whether the Trial Court erred when it denied Tenold's Motion to Suppress?

   Most relevant cases:

   Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).
   State v. Bonacker, 2013 S.D. 3, 825 N.W.2d 916.
   State v. Herren, 2010 S.D. 101, 792 N.W.2d 551.

2. Should the Court modify existing law to find pretextual traffic stops violate the rights of the people to be free from unreasonable searches and seizures.

Most relevant cases:

State v. Overbey, 2010 S.D. 78, 790 N.W.2d 35
State v. Opperman, 247 N.W.2d 673 (S.D. 1976)
Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)

STATEMENT OF THE FACTS

In January of 2017, City of Deadwood Police Department Investigator Jim Olson received a "tip" from a security officer at a hotel in Deadwood that the occupants of a certain hotel room may be selling drugs. *TR Suppression Hearing*, pgs. 5-7; *FFCL* ¶ 1. The tipster identified Appellant, Curtis Tenold and his companion, Lana Gravatt, as the renters of the hotel room. *Id*. The tipster's information was not sufficient for Investigator Olson to form reasonable suspicion of any criminal wrongdoing. *TR Suppression Hearing*, pg. 8 lns. 8-16. Instead, Investigator Olson typed up an informational report of the tip and made that report available to all the officers of the Deadwood Police Department. *Id*.; *FFCL* ¶ 4. Officers of the Deadwood Police Department were advised that Tenold and Gravatt were suspected of being involved with drug activity and were provided with a description of Tenold's vehicle, a red 1995 Mercury Tracer and its license plate number. *Suppression Hearing Exhibit C* (police report). In the event an officer encountered Tenold's vehicle, they were instructed to develop their own reasonable suspicion to stop the vehicle and to conduct a drug investigation based on the tipster's allegations. *Id*.

On February 2, 2017, Deadwood Police Officer Braxton McKeon spotted Tenold's vehicle and began following it. *TR Suppression Hearing* pg. 21-22; *FFCL* ¶ 5. Officer McKeon had been looking for the red Mercury Tracer since getting Investigator Olson's report several days before. *Id*. pg. 41 lns. 1-3. After following Tenold's vehicle, Officer McKeon initiated a traffic stop when he observed "one of the taillights on Mr. Tenold's vehicle was emitting a white light when the brakes were applied." *Id*. pg. 22 lns. 5-8. To be clear, Mr. Tenold's vehicle had three working tail lights, each of which emitted red light when the brakes were applied. *Id*. pgs. 41-44; *Suppression Hearing Exhibit C* (police report). However, Officer McKeon testified that the vehicle's third brake light in the back window also emitted some white light when the brake was applied, possibly due to sun damage to the light's housing or for some other reason. *Id*. pg. 56 lns 5-9; *Suppression Hearing Tenold's Exhibit C* (police report) at pg. 5; *Suppression Hearing Gravatt's Exhibit A* (video). Although there is no video of the actual stop, the vehicle's working lights can be observed in other videos. However, the white light Officer McKeon testified he observed cannot be observed in these videos; Officer McKeon attempted to explain away this fact by testifying, "you don't get the detail of color [in the video] that you do with the naked eye." *TR Suppression Hearing Volume 2*, pg. 129 lns. 3-7.

Once he had the vehicle stopped, Officer McKeon requested permission to search the vehicle, and Tenold consented. *Id*. at 26 lns. 3-17. During the search, Tenold was placed in the front passenger seat of Officer McKeon's patrol vehicle. *Id*. A thorough search of Tenold's vehicle produced no evidence of criminal wrongdoing. *Id*. Tenold and Gravatt were released and told they were free to leave. *Id*. at 27. After releasing Tenold

and Gravett from his custody, Officer McKeon returned to the Department's parking area and performed a search of his patrol vehicle. *Id*. at 28. During his search, Officer McKeon found a small foil ball under his front passenger side seat with a white crystalline substance coming out of it. *Id*. Officer McKeon performed a field-test for illegal substances, which resulted in a presumptive positive for methamphetamine. *Id*. at 28-30. (A subsequent laboratory analysis of the foil ball would be negative for methamphetamine or any other illegal substance.) *Suppression Hearing Tenold's Exhibit A* (laboratory analysis). Regardless, following the presumptive positive of his field-test, Officer McKeon returned to the area of the traffic stop looking for Tenold. *TR Suppression Hearing*, pg. 31. Officer McKeon located Tenold in a nearby casino and placed him under arrest. *Id*. Officer McKeon searched Tenold's person and found a small amount of marijuana. *Id*.

Following Tenold's arrest, Officer McKeon sought and obtained a warrant to search Tenold and Gravatt's hotel room. *Id*. at 36. A small amount of methamphetamine, marijuana, and drug paraphernalia were found in the hotel room. *Id*. at 11.

Before trial, Tenold made a motion to suppress the evidence against him for the reason that such evidence was discovered pursuant to an investigatory stop for which there was no reasonable suspicion. The Circuit Court denied Tenold's motion.

ARGUMENT

1. The Circuit Court erred when it denied Tenold's Motion to Suppress.

a. Standard of Review

This Court reviews a motion to suppress evidence obtained in the absence of a warrant de novo. *State v. Stanage*, 2017 S.D. 12, ¶ 6, 893 N.W.2d 522, 525. "We review the circuit court's factual findings for clear error but give no deference to the circuit court's conclusions of law." *State v. Lar*, 2018 S.D. 18, ¶ 6, 908 N.W.2d 181, 183.

b. Authority

The United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV; *see also* S.D. Const. art. VI, § 11. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . . [.]" *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967)). Thus, "[i]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. 373, 382, 134 S. Ct. 2473, 2482, 189 L. Ed. 2d 430 (2014). "The Fourth Amendment generally requires a warrant based upon probable cause to support the search and seizure of a person." *State v. Bonacker*, 2013 S.D. 3, ¶ 9, 825 N.W.2d 916, 919 (citing *State v. Overbey*, 2010 S.D. 78, ¶ 16, 790 N.W.2d 35, 41.) "There is an exception to the warrant requirement for investigative detentions based upon an officer's 'reasonable suspicion' of criminal activity." *Id.* (internal citations omitted). "Thus, an officer must have a 'specific and articulable suspicion of a violation' of law to support a traffic stop and observation of a minor traffic violation is sufficient." *Id*. (quoting *Overbey*, 2010 S.D. 78, ¶ 16, 790 N.W.2d at 41(internal citations omitted)). The constitutional reasonableness of an investigatory

detention involves a two-part inquiry: "[f]irst, was the stop 'justified at its inception . . . [.] Second, were the officer's actions during the stop 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id*. quoting *State v. Littlebrave,* 2009 S.D. 104, ¶ 11, 776 N.W.2d 85, 89.

Suppression of evidence gathered in violation of a defendant's constitutional rights is a remedy meant "to deter future Fourth Amendment violations." *State v. Fierro,* 2014 S.D. 62, ¶ 26, 853 N.W.2d 235, 244 (quoting *Davis v. U.S.,* 564 U.S. 229, 235). Suppression is appropriate in this case.

c. Argument

i. Officer McKeon did not observe a violation of SDCL § 32-17-8.1 and thus had no reasonable suspicion to stop Tenold's vehicle.

Officer McKeon stopped Tenold's vehicle because he claimed to have observed a small amount of white light emanating from one of Tenold's three otherwise-functional red brake lights. *See TR Suppression Hearing* pg. 21-22; *Id*. pg. 56 lns 5-9; *FFCL* ¶ 5; *Suppression Hearing Tenold's Exhibit C* (police report) at pg. 5; *Suppression Hearing Gravatt's Exhibit A* (video). Even if there was any objective evidence of this white light for the Court to review, such is not a violation of law.

SDCL § 32-17-8.1 provides, in pertinent part, ". . . each motor vehicle . . . shall be equipped with at least two stop lamps with at least one on each side. . . . Each stop lamp shall display a red light visible from a distance of not less than three hundred feet to the rear in normal sunlight . . .[.]" *SDCL* § 32-17-8.1. A violation of SDCL § 32-17-8.1 is a petty offense.

It is undisputed that Tenold's vehicle was "equipped with at least two stop lamps with at least one on each side" and that each stop lamp displayed a red light when the brakes were applied. *See TR Suppression Hearing* pg. 21-22; *Id*. pg. 56 lns 5-9; *FFCL* ¶ 5; *Suppression Hearing Tenold's Exhibit C* (police report) at pg. 5; *Suppression Hearing Gravatt's Exhibit A* (video). Having some amount of white light emanating in addition to red light—visible, apparently, only to the naked eye and not to state-of-the-art digital video cameras—is not a violation of SDCL § 32-17-8.1. *See State v. Lerma*, 2016 S.D. 58, ¶ 7, 884 N.W.2d 749, 751 (holding that SDCL § 32-17-8.1 requires only two working brake lights.)

In this case, the Circuit Court erroneously concluded that SDCL § 32-17-8.1 requires "all vehicles stop lights be red in color only." *FFCL* ¶ 6. A plain reading of the statute reveals no such requirement. Officer McKeon did not observe a violation of SDCL § 32-17-8.1 and therefore did not have reasonable suspicion to stop Tenold's vehicle. Accordingly, the Circuit Court erred in denying Tenold's motion to suppress evidence resulting from that stop.

ii. Even if Officer McKeon had observed a violation of SDCL § 32-17-8.1, neither this Court nor the Circuit Court can evaluate the objective reasonableness of Officer McKeon's claimed observations.

"An investigatory traffic stop must be based on objectively reasonable and articulable suspicion that criminal activity has occurred or is occurring." *State v. Herren,* 2010 S.D. 101, ¶ 7, 792 N.W.2d 551, 554 (internal quotations omitted) (emphasis added). The word 'objective' means "[o]f, relating to, or based on externally verifiable

phenomena, as opposed to an individual's perceptions, feelings, or intentions. OBJECTIVE, Black's Law Dictionary (10th ed. 2014) (emphasis added).

Even if the emission of some white light from an otherwise-operable brake light in was a violation of SDCL § 32-17-8.1, neither this Court nor the Circuit Court has any way to evaluate the objective reasonableness of Officer McKeon's claimed observations. The emission of the phantom white light cannot be seen in any videos of the encounter. Officer McKeon's explanation that his eyes were able to discern detail that state-of-the-art law enforcement video equipment could not record is not sufficient to meet the State's burden of proving objective reasonableness. *TR Suppression Hearing Volume 2*, pg. 129 lns. 3-7.

iii. Officer McKeon's seizure of Tenold was so blatantly pretextual that it violated Tenold's constitutional rights to be free from unreasonable search and seizure under Article VI, Section 11 of the South Dakota Constitution.

1. Acknowledgment of existing authority.

In interpreting the United States Constitution, the United States Supreme Court has held an officer's "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813 (1996). As such, "[o]nce an officer has probable cause, the stop is objectively reasonable and any ulterior motivation on the officer's part is irrelevant." *United States v. Frasher*, 632 F.3d 450, 453 (8th Cir.2011). "Similarly, it is irrelevant that the officer would have ignored the violation but for his ulterior motive." *Id*.

In interpreting the South Dakota Constitution, the South Dakota Supreme Court has reached similar results. "With regard to a traffic stop, all that is required is that the officer have specific and articulable suspicion of a violation for a traffic stop to be permissible." *State v. Overbey*, 2010 S.D. 78, ¶ 16, 790 N.W.2d 35, 41 (internal citations and quotations omitted). The observation of a minor violation is sufficient to justify stopping of a vehicle. *Id*. "[E]ven if an officer has subjective reasons for stopping someone, those subjective reasons are not relevant." *Id*. ¶ 18, 790 N.W.2d 35, 41 (internal citations and quotations omitted). "An objectively reasonable stop will not be invalidated even if the stop was pretextual." *Id*.

2. Argument for the adoption of a new rule.

As already argued, Tenold's stop cannot be called objectively reasonable. But, even if it could, the facts of this case should cause this Court to reexamine the rule that "[a]n objectively reasonable stop will not be invalidated even if the stop was pretextual." *Overbey*, ¶ 18, 790 N.W.2d 35, 41. Tenold respectfully submits that this rule should be modified such that, when considering the totality of the circumstances, a clearly pretextual traffic stop violates the right of people to be free from unreasonable searches and seizures guaranteed by Article VI, Section 11 of the South Dakota Constitution.

The South Dakota Constitution provides the same protections against unreasonable searches and seizures as the United States Constitution. It has even been held that the South Dakota Constitution offers greater protections against unreasonable searches and seizures than the United States Constitution. *State v. Opperman*, 247 N.W.2d 673, 674–75 (S.D. 1976) ("There can be no doubt that this court has the power to

provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution. [. . .] We find that logic and a sound regard for the purposes of the protection afforded by S.D.Const., Art. VI, § 11 warrant a higher standard of protection for the individual in this instance than the United States Supreme Court found necessary under the Fourth Amendment.") *Id*.

In this case, it is clear that the traffic stop performed by Officer McKeon was motivated entirely by the Deadwood Police Department's desire to conduct a drug investigation that it lacked probable cause to otherwise conduct. Officer McKeon and the rest of the Deadwood Police Department were explicitly instructed to find the red 1995 Mercury Tracer, develop reasonable suspicion to initiate a traffic stop, and investigate the tipster's allegations of drug activity. *TR Suppression Hearing*, pg. 21 lns. 5-18; *Suppression Hearing Exhibit C* (Police Report). That is exactly what Officer McKeon accomplished. Again, the emission of an imperceptible amount of white light from a tail light in perfect working order is not a legal violation. But, even if it was, such a petty offense should not be allowed to justify such a blatantly pretextual seizure. But for the happenstance occurrence of some completely unrelated traffic offense, Officer McKeon's stop of Tenold would be unquestionably unconstitutional. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968). But, for some reason, the Courts allow these kinds of pretextual seizures if a law enforcement officer manages to observe any minor traffic violation, even if (as it was here) that traffic violation is totally unrelated to the reason for the seizure. In fact, the stop can be a complete ruse conducted for the sole purpose of investigating a tip that that the subject may be involved with drug activity. *See Overbey, supra*. This strange "loophole"—that blatantly impermissible

police conduct can be rendered permissible by the random (even fabricated) occurrence of a completely unrelated event—can not possibly be what the drafters of Article VI, Section 11 of the South Dakota Constitution when they intended to secure individual liberty against government intrusion.

This rule cannot survive scrutiny under Article VI, Section 11 of the South Dakota Constitution. Tenold is not asking for a blanket rule that an officer must lack any suspicion of unrelated criminal activity when she makes a traffic stop. Instead, Tenold merely asks for the recognition of an exception that would allow a neutral and detached magistrate to review the entirety of the record and to make a judicial determination as to whether an investigatory stop was a ruse or a pretext for conducting a criminal investigation, and, if so, to suppress the evidence resulting from such search.

The state must enforce its laws using methods that demonstrates respect for its citizens' constitutional rights instead of fashioning clever end-runs around them. Tenold respectfully submits that the blanket exception recognized in *Overbey* should be limited in such a way that permits judges to examine the totality of the circumstances to determine whether a vehicle stop was really a pretext to perform an otherwise-impermissible investigation, and, if so, to give those judges the discretion to invoke the exclusionary rule if the circumstances warrant. Numerous other states have refused to allow pretextual stops on state constitutional grounds. *See, e.g.*, *State v. Ladson*, 138 Wash. 2d 343, 979 P.2d 833 (1999); *State v. Heath*, 929 A.2d 390 (Del. Super. Ct. 2006); *State v. Ochoa*, 2009-NMCA-002, 146 N.M. 32, 206 P.3d 143; *People v. Dickson*, 180 Misc. 2d 113, 690 N.Y.S.2d 390 (Sup. Ct. 1998). South Dakota should again recognize and uphold the the higher standard of protection provided to individual liberties under the

South Dakota Constitution than the United States Constitution.

iv. Officer McKeon's discovery of the foil ball, without more, did not provide probable cause to arrest Tenold for possession of methamphetamine.

"The constitutional validity of an arrest is dependent upon the existence of probable cause." *State v. Smith*, 2014 S.D. 50, ¶¶ 18-22, 851 N.W.2d 719, 724–26 (quoting *Klingler v. United States*, 409 F.2d 299, 303 (8th Cir. 1969). "Probable cause . . . exists where the facts and circumstances within the . . . officers' knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a belief by a person of reasonable caution that a suspect has committed or is committing an offense." *Id.* (quoting *State v. Hanson*, 1999 S.D. 9, ¶ 13, 588 N.W.2d 885, 889). "Probable cause deals with probabilities that are not technical but only the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." *Id.* "[P]robable cause is measured against an objective standard. *In re H.L.S.*, 2009 S.D. 92, ¶ 15, 774 N.W.2d 803, 808.

Although Officer McKeon testified he always searches his patrol vehicle at the beginning of each shift and each time someone is in his patrol vehicle, he also testified that he does not actually look underneath the seat during these searches. *TR Suppression Hearing*, pg. 60 lns. 1-13. He also does not <u>feel</u> underneath the seat during his searches. *Id*. Officer McKeon couldn't even describe what the bottom of his passenger seat looked like. *Id*. He had never felt underneath the seat or in any of the crevices underneath the seat. *Id*. In none of the searches he had ever performed had Officer McKeon ever felt

underneath the seat or searched in any of the crevices under the seat. *Id*. at lns. 10-18. Officer McKeon testified that it was entirely possible that somebody could have stuffed something underneath the passenger seat of his patrol vehicle months, or even years ago. *Id*. at lns. 19-21.

It is clear from Officer McKeon's own testimony that any one of hundreds (maybe thousands) of occupants of the front seat of that patrol car could have stuffed foil (which did not even test positive for drugs) underneath that seat over the past several months or years. If any one of hundreds or thousands of unknown persons could have placed a foil ball under that seat without Officer McKeon having found it during any of his subsequent searches, it cannot be said that Officer McKeon possessed "reasonably trustworthy information" sufficient to warrant a belief that Tenold alone placed that foil there. Accordingly, Officer McKeon did not possess probable cause to arrest Tenold for possession of the foil ball.

v. The search of the hotel room and the discovery of small amounts of drugs and paraphernalia therein must be suppressed as the fruit of the poisonous tree.

"[T]he exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search." *State v. Boll*, 2002 S.D. 114, ¶ 19, 651 N.W.2d 710, 716 (quoting *Murray v. United States*, 487 U.S. 533, 536, 108 S.Ct. 2529, 2533, 101 L.Ed.2d 472 (1988)). "[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found

to be derivative of an illegality or 'fruit of the poisonous tree.'" *State v. Heney*, 2013 S.D. 77, ¶ 9, 839 N.W.2d 558, 562 (quoting *Segura v. United States*, 468 U.S. 796, 804, 104 S.Ct. 3380, 3385, 82 L.Ed.2d 599 (1984) (citations omitted).

"When the issue is whether challenged evidence is the fruit of a Fourth Amendment violation, the defendant bears the initial burden of establishing the factual nexus between the constitutional violation and the challenged evidence." *Id*. (quoting *United States v. Marasco*, 487 F.3d 543, 547 (8th Cir.2007) (internal citations omitted). "Suppression is not justified unless 'the challenged evidence is in some sense the product of illegal governmental activity.'" *Id*. quoting *Segura*, 468 U.S. at 815, 104 S.Ct. at 3391 (internal citations omitted).

> The challenged evidence should not be excluded as fruit of the poisonous tree "unless the illegality is at least the 'but for' cause of the discovery of the evidence." *Id.* It should be noted that "but-for causality is only a necessary, not a sufficient, condition for suppression" under the fruit of the poisonous tree doctrine. *Hudson v. Michigan*, 547 U.S. 586, 592, 126 S.Ct. 2159, 2164, 165 L.Ed.2d 56 (2006). The primary focus of our analysis is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Boll*, 2002 S.D. 114, ¶ 32, 651 N.W.2d at 719 (quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963)). *State v. Heney*, 2013 S.D. 77, ¶ 12, 839 N.W.2d 558, 562–63.

The warrant to search Tenold and Gravatt's hotel room was based on probable cause gathered as the result of Officer McKeon's initial traffic stop, which was conducted in violation of Tenold's constitutional right to be free from unreasonable search and seizure. Investigator Olson testified that the information from his tipster alone was insufficient to establish probable cause that Tenold and Gravatt were engaged in drug activity. *TR Suppression Hearing*, pg. 8, lns 8-16. As such, but for the evidence

uncovered during Officer McKeon's investigatory stop, the warrant to search the hotel room would not have issued.

CONCLUSION

Current law allows law enforcement officers to make blatantly pretextual traffic stops to investigate unrelated crimes so long as the officer is patient enough to wait for a motorist to commit any inconsequential moving violation. As justification for stopping Mr. Tenold, Officer McKeon claimed to have observed some white light emanating from one of Mr. Tenold's brake lights. However, that is not illegal. But, even if it was, the Court has no objective way to evaluate Officer McKeon's claims. Further, this Court should join other states and hold that pretextual traffic stops do not comport with the individual liberties secured by Article VI, Section 11 of the South Dakota Constitution.

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REQUEST FOR ORAL ARGUMENT

Counsel respectfully requests oral argument in the amount of thirty (30) minutes.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), counsel for the Appellant does hereby state that the foregoing brief is typed in proportionally spaced typeface in Times New Roman 12-point font. The pages of this brief, excluding the Appendix, do not exceed thirty-two pages and the word processor used to prepare this brief indicated that there are no more than 3,832 words in the body of this brief.

Dated this 25th day of March, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of March, 2019, a true and correct copy of Appellant's Brief in this matter was served via electronic mail upon:

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VS.	)	**JUDGMENT OF CONVICTION**
	)	
CURTIS DEAN TENOLD,	)	
Defendant.	)	

A Superseding Indictment was filed with this Court on the 30th day of May, 2018 charging the Defendant with the crime of Count I: Possession Of A Controlled Drug Or Substance (SDCL 22-42-5 and 34-20B), Count II: Unauthorized Ingestion Of Controlled Substance (SDCL 22-42-5.1 and 34-20B).

On the 23rd day of March, 2017, the Defendant, the Defendant's Attorney, Kelly Sanderson (for Nate Nelson), and John H. Fitzgerald as prosecuting attorney appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges that had been filed against the Defendant. The Defendant entered a plea of not guilty and requested a Jury Trial on the charges contained in the Indictment.

A Jury Trial commenced on the charges on the 28th and 29th days of June, 2018, in Deadwood, South Dakota. On the 29th day of June, 2018, the Jury returned a verdict of guilty to the charges of Count I: Possession Of A Controlled Drug Or Substance (SDCL 22-42-5 and 34-20B), Count II: Unauthorized Ingestion Of Controlled Substance (SDCL 22-42-5.1 and 34-20B).

IT IS THEREFORE the Judgment of the Court that the Defendant is guilty of Count I: Possession Of A Controlled Drug Or Substance (SDCL 22-42-5 and 34-20B), Count II: Unauthorized Ingestion Of Controlled Substance (SDCL 22-42-5.1 and 34-20B).

S E N T E N C E

On the 16th day of August, 2018, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

COUNT I: POSSESSION CONTROLLED DRUG OR SUBSTANCE

IT IS HEREBY ORDERED that the Defendant shall serve three (3) years in the South Dakota State Penitentiary.

IT IS FURTHER ORDERED that the execution of said sentence shall be suspended and the Defendant shall be placed on probation for a period of three (3) years upon the following terms and conditions:

(1) Defendant shall follow all rules and regulations as set forth by his probation officer; and
(2) Defendant shall violate no laws; and
(3) Defendant shall reimburse Lawrence County for court appointed attorney fees in the amount of $7967.37 to be paid through the Lawrence County Clerk of Court's Office; and
(4) That the Defendant pay to the Lawrence County Clerk of Courts (for reimbursement to the South Dakota Drug Control Fund, in c/o Division Of Criminal Investigation, 1302 E Highway 14, Ste. 5, Pierre, SD 57501) the costs of urinalysis and/or testing of the marijuana or controlled substances in this case in the amount of $104.00 + $307.00; and
(5) Defendant shall pay Prosecutions costs in the amount of $462.80 -$873.80 to be paid through the Lawrence County Clerk of Court's Office; and
(6) Defendant shall submit to a warrantless search and seizure of the Defendant's breath, blood, urine, person, place or possessions at the request of any law enforcement officer or the Defendant's probation officer; and
(7) Defendant shall not possess nor consume any mind altering substances, including alcoholic beverages,

while the Defendant is on probation nor associate with people involved in these activities; and

(8) Defendant shall maintain full-time employment or be enrolled in a level of higher education; and

(9) Defendant shall not enter or remain in any establishment where the primary source of income comes from the sale of alcoholic beverages or from gaming; and

(10) Defendant shall undergo any treatment assessment needs recommended by his probation officer; and

(11) Defendant shall attend and successfully complete Moral Recognition Therapy; and

(12) Defendant shall attend and successfully complete Cognitive Behavioral Interventions; and

(13) Defendant shall pay LEOTF costs in the amount of $104.00; and

(14) Defendant shall serve thirty (30) days in the Lawrence County Jail with credit for one (1) day served; and

(15) Defendant shall be remanded to the custody of the Lawrence County Jail.

COUNT II: UNAUTHORIZED INGESTION OF A CONTROLLED DRUG OR SUBSTANCE

IT IS HEREBY ORDERED that the Defendant shall serve three (3) years in the South Dakota State Penitentiary.

IT IS FURTHER ORDERED that the execution of said sentence shall be suspended and the Defendant shall be placed on probation for a period of three (3) years upon the following terms and conditions:

(1) Defendant shall follow all rules and regulations as set forth by his probation officer; and

(2) Defendant shall violate no laws; and

(3) That the Defendant pay to the Lawrence County Clerk of Courts (for reimbursement to the South Dakota Drug Control Fund, in c/o Division Of Criminal Investigation, 1302 E Highway 14, Ste. 5, Pierre, SD 57501) for the costs of urinalysis and/or testing of the marijuana or controlled substances in this case in the amount of $45.00 + $149.00; and

(4) Defendant shall submit to a warrantless search and seizure of the Defendant's breath, blood, urine, person, place or possessions at the request of any law enforcement officer or the Defendant's probation officer; and

(5) Defendant shall not possess nor consume any mind altering substances, including alcoholic beverages,

while the Defendant is on probation nor associate with people involved in these activities; and

(6) Defendant shall maintain full-time employment or be enrolled in a level of higher education; and

(7) Defendant shall not enter or remain in any establishment where the primary source of income comes from the sale of alcoholic beverages or from gaming; and

(8) Defendant shall undergo any treatment assessment needs recommended by his probation officer; and

(9) Defendant shall attend and successfully complete Moral Recognition Therapy; and

(10) Defendant shall pay LEOTF costs in the amount of $104.00; and

(11) Defendant shall serve thirty (30) days in the Lawrence County Jail with credit for one (1) day served; and

(12) Defendant shall attend and successfully complete Cognitive Behavioral Interventions; and

(13) Defendant shall be remanded to the custody of the Lawrence County Jail.

IT IS FURTHER ORDERED that Count I and Count II shall run concurrent; and

IT IS FURTHER ORDERED that all bonds posted herein be exonerated.

BY THE COURT:

_____

Hon. Michelle Comer
Circuit Court Judge

DATE OF OFFENSE: FEBRUARY 2, 2017

NOTICE OF APPEAL

You are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise within thirty (30) days from the date that this Judgment and Sentence is signed, attested and filed, written Notice of Appeal with the Lawrence County Clerk of Courts, together with proof of service that copies of such Notice of Appeal have been served upon the Attorney General of the State of South Dakota, and the Lawrence County State's Attorney.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff,	*	CRI 17-103 CRI 17-104
vs.	*	FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANTS' MOTIONS TO SUPPRESS EVIDENCE
CURTIS TENOLD, LANA GRAVATT, Defendants	*	

Hearings were held on December 5, 2017 and December 29, 2017, before the Honorable Michelle Comer, Circuit Court Judge. The State appeared by John Fitzgerald, Lawrence County State's Attorney. Curtis Tenold personally appeared along with his attorney Nate Nelson and Lana Gravatt personally appeared along with her attorney Tim Barnaud. The Court heard the testimony of Officer Jim Olson, Officer Cory Shafer, Officer Braxton McKeon, Deadwood Police Department and Agent Steve Ardis of the South Dakota DCI and being fully advised, now makes its:

FINDINGS OF FACT

1. In late January, 2017, Officer Jim Olson of the Deadwood Police Department received information from Mike Gurich, head of security at the Deadwood Mountain Grand Casino. The information was that the Defendants, Curtis Tenold and Lana Gravatt, had been renting a room at the casino, and based upon the

amount of traffic in and out, he believed that drugs were being used and sold out of their hotel room.

2. Gurich made these reports to Officer Olson on two separate occasions. Gurich reported that the high amount of traffic in and out of the room had been going on for a period time. In addition to that information, Gurich supplied the name of a witness to the activities in the room. That witness was Kevin Klein of Deadwood, South Dakota. Mr. Klein was interviewed by Officer Olson and indicated that the Defendants had on more than one occasion offered to sell him methamphetamine.

3. Mike Gurich had provided the Deadwood Police Department on prior occasions with information of other crimes that had occurred at the Deadwood Mountain Grand Casino. That prior information proved to be accurate. The new information confirmed by Klein, led Officer Olson to consider Gurich a reliable source of information. He further understood Gurich to have law enforcement experience.

4. Officer Olson prepared an informational report concerning the activity of the Defendants and made it available to the Officers at the Deadwood Police Department. He indicated in the memorandum of information That Deadwood Police Officers

would still have to develop their own reasonable suspicion to initiate contact with the Defendants.

5. On February 2, 2017, at approximately 2:30 a.m., Officer Braxton McKeon of the Deadwood Police Department observed a vehicle driven and occupied by the Defendants on a public road. He further observed that when the stop lights, also referred to as brake lights, were applied the middle light was emitting white light.

6. SDCL 32-17-8.1 requires that all vehicles stop lights be red in color only. Based upon the observed traffic violation, Officer McKeon stopped the vehicle. Defendant Tenold was driving and Defendant Gravatt was a passenger. Defendant Tenold produced his driver license and registration, but was not able to provide proof of insurance.

7. Defendant Tenold was issued a warning ticket for improper stop lights and failure to have insurance. Officer McKeon asked and was granted consent to search the vehicle. The search did not uncover any contraband. While the search was taking place, Defendant Tenold was alone in Officer McKeon's patrol car. Following the consent search the Defendants left the area.

8. In accordance with police policy, after Defendant Tenold left the patrol car, Officer McKeon searched his vehicle. The Police

Department's Policy is that following every occasion when a member of the public is in a police vehicle it is searched thereafter.

9. Discovered under the seat of the patrol car where Defendant Tenold had been seated, Officer McKeon found a small foil ball with a white crystalline substance coming out of it. No one other than Defendant Tenold had been in the vehicle and could have placed the tin foil ball under the seat.

10. Officer McKeon went to the police department where he "field tested" the substance from the foil ball. According to the field test the substance in the foil ball was methamphetamine. The field tests used by Officer McKeon are relied upon by police officers as an indication in the field of the type of drug or controlled substance they have encountered. Officer McKeon reliance on the "field test" was reasonable and an accepted police procedure for determining whether a substance is an illegal drug.

11. DCI Agent Steve Ardis examined the foil that had been seized by Officer McKeon. The item he referred to as a "foily" had burnt marks on it consistent with it having been heated. Agent Ardis explained that "foilys" are heated and then the methamphetamine is vaporized and inhaled by methamphetamine users. Agent Ardis explained that heating process consumes the methamphetamine. Agent Ardis also explained that "field testing" consumes a quantity

of the substance being tested so that sometimes there is nothing else available for testing by a chemist at a laboratory.

12. DCI Agent Ardis indicated that the "field tests" are not a substitute for a chemist analyzation, but a reasonable police officer presented with a situation that Officer McKeon was facing would rely upon the results of a field test in making arrests or providing information for a request for a search warrant.

13. Following the positive field test for methamphetamine, Officer McKeon, with the assistance of another officer, began looking for the Defendant Tenold.

14. Officer McKeon, along with Officer Shafer located the Defendants outside of the Celebrity Casino in Downtown Deadwood.

15. Officer Shafer had contact with Defendant Gravatt and asked her questions about her use of marijuana. She admitted she had been using marijuana. She consented to a search of her person where a marijuana pipe and residue was found inside of her right shoe.

16. Police Officer Braxton McKeon, thereafter prepared an eight page affidavit in support of a request for search warrant which was then granted by Judge Strawn.

17. The affidavit in support of the request for search warrant fairly and accurately described the facts that Officer McKeon was aware of at the time he prepared the affidavit.

CONCLUSIONS OF LAW

1. The court has jurisdiction of both the parties and the subject matter.

2. Stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of the Fourth and Fourteenth Amendments of the United States Constitution. State vs. Thill, 474 NW2d 86 (SD 1991) citing Delaware vs. Prouse, 440 US 648, 653, 99 SCt 1391, 1396, 59 LEd2d 660, 667 (1979). It is well settled, in accordance with the Fourth Amendment of the United States Constitution, that a police officer may not stop a vehicle without a reasonable basis for doing so. State vs. Anderson, 331 NW2d 568 (SD 1983).

3. At a minimum, law enforcement must have an articulable and reasonable suspicion that the motorist is subject to seizure for violation of the law before the stop occurs." Thill, 474 NW2d at 87 (SD 1991). "Consistent with the principles set out in Terry vs. Ohio, 392 US 1, 88 SCt 1868, 20 LEd2d 889 (1968), the officer must have a specific and articulable suspicion of a violation before the stop will be justified." Anderson, 331 NW2d at 570.

4. The reasonable suspicion standard was extended to automobile stops in South Dakota in State vs. Anderson, 331 NW2d 568 (SD 1983). A police officer must have a specific and articulable suspicion of a violation before a stop will be justified. The factual basis required to support a stop is: "That the stop be not the product of mere whim, caprice, or idle curiosity. It is enough if the stop is based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion [.]"

5. SDCL 32-17-8.1 provides that "Except for vehicle equipped with slow-moving vehicle emblems in compliance with §§ 32-15-20 and 32-15-21 every motor vehicle trailer, semitrailer and pole trailer shall be equipped with two or more stop lamps...." "The stop lamp shall display a red light visible....."

6. Officer McKeon personally observed a traffic offense occur when the Defendant's vehicle stop light emitted white colored light when the brakes were applied. Officer McKeon had a probable cause that a traffic offense had occurred when he activated his red lights and stopped the car.

7. The field tests conducted on the substance found in the patrol car and the circumstances under which it was found provided a reasonable basis to believe that the substance was in fact methamphetamine.

8. Officer McKeon sought out a magistrate judge's independent opinion that probable cause existed for the issuance of a search warrant.

9. In the context of search warrants, probable cause is defined as the existence of facts and circumstances as would warrant an honest belief in the mind of a reasonable prudent man acting on all the facts and circumstances, within the knowledge of the magistrate that the offense has been or is being committed and that the property sought exists at the place designated. State v. Wellner, 1982, 318 N.W.2d 324; State v. Jackson, 616 N.W.2d 412; State v. Smith, 1979 N.W2d 430.

10. A search warrant is reviewed under the "four corners doctrine" which means that the probable cause is established in the affidavit, and additional information is usually not considered.

11: The South Dakota Supreme Court has defined the four corners doctrine as follows:

"Determination of whether an affidavit in support of a search warrant shows probable cause for issuance of the warrant must be based upon an examination of the four corners of the

reasonable basis to believe that the substance was in fact methamphetamine.

8. Officer McKeon sought out a magistrate judge's independent opinion that probable cause existed for the issuance of a search warrant.

9. In the context of search warrants, probable cause is defined as the existence of facts and circumstances as would warrant an honest belief in the mind of a reasonable prudent man acting on all the facts and circumstances, within the knowledge of the magistrate that the offense has been or is being committed and that the property sought exists at the place designated. State v. Wellner, 1982, 318 N.W.2d 324; State v. Jackson, 616 N.W.2d 412; State v. Smith, 1979 N.W2d 430.

10. A search warrant is reviewed under the "four corners doctrine" which means that the probable cause is established in the affidavit, and additional information is usually not considered.

11: The South Dakota Supreme Court has defined the four corners doctrine as follows:

> "Determination of whether an affidavit in support of a search warrant shows probable cause for issuance of the warrant must be based upon an examination of the four corners of the affidavit. State v. Iverson 1985, 364, N.W.2d 518 and State v. Jackson, 616 N.W.2d 412, 2000 S.D. 113. "

12. The four corners doctrine is also codified in SDCL 23A-35-4 which states "a warrant shall be issued only on evidence set forth in an affidavit or affidavits presented to a committing magistrate, which establishes the grounds for issuing the warrant."

13. Officer McKeon's affidavit in support of a search warrant provided probable cause to Judge Strawn to issue the search warrant in this case. The affidavit establishes that a reasonable and prudent magistrate equipped with the knowledge provided in the affidavit established that methamphetamine would be present in the Defendant's room at the Deadwood Mountain Grand Casino on the date it was served.

ORDER DENYING MOTION TO SUPPRESS EVIDENCE

In accordance with the foregoing Findings of Facts and Conclusions of Law, IT IS HEREBY;

ORDERED that the motion to suppress evidence is denied.

Dated this 22 day of February, 2018.

Michelle Comer

Hon. Michelle Comer
Circuit Court Judge

FILED
FEB 22 2018
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
BY _____

Attest: CAROL LATUSECK, CLERK
McCroden, Brianna
Clerk/Deputy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE in the above entitled matter upon the persons herein next designated all on the date below shown, by depositing a copy thereof in the United States Mail at Deadwood, South Dakota, postage prepaid, in envelopes addressed to said addressees, to-wit:

Nathaniel Nelson
1209 Junction Ave
Sturgis, SD 57785

Timothy Barnaud
211 Main St, Suite 2
Spearfish, SD 57783

Mr. John Fitzgerald (Hand Delivered)
90 Sherman Street
Deadwood, SD 57732

which addresses are the last addresses of the addresses known to the subscriber.

Dated this 22nd day of February, 2018.

Brianna McCroden
Deputy Clerk of Courts

FILED
FEB 22 2018
UNIFIED JUDICIAL SYSTEM
CLERK OF COURT

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28725

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CURTIS TENOLD,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE K. COMER
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed September 14, 2018

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28725

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CURTIS TENOLD,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Curtis Tenold, is referred to as "Tenold." Plaintiff and Appellee, State of South Dakota, is referred to as "State." References to documents are designated as follows:

Lawrence County Criminal File No. 17-103..... SR

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Jury Trial Volume 2, dated June 28, 2018.....JT2

Jury Trial Volume 3, dated June 29, 2018.....JT3

Appellant's Brief..... AB

All document designations are followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

This is an appeal of a Judgment of Conviction filed on August 21, 2018, by the Honorable Michelle Comer, Circuit Court Judge, Fourth Judicial Circuit, Lawrence County, South Dakota. SR 409. On September 14, 2018, Defendant filed a Notice of Appeal. SR 420. This Court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS EVIDENCE OF TENOLD'S DRUG ACTIVITY?

The trial court denied Tenold's motion.

Heien v. North Carolina, 574 U.S. 54, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014)

State v. Kenyon, 2002 S.D. 111, 651 N.W.2d 269

State v. Lerma, 2016 S.D. 58, 884 N.W.2d 749

United States v. Wright, 565 F.2d 486 (8th Cir. 1977)

II

WHETHER THIS COURT SHOULD MODIFY EXISTING LAW TO MAKE PRETEXTUAL STOPS UNLAWFUL?

Current law permits pretextual stops based on objective reasonable suspicion.

State v. Hoeft, 1999 S.D. 24, 594 N.W.2d 323

State v. Overbey, 2010 S.D. 78, 790 N.W.2d 35

United States v. Martin, 411 F.3d 998 (8th Cir. 2005)

STATEMENT OF THE CASE

On March 8, 2017, a Fourth Circuit grand jury indicted Tenold for Unauthorized Possession of a Controlled Drug or Substance (Methamphetamine), a Class 5 felony in violation of SDCL 22-42-5. SR 12. Tenold attended an arraignment on March 23, 2017, wherein Tenold plead not guilty to the charge, and requested a jury trial. SR 409. On May 30, 2017, a grand jury filed a Superseding Indictment charging Count I: Unauthorized Possession of a Controlled Drug or Substance (Methamphetamine), a Class 5 felony in violation of SDCL 22-42-5, and Count II: Unauthorized Ingestion of a Controlled Substance (Schedule I and II) (Methamphetamine), a Class 5 felony in violation of SDCL 22-42-5.1. SR 215.

Tenold filed a Motion to Suppress on November 3, 2017, requesting the trial court prohibit the State from introducing any evidence seized or derived from law enforcement's traffic stop of Tenold, alleging the stop was pretextual and not supported by either probable cause or reasonable suspicion. SR 25. Tenold also requested suppression of any evidence seized or derived from the warranted search of Tenold's hotel room, alleging law enforcement's affidavit in support of the search warrant was knowingly or intentionally false. *Id.*

A suppression hearing was held on December 5, 2017, but no ruling was made by the court because Tenold's co-defendant at that time desired to modify her motion, and the parties were urged to clarify

the "direction" of their motions. SH 81. The court invited Tenold to modify his motion as well. SH 82. At a continued status hearing on December 14, 2017, Tenold had not amended his motion. SR 506. A continued suppression hearing was held on December 29, 2017. SR 132. After presiding over three hearings regarding the Motion, and reviewing a brief in support of the Motion, the trial court denied Tenold's Motion to Suppress on February 22, 2018, as set forth in the trial court's Findings of Fact and Conclusions of Law. SR 213. Tenold then filed an interlocutory appeal with this Court regarding the motion to suppress. This Court dismissed the appeal on March 13, 2018, based on improper service. SR 216. Tenold filed a motion to reinstate his petition for a discretionary appeal, which this Court granted, and again, this Court denied Tenold's petition for an intermediate appeal on May 10, 2018. SR 217.

A two-day jury trial commenced on June 28, 2018, with a jury finding Tenold guilty on both Count I and Count II. SR 409. On August 21, 2018, the Honorable Michelle K. Comer issued a Judgment of Conviction, issuing the same sentence for both counts – three years in the South Dakota State Penitentiary with all time suspended, and thirty days in the Lawrence county jail with credit for one day served. SR 410-12. He was placed on probation for a period of three years on each count, subject to conditions, and requiring payment of court appointed attorney fees and costs. SR 410. The sentences for Counts I

and II were to run concurrent to one another. *Id.* A Notice of Appeal was filed on September 14, 2018. SR 420.

STATEMENT OF FACTS

On January 21, 2017, Special Agent Brandon Snyder of the South Dakota Commission on Gaming contacted Officer James Olson of the Deadwood Police Department. SR 31. Agent Snyder indicated he believed Tenold to be involved in drug activity. *Id.* Throughout January of 2017, Mike Gurich, the Security Manager of the Deadwood Mountain Grand Casino, observed considerable foot traffic in and out of Tenold's hotel room at all hours of the night. *Id.* A customer of the casino had been approached by Tenold's companion, Lana Gravatt, whom Tenold shared a hotel room with. SR 32. Gravatt asked the customer if he needed any meth, if he had any money she could borrow, and if she "could do something for [him]" in exchange for money. *Id.* The customer reported the exchange to casino staff, saying they were "tired of being harassed by Gravatt and Tenold." *Id.* Gurich had been a previously reliable informant of such activity and relayed his detailed observations to Agent Snyder. SR 31-32.

Officer Olson informed the Deadwood Police Department that Tenold was suspected of dealing methamphetamine out of his hotel room, but the tips alone were not sufficient for an arrest at that time without further investigation. SR 32. Officers were told if they encounter Tenold, there must be a reasonable suspicion for any contact

to occur. *Id.* Officers were provided with a description of Tenold's vehicle, including its year, make, model, and license plate number. *Id.*

At approximately 2:39 a.m. on February 2, 2017, Officer Braxton McKeon (McKeon) observed Tenold's vehicle leaving the Deadwood Mountain Grand casino. SR 4. Officer McKeon saw a white light emitting from the center rear brake light of Tenold's vehicle. *Id.* McKeon saw that the brake light lens was cracked. SH 69. Accordingly, McKeon made a traffic stop. SR 4. Officer McKeon asked Tenold if he could search his vehicle, and Tenold consented to the search. SH 26. During the search of the vehicle, Tenold was placed in the front seat of McKeon's patrol vehicle. *Id.* Finding no illegal substances in the vehicle, McKeon issued a citation for failure to provide insurance, informed Tenold he needed to fix his brake light, and sent Tenold on his way. SH 27.

After Tenold left the patrol vehicle, per department policy, McKeon performed a standard search of his vehicle for contraband. SH 28. Under the front passenger seat where Tenold had been sitting, McKeon found a small foil ball with white crystalline substance falling out of its creases. *Id.* McKeon completed a field test of the substance inside the foil ball, and with a presumptive positive result, the test indicated methamphetamine was present. SH 30. McKeon had searched the vehicle shortly before Tenold's traffic stop, after another subject had been in his vehicle, and no foil ball was present. SH 28.

McKeon performs a search of his vehicle at the beginning of every shift and after any person exits his vehicle. SH 28-29.

Officer McKeon returned to the Mineral Palace, where Tenold's vehicle was located. SR 33. Upon entering the Celebrity Hotel, a staff member, without any prompting from the officer, asked McKeon if he was "looking for Curtis (Tenold)." *Id.* The staff member indicated he had just walked into the Mineral Palace. *Id.* McKeon informed Tenold he was under arrest for possession of a controlled substance because of the discovery of the foil ball after Tenold exited the patrol vehicle. *Id.* McKeon searched Tenold incident to arrest, and on his person, McKeon located two clear plastic bags containing a green leafy substance which smelled of unburnt marijuana. *Id.* McKeon transported Tenold to the Lawrence County Jail. *Id.*

McKeon prepared an eight-page affidavit detailing law enforcement's knowledge of and interactions with Tenold, including the traffic stop, foil ball, and arrest. SR 29. The affidavit was prepared to request a search warrant for Tenold's hotel room and vehicle. *Id.* The Honorable Eric Strawn issued the search warrant requested, and at approximately 8:58 a.m. on February 2, 2017, officers entered the hotel room. Located therein were the following:

- A Ziploc bag containing approximately 1.7 grams of methamphetamine, located inside the hotel safe between the two beds. SR 268; JT2 81.
- Approximately 11.6 grams of marijuana. SR 45-46.
- A marijuana pipe. SR 45-46.

- Spiral binding of a book, which is a glass tube commonly used to smoke methamphetamine. SR 85-86.
- A butane or propane torch, sitting on the hotel room floor next to the bench. SR 87.
- A white pen tube used to smoke methamphetamine. SR 89.

The search warrant also authorized retrieval of a urine sample from Tenold. SR 197. The urine was positive for methamphetamine, amphetamines, and THC. JT2 168. On May 10, 2017, forensic chemist Richard Wold analyzed the evidence for the presence of controlled substances on the foil ball, the Ziploc bag, the snort tube, and the glass pipe. SR 268. There was no controlled substance identified on the "foiler" swab, but methamphetamine was present on all other objects. *Id.*

ARGUMENTS

I

THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS EVIDENCE OF TENOLD'S DRUG ACTIVITY.

Introduction

Tenold argues the trial court should have suppressed any evidence seized or derived from the traffic stop, found on Tenold's person upon his arrest, and found in the hotel room pursuant to a court-issued search warrant, because he argues the traffic stop was illegal and therefore, the discovery of any drugs or paraphernalia thereafter is "fruit of the poisonous tree." SR 25, AB 13. For clarity,

the State addresses the Motion to Suppress relevant to A) the traffic stop, B) the arrest, and C) the hotel room search, independently.

A. THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS EVIDENCE DERIVED FROM THE TRAFFIC STOP.[1]

Background and Standard of Review

Tenold asserts the circuit court erred in concluding Officer McKeon had a reasonable suspicion to stop Tenold's vehicle, and therefore, erred in denying his Motion to Suppress all evidence seized following the traffic stop. AB 6-7. Tenold argues the traffic stop violated his Fourth Amendment Rights. AB 8-9. The Fourth Amendment protects individuals from unreasonable searches and seizures and applies when a vehicle is stopped by law enforcement. *State v. Wright*, 2010 S.D. 91, ¶ 10, 791 N.W.2d 791, 794 (quoting *State v. Muller*, 2005 S.D. 66, ¶ 14, 698 N.W.2d 285, 288).

"A motion to suppress based on an alleged violation of a constitutionally protected right is a question of law reviewed de novo." *State v. Uhre*, 2019 S.D. 8, ¶ 14, 922 N.W.2d 789, 795 (quoting *Wright*, 2010 S.D. 91, ¶ 8, 791 N.W.2d at 794). A circuit court's findings of fact are reviewed for clear error. *State v. Barry*, 2018 S.D. 29, ¶ 9, 910 N.W.2d 204, 208. Once those facts have been determined, the application of a legal standard to those facts is reviewed de novo. *Id.*

[1] Appellant's Brief Issues (i.) and (ii.). AB 6-7.

"As such, determinations of reasonable suspicion are also reviewed de novo on appeal." *Id.* (quoting *State v. Ballard*, 2000 S.D. 134, ¶ 9, 617 N.W.2d 837, 840).

To justify a traffic stop, an officer need only a "reasonable suspicion." *State v. Chase*, 2018 S.D. 70, ¶ 6, 919 N.W.2d 207, 209; *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968). "Reasonable suspicion is a common-sense and non-technical concept dealing with the practical considerations of everyday life." *Wright*, 2010 S.D. 91, ¶ 10, 791 N.W.2d at 794 (citing *State v. Aaberg,* 2006 S.D. 58, ¶ 10, 718 N.W.2d 598, 600). While a stop may not be the "product of mere whim, caprice, or idle curiosity, it is enough that the stop is based upon 'specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant the intrusion.'" *Id.* (quoting *State v. Akuba,* 2004 S.D. 94, ¶ 15, 686 N.W.2d 406, 413).

This Court clarified that an officer's observation of "a traffic violation, however minor," creates reasonable suspicion of a violation of law that justifies a traffic stop. *State v. Hett*, 2013 S.D. 47, ¶ 7, 834 N.W.2d 317, 319–20 (quoting *United States v. Martinez,* which set forth, "[a]n officer's observation of a traffic violation, however minor, gives the officer probable cause to stop a vehicle, even if the officer would have ignored the violation but for a suspicion that greater crimes are afoot." 358 F.3d 1005, 1009 (8th Cir. 2004)). "Therefore, the basis needed for

a traffic stop is minimal." *State v. Bowers*, 2018 S.D. 50, ¶ 13, 915 N.W.2d 161, 165 (quoting *State v. Lockstedt,* 2005 S.D. 47, ¶ 16, 695 N.W.2d 718, 722).

Validity of Traffic Stop

Tenold argues his rights were violated because he does not believe a white light was emitting from his brake light, and even if it had, this was not a violation of SDCL 32-17-8.1. AB 7-8. Tenold asserts the observation of what appeared to be a broken or sun-damaged brake light did not create an objectively reasonable and articulable suspicion to justify an investigatory stop, because SDCL 32-17-8.1 requires only two working stop lights. AB 7; SH 56, 69. Officer McKeon, however, saw a rear brake light, which should have been red, emitting white light. SH 69. The trial court found the officer's observation and justification for the traffic stop to be reasonable. SR 210.

The stop lamp statute in question states, in part[2], "[E]ach motor vehicle . . . shall be equipped with at least two stop lamps. [. . .] Each

[2] 32-17-8.1. Stop lamps required--Mounting--Visibility--Violation as petty offense. Except for a vehicle equipped with a slow-moving vehicle emblem in compliance with §§ 32-15-20 and 32-15-21, each motor vehicle, trailer, semitrailer, and pole trailer shall be equipped with at least two stop lamps with at least one on each side. The side stop lamps shall be mounted on the same level and as widely spaced laterally as practicable. However, each motor vehicle, trailer, semitrailer, and pole trailer manufactured and assembled before July 1, 1973, and each motorcycle and motor-driven cycle shall be equipped with at least one stop lamp. A stop lamp shall be mounted on the rear of the vehicle at a height of no more than seventy inches nor less than fifteen inches. Each

stop lamp *shall display a red light…*" SDCL 32-17-8.1 (emphasis added). Officer McKeon and the trial court interpreted the emphasized portion to require *all* working brake lights to emit only red light. SR 206. Tenold had two working brake lights, but the center brake light was emitting a white light. *Id.* At the initial suppression hearing, the following exchange described Officer McKeon's understanding of the statute:

State's Attorney:	So what was it that constituted the reasonable, articulable suspicion to stop this vehicle?
Officer McKeon:	One of the taillights on Mr. Tenold's vehicle was emitting a white light when the brakes were applied.
State's Attorney:	How many red lights are required on the back of a vehicle on a public road?
Officer McKeon:	Minimum of two. [. . .]
State's Attorney:	Do you know, off the top, the statute that requires the two lights?
Officer McKeon:	32-17-8.1. [. . .]
State's Attorney:	Did you tell him what the reason was for stopping him?
Officer McKeon:	I did. I informed Mr. Tenold the white light was emitting from the rear of his vehicle when his brake lights were activated. [. . .]
State's Attorney:	So what did you say to Mr. Tenold?
Officer McKeon:	I informed him of what was necessary regarding the citation for no insurance and informed him that he needed to fix his taillight, and then I sent him on his way.
State's Attorney:	Did you give him the citation?
Officer McKeon:	Yes. I gave him a copy of the summons for the citation, as well as a copy of the written warning for the taillight.

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stop lamp shall display a red light visible from a distance of not less than three hundred feet to the rear in normal sunlight, except for a moped, which shall be visible from a distance of not less than one hundred fifty feet. Each stop lamp shall be actuated upon application of the brake which may be incorporated with one or more rear lamps. A violation of this section is a petty offense.

SH 24-27. Officer McKeon unquestionably believed the emittance of any light other than red, from any working brake light, is a violation of SDCL 32-17-8.1. He explained this violation to Tenold upon the stop. He verbally informed Tenold of the need to fix his brake light. He issued a warning ticket for the white-emitting brake light.

The trial court relied on the officer's observations and determined in its Findings of Fact that SDCL 32-17-8.1 is interpreted in the same manner as Officer McKeon. Specifically, the court found, "SDCL 32-17-8.1 requires that all vehicles stop lights be red in color only." SR 206. In the trial court's Conclusions of Law, it set forth, "SDCL 32-17-8.1 provides [. . .] 'the stop lamp shall display a red light visible [. . .]'", and therefore, "Officer McKeon personally observed a traffic offense occur when the Defendant's vehicle stop light emitted white colored light when the brakes were applied. Officer McKeon had a probable cause that a traffic offense had occurred when he activated his red lights and stopped the car." SR 210.

The plain language of SDCL 32-17-8.1 requires "[e]ach stop lamp shall display a red light . . ." It was reasonable for the triers of fact to interpret the statute as written, because "each" is defined as "every one of two or more considered individually or one by one." *Each*, *Random House Unabridged Dictionary*, (2019). This plain reading of the statute requires that "each," meaning "every" operable brake light, must only display a red light.

This Court recently interpreted the ambiguities of SDCL 32-17-8.1. In *State v. Lerma*, a police officer made a traffic stop due to an inoperable brake light. 2016 S.D. 58, ¶ 1, 884 N.W.2d 749, 750. This Court held, "it is not clear whether the Legislature intended the display and actuation requirements to apply to only the statutory minimum ('two') or to all it authorized ('two or more')." *Id.* at ¶ 8. This Court ruled,

> [b]ecause the Legislature authorized 'more' than two brake lights in the same section that it set out the display and actuation requirements, one could reasonably conclude that if a vehicle is equipped with brake lights, however many, the equipped brake lights 'shall display a red light' and 'shall be actuated upon application of the service brake.'

Id. While this Court determined "the most reasonable interpretation is that the Legislature intended the display and actuation requirements to apply only to the two required brake lights," it nevertheless concluded, "it was objectively reasonable" for an officer to believe that an inoperable brake light constituted a violation of law, justifying an investigatory stop. *Id.* at ¶ 7.

Significant authority interprets SDCL 32-17-8.1 as Officer McKeon and the trial court did. In *United States v. Martin*, the Eighth Circuit Court of Appeals cites SDCL 32-17-8.1 "as authority for the view that in South Dakota, 'all brake lights on a vehicle [. . .] must be in good working order.'" 411 F.3d 998, 1001 (8th Cir. 2005); *Lerma*, 2016 S.D. 58, ¶ 8, 884 N.W.2d at 751. The Court of Appeals held the statute to be

"counterintuitive and confusing," and ruled the officer's traffic stop was supported by sufficient cause and objectively reasonable. *Martin*, 411 F.3d at 1001-03.

In *State v. Kenyon*, the defendant was pulled over for white light emitting from his rear brake light, and this Court held, "[i]t is undisputed that the officer in this case had a 'specific and articulable suspicion of a violation' justifying the initial stop" and "[t]hus, there is no question that [the officer] was entitled to conduct an investigation reasonably related in scope to the traffic violation." 2002 S.D. 111, ¶ 16, 651 N.W.2d 269, 274. [3]

In another example, a police officer noticed the defendant's right brake light failed to properly illuminate. *State v. Anderson*, 359 N.W.2d 887, 889 (S.D. 1984).[4] This Court held, "the equipment violation on Anderson's car was sufficient to justify the stop in this case." *Id.* at 890. In fact, "[c]ircumstances giving rise to a 'specific and articulable suspicion of a [traffic] violation', are also sufficient to justify the investigatory stop of a vehicle." *Id.* (quoting *Whitson v. Department of Public Safety,* 346 N.W.2d 454, 456 (S.D. 1984)); *State v. Anderson,* 331 N.W.2d 568, 570 (S.D. 1983).

[3] The written decision does not indicate the number of other operable or inoperable brake lights on Kenyon's vehicle.

[4] The written decision does not indicate the number of other operable or inoperable brake lights on Anderson's vehicle.

Again, in *United States v. Sanders*, a South Dakota officer made a traffic stop because one of the brake lights on a trailer was emitting a white light. 196 F.3d 910, 912 (8th Cir. 1999). The Eighth Circuit Court of Appeals held that even if the officer was wrong in his belief that a violation of the brake light statute occurred, his belief was reasonable, and he had probable cause to stop the vehicle. *Id.* at 914.

This Court thoroughly reviewed SDCL 32-17-8.1 in *Lerma*, and the State contends the *Lerma* holding is supportive of the trial court's interpretation of the statute. This Court need only decide whether it was "objectively reasonable for an officer in his position to believe" that a stop lamp, displaying a white light instead of red, is a violation of the law. *See Lerma*, 2016 S.D. 58 n.2, 884 N.W.2d at n.2.

As in *Lerma*, it is not unreasonable for a police officer to believe he or she is justified in stopping a vehicle with a broken brake light. Officer McKeon did not act in a purposefully flagrant manner that rises to the level of misconduct. *Utah v. Strieff*, 136 S.Ct. 2056, 2058, 195 L.Ed.2d 400 (2016). Rather, his stop was based on a reasonable interpretation of a confusing statute "ambiguous enough to be open to differing and equally reasonable interpretations." *State v. Sutherland*, 231 N.J. 429, 436, 176 A.3d 775, 779 (2018). This Court has ruled, "[a] crime must be statutorily defined with definiteness and certainty." *State v. Hoeft*, 1999 S.D. 24, ¶ 16, 594 N.W.2d 323, 327 (quoting *State v. McGill*, 536 N.W.2d 89, 95 (S.D. 1995)). Significant case law reveals

SDCL 32-17-8.1 is not definite and certain, but rather unclear and "open to differing and equally reasonable interpretations," as evidenced by the confusion described in *Lerma* and other case law, and as shown by the trial court's interpretation in line with Officer McKeon's.

Further Support

This Court has noted the significance of the Supreme Court and United States Courts of Appeals' rulings which "stand unequivocal" and "unquestioned" as independent bases to support a traffic stop based upon a damaged brake light. *Lerma*, 2016 S.D. 58 n.2, 884 N.W.2d at n.2.

In *Heien v. North Carolina*, an officer stopped the defendant's vehicle under the mistaken understanding "that a similar North Carolina law required working left and right brake lights." *Lerma*, 2016 S.D. 58, ¶ 5, 884 N.W.2d at 750. The relevant North Carolina code provision required a car only be equipped with one stop lamp, which Heien's vehicle had. *Heien v. North Carolina,* 574 U.S. 54, 135 S.Ct. 530, 534, 190 L.Ed.2d 475 (2014). The Supreme Court upheld the lower court order denying the Motion to Suppress, concluding

> that while the officer's subjective understanding of the brake light statute was mistaken, nevertheless, the initiation of the traffic stop was objectively reasonable.

Id. at 540.

Much like the fact pattern in this case, in *United States v. Johns*, police officers stopped the defendant's vehicle because a rear center

brake light was not working properly. 410 F. App'x 519, 520-21 (3d Cir. 2011). Johns argued the brake light was not only functioning properly, but that a faulty center brake light did not violate any Pennsylvania motor vehicle laws, and therefore, there was no legal justification for the traffic stop. *Id.* at 521. Indeed, no state law required a center brake light at all, much less a fully operable one. *Id.* at 523. However, because other laws require a vehicle's lights to be in working order, because the officer's testimony was credible, and because other case law[5] found that an officer may validly effect a traffic stop when a center brake light is not operational, the United States Court of Appeals affirmed the lower court's denial of the motion to suppress. *Id.* at 522-24. South Dakota precedent mimics this position, as seen in *Lerma*, *Anderson*, *Martin*, *Sanders*, and *Kenyon*.

In addition, this Court has noted SDCL 32-21-27 makes it a misdemeanor to drive a vehicle on a highway "unless the equipment upon the vehicle is in good working order[.]" *Lerma*, 2016 S.D. 58, ¶ 9, 884 N.W.2d at 752; SDCL 32-21-27.[6] As set forth in *Lerma*, "[a] reasonably objective officer is bound by such unqualified statements of law. Therefore, the explicit statements in *Martin, Anderson,* and SDCL

[5] *See Commonwealth v. Muhammed,* 992 A.2d 897, 902–03 (Pa. Super. Ct. 2010)

[6] SDCL 32-21-27. Operation of improperly repaired or adjusted vehicle as misdemeanor. No person shall drive or move on any highway any motor vehicle, unless the equipment upon the vehicle is in good working order and adjustment and the vehicle is in such safe mechanical condition as not to endanger the driver or other occupant or any person upon the highway. A violation of this section is a Class 2 misdemeanor.

32-21–27 must be considered in support of finding it objectively reasonable for an officer to conclude that a nonworking side brake light constitutes a traffic violation sufficient to justify an investigatory stop." *Lerma*, 2016 S.D. 58, ¶ 9, 884 N.W.2d at 752.

Moreover, this Court and the United States Supreme Court have held that a reasonable suspicion can rest on a mistaken understanding of law. *Lerma*, 2016 S.D. 58, ¶ 9, 884 N.W.2d at 752; *Heien,* 574 U.S. 54, 135 S.Ct. at 536. Certainly, the Supreme Court has recognized that searches and seizures based on mistakes of fact and law can be reasonable, specifically ones made for an investigatory stop of a vehicle for a minor traffic violation. *Id.* In such a situation, it is proper to analyze whether Officer McKeon erred so greatly that no objectively reasonable officer might have done the same thing. *Id.* He did not. Substantial precedent and analysis by the trial court supported interpretation of Tenold's traffic violation as Officer McKeon did.

Totality of the Circumstances

This Court emphasizes the importance of viewing all facts that might give an officer a reasonable suspicion to stop a vehicle. This Court "must look at all the facts available to [an officer] at the time the stop was effectuated" to "determine whether reasonable suspicion existed based on the 'totality of the circumstances.'" *State v. Hett,* 2013 S.D. 47, ¶ 18, 834 N.W.2d 317, 323 (quoting *Herren,* 2010 S.D. 101, ¶ 14, 792 N.W.2d at 556). Even if a single instance of a minor traffic

violation "might be deemed insufficient to provide reasonable suspicion to support stopping his vehicle," one must consider "additional evidence in the record to support the stop." *Hett*, 2013 S.D. 47, ¶ 17, 834 N.W.2d at 323. This Court has also held an "officer's observations and experience, the location, and the underlying circumstances need only reasonably support 'a commonsense inference' that additional criminal activity is occurring or about to occur." *Kenyon*, 2002 S.D. 111, ¶ 18, 651 N.W.2d at 274. Again, this Court stated, "[t]he question whether an officer has reasonable suspicion is viewed under the totality of the circumstances." *Chase*, 2018 S.D. 70, ¶ 6, 919 N.W.2d at 209.

This Court recently recognized "considering the whole picture" when reviewing the basis for reasonable suspicion. *Barry*, 2018 S.D. 29, ¶ 23, 910 N.W.2d at 212. When attempting to "separately parse out each of the indicators" to develop reasonable suspicion, "each fact standing alone [may be] insufficient to warrant reasonable suspicion." *Id.* at ¶ 22. However, "the 'totality of the circumstances' requires courts to consider 'the whole picture.'" *Id.*, (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed. 2d 621 (1981)). As this Court noted, "[o]ur precedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation." *Id.* Officers may develop reasonable suspicion based on all factors before them.

This Court has held that details surrounding the stop do not, alone, determine whether reasonable suspicion existed; "[r]ather, the determination of whether reasonable suspicion existed must consider all facts available to [the officer] at the time of the stop, viewed under the totality of the circumstances." *Chase*, 2018 S.D. 70, ¶ 10, 919 N.W.2d at 210. Similarly, the Eighth Circuit Court of Appeals frequently emphasizes consideration of whether there is "no other suspicion of criminal conduct or justification for the stop," *United States v. Walker*, 555 F.3d 716, 720-21 (8th Cir. 2009); *United States v. Wright,* 565 F.2d 486, 489 (8th Cir.1977). After all, "[i]f police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion." *United States v. Hensley*, 469 U.S. 221, 229, 105 S.Ct. 675, 680, 83 L.Ed.2d 604 (1985); *see Chase,* 2018 S.D. 70, ¶ 6, 919 N.W.2d at 209.

Here, Officer McKeon was aware of Tenold's suspected drug activity. A reliable source provided consistent information about the frequent traffic in and out of Tenold's hotel room at all hours of the night. Casino guests complained of being harassed by Tenold and his companion regarding money and drugs. Tenold was driving between his hotel and casinos at 2:39 a.m. After the traffic stop, casino staff suspected exactly who police officers were looking for when they arrived.

Indeed, drugs were located on Tenold's person, and significant drugs and paraphernalia were found in his hotel room. The totality of the information possessed by Officer McKeon prior to the traffic stop supported Officer McKeon's belief that Tenold was using and in possession of illegal drugs, and his findings following the traffic stop were consistent with that knowledge.

While one of these factors alone may have been insufficient to seize Tenold, Officer McKeon undoubtedly knew there was reason to suspect criminal activity when he initiated the traffic stop. For all of these reasons and considering the totality of the circumstances, the trial court did not err in determining Officer McKeon had reasonable suspicion to stop Tenold's vehicle, and the stop was not unreasonable under the Fourth Amendment. *Barry*, 2018 S.D. 29, ¶ 22, 910 N.W.2d at 212.

For the foregoing reasons, the circuit court's Findings of Fact are not clearly erroneous. Therefore, "the officers' actions in this case were objectively reasonable in light of the information they possessed." *State v. Rogers*, 2016 S.D. 83, ¶ 15, 887 N.W.2d 720, 724.

B. THE TRIAL COURT FOUND THERE WAS PROBABLE CAUSE FOR THE ARREST.[7]

Background and Standard of Review

Tenold argues the discovery of the foil ball in Officer McKeon's patrol car did not create probable cause to arrest Tenold for possession

[7] Appellant's Brief Issue (iv.). AB 12.

of methamphetamine. AB 12. Tenold suggests that "any one of hundreds or thousands of unknown persons could have placed a foil ball under [the] seat without Officer McKeon having found it." AB 13. In contrast, in its Findings of Fact, the trial court found that "no one other than Defendant Tenold had been in the vehicle and could have placed the tin foil ball under the seat." SR 207. The trial court then concluded there was a reasonable basis to conclude the foil ball contained methamphetamine, that probable cause existed for the issuance of the search warrant, and accordingly denied Tenold's Motion to Suppress. SR 211, 213.

A trial court's findings of fact from a suppression hearing must be upheld unless they are clearly erroneous. *State v. Pfaff*, 456 N.W.2d 558, 560 (S.D. 1990). Likewise, a trial court's holding on probable cause for a warrantless arrest will not be overturned unless clearly erroneous. *State v. Baysinger,* 470 N.W.2d 840, 843 (S.D. 1991); *United States v. Woolbright*, 831 F.2d 1390 (8th Cir. 1987); *United States v. McGlynn,* 671 F.2d 1140 (8th Cir. 1982). This Court determines "whether the decision of the lower court lacks the support of substantial evidence, evolves from an erroneous view of the applicable law or whether, considering the entire record, there is a definite and firm conviction that a mistake has been made." *Baysinger,* 470 N.W.2d at 843; *State v. Corder,* 460 N.W.2d 733, 737 (S.D. 1990). In doing so, this

Court reviews the evidence in a light most favorable to the trial court's decision. *Id.; State v. Hanson*, 1999 S.D. 9, ¶ 10, 588 N.W.2d 885, 889.

Facts Support Finding of Probable Cause

Tenold denies the foil ball is justification for an arrest because the ball could have been planted. AB 13. Specifically, Tenold suggests Officer McKeon testified he does not look under the seat during his searches of his patrol vehicle. AB 12. However, a closer look at Officer McKeon's testimony reveals he does in fact look under the seats and between seat cushions, viewing under the seat as low as he possibly can. SH 59-60. McKeon had one other subject in his patrol vehicle several hours before Tenold, and he had searched the vehicle immediately after they left. SH 28, 29. There was no foil ball present in the vehicle when Tenold entered it. *Id.*

The trial court set forth in its Findings of Fact:

> 9. Discovered under the seat of the patrol car where Defendant Tenold had been seated, Officer McKeon found a small foil ball with a white crystalline substance coming out of it. No one other than Defendant Tenold had been in the vehicle and could have placed the tin foil ball under the seat.
>
> 10. Officer McKeon went to the police department where he 'field tested' the substance from the foil ball. According to the field test the substance in the foil ball was methamphetamine. [. . .] SR 207.

Tenold suggests "hundreds or thousands of unknown persons" could have placed the foil ball under Officer McKeon's patrol car seat. AB 13. Yet, this statement is entirely speculative. Tenold provides no evidence to substantiate this suggestion, nor any evidence refuting

Officer McKeon's testimony. No one else was in Officer McKeon's patrol vehicle at the time. Tenold's companion was with another officer, in another vehicle. SH 27. No evidence was provided to refute the trial court's finding that "[n]o one other than Defendant Tenold had been in the vehicle and could have placed the tin foil ball under the seat." SR 207.

This Court recently analyzed a similar fact pattern. In *State v. Tordsen*, the defendant was arrested following a stop for a traffic violation. 921 N.W.2d 686, 2018 WL 6428432. Tordsen and an acquaintance were both placed in the back seat of the officer's patrol car. Per protocol, the officer had searched the back seat of his patrol car before that day's shift and after transporting any persons prior to defendant and her acquaintance. After the defendant left the patrol car, the officer found a syringe where the defendant had been seated. The syringe yielded a presumptive positive field test for methamphetamine. Finding the syringe where the defendant had been seated, even with another individual in the back of the patrol car with her, a jury found the defendant guilty of possession of methamphetamine, and the appeal was summarily affirmed. In line with Tenold's fact pattern, no one else had been in the patrol car prior to the defendant. The place where the contraband was found was the same place where the defendant had been seated. Here, when viewed as a whole, the evidence supports the conviction. *See Barry*, 2018 S.D. 29, ¶ 22, 910 N.W.2d at 212.

This Court has held that probable cause for an unwarranted arrest exists when "the facts and circumstances within the arresting officers' knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a belief by a man of reasonable caution that a suspect has committed or is committing an offense." *Baysinger*, 470 N.W.2d at 845. Each fact is not addressed individually, but cumulatively based on the totality of the circumstances. *Id.* at 845-46; *Barry*, 2018 S.D. 29, ¶ 22, 910 N.W.2d at 212. Officer McKeon had substantial information prior to the traffic stop that Tenold was a known user, and possible dealer, of methamphetamine. Given the totality of the information before him, upon finding the foil ball with white crystalline matter that field-tested positive for meth, it is reasonable for Officer McKeon to believe the ball was placed or left there by Tenold, the only individual who had been seated in his patrol car.

Officer McKeon acted properly. He followed protocol and searched his patrol vehicle when Tenold was sent on his way. He discovered a foil ball in his patrol car directly under the seat where Tenold was present. No one else had been seated there, and no foil ball was present before Tenold entered the car. McKeon tested the foil ball for methamphetamine. He received a presumptive positive test result. Given the cumulative information before him, he had probable cause to believe Tenold committed an offense. The trial court did not err in its

conclusion that probable cause existed to arrest Tenold based on the discovery of the foil ball.

C. THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS EVIDENCE DERIVED FROM THE SEARCH OF THE HOTEL ROOM, ISSUED PURSUANT TO A SEARCH WARRANT.[8]

Background and Standard of Review

In his last challenge to the trial court's denial of his Motion to Suppress, Tenold asserts the drugs and paraphernalia found in his hotel room should be suppressed as "fruit of the poisonous tree." AB 13. *See Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Tenold claims the initial traffic stop was unconstitutional, and therefore, the warrant to search Tenold's hotel room should not have been issued. AB 14-15. Because he claims Officer McKeon's traffic stop of Tenold's vehicle constituted illegal government activity, he asserts all evidence must be suppressed. AB 14.

In South Dakota, "[p]olice ordinarily must obtain a warrant based on probable cause and issued by a neutral magistrate before searching or seizing an individual's property." *Wright*, 2010 S.D. 91, ¶ 9, 791 N.W.2d at 794 (citing *State v. DeLaRosa,* 2003 S.D. 18, ¶ 7, 657 N.W.2d 683, 685 (citing *Terry*, 392 U.S. at 20, 88 S.Ct. at 1879). When a defendant seeks to suppress evidence, "[i]t is well settled that the

[8] Appellant's Brief Issue (v.). AB 13.

burden is on the one making the motion to suppress evidence to establish that such evidence was illegally seized." *State v. Heney*, 2013 S.D. 77, ¶ 11, 839 N.W.2d 558, 562.

Additionally, "[w]hen the issue is whether challenged evidence is the fruit of a Fourth Amendment violation, the defendant bears the initial burden of establishing the factual nexus between the constitutional violation and the challenged evidence." *State v. McCahren*, 2016 S.D. 34, ¶ 21, 878 N.W.2d 586, 596; *United States v. Marasco,* 487 F.3d 543, 547 (8th Cir.2007) (citing *Alderman v. United States,* 394 U.S. 165, 183, 89 S.Ct. 961, 972, 22 L.Ed.2d 176 (1969)). This Court has recognized that "[s]uppression is not justified unless the challenged evidence is in some sense the product of illegal governmental activity." *McCahren*, 2016 S.D. 34, ¶ 21, 878 N.W.2d at 596 (quoting *United States v. Crews,* 445 U.S. 463, 471, 100 S.Ct. 1244, 1250, 63 L.Ed.2d 537 (1980)). Tenold must not only show the traffic stop was illegal, but that but for the traffic stop, the drugs and paraphernalia in his hotel room would not have been discovered. *McCahren*, 2016 S.D. 34, ¶ 22, 878 N.W.2d at 596.

Judge Issued Search Warrant Based on Probable Cause

This Court has held, "[t]he Fourth Amendment's prohibition against unreasonable searches generally require searches of persons and places to be authorized by warrant and require such warrants to be based on probable cause to believe that the search will yield contraband

or other evidence of a crime." *State v. Helland*, 2005 S.D. 121, ¶ 14, 707 N.W.2d 262, 268 (citing *State v. Zachodni,* 466 N.W.2d 624, 627 (S.D.1991)). Here, such a warrant was sought and granted. Following Tenold's arrest, Officer McKeon prepared an eight-page affidavit in support of a request to search Tenold's hotel room. SR 29. Judge Strawn, a neutral magistrate, reviewed the affidavit and found probable cause to issue the search warrant. SR 213.

Following multiple hearings on Tenold's Motion to Suppress, review of the entirety of the record, and all evidence before the court, the trial court concluded, "[t]he affidavit establishes that a reasonable and prudent magistrate equipped with the knowledge provided in the affidavit established that methamphetamine would be present in the Defendant's room at the Deadwood Mountain Grand Casino on the date it was served." *Id.* Indeed, such methamphetamine and additional drugs and paraphernalia were found.

Tenold claims Investigator Olson conceded the "information from his tipster alone was insufficient to establish probable cause" for the issuance of a search warrant. AB 14. However, there was no indication the Investigator had insufficient evidence; rather, he merely indicated he lacked time for a deeper investigation at the time he received the tip of Tenold's drug activity. SH 8. He was sensibly making officers aware of the information the department received, and properly advised them they must have some reasonable suspicion or probable cause to make

contact with Tenold and to not act on the tips alone. Considering the reputation Tenold and his companion had made among the hotel and casino guests and staff, the suspicious traffic in and out of their hotel room, and the public offer to sell illegal drugs, further investigation on their prior actions alone may have justified a search warrant. Tenold has not shown that "but for" the initial traffic stop, his hotel room would not have been searched.

Tenold's assertion that there was not probable cause for the warrant authorizing the hotel search differs from his stance at trial. Defense counsel stated on the record, "I'm not saying that the probable cause didn't exist. The jury doesn't even necessarily need to know what probable cause is. All I'm saying is that, from a legal standpoint, yes, there's probable cause. Obviously, the Court ruled on it. Obviously, Judge Strawn signed off on it. There's a legal cause for probable cause, and the warrant and everything, as it sits right now, was done legally." JT3 225. The trial court and State agree that probable, legal cause existed for issuance of the search warrant. Because Tenold has not shown any factual nexus between the legal traffic stop based on reasonable suspicion and the search of the hotel room, suppression of the evidence is not justified.

Conclusion

The trial court reviewed the evidence, held multiple hearings on the suppression motion, and determined in its Findings of Fact and

Conclusions of Law that probable cause existed for the stop, arrest, and search warrant. SR 209-13. When viewing all evidence before the trial court collectively, it shows Tenold knowingly possessed controlled substances. Significant case law supports Officer McKeon's decision to make the traffic stop, and any error was harmless. The State introduced sufficient evidence to prove Tenold possessed and ingested methamphetamine. Considering the reliable tips from numerous individuals about Tenold's drug activity, the discovery of the foil ball, the location of marijuana on his person, the several items of paraphernalia and illegal substances found in his hotel room, and the lab tests confirming his ingestion of methamphetamine, there was sufficient direct and circumstantial evidence to affirm Tenold's guilt.

II

CURRENT LAW PROPERLY ALLOWS AN OBJECTIVELY REASONABLE STOP EVEN IF THE STOP IS PRETEXTUAL.[9]

Background and Standard of Review

Tenold requests this court modify existing law to invalidate pretextual traffic stops. AB 2. He also requests this Court modify existing law and statute to allow a magistrate to review the "totality of the circumstances," and not merely an affidavit, when issuing a search warrant. AB 9. Tenold argues objectively reasonable traffic stops, when officers are aware that other criminal activity may be afoot, are a "strange loophole," allowing police to permit random and fabricated

[9] Appellant's Brief Issue (iii.). AB 8.

intrusions of privacy. AB 10-11. Tenold "merely asks for the recognition of an exception that would allow a neutral and detached magistrate to review the entirety of the record and to make a judicial determination as to whether an investigatory stop was a ruse or a pretext for conducting a criminal investigation, and, if so, to suppress the evidence resulting from such search." AB 11. He contends that a petty traffic offense should not be allowed to justify a traffic stop. AB 10-11.

Pretextual Traffic Stops are Rightfully Lawful

This Court, the Eighth Circuit Court of Appeals, and the United States Supreme Court have long upheld pretextual traffic stops. Indeed, this Court notes that an objectively reasonable stop is not invalidated even if the stop is pretextual. *State v. Overbey*, 2010 S.D. 78, ¶ 18, 790 N.W.2d 35, 41; *State v. Chavez,* 2003 S.D. 93, ¶ 20, 668 N.W.2d 89, 96. As set forth in *United States v. Martin,* "a traffic stop generally must be supported by 'at least a reasonable, articulable suspicion that criminal activity has occurred or is occurring,' and a 'traffic violation—*however minor*—creates probable cause to stop the driver of a vehicle.'" 411 F.3d 998, 1000 (8th Cir.2005) (citing *United States v. Fuse,* 391 F.3d 924, 927 (8th Cir. 2004) (emphasis added). Stated clearly, "[a]n officer has probable cause to conduct a traffic stop when he observes even a minor traffic violation. This is true even if a valid traffic stop is a pretext for other investigation." *United States v. Sallis,* 507 F.3d 646,

649 (8th Cir. 2007); W*hren v. United States*, 517 U.S. 806, 811-812, 116 S. Ct. 1769, 1773, 135 L.Ed.2d 89 (1996).

In fact, such precedent protected Tenold. Officers were instructed not to make an unwarranted seizure of Tenold based solely on the tips Deadwood Police Department received prior to January of 2017. SR 32. Despite receiving reliable information of Tenold's drug activity, law enforcement did not arrest and search him based on that information alone. Investigator Olson was acting prudently when he stated no police officer should make contact with Tenold unless some amount of reasonable suspicion or probable cause exists to do so. *Id.* His explicit instructions were consistent with the law, and protected Tenold from search and seizure until further reasonable suspicion existed.

Tenold also argues that judges should be permitted to assess the "totality of the circumstances" when issuing a search warrant. The doctrine used when issuing a search warrant is well established in case law and in statute. A search warrant is issued based on the facts contained within the four corners of the affidavit. *State v. Gilmore,* 2009 S.D. 11, ¶ 7, 762 N.W.2d 637, 641–42. *See also* SDCL 23A-35-4. The issuing judge must have "at least a substantial basis" for the finding of probable cause. *Gilmore*, 2009 S.D. 11, ¶ 7, 762 N.W.2d at 641-42. The magistrate court is given great deference in its decision. *Id.*

Tenold offers no support for his suggestion that Judge Strawn was not permitted to review sufficient information before issuing the

search warrant. While he suggests Judge Strawn would have supposedly learned of the "blatantly pretextual" nature of the initial traffic stop had the Judge reviewed the entirety of the record, Tenold fails to note that Officer McKeon's lengthy affidavit explicitly shares that pertinent information with the Judge. The affidavit begins with three paragraphs of "Historical Information" detailing the tips received by the police department. SR 31-32. Officer McKeon specifically advises the Judge that he was informed by his superior that he must have reasonable suspicion to stop Tenold's vehicle if spotted. SR 32. Tenold offers no support to suggest the Judge would find anything but more adverse evidence against Tenold had he reviewed additional information outside of the lengthy affidavit prepared for him. Judge Strawn was accurately informed of the reliable tips from numerous individuals about Tenold's drug activity, the discovery of the foil ball, the arrest, and the location of marijuana on his person prior to issuing the search warrant.

Further, this Court upholds the notion that an affidavit in support of a search warrant does not require extreme particularity because, "[s]earch warrants are not directed at persons; they authorize the search of 'places' and the seizure of 'things,' and as a constitutional matter they need not even name the person from whom the things will be seized." *Helland*, 2005 S.D. 121, ¶ 24, 707 N.W.2d at 271 (citing *United States v. Kahn,* 415 U.S. 143, 155, n.15, 94 S.Ct. 977,

984, n.15, 39 L.Ed.2d 225, n.15 (1974)). Officer McKeon's affidavit was exceedingly thorough. Judge Strawn is a "neutral and detached magistrate" capable of reviewing the information before the court in making a judicial determination. AB 11. Hence, the search warrant was properly requested and issued.

Law enforcement officers are rightfully permitted to enforce the law, including petty traffic offenses. Tenold has not proven beyond a reasonable doubt that the laws upholding the issuance of a search warrant violate a state or federal constitutional provision. This case does not justify any modification to long standing precedent in support of law enforcement's duties and the protection of defendant's rights.

CONCLUSION

Based upon the foregoing arguments and authorities, State respectfully requests that Tenold's convictions and sentences be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 8,234 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 9th day of May 2019.

Sarah L. Larson
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this May 9, 2019, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Curtis Tenold* was served via electronic mail upon Nathaniel Nelson at nate@nelsonlawsturgis.com.

Sarah L. Larson
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Supreme Court Appeal No. 28725

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

-vs-

CURTIS TENOLD,

Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE COMER
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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SUPPLEMENTAL TABLE OF AUTHORITIES

Cases

City of Sioux Falls v. Ewoldt, 1997 S.D. 106, 568 N.W.2d 764……...…….. 1

In re Marvin M. Schwan Charitable Found., 2016 S.D. 45, 880 N.W.2d 88……. 2

Hoeft v. South Dakota Bd. of Pardons & Paroles, 2000 SD 88, 613 N.W.2d 61……...… 3

Matter of Revocation of Driver License of Fischer, 395 N.W.2d 598 (S.D. 1986)……... 3

PRELIMINARY STATEMENT

References herein to Appellee the State of South Dakota's brief are designated as "State's Brief" followed by the page number. Tenold relies upon the Jurisdictional Statement, Statement of the Case, Statement of Facts, and Statement of Legal Issues presented in his opening brief.

REPLY

I. The Circuit Court erred when it denied Tenold's Motion to Suppress.

A. Officer McKeon did not observe a violation of SDCL § 32-17-8.1 and thus had no reasonable suspicion to stop Tenold's vehicle.

SDCL 32-17-8.1 provides, in pertinent part, "[e]ach stop lamp shall display a red light . . .[.]" It is undisputed that each stop lamp on Tenold's vehicle displayed a red light. That fact is clearly visible on video. *See Suppression Hearing Gravatt's Exhibit A* (video). However, Officer McKeon testified one of Tenold's brake lights also emitted some white light. To justify Officer McKeon's seizure of Tenold, the State would like this Court to redraft SDCL 32-17-8.1 so it reads, "[e]ach stop lamp shall display [only] a red light . . .[.]" and argues inserting the word "only" into the statutory text is an exercise in reasonable interpretation. *State's Brief* at 13.

However, under this Court's well-settled rules of statutory interpretation, "we may not, under the guise of judicial construction, add modifying words to the statute or change its terms." *City of Sioux Falls v. Ewoldt*, 1997 S.D. 106, ¶ 13, 568 N.W.2d 764, 767 (citation omitted). "Nor will we declare the intent of the statute based on what we thought the Legislature meant to say. We are bound by the actual language of applicable statutes and assume that statutes mean what they say and that the legislators have said

what they meant." *In re Marvin M. Schwan Charitable Found.*, 2016 S.D. 45, ¶ 23, 880 N.W.2d 88, 94 (citations and internal quotations omitted).

First, the State argues Officer McKeon made an on-the-fly, "reasonable interpretation of a confusing statute" when he decided to pull over Tenold. *State's Brief* at 16. However, Officer McKeon's own testimony does not support that claim. Officer McKeon was perfectly candid about why he seized Tenold. Just two days prior, Officer McKeon was instructed, if he was to encounter Tenold during his patrol, he should "develop [his] own reasonable suspicion to stop [him]" to investigate a tipster's allegations that Tenold may be involved in drug activity. *TR Suppression Hearing*, pg. 21 lns. 5-15. On the night Tenold was arrested, Officer McKeon testified he had been on the lookout for Tenold. *Id.* pg. 41 lns. 1-10. Officer McKeon was pulling into the police station when he spotted Tenold's vehicle leaving the Deadwood Mountain Grand. *Id.* pgs. 39-40 lns. 20-9. Upon spotting Tenold, Officer McKeon followed him, began searching for a reason to stop him, seized him, and then immediately began investigating the tipster's allegations—including searching Tenold's car. *See Id.* at 21-22; 41 lns. 1-10.

Second, there is nothing confusing about a statutory requirement that, when one applies one's brakes, "[e]ach stop lamp shall display a red light . . .[.]" The statute is not ambiguous, and the requirement is not confusing to motorists. But, even if it was, the State's proposal to add a modifier to the statutory text so it reads, "[e]ach stop lamp shall display [only] a red light" would create an impractical and absurd result. Anyone who has replaced a light bulb in his or her vehicle knows that the bulb is clear. The light emitting from those bulbs appears colored because it passes through a colored plastic housing to display varying shades of red, white, yellow, orange, and clear. The State's proposed

interpretation of SDCL 32-17-8.1 would require plastic light covers to be manufactured with such precision that only one, pure red light (the legislatures has not yet informed us which frequency(s) are acceptable) is emitted. To enforce the law, law enforcement officers would be required to carry spectrometers with them in their cruisers. The State's proposed interpretation would cause every vehicle on the road to violate SDCL 32-17-8.1 when raindrops refracted the light emitting from brake taillights into colors other than red. This Court "will not construe a statute to arrive at a strained, impractical, or illogical conclusion." *Hoeft v. South Dakota Bd. of Pardons & Paroles*, 2000 SD 88, ¶ 9, 613 N.W.2d 61, 63. "Statutes should be given a sensible, practical and workable construction[.]" *Matter of Revocation of Driver License of Fischer*, 395 N.W.2d 598, 600 (S.D. 1986). A statute that says, essentially, "brake lights must be red," is sensible, practical, and workable. The State's proposal is not.

Even if there was any objective way for this Court to assess the nature of the phantom white light emitting from Tenold's vehicle (which was too subtle to be captured by video), such an occurrence is not a violation of SDCL 32-17-8.1. Accordingly, Officer McKeon had no reasonable suspicion to stop Tenold's vehicle, and any evidence gathered as the result of that seizure should be suppressed.

B. Officer McKeon's seizure of Tenold was not justified under the totality of the circumstances.

If this Court finds Tenold did not violate SDCL 32-17-8.1, the State asks this Court to nevertheless justify Tenold's seizure under the totality of the circumstances. *State's Brief* at 19-22. In support of this argument, the State invokes a tipster's suspicions that Tenold was involved in drug activity as justification for the police stop. *Id.* at 20-22.

The State essentially argues the tipster's allegations alone provided the Deadwood Police Department with more than enough reasonable suspicion to seize Tenold. In response to Tenold's argument that the tipster's information was insufficient to establish probable cause for a search warrant, the State asserts "there was no indication [Investigator Jim Olson] had insufficient evidence [to establish probable cause]; rather he merely indicated he lacked time for a deeper investigation at the time he received the tip[.]" *Id.* at 29. Once again, the State's argument is in direct conflict with the testimony of its own witnesses. Both Investigator Jim Olson and Officer McKeon expressly acknowledged the Deadwood Police Department lacked reasonable suspicion to stop Tenold based on the tip. Officer McKeon testified, "the claims of methamphetamine dealings had not been substantiated enough to develop probable cause to go seek out Mr. Tenold . . . on those charges." *TR Suppression Hearing*, pg. 21 lns. 19-25. Investigator Olson testified at the time he received the tip, he "did not have enough time to investigate the issue on my own and create my own reasonable suspicion or probable cause to conduct any further investigation on it." *Id.* pg. 8 lns. 8-14.

Even if the State's argument was supported by the evidence, the State argues Officer McKeon's "findings following the traffic stop" justify the stop. *State's Brief* at 22. Obviously, probable cause to conduct a traffic stop cannot be acquired after the stop. *See generally U.S. Const. amend. IV; S.D. Const. art. VI, § 11.* Officer McKeon's seizure of Tenold cannot be justified under the totality of the circumstances.

C. Officer McKeon's discovery of the foil ball, without more, did not provide probable cause to arrest Tenold for possession of methamphetamine.

Even though Officer McKeon's seizure and subsequent search of Tenold produced no evidence of criminal wrongdoing, Officer McKeon arrested Tenold for possession of methamphetamine after Officer McKeon found a foil ball under the passenger seat of his patrol car (where Tenold had been seated), which field-tested positive for methamphetamine. *TR Suppression Hearing*, pg. 31. (A laboratory analysis of the foil ball would later come back negative for methamphetamine). After he arrested Tenold, Officer McKeon applied for and received a warrant to search Tenold's hotel room based upon the presence of the foil ball and a small amount of marijuana discovered on Tenold's person during his arrest. *Id.*

In his opening brief, Tenold's argues Officer McKeon's searches under the passenger seat of his patrol car are not thorough. The State's responds that Officer McKeon looks "under the seat as low as he possibly can." *State's Brief* at 24. Officer McKeon explained he, "can't get low enough to see under the seat." *TR Suppression Hearing*, pg. 60 lns. 8-9. A person cannot perform a thorough search of the underside of a car seat if he can neither see nor feel under the seat. *Id*. 12-13. Officer McKeon conceded as much:

> Q: So it's possible that someone could have stuffed something in that seat months or years ago; correct?
>
> A: Yes.

Id. pg. 60 lns. 19-21. The trial court's conclusion that "no one other than Defendant Tenold . . . could have placed the tin foil ball under the seat" is clearly erroneous considering Officer McKeon's testimony. Officer McKeon discovered the foil ball as the direct result of an unlawful traffic stop. But, even if the stop

was lawful, Officer McKeon admitted that anyone could have stuffed a foil ball in his seat months or even years ago. Both Investigator Olson and Officer McKeon admitted, before Officer McKeon seized Tenold, the Deadwood Police Department lacked the reasonable suspicion to even stop Tenold—much less the probable cause necessary to search his hotel room. As probable cause for the search warrant, Officer McKeon's affidavit recited only the tipster's allegations, the foil ball, and the small amount of marijuana found on Tenold's person when he was arrested. The warrant to search Tenold's hotel room was based entirely on the tipster's allegations and unreliable evidence discovered after an unlawful traffic stop. Accordingly, such evidence must be suppressed.

D. Officer McKeon's seizure of Tenold was so blatantly pretextual that it violated Tenold's constitutional rights to be free from unreasonable search and seizure under Article VI, Section 11 of the South Dakota Constitution.

The State claims Tenold "requests this Court modify existing law and statute to allow a magistrate to review the "totality of the circumstances," and not merely an affidavit, when issuing a search warrant." *State's Brief* at 31. The State further claims "Tenold also argues that judges should be permitted to assess the "totality of the circumstances" when issuing warrants." *Id*. at 33. Tenold makes no such request and is unsure how the State made such an inference. Tenold's request for the adoption of a new rule relating to pretextual stops has nothing to do with the warrant issued to search his hotel room. Tenold is not arguing a judge needs to review anything other than an affidavit of probable cause before issuing a warrant.

Instead, Tenold argues the conduct of the Deadwood Police Department in this case cries out for the recognition of an exception to the rule that an objectively reasonable *Terry* stop will not be invalidated even if the stop was pretextual. Such an exception would allow a neutral and detached magistrate to review the totality of the circumstances behind the stop, and if it is determined the stop was conducted solely as a ruse or pretext for the purposes of conducting an unrelated criminal investigation, to suppress any evidence resulting from the pretextual stop.

In this case, the traffic stop performed by Officer McKeon, by his own admission, was motivated entirely by the Deadwood Police Department's desire to conduct a drug investigation which it lacked probable cause to otherwise conduct. Here, the underlying infraction was a petty offense. Tenold was not even issued a citation. The purported offense was not visible to anyone but Officer McKeon and was allegedly so subtle that it could not be captured by state-of-the-art video equipment—thus entirely evading judicial review.

South Dakota should again recognize and uphold the higher standard of protection provided to individual liberties under the South Dakota Constitution than the United States Constitution and follow the leads of the other States who hold pretextual stops unconstitutional on state grounds.

CONCLUSION

The warrant to search Tenold's hotel room was based on facts gathered as the result of Officer McKeon's initial traffic stop, which was conducted in violation of Tenold's constitutional rights to be free from unreasonable search and seizure. As such, but for the evidence uncovered during Officer McKeon's investigatory stop, the warrant

to search the hotel room would not have issued.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), the undersigned hereby certifies this brief complies with the requirements set forth in South Dakota Codified Law. This brief was prepared using Microsoft Word for Office 365, Times New Roman (12 point) and contains 2,011 words, excluding the certificates of counsel. I have relied on Microsoft Word's word counts to prepare this certificate.

Dated this 24th day of May, 2019.

/s/ Nathaniel Forrest Nelson
Nathaniel Forrest Nelson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of May, 2019, a true and correct copy of Appellant's Reply Brief was served via electronic mail upon:

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