STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC **SUPERIOR COURT**

(FILED: July 21, 2016)

STATE OF RHODE ISLAND	:	
	:	
v.	:	**No. K2-2015-0787A**
	:	
JOSE CABRERA	:	

DECISION

STERN, J. Before the Court is Jose Cabrera's (Defendant) Motion to Suppress Tangible Evidence (the Motion). Defendant argues that the 1100 oxycodone pills found in his car should be excluded from evidence because the search of his motor vehicle was unconstitutional as it was not supported by probable cause. Conversely, the State of Rhode Island (the State) objects to the Motion, maintaining that the search of Defendant's motor vehicle was supported by probable cause and thus constitutional. Jurisdiction is pursuant to G.L. 1956 § 8-2-15. For the following reasons, the Court denies the Motion.

I

Facts[1] and Travel

On October 7, 2015, Trooper Garrett Hassett (Trooper Hassett) of the Rhode Island State Police (RISP) was patrolling Route 95 near Exit 5 and the Austin Farm turnaround. Trooper Hassett is a five-year veteran of the RISP and a member of the Domestic Highway Enforcement Team (DHET). As a member of the DHET, Trooper Hassett has received training to identify criminal activity in automobiles. The training informed Trooper Hassett of certain indicia of

[1] The following facts are taken from testimony at a hearing on the Motion that was conducted on June 23, 2016.

criminal activity in a motor vehicle stop, such as using cover scents and sympathetic statements, having unrealistic travel plans, and being untruthful, among others.

During Trooper Hassett's patrol, he observed a black vehicle (the Vehicle) bearing Massachusetts license plates, following a semi-truck car carrier. The Vehicle was traveling in the northbound direction in the travel lane furthest to the right and following the car carrier too closely, only being one-half of a car length behind it. As a result, Trooper Hassett followed the Vehicle for half of a mile, during which time he observed that another RISP Trooper had initiated a traffic stop ahead of himself and the Vehicle. Trooper Hassett increased the distance between his police cruiser and the Vehicle to give the Vehicle ample room to move over to the left travel lane, away from the traffic stop, in conformance with Rhode Island's new "Move Over" law[2]; however, the Vehicle did not move to the left travel lane. Accordingly, Trooper Hassett initiated a traffic stop of the Vehicle.

After approaching the Vehicle, Trooper Hassett observed that Defendant was the driver and there were no passengers. Trooper Hassett asked Defendant to provide his license, registration, and proof of insurance, and questioned Defendant about his travel plans. Defendant indicated that he was coming from the Bronx, New York, where he spent the night visiting his father, who was sick. At this time, Trooper Hassett noticed an odor of marijuana emanating from the Vehicle and asked Defendant if he had smoked marijuana, to which Defendant responded that he had smoked one hour before. At this time, Defendant handed Trooper Hassett a small amount of marijuana and a half-smoked joint.[3] Trooper Hassett asked Defendant if he had ever been arrested before, and Defendant stated that he had been arrested in 2001 by the Drug Enforcement Administration (DEA) for a conspiracy drug charge. In making a cursory

[2] The "Move Over" law is codified at G.L. 1956 § 31-14-3.
[3] A "joint" is a term commonly used to refer to a marijuana cigarette.

glance around the passenger compartment of the Vehicle, Trooper Hassett observed, in plain view, a magazine on the passenger seat of the Vehicle with what he identified as a marijuana grow lamp on the front cover. Trooper Hassett indicated that his interaction with Defendant was normal—while he sensed that Defendant was slightly nervous, he stated that such a reaction was common among the majority of people who are pulled over by police. Trooper Hassett reported back to his police cruiser to check Defendant's license, registration, and to run a background check. The background check revealed that Defendant had also been arrested in 2009 by the Massachusetts State Police for possession of cocaine.

About fifteen minutes into the traffic stop, Trooper Hassett returned to the Vehicle and asked Defendant to step out of the Vehicle so that they could talk. After Defendant exited the Vehicle, Trooper Hassett asked Defendant to submit to a field sobriety test because he noticed that Defendant's eyes were bloodshot and watery. Defendant obliged and passed the three field sobriety tests that were administered. Trooper Hassett asked Defendant why he had not told him about the 2009 Massachusetts arrest, and Defendant responded that he was nervous and that he had forgotten about it. At this time, Defendant's nervousness had increased exponentially. Despite it being only seventy degrees, Trooper Hassett observed that Defendant was perspiring at an excessive rate; so much so that Defendant used the bottom of his shirt to wipe the sweat from his forehead and face. When Defendant picked up the bottom of his shirt to wipe his face, Trooper Hassett observed that Defendant's abdomen was also covered in sweat. Trooper Hassett stated that this was the most nervous and the most he has seen anyone perspire in his five years of service with the RISP. Subsequently, Trooper Hassett indicated to Defendant that he was going to search the Vehicle, at which time Defendant's knees buckled and he fell to the ground, having apparently fainted. Trooper Hassett and two other members of the RISP who were on

scene helped Defendant to his feet, and told him to sit on the push bumper of Trooper Hassett's police cruiser while Trooper Hassett conducted a search of the Vehicle.

During Trooper Hassett's search of the Vehicle, he observed, in plain view, a Marmot backpack in the back seat. He opened the backpack and found a black plastic bag. Upon opening the black plastic bag, Trooper Hassett found eleven separate clear bags containing a total of 1100 oxycodone pills, which have a street value of roughly $33,000. Trooper Hassett arrested Defendant on drug charges and also issued Defendant two civil citations.

On December 24, 2015, the State filed a criminal information charging Defendant with (1) possession and intent to deliver a controlled substance in violation of § 21-28-4.01(a)(4)(i) of our general laws, and (2) operating a motor vehicle while knowingly having in the motor vehicle a controlled substance, in violation of § 31-27-2.4 of our general laws. On January 15, 2016, Defendant was arraigned and pled not guilty to the above charges. After several conferences with the Court, Defendant filed the Motion arguing that the 1100 oxycodone pills should be suppressed because they were obtained during an unconstitutional search.

II

Standard of Review

Defendant brings the instant motion pursuant to Super. R. Crim. P. 41(f); therefore, at a suppression hearing, the State bears the burden of establishing that the evidence is admissible "by a fair preponderance of the evidence." State v. O'Dell, 576 A.2d 425, 427 (R.I. 1990) (citing United States v. Matlock, 415 U.S. 164, 177-78 n.14 (1974)); see also State v. Tavarez, 572 A.2d 276, 279 (R.I. 1990).

III

Analysis

Defendant avers that the 1100 oxycodone pills should be suppressed because Trooper Hassett's search of the Vehicle was unconstitutional as it violated the Fourth Amendment of the United State Constitution and article I, section 6 of the Rhode Island Constitution. Specifically, Defendant argues that the odor of marijuana and his possession of a noncriminal amount of marijuana cannot constitute probable cause to search the Vehicle. Conversely, the State maintains that probable cause existed that contraband was in the Vehicle; therefore, the search of the Vehicle was constitutional pursuant to the "automobile exception" to the Fourth Amendment's warrant requirement.[4]

A

The Automobile Exception and Contraband

"The Fourth Amendment to the United States Constitution, as well as article I, section 6, of the Rhode Island Constitution, protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" State v. Werner, 615 A.2d 1010, 1011 (R.I. 1992). "The United States Supreme Court has used this language to establish the bright-line principle that states that searches conducted without 'prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" Id. (citing Katz v. United States, 389 U.S. 347, 357 (1967)).

One such exception is the "automobile exception," which was created by the Supreme Court of the United States in Carroll v. United States. See 267 U.S. 132, 153-54 (1925). The

[4] Both Defendant and the State agree that the "automobile exception" is the applicable exception to the warrant requirement given the facts of the instant matter.

rationale behind the automobile exception is that the inherent mobility of an automobile creates an exigency that makes obtaining a warrant impractical. See id. "The automobile exception allows police officers to search automobiles and containers therein without a warrant when they have probable cause to believe that they hold contraband or evidence of a crime . . ." State v. Santos, 64 A.3d 314, 319 (R.I. 2013); see Werner, 615 A.2d at 1013-14 ("As long as the police have probable cause to believe that an automobile, or a container located therein, holds contraband or evidence of a crime, then police may conduct a warrantless search of the vehicle or container, even if the vehicle has lost its mobility and is in police custody."). Therefore, a police officer can search an automobile if he or she has probable cause to believe that the car holds either (1) contraband or (2) evidence of a crime. Accordingly, as a prerequisite, the Court must determine what constitutes "contraband" or "evidence of a crime" before ruling on whether Trooper Hassett had probable cause to search for either.

The term "evidence of a crime" is relatively straightforward. However, "contraband," unlike "evidence of a crime," is more of an amorphous and pliable term. "Though some articles such as counterfeit money, narcotics, or dangerous weapons are contraband by their very nature [("contraband per se")], other articles, such as large sums of money, acquire that status only if their possession or receipt is substantially and instrumentally related to illegal behavior [("derivative contraband")]." United States v. Jenison, 484 F. Supp. 747, 753 (D.R.I. 1980); see also contraband, Black's Law Dictionary, 341(8th ed. 2004). While the concepts of "contraband per se" and "derivative contraband" allow for judicial interpretation of a causal connection between the item and criminal activity, the statutory definition of "contraband" is much more straightforward. In the purview of drug investigations and enforcement, contraband includes "[a]ll controlled substances, which may be handled, sold, possessed, or distributed in violation of

any of the provisions of [the Uniform Controlled Substances Act of Rhode Island (UCSA)]." Sec. 21-28-5.06. A controlled substance under the UCSA is "a drug, substance, immediate precursor, or synthetic drug in schedules I [through] V" as categorized by the UCSA. Sec. 21-28-1.02(7). Notable controlled substances under the UCSA include opium, oxycodone, heroin, and marijuana. See § 21-28-2.08.

Although marijuana remains a controlled substance, and thus contraband, possession of less than an ounce of marijuana has been decriminalized by § 21-28-4.01(c)(2)(iii) (the Decriminalization Statute). The Decriminalization Statute provides the following:

> "Notwithstanding any public, special, or general law to the contrary, the possession of one ounce (1 oz.) or less of marijuana by a person who is eighteen (18) years of age or older and who is not exempted from penalties pursuant to chapter 28.6 of this title shall constitute a civil offense, rendering the offender liable to a civil penalty in the amount of one hundred fifty dollars ($150) and forfeiture of the marijuana, but not to any other form of criminal or civil punishment or disqualification. Notwithstanding any public, special, or general law to the contrary, this civil penalty of one hundred fifty dollars ($150) and forfeiture of the marijuana shall apply if the offense is the first (1st) or second (2nd) violation within the previous eighteen (18) months." Sec. 21-28-4.01(c)(2)(iii).

The Decriminalization Statute, however, does not remove marijuana's contraband status as it does not deschedule marijuana as a controlled substance, regardless of its quantity. See id. In addressing the interplay between decriminalization of a scheduled drug, the Massachusetts Supreme Judicial Court (SJC), in Commonwealth v. Cruz, discussed infra, noted that "decriminalization is not synonymous with legalization." 945 N.E.2d 899, 911 (Mass. 2011). In fact, the Cruz court concluded that "[b]ecause marijuana remains unlawful to possess, any amount of marijuana is considered contraband." Id.

Therefore, the Decriminalization Statute does not legalize marijuana; it merely changes the penalties associated with the illegal possession of marijuana. See § 21-28-4.01(c)(2)(iii). Despite its decriminalization, marijuana is unlawful to possess as it remains a controlled substance. See §§ 21-28-4.01(c)(1); 21-28-1.02(7). A plain reading of the UCSA and Decriminalization Statute evidences a legislative intent to reduce criminal liability to the person in possession of the marijuana, while nonetheless keeping marijuana a controlled substance that is subject to seizure and confiscation by law enforcement, regardless of its quantity. See §§ 21-28-4.01(c)(2)(iii); 21-28-5.06 ("All controlled substances . . . shall be subject to seizure and confiscation by any state or local officer whose duty it is to enforce the laws of this state relating to controlled substances."). Accordingly, the Court must construe the Decriminalization Statute to give effect to that intent. See Kaya v. Partington, 681 A.2d 256, 260 (R.I. 1996) (holding that it is a court's obligation "to ascertain the intent behind [the] legislative enactment and to give effect to that intent") (internal quotation marks omitted).

Here, despite its decriminalization, marijuana remains a "controlled substance" and thus "contraband." See §§ 21-28-5.06; 21-28-1.02(7); 21-28-2.08(d)(10). Accordingly, Trooper Hassett, pursuant to the automobile exception, had the ability to search the Vehicle for marijuana, or other controlled substances, so long as he had probable cause to believe that marijuana or other controlled substances were in the Vehicle.[5] See Santos, 64 A.3d at 319; Werner, 615 A.2d at 1013-14. Simply because Defendant forfeited a small amount of marijuana to Trooper Hassett does not mean that Trooper Hassett's investigation for further—even noncriminal—amounts of marijuana should have ceased; marijuana, regardless of quantity and attendant penalties, is subject to forfeiture. See §§ 21-28-4.01(c)(2)(iii); 21-28-5.06. Trooper

[5] A determination of probable cause will be discussed infra, § III(A)(1).

Hassett, if he established probable cause that the Vehicle held additional marijuana or controlled substances, acted within the limitations of the United States and Rhode Island constitutions, while also advancing the intent and purpose of the UCSA.

The Court finds that an alternative ruling would be to construe the UCSA and the Decriminalization Statute in an absurd manner in the face of its plain meaning. See Kaya, 681 A.2d at 261 (courts will not construe a meaning of a statute to "reach an absurd result"). To suggest that law enforcement cannot continue to investigate for noncriminal amounts of marijuana for the purposes of seizing such marijuana results in an irrational reading of a statute that requires forfeiture and seizure of such drugs, regardless of whether the penalty for possessing those drugs is criminal or civil. See §§ 21-28-4.01(c)(2)(iii); 21-28-5.06; Kaya, 681 A.2d at 261. For instance, after forfeiting a small amount of marijuana and a joint, a driver of a vehicle could indicate that no other marijuana was in the car, despite having several other joints hidden somewhere in the car. To suggest that a police officer, who has probable cause to believe that additional marijuana is in the car, should not be able to search the car for the marijuana because he does not have probable cause that the amount of marijuana is criminal would contradict the intent and purpose of the UCSA and Decriminalization Statute. See §§ 21-28-4.01(c)(2)(iii); 21-28-5.06. Rather, a plain reading of the UCSA reveals that if a police officer has probable cause to believe that additional marijuana is present in the car, there is nothing that prevents him or her from searching the car and seizing the additional marijuana while not sanctioning the driver with criminal penalties. See §§ 21-28-4.01(c)(2)(iii); 21-28-5.06. The end result is consistent with the intent and purpose of the UCSA and Decriminalization Statute: the driver is not subject to criminal penalties and controlled substances are seized and forfeited as contraband. See §§ 21-28-4.01(c)(2)(iii); 21-28-5.06.

The Court recognizes that this logic was not followed by the SJC; however, there are several factors that the SJC relied upon that are not present here in Rhode Island. See Commonwealth v. Pacheco, 985 N.E.2d 839, 843 (Mass. 2013); Cruz, 945 N.E.2d at 909-10. For instance, the SJC stated that police, as a policy issue, should not be worried by or investigate small quantities of marijuana or contraband. See Pacheco, 985 N.E.2d at 843; Cruz, 945 N.E.2d at 909-10. However, the SJC did not simply announce that policy; the voters of Massachusetts did by a referendum. See Cruz, 945 N.E.2d at 909-10. "The ballot question was a law proposed by initiative petition, one of four ways the Massachusetts Constitution permits individuals to directly affect the State laws." Id. at 909 n.19. The Massachusetts Constitution permits such action to "allow the people to enact laws directly without being thwarted by an unresponsive Legislature." Id. (internal citations omitted). While there were pros and cons to the decriminalization of marijuana, the SJC noted that the voters' intention was clear: "possession of one ounce or less of marijuana should not be considered a serious infraction worthy of criminal sanction." Id. at 909. Therefore, SJC concluded that its "analysis must give effect to the clear intent of the people of the Commonwealth," and it held that the investigation of marijuana should only be reserved for the instance in which the search or investigation would yield a criminal amount of marijuana. Id. at 905-09. However, Rhode Island has yet to make such a policy determination either by the legislature or through its citizens. There is nothing in Rhode Island law to suggest that its government or its citizens are not interested in investigating small amounts of marijuana. In fact, as aforementioned, it appears quite the opposite, as marijuana under an ounce remains subject to forfeiture and seizure. See § 21-28-5.06. The Court does not believe it is its place to determine drug investigation policies without affirmative findings from the government or the state's citizens. Accordingly, the Court interprets the Decriminalization

Statute by its plain meaning and construes it to give effect to its meaning and intentions, which is to prevent criminal charges for less than an ounce of marijuana, while subjecting marijuana to forfeiture and seizure. See §§ 21-28-4.01(c)(2)(iii); 21-28-5.06. However, pursuant to the automobile exception to the warrant requirement, such forfeiture and seizure is still limited by a requisite finding of probable cause. See Santos, 64 A.3d at 319; Werner, 615 A.2d at 1013-14; infra § III(A)(1).

1

Probable Cause to Search for Contraband or Evidence of a Crime

After determining that marijuana is "contraband"—and thus may be searched for regardless of its quantity—the Court turns to a determination of what amounts to probable cause to believe that such "contraband" is in a motor vehicle. Defendant argues that Trooper Hassett did not have probable cause to search the Vehicle. Specifically, Defendant argues that the smell of marijuana originating from Defendant's car and Defendant's possession of a noncriminal amount of marijuana and a half-smoked joint does not give rise to probable cause because possession of less than one ounce of marijuana has been decriminalized and is only civil in nature. On the other hand, the State argues that other factors, in addition to the smell and possession of marijuana, were sufficient to establish probable cause to search the Vehicle. Additionally, the State argues that several statutes charge police officers with the duty to investigate controlled substances, whether or not they are criminal, because despite their noncriminal status, they are nonetheless contraband.

"Probable cause for a warrantless search 'exists where the facts and circumstances within [an officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has

been or is being committed." State v. DeLaurier, 533 A.2d 1167, 1170 (R.I. 1987) (citing Brinegar v. United States, 338 U.S. 160, 175-76 (1949)). Our Supreme Court has held that a determination of probable cause is to be approached with "common sense," and has clarified that the quantum of proof necessary to find probable cause is dissimilar to the proof necessary to convict. State v. Spaziano, 685 A.2d 1068, 1069 (R.I. 1996). Specifically, the Supreme Court held that in a probable cause analysis "[p]robability of criminal activity is the benchmark." Id.; see also State v. Storey, 8 A.3d 454, 462 (R.I. 2010) (employing a "fair probability" standard). Further, the Supreme Court has instructed that a court should consider the "totality of the circumstances." Id. at 465.

In employing the totality of the circumstances test, "[t]he personal knowledge and experience of the officers are important factors that may allow an officer reasonably to infer from observation of otherwise innocuous conduct that criminal activity is imminent or is taking place." State v. Halstead, 414 A.2d 1138, 1148-49 (R.I. 1980). Such effect is given to the training and experience of police officers because "[a]lthough each piece of information may not alone be sufficient to establish probable cause and some of the information may have an innocent explanation, 'probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers.'" Storey, 8 A.3d at 462 (quoting State v. Schmalz, 744 N.W.2d 734, 738 (N.D. 2008)). Accordingly, a probable cause determination is made on "the mosaic of facts and circumstances . . . viewed cumulatively 'as through the eyes of a reasonable and cautious police officer on the scene, guided by his or her experience and training.'" State v. Guzman, 752 A.2d 1, 4 (R.I. 2000) (quoting In re Armand, 454 A.2d 1216, 1218 (R.I. 1983)); see also Commonwealth v. Hernandez, 863 N.E.2d 930, 935 (Mass. 2007) ("court evaluates 'the whole silent movie'

disclosed to the eyes of an experienced [police officer] when determining existence of probable cause").

Our Supreme Court has made a myriad of rulings on other factors and facts to consider in conjunction with an officer's experience in analyzing whether the officer had probable cause to search; it has yet to be confronted with the question of whether the odor and possession of a noncriminal amount of marijuana constitutes probable cause to search a motor vehicle. However, Massachusetts, which has also decriminalized marijuana, has had occasion to address whether the odor or possession of marijuana amounts to probable cause to search a motor vehicle. See Commonwealth v. Fontaine, 3 N.E.3d 82, 89 (Mass. 2014); Commonwealth v. Daniel, 985 N.E.2d 843, 848-49 (Mass. 2013); Pacheco, 985 N.E.2d at 842-43; Cruz, 945 N.E.2d at 908-09. After the decriminalization of marijuana, the SJC, in Commonwealth v. Cruz, held that the mere odor of burnt marijuana could not give rise to a reasonable suspicion that criminal activity is afoot, because there were no other factors in the record that indicated that the defendant possessed a criminal amount of marijuana. 945 N.E.2d at 908. The SJC held that the police would need certain "[a]rticulable facts . . . [to] demonstrate a suspicion that the defendant possessed more than one ounce of marijuana, because possession of one ounce or less of marijuana is not a crime." Id. However, the SJC explained that the odor of marijuana in conjunction with other factors could possibly give the police reasonable suspicion or probable cause that the defendant possessed a criminal amount of marijuana. Id. For example, there could have existed certain facts demonstrating reasonable suspicion that the defendant was "selling, manufacturing or trafficking" marijuana. Id. at n.14. Further, evidence of a scale, plastic baggies, or any other drug paraphernalia traditionally associated with the sale of marijuana may have yielded a conclusion by the police that the defendant possessed a criminal

amount of marijuana. Id. at n.15. However, because none of these additional factors was present, the SJC held that the police officers did not have a reasonable suspicion that criminal activity was taking place. Id.

The Cruz decision was subsequently reaffirmed by Pacheco and Daniel, in each of which police officers relied upon the odor and possession of a noncriminal amount of marijuana alone to establish probable cause to search automobiles. See Daniel, 985 N.E.2d at 848-49; Pacheco, 985 N.E.2d at 842-43. In Daniel, the SJC held that a police officer did not have probable cause to conduct a warrantless search of a vehicle following a traffic stop when the officer smelled freshly burned marijuana, and the driver forfeited to the officer two small bags of marijuana. 985 N.E.2d at 848-49. The SJC reasoned that there were no facts supporting a belief that a criminal amount of marijuana was in the vehicle. Id. at 849. Similar, in Pacheco, the SJC held that a police officer lacked probable cause to conduct a warrantless search of a car based on the facts that he smelled freshly burned marijuana, the occupants of the vehicle admitted to smoking marijuana, and one occupant of the vehicle had a small bag of marijuana on the floor. 985 N.E.2d at 842-43. The SJC concluded that "[a]bsent articulable facts supporting a belief that [any occupant of the vehicle] possessed a criminal amount of marijuana, the search was not justified by the need to search for contraband." Id. at 843 (citing Daniel, 985 N.E.2d at 849).

However, most recently, in Fontaine, the SJC found that probable cause existed "when an experienced police officer detects an 'overwhelming' odor of unburnt marijuana that is 'pervasive' throughout the entire vehicle, and the officer reasonably believes it is inconsistent with the small quantity of marijuana that is visible in the vehicle, the officer has specific and articulable facts that support a reasonable suspicion that a crime is being committed." 3 N.E.3d at 89. Additional facts included

> "the absence of any implements for smoking marijuana, the three sizable bundles of United States currency, the excess wiring under the dashboard and throughout the passenger compartment consistent with hides, the manner in which the marijuana in the small bag in the console was packaged, the inconsistency between the strength of the odor and the amount in the small bag, and the fact that the two occupants had prior criminal convictions of drug offenses . . ." Id.

A close reading of Cruz, Pacheco, Daniel, and Fontaine reveals that the SJC's holdings that the odor and possession of a noncriminal amount of marijuana cannot give rise to probable cause are limited to those situations in which police rely solely on the odor or possession of a noncriminal amount of marijuana. See Daniel, 985 N.E.2d at 848-49; Pacheco, 985 N.E.2d at 842-43; Cruz, 945 N.E.2d at 908. However, from the SJC's ruling in Fontaine, it is apparent that possession of a noncriminal amount of marijuana, or the odor of burnt marijuana, can be a part of a probable cause determination when accompanied by other articulable facts. See 3 N.E.3d at 89. While the mere odor or possession of marijuana may alone be insufficient to establish probable cause, that does not mean that such odor or possession cannot be considered in a probable cause analysis; after all, "[o]nce in the process of making a valid stop for a traffic violation, officers are not required to 'ignore what [they] see[ ], smell[ ] or hear[ ].'" Cruz, 945 N.E.2d at 906 (quoting Commonwealth v. Bartlett, 671 N.E.2d 515, 517 (Mass. 1996)).

Notably, a police officer's probable cause analysis can be further "buttressed" by observations of a suspect's demeanor. State v. Flores, 996 A.2d 156, 164 (R.I. 2010). "Although a suspect's apparent nervousness alone cannot elevate reasonable suspicion to the level of probable cause, a police officer may consider the suspect's demeanor upon encountering the police, including any observed nervousness, as one factor within the officer's probable-cause calculus." Guzman, 752 A.2d at 4; see Flores, 996 A.2d at 164.

Here, the Court finds that Trooper Hassett had two separate bases to find probable cause to search the Vehicle: (1) probable cause that the Vehicle contained additional contraband, including noncriminal amounts of marijuana; and (2) probable cause that Defendant was engaging in criminal activity, specifically trafficking of controlled substances. Both probable cause determinations are supported by the same articulable facts. These articulable facts include that Defendant admitted to smoking marijuana, had possession of marijuana and a half-smoked joint, and admitted that he had been under investigation by the DEA for a drug conspiracy charge. See Cruz, 945 N.E.2d at 908-09 (while odor and possession of a noncriminal amount of marijuana is alone insufficient for probable cause, it may be considered along with other factors to establish probable cause); see also Fontaine, 3 N.E.3d at 89 (prior drug convictions may be used in probable cause analysis). Further, Trooper Hassett observed a magazine in plain view with what he identified as a marijuana grow lamp on the front cover. Defendant was also not truthful as to his 2009 arrest by the Massachusetts State Police and became nervous when he was asked to step out of the Vehicle. See Fontaine, 3 N.E.3d at 89; see also Flores, 996 A.2d at 164; Guzman, 752 A.2d at 4. In his nervousness, Defendant lacked eye contact and was sweating profusely, so much so that Trooper Hassett commented that it was the most he has ever seen anyone perspire in his five years with the RISP. See Flores, 996 A.2d at 164; Guzman, 752 A.2d at 4. In fact, Defendant was so nervous that after being informed that Trooper Hassett was going to search the Vehicle, his knees buckled as he had apparently fainted. See Flores, 996 A.2d at 164. Furthermore, Defendant voluntarily told Trooper Hassett that he had made a one-day trip to the Bronx, New York, but had no overnight bag or luggage with him, and made several "sympathetic" comments, both of which are indicative of criminal activity according to Trooper

Hassett's experience and training.[6] See Guzman, 752 A.2d at 4 (probable cause is "viewed cumulatively as through the eyes of a reasonable and cautious police officer on the scene, guided by his or her experience or training") (internal quotations omitted).

The totality of the aforementioned facts—specifically, that Defendant had prior drug charges, was not truthful, possessed and smoked marijuana, and fainted after being informed that Trooper Hassett was going to search the car—in conjunction with Trooper Hassett's experience and training, would warrant a reasonable man to believe that criminal activity was probable. See Spaziano, 685 A.2d at 1069; DeLaurier, 553 A.2d at 1170. Specifically, a probability that the Vehicle contained more contraband, whether it be an additional noncriminal amount of marijuana or other controlled substances. See Storey, 8 A.3d at 462; Spaziano, 685 A.2d at 1069 ("[p]robability of criminal activity is the benchmark"); see also § 21-28-5.06 (controlled substances are contraband and subject to seizure). Any controlled substance, including a noncriminal amount of marijuana, may be searched for pursuant to the automobile exception. See Santos, 64 A.3d at 319; Werner, 615 A.2d at 1013-14; see also § 21-28-5.06 (controlled substances are contraband and subject to seizure); § 21-28-2.08(d)(10) (marijuana is a controlled substance). The above facts, in conjunction with the fact that Defendant volunteered that he had made a one-day trip to the Bronx, also establish a probability that Defendant was engaged in drug trafficking. His nervousness most importantly showed that he had something to hide; something in the Vehicle that could give rise to serious penalties. See Flores, 996 A.2d at 164. Simply, his behavior was not consistent with the behavior of someone who had nothing to hide

[6] Defendant indicated that his "father was sick" and that he was just hired at a new job and if he got in trouble he would lose his job. Trooper Hassett explained that these "sympathetic" statements are used by people engaged in criminal activity in an attempt to redirect the police away from their investigation.

or was not afraid of noncriminal penalties, such as a fine. See id. His behavior was indicative of someone who knew they were in trouble.

For these reasons, the Court finds that Trooper Hassett, in reviewing the totality of the circumstances, had probable cause to believe that the Vehicle contained additional marijuana, criminal or not, and that Defendant was engaged in a criminal activity.

IV

Conclusion

Trooper Hassett had probable cause to search the Vehicle because there existed certain articulable facts for him to believe that the Vehicle contained additional marijuana or contraband and that Defendant was engaged in criminal activity. As the search of the Vehicle was supported by probable cause, Defendant's constitutional rights have not been violated. Accordingly, Defendant's Motion is denied. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**State of Rhode Island v. Cabrera**
CASE NO:	**K2-2015-0787A**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**July 21, 2016**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
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