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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0919**

State of Minnesota,  
Appellant,

vs.

David Bryan Alfano,  
Respondent

**Filed January 14, 2013  
Reversed and remanded  
Collins, Judge\***

Dakota County District Court  
File No. 19HA-CR-12-736

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respondent)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and  
Collins, Judge.

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\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals  
by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**COLLINS**, Judge

Stemming from a traffic stop and vehicle search revealing methamphetamine and a firearm, respondent David Alfano was charged with four counts of second-degree controlled-substance crime and one count of firearm violation by a person convicted of a crime of violence. The state appeals the district court's order suppressing evidence and dismissing all charges with prejudice. We reverse and remand.

### FACTS

Shortly before 1:00 a.m. on February 25, 2012, Sergeant Booker Hodges of the Dakota County Sheriff's Department stopped a car for speeding. The driver, C.J., identified herself but did not have a driver's license. Sergeant Hodges asked the passenger, Alfano, for his driver's license, stating that they could leave soon if his license was valid. Sergeant Hodges later testified that he did not intend to permit the two to leave at that point; rather, the false assurance was partially a "stall tactic" to keep the two at ease while he called for backup, because he had noticed both C.J. and Alfano "tweaking."<sup>1</sup> He described C.J. as being "fidgety" and "really ticky and twitchy" and Alfano's behavior as "real fast, talkative behavior, overly excited, overly helping" and "really overly zealous." Sergeant Hodges's suspicion was elevated because C.J. and Alfano, each having a local address, were in a rented out-of-state car containing "nice" luggage. According to Sergeant Hodges, this meets a narcotics trafficking profile.

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<sup>1</sup> The district court described tweaking as indicia of methamphetamine intoxication, including twitching or fidgetiness.

Sergeant Hodges discovered that Alfano's license was valid, but C.J. had two outstanding warrants; he awaited his backup before returning to the car.

When Deputy Jeffrey Leopold arrived, Sergeant Hodges told him, "See if you can't smell weed or something in the car," because his nose was stuffed. It appears that Sergeant Hodges also called for a canine unit immediately after Deputy Leopold arrived. Sergeant Hodges arrested C.J. on the warrants and asked why she was driving when only Alfano was listed on the rental-car agreement, adding "[h]e's drunk, right?", which C.J. denied. Because Sergeant Hodges did not want any evidence destroyed, Deputy Leopold placed Alfano in his vehicle, but did not handcuff him.

Without giving the *Miranda* warning, Sergeant Hodges asked C.J. if there was "anything in the car." C.J. said there was nothing she knew about. Sergeant Hodges told her to be "straight up" and stated, "If there's something in [the car] and it's not supposed to be in there . . . you're probably not going to be out by Monday." Sergeant Hodges testified that he then stopped the audio recording because C.J. "indicated that she would be willing to discuss things and possibly do something [for the drug task force] but she didn't want it on tape and that she was afraid of Mr. Alfano." C.J. then told Sergeant Hodges that Alfano had a gun in the car, in her purse. For officer safety, Sergeant Hodges retrieved the purse, in which he discovered methamphetamine as well as the gun. Alfano was then arrested, searched, handcuffed, and returned to Deputy Leopold's vehicle.

The canine unit arrived, the dog alerted to narcotics, and crystal methamphetamine was found inside the car.

Alfano was charged with four counts of second-degree controlled-substance crime, including two sale crimes and two possession crimes, under Minn. Stat. § 152.022, subs. 1(1), 2(1) (2010), and one count of firearm violation by a person convicted of a crime of violence, under Minn. Stat. § 609.165, subd. 1b(a) (2010). At the omnibus hearing, Sergeant Hodges testified that he had extensive narcotics training, was previously a narcotics detective, and had made numerous arrests of individuals who were under the influence of methamphetamine. When asked why he did not permit Alfano to drive away once C.J. was in custody, Sergeant Hodges replied that he had “reasonable suspicion to believe there was narcotics in the vehicle” and because Alfano was tweaking. The district court suppressed all evidence necessary to support the charges, concluded the absence of probable cause, and dismissed the charges “with prejudice.” The district court found that Sergeant Hodges’s testimony regarding C.J. and Alfano tweaking lacked credibility. This state appeal followed.

## **D E C I S I O N**

To prevail in an appeal of a pretrial order, the state must clearly and unequivocally show both that (1) the district court’s order will have a critical impact on the state’s ability to prosecute the defendant successfully and (2) the order constituted error. *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995). Critical impact must be determined first. *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998). The pretrial order here had the requisite critical impact because it resulted in the dismissal of all charges.

When reviewing pretrial suppression orders, we independently review the facts and determine as a matter of law whether the district court erred in suppressing or failing

to suppress the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We accept the district court’s underlying factual determinations unless they are clearly erroneous. *State v. Lemieux*, 726 N.W.2d 783, 787 (Minn. 2007).

## I.

The state challenges the district court’s finding that the expansion of the scope of the traffic stop was improper. “Investigative stops are permitted if there is a particularized basis for suspecting criminal activity.” *State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003). Here, the car was observed to be speeding, a traffic violation satisfying the need for a particularized reason for stopping the car for further investigation of that activity. An officer may expand the scope and duration of a seizure to investigate other suspected illegal activity if the officer develops a reasonable, articulable suspicion of additional criminal activity. *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). “Determination of reasonable suspicion requires consideration of the totality of circumstances.” *State v. Tomaino*, 627 N.W.2d 338, 340-41 (Minn. App. 2001).

### A. Tweaking

Sergeant Hodges testified that he was suspicious of criminal activity because C.J. and Alfano were seen tweaking, among other reasons. The district court found Sergeant Hodges’s testimony regarding tweaking not credible. In reaching this determination, the district court relied in part on Sergeant Hodges telling Alfano that the two could leave soon if his driver’s license was valid. However, that comment was made only two minutes into the stop and has no bearing on whether, in the view of Sergeant Hodges, Alfano was tweaking. There are a number of possible reasons motivating Sergeant

Hodges to give Alfano false assurance, including, as Sergeant Hodges testified, as part of a reasonable stall tactic. The state argues, and we agree, that the district court gave undue weight to Sergeant Hodges's comment that they would be permitted to leave soon if Alfano's driver's license was valid.

However, the district court's additional reasons for its credibility determination are supported by the record. Although Sergeant Hodges characterized Alfano's behavior as tweaking, leading him to suspect methamphetamine use, Sergeant Hodges never mentioned methamphetamine during the audio-recorded segment of the stop. He identified tweaking as a sign of methamphetamine use, but asked Deputy Leopold to see if he could smell "[marijuana] or something" in the car. And he testified that a person under the influence of marijuana would be lethargic or depressed, but described Alfano's behavior as "really, really fast talking, really fidgety, really overly zealous." Finally, although he asserted that Alfano was exhibiting signs of methamphetamine use, Sergeant Hodges said to C.J., "He's drunk, right?" Accordingly, we do not see clear error in the district court's finding that Alfano was not tweaking. Because the finding is not clearly erroneous, it is necessary to determine whether the other evidence was sufficient to expand the scope of the stop.

#### **B. Other bases for suspicion**

Aside from any tweaking, there were other reasons cumulatively contributing to Sergeant Hodges's suspicion as to criminal activity on the part of Alfano: (1) C.J., who had two outstanding warrants, was driving without a driver's license; (2) Alfano, who had a valid driver's license and was the designated driver on the car-rental agreement,

was not driving; (3) C.J. and Alfano had local addresses, but were driving an out-of-state rental car; (4) the car contained luggage; and (5) based on Sergeant Hodges's training and experience, a local driver in a rented, out-of-state vehicle containing luggage is consistent with a narcotics-trafficking profile.

Supporting its conclusion that the expansion of the scope of the stop was unconstitutional, the district court cited *State v. Syhavong*, in which we held that questions about contraband were not related to the stop for a broken taillight. 661 N.W.2d 278, 281 (Minn. App. 2003). But there, the officer's only reasons for further inquiry were that the driver and passenger were "excessively nervous," "unable to sit still," and looking at the floor of the car. *Id.* at 280. Here, Sergeant Hodges was aware of a number of salient particulars contributing to a reasonable, articulable suspicion before asking C.J. questions about contraband.

Based on the circumstances as a whole, we conclude that Sergeant Hodges had a reasonable, articulable suspicion of criminal activity justifying the expansion of the original scope of the traffic stop.

## II.

The state also argues that the district court improperly suppressed the evidence obtained as a result of C.J.'s responses to questioning. Because C.J. did not receive the *Miranda* warning before she told about the gun in her purse, the district court found that the questioning was unconstitutional. While that may be true as to C.J., we examine whether Alfano may shield himself from evidence obtained as a result of C.J.'s statements.

Both the United States and Minnesota Constitutions protect a person against compelled self-incrimination. U.S. Const. amend. V; Minn. Const. art. I, § 7. “[T]he Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him.” *Couch v. United States*, 409 U.S. 322, 328, 93 S. Ct. 611, 616 (1973). “A party is privileged from producing the evidence, but not from its production.” *Id.* at 328, 93 S. Ct. at 616 (quotation omitted). The amendment prohibits compelling an accused to bear witness “against himself”—it does not proscribe incriminating statements elicited from another. *Id.* at 328, 93 S. Ct. at 616. *Miranda* rights are personal, and third parties are without standing to assert any alleged *Miranda* violations for their own benefit. *United States v. Escobar*, 50 F.3d 1414, 1422 (8th Cir. 1995). Here, the district court improperly focused its inquiry on the lack of a *Miranda* warning to C.J. because Alfano’s rights, not C.J.’s, are at issue. And, because Alfano is without standing to raise C.J.’s *Miranda* protection as his own, the district court clearly erred by applying C.J.’s alleged *Miranda* violation to suppress the evidence against Alfano.

### III.

The state argues, and Alfano concedes, that the dismissal in this case was erroneously termed “with prejudice.” The phrase “with prejudice” is inconsequential when applied before jeopardy attaches. *State v. Hart*, 723 N.W.2d 254, 257 (Minn. 2006). It is undisputed that jeopardy did not attach here. Accordingly, the district court erred when it dismissed the charges “with prejudice.”

**Reversed and remanded.**