CRIMINAL JUSTICE – INVESTIGATORY STOP: CREDIBILITY OF OFFICER TESTIMONY AND REASONABLE, PARTICULARIZED SUSPICION TO JUSTIFY THE STOP OF A PARTICULAR VEHICLE ON THE BASIS OF MARIJUANA ODOR

United States v. Shumaker, 21 F.4th 1007 (8th Cir. 2021).

ABSTRACT

In *United States v. Shumaker*, the United States Court of Appeals for the Eighth Circuit considered the credibility of testimony and reasonable, particularized suspicion to stop a specific vehicle based on the scent of marijuana. The Eighth Circuit *held* officers made credible testimony about smelling burnt marijuana when driving behind Shumaker. The court indicated the officers testified consistently to smelling the burnt marijuana odor after maneuvering their vehicle behind Vernon Shumaker's open-windowed Impala, after previously not smelling the odor when driving behind a black sedan with the windows rolled up. Second, the court found that the video evidence corroborated the testimony that officers smelled burnt marijuana from Shumaker's vehicle before and during the stop. Third, the Eighth Circuit found the district court correctly credited the personal and professional testimony of David L. Frye, a former state trooper, and the district court adequately explained why it rejected Shumaker's arguments. Fourth, the officers present at the scene consistently testified to smelling the odor of burnt marijuana while driving behind the Impala, further corroborated by the videos, Frye, and the evidence found in the vehicle. Further, as a case of first impression, the court *held* there was reasonable, particularized suspicion to justify the stop of Shumaker's vehicle based on the odor of burnt marijuana. As a matter of first impression, the Eighth Circuit relied on Third Circuit case law. In addressing how particularized an officer's suspicion must be prior to stopping a vehicle based on the smell of marijuana, the Third Circuit indicated that the particularity requirement is not as stringent when establishing reasonable suspicion. As the particularity requirement is not as stringent, the totality of the circumstances was sufficiently particularized to justify a stop of Shumaker's Impala based on officers smelling an odor of burnt marijuana emanating from the vehicle.

I. FACTS

Officers Ryan Steinkamp, Brian Minnehan, and Ryan Garrett ("the officers") operated as part of a Special Enforcement Team six months out of the year, actively searching for criminal activity.[1] The officers frequently encountered the scent of marijuana, and when they identified it while driving, they followed the vehicle that was believed to be the source, planning to stop the vehicle if the scent did not dissipate.[2]

On October 5, 2019, the officers were patrolling in their squad car with the vehicle's back windows rolled down.[3] The officers drove westbound behind a black sedan with rolled up windows.[4] The wind was around thirteen to seventeen miles per hour.[5] They did not observe the scent of marijuana while behind the black sedan.[6] At a four-way intersection, an eastbound traveling red Chevrolet Impala, with its passenger side window rolled down, turned in front of the black sedan.[7] The officers turned right onto the same street as the Impala at the intersection and began traveling northbound.[8]

After making the northbound turn, the officers directed their attention to the Impala when they smelled the odor of marijuana.[9] The Impala was in the

1. United States v. Shumaker, 21 F.4th 1007, 1009 (8th Cir. 2021).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 1009-10.

left lane, while the black sedan was in the right.[10] The officers did not believe the odor was emanating from the black sedan because they had not smelled marijuana when previously behind the vehicle and its windows were rolled up.[11]

Officer Steinkamp and Officer Minnehan testified that the odor was that of "burnt marijuana."[12] Officer Garrett's video camera footage also indicated his belief that the scent was burnt marijuana.[13]

The officers entered the left lane and positioned their vehicle behind the Impala.[14] Another vehicle was ahead of the Impala and an SUV was farther ahead in the other lane.[15] The officers followed the Impala for approximately thirty seconds to "make sure that [they] kn[e]w for certain without a shadow of a doubt that [it was the] vehicle that has the odor of marijuana emitting from it."[16] After continuing behind the Impala for several more blocks, the scent of marijuana remained consistent.[17] The officers did not see smoke coming out from inside the vehicle or located within the vehicle, but "believe[d] that somebody in the car was actively smoking marijuana."[18] The officers conducted a traffic stop, and the Impala pulled over.[19]

The marijuana odor continued emitting from the Impala after the officers stopped the vehicle.[20] Officer Steinkamp, Officer Minnehan, and Officer Garrett each testified to the strong scent of marijuana as they approached the vehicle.[21]

At the stop, Officer Steinkamp and Officer Minnehan went to the driver's side of the vehicle, and Officer Garrett proceeded to the passenger's side where he identified a digital scale in a pouch located behind the passenger's seat.[22] Officer Steinkamp directed Vernon Shumaker ("Shumaker") out of the vehicle and Shumaker complied with the order.[23] Officer Minnehan asked Shumaker if he was smoking and driving or whether there was weed in the vehicle.[24] Shumaker denied smoking in the vehicle.[25]

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10. *Id.* at 1010.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* (alteration in original).
17. *Id.*
18. *Id.* (alteration in original).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 1010-11.

Officer Minnehan then inquired about illegal items in Shumaker's vehicle.[26] Shumaker acknowledged a gun belonging to his girlfriend was in the Impala.[27]

Officer Steinkamp placed Shumaker in handcuffs and put him in the patrol vehicle while Officer Garrett and Officer Minnehan began to search the Impala.[28] Officer Garrett commented on the strength of the odor upon entering the vehicle, with Officer Minnehan agreeing.[29] During the course of the search, Officer Minnehan saw a closed container ashtray in the cupholder with a small hole in the center.[30] Within the container were "several partially smoked marijuana cigarettes and ash."[31] Officer Minnehan observed a piece on top without any ash, with fresher paper than the others.[32] Officer Minnehan commented that Shumaker was smoking and driving to both Officer Garrett and Officer Steinkamp.[33]

The officers retrieved marijuana cigarettes, a digital scale with marijuana residue, and a loaded nine-millimeter pistol.[34] During the vehicle search, the officers did not locate a lighter, nor find embers or smoke in the ashtray.[35]

In the patrol vehicle, Shumaker denied smoking and driving.[36] Officer Steinkamp stated that all the officers could smell the marijuana odor while behind Shumaker's vehicle.[37] Shumaker continued to deny smoking and driving but acknowledged smoking prior to leaving his residence.[38] When confronted about the marijuana blunt in the vehicle, Shumaker indicated the marijuana roaches were old.[39]

Video footage of the stop shows Officer Steinkamp's notepad pages blowing toward the windshield of the vehicle.[40] Officer Steinkamp and Officer Minnehan testified to the wind blowing in a north to south direction.[41]

Officer Garrett conversed with Shumaker in the patrol vehicle, and Shumaker again indicated he did not smoke in the vehicle; rather, he smoked

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26. *Id*. at 1011.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*

prior to entering the car.[42] Officer Garrett asked if the roach was from that day, as it was strong.[43] Shumaker indicated he smoked strong weed.[44]

"Shumaker was charged with one count of being a felon and drug user in possession of a firearm . . . ."[45] He subsequently moved to suppress the evidence derived from the traffic stop.[46] The district court denied Shumaker's motion to suppress.[47] The district court found the evidence derived from the traffic stop valid because the officers testified credibly about smelling burnt marijuana while driving behind Shumaker's opened-window Impala.[48] Further, the district court found the officers had reasonable, particularized suspicion that the smell of marijuana was coming from Shumaker's vehicle.[49] Shumaker appealed the decision to the Eighth Circuit Court of Appeals.[50] The Eighth Circuit held "[t]he district court did not err in denying Shumaker's motion to suppress" and affirmed the judgment of the district court.[51]

II. LEGAL BACKGROUND

The Fourth Amendment to the United States Constitution and the reasonable suspicion standard are the relevant legal standards to review when determining whether to suppress evidence seized during a vehicle stop, and the Eighth Circuit Court of Appeals addressed these legal principals in its opinion.[52]

A. THE FOURTH AMENDMENT

The Fourth Amendment protects citizens from unreasonable searches and seizures.[53] The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

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42. *Id.*
43. *Id.* at 1012.
44. *Id.*
45. *Id.*
46. Brief of Appellee at 7, United States v. Shumaker, 21 F.4th 1007 (8th Cir. 2021) (No. 20-3467).
47. Brief of Appellant at 11, United States v. Shumaker, 21 F.4th 1007 (8th Cir. 2021) (No. 20-3467).
48. *Id.*
49. *Id.* at 11-12.
50. *Shumaker*, 21 F.4th at 1009.
51. *Id.* at 1019.
52. *Id.* at 1015.
53. U.S. CONST. amend. IV.

> supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[54]

Under the Fourth Amendment, "[a] traffic stop constitutes a seizure of the vehicle's occupants, including any passengers."[55] The stop "must be supported by reasonable suspicion or probable cause."[56]

B. REASONABLE SUSPICION STANDARD

"Reasonable suspicion exists when an officer is aware of particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant suspicion that a crime is being committed."[57] The reasonable suspicion required to justify a traffic stop depends on the "content of information possessed by police and its degree of reliability."[58] "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause."[59] The standard considers the totality of the circumstances.[60]

III. ANALYSIS

The Eight Circuit held the district court did not err in determining the evidence found in the search of Shumaker's vehicle could not be suppressed.[61] It affirmed the judgment of the district court, finding there was sufficient credibility of officer testimony and there was particularized suspicion to justify the car stop.[62] The court relied on Third Circuit precedent in answering a question of first impression regarding whether the officers were justified in stopping a particular vehicle based on the scent of marijuana.[63]

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54. *Id.*

55. United States v. Sanchez, 572 F.3d 475, 478 (8th Cir. 2009) (citing Brendlin v. California, 551 U.S. 249, 255–57 (2007)).

56. *Shumaker*, 21 F.4th at 1015 (quoting Garcia v. City of New Hope, 984 F.3d 655, 663 (8th Cir. 2021)).

57. *Id.* (quoting United States v. Givens, 763 F.3d 987, 989 (8th Cir. 2014) (internal quotation marks omitted in original)).

58. Navarette v. California, 572 U.S. 393, 397 (2014) (quoting Alabama v. White, 496 U.S. 325, 330 (1990)).

59. *Id.* (citations omitted).

60. *Shumaker*, 21 F.4th at 1017 (citing *Navarette*, 572 U.S. at 397); *e.g.*, United States v. Gordon, 741 F.3d 872, 876 (8th Cir. 2013) (finding reasonable suspicion to justify a traffic stop where the officer repeatedly identified a vehicle speeding and a helicopter unit's spotlight use and notifications to the officer aided the investigation).

61. *Shumaker*, 21 F.4th. at 1019.

62. *See id.*

63. *Id.* at 1018.

A. CREDIBILITY OF OFFICER TESTIMONY

Based on deference owed to the district court, the Eighth Circuit held "the district court's factual finding that the officers credibly testified to smelling burnt marijuana while driving behind Shumaker is not clearly erroneous."[64] The district court determined the officers testified consistently to smelling burnt marijuana.[65] The officers conclusively determined the scent came from the Impala after following the opened-windowed vehicle and the marijuana odor remained constant.[66] Additionally, the officers indicated a lack of burnt marijuana aroma when driving behind the black sedan.[67]

Further, videos leading up to, and during, the stop of Shumaker corroborated the officers' testimony.[68] The Eighth Circuit referenced the explanation of the district court, indicating:

> Videos of the stop show the officers making statements both before and during the stop indicating they smelled burnt marijuana coming from Shumaker's car while driving behind him. Shumaker does not respond to these statements with surprise or doubt. Instead, he insists he smoked before driving, and not while driving. At one point, he even explains that the officers could smell his marijuana because it was "strong weed." The officers' testimony is further corroborated by the marijuana roaches recovered from Shumaker's car—one of which was larger and fresher than the others—and the cologne bottle and deodorizer near the ashtray.[69]

The Eighth Circuit reviewed the district court's explanation of why it credited the expert testimony of David L. Frye ("Frye") over that of Dr. Richard L. Doty ("Dr. Doty").[70] During the suppression hearing, Dr. Doty, the Director of the Smell and Taste Center at the University of Pennsylvania Medical Center, testified about his research concerning marijuana.[71] Dr. Doty testified when driving behind Shumaker, the officers would not have been able to smell the marijuana in Shumaker's vehicle.[72] Dr. Doty conceded the smell of marijuana, when smoked, may be stronger, and his experiments did not involve the use of burnt marijuana.[73] Frye, a former state trooper, a part-

64. *Id.* at 1016.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 1016-17.
71. *Id.* at 1012.
72. *Id.*
73. *Id.*

time deputy, and director of a law enforcement training program, testified on behalf of the government, describing his experience smelling marijuana when following vehicles as an officer.[74] In explaining why it credited Frye's testimony over that of Dr. Doty, the court reasoned Frye based his testimony on his personal and professional experiences smelling burnt marijuana in his career as an officer.[75] In comparison, Dr. Doty acknowledged during his testimony that burnt marijuana has a stronger odor than unburnt marijuana, and the experiments he performed did not involve burnt marijuana.[76]

Accordingly, the Eighth Circuit found the officers testified consistently to smelling burnt marijuana while driving behind Shumaker's open-windowed Impala.[77] The court asserted that the officers' testimony was "corroborated by their on-video statements, Shumaker's behavior, Frye's expert testimony, and the evidence recovered from Shumaker's car."[78]

B. REASONABLE, PARTICULARIZED SUSPICION JUSTIFYING A CAR STOP

In *Shumaker*, the Eighth Circuit addressed whether the officers had reasonable, particularized suspicion that Shumaker's vehicle was the source of the marijuana odor. The Eighth Circuit acknowledged its prior holdings, finding, under the automobile exception, marijuana odor amounts to probable cause to search a vehicle.[79] The automobile exception allows for a warrantless search of a vehicle when there is probable cause for officers to believe it "contains evidence of criminal activity."[80] The Eighth Circuit further declined to establish whether the odor of marijuana must be faint or strong when determining if the smell is enough to prolong a vehicle stop.[81]

The Eighth Circuit, as a matter of first impression, found the officers had reasonable, particularized suspicion to stop Shumaker's vehicle based on the scent of burnt marijuana emanating from the vehicle.[82] The court relied on Third Circuit caselaw in determining the requirement for how particularized an officer's suspicions must be prior to stopping a vehicle based on the scent of marijuana.[83]

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74. *Id.* at 1013.
75. *Id.* at 1016-17.
76. *Id.*
77. *Id.* at 1017.
78. *Id.*
79. *Id.* at 1017-18*; see also* United States v. Muhammad, No. 21-2832, 2022 WL 2093857, at *3 (8th Cir. June 9, 2022) (citing United States v. Williams, 955 F.3d 734, 737 (8th Cir. 2020)).
80. United States v. Davis, 569 F.3d 813, 817 (8th Cir. 2009) (quoting United States v. Cortez-Palomino, 438 F.3d 910, 913 (8th Cir. 2006) (per curiam)).
81. *Shumaker*, 21 F.4th at 1018.
82. *Id.* at 1018-19.
83. *Id.* at 1018.

In *United States v. Ramos*,[84] the Third Circuit reasoned that a "broadly diffuse and undistinguished marijuana odor" may not provide the particularity needed for reasonable suspicion.[85] "For instance, had the officers smelled marijuana odor in a crowded bar, they would not be justified to pat down every patron on the claim of some individualized reasonable suspicion."[86] When determining reasonable suspicion, the particularity requirement is not required to be as stringent as that for probable cause.[87]

The Eighth Circuit compared Shumaker's case to that of *Ramos*, asserting that "[t]he totality of the circumstances sufficiently particularized the odor to justify a *Terry* stop of [Shumaker's] car."[88] Under the totality of the circumstances, the court recognized that, when first identifying the burnt marijuana odor, the officers were closest to Shumaker's Impala and the black sedan.[89] The officers eliminated the black sedan as a source of the marijuana odor because the officers had followed the vehicle prior, without smelling the scent of marijuana, and the windows were rolled up.[90] Moreover, in determining the Impala was the source of the burnt marijuana smell, the officers drove behind the vehicle for approximately thirty seconds, during which time the smell "remained constant."[91] The windows of Shumaker's vehicle were also rolled down.[92]

Therefore, the court determined that the judgment of the district court was not clearly erroneous, and, as a matter of first impression, the officers were justified in stopping Shumaker as they had reasonable, particularized suspicion that his vehicle was the source of the burnt marijuana odor based on a totality of the circumstances.[93]

IV. IMPACT OF THE DECISION

The law on vehicle stops is constantly evolving. Pursuant to the court's holding in this case, in determining a matter of first impression, the Eighth Circuit expanded the ability of law enforcement to stop a vehicle based on a

84. 443 F.3d 304 (3d Cir. 2006).
85. *Ramos*, 443 F.3d at 309.
86. *Id.* (citing Ybarra v. Illinois, 444 U.S. 85 (1979)).
87. *Id.*
88. *Shumaker*, 21 F.4th at 1018 (second alteration in original) (quoting *Ramos*, 443 F.3d at 309); *see also* United States v. French, 974 F.2d 687, 692 (6th Cir. 1992) (finding the officers had an objectively reasonable, particularized suspicion to stop multiple vehicles driving 'in tandem" and the officers smelled a strong odor of marijuana emanating from the truck after it had stopped).
89. *Shumaker*, 21 F.4th at 1018.
90. *Id*. at 1018-19.
91. *Id.* at 1019.
92. *Id.*
93. *Id.* at 1018-19.

reasonable and particularized suspicion that an odor of burnt marijuana came from the vehicle.[94]

While the court addressed its prior holdings, that marijuana odor allows for probable cause to search a vehicle without a warrant under the automobile exception, and declined to distinguish whether a strong or faint odor is required to prolong a stop, *Shumaker* expanded the ability of law enforcement officers to conduct vehicle stops.[95] Law enforcement officers now have the capability and the authority to pull over a particular vehicle based on their identification that the odor of marijuana is emanating from that specific vehicle.[96]

As the Third Circuit Court of Appeals noted in *Ramos*, and the Eighth Circuit applied in *Shumaker*, "a broadly diffuse and undistinguished marijuana odor will not automatically provide the necessary particularity to establish reasonable suspicion."[97] However, as the standard is less stringent, the totality of the circumstances may establish reasonable suspicion.[98] In identifying the totality of the circumstances in *Shumaker*, the Eighth Circuit acknowledged the stop was justified based on the specific facts identified by the district court.[99]

From *Shumaker*, practitioners can glean facts helpful in assigning the aroma of marijuana to a specific vehicle, including: eliminating other vehicles as the source of the odor; the status of a vehicle's windows, whether they are open or closed; and whether the marijuana scent remains constant.[100] Further, when officers detect odor from parked vehicles, it is reasonable for officers to determine the scent is emitting from "one, the other, or both vehicles," based on their skills and experience.[101] Speculatively, courts may find the specific marijuana odor cannot be assigned to a specific vehicle if alternative facts are present, including: when there is heavy traffic, the aroma dissipates, or vehicles cannot be eliminated as a source of the odor. If relying on the hypothetical facts listed above, the court may not make the same ruling as in this case, because under the totality of the circumstances, officers would likely be unable to sufficiently particularize the marijuana odor to justify a stop of a specific vehicle.

As the Eighth Circuit noted, this case depended heavily on the facts, further emphasizing the significance of the factual findings when

94. *See id.*; *see also* United States v. Ramos, 443 F.3d 304, 309 (3d Cir. 2006).
95. *Shumaker,* 21 F.4th at 1017-18.
96. *See id.* at 1019.
97. *Id.* at 1018 (quoting *Ramos*, 443 F.3d at 309).
98. *Id.*
99. *Id.* at 1018.
100. *Id.* at 1018-19.
101. *Id.* at 1018 (quoting *Ramos*, 443 F.3d at 309).

determining if reasonable, particularized suspicion exists when identifying whether a law enforcement officer was justified in pulling over a particular vehicle based upon smelling the odor of marijuana.

V. CONCLUSION

As law enforcement continues to engage in vehicle stops, state and federal courts will continue to apply the reasonable particularized suspicion standard. As a matter of first impression in the Eighth Circuit, *Shumaker* further broadened the authority of officers to stop a specific vehicle when there is reasonable, particularized suspicion that marijuana odor is coming from a distinct vehicle.[102] This decision impacts the capability of law enforcement to pull over vehicles, while in turn changing how prosecution and defense attorneys must approach vehicle stop cases. Pursuant to *Shumaker's* holding, the Eighth Circuit recognized that "the totality of the circumstances sufficiently particularized the marijuana odor…," authorizing the stop of Shumaker's open-windowed Impala.[103] The Eighth Circuit further found that the district court was correct in its ruling regarding the testimony of the officers, resulting in the denial of Shumaker's motion to suppress.[104]

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102. *Id.* at 1018-19.

103. *Id.* at 1018 (quoting United States v. French, 974 F.2d 687, 692 (6th Cir. 1992)).

104. *Id.* at 1016, 1019.

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