

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 22-0254

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**STATE OF MONTANA,**

Plaintiff and Appellee,

v.

**DAVID VINCENT STRACHAN,**

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT COURT,  
LEWIS AND CLARK COUNTY, THE HONORABLE KATHY SEELEY, PRESIDING

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**TABLE OF CONTENTS**

Table of Authorities . . . . . ii

    Case Law . . . . . ii

    Statutory Law . . . . . ii

    Constitutions . . . . . iii

    Rules of Appellate Procedure . . . . . iii

Statement of the Issue Presented for Review . . . . . 1

Statement of the Case . . . . . 2

Statement of Facts . . . . . 4

Standard of Review . . . . . 10

Summary of the Argument . . . . . 11

Argument . . . . . 11

Point No. 1: The standard of review should not be deferential to the District Court’s findings when the case law does not require this Court to disregard video evidence that contradicts testimony apparently found credible by the lower court.. . . . 14

Point No. 2: The District Court clearly erred when it found that there was particularized suspicion to justify the stop. . . . . 16

Conclusion . . . . . 21

Request for Oral Argument . . . . . 21

Certificate of Compliance . . . . . 23

## TABLE OF AUTHORITIES

### Case Law

|   |            |
|---|------------|
| <i>Carmouche v. State</i> , 10 S.W.3d 323, 332 (Tex. Crim. App. 2000) . . . . .   | 15         |
| <i>City of Missoula v. Metz</i> , 2019 MT 264, 397 Mont. 467,<br>451 P.3d 530 . . . . .                                 | 14, 18     |
| <i>City of Missoula v. Moore</i> , 2011 MT 61, ¶ 10, 360 Mont. 22,<br>251 P.3d 679 . . . . .                            | 10, 11, 13 |
| <i>State v. Clayton</i> , 2002 MT 67, ¶ 11, 309 Mont. 215, 45 P.3d 30 . . . . .   | 12         |
| <i>State v. Elison</i> , 2000 MT 288, ¶ 15, 302 Mont. 228, 14 P.3d 456 . . . . .  | 12         |
| <i>State v. Gill</i> , 2012 MT 36, ¶ 10, 364 Mont. 182, 272 P.3d 60 . . . . .   | 10, 11     |
| <i>State v. Hoover</i> , 2017 MT 236, ¶ 14, 388 Mont. 533,<br>402 P.3d 1224 . . . . .                                   | 12, 16     |
| <i>State v. Kaufman</i> , 2002 MT 294, ¶ 11, 313 Mont. 1,<br>59 P.3d 1166 . . . . .                                     | 13, 14     |
| <i>State v. Maciel</i> , 2021 MT 96N, ¶ 8, 404 Mont. 552, 485 P.3d 204 . . . . .  | 15         |
| <i>State v. Marcial</i> , 2013 MT 242, ¶ 18, 371 Mont. 348, 308 P.3d 69 . . . . .                                       | 13         |
| <i>State v. Wagner</i> , 2013 MT 159, ¶ 10, 370 Mont. 381, 303 P.3d 285 . . . . .                                       | 13         |
| <i>State v. Wilson</i> , 2018 MT 268, ¶ 21, 393 Mont. 238, 430 P.3d 77 . . . . .  | 10         |
| <i>Wiggins v. Florida Dep't of Highway Safety &amp; Motor Vehicles</i> ,<br>209 So. 3d 1165, 1172 (Fla. 2017) . . . . . | 15         |

### Statutory Law

|                              |    |
|------------------------------|----|
| § 46-5-401(1), MCA . . . . . | 12 |
|------------------------------|----|

**Constitutions**

Fourth Amendment to the United States Constitution . . . . . 3, 11

Fourteenth Amendment to the United States Constitution . . . . . 3

Montana Constitution, Article II, § 10 . . . . . 3

Montana Constitution, Article II, § 11 . . . . . 3, 11, 12

**Rules of Appellate Procedure**

M.R.App.P., Rule 11(4)(e) . . . . . 23

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In this case two Helena police officers were talking to a pedestrian at the intersection of East 6<sup>th</sup> Avenue and North Davis Street, which is a corner familiar to Helena natives as one that has limited sight distance for vehicles approaching the corner of traffic approaching the



same corner from the opposite direction. It was night, and with only one street light, the corner was poorly lit. Both the pedestrian and the police officers were wearing dark clothing and the pedestrian was standing in the street.

As the Appellant's vehicle approached the corner, another vehicle was approaching the same corner from the opposite direction. Seeing the pedestrian in the street and the approaching vehicle, the Appellant braked so as to avoid hitting either the pedestrian standing in the street or the approaching vehicle. When the approaching vehicle passed and the pedestrian stepped onto the sidewalk, the Appellant

proceeded a short way down the street, turned into an alleyway, and parked in a private parking lot. The officers used Appellant's driving behavior under these circumstances as particularized suspicion to stop him. The Appellant was eventually arrested and charged with various offenses. He challenged the stop in the District Court, arguing that it was made without particularized suspicion. The District Court rejected that challenge.

The issue in this case is therefore whether the District Court erred when it denied the Appellant's motion to suppress for lack of particularized suspicion.

### **STATEMENT OF THE CASE**

On March 18, 2021, David Strachan was charged by Information with five counts:

Count 1: Driving While Under the Influence (7th), a felony;

Count 2: Criminal Possession of Dangerous Drugs  
(methamphetamine), a felony;

Count 3: Criminal Possession of Drug Paraphernalia, a  
misdemeanor;

Count 4: Resisting Arrest, a misdemeanor;

Count 5: Obstructing a Peace Officer, a misdemeanor; and

Count 6: Tampering with Physical Evidence, a felony.

See, Doc. No. 4.<sup>1</sup>

On June 11, 2021, Strachan moved to suppress all evidence obtained at the time of his arrest because the seizure of such evidence violated the Fourth and Fourteenth Amendments of the United States Constitution, and the Montana Constitution, Article II, § § 10-11. Specifically, Strachan argued that the arresting officers lacked particularized suspicion to stop. The matter was briefed and an evidentiary hearing was held on November 22, 2021. Doc. No. 24; App. 2.

On December 7, 2021, the District Court denied the Defendant's motion to suppress. Doc. No. 26; App. 1.

On January 10, 2022, Strachan entered into a conditional plea agreement in which he pled guilty to Counts 1 and 6 of the Information and reserved his right to appeal to this Supreme Court the District

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<sup>1</sup> Citations to the record below include "Doc. No." which is the document in the District Court Case Register Report. "App." refers to the document in the accompanying appendix to this brief.

Court's denial of his motion to suppress. Doc. No. 32. He changed his plea on January 20, 2022, and a presentence investigation report was ordered. Doc. No. 33.

On April 18, 2022, Strachan was committed by the District Court to the Department of Corrections for a period of four years on Count 1. Strachan received a consecutive four-year suspended sentence to the Montana State Prison on Count 2. Doc. No. 39.

Strachan timely filed his Notice of Appeal on May 12, 2022. Doc. No. 43.

### **STATEMENT OF FACTS**

The events crucial to this appeal occurred within a span of about ten seconds. They were recorded by video which was admitted into evidence and viewed by the District Court. App. 2 (21:23 to 22:17). Still images taken from the video are displayed below to provide context to the testimony elicited at the suppression hearing.

On March 2, 2021, at approximately 11:10 p.m., Helena Police Officers Alex Nimmick and Dakota Becker stood on the sidewalk on the northwest corner of East Sixth Avenue and North Davis Street in Helena, Montana. App. 2 (26:8 to 27:21); App. 4. The officers were

speaking with a pedestrian about an unrelated incident. While Officers



Nimmick and Becker stood on the sidewalk, the pedestrian stood just off the sidewalk, in the street. App. 2, (7:10 to 8:14). This still image was taken from Officer Becker's body cam video and shows the location of the pedestrian standing in the street. It shows the poor lighting at the corner and that the pedestrian was wearing dark clothing. App. 2, (23:8 to 25:16; 31:5, 6); see also, App. 3.

A white Toyota truck driven by David Strachan was heading westbound on Sixth Avenue and approached the three men. Officer

Becker's body camera video shows that the White Toyota truck's headlights were not shining directly at the pedestrian or the officers as it approached and rounded the corner, nor was the truck veering towards the curb or towards the person standing in the road. App. 2 (8:17-22), *cf.*, (25:23 to 26:7).



Officer Becker's body cam video further shows that the truck

would not have struck the pedestrian even though he was standing in the street. App. 2 (9:14, 15, *cf.* 27:23 to 28:15). The still images below show the pedestrian stepping out of the street and onto the sidewalk as the Toyota rounded the corner. As the Toyota approaches the corner driving in a westerly direction, its line of sight is blocked by the building so that it could not see other vehicles approaching from the opposite direction. App. 2 (27:6-16); App. 4.





Meanwhile, a second vehicle approached the curve from the opposite direction, heading east on Sixth Avenue. The limited line of sight at this corner forced the driver of the Toyota to brake and stop when he saw the pedestrian in the road so as to avoid possibly hitting the approaching vehicle. App. 2 (28:18 to 30:8). Ten or eleven seconds into the video, the vehicle passes and the white Toyota truck stops. App. 2 (31:16 to 32:20).



With a pedestrian standing in the street and an approaching vehicle limited by the line of sight at this particular corner, it was reasonable for the driver in that situation to stop. App. 2 (58:22 to 60:14).

After the Toyota passed the officers, it continued west on Sixth Avenue. Within a half block, the officers saw the truck lock up its brakes, speculating that it was to avoid a trash dumpster along the side of the road. The officers heard the truck's tires skid. App. 2 (32:25 to

33:21). At that point the officers decided to stop the driver of the white Toyota truck. The only facts upon which the officers based reasonable suspicion was the driver applying the brakes and stopping two times. App. 2 (34:23 to 35:4). Speed was not a consideration. App. 2 (41:6-9).

Officer Nimmick's body camera video did not record any of the driving behavior. Only Officer Becker's did. App. 2 (54:16-23).

Kenneth Strachan is David Strachan's brother. App. 2 (62:6-13). Kenneth sold the white Toyota truck at issue in this case to David. When he sold it to David the brakes were worn and the rear brakes, which were drum brakes, would lock up and skid if they were applied hard. App. 2 (62:14 to 65:16).

### **STANDARD OF REVIEW**

This Court reviews a lower court's denial of a motion to suppress to determine whether the court's findings are clearly erroneous and whether those findings were applied correctly as a matter of law. *State v. Wilson*, 2018 MT 268, ¶ 21, 393 Mont. 238, 430 P.3d 77 (citing *State v. Gill*, 2012 MT 36, ¶ 10, 364 Mont. 182, 272 P.3d 60). A lower court's finding that particularized suspicion exists is a question of fact which is also reviewed for clear error. *Gill*, ¶ 10 (citing *City of Missoula v.*

*Moore*, 2011 MT 61, ¶ 10, 360 Mont. 22, 251 P.3d 679).

“A finding is clearly erroneous if it is not supported by substantial evidence, if the lower court has misapprehended the effect of the evidence, or if our review of the record leaves us with the firm conviction that a mistake has been made.” *Gill*, ¶ 10 (citing *Moore*, ¶ 10).

### **SUMMARY OF THE ARGUMENT**

The District Court’s factual findings should not be afforded deference in this case because the objective and neutral video evidence clearly shows the events that occurred, and this Court can compare the testimony of the officers with the recorded events in the video in the exact same manner as did the District Court. When reviewing the totality of the circumstances of Mr. Strachan’s driving behavior as shown by the video evidence, the officers did not have particularized suspicion to stop Strachan for questioning and the stop was unlawful.

### **ARGUMENT**

The Fourth Amendment to the United States Constitution and Article II, Section 11 of the Montana Constitution protect persons against unreasonable searches and seizures, including brief

investigatory stops such as traffic stops. *State v. Elison*, 2000 MT 288, ¶ 15, 302 Mont. 228, 14 P.3d 456. The fundamental purpose of the Fourth Amendment and Article II, Section 11, is “to protect the privacy and security of individuals” from unreasonable government intrusion or interference. *State v. Hoover*, 2017 MT 236, ¶ 14, 388 Mont. 533, 402 P.3d 1224 (citing *State v. Clayton*, 2002 MT 67, ¶ 11, 309 Mont. 215, 45 P.3d 30). To initiate a traffic stop, a law enforcement officer must have particularized suspicion that the occupant of the vehicle is or has been engaged in unlawful behavior. § 46-5-401(1), MCA, provides:

In order to obtain or verify an account of the person’s presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense. If the stop is for a violation under Title 61, unless emergency circumstances exist or the officer has reasonable cause to fear for the officer’s own safety or for the public’s safety, the officer shall as promptly as possible inform the person of the

reason for the stop.

To obtain “particularized suspicion for an investigative stop, a peace officer must be possessed of: (1) objective data and articulable facts from which he or she can make certain reasonable inferences; and (2) a resulting suspicion that the person to be stopped has committed, is committing, or is about to commit an offense.” *State v. Marcial*, 2013 MT 242, ¶ 18, 371 Mont. 348, 308 P.3d 69 (quoting *State v. Wagner*, 2013 MT 159, ¶ 10, 370 Mont. 381, 303 P.3d 285).

This Court evaluates whether particularized suspicion exists under the totality of the circumstances, considering the quantity or content of the information available to the officer and the quality or degree of reliability of that information. *Moore*, ¶ 16. The question of whether an officer had a particularized suspicion of criminal activity is a question of fact under the totality of circumstances, but the related question of whether the circumstances indicated activity that was illegal is a question of law. *State v. Kaufman*, 2002 MT 294, ¶ 11, 313 Mont. 1, 59 P.3d 1166.

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**Point No. 1:**

**The standard of review should not be deferential to the District Court’s findings when the case law does not require this Court to disregard video evidence that contradicts testimony apparently found credible by the lower court.**

This Court will generally defer to a lower court’s findings of fact because it is in the best position to evaluate the credibility of witnesses, to become intimately familiar with the details of the case, and to weigh the value of evidence. *State v. Kaufman*, 2002 MT 294, ¶ 12, 313 Mont. 1, 59 P.3d 1166.

However, in *City of Missoula v. Metz*, 2019 MT 264, 397 Mont. 467, 451 P.3d 530, a case involving similar issues of particularized suspicion as the present case, a law enforcement officer’s body and dash cameras recorded video of the events leading up to Metz’s arrest. As occurred in this case, the video was both viewed and entered into evidence at a suppression hearing. On appeal, this Court reviewed the officer’s testimony and the body camera video and determined that the lower court’s holding was “flatly wrong.” *Id.*, ¶ 18. In-doing-so, this Court noted that “nothing in our case law requires this Court to simply

disregard video evidence which contradicts testimony apparently found credible by a lower court, particularly when the lower court's holding is clearly erroneous. The Court then looked to *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000) and *Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1172 (Fla. 2017) for the proposition that the Court "cannot blind itself to the videotape evidence simply because [an officer's] testimony may, by itself, be read to support the [lower court's] holding." *Metz*, ¶ 30. Therefore, a judge who has the benefit of reviewing objective and neutral video evidence along with officer testimony cannot be expected to ignore that video evidence simply because it totally contradicts the officer's recollection. Such a standard would produce an absurd result." *Id.*; see also, *State v. Maciel*, 2021 MT 96N, ¶ 8, 404 Mont. 552, 485 P.3d 204 (unpublished decision referring to tape recorded statement).

Such is the case here. The video evidence from Officer Becker's body camera both refutes and contradicts the testimony of both officers that the white Toyota truck veered toward the pedestrian and the officers, and would have struck the pedestrian. It also refutes the contention that his "untimely braking demonstrated a "delayed reaction

time” which is an “indicator of impairment.” App. 1, 3:3-10. This Court should not therefore defer to the District Court’s findings of fact on review because the video evidence directly refutes the officers’ testimony.

**Point No. 2:**

**The District Court clearly erred when it found that there was particularized suspicion to justify the stop.**

Whether particularized suspicion exists is a question of fact determined by examining the totality of the circumstances, but the related question of whether the circumstances indicated activity that was illegal is a question of law. *Hoover*, ¶ 17. This standard requires more than mere generalized suspicion or an undeveloped hunch of criminal activity. *Hoover*, ¶ 18.

In paragraph 7 of its order, the District Court found that “based on the totality of the circumstances, the officers possessed particularized suspicion to investigate Defendant for a DUI and conduct SFSTs. *Defendant’s driving alone likely did not rise to the level of erratic driving that creates particularized suspicion to conduct SFSTs.*” (Italics added.) App. 1, 7:3-9.

If Strachan's driving alone did not rise to the level of particularized suspicion to conduct field sobriety tests, then it reasonably follows that his driving did not rise to the level of erratic driving that would justify a stop in the first place. The corner of Sixth Avenue and Davis offers approaching drivers limited sight distance of other vehicles approaching the same corner from the opposite direction. There is no evidence that the Toyota was driving at an excessive rate of speed, driving all over the road, crossing the center line and fog line, weaving in and out of traffic, braking for green lights, or engaged in any inappropriate driving behaviors. The contention that the Toyota veered toward the pedestrian and the officers is contradicted by the video which shows nothing of the sort.

Officer Nimmick's report says nothing about late or untimely braking or delayed reaction time:

**PARTICULARIZED SUSPICION:** Based on David's driving behavior where he nearly collided with a pedestrian and locked up the brakes on his vehicle twice, the strong odor of an alcoholic beverage emitting from his breath, bloodshot and watery eyes, and David appeared to be staggering while

balancing; I believe particularized suspicion existed to conduct the Standard Field Sobriety Tests with David.

Doc. No. 21, *cf.*, *Metz*, ¶ 27.

Furthermore, the contention that “braking too late” or “untimely braking” demonstrated delayed reaction time is simply not supported by other evidence. Officer Nimmick’s Affidavit of Probable Cause doesn’t mention any late or untimely braking or delayed reaction time. His affidavit doesn’t mention that the incident occurred at around 11:00 at night, that it was dark and the area was poorly lit, that there was limited sight distance around the corner, or that the pedestrian was standing in the street wearing dark clothing. Nimmick’s claim that he “observed the Defendant veering towards the sidewalk” is refuted by the video which does not show the white Toyota truck veering towards the sidewalk. He also states that the “Defendant continued driving on 6<sup>th</sup> Ave. and almost collided with a parked patrol car” even though the video does not bear that out either. See, Doc. No. 2, *cf.*, *Metz*, ¶ 27. Officer Nimmick admitted that very statement was incorrect, but he made no effort to correct his affidavit after he swore that Strachan almost collided with a parked patrol car. App. 2 (55:15 to 56:17).

Nor does the video record either Becker or Nimmick questioning Strachan about “braking too late” or “untimely braking.” The video shows that when Becker first approached Strachan, he asked “You good?” Strachan replied, “I’m alright, that guy just stepped out in the road in front of me. I’m alright.” Apparently forgetting to mention that the guy was standing in the street, Becker retorted, “I don’t know that he stepped out in front of you, he was just standing there.” Strachan explained, “I had a car coming the other way and his lights was in my eyes and all of a sudden I seen that guy and it freaked me out and I hit it. I still got my studs on.” One minute and sixteen seconds into the video (not 1:16 minutes into his interaction with Strachan) and without any additional information, Becker asks Strachan whether he had been drinking tonight. Strachan answers in the negative. Becker then asks where he had been. Strachan told him he had been in East Helena.

App. 3. Becker testified at the hearing that at that point “[Strachan] would have been free to leave if he wanted to leave.” App. 2 (34:20 to 35:6). Notwithstanding Becker’s testimony that Strachan could have left had he wanted to, Becker continued to ask him what he had been doing in East Helena, and Strachan answered that he had been visiting

his niece and her baby and her husband, and that Becker could call her if he wanted. Becker continued to press him about where he had been and whether he had been drinking, which Strachan denied.<sup>2</sup> Less than one minute, fifty-seven seconds into the video, Becker asks Strachan if he “mind[s] if we can take a look into your eyes?” Strachan says, “yeah, I do.” During this exchange Strachan’s speech isn’t slurred. He isn’t staggering and he isn’t off balance. Strachan said that he “didn’t do anything wrong” and that “there was a car coming the other way.” Strachan says, “I’m at home right now. I wouldn’t mind just, you know, going home. I didn’t do anything wrong.” Even though Becker testified that Strachan was free to leave, Becker continued to press him to check his eyes and did not allow Strachan to enter his residence. App. 3. Notwithstanding Becker’s testimony, any reasonable person would not have believed that he was free to leave.

Officers Becker and Nimmick lacked particularized suspicion for the initial stop. Strachan’s driving behavior was reasonable under the circumstances. It occurred at night in a poorly lit area with both

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<sup>2</sup> A search warrant for a blood sample from was later obtained. When analyzed, the blood sample showed no alcohol.

officers and the pedestrian dressed in dark clothing. There is no dispute that the pedestrian was standing in the street when Strachan rounded the corner. An approaching car that passed from the opposite direction in a location with limited sight distance provided the reason for Strachan's braking and stopping. Under the totality of circumstances, Strachan's driving behavior did not constitute particularized suspicion that he had committed, was committing, or was about to commit an offense. The District Court erred when it did not hold that the officers lacked particularized suspicion for the initial stop.

### **CONCLUSION**

The District Court's order denying Strachan's motion to suppress should be reversed. Strachan's Judgment and Commitment should be vacated and the matter should be remanded to the District Court with instructions that all evidence derived from the illegal stop should be suppressed.

### **REQUEST FOR ORAL ARGUMENT**

David Strachan requests that oral argument be held on this matter.

DATED this 3<sup>rd</sup> day of November, 2022.

By: s/ Palmer Hoovestal  
Palmer Hoovestal  
Attorney for Appellant

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by WordPerfect is 3,418 and not averaging more than 280 words per page, excluding caption, table of contents, table of authorities, and certificate of compliance.

DATED this 3<sup>rd</sup> day of November, 2022.

By: s/ Palmer Hoovestal

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## CERTIFICATE OF SERVICE

I, Palmer A. Hoovestal, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-03-2022:

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