STATE OF MINNESOTA

COUNTY OF DAKOTA

DISTRICT COURT

FIRST JUDICIAL DISTRICT

[redacted],

Petitioner,

vs.

Commissioner of Public Safety,

Respondent.

Court File No. 19-HA-CV-11-5918

**ORDER**

The above-entitled matter was heard before the undersigned on March 2, 2012 pursuant to Petitioner's Petition for Judicial Review, at the Dakota County Judicial Center in Hastings, Minnesota. Petitioner was represented by Jeffrey S. Sheridan, Esq. and also appeared personally. Mathew Ferche, Assistant Attorney General, appeared on behalf of the Commissioner of Public Safety.

Based upon the files, proceedings, submissions and arguments of counsel, the Court makes the following:

**ORDER**

1. That the cancellation of Petitioner's driver's license is rescinded.
2. The attached Memorandum shall constitute the Court's rationale:

DATED: April 13, 2012

BY THE COURT:

Martha M. Simonett
Judge of District Court

FILED DAKOTA COUNTY
CAROLYN M. RENN, Court Administrator

APR 13 2012

## MEMORANDUM

This matter is before the Court on Petitioner's petition to reinstate his driver's license pursuant to Minn. Stat. §171.19. He argues that his license should be reinstated because he was illegally seized by police and that any evidence obtained as a result of the illegal seizure should be excluded and that, without this evidence, there is no justification for the Commissioner's cancellation of his driving privileges.

At 2:30 a.m. on May 13, 2011, Sergeant Mark Deming was on routine patrol in the city of Apple Valley. He noticed the Petitioner leaning against his garage in the parking lot of his condominium complex as he drove past the complex. The sergeant made a U-turn and returned to the complex to talk to Petitioner, because he wanted to see if he was a "car prowler." He acknowledged that he had no reason to believe that Petitioner had committed a crime when he stopped to talk to him, and he conceded that car prowling incidents had been dispersed throughout the city and that Petitioner's complex did not have a specific car prowler problem. In a marked squad and in full uniform, he approached Petitioner and asked him in a conversational tone what was "going on". Petitioner, it appears, at no point attempted to evade any of the sergeant's questions. He responded that he was just "having a cigarette and looking at the stars." The sergeant acknowledged that he had no reason to suspect Petitioner was doing anything other than what he had stated but he still wanted to make sure that Petitioner "had a right to be there." The sergeant asked Petitioner if he lived there and Petitioner replied that he did. Sergeant Deming asked to see his identification because of a "generalized distrust" but conceded that there was nothing in Petitioner's demeanor to allow him to conclude that Petitioner was being untruthful. Petitioner gave him his driver's license and he was able to instantly confirm that Petitioner did, indeed, live in the condominium complex.

However, at this point, instead of returning his license and going on his way, the sergeant called the information channel and ran Petitioner's name. Another officer overheard the request, arrived at the parking lot, and informed the sergeant that Petitioner had a total abstinence restriction on his driver's license. Petitioner told the sergeant that he had previously walked to Bogey's, a bar and bowling alley across the street from the condominium complex. Having previously smelled an odor of alcohol, the sergeant had Petitioner take a PBT, which registered a 0.085. The sergeant then left because he had no reason to believe Petitioner had committed a crime or had been driving. He reported Petitioner's alcohol use to the Commissioner of Public Safety, who cancelled Petitioner's driving privileges.

Petitioner first requests that the Court rescind the cancellation on the basis that the initial contact by Sergeant Deming was unconstitutional. An officer may approach an individual in a public place without necessarily seizing the person. *Crawford v. Comm'r of Public Safety*, 441 N.W.2d 837, 839 (Minn. Ct. App. 1989). A seizure occurs where the officer has restrained the liberty of an individual by physical force or some other show of authority. *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). The Court will consider the totality of the circumstances when determining whether a situation constitutes a seizure. *Id.* An officer may stop a person where the officer has a particularized and objective basis for suspecting that the person has committed a crime. *Berge v. Comm'r of Public Safety*, 374 N.W.2d 730, 732 (Minn. 1985).

In this case, Petitioner was seized when Sergeant Deming approached him and requested his identification. Although Sergeant Deming did not make a show of force to compel Petitioner to provide identification, the circumstances do not indicate that Petitioner was free to disregard Sergeant Deming's request. Once Sergeant Deming was holding Petitioner's identification card, Petitioner would not have felt free to leave without it. This seizure was reasonable under the

circumstances. Sergeant Deming's suspicions were aroused when he saw Petitioner just outside a string of garages adjacent to a condominium building because of recent concerns in the community regarding car prowlers. There were no other people in the area, and Sergeant Deming was concerned about an individual lingering near this grouping of garages. Sergeant Deming thus approached Petitioner and asked him for identification, which did demonstrate that Petitioner lived at the property. To the Court, this search is reasonable because Sergeant Deming made a limited request for identification, and nothing further. This allowed him to determine whether Petitioner had a right to be there and allay any suspicions about car prowling. Sergeant Deming's suspicions were limited, but so was the seizure. While Petitioner was seized when Sergeant Deming requested his identification, the Court finds that it was reasonable under the circumstances.

However, it seems to the Court that the stop was unreasonably expanded when Sergeant Deming radioed in Petitioner's name and another officer indicated that Petitioner's driver's license bore a total abstinence restriction. Whenever a stop is to be expanded beyond its initial basis, there must be additional reasonable, articulable suspicion. *State v. Burbach*, 706 N.W.2d. 484, 488 (Minn. 2005). Where an individual is not driving, running a check to determine if the individual has outstanding warrants or a valid driver's license has been held as expansion of the stop. *State v. Johnson*, 645 N.W. 2d 505, 510 (Minn. Ct. App. 2002). In this case, there was no reason to run Petitioner's driver's license information through the database. Petitioner had demonstrated to Sergeant Deming that he had a right to be at the condominium complex. Furthermore, Petitioner had demonstrated that he was being truthful when his driver's license confirmed his prior statement to Sergeant Deming that he resided at the complex. It seems to the Court that the limited reasonable, articulable suspicion existing at the outset of this encounter

had been entirely dispelled by the time Sergeant Deming radioed in Petitioner's information and received information regarding the restriction. This search violated Petitioner's right to be free from unreasonable searches and seizures.

Petitioner requests that the Court suppress the evidence based on the statutory protection against unreasonable searches and seizures. Petitioner cites Minn. Stat. §626.21, which provides for the return of property, or suppression of evidence, where law enforcement has obtained the property or evidence through an unreasonable search. (2010). However, generally, the Court has refused to order suppression of evidence that consists of merely the officer's observations. *State v. Johnson*, 679 N.W.2d 169, 176 (Minn. Ct. App. 2004); *Flynn v. Comm'r of Public Safety*, No. A06-1136, 2007 WL 1747008 (Minn. Ct. App. June 19, 2007). While Petitioner indicates that the Court of Appeals decision in *Johnson* was in error, that case remains good law and has been applied to other appellate cases. In *Flynn*, the officer observed an odor of alcohol on the driver's breath, and that the driver's eyes were red, bloodshot and watery. *Id.* *7. In that case, the Court of Appeals upheld cancellation of the driver's license even where those observations were made in the context of an unconstitutional traffic stop. Given that Minn. Stat. §626.21 has not been interpreted to permit suppression of an officer's observations, this Court cannot prohibit such observations from being admitted into evidence.

Petitioner further argues that the evidence should be suppressed on constitutional grounds. Specifically, Petitioner argues the Court should apply the exclusionary rule to this proceeding, suppressing all evidence obtained during Officer Deming's interaction with Petitioner because that seizure was unconstitutional. The Court of Appeals has, as of yet, refused to apply the exclusionary rule to proceedings pursuant to Minn. Stat. §171.91. *Ascher v. Comm'r*, 527 N.W.2d 122 (Minn. Ct. App. 1995) (hereinafter "*Ascher II*"). In *Ascher II*, the Court pointed

out that there was little additional deterrent benefit to be achieved where the driver had access to criminal and implied consent proceedings during which the stop could be challenged. *Id.* at 126. The Court reiterated the *Ascher II* holding in *Prasher v. Comm'r of Public Safety*, another case where the traffic stop came about in the context of a DWI arrest, thus providing the driver with two avenues to attack the stop, though this otherwise-inadmissible evidence would still be admitted in the §171.19 proceeding. No. A05-536, 2005 WL 3527284 (Minn. Ct. App. Dec. 27, 2005).

Although neither *Ascher II* nor *Prasher* specifically state that a driver must have an opportunity to challenge the stop in another proceeding before the illegally obtained evidence may be admitted in the §171.19 proceeding, it seems to the Court that this must be the case. The basis for the holdings in both of those cases is that there is no additional deterrent benefit to be obtained. This is only true because the police officers engaged in illegal searches were sufficiently chastened when the criminal and implied consent proceedings were resolved in favor of the intoxicated driver. In this case, if the evidence is admitted in the §171.19 proceeding, the officers involved will be rewarded for their violation of Petitioner's constitutional rights. This proceeding is Petitioner's exclusive opportunity to ask the Court to issue an order that will deter the police from repeating their behavior in the future, and the Court can see no basis to preclude Petitioner from that opportunity.

Accordingly, the cancellation of Petitioner's driving privileges is hereby rescinded.

**M.M.S.**