In the
Indiana Supreme Court

Theodore J. Canonge, Jr.,
Appellant,

v.

State of Indiana,
Appellee.

Supreme Court Case No.
24S-CR-00015

Court of Appeals Case No.
22A-CR-02451

Trial Court Case No.
32D04-2105-F3-000008

FILED
Jun 17 2024, 4:20 pm
CLERK
Indiana Supreme Court
Court of Appeals
and Tax Court

Published Order

By order dated January 11, 2024, the Court granted a petition seeking transfer of jurisdiction from the Court of Appeals. After further review, including consideration of the points presented by counsel at oral argument and discussion among the Justices in conference after the oral argument, the Court has determined that it should not assume jurisdiction over this appeal and that the Court of Appeals opinion reported as *Canonge v. State*, 218 N.E.3d 620 (Ind. Ct. App. 2023), should be reinstated as Court of Appeals precedent.

Accordingly, the order granting transfer is VACATED and transfer is hereby DENIED. Pursuant to Appellate Rule 58(B), this appeal is at an end.

Done at Indianapolis, Indiana, on 6/17/2024.

FOR THE COURT

Loretta H. Rush
Chief Justice of Indiana

Massa and Goff, JJ., concur.
Molter, J., concurs in the denial of transfer with separate opinion.
Rush, C.J., dissents from the denial of transfer with separate opinion.
Slaughter, J., dissents from the denial of transfer with separate opinion.

Molter, J., respecting the denial of transfer.

While I join the majority in voting to deny transfer, I write separately to explain that my vote is based on the defendant abandoning his state constitutional law claim on appeal.

Defendant Theodore Canonge appeals the trial court's order denying his motion to suppress evidence that he argues police uncovered through an unconstitutional search of his vehicle. Officer Kevin Roach of the Avon Police Department testified that he pulled Canonge over for an illegal lane change. While Officer Roach was completing his normal traffic stop routine, he was also making calls to his colleagues requesting that a K-9 unit come join him to investigate whether there were drugs in the car. But he had some difficulty with this. The first officer he called was unavailable. And the second, Officer Steven Kasprzyk, was tending to a disabled vehicle.

To prolong the traffic stop so Officer Kasprzyk would have more time to arrive, Officer Roach began writing out a written warning even though that was not his typical practice. Or as he put it, he was "finding work" until the K-9 unit arrived. Tr. at 32. Officer Kasprzyk arrived about twenty minutes after Officer Roach pulled Canonge over, and a couple minutes later the dog alerted to drugs near the rear driver's side door. Police then searched the vehicle and found what the State alleges is marijuana, cocaine, and methamphetamine.

In the trial court, Canonge argued that the evidence should be suppressed because the vehicle search violated not only the Fourth Amendment to the U.S. Constitution, but also Article 1, Section 11 of the Indiana Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

Ind. Const. art. 1, § 11. Even though the Fourth Amendment and Article 1, Section 11 use the same language, we analyze claims under each provision differently, and our state constitution "in some cases confers greater protections to individual rights than the Fourth Amendment affords." *Shotts v. State*, 925 N.E.2d 719, 726 (Ind. 2010).

Current U.S. Supreme Court precedent holds that under the Fourth Amendment police may not extend an otherwise completed traffic stop to conduct a dog sniff unless they have "reasonable suspicion" of a crime. *Rodriguez v. United States*, 575 U.S. 348, 350–51, 355 (2015). The Court of Appeals concluded there was reasonable suspicion here because: (1) the officer saw "movements in the vehicle that began when he activated his police lights and continued when the vehicle stopped"; (2) "the occupants seemed to be reaching toward the floorboard area" where a backpack was located "while looking back toward Officer Roach"; (3) when the officer approached the car, "Canonge already had his arm extended to hand over documents"; (4) "at one point, Canonge interjected to respond on a passenger's behalf, as though Canonge was trying to control and expedite the encounter with Officer Roach"; and (5) the passengers in the vehicle seemed nervous. *Canonge v. State*, 218 N.E.3d 620, 628–29 (Ind. Ct. App. 2023).

I share the Chief Justice's and Judge May's concern that this analysis reflects an erosion of Fourth Amendment protections. I am especially troubled by the notion that reasonable suspicion could be based on a driver being *too* cooperative with police, in this case by Canonge handing his license and registration to Officer Roach before being asked. I also agree that reasonable suspicion cannot be based on the ordinary nervousness people routinely feel when stopped by police, nor can it typically be based on a driver answering questions for their teenage child when the officer does not have any particular concern about the child. But the sort of movements in the car as Officer Roach approached that were captured on the dashboard camera makes this a closer question under current federal Fourth Amendment precedent. And I attribute the erosion of Fourth Amendment protections to the evolution of federal precedent rather than our Indiana state court precedent.

Critically though, our Indiana Constitution provides search-and-seizure protections that federal courts do not recognize under the Fourth Amendment. Under Article 1, Section 11 of the Indiana Constitution, we evaluate "the reasonableness of the police conduct under the totality of the circumstances." *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005). While there may be additional factors, this evaluation most often entails balancing: "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs." *Id.* at 361.

The Court of Appeals' explanation for why the search and seizure here were permissible under the Fourth Amendment is remarkably similar to what our Court held in *State v. Quirk*, 842 N.E.2d 334 (Ind. 2006), was impermissible under Article 1, Section 11 of the Indiana Constitution. Just as Canonge was pulled over for a minor traffic violation, the defendant semi-driver in *Quirk* was pulled over for driving with one headlight. *Id.* at 338. Like the passengers in Canonge's car, the semi-driver in *Quirk* appeared nervous. *Id.* at 340. Unlike Canonge, a criminal history check in *Quirk* revealed multiple entries for drug related offenses that were possibly related to narcotics trafficking. *Id.* at 341–42. The semi-driver also used multiple aliases in the past, and he "was less than forthright" when he discussed his criminal history with the police. *Id.* at 340, 342.

Even though the level of concern and suspicion was at least as high in *Quirk* as in this case, we held that the officer's decision to prolong the stop for a dog sniff in *Quirk* was unreasonable under the totality of the circumstances. *Id.* at 343. We acknowledged that "nervousness may indicate potential wrongdoing," but "other evidence that a person may be engaged in criminal activity must accompany nervousness before the nervousness will evoke suspicion necessary to support detention" because "it is not at all unusual that a citizen may become nervous when confronted by law enforcement officials." *Id.* at 341. While Quirk had used aliases in the past, the record did not suggest when or where he used them, and there was no reason to think the past use of aliases suggested unlawful conduct at the time of the stop. *Id.* As for the criminal history, the record was unclear whether it involved arrests or convictions, and it

therefore did not suggest that Quirk was presently engaged in criminal activity. *Id.* at 342. While Quirk was dishonest about his criminal history, it is not "unusual that a person would fail to provide law enforcement with information about his past that would attract unwanted attention." *Id.*

At bottom, Article 1, Section 11 precluded the search in *Quirk* because, under the standard we apply for that provision, "a combination of irrelevant conduct and innocent conduct, without more, cannot be transformed into a suspicious conglomeration." *Id.* at 343. Yet, while Canonge argued in the trial court that the search violated Article 1, Section 11, and he cited *Quirk* in his appellate briefing, he never cited our state constitution on appeal and did not provide any analysis distinct from his Fourth Amendment analysis. He therefore waived his state constitutional law claim on appeal. *Canonge*, 218 N.E.3d at 626 n.2 ("Here, Canonge exclusively relies on the Fourth Amendment in challenging the denial of his motion to suppress.").

In order "to illuminate and effectuate" the different and additional protections that Article 1, Section 11 affords, "litigants must seize opportunities for invoking the state constitution." Hon. Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 Alb. L. Rev. 1353, 1380 (2019); *see also* Hon. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 Ind. L. Rev. 575, 580 (1989) ("[T]he Indiana Constitution provides a great variety of protections for citizens which are not contained in the Federal Bill of Rights."). We can't be sure because Canonge failed to advance his state constitutional argument on appeal, but this may have been an important missed opportunity.

Rush, Chief Justice, dissenting.

The Fourth Amendment protects people from the intrusion of unreasonable searches and seizures by law enforcement. And such a search or seizure can become unreasonable during an otherwise lawful traffic stop—as exemplified by this case. An officer stopped Theodore Canonge's vehicle on a spring afternoon for failing to signal within 200 feet before changing lanes. The officer then extended that stop by about twenty minutes for a K-9 unit to arrive and conduct a dog sniff. Based on that dog sniff, law enforcement searched the vehicle and found narcotics. The State filed charges against Canonge, and he moved to suppress the evidence. But the trial court denied that motion, and the majority of a Court of Appeals' panel affirmed. *Canonge v. State*, 218 N.E.3d 620, 629 (Ind. Ct. App. 2023). Judge May, however, dissented, concluding that the officer impermissibly prolonged the traffic stop without reasonable suspicion. *Id.* at 629–30 (May, J., dissenting). I agree.

The majority's published opinion hurdles the line of constitutional reasonableness in this context as articulated by the United States Supreme Court. *See Rodriguez v. United States*, 575 U.S. 348, 354–55 (2015). The panel decided an important question of law that has not been, but should be, decided by this Court. And the holding conflicts with those in other Court of Appeals' opinions. *See Wilson v. State*, 847 N.E.2d 1064, 1067–68 (Ind. Ct. App. 2006); *Powers v. State*, 190 N.E.3d 440, 446–47 (Ind. Ct. App. 2022). For any of these reasons, transfer should be granted. Ind. Appellate Rule 57(H)(1), (3), (4).

A valid traffic stop becomes unreasonable under the Fourth Amendment[1] if it is prolonged beyond the time "reasonably required" to complete the mission of the stop. *Rodriguez*, 575 U.S. at 354 (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). Because this mission does not include

[1] Unfortunately, Canonge did not argue on appeal that his rights were violated under Article 1, Section 11 of the Indiana Constitution. And I agree with Justice Molter's assessment of Canonge's claim under Section 11, including his point that failing to preserve this "state constitutional argument . . . may have been an important missed opportunity."

conducting a dog sniff, prolonging a stop for that reason requires reasonable suspicion. *Id.* at 355. Reasonable suspicion exists when an officer can "point to specific and articulable facts," *Terry v. Ohio*, 392 U.S. 1, 21 (1968), that produce a "particularized and objective basis for suspecting the particular person stopped of criminal activity," *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). And when reviewing reasonable-suspicion determinations, we must consider the "totality of the circumstances." *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

Here, the totality of circumstances—the entire picture—of this traffic stop shows that it was unreasonably prolonged by the officer without any particularized and objective basis to suspect any of the vehicle's occupants of criminal activity. After the officer pulled over Canonge's car during the daytime for a minor traffic violation, he approached the vehicle, asked for identification from its three occupants, and immediately called a K-9 unit to conduct a dog sniff. The officer then decided to issue a written warning "to fill time until" the K-9 unit "got there." Despite this concerning admission, the officer testified that he developed reasonable suspicion to prolong the stop based on four circumstances: (1) he saw movement in the car as it pulled over, including "occupants reaching around" and "looking back at [the] patrol vehicle"; (2) the front-seat passenger smoked a cigarette and avoided eye contact, which the officer knew was "indicative of a stressful situation"; (3) the back-seat passenger, Canonge's teenage step-son, "seemed really nervous" and sat very still; and (4) Canonge had his identification ready when the officer approached the car.[2]

These circumstances, viewed in their totality, provide at best a "mere 'hunch'" of criminal activity, which "does not create reasonable suspicion." *Navarette v. California*, 572 U.S. 393, 397 (2014) (quoting *Terry*, 392 U.S. at 27). Indeed, there is nothing unusual about passengers moving

[2] The officer also testified that a criminal history search—conducted after he called the K-9 unit—revealed "a couple of drug charges between" the two adult occupants. The majority declined to consider these charges in determining whether the officer had reasonable suspicion to prolong the stop. *Canonge*, 218 N.E.3d at 628 n.3. Based on the circumstances of the stop and the vagueness of the officer's testimony, I would conclude that the unspecified "drug charges" do not support a finding of reasonable suspicion.

their bodies and looking around when an officer activates his lights, an occupant smoking a cigarette and avoiding direct eye contact with police, or a driver readily providing identification. And the fact that the teenage passenger "seemed really nervous" and sat very still during the encounter does not tip the scales. Indeed, this Court, our Court of Appeals, and at least six federal circuit courts of appeal have held that nervous behavior alone does not create reasonable suspicion. *See, e.g.*, *Finger v. State*, 799 N.E.2d 528, 534 (Ind. 2003); *Wilson*, 847 N.E.2d at 1068; *Powers*, 190 N.E.3d at 446; *Huff v. Reichert*, 744 F.3d 999, 1007–08 n.3 (7th Cir. 2014) (collecting cases).

Yet the majority found the officer had reasonable suspicion, pointing to the teenager's "nervousness" accompanied by "evidence that a person reached toward a container" as the officer initiated the stop. *Canonge*, 218 N.E.3d at 629. But the latter point is not supported by the record. The officer did not see anyone reaching for a container; he merely "presumed" they were because he "saw their bodies moving." If nervous behavior and body movement by a vehicle's occupants—typical stress responses—during a daytime stop are all that is required to create reasonable suspicion of criminal activity, then the Fourth Amendment's protections in this context are diluted, if not eviscerated.

All in all, the totality of the circumstances here would not provide any officer with a particularized and objective basis to believe the vehicle's occupants were engaged in criminal activity. By denying transfer, this Court approves an opinion that "dramatically lowers the bar of what is required for an officer to indefinitely detain a motorist pending the arrival of a K-9 officer." *Id.* at 631 (May, J., dissenting). Because this opinion conflicts with binding precedent, decides an important question of law, and creates a conflict in our Court of Appeals, I dissent from the Court's decision to deny transfer.

Slaughter, J., dissenting from denial of transfer.

Like Chief Justice Rush, I respectfully dissent from the Court's denial of transfer. But I do so for different reasons than she. Whereas she believes we should correct our court of appeals' Fourth Amendment holding, I would grant transfer because the appellate court lacked jurisdiction to decide this constitutional issue. The lack of appellate jurisdiction here is an important issue of first impression warranting our review and, ultimately, our dismissal of the appeal.

A

Defendant, Theodore Canonge, sought to challenge the trial court's order denying his motion to suppress incriminating evidence police found in his car. In hopes of suppressing evidence central to the State's criminal case against him, Canonge appealed the trial court's interlocutory (nonfinal) ruling under Appellate Rule 14(B). An appellate court will typically hear an appeal only after a trial court has entered a final judgment. *Ball State Univ. v. Irons*, 27 N.E.3d 717, 720 (Ind. 2015). A final judgment resolves all claims as to all parties. Ind. Appellate Rule 2(H)(1).

Rule 14 lists exceptions to the final-judgment rule. Relevant here, Rule 14(B), which governs discretionary appeals, gives a trial court discretion to certify a nonfinal order for immediate appeal if the case involves a substantial legal question the early determination of which will essentially decide the case. *Id.* 14(B)(1)(c)(ii). The rule contains three requirements, see *id.* 14(B)(1), 14(B)(2), 14(B)(3), but only the first requirement pertains here—that the trial court must certify the nonfinal order for immediate appeal.

Under the rule, the party seeking to appeal a nonfinal order must move to certify with the trial court "within thirty (30) days after the date the interlocutory order is noted in the Chronological Case Summary". *Id.* 14(B)(1)(a). A belated motion is not necessarily fatal. A trial court may still grant a belated motion and certify the order for appeal. But to do so, the rule says, the court "shall" do two things: "make a finding that the certification is based on a showing of good cause" and "set forth the basis

for that finding." *Ibid*. Both requirements are essential; the trial court may not "permit[] a belated motion" absent good cause. *Ibid.*

Here, Canonge's motion to certify was untimely. The disputed order was noted on the CCS on August 3, 2022, yet Canonge did not move to certify it until September 6, 2022—beyond the thirty-day deadline. Not only was his motion belated, but he did not argue good cause for his belated filing. Nor did the trial court's certification order make the required findings. Its order did not find good cause and did not explain why good cause existed for its belated certification—all contrary to Rule 14(B)(1)(a).

Compounding the trial court's error, the appellate panel acknowledged these shortcomings but accepted jurisdiction and reached the merits anyway. *Canonge v. State*, 218 N.E.3d 620 (Ind. Ct. App. 2023). The panel justified its decision with three observations about the State's advocacy below:

- The State did not oppose Canonge's belated motion in the trial court;
- the State did not argue the appellate court lacked jurisdiction; and
- the State suggested that any dismissal would be on "non-jurisdictional grounds".

Id. at 625 n.1 (citation omitted). The panel summarized its decision thus: "[B]ecause the State did not object to the motion to certify and does not directly seek dismissal, we elect to reach the merits." *Ibid*. The panel ignored that appellate jurisdiction is like subject-matter jurisdiction. *In re Adoption of S.L.*, 210 N.E.3d 1280, 1282 (Ind. 2023). Parties cannot waive it; courts must ensure it is secure; and its absence can be raised at any time, by parties or by courts sua sponte. *Carpenter v. State*, 360 N.E.2d 839, 842 (Ind. 1977).

B

We have not previously addressed the specific question here—whether compliance with Rule 14(B) is required to transfer jurisdiction over a nonfinal order to the appellate court. We have suggested that the

requirements of Rule 14 are non-discretionary. As we observed in *National Collegiate Athletic Association v. Finnerty*, our appellate rules "confer appellate jurisdiction over nonfinal—interlocutory—orders through Appellate Rule 14" as an exception to the final-judgment rule. 191 N.E.3d 211, 217 (Ind. 2022). After the trial court successfully certifies its order, the court of appeals must then "accept jurisdiction over the appeal", *ibid.*, to put the case "properly before" the appellate court, *id.* at 217. If the appellate court accepts the appeal, it "retains the inherent authority to reconsider its decisions up until the point when it loses jurisdiction over the appeal". *Means v. State*, 201 N.E.3d 1158, 1164 (Ind. 2023). Absent a final judgment, then, jurisdiction passes from a trial to an appellate court only by following Rule 14's path and complying with its requirements.

In my view, the failure to follow Rule 14(B)'s twin certification requirements—finding and explaining good cause—means certification fails in the first instance. Put differently, the trial court does not fulfill the prerequisite of certifying its interlocutory order for immediate appeal if it omits the two good-cause requirements. Good-cause findings here are like the "magic language" trial courts must invoke to create an appealable final judgment under Trial Rules 54(B) and 56(C) when the disputed order disposes of fewer than all claims as to all parties. *Pennington v. Mem'l Hosp. of S. Bend, Inc.*, 223 N.E.3d 1086, 1093 (Ind. 2024) (internal citations and quotation marks omitted). If the trial court does not incant the Rules' required language—an express determination and direction in writing—its judgment is not final and is unreviewable on appeal. *Martin v. Amoco Oil Co.*, 696 N.E.2d 383, 385–86 (Ind. 1998). I would hold the same is true of the two requirements for obtaining appellate jurisdiction under Appellate Rule 14(B). Absent a written good-cause finding and explanation to justify a belated motion to certify, the trial court's order remains interlocutory, and the court of appeals cannot "accept[] jurisdiction" over the interlocutory order. App. R. 14(B).

As an alternative argument, some appellate panels (though not the panel below) have invoked Appellate Rule 9, which governs appeals from final judgments, as a basis for excusing non-compliance with Rule 14(B). These panels have looked to Rule 9 precedent to hold that noncompliance with Rule 14 is not jurisdictional but merely forfeits the right to appeal.

E.g., *State v. Fahringer*, 132 N.E.3d 480, 486 (Ind. Ct. App. 2019) (citing App. R. 9 precedent to hold that tardy appellant forfeited its right to appeal by failing to timely move to certify under Rule 14(B) and show good cause); *Carvajal v. Int'l Med. Grp., Inc.*, No. 20A-MI-2321, at *5, *12 (Ind. Ct. App. Aug. 11, 2021) (mem.) (citing *Fahringer*, 132 N.E.3d at 486 and App. R. 9(A)(5)) (same).

Rule 9 is inapt here. This rule says that failure to file a notice of appeal within thirty days after entry of judgment means "the right to appeal shall be forfeited". App. R. 9(A)(5). Our prior cases have observed that "[f]orfeiture and jurisdiction are not the same." *In re Adoption of O.R.*, 16 N.E.3d 965, 970 (Ind. 2014). Forfeiture is "[t]he loss of a right, privilege, or property because of a . . . breach of obligation, or neglect of duty", *ibid.* (alteration original) (internal citation and quotation marks omitted); jurisdiction, in contrast, "speak[s] to the power of the court rather than to the rights or obligations of the parties", *id.* at 971 (alteration in original) (internal citation and quotation marks omitted). Applying Rule 9, we have held that "a tardy notice of appeal forfeits the aggrieved party's right to appeal, but does not deprive a reviewing court of jurisdiction to hear the appeal." *In re Adoption of D.J. v. Indiana Dep't of Child Servs.*, 68 N.E.3d 574, 576 (Ind. 2017).

To infer from Rule 9 that skirting Rule 14's strictures merely forfeits the right to appeal (versus barring appellate jurisdiction) ignores a key textual difference between these rules. Non-compliance with Rule 9, by its terms, results in forfeiture of the right to appeal. Rule 14, in contrast, does not say that non-compliance only forfeits appellate rights, and it does not otherwise relieve a party that fails to comply with the rule. It follows that appeals from interlocutory orders under Rule 14 must meet the rule's requirements to invoke appellate jurisdiction. To be clear, non-compliance with Rule 14 does not preclude appellate review forever. Once the trial court enters a final judgment, the aggrieved party can seek review of that judgment and any orders subsumed within it. That would include, for example, the order denying Canonge's motion to suppress evidence.

The upshot is that the panel below could not accept jurisdiction given the trial court's failure to certify its order consistent with Rule 14(B). This

failure means jurisdiction over Canonge's case never passed from the trial court to the court of appeals—and, because our jurisdiction derives from the appellate court's, never passed to us.

* * *

For these reasons, I respectfully dissent from the Court's denial of transfer. I would grant transfer and dismiss the appeal for lack of jurisdiction.