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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A16-0743**

State of Minnesota,  
Respondent,

vs.

Anthony Solon LaBatte,  
Appellant.

**Filed March 27, 2017  
Affirmed  
Jesson, Judge  
Concurring specially, Cleary, Chief Judge**

Yellow Medicine County District Court  
File No. 87-CR-14-265

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

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Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

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Considered and decided by Halbrooks, Presiding Judge; Cleary, Chief Judge; and  
Jesson, Judge.

## UNPUBLISHED OPINION

**JESSON**, Judge

Appellant Anthony Solon LaBatte challenges his conviction of felony driving while impaired, arguing that the district court erred by denying his motion to suppress evidence because the arresting officer impermissibly expanded the scope of the traffic stop and a substantial violation of the *Scales* recording requirement occurred. Because the officer had reasonable articulable suspicion of additional illegal activity to justify expansion of the stop, and because the *Scales* violation was not substantial, we affirm.

### FACTS

Shortly after midnight on May 7, 2014, a police officer working for the Upper Sioux Community Police Department observed a vehicle come to a rolling stop at a stop sign. He activated his squad car's emergency lights, approached the vehicle, and spoke with the driver, appellant LaBatte.

The officer observed that LaBatte's voice was low and raspy and that he had droopy eyelids. The officer, who recognized LaBatte from previous contact, testified at a suppression hearing that he had not observed these characteristics in LaBatte before. According to the officer, LaBatte also seemed anxious and restless, and he appeared disoriented and had difficulty finding and removing his driver's license from his wallet. He kept wiping his hands on his pants, which the officer recognized from his training and experience in drug evaluation as a possible response when a person is nervous and under the influence of a drug that increases heart rate and causes sweating. Based on his training and experience, the officer believed that LaBatte could be impaired by a stimulant.

After running LaBatte's driver's license, the officer reapproached the vehicle and had LaBatte undertake field sobriety tests, which LaBatte had difficulty performing. Following the field sobriety tests and a breath test, the officer arrested LaBatte on suspicion of driving while impaired and placed him in the back of the squad car.

The squad car was equipped with a video recording system, which automatically activates when the squad's emergency lights are placed on a high level. Although the system began to record when the officer observed the traffic violation and initiated the stop, about four-and-one-half minutes later, the system stopped recording. The officer testified at a suppression hearing that he was not aware at the time that the recording had stopped, and that this had occurred either because of a malfunction or because the system's memory disk became full.

According to the officer, when he placed LaBatte under arrest, he read him the *Miranda* warning, and LaBatte indicated by shaking his head up and down that he understood his rights. The officer then transported him to the Yellow Medicine County jail. The officer testified that during the ride, he asked no questions pertaining to the case and merely engaged in small talk with LaBatte.

When they arrived at the jail, the officer performed a drug evaluation of LaBatte in the jail booking room.<sup>1</sup> The entire interrogation at the jail was recorded. Although officers

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<sup>1</sup> The drug recognition evaluation includes an interview with the arresting officer and administering protocols for evaluating the presence of drugs in a suspect's system. *State v. Klawitter*, 518 N.W.2d 577, 579-80 (Minn. 1994). It includes "questioning of the suspect in which the officer should suggest that the officer knows the suspect has used certain drugs." *Id.*

generally read a suspect his *Miranda* rights before a drug evaluation, the officer did not read LaBatte his rights again because he had done this ten minutes earlier, at the time of the arrest. The jail recording confirms that he told LaBatte that he would not be receiving another *Miranda* warning, and LaBatte did not indicate that he was confused about his rights. During the interrogation, the officer asked LaBatte when the puncture marks on his arms dated from. LaBatte replied, “Five days ago.” The officer asked, “Free party hit or what?” LaBatte responded, “Pretty much.”

The state charged LaBatte with first-degree driving while impaired under the influence of a controlled substance. *See* Minn. Stat. § 169A.20, subd. 1(7) (2014). LaBatte moved to suppress evidence resulting from the stop, arguing that there was no reasonable suspicion of additional illegal activity to justify expansion of the stop by performing field sobriety testing. He also argued that the statement LaBatte made about previous use during the drug-evaluation interrogation should be suppressed because there was no full recording of the *Miranda* warning, which was a violation of the recording requirement in *State v. Scales*, 518 N.W.2d 587, 588 (Minn. 1994).

The district court issued an order denying the motion to suppress. The district court found that the officer had a reasonable articulable suspicion of additional illegal activity, so as to justify expansion of the stop, and that the failure to record the *Miranda* warning, even if a *Scales* violation, was insubstantial and did not warrant suppression of LaBatte’s custodial statements. A jury convicted LaBatte, and the district court sentenced him to 48 months in prison. This appeal follows.

## DECISION

In a challenge to the district court's denial of a motion to suppress evidence, this court independently reviews the facts and determines as a matter of law whether the district court erred by refusing to suppress the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's factual findings for clear error and its legal determinations de novo. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

LaBatte challenges the district court's order denying his motion to suppress on two grounds. First, he argues that the officer impermissibly expanded the scope of the initial traffic stop, so that the results of the field sobriety tests should have been suppressed. Second, he argues that the failure to record the officer's reading of his *Miranda* rights amounted to a substantial *Scales* violation, so that the district court erred by refusing to suppress his statements about prior drug use made during the jail interrogation.

***I. The district court did not err by denying the motion to suppress field sobriety tests because police did not impermissibly expand the scope of the traffic stop.***

The United States Constitution and the Minnesota Constitution prohibit unreasonable searches and seizures by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Police may execute a traffic stop if they have a reasonable suspicion of criminal activity. *State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999); see *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968). Under the Minnesota Constitution, any incremental intrusion during a stop must be justified by and tied to either (1) the circumstances that permitted the original stop, (2) independent probable cause, or (3) reasonableness under *Terry*. *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004).

Thus, to expand the scope of a stop to investigate additional illegal activity, an officer must have reasonable articulable suspicion of that other illegal activity. *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002) (citing *Terry*, 392 U.S. at 20-21, 88 S. Ct. at 1868). Here, the district court found that, based on the officer's training and experience, he reasonably suspected that LaBatte was impaired by a controlled substance, and the district court concluded that the officer did not unreasonably expand the scope of the stop.

LaBatte challenges this determination, arguing that the officer lacked reasonable suspicion to expand the scope of the stop beyond its original purpose: to investigate a traffic violation. Reasonableness is an objective test, based on the totality of the circumstances. *State v. Smith*, 814 N.W.2d 346, 351 (Minn. 2012). LaBatte points out that a driver's nervous behavior alone has been held not to justify expansion of a stop, absent other indications supplying reasonable suspicion. *See State v. Burbach*, 706 N.W.2d 484, 490-91 (Minn. 2005) (concluding that following a traffic stop, a defendant's nervous demeanor was not sufficient by itself to provide reasonable suspicion to search his vehicle). And he argues that, at trial, the officer could recall little about his previous conversation with LaBatte, which allegedly provided the basis for his observation that LaBatte's voice was uncharacteristically low and raspy, and his eyes were droopy.

But here, the officer, who had received training as a state-certified drug recognition evaluator, did not just note LaBatte's nervous behavior, raspy voice, and droopy eyelids. He also observed that LaBatte appeared disoriented and had difficulty removing his

driver's license from his wallet.<sup>2</sup> The officer was permitted to consider all of these observations together in determining whether reasonable suspicion existed to support expansion of the stop by asking LaBatte to perform field sobriety testing. *See, e.g., Smith*, 814 N.W.2d at 351 (concluding that driver's extreme shaking and evasive answers to questions provided officers with reasonable suspicion to expand scope of traffic stop).

We give deference to the district court's factual findings regarding whether reasonable suspicion existed. *Id.* at 354. Here, the district court's findings on reasonable suspicion are not clearly erroneous, and under the totality of the circumstances, LaBatte's behavior provided a sufficient basis for the officer to develop reasonable suspicion of additional illegal activity to support expansion of the stop.

***II. The district court did not err by denying the motion to suppress LaBatte's custodial statements because, although a Scales violation occurred, the violation was not substantial.***

LaBatte also challenges the district court's denial of the motion to suppress evidence of his custodial statements on the ground that a *Scales* violation occurred and that the violation was substantial. In 1994, the Minnesota Supreme Court exercised its supervisory power over the fair administration of justice to impose the requirement that "all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when

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<sup>2</sup> We also note, to the extent that LaBatte relies on trial testimony to support his argument, it is inappropriate to challenge a district court ruling with evidence not placed on the record at the time of the suppression hearing. *See State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 554, 141 N.W.2d 3, 13 (1965) (stating that a suppression ruling must be made "[u]pon the record of the evidence elicited" at the suppression hearing).

questioning occurs at a place of detention.” *Scales*, 518 N.W.2d at 592. Such a recording safeguards the accused’s right to counsel, right against self-incrimination, and right to a fair trial. *Id.* The *Scales* requirement applies not just to a defendant’s formal statement, but to the entire custodial interrogation, including administration of the *Miranda* warning and any waiver of the defendant’s rights. *State v. Thaggard*, 527 N.W.2d 804, 808 (Minn. 1995). If a violation of the recording requirement is “substantial,” any statements obtained from the interrogation must be suppressed. *Scales*, 518 N.W.2d at 592. We review de novo whether a substantial violation of *Scales* occurred. *State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996), *review denied* (Minn. Nov. 20, 1996).

Here, it is undisputed that the squad car’s recording equipment malfunctioned and did not record the entire traffic stop and, in particular, the *Miranda* warning given to LaBatte. The district court found that it was unclear whether a *Scales* violation occurred because LaBatte made incriminating statements regarding drug use during a separate recorded interview, in which he acknowledged that he had been given a *Miranda* warning. The district court found, however, that even if there was a *Scales* violation, it was not substantial, and suppression was not warranted.

The *Scales* recording requirement applies to the entire custodial interrogation. *Thaggard*, 527 N.W.2d at 808. Therefore, we agree with LaBatte that a *Scales* violation occurred because his entire custodial interrogation, including the reading of *Miranda*, was not recorded.<sup>3</sup> We, therefore, must assess whether the violation is substantial. In analyzing

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<sup>3</sup> The drug recognition evaluation, which requires an interview with a police officer, contains the type of direct questioning that implicates *Miranda* because it includes “words

this issue, we examine the circumstances relating to substantiality, including those set forth in the Model Code of Pre-Arrest Procedure. *Scales*, 518 N.W.2d at 592 (citing Model Code of Pre-Arrest Procedure § 150.3(2), (3) (1975)). These factors include: (1) the willfulness of the violation, (2) the extent of the deviation from lawful conduct, (3) the extent to which the violation was likely to have led the defendant to misunderstand his legal rights, and (4) the extent to which the statement is likely to have prejudiced the defendant's ability to defend himself in the proceeding in which the statement will be used. *Id.* at 592 n.5 (citation omitted).

LaBatte argues that the *Scales* violation was willful. We disagree. There was no evidence presented to the district court that the officer deliberately turned off the recorder or that the recording failure was anything more than a technical problem, which occurred because of a malfunction or a full memory disk. *Cf. Critt*, 554 N.W.2d at 95-96 (determining that four-minute gap in recording was not willful and did not amount to a substantial *Scales* violation when deputy had turned off recorder after defendant declined to give a statement, but turned it back on when the defendant decided to speak).

LaBatte further contends that the Model Code of Pre-Arrest Procedure provides that a violation is deemed willful regardless of an individual officer's good faith if it appears to be the law enforcement agency's practice or was authorized by a high authority within the agency. *Scales*, 518 N.W.2d at 592 n.5 (citing Model Code of Pre-

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or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Edrozo*, 578 N.W.2d 719, 724 (Minn. 1998) (quotation omitted); *see Klawitter*, 518 N.W.2d at 579-80.

Arraignment Procedure § 150.3(2)(a)). He cites a footnote to the district court's order, which expressed concern with repeated failures of recording equipment in the Upper Sioux Police Department and noted that officers and departments have an obligation to assure that their equipment is properly maintained, in working order, and with sufficient space to store recorded video. We view repeated failures of recording equipment with concern as well. But these observations of the district court were not included in the district court's findings in this case: the district court found only that the *Scales* violation was negligent, not willful. And we are reluctant to impute a willful *Scales* violation to a law-enforcement agency based solely on equipment failure when the district court received no evidence that the agency or officials within it authorized a policy of failing to maintain recording equipment. *Cf. id.*

LaBatte also maintains that he was prejudiced by the *Scales* violation because he disputes that a *Miranda* warning was given. If a defendant alleges, contrary to the prosecution's assertions, that he was not given a *Miranda* warning or that he did not waive his *Miranda* rights, a *Scales* violation may be considered prejudicial. *State v. Inman*, 692 N.W.2d 76, 81 (Minn. 2005). This is because the rationale for the recording requirement is to avoid factual disputes underlying claims that police violated an accused's constitutional rights. *Id.* (citing *State v. Williams*, 535 N.W.2d 277, 289 (Minn. 1995)).

LaBatte bases his prejudice argument partially on his trial testimony that he was not read his *Miranda* rights. But this testimony is not a proper basis for challenging the suppression order because it was not part of the record at the suppression hearing. *See Rasmussen*, 272 Minn. at 554, 141 N.W.2d at 13. LaBatte also points out that the police

report does not state that he was given a *Miranda* warning at the time of arrest, and he argues that, at the suppression hearing, he implicitly challenged whether an initial warning had been given. But at the suppression hearing, the main focus of counsel's argument was the officer's failure to re-*Mirandize* LaBatte at the jail. This argument was rejected by the district court and has not been renewed on appeal. *See State v. Butcher*, 563 N.W.2d 776, 780-81 (Minn. App. 1997) (stating issues not briefed are forfeited), *review denied* (Minn. Aug. 5, 1997). Under these circumstances, we cannot conclude that LaBatte has shown prejudice from the *Scales* violation.<sup>4</sup>

Finally, we note that, given the officer's confirmation with LaBatte that he would not be giving him another *Miranda* warning and LaBatte's failure to object, the failure to record the complete interrogation did not likely lead LaBatte to misunderstand his legal rights, and exclusion would not likely prevent future *Scales* violations. *See Scales*, 518 N.W.2d at 592 n.5. The district court did not err by concluding that no substantial violation of the *Scales* requirement occurred and by declining to suppress evidence of LaBatte's custodial statements.

**Affirmed.**

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<sup>4</sup> We additionally observe that LaBatte has failed to show that the officer was required to give him a *Miranda* warning specifically at the time of his arrest, as opposed to during the drug evaluation, when the record does not indicate that the officer engaged in custodial interrogation immediately upon the arrest. *See Edrozo*, 578 N.W.2d at 724 (defining "interrogation" for purposes of *Miranda* requirement).

**CLEARY**, Chief Judge (concurring specially)

I agree with the majority that, although there was a *Scales* violation in this instance, we cannot say, from this record, that the failure to record the interaction between the officer and appellant at the scene was willful. The officer testified under oath that he read appellant his *Miranda* rights at the scene, and there is no reason to doubt the good faith of this individual officer. Further, appellant did not testify at the omnibus hearing that he had not received a *Miranda* warning. However, “[a] violation shall be deemed willful regardless of the good faith of the individual officer if it appears to be part of the practice of the law enforcement agency or was authorized by a high authority within it.” Model Code of Pre-Arrest Procedure § 150.3(2) (1975). Here, the district court admonished the local police department, noting:

[E]ven though the recording malfunction did not rise to a substantial *Scales* violation in the present case, the Court is concerned with the repeated failures of recording equipment associated with the Upper Sioux Police Department. Officers and their departments have an obligation to ensure their recording equipment is properly maintained, in working order, and that enough space is available on storage devices to hold video which should be recorded.

At some point, as the district court implicitly suggested, repeated failures of recording equipment point to a “practice” of the law enforcement agency. Such failures may be intentional or may be a result of negligence. It is not enough to simply “blame the equipment” when equipment failure constitutes a pattern of noncompliance with the recording requirement in *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994). In *Scales*, the Minnesota Supreme Court stressed that the recording of custodial interrogations is

necessary to protect an accused's rights. *Id.* (concluding that recordings protect an accused's right to counsel, right against self-incrimination, and right to a fair trial). Disturbed by the fact that law enforcement officials had ignored warnings that their failure to record would be disfavored, the *Scales* court exercised its supervisory power to ensure the fair administration of justice. *Id.* at 591-92. It held "that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention." *Id.* at 592.

Any statements obtained in violation of the *Scales* recording requirements must be suppressed if the violation is deemed substantial. *Id.* The *Scales* court held that substantiality is determined by considering all relevant circumstances, including those set forth in section 150.3(2) and (3) of the Model Code of Pre-Arrest Procedure. *Id.*

Here, the district court expressed its concern with the repeated failures of the recording equipment associated with the Upper Sioux Police Department, but nonetheless found that the violation at issue was not willful. At some point, such repeated failures should be considered willful, particularly now that this police department has been given notice of repeated noncompliance by the district court. I believe that it is incumbent upon the courts to closely monitor such noncompliance with the requirements of *Scales*, and when a practice or pattern of violations emerge, courts should impose the available remedy: suppression of any statements obtained from the interrogation. Then, and only then, I would surmise, will police departments consistently "ensure their recording

equipment is properly maintained, in working order, and that enough space is available on storage devices to hold video which should be recorded.”