SUMMARY
November 18, 2021

2021COA139

No. 20CA0224, *People v. Restrepo* — Constitutional Law — Colorado Constitution — Searches and Seizures — Exclusionary Rule — Good Faith Exception

Relying on the holding in *People v. McKnight*, 2019 CO 36, a division of the court of appeals considers whether, when evidence was obtained in violation of the defendant's rights under article II, section 7 of the Colorado Constitution, the "good faith" exception to the exclusionary rule should be applied because the police acted in reasonable reliance on certain precedent.

As a matter of first impression, the division concludes that the cited pre-*McKnight* precedent — *Illinois v. Caballes*, 543 U.S. 405 (2005); *People v. Esparza*, 2012 CO 22, *abrogated by McKnight*; and *People v. Mason*, 2013 CO 32 — is not binding because these cases are distinguishable.

The division notes that for the good faith exception to apply, a peace officer must make "a reasonable judgmental error concerning the existence of facts or law." § 16-3-308(1), (2)(a), C.R.S. 2021. A good faith error with respect to the existence of law is "reliance upon then-binding appellate court precedent," not merely conduct that is reasonable in the abstract. *People v. Barry*, 2015 COA 4, ¶ 18. Because *Caballes*, *Esparza*, and *Mason* are not binding precedent, reliance on them does not trigger the good faith exception.

In the absence of probable cause or an applicable exception to the exclusionary rule, the division concludes that evidence should be suppressed pursuant to state constitutional law. *See McKnight*, ¶ 61.

COLORADO COURT OF APPEALS **2021COA139**

Court of Appeals No. 20CA0224
El Paso County District Court No. 17CR2754
Honorable Larry E. Schwartz, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Anthony Phillip Restrepo,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE RICHMAN
Harris and Gomez, JJ., concur

Announced November 18, 2021

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¶ 1 Defendant, Anthony Phillip Restrepo, appeals the judgment of conviction entered on jury verdicts finding him guilty of possession of drug paraphernalia, possession with intent to manufacture or distribute methamphetamine, and possession of a controlled substance. Because the district court admitted evidence that should have been suppressed under *People v. McKnight*, 2019 CO 36 (*McKnight II*), and the error was not harmless, we reverse the judgment.

I. Background

¶ 2 In 2017, drug task force investigators were following a suspected "high level" drug dealer when he visited Restrepo's house. After the drug dealer drove away, some members of the task force stopped him; they found firearms and a quarter pound of methamphetamine in his vehicle. At some point, the drug dealer told officers that he had been at Restrepo's house to sell him methamphetamine, as a customer.

¶ 3 Meanwhile, other members of the task force remained watching Restrepo's house. When Restrepo left in his car, they followed for a couple of hours. During that time, the task force "decided to make a traffic stop." After Restrepo rolled through a

stop sign, the task force asked Jeremy Sheldon, a uniformed officer with the canine unit of the Colorado Springs Police Department, to stop Restrepo's car. During the stop, Officer Sheldon patted Restrepo down and found $1,200 in Restrepo's pocket. He then commanded his dog to perform a drug sniff of Restrepo's vehicle. The dog, trained to alert to marijuana as well as to other controlled substances, alerted to Restrepo's car. Officer Sheldon then searched the vehicle and found suspected methamphetamine and drug paraphernalia in a backpack in the backseat.

¶ 4 Based on these facts, the district court denied Restrepo's pretrial motion to suppress the evidence found in his backpack. The court found that there had been reasonable suspicion — the standard articulated in *People v. McKnight*, 2017 COA 93 (*McKnight I*), *aff'd*, *McKnight II* — for a dog sniff by a dog trained to alert in the same way to the presence of a legal amount of marijuana and the presence of unlawful drugs. The court further found that the dog's alert had provided probable cause to search Restrepo's car.

¶ 5 Before Restrepo's trial, the Colorado Supreme Court issued its decision in *McKnight II*. Restrepo moved for reconsideration of his suppression motion based on the court's ruling that a dog sniff

from a dog trained to alert to a legal amount of marijuana must be supported by probable cause, not just reasonable suspicion. *McKnight II*, ¶¶ 54-55. The motion specifically relied, in part, on the Fourth Amendment and article II, section 7 of the Colorado Constitution.

¶ 6 The district court held a hearing on the motion to reconsider. There, the prosecution argued that because the decision in *McKnight II* had not been published — based on a Westlaw notation that the decision was subject to modification before it was sent for publication — it did not have precedential value. The court accepted the prosecution's position, stating that it believed that *McKnight I* controlled its decision, and denied the motion to reconsider. But, recognizing that it might be wrong about the application of the supreme court decision, the court found that the dog sniff search was not supported by probable cause.

¶ 7 The seized contraband was admitted at Restrepo's trial, and he was convicted as set forth above. On appeal, Restrepo argues that the contraband was the fruit of an illegal search, and its admission at trial constitutes reversible error.

¶ 8 The People concede that *McKnight II* was the governing law when the district court ruled on the motion to reconsider. They further concede that if the evidence was improperly admitted, the error was not harmless. And they do not contest the district court's finding that law enforcement did not have probable cause for a dog sniff. But they argue that since the dog sniff occurred before *McKnight I* and *McKnight II*, it was conducted in good faith compliance with then-existing Colorado law, and the good faith exception to the exclusionary rule should apply.[1]

¶ 9 We agree with Restrepo that the district court reversibly erred by admitting the evidence seized from the backpack. We need not address his other arguments.

II. Applicable law

¶ 10 Section 16-3-308(1), C.R.S. 2021, provides that "[e]vidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the

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[1] The prosecution asked the district court to find that the challenged evidence need not be suppressed because it falls "under [section] 16-3-308(1)[,] (2)(b), [C.R.S. 2021], the good-faith exception." The court did not have to reach this issue because it concluded, on other grounds, that the search was legal. Because the issue of good faith was preserved, we address the issue on appeal. *See McKnight II*, 2019 CO 36, ¶ 61.

evidence was seized by a peace officer . . . as a result of a good faith mistake or of a technical violation." Section 16-3-308(2)(a) defines a "good faith mistake" as "a reasonable judgmental error concerning the existence of facts or law which if true would be sufficient to constitute probable cause." Section 16-3-308(2)(b) defines a "technical violation," in part, as "a reasonable good faith reliance upon . . . a court precedent which is later overruled."

¶ 11 In *Davis v. United States*, 564 U.S. 229, 241 (2011), the Supreme Court held that "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." The Colorado Supreme Court has held that "the exclusionary rule should not automatically apply every time a Fourth Amendment violation is found." *Casillas v. People*, 2018 CO 78M, ¶ 21 (quoting *People v. Gutierrez*, 222 P.3d 925, 941 (Colo. 2009)). "Because 'the exclusionary rule is intended to deter improper police conduct[,]' it 'should not be applied in cases where the deterrence purpose is not served, or where the benefits associated with the rule are minimal in comparison to the costs associated with the exclusion of probative evidence.'" *Id.* (quoting *People v. Altman*, 960 P.2d 1164, 1168 (Colo. 1998)).

"When the police conduct a search in objectively reasonable reliance on binding precedent, the exclusionary rule does not apply." *People v. Barry*, 2015 COA 4, ¶ 34 (quoting *Davis*, 564 U.S. at 249-50).

III. Standard of Review

¶ 12 When reviewing a motion to suppress, we defer to a trial court's findings of fact as long as they are supported by the record, and we review de novo the court's conclusions of law. *People v. Brunsting*, 2013 CO 55, ¶ 15. We may look only to the evidence presented in the suppression hearing in reviewing a trial court's ruling on such matters. *Moody v. People*, 159 P.3d 611, 614 (Colo. 2007).

¶ 13 "Whether an officer's actions with respect to conducting a [search] without a warrant were in good faith reliance on then-binding appellate court precedent presents a question of law." *Barry*, ¶ 20. Hence, we review that issue de novo. *See People v. Hagos*, 250 P.3d 596, 619 (Colo. App. 2009); *see also People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006) ("On appeal, a party may defend the trial court's judgment on any ground supported by the record, whether relied upon or even considered by the trial court.").

IV. Discussion

¶ 14 The People assert that Officer Sheldon conducted the dog sniff in good faith reliance on the binding precedent of *Illinois v. Caballes*, 543 U.S. 405 (2005); *People v. Esparza*, 2012 CO 22, *abrogated by McKnight II*; and *People v. Mason*, 2013 CO 32. However, for precedent to be binding under the good faith reliance exception, the precedent must "address or validate the police conduct at issue" in the case where it is sought to be applied. *People v. Folsom*, 2017 COA 146M, ¶ 19.

¶ 15 We conclude that *Caballes*, *Esparza*, and *Mason* do not set binding precedent for the dog sniff at issue in this case for a fundamental legal reason. Those cases address the legality of a dog sniff search where the dog's alert "does not expose noncontraband items that otherwise would remain hidden from public view." *Caballes*, 543 U.S. at 409 (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)); *see Esparza*, ¶ 2 (holding that because narcotics dogs communicated only whether a truck "either contained or did not contain contraband, no reasonable privacy interest was infringed"). *McKnight I* and *II* were the first decisions opining on the

police conduct at issue here — "whether the sniff of a dog trained to detect marijuana in addition to other substances is a search under a state constitution in a state that has legalized marijuana." *McKnight II*, ¶ 47.

¶ 16 *Esparza* explains the rationale of *Caballes* — a dog sniff revealing "nothing more than the possession of contraband" cannot be a cognizable search under the Fourth Amendment because it does not compromise a legitimate interest in privacy; there is no legitimate interest in possessing contraband. *Esparza*, ¶ 6. The court in *Esparza* declined to find that the Colorado Constitution provides greater protection for "any privacy interest in the possession of contraband" or that a dog sniff indicates "anything more than the presence or absence of contraband." *Id.* at ¶ 11. The supreme court thus concluded that a dog sniff is not a search under article II, section 7. *Id.*

¶ 17 Several months after *Esparza* was decided in 2012, the voters of Colorado passed Amendment 64 to the Colorado Constitution,

legalizing the possession of up to one ounce of marijuana for personal use. *See* Colo. Const. art. XVIII, § 16(3)(a).[2]

¶ 18 When a dog trained to alert to both marijuana and illegal drugs alerts, the handler does not know if the dog is alerting to contraband or to a legal amount of marijuana. *See McKnight II*, ¶ 35. Therefore, a dog sniff from a dog trained to detect marijuana is a search under article II, section 7; it intrudes on a person's reasonable expectation of privacy in lawful activity. *Id.* at ¶¶ 43, 48. Accordingly, there must be probable cause to believe a vehicle contains illegal narcotics under state law before deploying a drug detection dog trained to alert to marijuana. *Id.* at ¶ 55.

¶ 19 When probable cause is lacking, under the Colorado Constitution the results of the search should be suppressed. *See id.* at ¶ 61.

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[2] And several months after Amendment 64, the supreme court decided *People v. Mason*, 2013 CO 32. But in *Mason*, the court did not discuss the legal effect of a sniff by a dog trained to alert to both marijuana and illegal narcotic drugs after Amendment 64. It simply cited *Caballes* and *Esparza* for the precedent that a dog sniff by a "narcotics detection dog" is not a search under the United States or Colorado Constitutions, after already deciding the case on other grounds. *Mason*, ¶¶ 10, 17.

¶ 20 We are not persuaded otherwise by the People's mention that the exclusionary rule "should not be applied in cases where the 'deterrence purpose is not served, or where the benefits associated with the rule are minimal in comparison to the costs associated with the exclusion.'" *Altman*, 960 P.2d at 1168 (quoting *People v. Deitchman*, 695 P.2d 1146, 1160 (Colo. 1985) (Dubofsky, J., concurring)). The People do not explain why the deterrence purpose would not be served here, as it is presumed to be in most cases of unlawful police conduct, or why the benefits of exclusion are minimal. We decline to address this undeveloped argument. *See People v. Stone*, 2021 COA 104, ¶ 52.

¶ 21 At oral argument, the People contended that the officer's conduct was "reasonable" at the time he conducted the search because a reasonable officer would not have anticipated the ruling in *McKnight II* and the effect of Amendment 64 on prior precedent involving dogs trained only to sniff illegal narcotics. While it is true that the statute defines a "good faith mistake" as "a reasonable judgmental error," it also states that the error must be with respect to the "existence of facts or law." § 16-3-308(2)(a). The case law states that good faith with respect to law applies where there is

"reliance on then-binding appellate court precedent," not merely conduct that is reasonable in the abstract. *Barry*, ¶ 20. As we have concluded there was not binding appellate court precedent, the reasonableness of the officer's conduct is not determinative.

V. Conclusion

¶ 22 The district court erred by denying Restrepo's motion to suppress the evidence. The judgment of conviction, relying as it does on admission of the contraband, is therefore reversed, and the case is remanded to the district court for further proceedings.

JUDGE HARRIS and JUDGE GOMEZ concur.