SUMMARY
January 13, 2022

2022COA10

No. 18CA1516, *People v. Gamboa-Jimenez* — Evidence — Testimony by Experts — Irrelevant Evidence Inadmissible — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Applying *Salcedo v. People*, 999 P.2d 833 (Colo. 2000), a division of the court of appeals considers whether a state trooper's expert testimony at trial was improper drug courier profile testimony. Concluding that it was, the division further concludes that admission of the testimony was plainly erroneous. Accordingly, the division reverses the judgment of conviction and remands the case for a new trial. Separately, the division affirms the trial court's suppression order, rejecting defendant's contention that evidence recovered during a traffic stop was obtained in violation of the Fourth Amendment.

COLORADO COURT OF APPEALS **2022COA10**

Court of Appeals No. 18CA1516
Mesa County District Court No. 17CR2299
Honorable Valerie J. Robison, Judge
Honorable Lance P. Timbreza, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Mario Antonio Gamboa-Jimenez,

Defendant-Appellant.

JUDGMENT REVERSED, ORDER AFFIRMED,
AND CASE REMANDED WITH DIRECTIONS

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

Announced January 13, 2022

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¶ 1 Defendant, Mario Antonio Gamboa-Jimenez, appeals the judgment of conviction entered on jury verdicts finding him guilty of possession of a controlled substance and possession with intent to distribute a controlled substance. He also appeals his designation as a special offender. We reverse and remand for a new trial.

I. Background

¶ 2 Around 5:30 a.m. on December 6, 2017, a state trooper was parked along I-70 about ten miles from the Utah border when he observed an eastbound driver commit a traffic infraction.[1] As the car passed, the trooper saw its brake lights illuminate. He began to follow. When he caught up to the car, the trooper noticed it was traveling five miles per hour below the speed limit. After following the car for a few miles, the trooper activated his overhead lights and initiated a traffic stop. The driver pulled over.

¶ 3 The trooper then walked up to the car and peered through its windows: two men were sitting up front and discarded food wrappers and clothing were strewn across the back seats. As the trooper approached the front passenger side window, which was

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[1] The driver was driving continuously in the left lane of the highway in violation of section 42-4-1013, C.R.S. 2021.

open, the passenger, Gamboa-Jimenez, sat up quickly, and the trooper smelled what he would later describe as an "overwhelming" scent of air fresheners coming from within the car.

¶ 4 The trooper then introduced himself to the car's occupants and explained why he had pulled them over. The driver apologized for committing the infraction. The trooper then requested the driver's license and asked the men about their travel plans. His hands shaking, the driver produced his license and told the trooper that he and Gamboa-Jimenez were on their way home to Virginia after spending three days in Las Vegas. The trooper then asked for the car's registration and proof of insurance. In response, the driver said something to Gamboa-Jimenez in Spanish and Gamboa-Jimenez rummaged through the glove box; eventually, the documents were located, and the driver handed them to the trooper.

¶ 5 While reviewing the car's Virginia registration, the trooper noticed that the driver did not own the car, so he asked who did. Following a short conversation with Gamboa-Jimenez, the driver replied that the car belonged to one of Gamboa-Jimenez's friends. Looking closer at the registration, the trooper noticed something else: it listed the car's mileage from when it was last purchased.

The trooper then asked the driver for the car's current mileage, and the driver told him. With the current mileage, the trooper was able to calculate that the car had been driven more than 30,000 miles in less than a year.[2] Further, as he was chatting with the driver, the trooper noticed there were four cell phones in the car.

¶ 6 Concerned that something criminal might be afoot, the trooper nevertheless told the men he would be letting them off with a warning so long as the personal information they had provided checked out. The trooper then went to his patrol car, called for a cover officer, and ran the information the men had provided.

¶ 7 When the trooper returned, the information having not raised any red flags, he gave the men a verbal warning and a business card. And that might have been the end of the story, but as the trooper handed back the driver's license, he asked a question: Why had the men driven to Las Vegas instead of flying? The driver answered that they drove because flying was too expensive. The

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[2] There is a discrepancy as to precisely how long it took to put the miles on the car. During a pretrial hearing, the trooper testified, and the court found, that the registration reflected the car's mileage as of February 2017. At trial, however, the trooper testified that it showed the mileage as of April 15, 2017. The registration is not a part of the record on appeal.

trooper countered that between gas and hotel rooms for a multi-day trip, surely flying was the cheaper option. The driver responded that they had not gotten a hotel room.

¶ 8 The trooper then told the men they were "good to go" and began walking back to his patrol car. Before taking more than a few steps, however, the trooper turned around and asked the driver if he would be willing to answer some more questions. The driver said that would be fine. First the trooper asked if there was anything illegal in the car, like narcotics. The driver said no. Then the trooper asked if he could search the car, advising the driver that he had the right to refuse the request. Again, the driver said no.

¶ 9 The trooper then instructed the men to get out of the car and stand on the side of the road so that he could walk his drug-detection dog around the car. The men complied. In getting out of the front passenger seat and grabbing a jacket from the back seats, Gamboa-Jimenez left both doors on the passenger side of the car wide open. The trooper retrieved his dog from his patrol car.

¶ 10 When the trooper came back, he started walking the dog around the car, beginning with the driver's door and moving counterclockwise. As the dog passed the open rear door on the

passenger side of the car, he snapped his head, pulled on his leash, and jumped into the car. Once inside, the dog gave what the trooper would later describe as a "final alert" to the presence of narcotics under the front passenger seat by putting his nose on the source of the scent and staring. The trooper and the cover officer then searched the car by hand. In a compartment below the front passenger seat carpeting, they discovered a package that testing would later reveal contained just over a kilogram of cocaine.

¶ 11 Gamboa-Jimenez was arrested and charged with possession of a controlled substance, possession with intent to distribute a controlled substance, and a special offender designation for having introduced or imported more than fourteen grams of cocaine into Colorado. Before trial, he moved to suppress the evidence recovered from the car, arguing that it was obtained in violation of his constitutional right to be free from unreasonable searches and seizures. The trial court denied the motion after a hearing and the case proceeded to trial. At trial, Gamboa-Jimenez's defense was that he did not know there was any cocaine in the car. A jury convicted him as charged.

¶ 12 On appeal, he raises four contentions: (1) the court erred by denying his motion to suppress; (2) the court erred by allowing the trooper to offer drug courier profile testimony at trial; (3) the court erred by allowing the jury to consider evidence of prior drug trafficking; and (4) there was insufficient evidence for the jury to have found that he introduced or imported more than fourteen grams of cocaine into Colorado. We begin with the second.

II. Drug Courier Profile Testimony

¶ 13 The trial in this case was relatively brief, two days altogether, and only three witnesses testified: the trooper, the cover officer, and a forensic scientist from the Colorado Bureau of Investigation who had tested the cocaine found in the car. The latter two provided minimal testimony; nearly the entirety of the prosecution's case was presented through the trooper, who testified in two capacities: as an eyewitness and as an expert in "drug interdiction."

¶ 14 As is relevant on appeal, the trooper's expert testimony consisted of him detailing the "physical indicators" and "human behaviors" that he believes are associated with people involved in drug trafficking. In particular, he testified that the following things make him suspicious someone is a drug courier: the scrupulous

obedience of traffic laws after law enforcement is observed, the smell of "masking odors" such as air fresheners, unusual travel plans, the use of a vehicle owned by or registered to a third party, travel from west to east across the United States along interstate highways, putting high mileage on a car in a short period of time, having multiple cell phones, and possessing religious iconography.

¶ 15 And the trooper matched each of those "indicators" and "behaviors" to Gamboa-Jimenez, testifying that he saw the car in which Gamboa-Jimenez was a passenger slow down and travel below the speed limit after it passed him, the car smelled overwhelmingly of air fresheners, the travel plans of the occupants did not make sense to him, the car was not registered to either of the occupants, they were stopped traveling eastbound on I-70, there was excessive mileage on the car for the period of time from its registration to the stop, he saw four cell phones in the car, and he noticed a prayer card in the car bearing the image of Saint Jude.

¶ 16 Despite not objecting to the trooper's expert testimony at trial, Gamboa-Jimenez now asserts that it constituted improper "drug courier profile testimony." As we will explain, we agree. What is

more, we further conclude that admission of the testimony was not only erroneous, it was reversibly so.

A. Standard of Review

¶ 17 When a defendant does not contemporaneously object to testimony at trial, we review for plain error. *Lehnert v. People*, 244 P.3d 1180, 1184 (Colo. 2010); Crim. P. 52(b). "A plain error is one that is both 'obvious and substantial.'" *People v. Sandoval*, 2018 CO 21, ¶ 11 (quoting *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005)). An error is obvious when it contravenes a clear statutory command, a well-settled legal principle, or Colorado case law. *Scott v. People*, 2017 CO 16, ¶ 16. An error is substantial when it "so undermine[d] the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *Hoggard v. People*, 2020 CO 54, ¶ 13 (quoting *People v. Weinreich*, 119 P.3d 1073, 1078 (Colo. 2005)).[3]

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[3] We share the concern raised in footnote 5 of *Hoggard* that some cases appear to treat obviousness, substantiality, and fundamental fairness as three distinct elements, *see, e.g.*, *People v. Rediger*, 2018 CO 32, ¶ 48, while others suggest that substantiality and fundamental fairness are one and the same, *see, e.g.*, *Cardman v. People*, 2019 CO 73, ¶ 19.

B. Law and Analysis

¶ 18 A drug courier profile is "an array of behaviors and characteristics that detectives believe indicate a person may be smuggling illegal narcotics." *Salcedo v. People*, 999 P.2d 833, 836-37 (Colo. 2000). Although such profiles may have some utility, they are inadmissible as substantive evidence of a defendant's guilt. *Id.* at 837. More than two decades ago, in *Salcedo*, our supreme court explained why.

¶ 19 In *Salcedo*, a detective stopped the defendant at the airport because he fit the detective's loose profile of a drug courier: someone who, among other things, displayed religious symbols, did not wear a wristwatch, did not carry any books or magazines, purchased a one-way ticket with cash on the day of his flight, and arrived from a so-called "source city." *Id.* at 835. With the defendant's consent, the detective searched the defendant's suitcase and found three kilograms of cocaine. *Id.*

¶ 20 At trial, the defendant's defense, like Gamboa-Jimenez's here, was that he did not know about the cocaine. *Id.* at 836. To rebut that defense, the prosecution tendered the detective as both an eyewitness and as an expert "in the area of narcotics interviews."

Id. Over an objection, the court so recognized the detective. *Id.* The detective first testified about the behaviors and characteristics that constituted his profile of a drug courier. *Id.* He then testified about the aspects of the defendant's behavior and appearance that conformed to that profile. *Id.* He finally testified that, in his expert opinion, the defendant knew the suitcase contained cocaine because he fit the profile. *Id.* A jury convicted the defendant. *Id.*

¶ 21 On review, the supreme court determined that the detective's profile testimony was inadmissible under CRE 702.[4] First, the court found "cause for concern" that the detective's opinion of the defendant's guilt was based "on a subjective assessment of the 'totality of the circumstances' rather than on an articulable combination of behaviors and characteristics in an objective drug courier profile." *Id.* at 839. To that end, the court reasoned that the absence of evidence that the detective "utilized an objective, widely recognized profile seriously undermined the likelihood that

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[4] CRE 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

his testimony and opinions would assist the jury to determine [the defendant's] state of mind at the time of his arrest." *Id.*

¶ 22 Then, noting that the admission of expert testimony under CRE 702 "necessarily requires a finding that the proposed testimony is both relevant under CRE 402 and not unfairly prejudicial under CRE 403," the court determined that the detective's testimony was irrelevant and unduly prejudicial. *Id.* As to relevancy, the court explained that the behaviors and characteristics in the detective's profile were neither unique to drug smugglers nor tied to an objective profile, so the fact that the defendant displayed those behaviors and characteristics did not tend to make it more or less probable that he was a drug courier. *Id.* As to prejudice, the court explained that since the detective

> intermingled expert testimony concerning the behavior and characteristics that constitute the drug courier profile with eyewitness testimony concerning [the defendant's] actions and appearance . . . [his] testimony posed a risk of misleading the jury to believe that [the defendant] exhibited all of the behaviors and characteristics in [the detective's] profile or that all of [the defendant's] behaviors and characteristics could be found in [the detective's] profile.

Id. at 840.

¶ 23 This case is strikingly similar. Here, like the detective in *Salcedo*, the trooper testified as both an eyewitness and an expert witness, and his expert testimony consisted of him explaining, without reference to any sort of objective, widely recognized profile, the things that make him suspicious that someone is a drug courier. In fact, as in *Salcedo*, it appears that the trooper's profile was entirely subjective and may have even been personal to him. Moreover, the trooper's profile testimony suffered from the same fundamental flaw as the detective's profile testimony in *Salcedo*: the prosecution offered no foundational evidence that a defendant's conformity to the trooper's drug courier profile is a reliable indication of a person's guilt. *Id.* at 839. Therefore, the trooper's profile testimony was irrelevant.

¶ 24 The testimony was also unfairly prejudicial. For one thing, part of the trooper's profile — that drug couriers scrupulously obey traffic laws once they see law enforcement officers, use "masking odors" such as air fresheners, have unusual travel plans, drive vehicles owned by or registered to third parties, and travel from west to east across the United States along interstate highways — was elicited in advance of his eyewitness testimony (thereby priming

the jury to look for those things) and could just as well have described innocent travel. And the other parts of his profile — namely, that it is common for drug couriers to put a lot of miles on their cars in short periods of time, to have multiple cell phones, and to possess religious iconography — were intermingled with his eyewitness testimony, and, as a result, there is a real risk that the trooper's testimony misled the jury into thinking that Gamboa-Jimenez exhibited all the behaviors and characteristics of a drug courier. And this is true even though, unlike the detective in *Salcedo*, the trooper did not offer the express opinion that Gamboa-Jimenez knew the car contained cocaine because he fit the profile.

¶ 25 We likewise observe that the testimony of the trooper in this case was not a description of the "modus operandi" of those who engage in drug trafficking, *see People v. Montalvo-Lopez*, 215 P.3d 1139, 1143 (Colo. App. 2008), nor was it an explanation of a pattern of behavior beyond the jury's normal experience, *see People v. Conyac*, 2014 COA 8M, ¶ 26. Rather, it was a recitation of the trooper's observations that, in the absence of evidence he was working from an objective, widely recognized drug courier profile, provided no value as expert testimony.

¶ 26 Altogether, we conclude that admission of the trooper's profile testimony was erroneous and that, in light of *Salcedo*, the error was obvious. We next consider whether it was substantial.

¶ 27 To start, we note that the trooper's profile testimony played a prominent role at trial. In addition to making the testimony a major part of its case-in-chief, the prosecution both highlighted the trooper's drug courier profile during its opening statement and, during closing arguments, invited the jury to rely on the profile as substantive evidence of Gamboa-Jimenez's guilt by emphasizing his supposedly perfect fit thereto:

> Now, [the] defense is right about one thing. That a lot of these items are pretty common in day-to-day life. You may see one air freshener in a car. You may see a religious icon somewhere. You might even see someone being nervous to encounter law enforcement. But what about all of these? Right? Because these are some of the things law enforcement may look for. Maybe one or two of them. But, what about all of these being present in one case? And that's what we have here.[5]

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[5] From the record it appears that this portion of the prosecution's closing argument was delivered while the jury was shown a demonstrative exhibit listing elements of the trooper's profile as "drug interdiction giveaways," specifically: "Overly compliant with the law," "Strange travel plans," "Third party vehicle," "Unusually

¶ 28 In so doing, the prosecution essentially asked the jury to trust the trooper's profile even if it found the evidence did not on its face indicate that Gamboa-Jimenez had a criminal state of mind.

¶ 29 For their part, the People argue that admission of the trooper's profile testimony was not substantial because there is ample independent evidence demonstrating Gamboa-Jimenez's guilt. In particular, the People point to three pieces of evidence that, they contend, together lead to the inference that Gamboa-Jimenez knew there was cocaine in the car: (1) he — but not the driver — knew whose car it was when the trooper asked; (2) receipts found in the car suggest that it had been in his possession and control for at least a couple of months before the encounter; and (3) there was "excess cocaine residue" found in the compartment where the package of cocaine was discovered. But upon close examination, this evidence does not support the inference the People urge.

¶ 30 Significantly, our review of the record reveals that nobody ever testified that the purported "cocaine residue" was, in fact, cocaine residue, nor is there any documentary evidence to support that

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high mileage on the car," "Nervousness," "Religious Icons," "Multiple cell phones," "Air fresheners," and "Natural voids in the car."

conclusion. Instead, the conclusion appears to stem from the following colloquy in reference to a photograph of the compartment in the car where the package of cocaine was found:

> TROOPER: . . . And then, on the metal portion there, you can see what appears to be cocaine residue or little white specks of, of cocaine.
>
> PROSECUTOR: Now, the package that you received in this case, was it pretty firmly wrapped?
>
> TROOPER: Yes. I believe it was wrapped in duct tape, and then there may have been a layer below it.
>
> PROSECUTOR: So, what were your thoughts on the origin of the other cocaine in the car?
>
> TROOPER: Oh, well, since that package wasn't broken, it appeared to me that the vehicle had been used prior, and that there's residue in there from another trip, potentially.

¶ 31 In the absence of evidence that the "little white specks" were actually specks of cocaine, we cannot conclude that the evidence against Gamboa-Jimenez was overwhelming.

¶ 32 Said simply, the trooper's profile testimony tied this case together for the jury and was the basis of the prosecution's theory that Gamboa-Jimenez knew about the cocaine. As we have mentioned, the profile testimony was (1) used to prime the jury to

be on the lookout for specific "physical indicators" of, and "human behaviors" associated with, drug trafficking; (2) intermingled with the trooper's eyewitness testimony; and (3) heavily emphasized by the prosecution during closing arguments. Accordingly, we conclude that the erroneous admission of the testimony so undermined the fundamental fairness of Gamboa-Jimenez's trial as to cast serious doubt on the reliability of the judgment of conviction. Therefore, we reverse the judgment of conviction and remand the case for a new trial.

¶ 33 Because it is likely to arise again on retrial, we address, but reject, Gamboa-Jimenez's contention that the trial court should have granted his motion to suppress.[6]

III. Suppression of Evidence

¶ 34 Gamboa-Jimenez argues the court should have suppressed the evidence recovered from the car for two reasons. First, he asserts the trooper lacked reasonable suspicion to extend the traffic stop, i.e., to detain him beyond the time it took to investigate the

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[6] In contrast, we decline to address his contention that the trooper's "cocaine residue" testimony was inadmissible under CRE 404(b), as that issue was never squarely presented to the trial court.

underlying traffic infraction. Second, he asserts the dog's entry into the car constituted a search that was not supported by probable cause. As we will explain, we disagree with each assertion.

A. Standard of Review

¶ 35 A trial court's suppression order presents a mixed question of fact and law. *People v. Munoz-Gutierrez*, 2015 CO 9, ¶ 14. We defer to the court's factual findings if they are supported by competent evidence in the record, but we assess the legal significance of those facts de novo. *Id.*

B. Law and Analysis

¶ 36 Both the United States Constitution and the Colorado Constitution protect individuals from unreasonable searches and seizures by the police. U.S. Const. amend. IV; Colo. Const. art. II, § 7. Colorado law recognizes three types of police-citizen contacts: arrests, investigatory stops, and consensual encounters. *People v. Marujo*, 192 P.3d 1003, 1006 (Colo. 2008). The first two are seizures, and thus need to be justified, *see People v. Fields*, 2018 CO 2, ¶ 12 (describing the necessary justifications for arrests and for investigatory stops), while the last is not a seizure, and requires no justification, *see People v. Shoen*, 2017 CO 65, ¶ 10

("Consensual encounters between police and citizens do not implicate Fourth Amendment protections . . . ."). Traffic stops are typically investigatory stops. *People v. Gutierrez*, 2020 CO 60, ¶ 14.

¶ 37 An investigatory stop is constitutionally compliant when it satisfies three conditions: (1) the officer has reasonable suspicion that criminal activity has happened, is happening, or is about to happen; (2) the purpose of the intrusion is reasonable; and (3) the character and scope of the intrusion are reasonably related to its purpose. *People v. Reyes-Valenzuela*, 2017 CO 31, ¶ 11. In the context of traffic stops, an officer only needs to have reasonable suspicion that a driver has committed a traffic violation to pull the driver over. *People v. Vaughn*, 2014 CO 71, ¶ 11.

¶ 38 At the same time, "[a] seizure prompted by a suspected traffic violation can become unreasonable if the detention is 'prolonged beyond the time reasonably required to complete' the mission of the traffic stop." *People v. Chavez-Barragan*, 2016 CO 66, ¶ 20 (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). That is to say, "[o]nce the purpose of the investigatory stop is accomplished and *no further reasonable suspicion* exists to support further investigation, the officer generally may not further detain the driver or passengers

of the vehicle." *People v. Cervantes-Arredondo*, 17 P.3d 141, 147 (Colo. 2001) (emphasis added).

¶ 39 When deciding whether a lawful traffic stop was unreasonably extended, we must "consider[] the facts and circumstances that gave rise to the initial stop plus any additional information learned by the officer before issuing a warning or citation." *Id.* at 148; *see also Chavez-Barragan*, ¶ 21 ("If, while completing the normal tasks incident to a traffic stop, an officer discovers information giving rise to a new reasonable suspicion, the encounter may lawfully be extended to permit further investigation.").

¶ 40 An officer has reasonable suspicion "when the facts known to the officer, taken together with rational inferences from those facts, create a reasonable and articulable suspicion of criminal activity which justifies an intrusion into the defendant's personal privacy at the time of the stop." *People v. Funez-Paiagua*, 2012 CO 37, ¶ 9. This is an objective inquiry that requires us to consider the totality of the circumstances at the time of the intrusion. *People v. Wheeler*, 2020 CO 65, ¶ 13. Moreover, because an officer is entitled to draw rational inferences from all the circumstantial evidence, we may not dismiss or discount acts simply because in isolation they may each

have plausible innocent explanations. *People v. Threlkel*, 2019 CO 18, ¶ 20. Put differently, "[t]he relevant inquiry is not whether the defendant's conduct is innocent or guilty, 'but the degree of suspicion that attaches to particular types of noncriminal acts.'" *Id.* (quoting *Reyes-Valenzuela*, ¶ 13).

¶ 41 In this case, Gamboa-Jimenez does not dispute that the trooper had reasonable suspicion to pull the car over for a traffic infraction, nor does he argue that the trooper took too long to investigate the infraction. Rather, he contends the trooper did not develop *additional* reasonable suspicion during his investigation of the infraction to support his instructing the men to get out of the car. This point bears clarification.

¶ 42 In its suppression order, the trial court determined that the dog sniff of the exterior of the car was a search that needed to be supported by reasonable suspicion, and that "there was reasonable suspicion to have the dog sniff conducted, which included requesting the two men to exit the vehicle." To reach this conclusion, the court analyzed the trooper's interaction with the men as three separate interactions: a detention, followed by a consensual encounter, followed by another detention. According to

the court, the traffic stop finished once the trooper told the men they were "good to go." It was "[s]hortly thereafter," the court reasoned, that "the circumstances of the free air sniff began." While we agree with the court that the dog sniff was lawful, we disagree with its analytical approach for two reasons.

¶ 43 First, because deploying a drug-detection dog to walk around a car is *not* a search (unless, of course, the dog has been trained to detect marijuana, *People v. McKnight*, 2019 CO 36, ¶ 48, which the dog in this case was not), we are not concerned with whether the trooper had reasonable suspicion to justify *the dog sniff*. Instead, we are concerned with whether the trooper had reasonable suspicion to justify *Gamboa-Jimenez's further detention* (during which the dog sniff occurred). Consider the following cases.

¶ 44 In *Caballes*, the Supreme Court held that because a well-trained drug-detection dog alerts only to the presence of contraband in which no one has a legitimate privacy interest, a dog sniff performed on the exterior of a suspect's vehicle *during* the time it takes to complete a lawful traffic stop "does not rise to the level of a constitutionally cognizable infringement," i.e., does not need to be justified by additional reasonable suspicion. 543 U.S. at 409.

Putting a finer point on it, the Court then stated in *Rodriguez v. United States*, 575 U.S. 348, 357 (2015), that, consistent with *Caballes*, "[t]he critical question" is whether a dog sniff "prolongs" a stop. If so, the officer must have reasonable suspicion of criminal activity — in addition to that which initially supported the traffic stop — to justify detaining the suspect. *Id.* And this tracks with Colorado law. *See, e.g.*, *People v. Mason*, 2013 CO 32, ¶ 17 ("Because the officers lacked reasonable articulable suspicion to detain the defendant for further questioning or investigation after issuing him a summons and completing the traffic stop, the contraband seized from his vehicle [consequent to a dog sniff that took place after the traffic stop was complete] was properly suppressed as the product of an illegal detention.").

¶ 45 Second, rather than characterize the stop in this case as three separable, self-contained interactions, we instead view the stop as a single, continuous interaction in legally distinct phases. As explained in *Cervantes-Arredondo*, because the transition between a detention and a consensual exchange can be "seamless" and is not readily apparent to most people, "a traffic stop followed by a request for consent to search is not made up of two separable contacts, but

one interaction in distinct phases. They are part of the same continuous contact, which begins with a routine traffic stop." 17 P.3d at 147-48 (citation omitted).

¶ 46 Any uncertainty in this case can, we think, be attributed to the trooper inexplicably telling the men they were "good to go" even though he had already learned all of the facts that made him suspicious the men were transporting drugs. Accordingly, when the trooper did not learn anything new during the consensual encounter phase of the interaction to support his hypothesis, it may appear that he lacked justification to then instruct the men to get out of the car. But as a division of this court held in *People v. Garcia*, 251 P.3d 1152, 1159 (Colo. App. 2010), an officer can have reasonable suspicion of criminal activity even after returning a driver's paperwork and telling the driver he can leave, explaining that "our supreme court has made clear that in reviewing an officer's conduct in making an investigatory stop, a court must base its decision on an objective analysis of the facts rather than the subjective intent of the officer." *Id.* (citing *People v. Rodriguez*, 945 P.2d 1351, 1359-60 (Colo. 1997)).

¶ 47 Thus, the trooper did not need to learn anything new during the consensual encounter to justify instructing the men to get out of the car. *See id.* at 1159-60 ("Defendant's denial of having contraband and refusal to consent to a search during the consensual interview did not give rise to reasonable suspicion. Nevertheless, the objective factors . . . that were known to the officer before the consensual questioning provided a sufficient basis for reasonable suspicion . . . ."); *see also United States v. Williams*, 271 F.3d 1262, 1271 (10th Cir. 2001) (termination of a traffic stop does not immediately negate the objectively reasonable suspicions developed by an officer during a traffic stop). What matters is whether the trooper developed reasonable suspicion while investigating the traffic infraction to support the extended detention. We turn to that analysis now.

¶ 48 In its order, the court determined that the trooper had reasonable suspicion to justify the dog sniff because of nine facts the trooper testified to during the suppression hearing: (1) the driver's driving behavior was suspicious; (2) the men appeared nervous; (3) several air fresheners were visible in the car; (4) several cell phones were visible in the car; (5) the car had recently been

driven a lot; (6) the men said that they were coming back from a short trip to Las Vegas; (7) the car was owned by a third party; (8) there was no visible luggage in the car; and (9) the men said that they had not "even" gotten a hotel room.

¶ 49 On appeal, Gamboa-Jimenez does not contest any of the court's factual findings. Instead, he attempts to pick apart each of the nine facts relied upon by the court and then asserts that "even examined together," the facts did not amount to reasonable suspicion of criminal activity. We are not persuaded.

¶ 50 As we have explained, we must consider the totality of the circumstances in this case, and because an officer is entitled to draw rational inferences from circumstantial evidence, we may not dismiss or discount acts simply because in isolation they may each have plausible innocent explanations. *Threlkel*, ¶ 20. Based on our review of the facts and the transcript of the suppression hearing, we conclude that the trooper had reasonable suspicion of criminal activity to justify detaining the men beyond the time it took to investigate the underlying traffic infraction. Not only was the trooper able to explain why each of the nine facts the court cited to in its order were indicative of drug trafficking, his inferences were

rational.[7] Therefore, we cannot say that his decision to further detain Gamboa-Jimenez was based on a "mere generalized suspicion or hunch." *Wheeler*, ¶ 13.

¶ 51 Having concluded that the trooper lawfully prolonged the traffic stop (and thus was able to walk his drug-detection dog around the car), we next take up Gamboa-Jimenez's contention that the dog's entry into the car, facilitated by the trooper allowing the dog to jump through the open door, constituted an illegal search.

¶ 52 Assuming without deciding that the dog's entry into the car *was* a search, we conclude it was a reasonable one. As our supreme court has explained, a warrantless search is presumptively unreasonable and thus unconstitutional unless it is supported by probable cause and is justified by an exception to the warrant requirement. *People v. Zuniga*, 2016 CO 52, ¶ 14. One such exception is the "automobile exception," which "allows police officers to conduct a warrantless search of an automobile if they

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[7] Although it is likely that the trooper's inferences were tied to the same "drug courier profile" that was improperly used at trial as substantive evidence of Gamboa-Jimenez's guilt, a person's conformity to such a profile can still support an officer's reasonable suspicion of criminal activity. *United States v. Sokolow*, 490 U.S. 1, 10 (1989); *Salcedo v. People*, 999 P.2d 833, 841 (Colo. 2000).

have probable cause to believe that the automobile contains evidence of a crime." *Id.* (quoting *People v. Hill*, 929 P.2d 735, 739 (Colo. 1996)). In this respect, we find a recent case instructive.

¶ 53 In *People v. Bailey*, a state trooper pulled into a gas station parking lot and saw the defendant standing next to his car and acting suspiciously. 2018 CO 84, ¶¶ 2-3. After watching the defendant repeatedly walk in and out of the gas station, the trooper called another trooper to join him. *Id.* at ¶ 3. Eventually, the troopers contacted the driver and observed or learned the following: (1) the car smelled "overwhelming[ly]" of either air fresheners or cologne; (2) the car belonged to a third party; (3) the defendant had an outstanding, nonextraditable arrest warrant out of California; (4) the defendant's hands were "shaking badly"; (5) the defendant told the troopers he was returning home to Iowa after going to a convention in Las Vegas; (6) the defendant was unable to show the troopers any documentation of his accommodations in Las Vegas; and (7) the defendant told the troopers he had left Iowa only three days ago. *Id.* at ¶¶ 5-6. The defendant then said he was not going to talk anymore and rolled up his window. *Id.* at ¶ 7.

¶ 54 Then a third trooper, who, sometime earlier, had been told to bring his drug-detection dog, arrived. *Id.* at ¶ 8. That trooper was asked to deploy his dog around the car, and he obliged. *Id.* As the trooper and the dog walked around the car, the dog did a "head snap" while passing the driver's side door. *Id.* at ¶ 10. Because of the dog's change in behavior, the trooper placed the dog inside the car. *Id.* Once inside, the dog was unable to identify the specific location of any narcotics, so the trooper opened the trunk and had the dog sniff around in there; nothing. *Id.* The trooper then took the dog over to the passenger side of the car, at which point the dog "gave a final indication" to the presence of narcotics. *Id.* The troopers then hand-searched the car and found drugs. *Id.* at ¶ 11.

¶ 55 Before trial, the defendant moved to suppress the drugs, arguing that the dog's entry into his car was a search that was not supported by probable cause. *Id.* at ¶ 1. The district court agreed. *Id.* On interlocutory review, the supreme court reversed, concluding that the dog's "initial alert," i.e., his change in behavior, "when considered in conjunction with other circumstances present, provided the troopers probable cause to believe that there were narcotics in [the defendant's] car." *Id.* at ¶ 30.

¶ 56 This case is not meaningfully distinguishable from *Bailey*.[8] Here, just as there, the trooper had information that, when considered in conjunction with the drug-detection dog's initial alert, provided probable cause to support the dog's entry into the car.

¶ 57 "A law enforcement official has probable cause to conduct a search 'when the facts available to the officer would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present.'" *People v. Cox*, 2017 CO 8, ¶ 13 (quoting *Zuniga*, ¶ 16). This standard "does not require certainty or even that it be more likely than not that a search will reveal evidence." *Id.* Rather, like reasonable suspicion, probable cause is a commonsense concept that requires courts to consider the "totality of the circumstances." *Id.* at ¶ 14. And, like reasonable suspicion, "a court must consider the '[f]acts in combination.'" *Id.* (quoting *People v. Schall*, 59 P.3d 848, 852 (Colo. 2002)).

¶ 58 As we have discussed, the trooper here articulated numerous reasons to suspect that Gamboa-Jimenez and his companion were

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[8] As an aside, we note that the encounter in *Bailey* involved the same drug-detection dog and dog-handling trooper as in this case, and it occurred the very next day.

transporting narcotics before the trooper's drug-detection dog was deployed. And the dog changed his behavior before entering the car. Therefore, consistent with *Bailey*, we conclude that the totality of the circumstances provided the trooper and the cover officer with the requisite probable cause to search the car.[9]

¶ 59 Finally, Gamboa-Jimenez contends that the prosecution did not present records showing, nor did the court find, that the dog was a reliable drug detector. *See Florida v. Harris*, 568 U.S. 237, 246-47 (2013) (explaining that a drug-detection dog's alert by itself can establish probable cause to support a search, provided the dog's training and experience give sufficient reason to believe that the dog's alert is reliable). But this argument misses the mark for a couple of reasons. First, the trooper testified that not only had he and the dog been through extensive training together, the dog had

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[9] To the extent it is not apparent, the cover officer had probable cause, at a minimum, pursuant to the fellow officer rule. *See People v. Swietlicki*, 2015 CO 67, ¶ 27 ("The fellow officer rule provides that a law enforcement officer who does not personally possess a sufficient basis to [take action] nevertheless may do so if (1) he acts at the direction [of] or as a result of communications with another officer, and (2) the police as a whole possess a sufficient basis to [take the action]." (quoting *People v. Arias*, 159 P.3d 134, 139 (Colo. 2007))).

been certified by the Colorado Police Canine Association to detect the odors of methamphetamine, cocaine, heroin, and MDMA ecstasy. Second, despite having had the opportunity, defense counsel did not challenge the dog's reliability at any point during the suppression hearing. Thus, we have no reason to believe that the dog's sniff was anything but "up to snuff." *Id.* at 248.

IV. Conclusion

¶ 60 The order denying Gamboa-Jimenez's motion to suppress is affirmed, the judgment of conviction is reversed, and the case is remanded for a new trial.

JUDGE HARRIS and JUDGE GOMEZ concur.