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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203	
Jefferson District Court Honorable Tamara Russell Case Number 10CR2446	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. STEVE GORDON Defendant-Appellant	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender BRITTA KRUSE, #41572 1300 Broadway, Suite 300 Denver, CO 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 11CA1890

REPLY BRIEF OF DEFENDANT-APPELLANT

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I hereby certify that this reply brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The reply brief complies with C.A.R. 28(g).

Choose one:

☑ It contains 3,688 words.

☐ It does not exceed 18 pages.

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Signature of attorney or party

In response to matters raised in the State's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Mr. Steve Gordon submits the following Reply Brief.

ARGUMENT

I. SUPPRESSION IS REQUIRED BECAUSE MR. GORDON'S PROLONGED DETENTION IMPERMISSIBLY EXCEEDED THE SCOPE OF THE TRAFFIC STOP IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. This issue is preserved

The State contends that Mr. Gordon failed to preserve for review the issue that the police unconstitutionally prolonged the traffic stop, arguing that this is a new argument never presented to, or ruled on, by the trial court. (AB, p.7-9) The record refutes the State's claim. As set forth in the Opening Brief, defense counsel raised this issue in his written suppression motion filed in the court, where he argued that, "[a]fter stopping the Defendant's vehicle, Defendant was detained by Agents Collett and Jacobsen for an excessive amount of time," and argued that "the agents again detained the Defendant and continued to question him, and also that "a reasonable person in the Defendant's position would not feel free to leave the two police officers." (v1, p.40-41)

Additionally, the nature and scope of an investigation and detention are included within, and the trial court is obligated to evaluate it as part of the totality of the circumstances, *see Michigan v. Chesternut*, 486 U.S. 567, 572 (1988) ("[A]ny assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account all of the circumstances surrounding the incident in each individual case." (internal quotations omitted)), and evidence was presented to the trial court at the hearing concerning the nature of the traffic investigation, when it concluded, and when Mr. Gordon's documents were returned to him, (*see* 4/12/11, p.11-15, 21-22, 57-59, 62-66).

Finally, as set forth in the Opening Brief, the trial court made findings of fact regarding this issue and entered a legal ruling. Specifically, the court found that the basis for the stop was to investigate alleged traffic violations (5/13/11, p.3), although the court was skeptical about whether that was the actual basis for the stop (*id.* 8-9), and found that "the amount of time that the officers kept Mr. Gordon at the side of the road was minimal. That it was nearly long enough for them to look at the registration, the insurance, and the license to determine that all of those were valid" (*id.* at 12).

Consequently, not only was this issue raised in Mr. Gordon's motion to suppress evidence, but the facts relevant to the issue were litigated at the hearing, and

the trial court considered the issue and entered a ruling on it. Thus, contrary to the State's contention, the trial court was provided with "the opportunity to directly address" Mr. Gordon's argument, (AB, p.8 n.2), and, in fact, did directly address the argument. Consequently, this Court may review this issue because the purposes of the preservation requirement have been more than satisfied. *See People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004) (stating that, to permit review, "the trial court must be presented with an adequate opportunity to make findings of fact and conclusions of law" on the issue); *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006) ("The purpose of the contemporaneous objection rule is to conserve judicial resources by alerting the trial court to a particular issue in order to give the court an opportunity to correct any error that could otherwise jeopardize a defendant's right to a fair trial.").

Nevertheless, as the State concedes (*see* AB p.8-9), this Court may still review this issue under a plain error standard of review even if this Court finds that this issue is not preserved, *People v. Miller*, 113 P.3d 743, 748-49 (Colo. 2005) (holding that plain error review applies to unpreserved constitutional errors), and, here, reversal would be required even under plain error review. The prosecutor's entire case rested on the admission of the fruits of Mr. Gordon's illegal detention. Therefore, reversal is required because the trial court's error in not suppressing these fruits affected Mr. Gordon's "substantial right" to be free from unreasonable searches and seizures, U.S.

Const. amends. IV, XIV; Colo. Const. art. II, § 7; Crim. P. 52(b) (defining plain error as error "affecting substantial rights"), and cast "serious doubt on the reliability of the judgment of conviction," *Miller*, 113 P.3d at 750 (defining plain error).

B. Mr. Gordon was illegally detained.

As argued in the Opening Brief, the officers unconstitutionally prolonged Mr. Gordon's detention when, without returning Mr. Gordon's documents to him and without reasonable suspicion to justify the prolonged detention, the officers persisted in questioning both Mr. Gordon and his wife after the officers' investigation into the minor traffic infractions for which they had purportedly stopped the Gordons had already concluded.

Notably, the State does not dispute that the officers retained Mr. Gordon's documents and continued to question him and his wife even after the officers' traffic investigation had concluded. Instead, the State argues that the seizure was not unconstitutional because (1) the stop "was of minimal duration," (2) the "discussion was conversational and polite, not confrontational," and (3) the "discrepancies" in the Gordons' statements "combined with" Mr. Gordon's "extremely nervous behavior" gave rise to reasonable suspicion justifying detention for further questioning. (AB, p.19-20) The State's arguments are unavailing.

First, the law is clear that once the purpose for which the stop was initiated has been resolved, "*any* further detention"—whether minimal or not—constitutes an unconstitutional seizure if not supported by reasonable suspicion.[1] *United States v. Trestyn*, 646 F.3d 732, 742 (10th Cir. 2011) (emphasis added); *see Florida v. Royer*, 460 U.S. 491, 500 (1983) (stating that, to withstand constitutional muster, a traffic stop must last "no longer than necessary to effectuate the purpose of the stop"); *People v. Redinger*, 906 P.2d 81, 85-86 (Colo. 1995) ("When...the purpose for which the investigatory stop was instituted has been accomplished and no other reasonable suspicion exists to support further investigation, there is *no justification* for continued detention and interrogation of citizens." (emphasis added)); *see also Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (observing that a traffic stop is a "seizure" within the meaning of the Fourth Amendment, "even though the purpose of the stop is limited and the resulting detention quite brief"). Thus, it is irrelevant whether the officers

[1] It appears that the State has mistakenly adopted the analysis for evaluating whether a suspect is in "custody" rather than "seized" for purposes of the Fifth Amendment rather than the Fourth Amendment. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 436-438 (1984) (holding that roadside detentions pursuant to routine traffic stops do not implicate the "custody" requirement for the Fifth Amendment because a routine traffic stop is "presumptively temporary and brief," lasing "only a few minutes"); *see People v. Hughes*, 252 P.3d 1118, 1121-22 (Colo. 2011) (holding that the test for determining whether a suspect is in custody for purposes of the Fifth Amendment is not the same as the test for determining whether a suspect is seized for purposes of the Fourth Amendment).

illegally prolonged the Gordons' detention for several minutes or several hours, the prolonged detention constituted an unconstitutional seizure.

The State's second argument fails for the same reasons. It is irrelevant whether, during Mr. Gordon's illegally prolonged detention, the officers were polite and conversational in tone rather than accusatory and confrontational.[2] By law, if the purpose for which the traffic stop was instituted has concluded and there is no reasonable suspicion justifying further questioning, the police cannot continue to detain a person for *any* further investigation or questioning, regardless of the tone the police choose to employ during the unlawful seizure. *Trestyn*, 646 F.3d 732, 742 (10th Cir. 2011); *People v. Rodriguez*, 945 P.2d 1351, 1360 (Colo. 1997) ("Once a driver produces a valid license and proof that he is entitled to operate the vehicle, 'he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning.'" (quoting *United States v. Mendez*, 118 F.3d 1426, 1429 (10th Cir. 1997)); *Redinger*, 906 P.2d at 85-86.

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[2] It again appears that the State has erroneously adopted the Fifth Amendment analysis for evaluating whether a suspect is subjected to "custodial interrogation," rather than the Fourth Amendment analysis for determining whether a suspect is "seized." *See, e.g., People v. Klinck*, 259 P.3d 489, 494 (Colo. 2011) (holding that suspect was not in "custody" for purposes of Fifth Amendment in part because, when questioning the suspect, the officer "used a conversational tone" and asked "non-confrontational, open-ended questions"); *Hughes*, 252 P.3d at 1121-22.

Third, as set forth in the Opening Brief, there was no reasonable suspicion to justify Mr. Gordon's prolonged detention after the officers had concluded their traffic investigation. The State relies on the alleged discrepancies in the Gordons' accounts of their travels and the fact that Mr. Gordon appeared nervous. As an initial matter, courts have repeatedly admonished against placing too much reliance on the fact a suspect appears nervous. As the Colorado Supreme Court has recognized, "it is not uncommon for most citizens—whether innocent or guilty—to exhibit signs of nervousness when confronted by a law enforcement officer." *People v. Haley*, 41 P.3d 666, 675 (Colo. 2001) (internal quotations omitted). Thus, to the extent Mr. Gordon—a black man traveling from out of state, stopped on the side of the interstate, separated from his family, and questioned by several armed, uniformed police officers—appeared nervous, any such nervousness would be "of limited significance in determining reasonable suspicion." *United States v. Fernandez*, 18 F.3d 874, 879-80 (10th Cir. 1994) (observing that reliance on nervousness as a basis for reasonable suspicion must be treated with caution).

In addition, concerning alleged "discrepancies" in the Gordons' statements, the officers were not aware of any actual discrepancies at the time the unlawful detention began. As set forth in the Opening Brief, up to that point, the Gordons' statements about their travel plans were nearly identical, except to the extent there was some

ambiguity regarding whether the Gordons had already been to Chicago or whether they were going to stop there for the first time on their way home as opposed to stopping there a second time.

However, even assuming that constitutes a discrepancy, there was no evidence presented indicating how that discrepancy was indicative of any crime. The officers did not testify that Chicago, or San Francisco for that matter, was a hub of drug activity and that Mr. Gordon therefore had a reason to lie about when he had traveled there. *See United States v. Wood*, 106 F.3d 942, 947 (10th Cir. 1997) (holding that where a discrepancy existed in suspect's account of where he rented his car, such a discrepancy did not give rise to reasonable suspicion because there was no evidence to suggest that the suspect was trying to "conceal the fact that he had rented the car in a city known to be a source of narcotics"). Nor did the officers testify that, in their experience, it is common among drug couriers to give ambiguous or conflicting accounts of their precise movements during a long trip. *See People v. Garcia*, 251 P.3d 1152, 1156 (Colo. 1993) (relying on the fact that an officer with extensive training and experience in drug investigations was concerned about lack of knowledge about ownership of the truck driven by suspect in concluding that reasonable suspicion existed). Thus, such a minimal "discrepancy" could not give rise to a finding of

reasonable suspicion that a drug crime was being committed, even in combination with Mr. Gordon's apparent nervousness.[3]

Finally, the State's reliance on *People v. Garcia*, 251 P.3d 1152 (Colo. 1993), and *People v. Castaneda*, 187 P.3d 107 (Colo. 2008), is misplaced. As argued in the Opening Brief (*see* OB, p.20-21), *Garcia* is inapposite because it is distinguishable from Mr. Gordon's case in several important ways. Unlike in Mr. Gordon's case, the discrepancies in the suspects' travel plans in *Garcia* were substantial and numerous. *See* 251 P.3d at 1156-57. Furthermore, in *Garcia*, unlike here, one of the police officers apparently provided testimony to explain how such discrepancies were indicative of a drug crime. *See id.* at 1156. Finally, in *Garcia* the additional questioning occurred *after* the officers returned the suspect's documents to him, thereby converting the seizure into a consensual encounter that was likewise justified by reasonable suspicion,

[3] To the extent the State is also relying on the alleged discrepancy regarding whether the Gordons had traveled to Los Angeles or Mr. Gordon's alleged hesitancy in responding to Collett's question of whether there was marijuana in the truck, neither this "discrepancy" or "hesitancy" arose until *after* the illegal seizure had already begun—both were a fruit of the initial unlawful detention, and therefore they cannot be relied upon as justification for the unlawful detention itself. *See Haley*, 41 P.3d at 674 (stating that courts apply an objective test that considers only facts and circumstances known to the office at the time); *see also United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 2997) ("[T]he scope or duration of an investigative detention may be expanded beyond its initial purpose only if the detaining officer *at the time of the detention* has a particularized and objective basis for suspecting the particular person stopped of criminal activity." (internal quotations omitted)).

whereas here the officers persisted in questioning both of the Gordons *before* returning their documents; thus, the seizure continued. *See id.* at 1157.

Likewise, *Castaneda* does not apply to this case because the issue there was whether the detention had evolved into a consensual encounter. 187 P.3d at 109-10. In *Castaneda*, the court found that that the suspect was no longer "seized" because, unlike here, the officers had returned the suspect's documents to him before resuming their investigation of a potential drug crime, and a reasonable person in the suspect's position would feel free to leave; therefore, the encounter was merely consensual. *See id.* Thus, *Castaneda* did not concern whether the officers had reasonable suspicion to prolong the suspect's detention because the court determined that reasonable suspicion was not required. *See id.*

II. MR. GORDON'S CONVICTION MUST BE VACATED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT THE SUBSTANCE DISCOVERED AMOUNTED TO MORE THAN FIVE POUNDS OF MARIJUANA.

A. De novo review applies.

The State's contention that de novo review does not apply to an issue concerning the constitutional sufficiency of the evidence (*see* AB, p.26), is contradicted by well-established precedent. *See, e.g., Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005) (reviewing claim of insufficient evidence de novo), *People v. Williams*, 297 P.3d

1011, 1017 (Colo. App. 2012) ("We review the record de novo to determine whether the evidence before the jury was sufficient in quality and quantity to sustain the conviction."); *People v. Robb*, 215 P.3d 1253, 1257 (Colo. App. 2009) ("We review a sufficiency of the evidence claim de novo.").

Additionally, the State contends that Mr. Gordon did not address preservation of this issue in his Opening Brief. (AB, p.27). To the contrary, Mr. Gordon, under a separate heading entitled "Standard of Review and Preservation," set forth the applicable law stating that a sufficiency of the evidence claim need not be preserved. (*See* OB, p.32-33 (citing *People v. Duncan*, 109 P.3d 1044, 1045 (Colo. App. 2004))); *see also People v. Peay*, 5 P.3d 398, 400 (Colo. App. 2000) ("[W]e reject the People's contention that defendant failed to preserve the issue of the sufficiency of the evidence as to the charge of criminal impersonation because he failed to raise it in his motion for acquittal. We are unaware of any authority supporting the People's contention.").

B. The evidence was insufficient in this case to establish that the substance discovered amounted to more than five pounds of marijuana.

The State contends there was sufficient evidence of more than five pounds of marijuana because the jury could simply infer that if one or two packages contained marijuana, they must all contain marijuana. (AB, p.29-32) However, the State's argument amounts to nothing more than an argument that jurors should be permitted

to resort to guessing and speculation in rendering a criminal guilty verdict, which is contrary to well-settled law. *See People v. Stark*, 691 P.2d 334, 339 (Colo. 1984) ("[V]erdicts in criminal cases may not be based on guessing, speculation, or conjecture."); *People v. Urso*, 269 P.2d 709, 711 (Colo. 1954) (same); *People v. Miralda*, 981 P.2d 676, 678 (Colo. App. 1999) (same); *see generally In re Winship*, 397 U.S. at 363 (observing that the reasonable doubt standard "plays a vital role in the American scheme of criminal procedure" and "provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

Furthermore, Mr. Gordon has not argued that the prosecutor was required to open and have tested every single package in order to meet its burden beyond a reasonable doubt; however, the prosecution was required to prove beyond a reasonable doubt the existence of at least five pounds of marijuana, *see* § 18-18-406(6)(b)(I), (III)(B), C.R.S. (2010); *People v. Atencio*, 140 P.3d 73, 74-75 (Colo. App. 2005)(observing that where a statutory provision "relating to amount of controlled substance increases the punishment for the offense," the provision "must be proved beyond a reasonable doubt in the same manner as an element of the offense"), and therefore the prosecutor was required to present "sufficient and substantial" evidence

of at least five pounds of marijuana, *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973) (observing that the evidence must be both "substantial and sufficient" in order to support the determination of guilt beyond a reasonable doubt). Here, however, the prosecutor only presented evidence of, at most, four pounds of marijuana, and then simply left it to the jury to assume that the remaining bundles contained additional marijuana, even though the officers themselves testified they could not be certain what was in the bundles until they opened them, and even if opened,[4] the bundles were never weighed or tested to determine whether they in fact contained marijuana. Thus, Mr. Gordon's conviction must be vacated.

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[4] The State contends that the prosecutor opened an additional bundle during closing argument to show that it contained the same substance that Collett identified as marijuana. (AB, p.31) However, the portion of the record to which the State cited does not clearly reflect what occurred, and, even assuming the prosecutor had opened another bundle during closing argument, closing arguments are not evidence, *see People v. Rodriguez*, 914 P.2d 230, 278 (Colo. 1996) ("The closing arguments of counsel are not evidence."), and, moreover, the prosecutor would have been improperly exposing the jury to extraneous information because only the unopened bundles, not the contents of the bundles—which were unknown since no one had previously opened them—had been admitted into evidence, *see Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (jury verdict must be based only on evidence developed at trial); *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005) (observing that, in rendering a verdict, "jurors are required to consider only the evidence admitted at trial and the law as given in the trial court's instructions"); *see also People v. Walters*, 148 P.3d 331, 334 (Colo. App. 2006) ("[I]t is not proper for a prosecutor to refer to facts not in evidence or to make statements reflecting his or her personal opinion or personal knowledge.").

III. THE TRIAL COURT REVERSIBLY ERRED WHEN IT FAILED TO TAKE ANY ACTION IN RESPONSE TO DEFENSE COUNSEL'S CONCERN THAT JURORS MAY HAVE BEEN EXPOSED TO PREJUDICIAL EXTRANEOUS INFORMATION.

The State contends that this issue is not preserved and that Mr. Gordon failed to address preservation in his Opening Briefs. Neither contention is correct. As set forth in the Opening Brief (*see* OB, p.36, 38), defense counsel preserved this issue by specifically informing the court that, during a break in jury selection, he had seen prospective jurors[5] looking at a docket sheet apparently listing Mr. Gordon as a defendant in an additional case, which he believed could cause those jurors to believe that Mr. Gordon had several criminal cases against him, requesting the court to address the issue with the jury, and receiving a definite ruling from the court that it would not do so because it did not wish to "highlight" the issue. (*See* 6/7/11, p.132-33) Furthermore, contrary to the State's argument, defense counsel did not thereafter fail to preserve this issue by not re-objecting following the court's ruling. *People v.*

[5] Contrary to the State's suggestion that no prejudice occurred because these events occurred before jury selection had concluded (AB, p.33), the fact that it was not known whether any of the prospective jurors who viewed the docket sheet served on Mr. Gordon's jury made it even more imperative for the court to canvass the jury so that it could determine whether any of them had been exposed, and, if so, whether it would have any impact on their verdict in Mr. Gordon's case. *See Harper v. People*, 817 P.2d 77, 83 (Colo. 1991) (noting that the purpose of the three-step test is to give the court an opportunity to determine whether, in fact, the extraneous information "prejudiced the deliberations of the particular jury trying the case").

Renfro, 117 P.3d 43, 47 (Colo. App. 2004) (observing that a party need not renew an objection to preserve a claim of error once the court makes a definite ruling).

CONCLUSION

Mr. Gordon respectfully requests this Court to vacate his conviction and remand his case with directions to the trial court to order suppression of the evidence obtained as a result of Mr. Gordon's illegal detentions. Alternatively, Mr. Gordon requests this Court to reverse his conviction because the trial court reversibly erred in failing to take any action pursuant to *Harper*. Finally, Mr. Gordon would ask this Court to vacate his conviction for lack of proof beyond a reasonable doubt that the substance discovered amounted to more than five pounds of marijuana.

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CERTIFICATE OF SERVICE

I certify that, on July 3, 2013, a copy of this Request For Extension Of Time was electronically served through ICCES on Kevin E. McReynolds of the Attorney General's Office.

K. Root