COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203	DATE FILED: February 11, 2014 11:21 AM
El Paso District Court Honorable Theresa M. Cisneros, Judge Case Number 2010CR4540	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. DERICK CAMPBELL Defendant-Appellant	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender DAYNA VISE, #36656 1300 Broadway, Suite 300 Denver, CO 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 2011CA1279

REPLY BRIEF OF DEFENDANT-APPELLANT

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CERTIFICATE OF COMPLIANCE

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 1,516 words.

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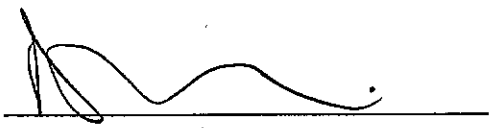

Signature of attorney or party

In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant submits the following Reply Brief.

ARGUMENT

I. THE AFFIDAVIT FOR A SEARCH WARRANT TO SEARCH MR. CAMPBELL'S CAR WAS MATERIALLY MISLEADING, THERE WAS NO PROBABLE CAUSE TO SEARCH MR. CAMPBELL'S CAR AT THE TIME IT WAS SEARCHED, AND THE SEARCH THUS VIOLATED MR. CAMPBELL'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

This case involved the single charge of possession of a controlled substance found in a jacket in Mr. Campbell's vehicle after he was pulled over to investigate a report of a robbery. The investigating officer ultimately determined no robbery had been committed. (4/22/11, pp25-26) Instead, the report of a robbery resulted from Mr. Campbell's retrieving items belonging to him. (4/18/11, pp49,76-78) However, the officers in this case searched Mr. Campbell's car *after* officers determined that no robbery had been committed and *after* officers released Mr. Campbell from custody as a result of the determination no crime had been committed. (4/22/11, pp25-26; 4/18/11, pp65,79) Yet the State argues that the warrant upon which the search of Mr. Campbell's car was authorized, and which failed to include this information, was not misleading. (AB, p20) Alternatively, the State argues the search of the vehicle after

determining no crime had been committed was valid under the automobile exception, under the inventory search exception, or as a valid search of a parolee. (AB, pp23-24)

This Court should reverse Mr. Campbell's conviction because there was no probable cause to support the search at the time officers searched Mr. Campbell's car. The affidavit attached to the warrant failed to inform the judge that officers had determined no robbery had occurred, rendering the affidavit misleading. *People v. Kazmierski,* 25 P.3d 1207, 1210 (Colo. 2001); *People v. Eirish,* 165 P.3d 848, 856 (Colo. 2007). Even if not misleading, by the time the search was executed probable cause had dissipated and rendered the warrant stale based on the determination no robbery had occurred. *People v. Russom,* 107 P.3d 986, 991 (Colo. App. 2004). The determination meant there was no longer probable cause to keep Mr. Campbell in custody and resulted in his release; similarly, there was no longer probable cause to retain and search his car.

The State argues the officers in this case had "alternate grounds to perform a warrantless search on the vehicle." (AB, p23) However, the alternate grounds argued by the State in its Answer Brief cannot be argued for the first time on appeal when the prosecution never argued those grounds below and there is no evidence to support the alternate grounds. *Steagald v. United States*, 451 U.S. 204, 209 (1981) (the government cannot raise a factual issue on appeal "when it has failed to raise such

questions in a timely fashion during the litigation."); *Moody v. People*, 159 P.3d 611, 614-14 (Colo. 2007) (citing *Steagald*, holding that prosecution "waived" argument that defendant lacked standing by failing to raise it in trial court); *People v. Roybal*, 672 P.2d 1003, 1006 & n.7 (Colo. 1983) (if the State does not present evidence on alternate theories of admissibility in the trial court because it does not anticipate an unfavorable ruling, these claims are waived).

Nevertheless, the State's argument that the officers could have searched the car under the roadside automobile search exception or inventory search exception to the warrant requirement is without merit because those exceptions apply under certain circumstances not present in this case. For example, the officers did not conduct a roadside search of Mr. Campbell's car at the scene of the stop. Thus, this was not a roadside automobile search. *Arizona v. Gant,* 556 U.S. 332 (2009); *People v. Coates,* 266 P.3d 397, 398-99 (Colo. 2011). Even if the officers had conducted a roadside search of the vehicle when they arrested Mr. Campbell, *Gant* established that there is no bright-line rule automatically permitting vehicle searches incident to arrest. *Coates,* 266 P.3d at 398. The State never established that this exception applied in the trial court. *See People v. Lorio,* 546 P.2d 1254, 1257 (Colo. 1976) ("warrantless searches are presumptively illegal under both the United States Constitution and the Constitution and laws of the State of Colorado, and that the prosecution must bear the burden of

proving an exemption from the warrant requirements"). Courts employ a reasonableness inquiry to determine if this exception to the warrant requirement applies. *Coates,* 266 P.3d at 399. Here, officers verified Mr. Campbell's explanation that the items in the back of his car belonged to him and that he had just recovered them after having reported them stolen the day before. (4/18/11, pp77-78) Because they could not meet the requirements necessary to conduct a search under the automobile exception to the warrant requirement, the officers decided to get a warrant to search the car. However, by the time they obtained the warrant, it had already been determined by the officer investigating the robbery that no robbery had occurred and, thus, probable cause no longer existed.

Similarly, an inventory search exception to the warrant requirement was never argued by the prosecution below and cannot justify the search of Mr. Campbell's vehicle. "[I]nventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Colorado v. Bertine*, 479 U.S. 367, 372 (1987). An inventory search must be conducted in strict accordance with police policies and procedures. *People v. Houseman,* 900 P.2d 74, 78 (Colo. 1995). Police cannot rely on the inventory search exception when there is "evidence showing that the police acted in

bad faith or for the sole purpose of investigation." *Pineda v. People,* 230 P.3d 1181, 1185 (Colo. 2010).

Here, there was no evidence presented that the officers were conducting an inventory search pursuant to policy and/or procedure. The prosecution did not argue this below and there was no evidence presented to support this alternate theory of admissibility; therefore, this argument was waived. *Steagald, Moody, Roybal, supra.* Moreover, the evidence established that the officers went to search Mr. Campbell's vehicle after learning from Officer Blackburn that no robbery had occurred (4/22/11, p25). Thus, the officers searched the car knowing there was no longer probable cause to do so and therefore acted in bad faith. The State cannot rely on this exception when the evidence demonstrates bad faith or for the sole purpose of investigation. *Pineda,* 230 P.3d at 1185.

Finally, the State argues that the search of Mr. Campbell's vehicle was a valid warrantless search of a parolee. (AB, p24) However, "[t]he fact that a person is on parole does not justify a search without a warrant by any law enforcement officer, other than a parole officer." *People v. Anderson,* 536 P.2d 302, 305 (Colo. 1975). A warrantless search of a parolee is authorized by statute *by the parole officer only* and even then only in accordance with certain requirements. *See People v. McCullough,* 6 P.3d 774, 781-82 (Colo. 2000) (search must be conducted in furtherance of the purposes of

parole and "must be carried out under the authority of a parole officer;" "[a] parole officer must authorize the search and will normally be present during the search, and the search itself must be related to the rehabilitation and supervision of the parolee"). Here, there was no evidence the search of Mr. Campbell was conducted by his parole officer or was in accordance with the requirements to meet this exception to the warrant requirement. In fact, the prosecutor conceded that a search must be conducted by a parole officer to meet this exception to the warrant requirement before the trial court below. (4/22/11, p44) ("The Colorado specific statute actually only addresses parole officers [having authority to conduct a warrantless search under the parolee exception]") Consequently, the search of Mr. Campbell's vehicle was not a valid warrantless search of a parolee.

Here, the officers chose to search Mr. Campbell's vehicle after the investigating officer determined no robbery had occurred and after Mr. Campbell was released as a result. In other words, the officers decided to wait to search the vehicle until after they had already determined there was no longer probable cause to believe Mr. Campbell had committed a crime and released him. The State failed to establish any circumstances that would justify any of the above exceptions to the Fourth Amendment's warrant requirement. U.S. Const. amend. IV; Colo. Const. art. II, § 7. This Court should reverse Mr. Campbell's conviction and remand with directions to

suppress the evidence obtained as the result of the illegal search of Mr. Campbell's vehicle.

CONCLUSION

For the foregoing reasons and authorities and in Argument I of the Opening Brief, Mr. Campbell respectfully requests this Court reverse his conviction and remand to the trial court with instructions to suppress the evidence obtained from the search of his car. For the reasons and authorities in Arguments II and III, Mr. Campbell requests this Court reverse his conviction and remand for a new trial.

DOUGLAS K. WILSON
Colorado State Public Defender

DAYNA VISE, #36656
Deputy State Public Defender
Attorneys for Derick Campbell
1300 Broadway, Suite 300
Denver, CO 80203
303-764-1400

CERTIFICATE OF SERVICE

I certify that, on February 11, 2014, a copy of this Reply Brief of Defendant-Appellant was electronically served through ICCES on Gabriel P. Olivares of the Attorney General's office.