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| COURT OF APPEALS<br>STATE OF COLORADO<br><br>2 East 14th Avenue<br>Denver, CO 80203 | DATE FILED: June 25, 2019 1:09 PM<br>FILING ID: 60CDDB26C3D9D<br>CASE NUMBER: 2018CA1018 |
| Arapahoe County District Court<br>Honorable Andrew Baum, Judge<br>Case No. 2016CR1151 | |
| THE PEOPLE OF THE STATE OF COLORADO,<br><br>Plaintiff-Appellee<br><br>v.<br><br>KELVIN DALEXI ARTEAGA,<br><br>Defendant-Appellant. | ▲ **COURT USE ONLY** ▲ |
| PHILIP J. WEISER, Attorney General<br>BRIAN M. LANNI, Assistant Attorney General*<br>Ralph L. Carr Colorado Judicial Center<br>1300 Broadway, Floor<br>Denver, CO 80203<br>Telephone: (720) 508-6000<br>Registration Number: 47486<br>*Counsel of Record<br><br>With thanks to intern Gavin Uitvlugt, who drafted this brief. | Case No. 2018CA1018 |

# PEOPLE'S ANSWER BRIEF

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

**The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).**

☒It contains 3,337 words.

**The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).**

☒In response to each issue raised, the appellee has provided, under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

**I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.**

/s/ Brian M. Lanni

Signature of attorney or party

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**CONSTITUTIONAL PROVISIONS**

## STATEMENT OF THE CASE

Defendant, Kelvin Arteaga, was charged with one count of distribution of a controlled substance and two counts of possession with intent to distribute. CF pp. 15-16. Defendant moved pretrial to suppress narcotics found during his arrest along with incriminating statements he made to officers. CF pp. 50-52. The court denied the motion. TR 8/15/17, pp. 76-83. The evidence was admitted at trial, and Defendant was convicted as charged. TR 2/22/18, pp. 86-90. Defendant was sentenced to five years in prison, which was later reduced to three years of probation. TR 4/16/18, pp. 16-17; TR 8/20/18, p. 6:2-7.

In this appeal, Defendant challenges the trial court's denial of the motion to suppress.

## STATEMENT OF THE FACTS

Defendant was arrested following a drug bust. At the suppression hearing, Investigator Eric Waters testified as follows.

Investigator Waters was the head of a narcotics operation involving a confidential informant. TR 8/15/17, pp. 22-23, 71:11-12. The

informant arranged a controlled drug purchase with a person the informant previously dealt with, named "Santos." TR 8/15/17, pp. 23-25,71-72. The informant described Santos as a "Hispanic male." TR 8/15/17, p. 24:1. Officers strip-searched the informant to ensure that he had no drugs or money on him, then the officers provided the informant with photocopied money to use in the drug deal. TR 8/15/17, pp. 27-28, 71-72.

Investigator Waters drove with the informant to the parking lot where the deal was supposed to take place. TR 8/15/17, p. 72:7-12. The informant and officers learned that Santos was in a red Honda. TR 8/15/17, pp. 28, 72:13-19. The informant entered the Honda wearing a wire. TR 8/15/17, pp. 29-30,73:2-3. Officers monitored the transaction and, after drugs were exchanged, the informant gave the "preplanned bust signal," and officers moved to detain everyone in the car. TR 8/15/17, pp. 31-32, 73:7-15.

There were five people in the Honda, including Defendant and the informant. TR 8/15/17, pp. 31-35. Officers approached with their guns drawn and ordered everyone out of the car. Each individual was

removed, handcuffed, and patted down. TR 8/15/17, pp. 31-32, 73:16-23. The trial court found that the officers took these steps to ensure officer safety, based on Investigator Waters' testimony that weapons were often involved in drug deals. TR 8/15/17, pp. 32:2-6, 73-74.

When Investigator Waters approached the car, he observed money on the front passenger side and drugs visible in the backseat. TR 8/15/17, p. 32:16-20. At this point, it was not known to officers which individual was Santos, or who was involved in the drug deal. TR 8/15/17, pp. 32:21-23, 73-74, 76:2-11. "About two minutes after the initial contact," Investigator Waters removed the informant from the scene to debrief. TR 8/15/17, p. 74:5-11. The informant told Investigator Waters that Defendant was involved in the drug transaction, though Defendant was not Santos. TR 8/15/17, pp. 33-34, 74:5-21. The informant reported that he gave Santos the money, Santos provided the informant with one bindle of drugs, a female in the car provided the informant with a second bindle, and Defendant provided two additional bindles. TR 8/15/17, pp. 33-35, 74:12-21. The informant had four bindles

of drugs with him, consistent with his account. TR 8/15/17, pp. 35:20-22, 74:23-24.

More drugs were found on Defendant's person after a search at the detention facility. TR 8/15/17, pp. 50:20-23, 76:12-15. Defendant was also read *Miranda* rights, which he waived. TR 8/15/17, pp. 12-14, 48:20-21, 78-83. EX, pp. 20-21. Defendant agreed to speak with Investigator Waters, and during the conversation Defendant confessed to selling heroin. TR 8/15/17, pp. 48-53.

## SUMMARY OF THE ARGUMENT

The trial court's denial of the motion to suppress should be affirmed for three reasons. First, the trial court correctly ruled that Defendant's initial detention was only an investigatory stop, not an arrest. The use of force by officers does not necessarily turn a detention into an arrest. Once the informant implicated Defendant in the drug deal, the officers had probable cause to arrest him.

Second, officers had probable cause to arrest Defendant even before the informant confirmed Defendant's role in the drug deal. The

presence of other potential suspects in the car does not change the fact that officers had a reasonable belief that Defendant had committed a crime.

Finally, even if the initial detention was unconstitutional, the evidence was attenuated from the taint of that detention because the informant provided an independent source of probable cause to arrest Defendant.

## ARGUMENT

### Defendant's motion to suppress was properly denied.

#### A. Preservation and Standard of Review

The People agree with Defendant regarding the standard of review and the preservation of the issue. Defendant's motion to suppress preserved this issue. CF pp. 51-52; TR 8/15/17, pp. 68-70. The trial court denied the motion on the grounds that the initial police detention was a lawful stop supported by reasonable suspicion and the later arrest was supported by probable cause. TR 8/15/17, pp. 70-76.

Courts review trial court rulings on motions to suppress as a mixed question of law and fact. *People v. Threlkel*, 2019 CO 18, ¶ 15.

Appellate courts defer to trial court determinations of fact but review legal conclusions de novo. *Id.*

Additionally, "appellate courts have the discretion to affirm decisions, particularly denial of suppression motions, on any basis for which there is a record sufficient to permit conclusions of law, even though they may be on grounds other than those relied upon by the trial court." *Moody v. People*, 159 P.3d 611, 615 (Colo. 2007) (citing *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006)).

Defendant's Opening Brief mentions evidence obtained from the car ("'money outside the front passenger side' and 'drugs visible in the backseat'"). Opening Brief, p. 7. However, in the trial court, he challenged only the legality of his arrest, the drugs obtained from his person as a result of his arrest, and the incriminating statements he made after his arrest. *See* TR 8/15/17, pp. 77-78. Defense counsel specifically clarified that she was not challenging the search of the vehicle. TR 8/15/17, p. 78:2–11. Therefore, any challenge to the search of the vehicle was waived. *People v. Cardman*, 2017 COA 87, ¶ 37; *People v. Lee*, 93 P.3d 544, 547 (Colo. App. 2003).

### B. Law and Analysis

#### 1. The trial court correctly ruled that the initial encounter with police officers was an investigatory stop, not an arrest.

Defendant argues that the initial force used by officers made his initial detention an arrest not supported by probable cause. This claim fails because use of force does not necessarily convert a police detention into an arrest. In this case, officers reasonably used force to ensure their own safety. After the informant confirmed Defendant's involvement in the drug deal, officers executed a lawful arrest.

The Fourth Amendment to the United States Constitution, and Colorado's counterpart, protect individuals from unreasonable searches and seizures. U.S. Const. amends. IV, XIV; Colo. Const. art. II, § 7. There are two categories of seizures: arrests and investigatory stops. *People v. Padgett*, 932 P.2d 810, 813 (Colo. 1997). "On the spectrum of police-citizen encounters, which range from a full-scale arrest or search to a consensual encounter, an investigatory stop falls in the middle." *People v. Smith*, 13 P.3d 300, 304 (Colo. 2000).

An "investigatory stop complies with the Fourth Amendment if three criteria are met." *People v. Reyes-Valenzuela*, 2017 CO 31, ¶ 11. First, the officers conducting the stop must have reasonable suspicion that a crime was committed. *Id.* An officer has a reasonable suspicion when, considering the totality of the circumstances, there is "an articulable and specific basis in fact for suspecting … that criminal activity has taken place." *Id.* Second, "the intrusion's purpose must be reasonable." *Id.* Third, "the character and scope of the intrusion [must be] reasonably related to its purpose." *Id.* (internal quotes omitted).

Here, the officers had more than a reasonable suspicion that Defendant was involved in criminal activity. The wire worn by the informant confirmed that a drug deal was taking place in the car. Defendant was in that car. This provided specific and articulable facts supporting the officers' belief that Defendant was involved in the crime.

The majority of Defendant's argument contests only the second and third criteria of an investigatory stop. *See* Opening Brief, pp. 6-7. Defendant argues that the initial detention was an arrest because the officers initially had weapons drawn, and Defendant was patted down

and handcuffed. *Id.* However, this argument fails because officers have the authority to use force typically associated with an arrest to detain a suspect for the officers' safety. *Smith*, 13 P.3d at 305.

"Officers' use of force and shows of force typically associated with arrest – such as the drawing of weapons, physical restraint, and the use of handcuffs – does not always preclude the legal characterization of a given encounter as an investigatory stop." *People v. King*, 16 P.3d 807, 814 (Colo. 2001) (citing *Smith*, 13 P.3d at 305-06). In *Smith*, the defendant parked behind officers who had stopped a separate car which the officers suspected was stolen. 13 P.3d at 303. Due to the defendant's behavior, the officers approached the defendant's car with weapons drawn, ordered the defendant out, and then handcuffed him. *Id.* at 303-04. The supreme court held that this encounter was an investigatory stop, not an arrest. *Id.* at 306. Though "the degree of force that the officers used was significant, [it] was not disproportioned to the circumstances." *Id.* at 305. Similarly, in *People v. Janis*, the court held that officers did not use unreasonable force during an investigatory stop when the officers handcuffed and questioned a woman suspected to be

involved in a nearby stabbing. 2016 COA 69, ¶ 49, *rev'd on other grounds*, 2018 CO 89.

In Defendant's case, the officers had a reasonable basis for detaining Defendant, and the force used was reasonably related to it. Investigator Waters testified that officers initially had weapons drawn because drug deals often involved weapons. Everyone in the car was patted down to ensure that there were no weapons, and handcuffs were used to ensure the officers' safety while Waters had a chance to talk to the informant and learn who was involved. Importantly, only a few minutes passed between the initial detention and the actual arrest. During those minutes no individual was searched, and Defendant was not questioned. The force used by officers was necessary to ensure the officers' safety while the officers learned who was involved with the drug deal. Thus, the trial court correctly concluded that the initial detention was a lawful investigatory stop.

Defendant does not appear to dispute that the officers had probable cause to arrest him once the informant implicated him specifically in the drug deal. *See generally* Opening Brief. The trial

court correctly concluded that probable cause to make an arrest existed. TR 8/15/17, p. 76:2-11. Probable cause exists when "the objective facts and circumstances available to a reasonably cautious officer. . . justify the belief that [ ] an offense has been or is being committed [ ] by the person arrested." *People v. Robinson*, 226 P.3d 1145, 1149 (Colo. App. 2009) (quoting *People v. Rogers*, 68 P.3d 486, 489 (Colo. App. 2002)). When the informant specifically described Defendant's involvement in the drug deal, officers had an objectively reasonable belief that Defendant had committed a crime. *See Robinson*, 226 P.3d at 1149-50 (finding probable cause when a confidential informant identified an individual as a drug supplier).

Officers validly stopped Defendant and used reasonable force to ensure their safety. The informant gave the officers probable cause to arrest Defendant. For these reasons, the trial court correctly ruled that defendant's arrest was lawful, and the evidence obtained should not be suppressed.

### 2. The officers had probable cause to arrest Defendant prior to the discussion with the informant.

Even if this Court finds that the initial detention was an arrest, the trial court's ruling should still be affirmed because there was probable cause to make an arrest at that time. Defendant contends that even though the officers were aware of a drug deal occurring in the red Honda, there was no specific evidence that Defendant was involved in the crime at the time of the initial detention. This argument fails because probable cause only requires that officers have a reasonable belief that Defendant had committed a crime.

In order to make an arrest based on probable cause, the officer must reasonably believe that an offense has been committed by the person arrested. *King*, 16 P.3d at 813. When assessing whether probable cause existed, judges must "consider the totality of the circumstances" available to officers at the time of the arrest. *People v. Zuniga*, 2016 CO 52, ¶ 16. "The amount and quality of information necessary for probable cause to make a warrantless arrest. . . is *significantly less* than what is necessary to prove an accused's guilt."

*People v. Washington*, 865 P.2d 145, 148 (Colo. 1994) (quoting *United States v. Fox*, 902 F.2d 1508, 1513 (10th Cir. 1990)) (emphasis in original). Additionally, "innocent behavior will frequently provide the basis for a showing of probable cause." *Reyes-Valenzuela*, 2017 CO 31, ¶ 13 (quoting *United States v. Sokolow*, 490 U.S. 1, 10 (1989)).

In *People v. Flowers*, the court held that officers had probable cause to arrest a defendant that appeared to be involved in a drug deal despite never witnessing the defendant handle drugs or money. 128 P.3d 285, 288 (Colo. App. 2005). A confidential informant set up a drug deal with a coworker. *Id.* at 287. When the coworker arrived at the meeting place, officers observed the defendant's car park next to the coworker. *Id.* The coworker got into the defendant's car before exiting to meet the informant. *Id.* Due to the defendant's coordinated behavior with the coworker, the court held that the officers had a justified belief that the defendant had committed a crime. *Id.* at 288.

Similarly, in Defendant's case, the officers knew that Defendant was in a car where a drug deal was occurring. Officers knew that the informant was meeting with a drug dealer who went by "Santos" and

was Hispanic. Defendant was one of three Hispanic men in the car at the time of the deal. The existence of other possible suspects did not negate a reasonable belief that Defendant had committed a crime.

Like in *Flowers*, the officers never saw Defendant accept money for drugs. Nevertheless, Defendant's presence in the car provided sufficient justification for the belief that Defendant had committed a crime. It was reasonable for the officers to believe that when a drug deal occurred in a car, anyone in the car might have been involved in the deal.

In sum, the officers had probable cause to suspect that Defendant had committed a crime. The officers had authority to make a warrantless arrest of Defendant even before the informant confirmed that Defendant was involved. Thus, this Court should affirm the trial court's denial of the motion to suppress.

### 3. Even if the original detention was an unconstitutional arrest, the exclusionary rule would not apply in this case.

Defendant contends the evidence obtained during the arrest and his statements made later at the police station should have been suppressed because they were tainted by the illegality of Defendant's initial detention. Opening Brief, pp. 7-8. However, even assuming the initial detention was unconstitutional, the exclusionary rule should not apply here, because the evidence was attenuated from the taint of the initial detention.

"The exclusionary rule is a judicially created remedy under which the 'evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure.'" *People v. Tomaske*, 2019 CO 35, ¶ 10 (quoting *United States v. Calandra*, 414 U.S. 338, 347-48 (1974). The exclusionary rule is not an individual right and "applies only where it results in appreciable deterrence" of police misconduct. *Id.* (quoting *Herring v. United States*, 555 U.S. 135, 141 (2009) (internal quotes omitted). When

deciding if evidence should be excluded, "the relevant inquiry is whether the evidence was 'come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *People v. Rodriguez*, 945 P.2d 1351, 1363-64 (Colo. 1997) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). When the connection between the police misconduct and the evidence is attenuated, the evidence should not be suppressed. *Tomaske*, at ¶ 12.

The attenuation doctrine applies when "the connection between unconstitutional police conduct and the evidence is remote or has been interrupted." *Id.* (quoting *Utah v. Strieff*, 136 S.Ct. 2056, 2061 (2016)). Factors that courts consider in making this determination are the proximity between the misconduct and the evidence, "the flagrancy and purpose of the police misconduct, and whether some intervening circumstance serves to break the causal chain." *People v. Benson*, 124 P.3d 851, 854 (Colo. App. 2005) (citing *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)).

In this case, assuming the officers' conduct rendered the initial detention an arrest unsupported by probable cause, rather than an

investigatory stop, Defendant's statements and the evidence obtained were attenuated from any initial misconduct. First, there was a lapse of time between the initial detention and the obtaining of the evidence. Though it is not clear from the record how much time passed, drugs were not seized from Defendant's person until after he was removed from the scene of the arrest and taken to the detention center. Additionally, Defendant's confession was not given until after he was Mirandized. *See People v. Wambolt*, 2018 COA 88, ¶ 88 (holding defendant's statements were attenuated from his illegal arrest when handcuffs were removed, *Miranda* warnings were given, and eleven minutes passed before the defendant gave any statements).

Second, the informant's statements created intervening circumstances untainted by the initial detention. The informant's description of Defendant's involvement with the drug deal gave the officers probable cause to arrest and search Defendant. The informant acted independently and did not make the statements because of or in response to Defendant's detention. The probable cause was in no way tainted by Defendant's initial detention. *Cf. Tomaske*, at ¶¶ 17-20

(holding that defendant's responsive assault on officers was attenuated from the initial unconstitutional act from officers); *Strieff*, 136 S. Ct. at 2062-63 (holding that an arrest was lawful when an officer discovered a valid warrant to arrest defendant during an unconstitutional stop).

Third, any potential misconduct by the officers was minor. The officers did not search Defendant until after the officers debriefed the informant and there was probable cause to make an arrest. The statements that Defendant seeks to suppress were made after Defendant had been taken to the police station and read *Miranda* rights. The officers made every effort to conform with the law, and their only mistake, if any, was placing handcuffs on Defendant a few minutes before the informant confirmed his involvement. "Because the primary purpose of the [exclusionary] rule is to deter police misconduct, the rule should only be applied in situations where it is likely to have a deterrent effect." *People v. Doke*, 171 P.3d 237, 240 (Colo. 2007). There would be no deterrent effect in excluding the evidence or Defendant's statements because the officers only detained Defendant so that the informant could be debriefed. *See People v. Banks*, 655 P.2d 1384, 1385-

86 (Colo. App. 1982) (holding that it was not improper for officers to rely on a warrant that was later invalidated when making an arrest); *see also Herring*, 555 U.S. at 144 ("the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct").

In sum, even if the initial detention was unconstitutional, none of the challenged evidence flowed from that initial detention. The evidence and statements were only obtained after time had passed and intervening circumstances gave the officers probable cause to make an arrest. If any police misconduct existed, it was minimal, and suppressing the evidence would have no deterrent effect.

## CONCLUSION

For the foregoing reasons, the People respectfully ask this Court to affirm the judgement of the trial court.

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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the within **ANSWER BRIEF** upon **JOSEPH P. HOUGH** and all parties herein via Colorado Courts E-filing System (CCES) on June 25, 2019.

*/s/ Tiffiny Kallina*