COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Arapahoe County District Court; The Honorable Andrew Baum; and Case Number 16CR1151	~~DATE FILED: July 10, 2019 3:21 PM~~ FILING ID: 9D31D772416AB CASE NUMBER: 2018CA1018
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant Kelvin Dalexi Arteaga	
Megan A. Ring Colorado State Public Defender JOSEPH PAUL HOUGH 1300 Broadway, Suite 300 Denver, CO 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #34384	Case Number: 18CA1018
DEFENDANT'S REPLY BRIEF	

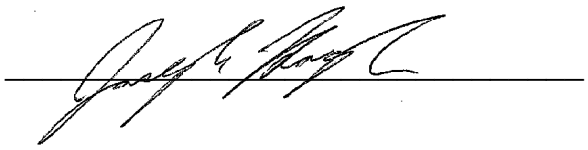
CERTIFICATE OF COMPLIANCE

I hereby certify that this 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:

This brief complies with the applicable word limit and formatting requirements set forth in C.A.R. 28(g).

It contains 1,140 words.

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



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Even though it was undisputed that six to eight armed officers (acting as a SWAT team) descended on Mr. Arteaga and the other vehicle's passengers (with their weapons drawn), ordered the defendant out of the car before placing him in handcuffs, conducted a "pat-down" search of his person, and then physically moved him around the vehicle, the State nevertheless argues that this was not an arrest but rather, something more akin to a mere "investigatory stop."(AB,p8-11) In support of this notion, the State primarily relies on two cases that are entirely distinguishable from the facts at issue. For instance, in *People v. Smith*, 13 P.3d 300, 303-04 (Colo. 2000), while our Supreme Court determined that an officer's drawing of his weapon and handcuffing of a suspect was reasonable (without probable cause), the officer there legitimately felt "alarmed" and reasonably "feared an ambush" after another vehicle suddenly pulled up "directly behind him" during a night-time traffic stop. Similarly, in *People v. Janis*, 441 P.3d 1, 12-13 (Colo. App. 2016), this Court found that an officer's show and use of force against a suspect did not rise to the level of an arrest and was reasonable under the circumstances because of the "immediacy and seriousness of the police radio call" concerning a "stabbing nearby" and the fact that the suspects closely matched the description of the armed and dangerous perpetrators.

In this case, by contrast, other than a single generalized statement[1] about drug deals involving weapons, there were no "specific facts or circumstances" concerning any threats or danger that the officers faced here necessitating the sort of "force typically associated with an arrest—such as the drawing of weapons, physical restraint, and the use of handcuffs." *People v. King*, 16 P.3d 807, 810, 816-17 (Colo. 2001) (though reasonable suspicion existed to stop the defendants for a drug crime, the officers' use of drawn weapons and handcuffs was unreasonable because there was "no evidence either man was carrying a weapon, nor was there evidence that either man would use a weapon"). Indeed, not only did the officers here encounter no particularized and immediate danger to their safety, their heavily armed SWAT team went up against a single, contained vehicle with non-threatening passengers inside. Accordingly, just as in *King*, though there may have been sufficient reasonable suspicion to detain Arteaga (as well as the vehicle's other passengers), the officers' use of force was unreasonable under the circumstances and as such, amounted to an unlawful arrest based on less than probable cause.

[1] While Officer Waters testified, at the suppression hearing, that "oftentimes during drug deals there are weapons," it is notable that there were no weapons recovered from any of the suspects and perhaps more importantly, no evidence was presented that "Santos" (who the CI indicated was to sell him drugs and was *not* the defendant) would be armed or dangerous during the transaction.

Next, the State contends that even if the defendant's arrest was, in fact, an arrest (and not a mere detention), there was nevertheless sufficient probable cause supporting it.(AB,p12) In so arguing, the State attempts to closely analogize this case to *People v. Flowers*, 128 P.3d 285 (Colo. App. 2005), but again, like in *Smith* and *Janis*, the facts in *Flowers* are critically distinct from those at issue. For instance, in *Flowers*, the confidential informant (CI) and police arranged for the CI to purchase drugs in a parking lot from someone he knew personally (AL). As the police monitored the situation (both visually and over the CI's "wire"), they noted that when AL entered the parking lot (in an Isuzu Rodeo), he was closely followed by the defendant (Flowers) in a Chevy Blazer. After AL left his vehicle, he approached the CI and informed him that he had to go to Flowers's truck in order to retrieve the drugs. AL then walked over to and entered Flowers's Blazer and remained there for several minutes. AL then left the Blazer, entered his own vehicle (the Rodeo), and drove over to the CI, where the two completed the transaction in AL's car. Shortly thereafter, both AL and Flowers were stopped, in their respective vehicles, and both were arrested for distributing drugs. *Id*. at 287-88.

Here, however, the vehicle where the drug transaction occurred contained a number of different people (not just one as in *Flowers*), and the police had no

information (visual, audio or otherwise) that the defendant, in particular, was any part of the deal. Again, at the time he was arrested, and for all the police knew at that point, Arteaga was merely an innocent passenger or bystander, who may or may not have even known that a drug transaction had just transpired. While the standard here is probable cause and not proof beyond a reasonable doubt (as it would be at trial), courts have nevertheless and consistently found that merely being in known proximity to drugs is not, in itself, criminal activity. *See, e.g*., *People v. Stark*, 691 P.2d 334, 339 (Colo. 1984) (when a defendant lacks exclusive possession of the place or premise where the drugs were discovered, it cannot be inferred that the defendant knowingly possessed the drugs); *People v. Steed,* 189 Colo. 212, 540 P.2d 323 (1975) (where there is nothing connecting the defendant to the possession of a narcotic found in the defendant's apartment in the proximity of nine other people the defendant is entitled to a judgment of acquittal); *Feltes v. People*, 178 Colo. 409, 417, 498 P.2d 1128, 1132 (1972) ("[m]ere presence without another additional link in the evidence will not sustain a conviction for possession"); *United States v. Valdez-Gallegos*, 162 F.3d 1256, 1262 (10th Cir. 1998) (finding that the mere presence and proximity to drugs failed to sufficiently establish knowledge).

Finally, the State argues (for the first time on appeal, and without any judicial findings below) that even if the defendant was unlawfully arrested, the drugs seized from his person and his confession was too far "attenuated from the taint of the initial detention" and therefore, not subject to the so-called "exclusionary rule."(AB,p15) However, while the defendant was, in fact, *Mirandized* shortly after his arrest, and agreed to speak with officers, that is simply insufficient (standing alone) to show sufficient attenuation from the initial and unlawful arrest. *See, e.g.*, *People v. Lewis*, 975 P.2d 160, 173-74 (Colo. 1999) (no significant "attenuating events…between the [unlawful] arrest and the interview"); *People v. Rodriquez*, 945 P.2d 1351, 1364 (Colo. 1997) (insufficient "intervening circumstances" occurring "between the illegal arrest and the consent"); *People v. Brandon*, 140 P.3d 15, 21-22 (Colo. App. 2005) (same). Accordingly, because the record below amply demonstrates that the incriminating evidence was procured as a direct result of Arteaga's unlawful arrest (without any significant intervening and attenuating circumstances), the defendant again respectfully requests that this Court reverse the trial court's order denying his suppression motion.

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CERTIFICATE OF SERVICE

I certify that, on July 10, 2019, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Brian M. Lanni of the Attorney General's office through their AG Criminal Appeals account.