DATE FILED: February 28, 2018 4:37 PM
FILING ID: 84C1022CDCE7E
CASE NUMBER: 2016CA728

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; Mesa District Court; Honorable David Bottger; and Case Number 15CR700	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant OLIVIA NAVARRO-GONZALEZ	
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OPENING 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 set forth in C.A.R. 28(g).

> It contains 9,500 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

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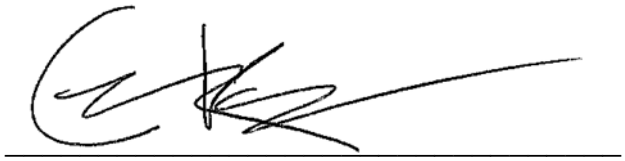

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ISSUE PRESENTED

A traffic stop becomes an illegal detention when prolonged beyond the time necessary to complete tasks tied to the infraction. Here, the trooper performed several tasks unrelated to the infraction but solely related to his hunch that Ms. Navarro was transporting illegal drugs, including detaining her for a dog sniff. The dog, trained to alert to legalized amounts of marijuana, sniffed the inside of the car four times. The trial court, finding reasonable suspicion authorized the detention, cited innocent behaviors and credited testimony directly contradicted by video of the encounter. Did the court err in denying Ms. Navarro's motion to suppress?

STATEMENT OF THE CASE

The State charged Olivia Navarro-Gonzalez with possession of a controlled substance with intent to manufacture or distribute, § 18-18-405(1),(2)(a)(I)(B), C.R.S. (2017), and as a special offender, § 18-18-407(1)(c), C.R.S. (2017), both level one drug felonies. CF, pp 13–16. The State also charged her with failure to signal for required distance, § 42-4-903(2), C.R.S. (2017), a class A traffic infraction. CF, pp 66–67.

Before trial, she moved to suppress the physical evidence against her, arguing it was the result of an unreasonable search and seizure. CF, pp 35–37. After a hearing, TR 12/07/15, the trial court denied the

motion in a written order, CF, pp 68–72. Following a three-day trial, a jury found her guilty as charged. CF, p 87; TR 01/14/16, pp 102:15–104:4. The trial court sentenced her to 16 years in the Colorado Department of Corrections. CF, pp 93–96; TR 03/11/16, p 20:14–18. She appeals the trial court's denial of her motion to suppress.

STATEMENT OF THE FACTS

i. Suppression Testimony

On June 10, 2015, Colorado State Patrol Trooper Shane Gosnell (the Trooper) was parked in his cruiser along I-70, near Fruita, Colorado. CF, p 68 ¶4. The Trooper saw a silver sedan coming up the hill toward him. TR 12/07/15, p 8:1–5. The car was a rental, and Olivia Navarro-Gonzalez (Ms. Navarro) was the driver.

The Trooper found Ms. Navarro's obedience to traffic laws suspicious. *See* TR 12/07/15, p 10:9–12 (stating that someone who is looking "straight ahead, focusing on driving, trying to be scrupulous, obedien[t] to traffic law[s]," is suspicious); CF, p 68 ¶4 (estimating that

Ms. Navarro was *not* speeding).[1] Her reaction to the sight of a highway patrolman also seemed odd. *Compare* CF, p 68 ¶5 (noting Ms. Navarro did not look at the officer, and leaned back as if not wanting to be seen) *with* TR 12/07/15, p 10:6–12 (claiming the general motoring public, unlike Ms. Navarro, waves at highway patrolmen). Armed with these observations, the Trooper decided to follow her. TR 12/07/15, p 12:3–5.

The Trooper caught up and, having been suspicious of Ms. Navarro's scrupulous obedience to traffic laws, pulled her over for an improper lane change.[2] TR 12/07/15, pp 12:3–14:21. He approached and

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[1] The Trooper said this was atypical behavior. *See also* TR 12/07/15, p 9:1–13 (suggesting Ms. Navarro impeded traffic by traveling 70 m.p.h. in a 75 m.p.h. zone).

[2] According to the Trooper, she had changed lanes to give wide birth to a roadside bicyclist; however, she did not wait a full two seconds with her blinker on before returning to the right-hand lane. TR 12/07/15, pp 12:6–13:18, 42:10–12 (explaining that a car going 65–70 m.p.h. travels about 100 per second).

told her the reason for the stop. TR 12/07/15, pp 15:1–16:2.[3]

The Trooper thought she seemed nervous, and he noted several things, such as a sleeping bag and Ms. Navarro's tattoos that read "Sonora" and "Sinaloa," that he found suspicious. *See infra* section I.A; CF, pp 69–72; EX Motions (People's Exhibit 2), pp 28–31. The Trooper asked several questions about her travel plans; then he returned to his patrol car and texted a K-9 officer with the Mesa County Sheriff's Department, Deputy Michael Miller, to join him. CF, p 69; TR 12/07/15, pp 26:11–13, 53:15–54:2, 69:14–19.

The purpose of the stop had been to issue a written warning for an improper lane change—but this took over twenty-two minutes. TR 12/07/15, p 26:9–25. During that time, the Deputy interviewed Ms. Navarro three times asking her about her travel plans, while the Trooper checked to see if Ms. Navarro had any wants or warrants (she

[3] The Trooper mistakenly told Ms. Navarro she was required to travel 300 feet, rather than 200 feet, with a blinker on before changing lanes. TR 12/07/15, pp 15:21–22, 43:23–25; *see* § 42-4-903(2) ("A signal of intention to turn right or left . . . shall be given continuously for at least two hundred feet" where "posted speed limit is more than forty miles per hour"). Although the Trooper's dash-cam video records 30 seconds prior to the activation of his police lights, there is no video recording of the traffic infraction. TR 12/07/15, pp 34:12–35:4.

did not). EX Motions (People's Exhibit 3) (hereinafter EX Video1)[4] at 15:19:56–20:35, 15:21:36–23:07, 15:32:18–33:48; CF, p 69. Before returning to Ms. Navarro's car, the Trooper prepared two forms: a written warning for the lane change violation, and a consent-to-search form. *See* TR 12/07/15, pp 50–51.

The Trooper approached Ms. Navarro's window and asked her to join him on the side of the road so he could explain the warning. CF, p 69. He asked several more questions about her travel plans and whether she had any contraband in the car. EX Video1, at 15:35:35–52. He returned her items, gave her the warning, and told her she was free to go. CF, p 69–70. Then he asked if she would consent to a search of her car; Ms. Navarro did not consent. CF, p 70.

The Trooper then told Ms. Navarro to wait on the side of the road while the Deputy ran his drug-detection dog around the car. CF, p 70. The dog jumped up and put its nose in the vehicle, through the open

[4] The Trooper's dash-board camera captured the entire stop, from the initial traffic stop to the Trooper transporting her to the jail. The video, entered as an exhibit, TR 12/07/15, pp 33:20–34:10, is broken up into three segments. The first two, EX Video1 and EX Video2, are relevant for this appeal.

windows, four times. EX Video1, at 15:37:15, 15:37:39, 15:37:44, 15:38:18. After the fourth intrusion, the dog sat near the front tire. EX Video1, at 15:38:22. The Trooper and the Deputy then performed a hand search of the vehicle; a few minutes later, contraband was found inside the walls of the trunk and Ms. Navarro-Gonzalez was arrested. CF, p 70; TR 12/07/15, p 32:9–16 (finding heroin in a "natural void" in the trunk); *see* EX Motions (People's Exhibit 2), pp 6–7, 11, 32.

ii. Trial

At trial, the prosecution introduced the fruit of the search as evidence against Ms. Navarro. TR 01/13/16, pp 70–74. Defense counsel argued that she did not know there were illegal narcotics in the walls of the rental car's trunk, but a jury found her guilty of the drug felonies and the traffic infraction. TR 01/13/16, pp 25–28; TR 01/14/16, pp 102:15–104:4.

SUMMARY OF THE ARGUMENT

I. Police seized Ms. Navarro under the Fourth Amendment for a lane change violation. That seizure became unreasonable in two ways: first, the Trooper prolonged the stop beyond the time necessary to complete

its mission once he finished the warrant checks and prepared the written warning; then, after issuing the warning, the Trooper detained her further for a dog sniff, fitting her with the profile of a drug smuggler. These actions ran afoul of the U.S. Supreme Court's holding in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015).

The trial court erred in finding the Trooper had reasonable suspicion to justify the prolonged stop and detention. Video evidence contradicts the Trooper's testimony about what he knew and when he knew it; he was not aware of at least two key factors relied upon by the trial court until after he searched the car. The other entirely innocent facts do not give rise to reasonable inferences of criminal wrongdoing; instead, they describe a typical motorist pulled over on I-70.

II. The police then conducted a dog sniff of Ms. Navarro's vehicle; that sniff was a search because the dog physically trespassed into the vehicle four times. The trial court erred in finding there was no evidence that the officers encouraged the dog to trespass, as the video shows the Deputy allow the dog to jump up and linger with her nose in the window again and again. Because the police lacked probable cause,

the trespassory sniff was unlawful and the evidence obtained as a result should have been suppressed.

III. Finally, the trial court erred in finding that the dog sniff provided probable cause to search the car because the dog was trained to alert to non-contraband, i.e., marijuana. An alert from such a dog does not establish probable cause for police to hand search a vehicle. *People v. McKnight*, 2017 COA 93.

Under any of the above issues, the trial court erred in denying Ms. Navarro's motion to suppress, and that error was not harmless. Evidence resulting from the unlawful search and seizure of Ms. Navarro should have been suppressed, and this Court must reverse.

PRESERVATION AND STANDARD OF REVIEW

This issue is preserved by Ms. Navarro's motion to suppress. *See* CF, pp 35–37 ("[M]oving to suppress all evidence . . . obtained as a result of an unlawful detention, search, and seizure.").

When reviewing a suppression order, this Court reviews the trial court's legal conclusions de novo, and defers to the trial court's findings

of fact so long as competent evidence supports them. *Grassi v. People*, 320 P.3d 332, 335 (Colo. 2014).

This Court independently reviews the audio and video recordings of police dashboard cameras. *People v. Madrid*, 179 P.3d 1010, 1014 (Colo. 2008) (noting an appellate court sits in similar position as the trial court when reviewing audio-video recordings); *see, e.g., People v. Kutlak*, 364 P.3d 199, 206–08 (Colo. 2016) (finding, after independent review of video interrogation, defendant did not unambiguously request counsel).

ARGUMENT

The Fourth Amendment protects "[t]he right of the people . . . against unreasonable searches and seizures." U.S. Const. amend. IV. The Colorado Constitution protects this right as well, Colo. Const. art. II, §7, but it guarantees an even greater range of privacy interests than does its federal counterpart, *People v. Oates*, 698 P.2d 811, 815–16 (Colo. 1985); *see, e.g., McKnight*, 2017 COA 93, ¶3, *petition for cert. granted*, No. 17SC584 (Colo. Jan. 16, 2018) (holding that, under article II, section 7 of the Colorado Constitution, the use of a drug-sniffing dog

trained to detect now-legalized amounts of marijuana is a "search" requiring reasonable suspicion).

The words of these constitutional provisions find their worth in the exclusionary rule—a "judicially created remedy" aimed at deterring police misconduct. *United States v. Calandra*, 414 U.S. 338, 348 (1974). Under the exclusionary rule, any evidence obtained or statements made as a result of an unreasonable search and seizure demands suppression. *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963).

In this case, by prolonging the stop without reasonable suspicion and holding her for the dog sniff, police unlawfully detained Ms. Navarro. The evidence found as a result should have been suppressed. But even if police had reasonable suspicion, the dog sniff was a search requiring probable cause because the dog physically trespassed into the vehicle. Finally, the police did not have probable cause to hand search the vehicle because the dog was trained to alert to non-contraband, i.e., marijuana.

I. POLICE UNLAWFULLY DETAINED MS. NAVARRO BY PROLONGING THE TRAFFIC STOP AND KEEPING HER FOR A DOG SNIFF WITHOUT REASONABLE SUSPICION THAT SHE HAD COMMITTED A CRIME.

A. Facts at Suppression Hearing

i. The prolonged stop

From the time the Trooper pulled Ms. Navarro over until he issued her a written warning and told her she was free to go, more than twenty-two minutes elapsed. EX Video1 at 15:13:15–15:35:55. He detained her for another four minutes for the dog sniff, EX Video1 at 15:36:20–40:23, and another three minutes for the hand search, EX Video1 at 15:43:42.

After his initial conversation with Ms. Navarro, the Trooper returned to his car, texted Deputy Miller to come to his location, TR 12/07/15, pp 26:11–13, and waited for the Deputy before calling for warrant checks, EX Video1 at 15:16:00–15:18:17. Once he arrived, the Deputy interviewed Ms. Navarro three separate times about her travel plans, twice while the Trooper ran warrant checks, EX Video1 at 15:19:56–20:35, 15:21:36–23:07, and once after she was cleared of any wants or warrants, EX Video1 at 15:28:21, 15:32:18–33:48. Then he

filled out a written warning and prepared a consent-to-search form. EX Video1 at 15:28:27, 15:31:24.

More than seven minutes after he cleared Ms. Navarro of warrants, the Trooper returned and asked her to step out of her vehicle. TR 12/07/15, pp 26–28; EX Video1, at 15:33:35–33:50. He explained the warning but then asked her a series of questions about illegal items in the car. TR 12/07/15, pp 28:3–29:3. Ms. Navarro told him he could look in the vehicle if it would satisfy him. EX Video1 at 15:35:15–52. He told her she was free to go. TR 12/07/15, p 28:3–4.

A few seconds later, the Trooper then asked if she would mind answering a few more questions, TR 12/07/15, p 28:8–11, namely, whether she would give consent for the officers to search her car; she said no. TR 12/07/15, p 28:21–29:2; EX Video1 at 15:35:59. He told Ms. Navarro to step to the side, telling her she was "going to stay put" while he had the Deputy run his drug-sniffing dog around the vehicle. TR 12/07/15, p 29:6–9; EX Video1 at 15:36:18 (asking Ms. Navarro to first remove her dog from the car).

ii. The Trooper's justification for the dog sniff

At the suppression hearing, the Trooper testified that he made several observations while collecting Ms. Navarro's driver's license and rental agreement: the car looked messy, with food wrappers and a sleeping bag on the floor. TR 12/07/15, p 15:11–16:2. He saw no suitcase in the passenger compartment, nor could he see luggage in the trunk beyond one of the folded-down back seats. TR 12/07/15, p 16:3–20. He later admitted he was not able to see everything in the trunk until conducting the search, TR 12/07/15, p 62:8–14, when he discovered another sleeping bag and what appears to be a backpack and a duffle bag, EX Motions (People's Exhibit 2), p 16. The Trooper also observed two tattoos on Ms. Navarro's arms, "Sonora" and "Sinaloa," two adjoining states in Mexico. TR 12/07/15, pp 20:16–19, 35:13–36:1. Although the Trooper knew of a drug cartel in Mexico called the Sinaloa cartel, TR 12/07/15, pp 20:22–21:9, the Trooper did not testify that he knew of a specific tattoo associated with the Sinaloa cartel.

The Trooper believed Ms. Navarro was nervous, with her hands shaking as she retrieved her driving information and "her pulse in her

neck" visible. TR 12/07/15, p 49:9–12. He thought she was hesitating and stuttering when answering his questions. TR 12/07/15, p 17:23–25. (Ms. Navarro had a Spanish-speaking interpreter at the motions hearing.) The Trooper later admitted that he spoke "very rapidly" to Ms. Navarro—for he too was nervous. TR 12/07/15, p 49:24–50:4.

The Trooper was suspicious of Ms. Navarro's travel plans. CF, p 69. Over the course of the stop she explained that she was headed from Riverside, California, to Aurora, Colorado. TR 12/07/15, pp 22:11–15, 57:24–58:1. A few weeks before, she had taken a Greyhound bus from Las Vegas, Nevada, to Riverside to work, painting houses and visiting family. TR 12/07/15, p 72:4–6. She had rented a car in Riverside on June 5, originally set to expire on June 8, and returned to Las Vegas where her mom lives. TR 12/07/15, p 24:12–16; EX Motions (People's Exhibit 2), p 10. Ms. Navarro told the Trooper that she was initially going to come to Colorado with her mom in her mom's car, but, when her mom decided to stay, she took the rental car instead, extending the rental agreement for three days. TR 12/07/15, pp 24:12–16, 25:3–8. At the time of the stop, she was headed to meet her sister and sister's

husband in Idaho Springs to go hiking. TR 12/07/15, pp 58:2–6, 72:9. The traffic stop was on Wednesday, June 10, and she planned to stay with her friends in Aurora until the coming Sunday. TR 12/07/15, p 22:18–19.

Periodically during the stop, the Deputy told the Trooper some of what he learned, ("[S]he used to live in Perris," California, EX Video1 at 15:27:41), and the officers discuss their suspicions, *see, e.g.,* EX Video1 at 15:30:40 ("Drugs in the spare tire you think?" "Somewhere. Trunk. Wouldn't surprise me if it was the spare"). During that time, the Deputy peered in at the mileage of the car and compared it to the rental agreement; using Google Maps, they estimated the car had 700 miles more than what would be a straight line from Riverside to Fruita. TR 12/07/15, pp 22:24–24:1.[5] Ms. Navarro told the Deputy she had been using the car driving to work sites. TR 12/07/15, pp 80:16–82:8.

iii. The Trooper's testimony v. post-arrest video evidence

The Trooper (and the trial court) attached a great deal of suspicion to Ms. Navarro's wallet—or, more precisely, to the items contained

[5] No other evidence was introduced showing the actual mileage of the car at the time.

therein. But video evidence shows *the Trooper was not aware of her wallet until after he arrested her* and hand searched the car.

The Trooper testified that he observed Ms. Navarro's wallet when he first approached the vehicle and collected her driver's license. TR 12/07/15, pp 17:21–18:11. In it he saw a Santa Muerte card, TR 12/07/15, pp 18–19, 37, and a "large amount of currency," TR 12/07/15, pp 18, 47. He also testified that he saw multiple cell phones when he first approached the vehicle. TR 12/07/15, pp 20:18–19, 21:10–14, 60:6–24, 66:2–5. According to his training and experience, these factors fit the profile of a drug courier.

But after the police searched the vehicle, arrested Ms. Navarro, and placed her in the back of the police cruiser, an unknown officer said to the Trooper, "Do you know where she put her wallet?" EX Video2 at 16:15:20. The Trooper clearly says, "She never had one. That I know of." EX Video2 at 16:15:20 (stating that "Mike may know, because he says there's $2000 somewhere"). During another hand search of the car, the Trooper says, "Oh, here's her wallet, man, and she's got a couple of phones." EX Video2 at 16:27:51.

B. Trial court's erroneous finding

The trial court denied Ms. Navarro's motion to suppress, finding the police had reasonable suspicion to justify detaining her "beyond the traffic stop so the dog sniff could occur." CF, p 72. The court gave weight to the following factors: (i) possession of a Santa Muerte image; (ii) large amount of cash; (iii) multiple cell phones; (iv) knowledge of Los Angeles as a source city; (v) use of a rental car or car owned by another; (vi) absence of luggage; (vii) late return of a rental car; (viii) unusual or inconsistent travel plans; (ix) nervousness; (x) "Sonora" and "Sinaloa" tattoos; (xi) and a used sleeping bag. CF, p 71–72.

C. Law and analysis

1. The police prolonged the traffic stop and further detained Ms. Navarro for a dog sniff after issuing the warning.

A traffic stop is a seizure under the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809–10 (1996). Such a seizure must "last no longer than is necessary to effectuate the purpose of the stop, and the scope of the detention must be carefully tailored to its underlying justification." *People v. Cervantes-Arredondo*, 17 P.3d 141, 147 (Colo.

2001) (quotation marks and citations omitted); *Florida v. Royer*, 460 U.S. 491, 500 (1983). "Authority for the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Rodriguez*, 135 S. Ct. at 1614 (citing *United States v. Sharpe*, 470 U.S. 675, 686 (1985)).

Accordingly, a seizure justified only by a police-observed traffic violation becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation. *Rodriguez*, 135 S. Ct. at 1612; *People v. Mason*, 310 P.3d 1003, 1005 (Colo. 2013); *see also Rodriguez*, 135 S. Ct. at 1616 ("If an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably required to complete the stop's mission." (citations and brackets omitted)).

Although police officers are permitted to make certain non-traffic related inquiries, they may not "measurably extend" the traffic stop in doing so. *People v. Chavez-Barragan*, 379 P.3d 330, 337 (Colo. 2016) (citing *Arizona v. Johnson*, 555 U.S. 323, 333 (2009)) (finding brief questioning did not transform stop into seizure of unconstitutional

duration); *Rodriguez*, 135 S. Ct. at 1616 (rejecting government's argument that an officer may "incrementally prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances." (brackets omitted)).

In this case, the seizure "exceed[ed] the time needed to handle the matter for which the stop was made," specifically, for police to issue a written warning to Ms. Navarro for failure to signal 200 feet in advance of changing lanes. *Rodriguez*, 135 S. Ct. at 1612 (citing *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). First, from the initial stop to when the Trooper told Ms. Navarro she was free to go, more than twenty-two minutes elapsed. *See* EX Video1 (beginning when police lights were turned on at 15:13:15 until 15:35:55). The Trooper admitted this exceeded the length of his usual traffic stops, usually lasting between fifteen and twenty minutes. TR 12/07/15, p 26:17–25. And in this case, it was not until about fifteen minutes into the stop when the Trooper began to write the traffic warning. EX Video1 at 15:28:27 ("[L]et me

scratch out her written [warning], I told her I was going to give her a written for [the] lane violation.").

Second, once the Trooper received notice that Ms. Navarro had no wants or warrants, he no longer had a basis to continue the stop. EX Video1 at 15:28:23 ("She's a negative all the way around"). That was the amount of time necessary to complete the stop's mission. *Rodriguez*, 135 S. Ct. at 1616. Instead, he continued the stop for another seven-and-a-half minutes. EX Video1 at 15:28:23–15:35:55. And much of this time he spent preparing for the subsequent search. TR 12/07/15, p 51:11–22; EX Video1 at 15:31:24 ("Alright, I know you guys don't do these, but I'm going to do a consent-to-search form real quick").

Third, after measurably extending the stop by filling out a consent-to-search form, the Trooper prolonged the stop even further by concluding the stop with a series of non-stop-related questions,

including about possible contraband in Ms. Navarro's vehicle.[6] EX Video1 at 15:35:35. And while the police were permitted to check for warrants and ask off-topic questions about Ms. Navarro's travel plans, this was the fifth time police interviewed her about her travel plans during the stop. *See* EX Video1 at 15:14:07–15:44, 15:19:56–20:35, 15:21:36–23:07, 15:32:18–33:46, 15:33:46–35:15. None of these actions went toward the original purpose of the stop and once that purpose was realized, police were not permitted to incrementally prolong the stop, fanning ineffable suspicions until they performed the dog sniff.

In short, once the warrant checks were clear, the Trooper measurably extended the stop past the time necessary or reasonable to issue a warning for an improper lane change with previously satisfied, non-stop-related inquiries and preparations for the impending search. *Chavez-Barragan*, 379 P.3d at 337. Therefore, any subsequent seizure was unreasonable and the trial court should have ended the inquiry

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[6] The trial court erred in finding these questions came before the Trooper told Ms. Navarro she was free to go. *See* CF, p 69–70. Although the Trooper testified that he asked her about illegal items in the car only *after* telling her she was free to go, TR 12/07/15, p 28:2–25, the video clearly shows these questions come before, EX Video1 at 15:35:15–55.

there under the Supreme Court's holding in *Rodriguez*. 135 S. Ct. at 1612.

But—even beyond the time for unrelated tasks and continued off-topic questioning—police further detained Ms. Navarro by making her stand to the side of the road while the officers ran the drug-sniffing dog around the car. EX Video1 at 15:35:59. Because they detained her without reasonable suspicion, the trial court erred in denying her motion to suppress.

2. The police did not have reasonable articulable suspicion to prolong the stop and detain Ms. Navarro for the dog sniff; instead, they ignored legitimate explanations and, left only with innocent facts, sought to retroactively support their suspicions with the fruits of their search.

Eventually, traffic stops must come to an end: to detain a person past a traffic stop—for a dog sniff or otherwise—a police officer must have reasonable articulable suspicion that the person has committed, is committing, or is about to commit a crime. *Rodriguez*, 135 S. Ct. at 1614–15; *Mason*, 310 P.3d at 1005.

(i) Santa Muerte image, (ii) large amount of cash & (iii) multiple cell phones

"In considering whether reasonable suspicion exists, [a reviewing] court looks at the totality of the circumstances, the specific and articulable facts known to the officer *at the time of the encounter*, and the rational inferences to be drawn from those facts." *People v. Garcia*, 251 P.3d 1152, 1158 (Colo. App. 2010) (citations omitted) (emphasis added).

In this case, the Santa Muerte image, large amount of cash, and multiple cell phones must be dismissed from consideration because video evidence clearly shows they were not known by the Trooper at the time of the detention.

The Trooper testified that he saw multiple cell phones and Ms. Navarro's wallet when he first collected her driver's license. TR 12/07/15, pp 17:21–20:3, 60:6–24 (containing therein a large amount of cash and a prayer card depicting the Santa Muerte, a religious icon in Mexican culture). He testified at length about the significance of these items, in his training and experience, being common to drug couriers. *Id.*

But, minutes after Ms. Navarro's arrest, an unknown officer asks the Trooper, "Do you know where she put her wallet?" to which, the Trooper clearly says, "she never had one. That I know of." EX Video2 at 16:15:20. After the unknown officer apparently mocks Ms. Navarro's accent, the Trooper says, "actually, Mike may know because he said there was $2000 somewhere." EX Video2 at 16:15:28 (presumably referring to Deputy Michael Miller). Later, while the Trooper is looking through the car, he says, "Oh here's her wallet, man. And she's got a couple phones." EX Video2 at 16:27:51.

Therefore, the video, tendered and admitted as an exhibit by the prosecution, TR 12/07/15, pp 33:19–34:10, shows the Trooper was not aware of her wallet, or the Santa Muerte image or cash therein, until after the hand search. Because this Court independently reviews audio and video recordings, these factors should be dismissed entirely from the reasonable suspicion analysis. *Madrid*, 179 P.3d at 1014.

Defense counsel also confronted Trooper Gosnell with the fact that he did not mention noticing multiple cell phones in his initial report. TR 12/07/15, p 60:6–24. Although the Trooper "believe[s]" he noticed

multiple cell phones on his first approach, i.e., before the detention, TR 12/07/15, p 60:12–15, the video suggests he discovered the phones only with the wallet. Moreover, the Trooper did not mention the cell phones in his initial affidavit, CF, p 1–4, or when relaying his suspicions to Deputy Miller during the stop. Therefore, this factor, too, should be dismissed from consideration.

But even assuming the Trooper's testimony is credible, this factor should be given little weight as the Trooper himself possessed multiple cell phones: he said "multiple cell phones are common with drug trafficking for the fact that they generally don't mix their personal life with their business for the purpose of if they get caught, you don't have both things. . . . So the business stuff is kept separate from the personal phone." TR 12/07/15, p 21:15–23. Then, on cross, the Trooper admitted that he himself had two cell phones, one for business and one for personal use, and one of which he used to initially contact the Deputy via text message. TR 12/07/15, pp 53:15–54:2. The Trooper's testimony shows this factor is as empty as it is elastic.

(iv) Los Angeles as a source city, (v) use of a rental car & (vi) absence of luggage

Generic, innocent facts cannot form the objective basis required for reasonable suspicion, even if police fit them to a drug-courier profile. *Reid v. Georgia*, 448 U.S. 438, 439–42 (1980) (dismissing facts that "describe[d] a very large category of presumably innocent travelers," such as defendant's arrival from city known as source of illegal narcotics with an absence of luggage).

Indeed, following *Reid*'s reasoning, the Tenth Circuit stated that "[e]ven though reasonable suspicion may be founded upon factors consistent with innocent travel, some facts must be outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous." *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997) (citing *Reid*, 448 U.S. at 441) (quotations marks and brackets omitted). In *Wood*, the court dismissed the following factors from the reasonable suspicion analysis due to their generic, equivocal nature: unusual travel plans (an unemployed painter flying one-way to California for a two-week sojourn, then renting a car and driving back to Kansas); originating from a drug-source location (California); and the condition of

the car's interior (fast-food food wrappers and open maps about). 106 F.3d at 943–48. With these factors removed, the court found the officers did not have reasonable suspicion based on the defendant's nervousness and prior narcotics convictions. *Id.* at 948.

First, as she told both officers, Ms. Navarro started her journey in Riverside, not Los Angeles, TR 12/07/15, pp 22:11–15, 72:4–6; *see* rental agreement, EX Motions (People's Exhibit 2), p 10. There is no evidence that Riverside is a source city for illegal narcotics; the Trooper merely confirmed that Riverside is "near" Los Angeles, TR 12/07/15, pp 22:25–23:1, and then testified, "[w]e know that . . . the west coast is an origination for illegal narcotics due to the fact of Mexico controlling most of the drug trade in the United States. They ship illegal narcotics across from Mexico, which is the west coast, . . . and then they move it from the origination to the destination areas." TR 12/07/15, p 30:11–16. The fact that the Trooper assumed the source-city rationale extends to all nearby cities as well—or, indeed, the entire west coast—underlines why this Court should give this factor little weight, if any. *People v. Haley*, 41 P.3d 666, 675 (Colo. 2001), *abrogated on other grounds by*

People v. Esparza, 272 P.3d 367 (Colo. 2012) ("We cannot assume as a basis for reasonable suspicion that cars traveling from California on I-70 in Colorado contain illegal drugs. . . . [T]his circumstance is of very little weight"); *see also Karnes v. Skrutski*, 62 F.3d 485, 495 (3d Cir. 1995), *abrogated on other grounds by Curley v. Klem*, 499 F.3d 199, 209 (3d Cir. 2007) ("Florida is not the only 'known drug center,' and the mere fact that Karnes was from Florida cannot be a factor supporting reasonable suspicion. Presumably the vast bulk of people with cars registered in Florida are not drug smugglers, and they have a right to travel to Pennsylvania.").

Next, it is true, Ms. Navarro was not driving her own car; instead, she rented a car in her own name. EX Motions (People's Exhibit 2), p 34. But it is misleading to compare this arrangement with cases where the suspect drives a car owned by another, absent party. *See* CF, p 71 (citing *United States v. Felix*, 2013 WL 474542, *6–7 (D. Utah 2013) (the trooper found it suspicious the driver borrowed a car from a friend to drive from Arizona to Minnesota for a singing gig, and did not know the friend's last name)). In any event, this factor does not give

particularized suspicion that Ms. Navarro, having rented a car, would be suspected of illegal narcotics smuggling. As the Colorado Supreme Court has stated, "[t]he choice of means of travel at any time on [a] journey does not lend support to reasonable suspicion." *Haley*, 41 P.3d at 675; *see id.* ("Traveling cross-country in a rental car in the company of others is not suspicious behavior").

Finally, apart from its generic nature, the apparent absence of luggage must be abandoned because, although the officers did not see luggage in her passenger compartment or from their limited vantage point of the inside of her trunk through the void left by a folded-down back seat, they could not see all of the trunk (whereupon later they found another sleeping bag, a duffle bag, and a backpack, EX Motions (People's Exhibit 2), p 16). They simply did not know what was in the trunk, and Ms. Navarro's choice to put luggage there does not form an objective basis from which one could infer she was smuggling illegal narcotics.

(vii) unusual or inconsistent travel plans

First, there is nothing whatever in the record to suggest Ms. Navarro's travel plans were inconsistent—indeed, the Trooper admitted she gave a consistent account throughout the stop. TR 12/07/15, p 56:19–25. The trial court did nothing to elaborate or analyze this point and, accordingly, several of the cases it cited are inapt because they dealt only with *inconsistent* or *contradictory* stories. CF, p 71; *e.g., United States v. Davis*, 636 F.3d 1281, 1291–92 (10th Cir. 2011) (noting internal inconsistencies in driver's story and contradicting accounts between driver and passenger about travel plans); *United States v. Pena-Ponce*, 588 F.3d 579, 584 (8th Cir. 2009) (conflicting stories by two passengers about the underlying purpose of their travel).

Second, the other cases cited by the trial court demonstrate that Ms. Navarro's travel plans were *not* unusual, and, in any event, do not warrant suspicion.

Specifically, the trial court cited *United States v. Wood*, 915 F. Supp. 1126 (D. Kan. 1996), mistakenly labelling it as "reversed on other grounds," CF, p 71; in fact, the Tenth Circuit reversed on the precise

grounds that the motorist's travel plans did not warrant suspicion. The district court had found that it was unusual or unlikely that an unemployed painter from Kansas could fly one way to California, afford a two week vacation, and rent a "1995 Mercury Marquis" to drive back home to Kansas. *Wood*, 915 F. Supp. at 1141–42. On review, the Tenth Circuit rejected the trial court's conclusions that these were unlikely or implausible travel plans. 106 F.3d 942, 946–47.

By contrast, travel plans that defy plausibility can warrant suspicion: in another case cited by the trial court, *United States v. Hernandez-Lizardi*, 530 Fed.Appx. 676, 681–82 (10th Cir. 2013) (unpublished), the defendant told police he drove 1600 miles from Anaheim, California, to Kansas city, Missouri, to pick up passengers, then intended to make a 1200 mile round trip to Denver and back to Kansas City to repaint a friend's car, and finally make the 1600 mile return to Anaheim. *Id.* The court found that this story so unlikely as to support reasonable suspicion of illegal activity. *Id.*; *see also United States v. Sokolow*, 490 U.S. 1, 8–10 (1989) (finding twenty-four hour

flight from Hawaii to Florida for a forty-eight hour holiday in Miami warrants suspicion).

But unlike the defendant's story in *Hernandez-Lizardi*, which, again, defies plausibility, Ms. Navarro gave police officers a coherent account of driving to Aurora from Riverside, where she had worked for several weeks painting houses and staying with family. TR 12/07/15, pp 22:11–15, 57:24–58:1, 72:4–6. She then rented a car to drive to Las Vegas where her mother lived. TR 12/07/15, p 23:6–13. She planned to drive with her mother in her mother's car but her mother decided not to come. TR 12/07/15, p 25:3–8. When police stopped her, she was on her way to Idaho springs to meet her sister to go hiking. TR 12/07/15, pp 58:2–6, 72:9. She then planned stay with friends in Aurora; she did not have their specific address but would use GPS when she got close. EX Video1 at 15:34:44–35:15.

The officers were suspicious that the rental agreement stated that the return address for the vehicle was back in Riverside, suggesting that Ms. Navarro would have to drive back to Riverside before returning to Las Vegas, where her address is marked on her driver's

license. TR 12/07/15, p 82:6–25. This is wrong for two reasons: one, even if the rental agreement showed a return trip, rental agreements can be changed. In fact, the Trooper was aware that Ms. Navarro had already changed it once, continuing the rental agreement once her mom decided against driving in her own car. TR 12/07/15, p 25:3–8; EX Video1 at 15:34:36 ("I didn't know I was going to come in a rental car"). Two, even if she were to eventually return the vehicle to Riverside, both officers knew she had family in Riverside, worked there, and she used to live in nearby Perris, California. EX Video1 at 15:27:41.

The more the police inquired, the clearer Ms. Navarro's travel plans became. And, "while the [T]rooper may have had no obligation to seek clarification or elaboration, it also means that he had to play with the cards he was dealt." *People v. Cox*, 401 P.3d 509, 515 (Colo. 2017) (Hood, J., dissenting). Here, the Trooper held a remarkably transparent picture of Ms. Navarro's travel plans, no matter what his ineffable yet immovable doubts were about its coherency and consistency.

(viii) late return of a rental car

Of course, Ms. Navarro was not late in returning her rental car. As she told Trooper Gosnell, "she was initially going to go with her mom in her mom's vehicle and then decided to get the rental car because her mom wasn't coming, and she claim[ed to have] renewed the rental agreement for three days." TR 12/07/15, p 25:3–6. The only case cited by the trial court to support this factor carries no weight here as it dealt with an actual overdue rental car. *Worthy v. State*, 91 So.3d 762, 767 (Ala. Crim. App. 2011) (citing *United States v. Branch*, 537 F.3d 582, 588 (6th Cir. 2008) (finding that rental car overdue by several weeks contributed to reasonable suspicion)).

The Trooper believed "the three days didn't match her travel plans that she said she was going to be in Denver through Sunday." TR 12/07/15, p 25:6–8. But on the video Ms. Navarro explains to the Trooper that she would extend the rental agreement again. EX Video1 at 15:34:21–45. Once Ms. Navarro explained her plans and the extended

use of the rental car, any suspicion associated with an overdue rental agreement evaporated.[7]

(ix) tattoos

The Trooper noted two of Ms. Navarro's tattoos: one read "Sonora," the other "Sinaloa." CF, p 72. The trial court stated "[t]hese are two states in Mexico, which is a source of illegal drugs, especially Sinaloa." CF, p 72.

First, Trooper Gosnell said "Sonora" was of no significance to him at all, other than it being a state in Mexico. TR 12/07/15, p 46:7–9. Second, the Trooper had no more of an objective basis to associate Ms. Navarro's tattoo with illegal narcotic smuggling than a Coloradoan could be presumed to be possessing marijuana whenever he or she leaves the state. The Trooper gave enthused testimony about the Sinaloa cartel ("El Chapo Guzmen is the ringleader," TR 12/07/15, pp

[7] The Deputy, apparently unaware of Ms. Navarro's answer to the Trooper, compared specific, non-suspicious answers from suspiciously vague ones, saying, "I ask them[,] ['H]ey you're rental agreement is expired[,'] and they're very specific, [O]h, yeah, I had to extend it because of this, and I've already called and I have it extended for three days.['] Not a vague answer." TR 12/07/15, p 82:13–16. The latter were essentially the answers given by Ms. Navarro.

20:22–21:6) but did not claim members of the cartel wear "Sinaloa" tattoos. And, because he did not, it is not rational to infer that her tattoo represents anything more than the state of her birth.[8]

(x) sleeping bag

According to the trial court, the officers noted "an apparently used sleeping bag, suggesting that she had slept in the car to protect her cargo (she had enough cash to rent a motel room)." CF, p 72.

But Ms. Navarro told the officers that she had traveled from Las Vegas that morning, i.e., she would never have had to choose between sleeping in her car and renting a motel room. And, as the video shows, the Trooper *was not aware of the cash* until after he searched her car. More importantly, for someone on holiday in Colorado, perhaps hiking in Idaho Springs and staying with family and friends for a long weekend, a rational inference to be drawn from the possession of one (or two) sleeping bags is, not that its owner is smuggling illegal narcotics, but that he or she is vacationing in Colorado.

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[8] Ms. Navarro is apparently from Sinaloa, Mexico. EX Video2 at 16:31:20.

(xi) nervousness

It is hard to come across an officer whose alleged reasonable suspicion does not include a suspect's nervousness. This is but one reason why courts give this factor minimal weight.

Signs of nervousness, e.g., stuttering, verbal pauses, shaky hands, are not only divorced from criminal wrongdoing, but to be expected in police interactions. *Haley*, 41 P.3d at 675 ("[I]t is 'not uncommon for most citizens—whether innocent or guilty—to exhibit signs of nervousness when confronted by a law enforcement officer.'") (quoting *Wood*, 106 F.3d at 948); *see also United States v. Fernandez*, 18 F.3d 874, 879–80 (10th Cir. 1994) ("We have repeatedly held that nervousness is of limited significance in determining reasonable suspicion and that the government's repetitive reliance on [nervousness] as a basis for reasonable suspicion . . . must be treated with caution.") (citations omitted); *United States v. Millan–Diaz*, 975 F.2d 720, 722 (10th Cir. 1992) ("It is common knowledge that most citizens, and especially aliens, whether innocent or guilty, when confronted by a law enforcement officer who asks them potentially

incriminating questions are likely to exhibit some signs of nervousness.").

And in this case, the officers had no opportunity to compare Ms. Navarro's demeanor during the interaction, such as her "funny" voice inflections, TR 12/07/15, p 49:9–12, with her regular habits, *see United States v. Simpson*, 609 F.3d 1140, 1147–48 (10th Cir. 2010) ("[U]nless the police officer has had significant knowledge of a person it is difficult even for a skilled police officer, to evaluate whether a person is acting normally for them or nervously.").

Furthermore, English is not Ms. Navarro's first language, as is evident in the video (and by her use of an interpreter during every subsequent court proceeding). Hence, her "hesitat[ion]" and "stutter[s]" and "verbal pauses" lose their allegedly seedy undertones. TR 12/07/15, pp 72:3–4, 49:11. Indeed, the Trooper admitted he himself spoke "very rapidly" in his interactions with Ms. Navarro—a sign of his own nervousness. TR 12/07/15, p 50:2–4. Ms. Navarro, on the other hand does not appear "extremely nervous" in the video, despite her twenty-minute confrontation with highly inquisitive police officers.

Under the totality of these circumstances, the innocent facts before the Trooper amounted to nothing more than inchoate suspicions, not an objective basis that Ms. Navarro was trying to conceal illegal narcotics.

Wood is instructive here. 106 F.3d 942. In that case, police listed the following factors as playing into their reasonable suspicion: Mr. Wood was extremely nervous and had a prior drug conviction; his travel plans were unusual; he told police the wrong city from which he rented the car; he was traveling from a source city; and he had food wrappers and open maps in his car. *Id.* at 946–48. After examining each factor in turn, the court cautioned:

> Reliance on the mantra "the totality of the circumstances" cannot metamorphose these facts into reasonable suspicion. Although the nature of the totality of the circumstances test makes it possible for individually innocuous factors to add up to reasonable suspicion, it is "impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation."

Wood, 106 F.3d at 948 (citing *Karnes*, 62 F.3d at 496). After "[s]tripping away the factors which must be disregarded because they are

innocuous, [the Tenth Circuit was] left with Mr. Wood's nervousness and his prior drug conviction, both of which [the] court has cautioned are of only limited significance in determining whether reasonable suspicion existed." *Wood*, 106 F.3d at 948.

In this case, there is no question that the officers suspected Ms. Navarro of illegal activity ("She's up to no good," EX Video1 at 15:41:54), most likely possession of narcotics ("Drugs in the spare tire you think?" EX Video1 at 15:30:40). But those suspicions were not built on an objective, particularized basis that Ms. Navarro had committed a crime—they were built on an amorphous profile of a drug courier, from which arose a rather large hunch.

Every single factor cited by the trial court is innocent of criminal activity, and, while the totality of the circumstances test does not use a divide-and-conquer approach, neither does the sum of an officer's inchoate intuitions equal objective, reasonable suspicion. The video clearly shows the Trooper was unaware of several factors until after the hand search and arrest. And of the remaining factors cited above, many are so generic and equivocal (nervousness) that the Colorado Supreme

Court has listed them as deserving "very little weight." *Haley*, 41 P.3d at 675. The factors that come closest to tying Ms. Navarro's particular conduct—not a fluid caricature of a drug courier—to suspicion of illegal narcotic smuggling were a sleeping bag and a pair of tattoos. *C.f. Salcedo v. People*, 999 P.2d 833, 839–40 (Colo. 2000) (rejecting, as evidence of petitioner's substantive guilt, a "loose profile of behaviors and characteristics that he found were frequently exhibited by persons smuggling drugs"). The officers did not ask her about these, and when they did follow up on other suspicions, Ms. Navarro gave plausible answers—such as explaining that she had extended the rental car agreement—that the police were not free to ignore.

In sum, the sheer quantity of factors does not make their factual or legal quality suspicious. None of the factors, singly or in combination, justify detaining Ms. Navarro. *Haley*, 41 P.3d at 675–77 (finding police did not have particularized, objective basis to detain nervous travelers from California). Because the Trooper detained Ms. Navarro without reasonable suspicion, the evidence discovered in her trunk is a tainted

result of the unreasonable seizure and it must be suppressed. *Wong Sun*, 371 U.S. at 484–86.

II. THE DRUG-SNIFFING DOG'S FOUR-TIME PHYSICAL TRESPASS INTO MS. NAVARRO'S CAR WAS A SEARCH.

A. Facts and the trial court's erroneous ruling

At the suppression hearing, the Deputy admitted that his dog, Libby, "smelled the inside of the car," TR 12/05/15, p 75:11–12, and that he "tr[ied] to control her the best [he could]" during the sniff, TR 12/07/15, p 75:12–13. The video confirms that Libby jumped up and put her nose and paws inside the car four times, EX Video1 at 15:37:15, 15:37:39, 15:37:44, 15:38:18, and did not sit until after the fourth intrusion, EX Video1 at 15:38:22.

In its written order, the trial court made a finding of fact that the dog "stuck its head through the open driver's and passenger side windows." CF, p 70 n.1. But, the trial court held, "[a]bsent evidence that it was commanded, encouraged or trained to do so, this does not transform its sniff into a search." CF, p 70 n.1 (citing *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 880 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 975 (2015)).

B. Law and analysis

The trial court erred in finding that the dog's repeated trespass did not constitute a search because the Deputy allowed the dog to jump up, unhindered, and come down on its own accord, four separate times. Therefore, absent probable cause, the dog's unrestrained and successive leaps into the vehicle constituted an unconstitutional search and the evidence obtained as a result should have been suppressed.

A physical trespass by police into a constitutionally protected area constitutes a search under the Fourth Amendment. *United States v. Jones*, 565 U.S. 400, 404–05 (2012) (holding installment of a GPS tracking device on defendant's car was a "search" under the "common-law trespass" test).

A dog's intrusion into a vehicle during a free-air sniff is a search requiring probable cause when police facilitated or encouraged the dog to do so. *Felders*, 755 F.3d at 877 (finding officers had facilitated dog's entry by preventing car door from closing after asking passengers out of the car for a sniff); *United States v. Vasquez*, 555 F.3d 923, 930 (10th Cir. 2009) (holding a dog's leap into the car did not violate the Fourth

Amendment where (1) leap was "instinctual rather than orchestrated and (2) the officers did not ask the driver to open the point of entry, such as a hatchback or window, used by the dog"); *United States v. Winningham*, 140 F.3d 1328, 1329–31 (10th Cir. 1998); *United States v. Stone*, 866 F.2d 359, 363–64 (10th Cir. 1989) (finding dog's single instinctual leap into vehicle did not violate Fourth Amendment where driver opened hatchback to retrieve item before dog sniff). "Absent probable cause, facilitating a dog's entry into a vehicle during a dog sniff constitutes an unconstitutional search." *Felders*, 755 F.3d at 877.

In this case, the Deputy did nothing to prevent the dog from jumping up to the window—nothing to halt Libby from lingering with head and paws in the vehicle, and nothing to deter her from repeating the exercise three more times. *See* EX Video1 at 15:37:15, 15:37:39, 15:37:44, 15:38:18. Again, Libby did not sit until after the fourth intrusion. EX Video1 at 15:38:22. The Deputy admitted that the dog "smelled the inside of the car," TR 12/05/15, p 75:11–12, and, although he testified that he "tr[ied] to control her the best [he could]" during the sniff, TR 12/07/15, p 75:12–13, the video shows the opposite—indeed, at

one point the Deputy appears to give a welcome waive for Libby to jump up. EX Video1 at 15:37:44. The Deputy's obvious—and, arguably, deliberate—lack of restraint is tantamount to encouragement of Libby's physical trespass.

The Deputy's testimony that Libby alerted before she trespassed is not supported in the video.[9] The Deputy testified that after he walked Libby "behind the car to the passenger side . . . . [s]he immediately started alerting. She indicated, but she didn't sit." TR 12/07/15, pp 74:24–76:4 (speculating that Libby did not sit during the sniff because the ground was wet). But, like the dog in *Felders*, Libby jumped up as soon as the sniff began. 755 F.3d at 877 (finding dog "almost immediately jumped in the vehicle"). The video clearly shows the Deputy walk Libby straight to the driver's side where she makes her first intrusion. EX Video1 at 15:37:11–16. Thus, any "immediate

[9] In *Felders*, as in this case, "the video does not show whether [the dog] made any sounds or movements before jumping into the vehicle." 755 F.3d at 877.

alerting" was only after she had already put her nose through one window.[10]

In sum, Libby's trespass was a search and, because the police lacked probable cause, that search was unreasonable. The evidence obtained as a result must be suppressed.

III. UNDER THE COLORADO CONSTITUTION, THE DOG'S ALERT DID NOT PROVIDE PROBABLE CAUSE FOR POLICE TO HAND SEARCH THE CAR BECAUSE LIBBY WAS TRAINED TO ALERT TO NON-CONTRABAND, I.E., MARIJUANA.

Even if the dog's physical trespass did not constitute a search, the trial court erred in finding that the dog's subsequent alert provided the police with probable cause to hand search the car because Libby was trained to alert to non-contraband, i.e., marijuana.

A. Facts and trial court's erroneous ruling

After the dog sniff, but before the hand search, the Deputy asked Ms. Navarro, "[i]s there a reason why my dog would be hitting on the car? . . . You haven't smoked any small or personal use amounts of marijuana?" EX Video1 at 15:40:10; *see* TR 12/07/15, pp 32:4–7 (stating

[10] This also contradicts the Deputy's claim that the dog put her head in the window only "on the second passage." TR 12/07/15, p 83:1–4.

that the dog had alerted to "illegal narcotics"). At the suppression hearing, the trial court found that Libby "alerted to the odor of illegal drugs," CF, p 70, and that "[t]he alert by [Deputy] Miller's dog provided probable cause for the subsequent search," CF, p 72 (citing *United States v. Moore*, 795 F.3d 1224, 1232 (10th Cir. 2015)).

B. Law and analysis

Libby was trained to alert to marijuana. Because there is no way to distinguish (a) Libby's alert to illegal narcotics from (b) Libby's alert to legalized-amounts of marijuana, the trial court erred in finding that the alert provided probable cause for the Trooper and Deputy to hand search the vehicle.

A division of this Court recently held that an alert by a drug-detection dog, trained to detect now-legalized amounts of marijuana, by itself no longer supplies police with probable cause to hand search a car.[11] *People v. McKnight*, 2017 COA 93, ¶48. In that case, because such an alert "communicated only that [the dog] detected either a legal

[11] The court in *McKnight* also held that a dog sniff is now a "search" under the Article II, Section 7 of the Colorado Constitution when the dog is trained to alert to both contraband and non-contraband. 2017 COA 93, ¶¶13–18.

substance or an illegal substance," it "would not, by itself, warrant a person of reasonable caution to believe that [the defendant]'s truck contained contraband or evidence of a crime." *Id.* ¶44.

In this case, the trial court erred in finding that Libby's alert "provided probable cause for the subsequent search." CF, p 72; *see also* TR 12/07/15, p 3:4–6 ("[T]he dog alerted, and based on that alert, there was probable cause for a search"). Like the dog's alert in *McKnight*, Libby's alert was ambiguous as to whether the she detected marijuana or "illegal drugs." CF, p 70. Therefore, contrary to the trial court's finding, Libby's alert could not, by itself, provide probable cause for the hand search of Ms. Navarro's car.

Additionally, in combination with Libby's ambiguous alert, the other facts discussed *supra* Part I did not amount to probable cause. In *McKnight*, an officer observed the defendant parked outside a house in which drugs had been found seven weeks earlier and the officer knew the defendant's passenger had used methamphetamine "at some point in the past." 2017 COA 93, ¶50. The court found that those "additional facts d[id] nothing to clear up the ambiguity arising from [the dog]'s

alert." *Id.* at ¶53; *see also Cox*, 401 P.3d at 516 (Hood, J., dissenting) (finding defendant's possession of multiple cell phones, unusual nervousness, and odd travel plans, combined with a dog's alert that "is almost meaningless under current Colorado law," did not amount to probable cause). For the reasons stated *supra* section I.C.2, the highly ambiguous facts known to the Trooper did not even amount to reasonable suspicion, let alone probable cause, that Ms. Navarro's car contained contraband.

Therefore, the trial court erred in finding the officers had probable cause based on Libby's alert, and the Trooper's inchoate suspicions did nothing to clear the alert's ambiguity.

CONCLUSION

This Court should reverse the trial court and order that any fruit of that unlawful search and seizure be suppressed.

DOUGLAS K. WILSON
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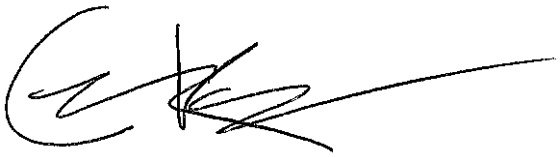

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CERTIFICATE OF SERVICE

I certify that, on February 27, 2018, a copy of this Opening Brief was electronically served through Colorado Courts E-Filing on L. Andrew Cooper of the Attorney General's Office.