COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: August 20, 2018 2:48 PM FILING ID: 9EAF3A9C956DC CASE NUMBER: 2016CA728
Mesa County District Court Honorable David A. Bottger, Judge Case No. 15CR700	
Plaintiff-Appellee, THE PEOPLE OF THE STATE OF COLORADO, v. Defendant-Appellant, OLIVIA NAVARRO-GONZALEZ.	▲ **COURT USE ONLY** ▲ Case No. 16CA0728
CYNTHIA H. COFFMAN, Attorney General FRANK R. LAWSON, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 9th Floor Denver, CO 80203 Telephone: 720-508-6000 E-Mail: frank.lawson@coag.gov Registration Number: 47042 *Counsel of Record	

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 **8218** words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 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 must provide 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/ Frank R. Lawson
Signature of attorney or party

TABLE OF CONTENTS

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGE

STATUTES

STATEMENT OF THE ISSUES

Defendant raises three issues in arguing that the trial court erroneously denied her motion to suppress evidence collected after a traffic stop: (1) Whether the trial court erred in finding reasonable suspicion justified the prolonged stop and detention (the initial stop was for a lane change violation; the eventual arrest was for drug possession with intent to distribute). (2) Whether the trial court erred in finding no evidence of trespass into the car by the police K-9 or her handler during the open-air sniff. (3) Whether the trial court erred in finding that the open-air sniff provided probable cause for a hand search of defendant's vehicle where the K-9 had been trained to alert for legal amounts of marijuana in addition to illegal narcotics.

STATEMENT OF THE FACTS AND CASE

On June 10, 2015, Colorado State Patrol Trooper Shane Gosnell pulled defendant over for a traffic violation in Mesa County. CF, pp 68-69; TR 12/7/15, pp 12-14. Deputy Michael Miller of the Mesa County Sheriff's Office — a K-9 handler — responded five minutes later to

assist. CF, p 69; TR 12/7/15, pp 25-26. After the officers collected information, both suspected that defendant was transporting narcotics. *See, e.g.*, TR 12/7/15, pp 29-31, 70-74.

The roots for their suspicion is summarized below, but explained in greater detail in the sections that follow. Defendant was traveling in a California rental car from Riverside (near Los Angeles) to Denver with a Nevada driver's license. CF, p 69; TR 12/7/15, pp 29-30. She appeared to be living out of the car, but had no apparent luggage for the trip. *See* TR 12/7/15, pp 15-17. She also had a small dog, but only minimal supplies (food only; no leash, toys, etc.). *Id.* at 15-16. The miles she had traveled — according to a comparison of the odometer and the rental agreement — did not correlate to her description of the trip. CF, p 69; TR 12/7/15, pp 22-25, 70. In addition, she was carrying a large amount of cash in her wallet (later determined to be $1300),[1] a

[1] It was later discovered that defendant carried separate collections of cash both in her wallet and her pocket. Taken separately, one amounted to $1300 and the other $1700. TR 1/13/16, p 15:7-9. At the suppression hearing, Trooper Gosnell identified the amount in the wallet as $1700. TR 12/7/15, pp 17-18. But at trial, it was clarified that the wallet in fact held the $1300. TR 1/13/16, p 54:10-14.

Santa Muerte card, and multiple cell phones. CF, p 69; TR 12/7/15, pp 17-22. She also had a "Sinaloa" tattoo on one arm with a "Sonora" tattoo on the other, and she appeared very nervous. CF, p 69; TR 12/7/15, pp 25, 71.

Almost immediately after Trooper Gosnell issued defendant a warning for the traffic violation, Deputy Miller and his K-9 — Libby — conducted an open-air sniff of her vehicle's exterior. CF, p 70; TR 12/7/15, pp 28-29, 75:21-24. Libby quickly alerted for narcotics, whereupon defendant was detained and the officers performed a hand search of the vehicle. CF, p 70; TR 12/7/15, pp 32, 74-75; *see also* Env (12/7/15), EX 3, 15:37:10-15:43-45. They found 3.57 pounds of brown heroin hidden in a small compartment inside the vehicle's trunk.[2] CF, p 70; TR 12/7/15, p 19:3-4.

Defendant was charged with possession of a controlled substance with intent to manufacture or distribute, § 18-18-405(1), (2)(a)(I)(B),

[2] Trooper Gosnell testified at trial that this amount of heroin likely carried a value of approximately $428,000 to $500,000. TR 1/13/16, p 105:3-6.

C.R.S. (2017), and as a special offender, § 18-18-407(1)(c), C.R.S. (2017). CF, pp 66-67. She was also charged with a traffic infraction for failure to signal for the required distance, § 42-4-903(2), C.R.S. (2017). *Id.* Following a three-day trial, a jury found her guilty as charged. CF, p 87; TR 1/14/16, pp 102-04. The trial court sentenced her to sixteen years in the Department of Corrections, followed by thirty-six months of mandatory parole. CF, pp 95-96.

Pertinent to this appeal, defendant moved to suppress the evidence collected from her car prior to trial. CF, pp 35-37. The court held a hearing in which it heard live testimony from Trooper Gosnell and Deputy Miller, and reviewed a dash-cam video that recorded the traffic stop, dog sniff, and hand search. TR 12/7/15, *passim*; Env (12/7/15), EX 3. The video also included audio from a microphone attached to Trooper Gosnell. The trial court ultimately denied the motion in a written order. CF, pp 68-72. Defendant appeals that order.

SUMMARY OF THE ARGUMENT

I. During defendant's traffic stop, officers noticed specific and articulable facts that suggested she was transporting narcotics. The trial court correctly considered these facts under the totality of the circumstances to conclude that a reasonable suspicion of wrongdoing existed to extend the traffic stop for additional investigation.

II. Defendant contends that the open-air K-9 sniff transitioned into a search in violation of her Fourth Amendment rights when the dog poked her head into the vehicle's windows. The trial court disagreed because Deputy Miller did not facilitate or encourage the dog's "entries." This factual finding is supported by both the dash-cam video and the Deputy's sworn testimony, and should not be disturbed on appeal. And because the finding supports the trial court's conclusion that the sniff did not become a search, the conclusion should likewise be upheld.

III. In a special concurrence to *People v. McKnight*, 2017 COA 93 (*cert. granted* Jan. 16, 2018), Judge Jones wrote that a K-9 alert — in and of itself — cannot establish the probable cause necessary to conduct a search. Defendant contends that this issue presents itself in the case at

hand. To the extent this Court addresses defendant's argument (rather than finding it waived), the People respectfully disagree.

This case aligns with *People v. Cox*, 2017 CO 8, in which the K-9 alert was one of multiple facts supporting a probable cause determination. And even assuming, arguendo, that the search was supported by the K-9 alert alone, any error arising from the determination was not plain error under the circumstances.

ARGUMENT

I. Standard of Review / Preservation

The People agree that the suppression order raises mixed questions of fact and law. *People v. Chavez-Barragan*, 2016 CO 66, ¶ 18 (in the context of reasonable suspicion); *People v. Zuniga*, 2016 CO 52, ¶ 13 (in the context of probable cause). Appellate courts defer to the trial court's factual findings that are supported by competent evidence, but review the trial court's legal conclusions de novo. *Chavez-Barragan*, ¶ 18.

The People also agree (though with one caveat[3]) that the first and second issues were preserved by defendant's motion to suppress. CF, pp 35-37; *see also* TR 12/7/15, pp 2-3. These issues are subject to constitutional harmless error review. *People v. Omwanda*, 2014 COA 128, ¶ 31.

The People disagree, however, that defendant's third argument was preserved by either her motion or subsequent argument at the suppression hearing. *See* CF, pp 35-37; TR 12/7/15, *passim*. Specifically, defendant did not challenge the officer's probable cause to hand search her vehicle on the ground that Libby had been trained to alert for non-contraband. This argument is, therefore, waived. *See, e.g.*, *People v. Staton*, 924 P.2d 127, 133 (Colo. 1996) (To preserve a suppression issue for appeal, where other grounds for suppression are

[3] The caveat is that defendant challenges, for the first time on appeal, the trial court's use of certain evidence in its reasonable suspicion analysis — (1) the cash observed in her wallet, (2) a Santa Muerte card also observed in her wallet, and (3) two cell phones observed in the vehicle's center console. Opening, pp 23-25. The consequences for not raising her contention with the trial court are addressed in detail in Section (II)(C)(1), *infra*.

stated in the motion to suppress, defendant "must have stated [the issue] initially as a ground for his motion to suppress."); *People v. Cardman*, 2017 COA 87, ¶ 37 ("Because defendant moved to suppress the statements solely on reinitiation grounds, he waived the voluntariness claims) (*cert. granted* Feb. 12, 2018); *People v. Salyer*, 80 P.3d 831, 835 (Colo. App. 2003) (issues not raised in fourth amendment hearing need not be addressed on appeal).

Assuming, arguendo, that this Court nonetheless chooses to consider the third argument, it is — at best — subject to plain error review. *See Hagos v. People*, 2012 CO 63, ¶ 14.

II. The trial court properly found that reasonable suspicion justified the prolonged stop and detention.

The broad contention underlying the first issue is that police violated defendant's Fourth Amendment rights by extending the search and seizure beyond the scope of a routine traffic citation. Under this umbrella, defendant presents two overlapping arguments: (1) that police prolonged the stop beyond the time necessary to complete the traffic citation; and (2) that police did not have a reasonable and

articulable suspicion to prolong the stop and detain defendant for the K-9 sniff. Defendant is incorrect on all accounts.

A. Background

As previously noted, defendant filed a motion to suppress the evidence collected from her car as fruit of an unlawful detention, search, and seizure. CF, p 35. The trial court held a hearing on the motion in which it observed the dash-cam video and heard live testimony from Trooper Gosnell and Deputy Miller. TR 12/7/15, pp 4-65, 66-84; Env (12/7/15), EX 3. The evidence — beginning with the officers' experience and training — is summarized below.

Investigating Officer's Training and Experience

At the time of defendant's arrest, Trooper Gosnell worked for the Colorado State Patrol's smuggling, trafficking, interdiction section in Mesa County. TR 12/7/15, pp 4-5. He had a bachelor's degree in criminal justice, four years prior experience as a road trooper in Eagle County, and had completed the Colorado State Patrol Academy. *Id.* Between 2011 and 2015, he had conducted roughly 1200 traffic stops

per year, and had also completed in excess of 250 hours of criminal interdiction training. *Id.* at 5:15-22; *see also* EX 1 (curriculum vitae).

Deputy Miller was an investigator with the Western Colorado Drug Task Force, and had been working with the Mesa County Sheriff's Office for almost twenty-two years. *Id.* at 67:11-16. He specialized in drug interdiction on the highway, with an estimated thousand hours in training on the subject. *Id.* at 67-68. He had also been a K-9 handler since 1998. *Id.* at 70:1-2. Libby was his third certified narcotics dog, and had been working with him since 2007. *Id.* at 70, 76.

The Traffic Stop

On June 10, 2015, Trooper Gosnell was patrolling along mile marker 10 of I-70, near Fruita. TR 12/7/15, pp 6-7. He observed defendant in a silver sedan with a California license plate "traveling notably slower" than the other passenger vehicles, and consequently impeding the flow of traffic around a commercial truck. *Id.* at 8-9. As she passed the Trooper's position, the defendant gave the appearance that she did not want to be seen. She leaned behind the seam of the driver's side door, avoided looking in his direction, and changed the

position of her hands on the steering wheel from 10-and-2 to 9-and-3.[4] *Id.* at 8:12-18.; CF, p 68. Shortly afterwards, she failed to properly signal while merging into the right lane, whereupon the Trooper pulled her over. TR 12/7/15, pp 12-14. (On appeal, defendant does not dispute the legality of the initial stop.)

Living out of the Vehicle with a Small Dog

Trooper Gosnell quickly became suspicious that more than a traffic violation was afoot when he noted that defendant appeared to be living out of the vehicle with a small dog. Specifically, the car was from California, and there was a used sleeping bag crumpled on the floorboard along with gas station food wrappers and dog food scattered in and out of bowls behind the front passenger seat. TR 12/7/15, pp 15-16. But defendant did not appear to have luggage for a trip, and she had no other supplies for the dog (i.e., a leash, toys, etc.). *Id.* at 16-17.

[4] Trooper Gosnell explained that this behavior corresponded with the "closed off" position employed by drivers trying to avoid police attention. TR 12/7/15, pp 10-11.

From the Trooper's training and experience, he knew that drug couriers often slept in their vehicles to ensure the security of their shipment. *Id.* at 17:11-20. He was also familiar with couriers bringing dogs while transporting drugs to distract police K-9's in case of an open-air sniff. *Id.* at 16-17.

Cash, Card, and Cell Phones

The Trooper's suspicion of wrongdoing grew after making contact. He observed defendant retrieve her license from a brown wallet in the center console, on top of which sat two cell phones. TR 12/7/15, pp 17, 21. As she opened the wallet, the Trooper saw a Santa Muerte card along with a substantial amount of cash — "so much that if you had like receipts or something in your wallet, you would have a hard time . . . folding it because there's so much in that pocket of the wallet." *Id.* at 18-19.

In his experience, drug couriers often used two cell phones "[s]o the business stuff is kept separate from the personal phone." *Id.* at 21:15-23. Additionally, some drug couriers view the Santa Muerte image as a good luck token. *Id.* at 19-20. And the unusually large

amount of currency corresponded with the amount paid a drug courier, and did not correspond with someone sleeping out of their car on a road trip. *Id.* at 18-19. (Why not rent a motel room?)

Connected to Source Locations for Narcotics Distribution

After providing her license, defendant told Trooper Gosnell that her trip originated from Riverside, California. TR 12/7/15, pp 20-21. The Trooper knew that Riverside is close to Los Angeles, and that Los Angeles is a source city for narcotics distribution. *Id.* at 22-23, 30.

The Trooper also noticed that defendant had a "Sinaloa" tattoo on one arm with a "Sonora" tattoo on the other. *Id.* at 20:16-18. From his training, he knew that Sinaloa is a region in Mexico from which a substantial amount of narcotics smuggling originates. *Id.* at 20-21.

Inconsistent or Peculiar Travel Plans

When Deputy Miller arrived to assist, both officers noted peculiarities arising from defendant's purported travel plans. She explained that she had taken a Greyhound bus from Nevada to Riverside to paint houses for a couple weeks. TR 12/7/15, pp 22-25, 30, 72. She then rented a car to travel back through Las Vegas (where her

mother lives) in route to Denver to meet some friends. *Id.* But this itinerary conflicted with the mileage she had in fact traveled. Based on a comparison of the car's odometer to the rental agreement, defendant had traveled approximately 1300 miles. *Id.* at 23-34. 70-72. The distance between Riverside and Mesa County was roughly 740 miles. *Id.*

In addition, the officers found it odd that she did not have luggage for such a trip; that she planned to return from Denver to Riverside rather than her home in Nevada; and that her destination in Denver was, at best, vague — she planned on visiting friends but she did not know where they lived. *Id.*at 24, 71-73.

Lastly, Trooper Gosnell noted that defendant's car rental agreement appeared to have expired. *Id.* at 24. While defendant claimed she renewed the agreement for another three days, this additional time did not correspond with her travel plans — the extension she described would have expired the following day while she was still in Denver. *Id.* at 25.

Unusually Nervous

Trooper Gosnell further observed that defendant appeared unusually nervous. He noted shaking hands, voice deflection, verbal pauses, and that her pulse was visible in her neck. TR 12/7/15, pp 25, 49. In addition, she avoided eye contact and laughed nervously when he asked if she was carrying anything illegal in the vehicle. *Id.* at 28.

Deputy Miller also noted that "she was certainly nervous." *Id.* at 71. In particular, he testified that she hesitated and stuttered when responding to questions. *Id.* at 72.

Open-Air K-9 Sniff

By the time the officers completed verifications related to the traffic violation, they felt they had a reasonable suspicion to conduct a K-9 sniff around the exterior of defendant's car. TR 12/7/15, pp 29, 73-74. Because the K-9 was already on site, this could be — and, in fact, was — accomplished immediately. *Id.* at 74-76; *see also* Env (12/7/15), EX 3, 15:36:45.

The open-air sniff resulted in multiple positive alerts, whereupon a subsequent hand search resulted in the discovery of the aforementioned heroin. TR 12/7/15, pp 32, 74-75.

B. Police did not violate defendant's Fourth Amendment rights by prolonging her stop beyond the time necessary to complete the traffic citation.

Defendant first argues that it was unlawful for Trooper Gosnell and Deputy Miller to prolong her stop beyond the time reasonably required to issue her traffic citation. Because the additional time was required to investigate a new suspicion of wrongdoing based on evidence discovered during the execution of the traffic citation, she is incorrect.

1. Relevant Law

Traffic stops generally fall in the category of investigatory stops, and are thus permissible under the Fourth Amendment if supported by reasonable suspicion. *Chavez-Barragan*, ¶ 19 (citing *Ornelas v. United States*, 517 U.S. 690, 693 (1996)); *People v. Cervantes-Arredondo*, 17 P.3d 141, 147 (Colo. 2001). Of course, such stops must be "brief in

duration, limited in scope, and narrow in purpose." *People v. Garcia*, 11 P.3d 449, 453 (Colo. 2000). That is, a traffic stop may become unreasonable if the detention is "prolonged beyond the time reasonably required to complete" its mission (i.e., verify a motorist's license, check vehicle registration, run a check for outstanding warrants assuming the procedure does not unreasonably extend the duration of the detention, and issue the ticket or warning). *Chavez-Barragan*, ¶ 20 (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)).

That being said, the stop may lawfully be extended to permit further investigation if the officer discovers information giving rise to a new reasonable suspicion while completing the aforementioned tasks. *Id.* at ¶ 21. For instance, in *People v. Rodriguez*, 945 P.2d 1351, 1361 (Colo. 1997), a stop for weaving was lawfully extended when registration card errors gave rise to a reasonable suspicion that the vehicle was stolen. Likewise, in *United States v. Thomas*, 290 F.Supp.3d 1162, 1168-69 (D. Colo. 2017), a stop for suspected drunk driving was lawfully extended for a dog sniff when the officer's observation of fifty credit cards in the backseat gave rise to an

objectively reasonable suspicion of an additional crime. But in *United States v. Lopez*, 849 F.3d 921, 925-26 (10th Cir. 2017) — for sake of comparison — an officer did *not* have reasonable suspicion to prolong a traffic stop to *await* the arrival of a drug dog when the driver did not exhibit unusual nervousness, there was no incriminating evidence in plain view, and the driver's travel story was plausible under the circumstances.

The present case aligns with *Rodriguez* and *Thomas*.

2. Application

Trooper Gosnell lawfully pulled defendant over for a lane violation. His initial observations called for a shift in the investigatory purpose of the stop. In the end, it took a total of twenty-three minutes to both issue the traffic warning and investigate the suspicion of drug trafficking. This was three to eight minutes more than the time ordinarily taken to issue a traffic citation alone.[5]

[5] Trooper Gosnell testified that it ordinarily took him fifteen to twenty minutes to issue a traffic citation. TR 12/7/15, p 26.

To begin, the People submit that the additional three to eight minutes did not trigger the concerns represented by the Fourth Amendment. *See Arizona v. Johnson*, 555 U.S. 323, 333 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."). Here, the time for additional investigation largely overlapped with that taken to complete the tasks associated with the traffic citation. And because the investigation was pursued diligently and efficiently, it simply was not "great enough to be worth consideration." *See United States v. Everett*, 601 F.3d 484, 491-92 (6th Cir 2010) (interpreting "measurable" to mean "significant" or "great enough to be worth consideration"); *Chavez-Barragan*, ¶ 28 (recognizing as relevant the fact police "proceeded with reasonable diligence").

But even so, the brief extension did not violate defendant's Fourth Amendment rights. "If, while completing the normal tasks incident to a traffic stop, an officer discovers information giving rise to a new reasonable suspicion, the encounter may lawfully be extended to permit

further investigation." *Chavez-Barragan*, ¶ 21; *see also* ¶ 26 ("[A] shift in the investigatory purpose is not improper when the underlying detention remains lawful.").

Here, Trooper Gosnell became suspicious that defendant was transporting drugs based on observations he made while contacting her for the traffic violation.[6] His suspicions were reasonable under the totality of the circumstances. *See* Section (II), *supra* (describing the totality of the circumstances supporting the officers' suspicion). Consequently, the return of defendant's warrant checks did not require a conclusion to the investigation, as defendant contends. Opening, pp 20-21. Nor was it improper for the officers to make non-stop related questions, or for Trooper Gosnell to fill out a consent-to-search form. *Id.*

In sum, the stop was lawfully extended by three to eight minutes to investigate a reasonable and articulable suspicion that defendant was transporting narcotics based on information observed while executing the traffic citation. This does not reflect a Fourth

[6] Defendant does not dispute the legality of the initial traffic stop on appeal.

Amendment violation. *See, e.g.*, *Rodriguez*, 945 P.2d at 1361; *Thomas*, 290 F.Supp.3d at 1168-69.

C. Police had a reasonable suspicion of wrongdoing to prolong defendant's stop and detain her for the K-9 sniff.

In an argument that overlaps with the prior analysis, defendant claims that Trooper Gosnell and Deputy Miller did not have a reasonable and articulable basis to prolong the stop and detain defendant for the open-air K-9 sniff. In support, she claims that (1) the trial court erroneously considered the cash, Santa Muerte card, and multiple cell phones in its analysis; and (2) the remaining evidence did not give rise to a reasonable suspicion of wrongdoing. The People address each position in turn.

1. The record supports the trial court's factual finding that Trooper Gosnell observed the cash, card, and phones during his initial contact with defendant.

The trial court found that Trooper Gosnell observed the cash, card, and phones during his initial contact with defendant. CF, p 69. For the first time on appeal, defendant points to statements made on

the dash-cam video to suggest that Trooper Gosnell did not observe these items until *after* the search.[7] Relying on his interpretation of these statements, he argues that this Court should not defer to the trial court's contrary factual finding when performing its own suppression analysis. He is incorrect.

When reviewing a suppression order, appellate courts defer to the trial court's factual findings if they are supported by competent evidence in the record. *People v. Quintero-Amador*, 2015 CO 59, ¶ 15. Here, the trial court considered both the dash-cam video and Trooper Gosnell's live testimony when issuing its order. The video showed the trooper's contact with defendant from the perspective of the police vehicle. The trooper's testimony then expounded upon his observations inside the vehicle. Taken together, the trial court found the trooper

---

[7] After defendant's arrest, an unknown officer asks Trooper Gosnell: "Do you know where she put her wallet?" He responds: "She never had one. That I know of." Env (12/7/15), EX 3, 16:15:20-28. Shortly afterwards, he says: "Actually, Mike may know because he said there was $2000 somewhere." *Id.* at 16:15:28. A little while later, while Trooper Gosnell and the unknown officer are looking through the vehicle, the Trooper says: "Oh, here's her wallet, man. And she's got a couple phones." Id. at 16:27:51.

observed the cash, card, and phones when first contacting defendant. Because the finding is supported by the record (both the video and the live testimony), it should be deferred to on appeal.

Citing to *People v. Madrid*, 179 P.3d 1010, 1014 (Colo. 2008), defendant argues that this Court should nonetheless undertake an independent review of the facts. Again, he is incorrect. In *Madrid*, the Colorado Supreme Court conducted an independent review of the facts depicted in a police interrogation video because it found itself in precisely the same position as the trial court. *Id.* That is, the evidence was audio- and video-recorded, there were no disputed facts outside the record bearing on the issue of suppression, and the trial court did not make detailed factual findings. *Id.*

Here, however, this division is not in the same position as the trial court at the suppression hearing. Specifically, the dash-cam video does not reveal what Trooper Gosnell observed when speaking with defendant in her car. Accordingly, the present case aligns with *People v. Chavez-Barragan*, 2016 CO 66, ¶ 5 n.1. There, the Colorado Supreme Court reviewed a dash-cam video that "captured most of what happened

after the [traffic] stop." *Id.* However, because the recording did not include important portions of the encounter (i.e., conversations outside of the car), the Court deferred to the trial court's record-supported factual findings, which were made after hearing live testimony. *Id.*

As applied here, the factual finding at issue rested on a combination of the dash-cam video and Trooper Gosnell's live testimony. The trial court considered both, and found the Trooper's statements in line with the video and credible under the circumstances. Because this finding is supported by the record, this Court must defer.

Lastly, it is important to note that the dash-cam statements do not necessarily undermine Trooper Gosnell's testimony at the suppression hearing. To the extent they appear inconsistent, the statements were made in passing. It is therefore possible the trooper misunderstood the other officer's question, or simply misspoke. Defendant did not raise this issue at the suppression hearing. Accordingly, the failure to afford Trooper Gosnell an opportunity to explain the inconsistency effectively renders defendant's present use of the statements inappropriate on appeal. *Cf.* § 16-10-201, C.R.S. (2017);

People v. Saiz, 32 P.3d 441, 445-46 (Colo. 2001) (extrinsic evidence of a prior inconsistent statement must be competent for the purpose for which it is offered; to be competent, the evidence must satisfy the requirements of admissibility; for an inconsistent statement to be admissible, the witness must be given an opportunity to explain or deny the statement).

In sum, the trial court's factual finding — that Trooper Gosnell observed the cash, car, and cell phones during his initial encounter with defendant — is supported by the record. The statements on the dash-cam video do not necessarily contradict, or otherwise render that finding erroneous. Accordingly, this Court should incorporate the trooper's observation of the cash, Santa Muerte card, and multiple cell phones in the totality of the circumstances when conducting its suppression analysis.

2. The totality of the evidence supported a reasonable suspicion of criminal wrongdoing.

Defendant next argues that Trooper Gosnell and Deputy Miller did not have a reasonable suspicion supporting defendant's prolonged

detention because they ignored legitimate explanations for the facts before them, and simply fit those facts to a drug-courier profile. Opening, p 26. Because "[c]ourts should not engage in a 'divide-and-conquer analysis in which courts dismiss individual factors that have plausible innocent explanations," she is incorrect. *People v. Reyes-Valenzuela*, 2017 CO 31, ¶ 14.

i. The Reasonable Suspicion Standard

The reasonable suspicion standard requires "considerably less than proof of wrongdoing by a preponderance of the evidence and is less demanding even than the 'fair probability' standard for probable cause." *People v. Polander*, 41 P.3d 698, 703 (Colo. 2001) (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)). It is satisfied if "'the police have specific and articulable facts, greater than a mere hunch, to support' their belief that the person to be stopped is or may have been involved in criminal activity." *People v. Huynh*, 98 P.3d 907, 912 (Colo. App. 2004) (internal quotation omitted).

In assessing whether reasonable suspicion exists, courts must consider the totality of the circumstances known to the investigating

officer, as well as rational inferences that can be drawn therefrom. *People v. Pacheco*, 182 P.3d 1180, 1183 (Colo. 2008). This includes consideration of the investigating officer's experience and specialized training and the reasonable inferences and deductions that the officer may draw based on that background. *United States v. Arvizu*, 534 U.S. 266, 273 (2002), *cited in Pacheco*, 182 P.3d at 1183.

A reasonable, articulable suspicion "may exist even where innocent explanations are offered for conduct." *People v. Castaneda*, 249 P.3d 1119, 1122 (Colo. 2011) (holding that an even higher standard, probable cause, may exist when several otherwise-innocent acts appear, in the aggregate, to be indicative of criminal activity), *quoted in Reyes-Valenzuela*, ¶ 14. "The fact that innocent explanations may be imagined does not defeat a probable cause showing." *Castaneda*, 249 P.3d at 1122. "Instead, the police are entitled to draw appropriate inferences from circumstantial evidence, even though such evidence might also support other inferences." *Id.*

Furthermore, "[c]ourts should not engage in a 'divide-and-conquer analysis' in which courts dismiss individual factors that have plausible

innocent explanations." *Reyes-Valenzuela*, ¶ 14. "A series of innocent facts, when taken together, may warrant further investigation." *Id.*

ii. Application

Trooper Gosnell and Deputy Miller explained to the trial court the bases for their suspicion that defendant was carrying illegal narcotics in light of their substantial training and experience. The trial court considered their testimony in conjunction with the dash-cam video. Under the totality of the circumstances, the trial court found — in a written order — that the evidence gave rise to a reasonable suspicion that defendant was engaged in illegal activity, justifying the prolonged stop and open-air dog sniff. CF, pp 68-72.

The trial court's determination should be affirmed because its factual findings are supported by the record (*see* Section (II)(C)(1), *supra*), and its legal conclusion conforms with the law. To begin, the factors applied by the trial court have been recognized and considered favorably in other suppression cases. For example:

- Originating from a source city → *see, e.g.*, *People v. Ortega*, 34 P.3d 986, 995 (Colo. 2001); *People v. Morales*, 935 P.2d 936, 941 (Colo. 1997).
- Inconsistencies or suspicious travel plans → *see, e.g.*, *Morales*, 935 P.2d at 941; *United States v. Davis*, 636 F.3d 1281,1291 (10th Cir. 2011).
- Unusual nervousness → *see, e.g.*, *People v. Ramirez*, 1 P.3d 223, 226 (Colo. App. 1999).
- Peculiar absence of luggage → *see, e.g.*, *United States v. Ilazi*, 563 F.Supp. 730, 735 (D. Minn. 1983).
- Tattoos suggesting gang membership → *see, e.g.*, *United States v. Vasquez-Ortiz*, 344 Fed.Appx. 551, 554 (9th Cir. 2009).
- Use of a rental car, especially with an expired agreement → *see, e.g.*, *Davis*, 636 F.3d at 1291.
- Possession of a Santa Muerte image → *see, e.g.*, *United States v. Pena-Ponce*, 588 F.3d 579, 584 (8th Cir. 2009).

- Carrying multiple cell phones → *see People v. Cox*, 2017 CO 8, ¶ 21.

More importantly, however, when these and the other factors (i.e., the cash, sleeping bags, and small dog) are taken together under the totality of the circumstances, they support a reasonable and articulable suspicion that defendant was transporting narcotics in the case at hand. *See* Section (II)(C)(2)(i), *supra*.

Defendant presents several arguments for a contrary outcome. First, she contends that "[g]eneric, innocent facts cannot form the objective basis required for reasonable suspicion, even if police fit them to a drug-courier profile." Opening, p 26. The People, however, read this as an inaccurate statement of the law. As noted above, our Supreme Court has explained that "[a] reasonable, articulable suspicion 'may exist even where innocent explanations are offered for conduct." *Reyes-Venezuela*, ¶ 14 (citing *Castaneda* 249 P.3d at 1122 (holding that an even high standard, probable cause, may exist when several otherwise-innocent acts appear, in the aggregate, to be indicative of criminal activity)). And while conformity to a drug courier profile may

not establish probable cause, it "may give rise to an officer's reasonable suspicion that the suspect is in possession of illegal narcotics." *Salcedo v. People*, 999 P.2d 833, 841 (Colo. 2000) (citing cases in which this proposition may be inferred).

Second, she contends that certain factors should be parsed from the analysis as "so innocent or susceptible to varying interpretations as to be innocuous." Opening pp 26-41 (quoting *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997)). But to fall within this context, the court must be without concrete reasons for the investigating officer's interpretation of the evidence as suspicious. *See Wood*, 106 F.3d at 948 ("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*." 106 F.3d at 948 (emphasis added)). Here, Trooper Gosnell and Deputy Miller testified at to why each and every factor bolstered their suspicion that defendant was a drug courier. *See* Section (II)(A), *supra*.

- Los Angeles as a source city → TR 12/7/15, p 30.
- Use and late return of a rental car → *Id.* at 24-25, 72.
- Absence of luggage / presence of sleeping bags → *Id.* at 16-17, 62, 71-72.
- Unusual or inconsistent travel plans → *Id.* at 22-25, 70-73.
- Tattoos → *Id.* at 20-21.
- Nervousness → *Id.* at 48-50.

But even if — for argument's sake — this Court found that one or more of the factors challenged in the opening brief (which does not include all the factors) should be disregarded,[8] the People submit that the remaining factors nonetheless amount to a reasonable and articulable suspicion of wrongdoing to support the open-air K-9 sniff.

iii. Summary

Even if there might, arguably exist a plausible, innocent explanation for many of the individual factors when viewed alone, this

[8] For sake of clarity, the People also incorporate the argument in Section (II)(C)(1) that the cash, Santa Muerte card, and cell phones should likewise *not* be parsed from this Court's analysis.

does not render the trial court's determination erroneous. *See Reyes-Venezuela*, ¶ 14.

Instead the factors must be viewed under the totality of the circumstances, giving consideration to reasonable inferences drawn by the investigating officers based on their experience and training. Doing so here, the trial court correctly determined that the evidence provided a reasonable and articulable suspicion that defendant was engaged in illegal activity at the time of her stop. In short, it was not a mere hunch. Accordingly, police did not violate her Fourth Amendment rights by detaining her for an open-air K-9 sniff.

III. The record supports the trial court's finding that Deputy Miller did not facilitate or encourage Libby to enter the car during the open-air sniff.

Within a footnote in its suppression order, the trial court found that while Libby stuck her head through the vehicle's windows, this entry was not facilitated or encouraged by Deputy Miller. Absent such conduct by Deputy Miller, Libby's entry did not constitute a search requiring probable cause. The finding, stated in its entirety, is as follows:

> I recognize that [Deputy] Miller's dog stuck its head through the open driver's and passenger side windows. Absent 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.

Defendant contends that this finding was erroneous. However, because there is record support for the finding — specifically, the dash-cam video taken in conjunction with Deputy Miller's suppression hearing testimony — she is incorrect.

A. Background

For the Court's reference, the K-9 sniff can be observed on the dash-cam video between roughly 15:36:45 and 15:38:45. Env (12/7/15), EX 3. It appears that Libby poked her head into the vehicle four times, as reflected at 15:37:15, 15:37:39, 15:37:44, and 15:38:18. And Libby appears to alert at around 15:37:20, 15:37:40, 15:38:10, and 15:38:20, although it is possible she alerted earlier.

Deputy Miller's testimony addressing the K-9 sniff can be found on pages 74-76 (direct) and 83-84 (cross) of the suppression hearing transcript. TR 12/7/15. Notably, he explains that though Libby

immediately alerted, she did not sit because of the wet ground. He also testified that she alerted before she poked her head into the car, and that these pokes were in spite of his best efforts to control her.

Because neither the defense, nor the People, nor this honorable Court have the same experience and training as Deputy Miller in conducting an open-air sniff or recognizing Libby's alerts, the video and testimony need to be considered together.

B. Relevant Law

There does not appear to be a published Colorado Supreme Court or Court of Appeals opinion addressing the transition from open-air sniff to search *by way of the police dog's physical intrusion*. There is, however, an abundance of Tenth Circuit cases directly on point.

To summarize, a police dog's open-air sniff outside a car during a lawful traffic stop does not constitute a search requiring probable cause. *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 880 (10th Cir. 2014) (citing *Illinois v. Caballes*, 543 U.S. 405, 409 (2005)). However, the dog's entry into the vehicle may become a Fourth Amendment violation if facilitated or encouraged by officers. *Id.*

For instance, in *United States v. Vazquez*, 555 F.3d 923, 930 (10th Cir. 2009), the Tenth Circuit found no constitutional violation where "(1) the dog's leap into the car was instinctual rather than orchestrated, and (2) the officers did not ask the driver to open the point of entry . . . used by the dog." Similarly, in *United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989), a dog's instinctive leap into a car by way of a hatchback opened by the defendant did not violate the Fourth Amendment where there was no evidence that officers either encouraged or facilitated the dog's entry.

But in *United States v. Winningham*, 140 F.3d 1328, 1331 (10th Cir. 1998), the court found a Fourth Amendment violation where (1) the dog jumped into the car through a door opened by officers, and (2) evidence indicated a desire to facilitate the dog's entry into the vehicle. Similarly, in *Felders*, 755 F.3d at 877, 884-86, an open-air sniff became a search when officers first prevented the car door from closing after asking passengers to exit, and then effectively guided the dog to the open door.

This case aligns with *Vazquez* and *Stone*.

C. Application

To begin, the People disagree with defendant's characterization of Libby's behavior. The dog never "leap[ed] into the vehicle." Opening, p 43. She briefly poked her head into and out of two open windows while sniffing the car's exterior. *See* Env (12/7/15), EX 3, 15:37:15; 15:37:39; 15:37:44; 15:38:18.

To the extent this nonetheless triggers a Fourth Amendment analysis, the next question is whether Deputy Miller facilitated or encouraged Libby to do so. *Felders*, 755 F.3d at 880. The record supports the trial court's finding that he did not.

First, the windows had been rolled down by defendant prior to the encounter without instruction or encouragement from the officers. *Compare Felders*, 755 F.3d at 880 (finding Fourth Amendment violation where the dog entered by a car door that officers prevented from closing after asking the passengers to exit), *with Vasquez*, 555 F.3d at 930 (finding no Fourth Amendment violation where officers did not ask the driver to open the point of entry).

Second, there is simply no suggestion in the video or testimony that Deputy Miller facilitated or encouraged Libby to poke her nose into the window. *Compare Winningham*, 140 F.3d at 1331 (finding Fourth Amendment violation where evidence indicated the officer facilitated the dog's entry into the vehicle), *with Stone*, 866 F.2d at 364 (finding no Fourth Amendment violation where there was no evidence that officers encouraged or facilitated the dog's entry). Instead, Deputy Miller explained at the suppression hearing that he tries to control Libby the best he can, but the nature of the search is that she takes the lead. *See* TR 12/7/15, pp 74-75.

In addition, it appears at least three — if not all four — of Libby's "entries" occurred after she alerted for narcotics.[9] That is, contrary to defendant's argument in her opening brief, the dash-cam video shows Libby clearly still and pointing at a location on the car before the second, third and fourth poke of her head into the car window. Env

[9] To the extent defendant suggests that Libby has to sit to alert, this is not supported by the record. *See* TR 12/7/15, p 83:7-8 (indicating that Libby may alert by stopping and staring).

(12/7/15), EX 3, 15:37:20, 15:37:40, and 15:38:10. As for the first "entry," Deputy Miller testified that an alert had already occurred. TR 12/7/15, p 83:1-5. While this might not be readily evident from the video, the ambiguity presents an insufficient basis to reverse the trial court's factual finding. *See Sanchez-Martinez v. People*, 250 P.3d 1248, 1254 (Colo. 2011) (to be clearly erroneous, the finding must have "no factual support in the record."). The People mention this because the fact that Libby had already alerted supports Deputy Miller's testimony that he did not encourage her "entries." In short, why would he need to?

IV. The trial court's determination that probable cause supported the hand search of defendant's vehicle was not error, much less plain error.

In its written order resolving defendant's suppression motion, the trial court summarized its determinations as follows:

> Trooper Gosnell's observations of Defendant's driving provided at least reasonable suspicion that she had violated §§ 42-4-1103(1) (impeding traffic) and 42-4-903(1) (required signal before lane change, C.R.S. The factors cited above provided reasonable suspicion to justify Defendant's detention beyond the traffic stop so

> the dog sniff could occur. ***The alert by Investigator Miller's dog provided probable cause for the subsequent search.*** *United States v. Moore*, 795 F.3d 1224, 1232 (10th Cir. 2015). The discovery of illegal drugs provided probable cause for Defendant's arrest.

CF, p 72 (emphasis added).

Defendant contends that the trial court erred in finding Libby's alert provided the probable cause necessary for the subsequent hand search of her vehicle. This, according to defendant's opening brief, is because Libby had been trained to detect legal amounts of marijuana in additional to illegal narcotics. Opening, p 46.

To begin, the People note that this argument was not raised with the trial court. In fact, it is not clear from the record if Libby has been trained to alert for marijuana in addition to illegal narcotics. Accordingly, the argument should be considered waived. *See* Section (I), *supra*.

Nonetheless, should the Court consider the argument (and further assume that Libby has been trained to alert for both contraband and non-contraband), there was no error because the dog sniff was but one

piece of evidence supporting the probable cause determination. And even assuming there was error, the issue was not sufficiently obvious to justify reversal as plain error.

A. The probable cause determination was not erroneous.

1. Relevant Law

Police officers may conduct a warrantless search of an automobile if they have probable cause to believe that the automobile contains evidence of a crime. *People v. Zuniga*, 2016 CO 52, ¶14; *see also California v. Acevedo*, 500 U.S. 565, 5880 (1991). An officer has probable cause to conduct such a search when the facts before him or her "would warrant a [person] of reasonable caution in the belief" that contraband or evidence of a crime is present. *Zuniga*, ¶ 16 (quoting *Florida v. Harris*, 568 U.S. 237, 243 (2013)).

"[P]robable cause is a common sense concept" that rests on a consideration of the totality of the circumstances. *Id.*; *see also Mendez v. People*, 986 P.2d 275, 280 (Colo. 1999). "It is not a standard that 'lend[s] itself to mathematical certainties' and instead is based on

'factual and practical considerations of everyday life on which reasonable and prudent people, not legal technicians, act." *Id.* (quoting *Mendez*, 986 P.2d at 280). "In sum, the totality of the circumstances test for probable cause is an 'all-things-considered approach' that calls for consideration of any and all facts that a reasonable person would consider relevant to a police officer's belief that contraband or evidence of a crime is present." *Id.*

2. Application

The People acknowledge that, as written, the trial court's order appears to base its relevant probable cause determination on Libby's alert alone. Assuming, arguendo, that this is the case, the determination would appear to conflict with Judge Jones's special concurrence in *People v. McKnight*, 2017 COA 93, ¶ 48 ("[A] drug-detection dog's alert does not alone give a Colorado state law enforcement officer probable cause to conduct a search of a vehicle[.]") (*cert. granted* Jan. 16, 2018).

It should be noted, however, that the trial court's probable cause finding rests under five pages of analysis supporting its reasonable

suspicion determination. *See* CF, pp 68-72. One may assume the court incorporated this analysis within its probable cause determination.

This is not important, however, because when reviewing suppression orders, this Court reviews the trial court's application of the law de novo. *Zuniga*, ¶ 11. That is, this Court reviews de novo whether "the facts available to the officer would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present." *Id.* at ¶ 13. In this case, the facts available to the officers went beyond the dog search, and included all of the observations and inferences discussed in the aforementioned sections.

With this in mind, the People submit that the present case does not turn on the special concurrence in *McKnight*. Rather, this case is analogous to *People v. Cox*, 2017 CO 8.

In *Cox*, our Supreme Court recognized that although a K-9 may be trained to alert for legal amounts of marijuana in addition to illegal narcotics, this does not warrant exclusion of the alert as evidence. *Id.* at ¶ 17. That is, "while a possible innocent explanation may impact the weight given to a particular fact in a probable cause determination, it

does not wholly eliminate the fact's worth and require it to be disregarded." *Id.* (quoting *Zuniga*, ¶ 23). Instead, when a K-9 alert suggests the presence of illegal drugs in the vehicle, it may be considered as part of the totality of the circumstances. *Id.*

Thus, the Supreme Court in *Cox* considered the K-9 alert "coupled with the fact that Cox had two cell phones on the car seat, exhibited unusual nervousness, and gave an inconsistent explanation regarding his travels." Based on this evidence, the Court found probable cause existed to search the trunk of Cox's vehicle. *Id.*

The present case presents the exact same facts as applied in *Cox*: the K-9 alert, multiple cell phones, unusual nervousness, and an inconsistent explanation of travel plans. In addition, this Court may also consider the fact that defendant's trip originated from a source location by way of a rental car; that she was living out of the car with a dog despite no luggage or supplies and ample cash; and that she displayed a tattoo associated with a region in Mexico that supplies a large volume of narcotics to the United States while simultaneously carrying a Santa Muerte card that is considered a good luck token for

drug couriers. Under the totality of the circumstances, the officers had probable cause to search the trunk of defendant's vehicle.

B. The alleged error did not rise to the level of plain error.

But assuming — arguendo — that this Court considers Libby's alert in isolation, and further assuming this Court agrees with the special concurrence in *McKnight* (currently before the Colorado Supreme Court on writ of certiorari), the trial court's determination was not plain error.

"To qualify as plain error, the error must be one that is so clear-cut, so obvious, a trial judge should be able to avoid it without benefit of objection." *People v. Ujaama*, 2012 COA 36, ¶ 42 (internal quotation omitted). "[A]n error is generally not obvious when nothing in Colorado statutory or prior case law would have alerted the trial court to the error." *Scott v. People*, 2017 CO 16, ¶ 17.

Here, the trial court did not have the benefit of *Zuniga*, (issued June 2016), *Cox* (issued February 2017), or *McKnight* (issued July 2017) at the time it wrote the suppression order (issued December 2015).

Instead, the court relied on what was — at the time — a "well established" principle that "[a] canine alert [provides] probable cause to search a vehicle." *United States v. Moore*, 795 F.3d 1224, 1231 (10th Cir. 2015) (quoting *United States v. Williams*, 403 F.3d 1203, 1207 (10th Cir. 2005); *see also People v. Reyes*, 956 P.2d 1254, 1257 (Colo. 1998) ("In certain circumstances, a 'canine sniff' by a trained narcotics detection dog may give rise to probable cause."); *Commonwealth v. Overmyer*, 11 N.E.3d 1054, 1058-59 (Mass. 2014) (as discussed in *Zuniga* and *Cox*).

Because the trial court's determination was in line with jurisprudence existing at the time of the order, it was not so obviously erroneous as to qualify as plain error. *See Scott*, ¶ 18.

CONCLUSION

For the foregoing reasons and authorities, the district court's denial of defendant's motion to suppress, and the ensuing judgments of conviction, should be affirmed.

CYNTHIA H. COFFMAN
Attorney General

/s/ Frank R. Lawson
FRANK R. LAWSON, 47042*
Assistant Attorney General
Attorneys for
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **CASEY MARK KLEKAS** and all parties herein via Colorado Courts E-filing System (CCES) on August 20, 2018.

/s/ Tiffiny Kallina