STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No. CUM-2024-381

STATE OF MAINE,
Appellant,

- against -

KYLE FITZGERALD,
Appellee

Appeal from the Unified Criminal Docket

for the County of Cumberland and State of Maine

Brief of the Appellee

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Contents

Cases

Other Authorities

Treatises

Statement of the Issues

1. Did the Trial Court correctly rule that law enforcement violated the Appellee's rights under the Fourth Amendment?
2. Did the Trial Court correctly apply the exclusionary rule in suppressing the illegally obtained evidence?

Summary of the Arguments

1. Law Enforcement Lacked Reasonable Articulable Suspicion to Extend the Detention of Ms. Fitzgerald in Violation of *Rodriguez v. United States*.
2. The Trial Court Correctly Ruled that, when the law enforcement canine entered the Appellee's vehicle without a warrant or probable cause, that was a search under the Fourth Amendment.
3. The Trial Court correctly concluded that, even if the instinct exception is recognized under Maine law, it does not apply in this case.

Statement of Facts

On or about November 15, 2021, the Maine State Police stopped the Defendant at approximately 11:40 AM and held her for approximately two hours and sixteen minutes before arresting her at 1:57 PM. (Tr. 4/19/24 p. 10, 69). At the hearing Trooper Nicholas Young and Zachary Fancy testified for the State. Additionally, the defense called Andy Falco-Jimenez an expert in canine dog sniffs.

Trooper Young testified that they stopped Ms. Fitzgerald's vehicle because he observed her not wearing her seatbelt. (Tr. 4/19/24 p. 11-12). He also testified that she "locked out" her arms and did not make eye contact with him while driving sixty miles an hour along the highway[1]. He believed these were indicators of "cognitive dissonance"[2] which he has learned about after attending several criminal interdiction trainings. (Tr. 4/19/24 p. 82). He pulls over the vehicle and eventually identifies the four occupants as Kyle Fitzgerald, Dennis Jones, Ja'Wayne Early, and Mariah Lancaster. (Tr. 4/19/24 p. 18-19).

After he pulled the vehicle over, he asked for Ms. Fitzgerald's license, registration, and proof of insurance; she is able to provide her license and proof of insurance. (Tr. 4/19/24 p. 20-21). Trooper Young requested that Ms. Fitzgerald

[1] Likely if she would have made such eye contact, that would have been noted as suspicious.

[2] Cognitive dissonance refers to "the mental conflict that occurs when beliefs or assumptions are contradicted by new information. The unease arouses in people is relieved by one of several defensive maneuvers." Britannica, T. Editors of Encyclopaedia. "cognitive dissonance." *Encyclopedia Britannica*, April 19, 2024. https://www.britannica.com/science/cognitive-dissonance. It is unclear how this relates to the Defendant's conduct which should lead the Court to be skeptical of Trooper Young's investigative conclusions.

exit her vehicle and talk with him at the rear of her car. (Tr. 4/19/24 p. 28). He then began aggressively questioning her about their destination, her point of origin, and the nature of her relationship with the passengers. She was able to substantively answer all his questions but fumbled over her words at times. (State's Exhibit #3 at 4:50). She told him that she did not know the two male passengers very well but that the female passenger was her girlfriend. Most importantly, she let the officer know that they were heading to Salem, New Hampshire to drop off some puppies and the officer confirmed that there were indeed puppies in the vehicle.[3]

After keeping the group at the roadside for almost thirty minutes Trooper Young requests a canine officer respond. (State's Exhibit #3 at 27:25). Thirteen minutes after he calls for a canine, he discovers the nearest Trooper is Trooper Fancy who is over a half hour away. Trooper Young explains the circumstances of the stop and Trooper Fancy seems hesitant about whether he has enough information to justify a further stop. However, he proceeds to Trooper Young's location to conduct a canine sniff.

One of Trooper Young's purported justifications for the detention is that when he initially spoke to Ms. Fitzgerald, he noticed that Mr. Early, was also not wearing a seatbelt. On that basis he requested Mr. Early identify himself; Mr.

[3] The State has argued this is a violation of law. However, the cited authority by the State is a regulation not a criminal code. Additionally, the officers did zero investigative work as it relates to this supposed violation the officers clearly were unconcerned by any issues with the puppies.

Early did not have a drivers license or official identification on him so he had to identify himself by spelling his name and providing his date of birth. (Tr. 4/19/24 p. 23-24). Mr. Early did not come back on file through dispatch at first even though he provided the correct name and date of birth and even eventually gave officers his social security number. Troopers eventually asked him to write down his name and date of birth for them and when he spelt it out, he included an apostrophe in "Ja'Wayne" and his name immediately came back on file. (Tr. 4/19/24 p. 8, 31, 65, 66, 71, 79). Troopers confirm his identity approximately forty-four minutes into the stop. (See State's Exhibit #3).

After keeping the group at the roadside for an hour and ten minutes, twenty-six minutes after they identify Mr. Early, Trooper Fancy finally arrives on scene. (State's Exhibit #4 at 7:00). Right after arriving on scene Troopers request that the occupants exit the vehicle and Trooper Fancy asks that the puppies be taken out. (State's Exhibit #4 at 9:50). Furthermore, Trooper Fancy testified that it is common for his canine to pull him when he is in an odor. (Tr. 12/7/23 p. 17, 18, 23). Despite Trooper Fancy's knowledge that his dog might pull him into the vehicle troopers make no effort to close the doors to the vehicle after the occupants leave. When Trooper Fancy begins the canine sniff in which his canine promptly jumps into the open car door pulls on the leash however he never provides his trained indication which is to sit or lay down when he smells the presence of his

trained odor. (Tr. 4/19/24 p. 50). Despite this failure to alert Trooper Fancy calls an alert and informs Trooper Young that he is "all set" to search the vehicle.

In addition to the Trooper's the Appellee called a canine expert Anthony Falco Jimenez to the stand. (Tr. 12/7/23 p. 56). Mr. Jimenez was a canine law enforcement officer for the Anaheim Police Department for seven years. He was selected to be a canine handler 1989 and served in that capacity until 1996 and continued to be their canine trainer until 2005 when he retired. (Tr. 12/7/23 p. 57). While still working as a law enforcement officer he incorporated his company Falco Enterprises and after retirement began training law enforcement in canine handling. In his career Mr. Jimenez estimated that he has trained "in the area of a thousand to two thousand" handler and dog teams. (Tr. 12/7/23 p. 58).

Mr. Jimenez testified as to the scientific process by which a dog is trained to alert to the presence of narcotics. He explained that it is through operant and classical conditions that the dogs are trained. Specifically, he explained that the trained alert action is "automatic behavior that the dog doesn't have to think about…in the case of a dog that's trained for passive alert." (Tr. 12/7/23 p. 66). He also provided that canines should be trained to ignore distractions but "in the end, dogs will be distracted at some point." (Tr. 12/7/23 p. 69). He also explained, that calling an alert when based solely on the dog's excitement has caused false alerts in the past; expounding on a competition he had helped set up where there

was some Kentucky Fried Chicken hidden in one of the competition vehicles. He found that "75 percent of the handlers whose dogs went to…the car with Kentucky Fried Chicken, based on their dog stopping and wagging their tail and sniffing, they called indications or alerts on those vehicles, and it was only chicken." (Tr. 12/7/23 p.69).

He testified that he had found this to be an increasing trend that was causing confusion because, as a trainer, he would want to see "tail wagging, stopping and sniffing, sudden behavior changes" those things, without the trained indication, "doesn't mean there's narcotics when those things are happening." (Tr. 12/7/23 p. 71). He also provided that among canine handler trainers "one thing we all agree on is that the doors of a vehicle, prior to [a dog sniff], and to the windows, should be closed prior to conducting a [sniff]…that would be an industry standard or something that is well known in the industry." (Tr. 12/7/23 p.72).

Mr. Jimenez also expressed his opinion as to the dog sniff in this case and believed it was unreliable. He came to this conclusion for several reasons, one of which was the presence of puppies in the Appellee's vehicle coupled with his observations of the behavior of this particular dog. (Tr. 12/7/23 p.73-74). Trooper Fancy took umbrage with Mr. Jimenez's opinion and expressed his own opinion that no one can render an opinion on the reliability of a dog sniff done by his canine except for him. (Tr. 12/7/23 p. 113-115).

Arguments

Law Enforcement Initiated a *De Facto* Arrest Unsupported by Probable Cause

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. 4. A traffic stop is a seizure for the purposes of the Fourth Amendment, but "a routine traffic stop is more analogous to a so-called *Terry* stop . . . than to a formal arrest." *Rodriguez v. United States*, 135 S.Ct. 1609, 1614 (2015) (citation omitted). A *Terry* stop is a brief investigatory stop where, in a traffic context, "there is probable cause to believe that the driver has committed a minor vehicular offense." *Maryland v. Wilson*, 519 U.S. 408 (1997).

Nevertheless, the allowable time for a traffic stop is determined by the stop's initial objective, "to address the traffic violation that warranted the stop." *Rodriguez* at 1614. Indeed, *Terry* recognized this principle, that "the scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 U.S. 1, 19 (1968). In *Rodriguez*, the Supreme Court held that "a traffic stop prolonged beyond [the amount of time reasonably required to complete the stop's mission] is unlawful." *Rodriguez* at 1616 (citation omitted).

While the length of time of a detention is an important fact in determining the reasonableness of a detention, the Supreme Court has "declined to adopt any

outside time limitation for a permissible *Terry* stop." *United States v. Place*, 462 U.S. 696, 709 (1983). "[I]n assessing the effect of the length of the detention, we take into account whether the police *diligently* pursued their investigation." *Id.* (emphasis added).

In order "to qualify as a mere *Terry* stop, a detention must be limited in scope and executed through the least restrictive means." *State v. Donatelli,* 2010 ME 43, ¶ 12 (citation omitted). When an officer exceeds what is necessary to dispel his suspicion, "the detention may amount to an 'arrest' and is lawful only if it is supported by probable cause." *Donatelli* at ¶ 12. (quoting *State v. Langlois*, 2005 ME 3, ¶7.) (internal quotations omitted).

In order to determine if a stop has transformed into an arrest the Law Court has utilized a two-step analysis that considers "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Longlois* at ¶7. In other words, "a detention requires probable cause when it 'intrudes so severely on interests protected by the Fourth Amendment as . . . to trigger the traditional safeguards against illegal arrest." *Id* at ¶8. (citation omitted). This requires a balancing test, "weighing the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *State v. Hill*, 606 A.2d 793, 795 (Me. 1992).

See also State v. Huether, 200 ME 59, ¶ 8 and *Donatelli* at ¶ 13.

In *Florida v. Royer,* the Supreme Court upheld a trial court decision invalidating a search of a suitcase that revealed marijuana. *Florida v. Royer,* 460 U.S. 491 (1983). Drug agents believed that Royer fit a "drug courier profile." Specifically, Royer "purchased a one-way ticket to New York City and checked his two suitcases, placing on each suitcase an identification tag bearing the name 'Holt' and the destination 'La Guardia.'" *Royer* at 493. Officers approached him and requested his license and plane ticket. The ticket bore the name Holt and his license bore the name Royer. The officers testified that Royer "became noticeably more nervous during this conversation." *Id.*

Officers did not return his ticket or his license and requested that he follow them into a small room described as a "large storage closet." *Id.* The officers obtained consent to search his luggage and found marijuana, and "approximately 15 minutes had elapsed from the time the detectives initially approached respondent until his arrest upon the discovery of the contraband." *Id.* The *Royer* Court found that although the officers initially had reasonable suspicion to investigate Royer, later, "at the time Royer produced the key to his suitcase, the detention to which he was then subjected was a more serious intrusion on his personal liberty than allowable on a mere suspicion of criminal activity." *Id.* at 502.

As it relates to this case, the intrusion on the Defendant's liberty was much greater than the fifteen-minute intrusion found unconstitutional in *Royer*. In this case, the Troopers detained the occupants for almost two hours.

Another analogous case is *State v. Donatelli*, where the Law Court held that there was no *de facto* arrest requiring probable cause where the officer had received a tip from a reliable confidential information that the defendant would be traveling to Maine transporting cocaine. *Donatelli,* 2010 ME 43. The officer in that case followed the defendant, observed two motor vehicle violations, and pulled the defendant over. Within minutes of the stop, a K9 officer arrived on scene, conducted a sniff on the vehicle, and alerted to the presence of narcotics. The defendant then consented to a search of his vehicle.

By contrast, the restrictions placed on the occupants in this case were substantially more significant than in *Donatelli*. In this case the Defendants were detained for an hour and fifty-three minutes long, not merely a few minutes as was the case in *Donatelli*. Second, there was no confidential informant in this case; instead, the stop was purportedly based on traffic infractions—but seems also to have been based on the mere hunches of Trooper Young.

It is clear that this was a pretextual stop. Trooper Young was clear that he suspected "criminal activity" was afoot as soon as he saw the Defendant and her arms extended all the way while driving. While the Law Court has repeatedly

ruled that "an officer's subjective motivation is not relevant to the determination" of reasonable articulable suspicion or probable cause. *State v. Sasso*, 2016 ME 95, ¶15. It is "relevant on matters of credibility, observer bias, or context." *Id*. at ¶16. Here, given Trooper Young's starting point it is fair to infer that he was the victim of substantial observer bias.

The occupants appear to be acting normal under the circumstances. The video provides that none of these individuals are acting outside of the bounds of a normal interaction for a reasonable person. Trooper Young also finds contradictory things to be suspicious, for example, Ms. Lancaster and Mr. Jones. According to Trooper Young, Ms. Lancaster suspicious because she was too forthcoming and attentive, but at the same time he found Mr. Jones to be suspiciously stand offish and apprehensive. A finding that these opposing actions are both suspicious sanctions an investigatory regime of "heads I win, tails you lose."

Law Enforcement Lacked Reasonable Articulable Suspicion to Extend the Detention of Ms. Fitzgerald in Violation of *Rodriquez v. United States*

Even if the stop was not transformed into a *de facto* arrest, officers still unconstitutionally extend the stop beyond its original justification. "The level of suspicion the [reasonable suspicion] standard requires is . . . less than is necessary for probable cause." *United States v. Ramdihall*, 859 F.3d 80, 90 (1st Cir. 2017) (quoting *Navarette v. California*, 572 U.S. 393, 397 (2014)). "Reasonable

suspicion requires more, however, than an 'inchoate and unparticularized suspicion or hunch.'" *Id*. at 91 (quoting *Terry v. Ohio,* 392 U.S. 1, 27 (1968)). "[A] finding of reasonable suspicion must be premised upon a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id*. "The particularity requirement ensures that the suspicion is grounded in specific and articulable facts, . . . while the objectivity requirement dictates a focus on what a reasonable law enforcement officer in the same or similar circumstances would have thought." *Id.* Finally, "the reasonable suspicion inquiry requires a court to look at the totality of the circumstances, rather than undertaking a 'divide-and-conquer analysis' of each individual fact." *Id.*

The allowable duration of a traffic stop "is determined by the seizure's 'mission' – to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez v. United States*, 575 U.S. 348, 349 (2015). Accordingly, "the scope of the detention must be carefully tailored to its underlying justification." *Royer,* at 500. Here the underlying justification of the stop was a seat belt violation. Importantly, "investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion *in a short period of time*." *Royer* at 500 (emphasis added).

Giving Trooper Young all the benefit of the doubt he was justified in extending the stop when he observed Mr. Early without a seatbelt and could not get

his name back on file. However, it is undisputed that he received his name back on file at approximately 12:24 PM. At that time, he needed to decide to give Mr. Early and/or Ms. Fitzgerald a ticket and release them, unless he had sufficient reasonable suspicion of drug crimes to hold them for a canine sniff. Trooper Young Testified that he believed he had enough to hold the group mostly because of certain non-verbal cues that he found suspicious and indicative if deception. He also testified that he was not suspicious of anything specific but rater "a general suspicion of criminal activity." (Tr. 4/19/24 p, 40).

Relying on law enforcement opinion that non-verbal cues are indicative of deception is perpetuating a myth that law enforcement is adept at identifying suspicious individuals through non-verbal means. The reality is empirical research has consistently shown that law enforcement officers are *worse* at detecting deceit through non-verbal communication than lay people. This is because "experts in lie detection *do not exist*; in fact no reliable differences in deception detection accuracy are found when "experts" are compared with novices in lie detection." Jillian Yarbrough, *The Science of Deception Detection: A Literature and Policy Review on Police Ability to Detect Lies*, 3:2 Journal of Criminal Justice and Law, 40, 43 (2020) (emphasis added).[4] In fact, in one study "60 officers engaged in a lie detection task and were asked to assess their accuracy in detecting lies. The

[4] Accessed at: https://assets.pubpub.org/tolaawe6/41607531364306.pdf

officers performed below the chance level, yet they evaluated their accuracy as high." *Id*. at 44. Another study put it more bluntly stating that:

> Several decades of empirical research have shown that none of the non-verbal signs assumed by psychological folklore to be diagnostic of lying vs. truthfulness is in fact a reliable indicator of lying vs. truthfulness. It is a substantial literature. Vrij's seminal book included more than 1,000 references to the research literature and the recent review by Vrij et al. identified 206 scientific papers published in 2016 alone. Thus, any reliable non-verbal cues to lies and deceit ought to have been identified by now. However, the conclusions drawn by DePaulo et al. who analyzed 116 studies more than 15 years ago, still appear to be valid…'the looks and sounds of deceit are faint,' and the recent review by Vrij et al. seconded this: '…the non-verbal cues to deceit discovered to date are faint and unreliable and…people are mediocre lie catchers when they pay attention to behaviors.' In other words, no reliable non-verbal cues to deception have to-date been identified.

Tim Brennen and Svein Magnussen, *Research on Non-Verbal Signs of Lies and Deceit: A Blind Alley*, Frontiers Psychology (Dec. 2020) (internal citations omitted).[5]

Given the state of empirical research, the Court should ignore all references and opinions to non-verbal cues in this, and future, cases. They are not just unsupported by science but over twenty years of research has proven definitively that non-verbal cues to deception are mythological. The research has been so compelling that the study referenced above advocated that that researchers should cease research into non-verbal cues as deception indicators. They argued that "the creative studies carried out during the last few decades have been important in showing that psychological folklore…are not correct…we have now sufficient evidence that there are no specific non-verbal behavioral signals that accompany

[5] Accessed at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7767987/

lying or deceitful behavior." *Id*. Trooper Young was completely unable to *articulate* what he was suspicious *of*. He testified that he had "a general suspicion of criminal activity" or what could more accurately be described as an inarticulate hunch. (Tr. 4/19/24 p. 40).

Law Enforcement Lacked Probable Cause to Conduct a Search of the Appellee's Vehicle

Assuming, *arguendo*, that the Troopers had enough reasonable suspicion to hold the group for the canine sniff, that sniff did not provide probable cause to search Ms. Fitzgerald's vehicle. Trooper Fancy and his canine Dutch began the dog sniff after the Troopers ordered each member of the group to exit the vehicle and ordered that they take the puppies out of the car. Troopers make no attempts to close the doors that the group had to exit based on the order that they exit the vehicle. Dutch begins his sniff works around the car clockwise, ducks under the open passenger side door and climbs into the vehicle. Trooper Fancy keeps the leash taught and after a few seconds pull Dutch out of the vehicle and begins walking back towards his cruiser. He informs Trooper Young that they are "all good" to search the vehicle.

It is undisputed that Dutch did not perform his trained indication to the presence of drugs which is to sit when he smells the presence of his trained odors. Trooper Fancy and defense expert Andy Falco Jimenez testified as to the basic way

in which dogs are trained to indicate to the presence of drugs. Through the use of operant conditioning the dog is trained to perform an automatic response to the presence of the trained odor in this case illegal narcotics. In other words, the dog is conditioned to sit upon identifying the odor of narcotics, this is trained as an automatic response meaning the dog does not think about sitting it just does it. Mr. Jimenez described that changes in behavior, which are sometimes described as "just noticeable differences" (or JNDs) are indications that the dog is excited about *something* but not necessarily illegal narcotics. Mr. Jimenez testified that regardless of training a narcotics detection dog is still a dog, and dogs get excited and will show changes in behavior. For example, almost all dogs will show excitement when the smell food or other dogs. Mr. Jimenez testified that there is no reliable objective way to differentiate between the excitement a dog might exhibit based on those innocuous odors or narcotics.

Trooper Fancy essentially agreed with the contention that there is no objective way to differentiate the different types of excitement. Rather, he testified that he, subjectively, can tell the difference between when Dutch is detecting the odor of narcotics and when he is excited for other reasons. Mr. Jimenez concluded that Dutch's sniff was unreliable because the JNDs that Dutch was exhibiting were not indications of the presence of narcotics. On the last day of testimony Trooper Young was asked directly about those conclusions and he stated that it was

impossible for Mr. Jimenez to come to that conclusion. Trooper Young testified that he alone could interpret Dutch's JNDs and that no one else could objectively verify whether he was reading those signs right.

It is for that reason, that the Court should find as a matter of law that without exhibiting the trained indication there cannot be probable cause. Even if Trooper Fancy is correct that Dutch exhibits different JNDs to the presence of narcotics. If Trooper Fancy is the only person on earth that can adequately interpret Dutch's behavior, then it is impossible for the Court to provide any meaningful judicial oversight for dog sniffs. Probable cause "is based on an *objective standard*, not on whether the particular officer believed he had probable cause." *State v. Martin*, 2015 ME 91 ¶10. (Emphasis Added). In determining whether reasonable suspicion or probable cause exists the Court should look to the events "leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable officer, amount to reasonable suspicion or probable cause." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). Under this standard, the Court has no choice but to find in the Defendant's favor as no objectively reasonable officer could assess whether probable cause exists. Instead, Trooper Fancy alone can, subjectively determine if probable cause exists when his canine does not perform his indication. By sanctioning this finding of probable cause the Court is sanctioning a form of evidence whereby the only requirement to

pass judicial muster is for the officer to show up to court and swear that he interpreted the dog's movements faithfully. That must be unacceptable under the Fourth Amendment when its purpose is that probable cause should be determined by "a neutral and detached magistrate instead of being judged by the officer engaged in the often-competitive enterprise of ferreting out crime" and "would reduce the Amendment to a nullity." *Johnson v. United States*, 333 U.S. 10, 14 (1947).

Even if the Court finds that canine Dutch alerted enough to give rise to probable cause, that alert did not occur until *after* Dutch trespassed into the Defendant's vehicle.[6] Prior to *United States v. Jones*, the State would likely have prevailed in this matter. *United States v. Jones*, *565* U.S 400 (2012). Just after *Jones* was decided the Sixth Circuit decided *United States v. Sharp* where a dog "jump[ed] through an open window [to] sniff inside his car." *United States v. Sharp*, 689 F.3d 616 (6th Cir. 2012). In it the Sixth Circuit provided that "absent police misconduct, the instinctiveness of trained canines, do not violate the Fourth Amendment." That Court reviewed the question and found that "our sister circuits who have addressed this precise issue are unanimous in holding that a dog's instinctive jump into a car does not violate the Fourt Amendment." *Id*.

[6] The State also argues that there was probable cause *prior* to Dutch entering the vehicle. The State attempts to characterize this assertion as a legal conclusion to avoid the clear error standard of review. However, the trial court's ruling on this point is clearly a factual one. The Court ruled, based on a combination of video review and the testimony, that Dutch began showing excitement approximately one to two seconds before entering the vehicle. The Court ruled as a factual matter that there was not enough time for Trooper Young to process Dutch's actions before he was in the car.

However, the *Sharp* decision was made without consideration of *United States v. Jones* and before *Florida v. Jardines*. 656 U.S. 400 (2012); 569 U.S. 1 (2013). In *Jones* the Supreme Court explained that the Court's "reasonable-expectation-of-privacy test" under *Katz v. United States*, 389 U.S. 351 (1967) was "*added to*, not *substituted for*, the common-law trespassory test." *Id.* The Court provided that "'when the government does engage in physical intrusion of a constitutionally protected area in order to obtain information that intrusion may constitute a violation of the Fourth Amendment.'" *Id*. (Sotomayor J., concurring) (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring in judgment)). The Court reaffirmed this test less than a year after *Jones* in *Florida v. Jardines* where it provided that "when the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." *Jardines* at 5. (internal quotations marks omitted) (citing *Jones* at n. 3).

The United States District Court, for the Northern District of Iowa recently grappled with this question in *United States v. Buescher* 691 F. Supp.3d 924 (N.D. Iowa 2023). In that case, law enforcement performed a canine sniff around the Defendant's vehicle and during the third pass of the vehicle the dog "put his nose in the open driver's window and tried to jump inside twice." The handler then "testified this was an alert." The Defendant filed a motion to suppress and a

hearing was held in front of a Magistrate Judge who issued a Report and Recommendation that the motion should be denied. Chief Judge Leonard Strand declined to adopt the Report and Recommendation and granted the Defendant's motion.

Judge Strand stated that "the use of the drug-sniffing dog on the exterior of a vehicle stop during a valid traffic stop is not a search and does not infringe upon any Fourth Amendment rights." *Id*. (internal quotation marks omitted). However, he found that "the inside of a car…is typically a different story. Police cannot search the interior of an automobile unless they have probable cause to believe that the vehicle contains contraband or other evidence of a crime." *Id*. He also found that "a drug dog is an instrumentality of the police, and the actions of 'an instrument or agent' of the government normally are governed by the Fourth Amendment." *Id*. (quoting *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614 (1989). Finally, he found that "the subjective intent of police officers is almost always irrelevant to whether an action violates the Fourth Amendment." *Id*. (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 736-37 (2011).

The State cites thirteen cases across seven federal circuits to support their contention that there is unanimity on this issue. However, a closer look at those cases reveals that reliance to be misplaced. Of the thirteen cases cited by the State

only *one* cites to *Jones* and *none* cite to *Jardines*.[7] Rather, these circuits were applying the instinct exception first articulated by the Tenth Circuit in *United States v. Stone*, 866 F.2d 359, 360-62 (10th Cir. 1989). This exception was created well before *Jones* and *Jardines* cases and it appears that the courts cited by the State have failed to examine that exception in light of those cases.

This case mirrors the *Buescher* case in that case, officers did not have probable cause to search the vehicle until the canine entered the interior without consent. This should be an easy case and indeed *Jardines* contemplates these sorts of easy cases in its revival of the Fourth Amendment's property rights tests by explaining that "one virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *Jardines* at 10. This is one such easy case; Dutch is an instrumentality of the police and to enter the Defendant's vehicle probable cause was necessary and it was not present here.

One Federal Court writing shortly after *Jardines* was decided acknowledged the changed landscape of the post-*Jones/Jardines* environment, writing "*Jones* changed the jurisprudential landscape" and that "case law now directs that if the government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has *undoubtedly occurred*." *United States v. Thomas*, 726 F.3d 1036, 1092 (9th

[7] The one case that does cite to *Jones*, *United States v. Zabokrtsky*,

Cir. 2013) (internal quotations omitted) (emphasis added). While acknowledging that changing landscape, the Court declined to apply the exclusionary rule as officers had relied on the binding precedent at the time. *Id*. at 1094.[8]

A more recent analysis was done by the Wisconsin Court of Appeals in *State v. Campbell* 411 Wis.2d 439 (Wis. 2024). In that case the canine entered Campbell's vehicle twice during its sniff and only established probable cause to search after these entries. The Court found that "both of the canine's entries into Campbell's vehicle constituted searches within the meaning of the Fourth Amendment" reasoning that "in *Illinois v. Caballes* the United States Supreme Court determined …that a canine sniff of the *exterior* of a vehicle does not require a search warrant or probable cause." *Id*. at 450. They highlighted that *Jardines* makes these sorts of conclusions easy "there is uncontroverted evidence that the canine – a trained member of law enforcement – twice entered Campbell's vehicle as opposed to staying at its exterior…Law enforcement undoubtedly gained information by physically intruding into one of Campbell's 'effects' thus both entries constitute searches within the meaning of the Fourth Amendment." *Id*. at 452-453. Here there is also uncontroverted evidence that the canine, "a trained member of law enforcement" trespassed into the Appellee's vehicle in order to

[8] At this point *Jones/Jardines* have been binding precedent for over a decade. Additionally, the legal tests are incredibly simple, has a physical intrusion occurred? If so, that is a search which requires probable cause and, unless an exception applies, a warrant. There can be no good faith reliance on previous precedent when the test is so simple.

gain information, *Jones* and *Jardines* makes it simple, that is a search and, since there was no probable cause, it was illegal under the Fourth Amendment.

Even if the Instinct Exception is a Recognized Exception, it does not Apply here

An exterior dog sniff of a motor vehicle is not a search and thus requires no level of suspicion at all. *Illinois v. Caballes*, 543 U.S. 405 (2005). This conclusion was reached because a "dog sniff was performed *on the exterior* of respondent's car while lawfully seized for a traffic violation." *Id*. at 409. (emphasis added). Despite this seemingly clear statement of law, some courts have continued to rely on the instinct exception first recognized in *United States v. Stone*, 866 F.2d 359, 360-62 (10th Cir. 1989).[9] This exception has never been adopted in Maine.

However, even if it is adopted it does not apply to this case. In *Stone* the Court found that "there is no evidence, nor does Stone contend, that the police asked Stone to open the hatchback so the dog could jump in." *Id*. at 364. In this case, the State has endorsed this rule stating that "it *does* violate the Fourth Amendment if the police facilitate or encourage a dog's entry into a car, such as by opening a closed door, lifting the dog, or removing impediments to its entry." (State's brief at p. 30).

In this case, law enforcement did facilitate the dog's entry into the vehicle. In applying this exception, the Tenth Circuit in another case ruled that "allowing

[9] As noted above, this case was pre-*Jones/Jardines* but also pre-*Caballes* as well.

the van to sit on the side of the highway with the sliding door wide open for a period of at least six minutes until the drug dog could arrive" was facilitating the dog's entry into the vehicle. *United States v. Winningham*, 140 F.3d 1328, 1331 (10th Cir. 1998).

In other words, when law enforcement creates the circumstances that allows easy access for the dog to enter the vehicle the instinct exception does not apply. Here, officers ordered the occupants to exit the vehicle and stand off to the side and retrieve the puppies that were in the vehicle. (Tr. 4/19/24 p. 50). Unless the Officers were expecting them to crawl out of the window, this instruction necessitates the individuals open the door to the vehicle. As the Trial Court noted in its order, law enforcement "were…in control of the situation. The dog handler knew the doors were open." The officers may not have physically opened the doors, but by ordering the occupants out, they ensured the doors would be open when the canine arrived thereby "facilitating" the dog's illegal entry into the vehicle.

The State in the *Campbell* case also addressed the instinct exception but did not rule on its applicability. Rather, the ruled that "even if we assume, without deciding, that the instinct exception properly existed under Wisconsin law, we conclude that the canine's searches of Campbell's vehicle would not fall under the instinct exception." *Campbell* at 459-460. That court ruled that "the circuit court's

finding that the canine entered Campbell's vehicle without *any* direction from [the handler] is clearly erroneous…while [the handler] did not directly order or command the canine to enter the vehicle, *he permitted and facilitated its entry*." *Id*. at 460. (emphasis added).

The Court noted the high level of training that both the dog and handler had stating that "[the handler] did not attempt to pull on the leash to remove the canine from the vehicle, and there was no evidence at the suppression hearing that he verbally instructed the canine – a highly trained law enforcement tool – to get out of the vehicle. Instead, he permitted the canine to stay in the vehicle…the searches in this case are far from the type of situation that occurs when a canine freely breaks away from human control and investigates without assistance." *Id*. at 461.

The Trial Court's order mirrored that language that while officers did not order the dog into the vehicle they facilitated its entry by creating the conditions to make it easier. Further, once in the vehicle officers did nothing to end the unlawful intrusion into the Appellee's vehicle.

The Trial Court Correctly Applied the Exclusionary Rule in this Case

The exclusionary rule is the product of years of evolving jurisprudence. It was first pronounced in *Weeks v. U.S.* where the Supreme Court where the court announced that "the principles laid down in this opinion affect the very essence of constitutional liberty and security." *Weeks v. United States*, 232 U.S. 383 (1914)

(quoting *Boyd v. United States*, 116 U.S. 616 (1886)). The Court in *Weeks* found that "the 4th Amendment is not directed to individual misconduct of …[government officials]." The Court after *Weeks* "required of federal law officers a strict adherence to that commend which this Court has held to be a clear, specific, and *constitutionally required*…deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.' *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (emphasis added).

Since then, Court is have warped the exclusionary rule's purpose and now forget the "constitutionally required" portion of the exclusionary rule. In reducing the Fourth Amendment to just a form of words, Courts now find that "the rule 'is neither intended nor able to cure the invasion of the Defendant's rights which he has already suffered." *United States v. Leon*, 414 U.S. 897, 906 (1984).[10] In examining this current iteration of the exclusionary rule, "the Supreme Court has 'examined whether the rule's deterrent effect will be achieved' and 'weighs the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process." *State v. Weddle* 2020 ME 12 ¶33. (quoting *Illinois v. Krull*, 480 U.S. 340, 347 (1987)).

In analyzing this balancing test, the Trial Court appropriately found that it was police who were in control of the situation. (App. at 31). It also found that

[10] At the same time, Courts have limited the ability of citizens to sue law enforcement through the judicially concocted doctrine of qualified immunity essentially making the Fourth Amendment a nullity.

"the court is not aware of any efforts the handler made to prevent the dog from going in the open door prior to commencing the exterior search. The officer did not appear to make any effort to get the dog out of the car once it was in there." (App. at 31).

The Court also ruled that while there was no intentional misconduct on the part of officers "the law is clear that law enforcement cannot search the interior of a car without probable cause. They can conduct an *exterior* dog sniff to establish probable cause. A dog handler should take measures to make sure the sniff is constitutionally permissible. Although the law is evolving, there may be times when a dog's instinctual in advertent penetration of the interior of the car may be excused. Here, however, the court finds that the theory does not fit the facts of this case." (App. at 31-32).

The Trial Court clearly performed the appropriate balancing test and found that the likelihood of the deterrent effect outweighed the cost of suppressing the evidence. The Officers were in complete control from the beginning of this traffic infraction which instantaneously became a drug investigation. The occupants of the vehicle were ordered out of the car by law enforcement and left the doors open when ordered to remove the puppies. No reasonable person would have believed that they could close the doors once they had exited the vehicle.

Lastly, the Trial Court in emphasizing the legality of exterior sniff is clearly referencing *Caballes* 543 U.S. 405 (2005). When viewed as a whole, that case is clearly ruling that an exterior sniff is not a search, an *interior* sniff is and would require probable cause to conduct. As the Wisconsin Court ruled, these canines are "a highly trained law enforcement tool" and should be treated as such. The *Jones* rule is simple and should not be difficult for officers to understand. They, or their instrumentalities, cannot intrude upon a citizen's effects without probable cause. If they fail to follow that stricture then the search is illegal and the evidence will be suppressed. If the Court failed to do so, it would be proving to the officers that violating someone's rights has zero consequences. They can put blinders onto the incredibly simple rules provided by *Jones*/*Jardines* and beg forgiveness later.

The Officers could have closed the doors and chose not to. They should have been aware that the dog's entry into the vehicle constituted a trespass and violated the Appellee's rights. Suppression of this evidence will ensure that in the future they take the necessary steps to safeguard the constitutional rights of those citizens they are investigating. By not applying the exclusionary rule, this court would be incentivizing police to make themselves blind to the strictures of the Fourth Amendment.

Conclusion

Law enforcement lacked reasonable suspicion to extend the detention of the Appellee once Mr. Early's name came back on file. Additionally, they lacked probable cause to search the Appellee's vehicle before the dog entered her vehicle. The dog never alerted and thus failed to establish probable cause to search the vehicle in any event. Lastly, the exclusionary rule is an appropriate remedy to deter the illegal conduct by law enforcement in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel A. Wentworth, counsel for the Appellant, hereby certify that I have delivered in-hand two true copies of the Appellee's Brief to the State through ADA Carlos Diaz.

February 3, 2025
Date

Daniel A. Wentworth, Esq.