STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. CUM-24-381

STATE OF MAINE,
Plaintiff/Appellant

v.

KYLE FITZGERALD,
Defendant/Appellee

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

REPLY BRIEF FOR APPELLANT STATE OF MAINE

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ARGUMENT

1) The drug dog's entry into the car did not violate the Fourth Amendment because probable cause already existed.

Without citing any legal authority, Fitzgerald argues that as a matter of law a dog sniff is inadequate to establish probable cause to search unless the dog gives final indication by sitting or lying down. *Appellant's Brief,* 22.[1] That argument is legally unfounded, as numerous cases hold that a drug dog's behavioral changes, such as those exhibited by the drug dog in this case, are legally sufficient to establish probable cause to search even if the dog does not give final indication. *Appellant's Brief,* 21-24 & n.21.[2]

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[1] Fitzgerald relies entirely on his expert witness's opinion that a dog sniff cannot establish probable cause to search unless the dog gives final indication. However, Californian dog trainer Andre Jimenez's area of expertise is dogs, not Fourth Amendment law, he has no familiarity with either Tr. Fancy's drug dog or the Maine certification standards, and his credibility was compromised by his financial motive. Thus, the trial court acted well within its discretion in giving no weight to his testimony or his legal opinion. *Handrahan v. Malenko,* 2011 ME 15, ¶ 14, 12 A.3d 79 (trial court may decide to give no weight to the testimony of an expert witness). For details regarding Jimenez's lack of credibility, including his authorship of the book *Big Income Expertise, How Even You Can Be an Expert on Anything and Profit From It,* see *App.* 46-48, 54-55 & n.6-8 & 15.

[2] See also *United States v. Shen,* 749 F. App'x 256, 263 (5th Cir. 2018) (even without final indication, probable cause was

Fitzgerald also argues that mere changes in a dog's behavior cannot establish probable cause because they are subjective and therefore unreviewable by a judge. *Appellee's Brief,* 22-23.[3] On the contrary, changes in a dog's behavior are objective facts that a judge can review, in this case through the handler's testimony and the video recording. Tr. Fancy's uncontroverted testimony established that he observed several objective changes in the dog's behavior consistent with its past behavior when in the odor of drugs, some of which also were plainly visible in the cruiser video,

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established because the dog "was acting as she has in the past when identifying a narcotic odor," including intense nasal exchanges, tail wagging, and staring at the passenger door seam); *United States v. Holleman*, 743 F.3d 1152, 1156–57 (8th Cir. 2014) ("we are not concerned about [the dog's] failure to give a full indication."); *United States v. Thomas*, 726 F.3d 1086, 1098 (9th Cir. 2013) ("Evidence from a trained and reliable handler about alert behavior he recognized in his dog can be the basis for probable cause.")

[3] Fitzgerald incorrectly asserts that Tr. Fancy testified "he alone" could correctly interpret the dog's behavior and it was "impossible" for the defense expert to do so. *Appellee's Brief,* 22. In fact, Tr. Fancy testified that "any handler" familiar with the dog would have concluded from the dog's behavior that it detected an odor of drugs coming from the car, and he disputed as baseless the opinion of the defense expert (who was unfamiliar with the dog) that the sniff was unreliable and that the dog must have been responding to the odor of puppies. *Tr. (4/19/2024),* 91-92, 98-99, 114.

including the head snap, pulling toward the car, and tail-wagging. Thus, contrary to Fitzgerald's argument, the dog's behavioral changes were reviewable objective facts.[4]

Fitzgerald's argument also rests on the mistaken and unfounded assertion that drug dogs are supposed to give final indication immediately when they first detect an odor of drugs. *Appellee's Brief*, 9-10, 20-21, 23, 34. On the contrary, Tr. Fancy's uncontradicted testimony explained that drug dogs are trained to give final indication only after following the drug odor to its source, not upon initially detecting a drug odor. *Tr. (12/7/2023),* 28 ("they are trying to work their way towards [the] odor *to find where that*

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[4] A judge's ability to determine probable cause based on a handler's description of changes in a dog's behavior is no less constitutionally sound than a judge's ability to determine probable cause based on a description of a driver's performance on field sobriety tests, or a description of an odor of burnt marijuana coming from a car. In each instance the judge may weigh the police officer's testimony, even though the judge can't observe firsthand what the officer observed. See e.g., *State v. Taylor,* 1997 ME 81, ¶ 13, 694 A.2d 907 (officer's observation of horizontal gaze nystagmus held sufficient to establish probable cause for OUI, even though "no one can verify the officer's HGN test reading"); *United States v. Staula,* 80 F.3d 596, 602 (1st Cir. 1996) (where officer testified he smelled odor of burnt marijuana coming from a car, "the case law is consentient… that olfactory evidence furnishes the officer with probable cause to conduct a search," even though the judge can't smell what the officer smelled.)

odor source is,") & 29 ("[through deep nasal exchanges] he is disturbing the area *to get to that source* because, at the end of the day, he wants his reward and *that is what he has been trained to do.*")[5] Even the defense expert witness agreed completely on that point.[6] Thus, contrary to Fitzgerald's argument, in this case the dog did not "fail" to give final indication; rather, it was not supposed to give final indication because it was not allowed to follow the drug odor to its source in the car's trunk.

Therefore, the drug dog's entry into the car did not violate the Fourth Amendment because probable cause already existed.

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[5] The terms final indication, final alert, and trained indication are synonymous, referring to the trained behavior of sitting or lying down. *Tr. (12/7/2023)*, 44-45, 48, 70; *Tr. (4/19/2024),* 89.

[6] Indeed, defense expert Jimenez agreed that drug dogs are trained to give final indication by sitting or lying down only upon locating the source of the odor of drugs, not immediately upon first detecting a drug odor. *Tr. (12/7/2023),* 66 ("when the dog is searching and then *locates the source* of the narcotic odor, the automatic behavior… is the sit behavior,") ("when he first comes in contact with the odor… he's trained *to go to the source first and then when he gets to the source, that automatic behavior [sitting] will happen,*") 67 ("he can smell the odor of narcotics emitting from a vehicle… [b]ut *then he will follow it to the source… and then sit at the source,*") & 77 (affirming that "the dog is trained to recognize certain odors of drugs and try to sniff *until they locate the source.*")

2) The dog's entry into the car did not violate the Fourth Amendment because the instinctive entry exception applied.

Fitzgerald argues the Fourth Amendment's instinctive entry exception ceased to exist after the United States Supreme Court's 2012 and 2013 opinions in *Jones* and *Jardines,* and that even if it still exists it does not apply in this case. *Appellee's Brief*, 23-30. On the contrary, numerous opinions after 2013 clearly show the instinctive entry exception still exists, and the trial court's factual findings compel the legal conclusion that it applies in this case.

Jones and *Jardines* broadened the scope of the Fourth Amendment's protection to prohibit any deliberate physical trespass by a police officer, but neither case involved a drug dog's instinctive entry into a car without direction or assistance from the police. *United States v. Jones,* 565 U.S. 400, 404 (2012) (holding the Fourth Amendment prohibited a police officer from deliberately trespassing upon a suspect's motor vehicle to install a tracking device); *Florida v. Jardines,* 569 U.S. 1, 6-7 (2013) (holding the Fourth Amendment prohibited a police officer with a drug dog from deliberately trespassing upon the curtilage of a suspect's home to

conduct a sniff.) Thus, neither case addressed the narrow instinctive entry exception.[7]

Furthermore, since 2013 numerous federal and state courts continue to recognize the instinctive entry exception, including opinions that expressly distinguish *Jones* and *Jardines*.[8] For

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[7] The fact that *Jones* involved a home is another significant distinction, as a home enjoys greater Fourth Amendment protection than an automobile. *Carroll v. United States,* 267 U.S. 132, 149 (1925); *State v. Tarantino,* 587 A.2d 1095, 1097 (Me. 1991).

[8] For post-2013 cases, see *Appellant's Brief,* 29-30 & n.26, and see *United States v. Shen,* 749 F. App'x at 262-63 (instinctive entry exception applied where drug dog stuck its head through open car window with no direction from handler); *United States v. Keller,* 123 F.4th 264, 268 (5th Cir. 2024) (distinguishing *Jones,* and finding no Fourth Amendment violation where a drug dog instinctively trespassed upon a motor vehicle); *United States v. Cordero,* No. 5:13-CR-166, 2014 WL 3513181, at *9-10 (D. Vt., Jul. 14, 2014) (distinguishing *Jones* and *Jardines,* and finding no Fourth Amendment violation where a drug dog instinctively trespassed upon a motor vehicle); *United States v. Trapp,* Nos. 1:13-CR-JGM-01 & 02, 2014 WL 1117012, at *2, *5 (D. Vt., March 20, 2014) (drug dog's instinctive entry into a taxi did not violate the Fourth Amendment); *United States v. Zabokrtsky,* No. 5:19-CR-40089-HLT-1, 2020 WL 1082583, *6 (D. Kan., Mar. 6, 2020) (distinguishing *Jones* and *Jardines,* and holding that a drug dog's instinctive trespass upon a motor vehicle and entry of its snout through an open window did not violate the Fourth Amendment); *United States v. Fellmy,* No. 5:24-CR-6-KKC-MAS, 2024 WL 5040927, *3, (E.D. Ky., Dec. 9, 2024) (holding there was no Fourth Amendment violation when a drug dog stuck its snout though an open car window without direction from the handler); *State v. Mumford,* 14 N.W.3d 346, 352-53 (Ia. 2024) (distinguishing *Jones* and *Jardines*,

example, recently the Iowa Supreme Court applied the instinctive entry exception (rejecting a dissenting judge's argument that it no longer exists after *Jones* and *Jardines*), noting the unanimity of the federal appellate courts recognizing the exception, and citing United States Supreme Court precedent holding that "dog sniffs are 'sui generis' because they only reveal the presence or absence of contraband… [which] generally does not implicate legitimate privacy interests." *State v. Bauler,* 8 N.W.3d 892, 899 (Ia. 2024), citing *Illinois v. Caballes,* 543 U.S. 405, 409-410 (2005) (holding that a drug dog's sniff around the exterior of a car during a lawful traffic stop is "sui generis" under the Fourth Amendment analysis because it "reveals no information other than the location of a substance that no individual has any right to possess.")[9] Thus, the Fourth

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finding no Fourth Amendment violation where drug dog stuck its snout through open passenger window without direction from handler); *United States v. Wilson,* No. 22-20100, 2024 WL 3634199, at *2, n.1 (5th Cir., Aug. 2, 2024) (instinctive entry exception applied where drug dog jumped through open car window passenger window without direction from handler).

[9] Fitzgerald suggests that the state and federal courts that continue to recognize the instinctive entry exception after *Jones* and *Jardines* simply are unaware of those opinions. *Appellee's Brief,* 26. However, as noted above, some of their opinions discuss and distinguish *Jones* and *Jardines.* Furthermore, United States

Amendment's instinctive entry exception still exists, even after *Jones* and *Jardines*.

Fitzgerald also argues that the instinctive entry exception does not apply here because the police officers' failure to prevent the dog from entering the car constituted improper facilitation, citing the opinion of the 10th Circuit Court of Appeals in *United States v. Winningham* and a very recent opinion of the Wisconsin Court of Appeals in *State v. Campbell*. However, Fitzgerald's reliance on those cases is misplaced, as their analysis actually refutes his argument. In both cases the courts acknowledged the existence of the instinctive entry exception, and held that it did not apply only because (1) the police lacked reasonable suspicion to detain the motorists for a dog sniff, and (2) the police deliberately facilitated the dog's entry into the vehicle by actively encouraging it to enter. *United States v. Winningham*, 140 F.3d 1328, 1330-31 (10th Cir. 1998); *State v. Campbell,* 5 N.W.3d 870, 874, 876, 880 & n.8 (Wi.

Supreme Court opinions tend to garner attention, and *Jones* and *Jardines* were no exception. As Fitzgerald pointed out, the 9th Circuit Court of Appeals promptly heralded that *Jones* "changed the jurisprudential landscape." *United States v. Thomas,* 726 F.3d at 1092. Thus, the suggestion that *Jones* and *Jardines* went unnoticed is absurd.

2024). Those facts are completely unlike the facts found by the trial court in this case. First, unlike *Winningham* and *Campbell,* the trial court found the police had reasonable and articulable suspicion to detain the motorists for a dog sniff.

Second, unlike *Winningham* and *Campbell,* here the police did not direct or encourage the dog to enter the car. In *Winningham* the police opened the door of the suspect's van and then directed the drug dog to sniff the van and unleashed it, thus orchestrating dog's entry into the van. *Winningham*, 140 F.3d 1328, 1330-31 (10th Cir. 1998). Similarly, in *Campbell* a police officer "directed" and "facilitated" the drug dog's entry into the car twice, by walking it to the open driver's side door and then standing with the officer's body "blocking the canine from moving toward the rear of the vehicle" and "blocking the canine from continuing its scan of the vehicle's exterior," giving the dog no alternative but to enter the car twice through the open doorway. *State v. Campbell,* 5 N.W.3d at 874, 876, 880 & n.8. Here, however, the trial court expressly found that the motorists left the doors open without any instruction from the police, that Tr. Fancy kept the dog on a taut leash throughout the sniff, that he did not direct, encourage or train it to enter the car,

and that before the dog entered the car it showed signs consistent with detecting an odor of drugs coming from the car. *App.* 10, 14, 18, 30-31. Thus, *Winningham* and *Campbell* actually support the argument that the instinctive entry exception applies here.

Furthermore, the ultimate ruling in *Campbell* rested on the fact that the dog gave no signs that it detected an odor of drugs before it entered the car, citing federal opinions holding that if a drug dog shows signs that a car contains drugs before it enters the car then the entry does not violate the Fourth Amendment. *Campbell,* 5 N.W.3d at 879, n.6, citing *United States v. Guidry,* 817 F.3d 997, 1006 (7th Cir. 2016), *United States v. Lyons,* 486 F.3d 367, 371-74 (8th Cir. 2007), and *United States v. Pierce,* 622 F.3d 209, 211-15 (3rd Cir. 2010). In this case, unlike *Campbell,* the dog showed clear signs that it detected an odor of drugs coming from the car before it entered.

Nor does *Campbell* support Fitzgerald's argument that Tr. Fancy violated the Fourth Amendment because he failed to pull the dog out immediately after it entered the car. *Appellee's Brief,* 30. As already discussed, by the time the dog entered the car probable

cause already existed, justifying a search, so Tr. Fancy's failure to pull the dog out at that point is of no legal consequence.

Fitzgerald also argues the instinctive entry exception does not apply because the police ordered the occupants to exit the car and remove the puppies, asserting that the command facilitated the dog's entry into the car because it "necessitated" and "ensured" the car doors would be left open, as "no reasonable person would have believed they could close the doors once the they exited the car to get the puppies." *Appellee's Brief,* 29, 32. However, during a lawful traffic stop the police lawfully may order the driver and all occupants to exit the vehicle, and the State's original brief cited numerous cases holding that the police have no duty to close the doors of a vehicle before a dog sniff. *Pennsylvania v. Mimms,* 434 U.S. 106, 111 (1977); *Maryland v. Wilson,* 519 U.S. 408, 414 (1997); *Appellant's Brief,* 28, n.25. Furthermore, the trial court found based on uncontroverted evidence that the police did not prevent the motorists from closing the doors, and the video plainly shows that at other times before the dog sniff the occupants did close the

doors upon exiting the car, thus demonstrating they were free to do so. *App.* 10, 18, 30-31; *Video 1,* 05:10, 09:10 & 21:20.[10]

Fitzgerald also argues the police should have taken steps to physically restrain the dog from entering the car, but that argument is logically unsound because the police could not simultaneously allow the dog to get close enough to sniff the car's exterior and also restrain it from getting close enough to trespass upon or enter the car. The dog could not obey a command to approach and sniff the car's exterior while simultaneously being pulled away from the car. The argument also is legally unsound, because the United States Supreme Court has expressly approved of the procedure whereby a

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[10] Moreover, under the Fourth Amendment it would be unlawful for the police to close the car doors before the dog sniff because it would be trespassing upon private property and manipulating or tampering with the evidence. *United States v. Jones,* 565 U.S. 400, 404 (2012) (unlawful for police officer to trespass upon a motor vehicle to collect information); *Arizona v. Hicks,* 480 U.S. 321 (1987) (unlawful for police to move stereo to reveal serial number); *State v. Pagnani,* 2018 ME 129, 193 A.3d 823 (unlawful for police to pick up a jacket the suspect took off before she was handcuffed.) Indeed, even the defense expert testified that closing the car doors would manipulate the evidence and assist the drug dog, because it would prevent ventilation and cause the drug odor to build up and intensify inside the car and then seep out through the seams around the doors and windows, thus increasing the likelihood that the dog would detect the drug odor during a sniff around the exterior. *Tr. (12.7.23),* 72.

dog handler and a drug dog approach close enough for the dog to sniff and make physical contact with the exterior of the vehicle. *Caballes,* 543 U.S. at 409-410.

Thus, the dog's entry into the car did not violate the Fourth Amendment because the instinctive entry exception applied.

3) The police conduct did not warrant application of the exclusionary rule.

Fitzgerald argues the trial court properly found that the police conduct warranted application of the exclusionary rule because the police were in control of the situation, knew the doors were open, and did not prevent the dog from entering the car. *Appellee's Brief,* 31-32; *App.* 31. However, the exclusionary rule does not apply to every violation of the Fourth Amendment; rather, it only applies upon "flagrant or deliberate violation of rights" and "intentional conduct that was patently unconstitutional," involving "deliberate, reckless, or grossly negligent conduct, or in some cases recurring or systematic negligence." *Herring v. United States,* 555 U.S. 135, 143-45 (2009).[11] The trial court made factual findings that the police

[11] Nor does the fact that the police were in control of the situation bar application of the instinctive entry exception, as the

did not direct, encourage or train the dog to enter the car, and even found that "Tr. Fancy did not intend the dog to go into the car." *App.*, 10, 14. Nor did the trial court find recurring or systemic negligence. Thus, as argued in the State's original brief, the trial court's factual findings regarding the conduct and the intentions of the police are inconsistent with, and do not support, application of the exclusionary rule. *State's Brief,* 35-40.[12]

Nor was application of the exclusionary rule warranted by the police officers' subsequent intentional search of the car, because the trial court found there was probable cause to search after the dog entered the car and "got all excited" (*App.* 23),[13] and because the police searched in good faith reliance on the unanimous federal

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police also were in control of the situation in every case where the instinctive entry exception has been applied.

[12] For more cases holding that failure to prevent a drug dog from instinctively trespassing upon and entering a car does not warrant application of the exclusionary rule, see *Zabokrtsky,* No. 5:19-CR-40089-HLT-1, 2020 WL 1082583, *6 (D. Kan., Mar. 6, 2020); *Mumford,* 14 N.W.3d at 352-53; *United States v. Lyons,* 486 F.3d 367, 373-74 (8th Cir. 2007); *United States v. Handley*, No. 23-CR-57-CJW-MAR, 2024 WL 1536750, at *9 (N.D. Ia., Apr. 9, 2024).

[13] *United States v. Ross,* 456 U.S. 798, 825 (1982) (police may search an automobile based on probable cause without a warrant).

case law holding that a drug dog's instinctive entry into a car does not violate the Fourth Amendment. *Davis v. United States,* 564 U.S. 229, 241 (2011) (good faith exception under the Fourth Amendment); *State v. Weddle,* 2020 ME 12, ¶ 35, 224 A.3d 1035 (good faith exception adopted under the Maine Constitution).

Thus, the conduct of the police officers did not warrant application of the exclusionary rule.

4) The trial court properly found based on competent evidence that the roadside detention was lawful.

Fitzgerald challenges the trial court's conclusions that the roadside detention did not constitute de facto arrest and that it was lawful based on reasonable and articulable suspension. *Appellee's Brief,* 12-20.[14] The Law Court reviews the trial court's factual findings for clear error and its legal conclusions de novo. *State v. Croteau,* 2022 ME 22, ¶ 19, 272 A.3d 286. Contrary to Fitzgerald's argument, the trial court correctly applied the law and its conclusions were based on competent evidence.

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[14] Because Fitzgerald did not file notice of cross-appeal, the Law Court may only consider his challenge to the lawfulness of the roadside detention as an alternative basis to suppress the evidence, and only if it finds the dog's entry into the car did not violate the Fourth Amendment. M.R. App. P. 2C(a)(1).

There is no bright line that distinguishes an investigative detention from an arrest, but an investigative detention may transform into de facto arrest, requiring probable cause, if the police take actions that exceed what is necessary to dispel a reasonable suspicion of unlawful activity. *State v. White,* 2013 ME 66, ¶ 13, 70 A.3d 1226. However, following a lawful traffic stop, prolonged detention for a dog sniff is lawful if there is reasonable and articulable suspicion of unlawful drug activity. *Rodriguez v. United States,* 575 U.S. 348, 354 (2015); *State v. Cooper,* 2017 ME 4, n.4, 153 A.3d 759. Here the facts support the trial court's finding that the roadside detention was lawful.

Tr. Young's testimony established that, in addition to observing traffic violations, he became suspicious of unlawful drug activity because the motorists were remarkably evasive and nervous and gave contradictory answers, so he detained them for an additional 34 minutes for a dog sniff. *Appellant's Brief,* 7, 19-20.[15]

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[15] Fitzgerald's reliance on allegedly empirical scientific research showing that nonverbal cues are unreliable in lie detection is misplaced, because no evidence of such research was presented at the suppression hearing. *State v. Barclift,* 2022 ME 50, ¶ 9, 282 A.3d 607 (appellate review is limited to the record before the trial court). Furthermore, our legal system endorses assessment of non-

The video shows that during the roadside detention the motorists were free to use their cell phones, smoke, and talk with each other. Accordingly, the trial court found "there was reasonable articulable suspicion of drug activity in the car for the purpose of requesting a sniff," the police "did not stretch the time out through a lack of diligence," and the detention did not rise to the level of de facto arrest requiring probable cause. *App.,* 12. Thus, the trial court properly found based on competent evidence that the prolonged roadside detention was lawful and did not constitute de facto arrest.[16]

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verbal cues such as demeanor, tone of voice and body language to assess credibility. *Weidul v. State,* 2024 ME 51, ¶¶ 34-35, 319 A.3d 1048.

[16] Although Fitzgerald also challenges the initial traffic stop as pretextual *(Appellee's Brief,* 15), he failed to preserve that issue for appeal because he expressly waived it at the suppression hearing. *Tr. (12/7/2023),* 5; *Tr. (4/19/2024),* 7-8; *App.* 11; *State v. Moore,* 2023 ME 18, ¶¶ 19-20, 290 A.3d 533. Moreover, Tr. Young's uncontroverted testimony established that the initial stop was lawful based on observed traffic violations. *Appellant's Brief,* 2.

CONCLUSION

The Law Court should reverse the trial court's order that suppressed the evidence resulting from the dog sniff and the car search.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this date I caused a true copy of the foregoing brief to be served upon counsel for Appellee Kyle Fitzgerald by email, and that upon approval of the brief by the Clerk of the Law Court I shall serve two printed copies on him by first class United States mail addressed to Daniel Wentworth, Esq., Law Offices of Dylan Boyd, 6 City Center, Suite 301, Portland, Maine 04101.

Dated: February 26, 2025

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