IN THE SUPREME COURT OF IOWA

Supreme Court No. 21-1133
Worth County No. SRCR011821

STATE OF IOWA,

Plaintiff-Appellee,

v.

STEPHEN ANDREW ARRIETA,

Defendant-Appellant.

Appeal from the Iowa District Court for Worth County
The Honorable Colleen Weiland, Judge (Suppression Ruling)
The Honorable DeDra Schroeder, Judge (Trial and Sentencing)

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition of the Case in the District Court

Appellant challenges the district court's ruling on his motion to suppress that held: (1) the trooper had a reasonable suspicion of criminal activity to detain Appellant to await a drug K9 unit; (2) the drug K9 and handler did not trespass onto Appellant's vehicle for purposes of obtaining information; and (3) the drug K9 was reliable and well trained and not cued by the handler. Ruling on Motion to Suppress; App. 028-027.

On August 24, 2020, the State files a Trial Information charging Appellant in Count I with Possession of a Controlled Substance – Marijuana in violation of Iowa Code section 124.401(5) following a warrantless search of his commercial motor vehicle on August 5, 2020. Trial Information; App.005 -008. Appellant enters a plea of not guilty by way of a Written Arraignment and is arraigned on September 24, 2020. Written Arraignment; Order of Arraignment App.009-013.

On October 17, 2020, the State amends the Trial Information to include Count II charging Appellant with Operating While Intoxicated – First Offense in violation of Iowa Code section 321J.2. Amended Trial Information; App. 014-016. The district court approves the amendment on the same day. Order Approving Amended Trial Information App. 017-018. Appellant enters a plea of not guilty to Count II in

writing and is arraigned on that charge on November 6, 2021. Written Arraignment as to Count II; Order of Arraignment; App. 019-023.

On November 18, 2020, Appellant files a motion to suppress challenging his detention, the subsequent search of his vehicle, the drug K9's reliability and the results of a urine sample obtained through implied consent. Motion to Suppress; App.024-025. The motion is later amended on December 11, 2020. First Amended Motion to Suppress; App. 026-027.

The district court hears testimony and receives exhibits regarding the Motion to Suppress on January 4, 2021. On May 12, 2021, the district court denies Appellant's arguments regarding the detention, search and reliability of the drug K9. Ruling on Motion to Suppress; App. 028-031. However, the district court grants Appellant's motion suppressing the urine test results. Ruling on Motion to Suppress; App. 028-031. As a result of the ruling, the State moves to dismiss Count II. Motion to Dismiss Count II; App 032. The district court dismisses Count II on the same day. Order for Dismissal of Count II; App. 033-034.

On June 26, 2021, Appellant waives his right to jury trial and proceeds to a trial on the minutes of testimony as to Count I. Written Waiver and Stipulation; App 035-039. On June 8, 2021, the district court finds Appellant guilty of Count I. Findings of Fact, Conclusions of Law and Verdict; App. 040-044. Appellant waives presence, record and allocution and acknowledges his right to file a Motion in Arrest

of Judgment. Waiver and Acknowledgement; App.045-046. Appellant is sentenced on July 19, 2021. Judgment and Sentencing; App. 04-049. He timely files a Notice of Appeal on August 18, 2021. Notice of Appeal; App. 050-051.

Statement of the Facts

On August 5, 2020, at approximately 12:39 p.m., Motor Vehicle Enforcement Trooper Taran Waalkens stops a commercial motor vehicle driven by Appellant for a vehicle registration issue at the Worth County Weigh Station. (Trial on the Minutes Exhibit 5). The trooper conducts a Level 3 CMV inspection involving an examination of Appellant's documents including his CDL, logbooks (taking up to 20 minutes), truck and trailer registrations (10 minutes), fuel tax receipts (10 minutes) and bills of lading (up to 3 minutes).[1]

The trooper runs the registration information through dispatch and receives an initial report that the truck is stolen. However, the trooper soon discovers that the truck was, in fact, not stolen. At 1:34 p.m., state radio advises the trooper not to hold Appellant.

At approximately 1:45 p.m., Trooper Waalkens requests assistance from Chief Deputy Jesse Luther, the Worth County K9 handler.[2] Luther arrives at the

[1.] If the Court credits the trooper's testimony, then this inspection would have been completed no later than 1:25 p.m.

[2.] Trooper Waalkens called for a drug K9 because: (1) the report of a stolen truck; (2) logbook inconsistencies; and (3) his belief that I-35 is a popular drug trafficking route from Texas to Minnesota. (Motion to Suppress Waalkens Hr'g Testimony).

weigh station around 2:00 p.m. with his drug K9. He runs the dog around Appellant's truck and trailer beginning on the passenger side front. The dog leads Luther on a leash free from any influence by him on this first pass. The dog exhibits no objectively verifiable alert on the vehicle as it completes one pass of the truck, which includes the driver's side cabin area.

Chief Deputy Luther next completes a second pass of the vehicle where he leads the dog instead in a counterclockwise direction and commands the dog to pay more attention to the vehicle's seams, a process he refers to as "detailing."[3] He admits directing the dog to pay particular attention to certain seams on the driver's side by making a series of audible sounds that can be clearly heard on the video. Although he denies touching the truck at the hearing, he is overheard on video telling the trooper that he, in fact, touches the seams on the detailing pass. *See* fn. 3. The dog responds by jumping up and placing its paws on the vehicle's tire and fuel tank to smell elevated areas and seams as directed by the deputy.[4] *See* Figures 1 and 2.

[3] At 5:18 p.m., Chief Deputy Luther tells Trooper Waalkens, "[n]ormally I let the dog walk around the vehicle. See if he does anything on his own without me telling him to do anything. Give him command to look and that is it. Around whole vehicle and if he does not do anything go back other direction due to windage. Call it detailing. Hit the seams. *Touch the seams* and then he is supposed to smell." (Motion to Suppress Appellant's Ex. A) (emphasis added).

[4] The video of the drug K9 sniff does not show the dog placing its paws on the truck at all on the first pass. It is only on the second detailing pass does the dog touch the truck, during which time the dog is purposely directed to concentrate on seams by verbal commands, hand cues and direct physical contact by the deputy himself. *See* fn. 3 *supra*.

Figure 1.

Figure 2.

Chief Deputy Luther is seen raising his hand with the leash shortly after the dog jumps off the fuel tank. He praises the dog next. Although the chief deputy is wearing a body camera, the actual alert is not captured on video. State's Exhibit A-Waalkens Report; App. 108-110.

A search of the truck reveals a small amount of marijuana and paraphernalia.

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court pursuant to Iowa R. App. P. 6.1101(2) because the case presents substantial issues of first impression, namely the extension of the trespass doctrine announced in *State v. Wright*, 961 N.W.2d 396 (Iowa 2021) to K9 searches under the Iowa Constitution, fundamental

issues of broad public importance requiring prompt or ultimate determination by the Supreme Court and substantial questions of enunciating or changing legal principles.

ARGUMENT

I. TROOPER WAALKENS LACKED AN INDIVIDUALIZED SUSPICION OF CRIMINAL ACTIVITY APART FROM THE TRAFFIC VIOLATION TO DETAIN APPELLANT TO AWAIT A K9.

PRESERVATION OF ERROR / STANDARD OF REVIEW: Appellant preserved error on this issue by timely filing a Motion to Suppress Evidence and timely filing a Notice of Appeal following sentencing. It is well established that the Supreme Court's review of constitutional issues is de novo. *See State v. Lyman*, 776 N.W.2d 865, 873 (Iowa 2010).

Legal Authorities. The Fourth Amendment to the United States Constitution assures "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend IV. Article I, section 8 of the Iowa Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

Iowa Const. art. I § 8.

The constitutional protection against unreasonable seizures on state grounds has grown increasingly important as federal protections have eroded. *State v. Ochoa*, 792 N.W.2d 260, 265 (Iowa 2010). Under federal law "[t]he Fourth

Amendment's protection against unreasonable intrusions on a person's liberty arises when an officer seizes a person." *State v. Reinders*, 690 N.W.2d 78, 82 (Iowa 2004). "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of this provision." *Wren v. United States*, 517 U.S. 806, 809-10 (1996). "One of the primary purposes of the Fourth Amendment is to limit the exercise of discretionary, arbitrary, or invasive use of law enforcement power." *State v. Campbell*, 2017 WL 706208 (Iowa App. Feb. 22, 2017) (citing *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 613-14 (1989) (stating the Fourth Amendment "guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction)).

To ensure the rights of individuals are respected, courts are instructed to be particularly mindful of law enforcement's actions during traffic stops. As the Iowa Court of Appeals explained:

> What could be more arbitrary than allowing law enforcement officials to stop motorists at their complete discretion, see *State v. Pals*, 805 N.W.2d 767, 776 (Iowa 2011) (explaining the "potential abuse of traffic stops as nearly all vehicles if followed for any substantial amount of time commit minor traffic offenses that could serve as a springboard to" roadside detentions), and subject them to intrusive questioning so long as the questioning is done in an expeditious fashion?

State v. Campbell, 2017 WL 706208 at *9.

In *Illinois v. Caballes,* the U.S. Supreme Court examined a stop in which a defendant was stopped for speeding. Law enforcement conducted a subsequent K9 search on the exterior of the vehicle while a warning ticket was being written. *Illinois v. Caballes*, 543 U.S. 405, 506 (2005). The *Caballes* decision commented "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete the mission." *Id.*at 407.

In *Rodriguez,* the Supreme Court progressed the constitutional protections further. *Rodriguez* held traffic stops become unlawful seizures as soon as law enforcement deviates from the traffic stop's mission to "detect evidence of ordinary criminal wrongdoing" unless the expanded investigation is supported by "reasonable suspicion." *Rodriguez v. U.S.*, 575 U.S. 348. 356 (2015).

In *Rodriguez,* the Government argued the defendant's constitutional rights were not violated until the duration of the stop passed beyond the time of an ordinary stop. Stated differently the Government argued the existence of a "shot clock" within which law enforcement had no restrictions on their activity. *Rodriguez* wholly rejected that argument:

> The Government argues that an officer may "incrementa[lly]" prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances. The Government's argument, in effect, is that by completing all traffic-related tasks

> expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation. The reasonableness of a seizure, however, depends on what the police in fact do. In this regard, the Government acknowledges that "an officer always has to be reasonably diligent." How could diligence be gauged other than by noting what the officer actually did and how he did it? If an officer can complete traffic-based inquiries expeditiously, then that is the amount of "time reasonably required to complete [the stop's] mission." As we said in *Caballes* and reiterate today, a traffic stop "prolonged beyond" that point is "unlawful." The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket, as Justice Alito supposes, but whether conducting the sniff "prolongs" – i.e., adds time to – "the stop[.]"

Rodriguez, 575 U.S. at 357; s*ee also State v. McFadden*, 2017 WL 4315047 (Iowa App. Sept. 27, 2017) (rejecting the notion there is a constitutional pass when law enforcement has a *de minimis* delay).

Numerous federal cases suppress evidence where law enforcement deviates from the mission of processing a traffic violation into measures focused on detecting other criminal wrongdoing. In *U.S. v. Evans*, 786 F.3d 779 (9th Cir. 2015), the Ninth Circuit held an officer's inquiry into the defendant's criminal history during a traffic stop was unconstitutional. The *Evans* court reasoned:

> The ex-felon registration check, unlike the vehicle records or warrants checks, was wholly unrelated to Zirkle's "mission" of "ensuring that vehicles on the road are operated safely and responsibly." Rather it was "a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing. *U.S. v. Evans*, 786 F.3d 779 (9th Cir. 2015) (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 40-41 (2000)). The *Evans* court also held that the delay occurring before a traffic citation was issued carries no weight in the Constitutional balance.

> That the ex-felon registration check "occur[ed] before…the officer issue[d] a ticket" is immaterial; rather, the "critical question" is whether the check "prolongs – *i.e.*, adds time to – the stop." The ex-felon registration check in this case took approximately eight minutes; in other words, almost *half* of the duration of the pre-dog sniff detention can be attributed to the dispatch operator's processing of Evans' criminal history and ex-felon registration. During this processing time, Zirkle continued to pose questions to Evans, many of which had no relation to the traffic violation or Evans' prior whereabouts.
>
> Put another way, all "tasks tied to the traffic infraction [had been] – or reasonably should have been – completed" by the time Zirkle instigated the eight-minute ex-felon registration check. Consequently, Zirkle violated Evans' Fourth Amendment rights to be free from unreasonable seizures when he prolonged the traffic stop to conduct this task, unless he had independent reasonable suspicions justifying this prolongation.

Id. at 787-788.

The Second Circuit was confronted with a five to six-minute traffic stop/seizure where law enforcement engaged in questioning about matters unrelated to issuing a citation. *United States v. Gomez*, 877 F.3d 76 (2d Cir. 2017). In suppressing the stop, the *Gomez* court opined "[f]rom the moment that Campbell first approached the black Honda, his questioning 'detour[ed] from th[e] mission' of the stop (Gomez's traffic violations) to the DEA's heroin-trafficking investigation." *Id.* at 91.

Other federal circuit courts agree the constitutional standard is whether law enforcement engages in inquiries into crimes unrelated to the original traffic stop in any way adding time to the seizure at any point. *See United States v. Clark*, 902 F.3d 404, 410-11 (3rd Cir. 2018) (finding that 20 seconds of unrelated questioning

concerning the driver's criminal history prolonged the stop); *United States v. Macias*, 658 F.3d 509, 518-19 (5th Cir. 2011) (holding officers may only ask questions unrelated to the traffic stop if the questions do not extend the duration of the stop); *United States v. Stewart*, 902 F.3d 664, 674 (7th Cir. 2018) (suggesting that 75 seconds used to call for backup might unlawfully prolong the stop, but the record was inadequate to determine if the officer's purpose was for safety or a dog sniff), *reh'g en banc denied* (Oct. 26, 2018); *United States v. Campbell*, 970 F.3d 1342, 1355 (11th Cir. 2020) ("We think the proper standard from *Rodriguez* is this: a stop is unlawfully prolonged when an officer, without reasonable suspicion, diverts from the stop's purpose and adds time to the stop in order to investigate other crimes.").

Turning to Iowa's Supreme Court, the first discussion concerning an unconstitutional delay in a traffic stop/seizure arose in *State v. Pals*, 805 N.W.2d 767, 775-76 (Iowa 2011). The *Pals* decision noted a split in authority between the states and between the different federal circuits. The Court in *Pals* ultimately passed on the question due to issues of error preservation.

The question of unconstitutional delay returned in *In re Pardee*, 872 N.W.2d 284 (Iowa 2015). Mr. Pardee was a passenger in a vehicle stopped by the Iowa State Patrol in Poweshiek County, Iowa for having an inoperable taillight and following too closely. During the stop, the trooper's suspicions were aroused by several factors. The factors included "the [vehicle's] California license plates, [the driver's]

behavior before Trooper Vander Weil pulled over the vehicle, the *nervousness* of Saccento and Pardee after Trooper Vander Weil stopped the vehicle, the lived-in look of the vehicle, the presence of a can of air freshener and the strong odor of air freshener, the criminal histories of Saccento and Pardee, and finally their curious and somewhat inconsistent travel plans." After considering the totality of all these factors, the Iowa Supreme Court found they did not support a reasonable suspicion of criminal activity.

Equally important, the Court opined: "[W]e are convinced that a stop in this case directed only at the traffic-related mission — *i.e.*, checking driver's license, vehicle registration, insurance, and outstanding warrants, and preparing warnings— **would have taken no more than ten minutes**." *Id*. at 396 (emphasis added).

This position, *i.e*., that the officer's "[a]uthority for the seizure . . . ends when the tasks tied to the traffic infraction are – or reasonably should have been – completed," continues to be reiterated by the Iowa Supreme Court. *See State v. Salcedo*, 935 N.W.2d 572, 578 (Iowa 2019) (quoting passage from both *Rodriquez* and *Pardee*).

So, what is reasonable suspicion? Reasonable suspicion exists where an officer has specific and articulable facts, which taken together with rational inferences from those facts, creates an objective, reasonable, belief criminal activity may have occurred. *State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004). The State

has the burden of proving such facts by a preponderance of evidence. *Id.* Stated slightly differently reasonable suspicion exists when "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer" to investigate further. *Maryland v. Buie*, 494 U.S. 325, 334 (1990). For many reasons, the "reasonable suspicion" standard is somewhat dissatisfying, but it is the standard this Court must apply. *See* Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 Vand. L. Rev. 407 (2006). "Reasonable suspicion is based on an **objective** standard: whether the facts available to the officer at the time of the stop would lead a person to believe that the action taken by the officer was appropriate." *State v. Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997) (emphasis added).

Analysis. This case involves an unreasonable detention. The trooper unlawfully detains Appellant to provide time for Chief Deputy Luther to arrive and run his K9 around the truck. The deputy could have simply issued warnings or citations for the logbook discrepancies. But that means Appellant is free to continue home to Texas by 1:25 p.m., well before the drug K9 arrives 35 minutes later.

Pardee reminds us this sort of traffic stop should last no more than roughly ten minutes. Perhaps slightly longer under the circumstances because of the Level 3 CMV inspection. However, in this instance, Appellant continues to be detained to

await a drug dog long after the traffic stop should have ended with citations or warnings. The Iowa Supreme Court was recently critical of this approach:

> What becomes immediately apparent is Deputy O'Hare's complete lack of effort to address Salcedo's specific traffic infraction. Six minutes elapsed from the time Salcedo entered the patrol car to the time Deputy O'Hare departed to speak with Deputy Lenz. Deputy O'Hare admitted that, throughout the duration of the stop, he did not ask Salcedo questions regarding the traffic infraction. The body camera revealed Deputy O'Hare repeatedly thumbing through the rental agreement. There does not appear to be any attempt to gain understanding of the document. To the contrary, the incessant page flipping appears to be a stalling tactic to keep the conversation going until a drug dog arrived. During this time, he did not attempt to run a check of Salcedo's identifying documents or criminal histories, and he did not prepare a traffic citation or warning. Deputy O'Hare admitted, "I was never—never entered information into a traffic citation."
>
> The body camera further supports Salcedo's position that Deputy O'Hare was stringing along the stop until a drug dog arrived. Shortly after Salcedo entered the patrol car, Deputy O'Hare requested assistance. When Deputy Lenz arrived, Deputy O'Hare was immediately disappointed to learn a drug dog was not available. Deputy O'Hare also testified at the suppression hearing that he knew from the time of the stop that he would be investigating issues other than the traffic infraction.

State v. Salcedo, 935 N.W.2d 572, 580 (Iowa 2019).

Logbook discrepancies in the driver's home state of Texas do not amount to reasonable suspicion that he is trafficking in narcotics. They could mean any number of things besides drug trafficking. The same can be said for Appellant's travel from a so-called "drug source state" to a "drug demand state." *See In re Pardee*, 872 N.W.2d at 394 (*citing United States v. Beck*, 140 F.3d 1129, 1137 (8th Cir. 1998) for

authority that the drug states factors do not provide a basis for reasonable suspicion for ongoing detention). Both factors upon which the trooper relies here - essentially travel itinerary issues - have been roundly criticized by Iowa appellate courts. It is important to keep in mind, too, that the report of a "stolen" truck should not factor into the analysis because the trooper was specifically instructed not to detain him on that matter.

Because Trooper Waalkens did not develop any reasonable suspicion of criminal activity during the brief encounter with Appellant, he cannot further detain him past 1:25 p.m. He unreasonably prolonged the stop by delaying Appellant's release for the sole purpose of waiting for the drug K9. The Court should suppress all evidence obtained by the State.

II. THE DRUG K9 AND HANDLER BOTH DELIBERATELY MADE PHYSICAL CONTACT WITH APPELLANT'S VEHICLE BEYOND A "FREE AIR SNIFF" FOR THE PURPOSES OF DISCOVERING INFORMATION ABOUT THE CONTENTS.

PRESERVATION OF ERROR / STANDARD OF REVIEW: Appellant preserved error on this issue by timely filing a Motion to Suppress Evidence and timely filing a Notice of Appeal following sentencing. It is well established that the Supreme Court's review of constitutional issues is de novo. *See State v. Lyman*, 776 N.W.2d 865, 873 (Iowa 2010).

Legal Authorities. "A trespass on 'houses' or 'effects' is a Fourth Amendment search if the goal of the trespass is to obtain information." *United States*

v. Jones, 565 U.S. 400, 408 n.5, 132 S. Ct. 945, 951 n.5, 952, 181 L. Ed. 2d 9111 (2012) (deciding a vehicle is an "effect" for Fourth Amendment purposes).

In holding there was an illegal search of the vehicle, the *Jones* Court reminds litigants that it is significant for Fourth Amendment purposes whether there is a physical intrusion by the government on a constitutionally protected area, *i.e*., "persons, houses, papers and effects," for purposes of obtaining information. When that occurs, the trespass alone amounts to a warrantless search in violation of the Fourth Amendment. While later cases, particularly *Katz*, deviated from that exclusively property-based approach, they did not repudiate it. *Id*. at 406-07. We only look to an individual's expectation of privacy under *Katz* where a classic trespassory search is *not* involved. *Id*. at 412-413.

The Iowa Supreme Court has since held that "a peace officer engaged in general criminal investigation acts unreasonably under article 1, section 8 when the peace officer commits a trespass against a citizen's hose, papers or effects without first obtaining a warrant . . . ." *See State v. Wright*, 961 N.W.2d 396, 412 (Iowa 2021) (applying trespass doctrine to refuse set out for curbside collection). "A constitutional search occurs whenever the government commits a physical trespass against property, even where de minimis, conjoined with 'an attempt to find something or obtain information.'" *Id*. at 413 (quoting *Jones*, 565 U.S. at 408 n.5, 132 S. Ct. at 951 n.5)

Analysis. Assuming there was reasonable suspicion to detain Appellant, which Appellant strenuously disputes, Chief Deputy Luther is only entitled to a "free air sniff" of the vehicle. *See State v. Bergmann*, 633 N.W.2d 328, 334 (Iowa 2001) (noting an exterior sniff of an automobile does not require entry into the car) (noting a sniff by a dog that simply walks around a car is "much less intrusive than a typical search") (quoting *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644, 77 L. Ed. 2d 110, 121 (1983)). However, in this instance, he directed the dog to jump up on the driver's side of the truck so that it could get its nose close to the seams of the sleeper cab. *See* Figure 2.

In *State v. George*, 2016 WL 6636750 (Iowa App. Nov. 9, 2016), the Iowa Court of Appeals confronted the issue of a dog jumping into a vehicle during such a search. The *George* Court held this was not unconstitutional because the dog's actions were instinctive. The single most important factor in the analysis, however, was the finding that the dog *was not directed* into the vehicle by the handler. *Id.* at *4-5.[5] The *George* Court quoted the Supreme Court of North Carolina for the following principle:

> It a police dog is acting without assistance, facilitation, or other intentional action by its handler (in the words of *Sharp* [689-20] acting "instinctively"), it cannot be said that a State or governmental actor intends to do anything. In such a case, the dog is simply being a dog. If, however, police misconduct is present, or if the dog is acting at the

[5] The *Jones* trespass analysis was not applied in *George*. It is unclear whether trespass was ever raised before the district court or the Court of Appeals.

> direction or guidance of its handler, then it can be readily inferred from the dog's action that there is an intent to find something or to obtain information. *See [United States v.] Winningham*¸140 F.3d 1328, 1330-31 [(10th Cir. 1998)] (invalidating a search on such grounds). In short, we hold that police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment.

Id. at *5-6 (quoting *State v. Miller*, 766 S.E.2d 289, 296 (N.C. 2014)).

That is exactly what is now before the Court. Chief Deputy Luther admits to touching the truck during the second "detailing" pass. That may be considered de minimis contact with the vehicle, but it amounts to a trespass, nevertheless. He facilitated and encouraged the dog's response to jump onto both the tire and fuel tanks using verbal cues and hand gestures. That, too, is a de minimis trespass by the K9. It is no longer a "free air sniff." The dog was not rewarded until *after* it had been cued to make physical conduct with the vehicle.

Furthermore, Chief Deputy Luther essentially admits the purpose of running the dog was to discover information about Appellant's truck. The handler team together physically intruded onto a constitutional effect in the process. This amounts to a physical trespass under *Jones* and *Wright* and, in effect, a warrantless search without probable cause. Because there was no reasonable suspicion or probable cause that the truck contained contraband, this is *per se* unreasonable police conduct under both the Fourth Amendment and article 1, section 8 of the Iowa Constitution. The marijuana seized must be suppressed as a result.

III. THE DRUG K9 IS NEITHER RELIABLE NOR WELL TRAINED AND WAS CUED TO ALERT BY THE HANDLER.

PRESERVATION OF ERROR / STANDARD OF REVIEW: Appellant preserved error on this issue by timely filing a Motion to Suppress Evidence and timely filing a Notice of Appeal following sentencing. It is well established that the Supreme Court's review of constitutional issues is de novo. *See State v. Lyman*, 776 N.W.2d 865, 873 (Iowa 2010).

Legal Authorities. A positive alert by a reliable and well-trained narcotics-detection dog is sufficient to establish probable cause for the presence of a controlled substance. *See generally Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L.Ed.2d 842 (2005); *United States v. Place*, *462 U.S.* 696, *103 S. Ct.* 2637**.** *77 L.Ed.2d* 110 (1983).

The defendant must have the opportunity to challenge any purported evidence of a dog's reliability, including contesting the adequacy of certification or training program, how the dog (or handler) performs in the assessments made in those settings and whether there are any circumstances surrounding a particular alert that undermine the case for probable cause, specifically whether the officer (consciously or not) cued the dog. *See Florida v. Harris*, 568 U.S. 237, 133 S. Ct. 1050, 185 L.Ed.2d 61 (2013); *see also State v. Bergmann*, 633 N.W.2d 328, 338 (Iowa 2001) (recognizing challenges to reliability may cast doubt on whether "reliable drug dog alert" alone is sufficient to establish probable cause).

Behaviors falling short of the positive alert the dog is trained to give, however, do not amount to probable cause. *See United States v. Jacobs*, 986 F.2d 1231 (8th Cir. 1993) (finding no probable cause to issue warrant in Johnson County, Iowa where application, after certain information was properly redacted, read "[t]he dog had showed an interest in the [defendant's] package, but had not given a full alert to the package")(dog's actions did not amount to the official "alert" it was trained to give in the presence of narcotics)(noting "without an alert, the police clearly lacked probable cause necessary to open the package"); *United States v. Rivas*, 157 F.3d 364 (5th Cir. 1998) (finding "casting," *i.e.*, "the dog maybe feels not a strong alert, but something that temporarily stops him and deters his attention at that point. And although he doesn't pursue as aggressive alert, he does stop and give it minute attention and continues with his duties by continuing his examination," is not the equivalent of a bite or scratch signifying the aggressive alert the dog was trained to give)(holding reasonable suspicion to search was not established when the dog merely "cast" at defendant's vehicle); *United States v. Heir*, 107 F.Supp.2d 1088 (D. Neb. 2000) (finding "alert," which in the parlance of that particular handler meant "a change in the dog's behavior which means the dog is detecting an odor" involving "subtle changes in breathing, sniffing or other behaviors" that only the handler can identify, was too subjective a standard to establish probable cause)(noting the same dog will "indicate" by scratching or biting because it was trained as an "aggressive

indicator")(finding "at no time during the 'walk-around' did [the dog] exhibit the specific reaction described by [the handler] that would positively signal [it] had detected the presence of drugs inside the vehicle").

Analysis. The comment section of the "K9 narcotic hidden logs" demonstrate that this dog is neither reliable nor well-trained. There are numerous entries showing the dog failed to alert to the presence of significant quantities of heroin, methamphetamine, cocaine and marijuana. (Motion to Suppress State's Ex. 1) ("dog in odor but didn't sit" on 9/23/19, 9/24/19, 9/25/19, 9/26/19, 9/27/19, 9/30/19, 10/10/19, 10/14/19, 11/1/19, 11/20/19). There is an entry showing that the dog *laid down* instead of sitting to alert as trained. *See id*. (10/1/19). Other entries show the dog was drawn to vehicles where the engine was hot but contained no narcotics. *See id*. (10/2/19). Furthermore, there is an entry that shows the dog *falsely* alerted to the presence of narcotics in a "blank" kitchen and vehicle. *See id*. (10/2/19, 10/16/19). The false alert in the room occurred during his certification exercise.

The dog's rapid breathing is not an alert. In fact, that is what this dog does upon command at the beginning of the run before it even encounters the car. The same holds true for a head snap or a whip. These are behaviors falling short of an alert and do not establish probable cause. This dog alerts to the presence of narcotics only by sitting.

The dog did not alert on the first pass of the driver's side when it was leading Chief Deputy Luther free from any influence by him. The dog should not be given another opportunity to go around the truck a second time. Essentially, the handler is communicating information to the dog that it failed to alert to the presence of contraband on the first pass. The need for multiple passes around a vehicle demonstrates the dog is neither reliable nor well trained.

The dog failed to alert on any other part of the vehicle until it returned to the driver's side on the second pass. At this time, the dog was instead led by the chief deputy who prompted the dog to jump up onto the fuel tank and press its nose onto the truck cab seams by actually touching the vehicle. Chief Deputy Luther also raised his hand in the area immediately before praising the dog. These actions cued the dog to alert on an area that had already been examined just moments before without any interest.

The handler's input is clearly the only variable between the two passes over such a short period. There is no evidence that the wind changed direction after the first pass. The fact that the dog appears disinterested in the driver's side door area on the first pass, but alerts at the exact same location on the second pass seconds later with handler input calls into question whether the dog is properly trained to

alert without being cued.[6] As *Harris* makes clear, the uncertainty surrounding a prompt-dependent alert casts doubt on whether there is probable cause to search the vehicle. The discovery of marijuana should be suppressed.

CONCLUSION

The district court erred in denying the Motion to Suppress. Appellant was unlawfully detained to await a drug K9. The handler and drug K9 both trespassed onto Appellant's vehicle, a constitutionally protected "effect," in an attempt to discover information about the contents of the vehicle without probable cause. Finally, the drug K9's records demonstrate the dog was neither reliable nor well trained. All indications point to the dog being prompt dependent and cued to alert by the handler. The marijuana discovered during a search of the vehicle must be suppressed as a result.

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6. The issue of whether handler beliefs of target scent location affected the outcomes in scent dog searches has been addressed in a peer reviewed article. *See* Lit., et al., *Handler Beliefs Affect Scent Detection Dog Outcomes*, Anim. Cogn. 14:387-394 (2011). The issue of whether handler beliefs of target scent location affected the outcomes in scent dog searches was recently addressed in a peer reviewed article. The study reviewed 18 certified handler/dog teams. The experiment was conducted in a church to minimize potential for residual odor of either drugs or explosives. Handler teams were *falsely* told that two sets of four search scenarios contained a visible paper marking the scent location when, in fact, no scenario contained any drug or explosive odor. Out of 144 runs (18 teams x 4 search scenarios x 2 days), there were 123 (85%) false responses. The authors determined that a handler's mistaken belief that a target odor was present potentiated identification of alerts when there should have been none.

This phenomenon demonstrates precisely why the handler should not be informed of the requesting officer's belief that contraband is present. It is one thing to deploy a narcotic detection dog around a vehicle during a traffic stop. It is entirely another to do so with the knowledge that another officer expects drug contraband will be found. That information can condition the handler to interpret certain behavior as providing probable cause to search in cases where the dog should not otherwise alert. The handler's belief affects the outcome more than the dog.

REQUEST FOR ORAL ARGUMENT

Appellant hereby requests to be heard in oral argument upon submission of the case.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

This brief complied with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because the brief contains 6,039 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). The brief further complied with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because the brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 font.

ATTORNEY'S COST CERTIFICATE

I, Colin Murphy, attorney for the Appellant, hereby certify that the actual cost of reproducing the necessary copies of this Brief was $0.00 and that amount has been paid in full by me.

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 31st day of May, 2022 I served this document by serving copies to Criminal Appeals Division, Attorney General of Iowa, Hoover Building, Des Moines, Iowa 50319 by way of electronic filing.

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Respectfully submitted,

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