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10/31/2019 1:46 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 46893-2019**
Plaintiff-Respondent,	)	
	)	**BANNOCK COUNTY**
v.	)	**NO. CR-2017-10456**
	)	
JACOB STEELE RANDALL,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HONORABLE ROBERT C. NAFTZ
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Jacob Randall entered a conditional guilty plea to one count of trafficking in marijuana preserving his right to appeal the denial of his motion to suppress. Mr. Randall asserts that his detention was unlawfully extended to allow a drug detection dog, "Bingo," to sniff his vehicle. Trooper Tyler Scheierman abandoned the purpose of the traffic stop when, absent reasonable articulable suspicion of criminal activity, he began questioning Mr. Randall about whether there were drugs in the car. He then instructed Mr. Randall to stand on the side of the road, led his drug detection dog, Bingo, to the driver's side door and then helped the dog through the open window. Without the boost from Trooper Scheierman, Bingo would not have been able to enter Mr. Randall's car through the window. Once inside the car, Bingo alerted. Mr. Randall also asserts that Bingo's entry into the open car window prior to any probable cause, and facilitated by Trooper Scheierman, was an unlawful Fourth Amendment search and the evidence gathered should be suppressed.

Further, Mr. Randall was sentenced to a term of seven years, with three years fixed. On appeal, Mr. Randall contends that this sentence represents an abuse of the district court's discretion, as it is excessive given any view of the facts.

Statement of the Facts and Course of Proceedings

On September 3, 2017, at approximately eight thirty in the morning, the rental car driven by Mr. Randall was observed traveling on the interstate at approximately 80 miles per hour. (1/25/18 Tr., p.19, L.7 – p.20, L.5; R., p.113.) The trooper noticed that the car slowed down upon seeing the marked patrol car and believed the driver was "sitting in a very rigid, uncomfortable, unnatural driving position, and pressing himself backwards in his seat . . .."

(1/25/18 Tr., p.20, Ls.6-25; R., pp.113, 116.) At that point, Trooper Tyler Scheierman decided to follow the car. (1/25/18 Tr., p.21, Ls.14-24; R., pp.113, 116.) Once he saw Mr. Randall change lanes without signaling for the requisite five seconds, he pulled the car over. (1/25/18 Tr., p.22, L.6 – p.24, L.10; R., pp.113, 116-17.)

Trooper Scheierman spoke to Mr. Randall and learned that the car was a rental and that he was driving from Nevada to Minnesota. (1/25/18 Tr., p.24, L.21 – p.27, L.5; R., p.119.) After learning that Mr. Randall had paid only $75.00 to fly to Las Vegas, but over $500.00 to rent the car, Trooper Scheierman became suspicious of Mr. Randall's reasons for travel. (1/25/18 Tr., p.24, Ls.6-19; R., pp.114, 119.) He thought it made "no sense to me to fly out, and then drive back, especially i[f] it's so much cheaper to fly."[1] (1/25/18 Tr., p.27, Ls.9-19.) He also noticed Mr. Randall's hands were shaking, his carotid artery was pulsating, and the car had a "lived-in" look. (1/25/18 Tr., p.27, L.20 – p.28, L.7; R., pp.114, 119.) He asked Mr. Randall to step out of the car, and he checked the validity of Mr. Randall's driver's license and looked to see if there were any warrants. (1/25/18 Tr., p.28, L.5 - p.29, L.1; R., p.114.) While awaiting these results, Trooper Scheierman asked Mr. Randall if he had been further west than Las Vegas during his trip. (1/25/18 Tr., p.29, L.5 – p.30, L.4; R., p.119; Exh. 1: 8:39:50-8:40:05.[2]) Mr. Randall paused in thought, and said he had also gone to Reno. (1/25/18 Tr., p.29, L.10 – p.30, L.4; R., p.119; Exh. 1: 8:39:50-8:40:05.) After Mr. Randall's driver's license and insurance came back "current and clear," Trooper Scheierman abandoned the purpose of the traffic stop and began a drug investigation. (1/25/18 Tr., p.28, L.14 – p.31, L.14; Exh. 1:

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[1] In the dashboard-camera video, Mr. Randall explained that he was planning to make several stops on his road trip back to Minnesota, including Yellowstone National Park. (Exh. 1: 8:36:51-8:38:01.)

[2] State's Exhibit 1 to the January 25, 2018 Suppression Hearing is attached to Mr. Randall's Motion to Augment, filed on October 31, 2019. Throughout Mr. Randall's Appellate Brief the exhibit shall be referred to as "Exh. 1."

8:39:24.) He questioned Mr. Randall about drug trafficking. (1/25/18 Tr., p.31, Ls.6-14; R., p.114.)

Trooper Scheierman had a dog, Bingo, with him. (1/25/18 Tr., p.32, Ls.14-25; R., p.115.) He asked Mr. Randall if he could run his drug detection K-9 around the car. (1/25/18 Tr., p.31, Ls.22-24; R., p.115.) Mr. Randall said he did not mind if that happened "around the car." (1/25/18 Tr., p.31, L.25 – p.32, L.2; R., pp.115, 123.) Before he ran the dog around the vehicle, Trooper Scheierman pat-searched Mr. Randall against the hood of the police car to ensure both the officer's and the dog's safety when the dog ran around the car. (1/25/18 Tr., p.35, Ls.7-17 2; Exhibit 1: 8:41:50-8:42:18; R., p.115.)

Trooper Scheierman began the sniff by walking the leashed dog over to the open driver's side window. (1/25/18 Tr., p.35, L.22 – p.36, L.8; Exh. 1: 8:43:40.) Bingo, a "passive indicator,"[3] immediately tried to jump into the car through the open driver's side window. (R., p.123; Exh. 1: 8:43:40-43.) The dog almost did not make the jump and was "boosted" up by Trooper Scheierman. (1/25/18 Tr., p.68, L.6 – p.69, L.4; R., p.123; Exh. 1: 8:43:40-43.) Once inside the car, it alerted. (1/25/18 Tr., p.36, Ls.10-19; R., p.124.) Trooper Scheierman found duffel bags containing marijuana in the trunk of the vehicle. (1/25/18 Tr., p.39, Ls.8-13.)

Based on these facts, the State filed an Information which alleged that Mr. Randall committed the crime of trafficking in marijuana in the amount of 25 pounds or more. (R., pp.47-48.) Thereafter, Mr. Randall filed a Motion to Suppress. (R., pp.59-61.) He asserted that the evidence gathered against him should be suppressed because the traffic stop was unsupported by reasonable articulable suspicion or probable cause and the traffic stop was unlawfully expanded, both in duration and scope. (R., pp.59-61.) A hearing was held on the motion. (R., pp.67-70;

[3] Bingo's final response or indication is a sit or lay down. (1/25/18 Tr., p.34, L.22 – p.35, L.1.)

Tr. 1/25/18.) Both parties submitted post-hearing briefing, pursuant to the district court's request. (R., pp.68, 71-111.)

The district court found that the totality of the circumstances surrounding the stop showed there were specific and articulable facts that provided the reasonable suspicion necessary for the investigative detention of Mr. Randall. (R., pp.112-25.) The court concluded:

> For example, the Defendant appeared nervous and shaking. His travel plans were also suspicious and confusing based upon the Defendant's statements that he had taken a $75.00 flight to Las Vegas and then spent over $500.00 to rent a car to drive home to Minnesota. The Defendant also exhibited nervousness and changed his answer when questioned about whether he had visited anywhere else during his trip to Las Vegas.

(R., p.120.) The court ruled that Trooper Scheierman, during the course of a lawful stop and based upon the totality of the circumstances, "gained the reasonable suspicion necessary to expand the initial detention to a drug investigation." (R., pp.122-23.) The district court wrote that when Trooper Scheierman asked Mr. Randall if he would allow his drug dog to sniff around the vehicle, Mr. Randall "stated that he did not mind if that happened." (R., p.123.) The district court acknowledged that the use of the drug dog may not lengthen the duration of the stop absent reasonable articulable suspicion, but concluded that in Mr. Randall's case, "there is nothing to indicate the detention lasted longer than necessary to satisfy the conditions of the investigative seizure." (R., pp.121-24.)

As for Mr. Randall's challenge to the lawfulness of the dog search, the district court held that the sniff search of the interior of the vehicle did not violate Mr. Randall's Fourth Amendment rights. (R., pp.120-24.) The court reasoned, "absent police misconduct, the instinctive actions of trained drug dogs do not expand the scope of an otherwise legal dog sniff" to an unlawful search. (R., pp.120-22.) The district court defined the term "instinctive" to mean "that a dog enters a car without assistance, facilitation, or other intentional action by its handler.

(R., p.122.) Although the district court acknowledged that Trooper Scheierman's dog immediately went to the driver's side window and tried to jump inside and the Trooper "assisted the dog further into the vehicle to prevent injury to the animal and the car," the court found "Trooper Scheierman's drug dog made independent entry into the Defendant's car because the dog detected an odor emanating from the vehicle." (R., p.123.) The court held that "Trooper Scheierman did nothing to initiate the dog's entry into the vehicle," thus, "his reliable drug-detection dog instinctively and without police misconduct indicated the presence of controlled substance inside that vehicle." (R., p.124.)

The district court ultimately denied Mr. Randall's motion to suppress, finding that the initial stop was lawful, the trooper had reasonable, articulable suspicion of drug trafficking such that a drug investigation was permissible, and the canine search was not violative of Mr. Randall's Fourth Amendment rights because Bingo "instinctively and without police misconduct" alerted to the presence of narcotics and that alert gave the trooper probable cause to search the interior of the vehicle. (R., pp.112-25.)

Mr. Randall entered a conditional guilty plea to a reduced charge of trafficking under 25 pounds of marijuana, preserving his right to appeal the denial of the motion to suppress. (12/3/18 Tr., p.85, L.11 – p.87, L.4; p.92, Ls.2-23; R., pp.139-49.) Two months later, Mr. Randall was sentenced. The State requested a sentence of seven years, with three years fixed. (2/11/19 Tr., p.107, Ls.7-9.) Mr. Randall's defense counsel asked the district court to sentence him to the mandatory minimum of three years. (2/11/19 Tr., p.107, Ls.16-17; p.111, Ls.12-13.) The district court sentenced him to a unified term of seven years, with three years fixed. (2/11/19 Tr., p.115, Ls.2-15; R., pp.160-63.) Mr. Randall filed a Notice of Appeal timely from the district court's Judgment of Conviction. (R., pp.164-68, 179-83.)

ISSUES

I. Did the district court err when it denied Mr. Randall's motion to suppress?

II. Did the district court abuse its discretion when it imposed a unified sentence of seven years, with three years fixed, upon Mr. Randall following his plea of guilty to trafficking in marijuana?

ARGUMENT

I.

The District Court Erred When It Denied Mr. Randall's Motion To Suppress

A. Introduction

Mr. Randall asserts that Trooper Scheierman did not have a reasonable suspicion of criminal activity to prolong the traffic stop for the dog sniff. At best, Trooper Scheierman had a mere hunch, which is insufficient to justify the prolonged stop under the Fourth Amendment. Further, Trooper Scheierman's facilitation of Bingo's trespass and search into the interior of the car, before the establishment of probable cause, was an unlawful search. Due to the unlawfully prolonged stop and the dog's unlawful search, Mr. Randall submits that the district court should have granted his motion to suppress. Mr. Randall's right to be free from unreasonable searches and seizures, protected by the Fourth Amendment to the United States Constitution was violated.

B. Relevant Jurisprudence And Standards Of Review

The Court uses a bifurcated standard to review a district court's order on a motion to suppress. *State v. Danney*, 153 Idaho 405, 408 (2012); *State v. Hunter*, 156 Idaho 568, 571 (Ct. App. 2014). The Court exercises free review of "the trial court's application of constitutional principles to the facts found." *Danney*, 153 Idaho at 408. Determinations of reasonable suspicion are reviewed *de novo*. *State v. Morgan*, 154 Idaho 109, 111 (2013) (citing *State v. Munoz*, 149 Idaho 121, 127 (2010)).

When reviewing the district court's determination of reasonable suspicion, "the appellate court 'should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement

officers.'" *Id.* (quoting *Munoz*, 149 Idaho at 127). "The Court accepts the trial court's findings of fact if supported by substantial evidence." *State v. Watts*, 142 Idaho 230, 234 (2005). The Court "has defined 'substantial evidence as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance.'" *Id.* (quoting *Evans v. Hara's, Inc.*, 123 Idaho 473, 478 (1993)). "At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence and draw factual inferences is vested in the trial court." *Hunter*, 156 Idaho at 570.

C. Trooper Scheierman Did Not Have The Reasonable Articulable Suspicion Necessary To Expand The Initial Traffic Stop To A Drug Investigation

"[A]n officer may stop a vehicle to investigate if there is a reasonable and articulable suspicion that the vehicle is being driven contrary to traffic laws." *State v. Edwards*, 158 Idaho 323, 324 (Ct. App. 2015) (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Flowers*, 131 Idaho 205, 208 (Ct. App. 1998)). Mr. Randall does not challenge Trooper Scheierman's initial stop of the vehicle based on his failure to adequately signal his lane change.

"A drug dog sniff may be performed during a traffic stop without violating the Fourth Amendment if the duration of the stop is not extended or if any extension of the stop is justified by reasonable suspicion." *State v. Kelley*, 159 Idaho 417, 424 (Ct. App. 2015). As the United States Supreme Court recently held, "An officer . . . may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . , he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015). In contrast to the ordinary inquiries incident to a traffic stop, a dog sniff "is a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'" *Id.* (alteration in original) (quoting *Indianapolis v. Edmond*, 531 U.S.

32, 40–41 (2000)). Therefore, a dog sniff cannot prolong the stop absent reasonable suspicion because a dog sniff "is not fairly characterized as part of the officer's mission" during a routine traffic stop. *Id.*

The United States Supreme Court has stated that a seizure under the Fourth Amendment "must be based on specific, objective facts indicating that society's legitimate interests require the seizure *of the particular individual*, or that seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. 47, 51 (1979) (emphasis added). The *Brown* Court went on to note "we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Id.* Reasonable suspicion must be based on specific, articulable facts considered with objective and reasonable inferences that form a basis for particularized suspicion. *State v. Sheldon*, 139 Idaho 980, 983-84 (Ct. App. 2003). Particularized suspicion consists of two elements: (1) the determination must be based on a totality of the circumstances, and (2) the determination must yield a particularized suspicion that the particular individual being stopped is engaged in wrongdoing. *United States v. Cortez*, 449 U.S. 411, 418 (1981). "An officer may draw reasonable inferences from the facts in his or her possession, and those inferences may be drawn from the officer's experience and law enforcement training." *State v. Swindle*, 148 Idaho 61, 64 (Ct. App. 2009). However, the officer "must be able to articulate more than an 'inchoate and unparticularized suspicion' or 'hunch' of criminal activity." *Illinois v. Wardlow*, 528 U.S. 119, 123-124 (2000) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). "The test for reasonable suspicion is based on the totality of the circumstances known to the officer at or before the time of the stop." *Morgan*, 154 Idaho at 112.

The scope of the search or seizure must be strictly tied to and justified by the circumstances which rendered its initiation permissible. *Terry v. Ohio*, 392 U.S. 1, 19, 28–29 (1968). The scope of the investigative detention "must be carefully tailored to its underlying justification." *Florida v. Royer*, 460 U.S. 491, 500 (1983).

Consequently, where the person is detained in a prolonged traffic stop, the scope of that detention must carefully tailored to its underlying justification: the officer's reasonable suspicion of criminal activity. The officer must have a reasonable suspicion of *drug-related* criminal activity if the stop is prolonged specifically for the purpose of deploying a dog to detect the odor of drugs. To allow a dog sniff without a reasonable suspicion of drug-related criminal activity would be an unreasonable expansion of the justification for the seizure. *See State v. Aguirre*, 141 Idaho 560, 564 (Ct. App. 2005) (holding that the defendant's Fourth Amendment rights were violated by officers prolonging stop for a dog sniff without reasonable suspicion of a "drug-related offense").

The United States Supreme Court's recent decision in *Rodriguez* holds "that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Id.* at 1612. In so finding, the *Rodriguez* Court made clear that it was adhering to the line drawn in its prior decision in *Illinois v. Caballes*. *Id; see Illinois v. Caballes*, 543 U.S. 405 (2005) (holding that a lawful seizure justified only by a traffic violation becomes unlawful if it is prolonged beyond the time reasonably required to complete the purpose of issuing a ticket for the violation).

In analyzing the issue, the United States Supreme Court explained: "Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety

concerns." *Id.* (internal citations omitted). The Court reiterated that "[b]ecause addressing the infraction is the purpose of the stop, [the detention] may 'last no longer than is necessary to effectuate th[at] purpose. Authority for the seizure thus ends when tasks tied to the infraction are—or reasonably should have been—completed." *Id.* (internal citations omitted). The Court recognized that an officer "may conduct certain unrelated checks during an otherwise lawful stop. But . . . he may not do so in a way that prolongs the stop absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* (internal citations omitted).

In *Rodriguez*, "[t]he Government argue[d] that an officer may 'incremental[ly]' 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." *Rodriguez v. United States*, 135 S.Ct. 1609 (2015). However, the Supreme Court rejected that argument:

> 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. . . . 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 the officer issues a ticket, . . . but whether conducting the sniff "prolongs"—*i.e.*, adds time to—"the stop . . .."

Rodriguez, 135 S.Ct. at 1616 (internal citations omitted).

In this case, the district court concluded that "Trooper Scheierman gained the reasonable suspicion necessary to expand the initial detention to a drug investigation." (R., pp.122-23.) The district court reasoned:

> [T]he totality of the circumstances surrounding the stop of the Defendant's vehicle show there were specific and articulable facts that justify the reasonable suspicion necessary to permit the investigative detention of the Defendant. For example, the Defendant appeared nervous and shaking. His travel plans were also

> suspicious and confusing based upon the Defendant's statements that he had taken a $75.00 flight to Las Vegas and then spent over $500.00 to rent a car to drive home to Minnesota. The Defendant also exhibited nervousness and changed his answer when questioned about whether he had visited anywhere else during his trip to Las Vegas.

(R., p.120.) However, these facts, even when considered in totality, support only a hunch.

The facts of this case are startlingly similar to those in *State v. Kelley*, 160 Idaho 761 (Ct. App. 2016). In *Kelley*, the officer stopped the car after seeing the driver cross the centerline. *Id.* 160 Idaho at 762. The officer had a drug detection canine in his patrol car. *Id.* Mr. Kelley provided his driver's license and registration, although the car was owned by a third party. *Id.* The officer found Mr. Kelley to have a nervous demeanor—avoiding eye contact, trembling, and a pulsating artery. *Id.* Based on Mr. Kelley's nervousness, the officer ordered a backup unit. *Kelley*, 160 Idaho at 762. While waiting for dispatch, the officer approached Mr. Kelley a second time and questioned him further about the car's owner and Mr. Kelley's travel plans. *Id.* Mr. Kelley said the car belonged to his friend and he was driving from Oregon to Nebraska to return the car. *Id.* The officer learned that Mr. Kelley was "clear and valid—no warrants." *Id.* The third time the officer approached Mr. Kelley's car he asked if there was anything illegal in the vehicle, if there were drugs or drug paraphernalia in the vehicle and if Mr. Kelley would be willing to consent to a search of the vehicle. *Id.* Mr. Kelley responded "no" to each question. *Id.* It was at that time that the backup unit arrived, and the assisting officers detained Mr. Kelley on the side of the road while the arresting officer ran the dog around the outside of Mr. Kelley's car. *Id.*

Mr. Kelley moved to suppress the evidence located after the dog alerted on the trunk of the car, alleging that the officer unlawfully prolonged the traffic stop. *Kelley*, 160 Idaho at 762. The district court denied the motion, ruling that the officer had reasonable suspicion to prolong

the stop. *Id.* The Idaho Court of Appeals reversed, holding that "none of the circumstances that occurred before and during the officer's second approach justified the officer's suspicion that Kelley was involved in criminal activity." *Id.* 160 Idaho at 764. The Court held:

> The officer did not testify to any facts connecting Kelley's nervous behavior with criminal activity. Likewise, the officer did not testify to any objective facts linking Kelley's unusual travel plans to drug activity. The only fact linking drug activity to Kelley was that he was driving on the same road others have used to transport drugs. The use of a commonly traveled road does not give an officer reasonable suspicion to prolong a traffic stop. The officer's suspicion that Kelley's route from Oregon to Nebraska was somehow related to drug activity was nothing more than a hunch. Thus, the information available to the officer prior to his second encounter with Kelley was insufficient to create reasonable suspicion to justify the prolonged stop.

Id. Like the facts in *Kelley*, Mr. Randall's nervousness, travel plans, and beating artery do not equate to reasonable suspicion of drug activity. The car's "lived-in" look and an unconventional travel itinerary, or increased nervousness when asked additional questions about the areas traveled to, are not objective facts linking the travel plans or increased nervousness to drug activity. In fact, there are no objective facts linking Mr. Randall to drug activity at all, unlike the circumstances of *Kelley* where Mr. Kelley was driving on a road others had used for transporting drugs. *Kelley*, 160 Idaho at 764.

Nervous behavior, standing alone, is insufficient for reasonable suspicion. *See United States v. Chavez-Valenzuela*, 268 F.3d 719, 726 (9th Cir. 2001) (noting that no circuit court has held that nervousness alone suffices for reasonable suspicion and holding that even extreme nervousness alone does not support reasonable suspicion), *amended by United States v. Chavez-Valenzuela*, 279 F.3d 1062 (9th Cir. 2002), *overruled on other grounds by Muehler v. Mena*, 544 U.S. 93 (2005). A person's nervous behavior during a police encounter is of "limited significance" to establish reasonable suspicion "because it is common for people to exhibit signs of nervousness when confronted with law enforcement regardless of criminal activity." *State v.*

Gibson, 141 Idaho 277, 285–86 (Ct. App. 2005); *see also State v. Bly*, 159 Idaho 708, 710 (Ct. App. 2016) (noting that "lawful, albeit unusual, conduct" is insufficient, standing alone, for reasonable suspicion). Mr. Randall's nervous behavior, in and of itself, does not create a reasonable suspicion that he had committed or was about to commit a drug-related crime.

The other circumstances known to Trooper Scheierman at the time do not establish a reasonable suspicion to justify the prolonged stop. Similar to nervousness, the "confusing travel plans" finding[4] also is of little significance. This is not a "specific, articulable" fact or rational inference thereof on which to base a determination of reasonable suspicion. *See Morgan*, 154 Idaho at 112. A driver's nervous behavior during an initial police encounter coupled with a rental vehicle traveling on an interstate while on a long road trip is insufficient for a reasonable suspicion of drug-related criminal activity. Moreover, none of the other relevant facts support a determination of reasonable suspicion. Trooper Scheierman did not smell the odor of marijuana during the encounter or see any items of drug paraphernalia. (1/25/18 Tr., p.50, L.5 – p.51, L.7.) Mr. Randall complied with Trooper Scheierman's requests for his driver's license and rental agreement. (1/25/18 Tr., p.26, Ls.2-22.) The vehicle was a rental car and everything was in order regarding the rental of the car. (1/25/18 Tr., p.55, L.20 – p.56, L.3.)

It is undisputed that Trooper Scheierman extended the duration of the traffic stop to conduct a drug investigation. (1/25/18 Tr., p.55, Ls.9-15; p.57, L.7 – p.58, L.5; R., p.119.) Because Trooper Scheierman prolonged the traffic stop for an unrelated purpose, a drug investigation, that investigation must be supported by a reasonable suspicion of drug-related criminal activity. *Rodriguez*, 135 S. Ct. at 1615; *Aguirre*, 141 Idaho at 564. In light of the totality of the circumstances, the information known to Trooper Scheierman prior to the second

[4] Mr. Randall assumes *in arguendo* that this finding is supported by the record.

encounter does not create a reasonable suspicion of drug-related criminal activity to justify the prolonged stop.

D. The District Court Erred In Denying Mr. Randall's Motion To Suppress Because The Dog's Entry Into The Interior Of Mr. Randall's Car Absent Probable Cause Constituted An Unlawful Search Where That Entry Was Facilitated By Trooper Scheierman

The Fourth Amendment to the United States Constitution and Article 1 Section 17 of the Idaho Constitution protect "[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; Idaho Const. Art. I, § 17. Thus, a warrant is generally required before law enforcement may conduct a search. "Warrantless searches are presumptively unreasonable and the State bears the burden to demonstrate that a warrantless search either fell within a well-recognized exception to the warrant requirement or was otherwise reasonable under the circumstances." *State v. Martinez*, 129 Idaho 426, 431 (Ct. App. 1996) (internal citation omitted). Accordingly, "searches and seizures 'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.'" *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (quoting *Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984)).

Under the "automobile exception," the police may search a car when they have probable cause to believe the vehicle contains contraband or evidence of a crime. *United States v. Ross,* 456 U.S. 798, 824 (1982); *State v. Easterday*, 159 Idaho 173, 175 (Ct. App. 2015). When a reliable drug-detection dog alerts on the exterior of a lawfully stopped car, police have probable cause to believe that there are drugs in the car and may search it without a warrant. *Id.*; *State v. Tucker*, 132 Idaho 841, 843 (1999). However, the interior of a vehicle has heightened protection.

When law enforcement deploys police dogs into protected, private areas it is a Fourth Amendment search. Under United States Supreme Court precedent, a drug dog's physical intrusion upon a home's curtilage is a search. In *Florida v. Jardines*, 133 S. Ct. 1409 (2013), the United States Supreme Court held that the use of a drug dog on a home's curtilage constituted a search. The Court stated "One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." *Id.* at 1417-18.

Similarly, in *United States v. Jones*, 132 S. Ct. 945 (2012), the Court held that installing a GPS device on a citizen's private vehicle constituted a search. *Id.* at 949. It said that "It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id.* Thus, the reasonable-expectation-of-privacy test originating from *Katz v. United States*, 389 U.S. 347 (1967), "has been added to, not substituted for, the common-law trespassory test." *Jones*, 565 U.S. at 409. *Jones* and *Jardine* strongly support a rule that a drug dog's entry into a vehicle, for any reason, prior to the establishment of probable cause, is an unconstitutional search.

When a drug-sniffing dog infringes upon a "constitutionally protected interest in privacy" by entering a car before probable cause is established, an unlawful search has occurred. *See Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (holding that a dog sniff performed "on the exterior of respondent's car" was not a violation of the Fourth Amendment and noting "unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy.") As a

general rule, "[a] dog sniff along the *outside* of a motor vehicle does not constitute a search under the Fourth Amendment." *State v. Parkinson*, 135 Idaho 357, 363 (Ct. App. 2000) (citing *United States v. Place*, 462 U.S. 696, 707 (1983) (emphasis added)). Once an officer has stopped a vehicle, a subsequent investigation "can ripen into probable cause as soon as a drug detection dog alerts on the *exterior* of the vehicle, justifying a search of the vehicle without the necessity of a warrant" based on the automobile exception. *State v. Tucker*, 132 Idaho 841, 843 (1999) (citing *State v. Gallegos*, 120 Idaho 894, 898 (1992) (emphasis added). A dog's alert on the outside can provide the probable cause necessary to overcome the requirement of a warrant to search the inside.

Based on United States Supreme Court precedent, the driver of a vehicle enjoys an expectation of privacy in the contents of a vehicle, and a vehicle is a piece of property that is protected against trespass. If there is an odor and an alert outside a vehicle, a dog sniff of the interior can be constitutional. If a dog enters a vehicle, for any reason, including instinct, prior to the establishment of probable cause, United States Supreme Court precedent indicates that is an unconstitutional search.

1. Because Bingo Was Boosted Into Mr. Randall's Car And Did Not Obtain Entry Without Assistance His Entry Constituted A Warrantless Search

Courts in some jurisdictions have held that a dog's entry into the interior of a vehicle during a canine sniff was not a search unless there was evidence that the handler facilitated or encouraged the dog's entry into the vehicle. *See United States v. Sharp*, 689 F.3d 616, 620 (6th Cir. 2012) (no search when dog jumped through open window without facilitation by police); *United States v. Pierce*, 622 F.3d 209, 214-15 (3d Cir. 2010) (no search when, without facilitation by police, dog entered car door opened by defendant); *United States v. Lyons*, 486

F.3d 367, 373–74 (8th Cir. 2007) (no search when, without facilitation by police, dog's head entered window opened by passenger); *United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989) (no search when dog jumped in hatchback that was not opened to permit dog to enter and police did not encourage entry); *United States v. Hutchinson*, 471 F.Supp.2d 497, 510-11 (M. D. Pa. 2007) (no search where dog entered car window that police did not open and police did not encourage entry); *cf. United States v. Winningham*, 140 F.3d 1328, 1331 (10th Cir. 1998) (search where police opened van door, unleashed dog as he neared the door, and the dog entered the van).

The issue of when a dog's entry into the open window of a vehicle constitutes an unlawful search has recently been addressed in Idaho. In *State v. Naranjo*, the Court of Appeals recognized the circumstances under which a drug dog may enter and sniff the interior of a vehicle absent probable cause. 159 Idaho 258, 260 (Ct. App. 2015). Although most of the federal cases the *Naranjo* Court was relying on were cases in which the dog had alerted to the vehicle's exterior prior to the interior entry, the *Naranjo* Court held, "We do not believe a drug dog's behavior before entering a vehicle is constitutionally significant." *Id.* The *Naranjo* Court determined that the applicable inquiry is whether a dog's entry into a car was "instinctual" and not the result of handler facilitation. *Id.*; *see also State v. Pierce*, 622 F.3d 209, 212-14 (3d Cir. 2010). The *Naranjo* Court concluded that the relevant case law held "that absent police misconduct, the instinctive actions of trained drug dogs do not expand the scope of an otherwise legal dog sniff to an impermissible search without a warrant or probable cause." *Id.*

It is undisputed that Bingo's alert occurred after his warrantless entry into Mr. Randall's car. (R., p.123.) Because the dog did not indicate the presence of narcotics while outside the

car, this was not a search based on probable cause. Thus, under *Naranjo*, the relevant inquiry is whether Trooper Scheierman facilitated the dog's entry into Mr. Randall's car.

In this case, it is clear in the trooper's dash-camera video that Trooper Scheierman walked the dog directly over to the open driver's side window. (Exh. 1: 8:43:40-43.) And then, when the dog only jumped halfway up, he boosted the dog in through the window. (Exh. 1: 8:43:40-43.) It is clear from his position that he anticipated the dog would enter through the open window, which it did, because he positioned the dog directly in front of the driver's side. (Exh. 1: 8:43:40-43.) The dog probably would not have made the jump without the boost from Trooper Scheierman. (Exh. 1: 8:43:40-43.) Trooper Scheierman testified that he helped the dog in when the dog got stuck in the window area, "He was about halfway in, and, yes, to prevent injury or whatever, I did boost him in." (1/25/18 Tr., p.68, Ls.10-15.) He then backtracked and pointed out that he did not pick the dog up and put him inside the car—"the term 'boost' is kind of a hot button topic right now. So I didn't boost him." (1/25/18 Tr., p.68, Ls.17-25.) Trooper Scheierman "helped him get all the way in because he kind of got hung up on the [way in]." (1/25/18 Tr., p.69, Ls.1-4.)

The district court acknowledged that, absent probable cause, it would be an unlawful search if the officer facilitated the dog's entry into Mr. Randall's car before the dog had detected the presence of contraband. (R., p.122.) Yet the district court found that the dog "made independent entry into the Defendant's car because the dog detected an odor emanating from the vehicle." (R., pp.122-23.) The district court concluded "Trooper Scheierman did nothing to initiate the dog's entry into the vehicle." (R., p.124.) This finding was erroneous. The dashboard-camera video, Exhibit 1, shows Trooper Scheierman leading the dog to the location and boosting the dog into the car through the open window.

Under *Naranjo*, whether the handler facilitated or assisted the dog's entry into the interior of the vehicle must be analyzed to determine the lawfulness of the dog's entry. *See also State v. Warsaw,* 956 P.2d 139, 143 (N.M. Ct. App. 1997) (distinguishing *Stone*[5] and *Watson*,[6] noting that "Officer Williams reached into the trunk to remove the glass-laden carpet because he expected the dog to jump in there. [The dog], under the preparation, guidance, and stimulation of Officer Williams, jumped into the open trunk"); *United States v. Winningham*, 140 F.3d 1328, 1331 (10th Cir. 1998) ("A desire to *facilitate* a dog sniff of the van's interior, absent in *Stone*, seems readily apparent here"); *State v. Freel*, 32 P.3d 1219, 1225 (Kan. Ct. App. 2001) (finding that the officer "encouraged the dog to enter into the car when it had not alerted on the exterior").

That is exactly what occurred here. Trooper Scheierman discovered the evidence in Mr. Randall's car only as a result of facilitating Bingo's physical intrusion into Mr. Randall's car. Bingo had not indicated when the trooper boosted him through the car window. (Exh. 1 at 8:43:40.) In fact, he had not even been run around the exterior of the vehicle before he was boosted through the open car window. (Exh. 1 at 8:43:39-41.) Bingo was on a leash and certainly could have been prevented from entering the car. (*See* Exh. 1: 8:43:40.) Based on United States Supreme Court precedent, it is clear that the driver of a vehicle retains an expectation of privacy in a vehicle's contents, and a vehicle is considered a piece of property that is protected against trespass.[7] Although the Idaho Court of Appeals, in *Naranjo*, held that an

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[5] *United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989).
[6] *United States v. Watson*, 783 F.2d 258, 265 (E.D. Va. 1992).
[7] In the Ninth Circuit case of *United States v. Thomas*, 726 F.3d 1086 (9th Cir. 2013), a drug dog "jumped up and placed his paws on the vehicle and pressed his nose against Thomas's toolbox." *Id.* at 1088. The Ninth Circuit said that "The government claims that it is frivolous for Thomas to contend that the dog's contact with his truck was a Fourth Amendment search. After *Jones* and *Jardines,* his argument cannot be so easily dismissed." *Id.* at 1092. The Ninth Circuit did not address the merits of this issue because it held that the exclusionary rule did not apply due to the good faith exception. *Id.* at 1093.

instinctual[8] leap into a vehicle is not an unlawful search so long as it is not facilitated by the handler, in this case Trooper Scheierman facilitated the dog's entry into the interior of Mr. Randall's car. Therefore, the trooper's actions to facilitate Bingo's trespass and search into the interior of the car resulted in an unlawful search.

2. The District Court Lacked Substantial And Competent Evidence For Its Finding That Bingo Smelled Narcotics So "Instinctively" Tried To Jump Through The Window

One of the facts that contributed to the district court's conclusion that the drug sniff of the interior of the car did not violate Mr. Randall's Fourth Amendment rights was the court's conclusion that the "drug dog made independent entry into the Defendant's car because the dog detected an odor emanating from the vehicle." (R., pp.120-23.) The finding is not supported by substantial and competent evidence in the record. The entirety of Trooper Scheierman's testimony on this subject provides:

> Q. [By the prosecutor] And upon retrieving or removing K-9 Bingo out of your vehicle, how did you go about conducting the sniff?
>
> A. Put Bingo on leash, and he walked me, basically, up to the car. I was supposed to walk him, but he walked me because – but, yeah, he went to the – and then went to the car, the suspect car.
>
> Q. And what did he do when he got to the vehicle?

[8] As a commentator on this issue has noted, "[g]iven the extensive training which canine teams complete to become detectors of contraband, it seems reasonable to expect that the dogs could be conditioned to resist the urge (instinctive or otherwise) to leap into a vehicle without clear instruction from their handlers." Brian R. Dempsey, *Canine Constables and the Fourth Amendment,* Fed. Law., June 2013, at 40, 42. Mr. Dempsey discussed the opinions in *Sharp* et. al. and said "by distinguishing between vehicle incursions that were caused by canine instinct and those which were encouraged by their handlers, these courts seemingly injected a subjective element into the Fourth Amendment analysis," which the United States Supreme Court has warned should "play no role in ordinary probable-cause Fourth Amendment analysis . . . ." *Id.* quoting *Whren v. United States*, 517 U.S. 806, 813 (1996).

> A. He went to the driver's side of the vehicle. He put his front paws up onto the front driver's side window, which was open, and I noticed Bingo paused briefly as he was sniffing, and then propelled himself inside of that open window.

(1/25/18 Tr., p.35, L.22 – p.36, L.12.) In light of this brief testimony, the district court's factual finding that Bingo "made independent entry" through the driver's side window "because the dog detected an odor emanating from the vehicle" is in error.[9] (R., pp.120-23.) There was no testimony or evidence as to why the dog jumped through the window. (*See* 1/25/18 Tr.) Where there are numerous reasons why a dog might try to enter a car through a window, including because it was trained to enter a vehicle whenever possible, the district court's finding was not based on substantial and competent evidence. Further, it is clear that he immediately went through the window due to the preparation and guidance of Trooper Scheierman. Bingo was led to the location the trooper wanted him to search and then his entry was substantially assisted by his handler. (*See* Exh. 1: 8:43:40-43.)

For the reasons stated above, Mr. Randall asserts that his continued detention was unreasonable and, thus, violated his Fourth Amendment and Article I § 17 right to be free from unreasonable searches and seizures. Mr. Randall asserts that the discovery of the evidence used against him was the product of his illegal detention and unlawful search of his vehicle and should have been suppressed as "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 478-488 (1963). Therefore, Mr. Randall asserts that the district court abused its discretion by denying his motion to suppress.

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[9] Essentially, the court held that what is found after an entry justifies the entry. The United States Supreme Court has repeatedly stated that one of the most basic tenets of Fourth Amendment law is that "[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light" and such a "doctrine has never been recognized by this court, nor can it be tolerated under our constitutional system . . . ." *Byars v. United States*, 273 U.S. 28, 29 (1927); *see also United States v. Di Re*, 332 U.S. 581, 595 (1948); *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

II.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Seven Years, With Three Years Fixed, Upon Mr. Randall Following His Plea Of Guilty To Trafficking Marijuana

Mr. Randall asserts that, given any view of the facts, his unified sentence of seven years, with three years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982). The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). In reviewing a trial court's decision for an abuse of discretion, the relevant inquiry regards four factors:

> Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.

Lunneborg v. My Fun Life, 163 Idaho 856, 863 (2018).

Mr. Randall does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show the district court abused its discretion by failing to reach its decision by the exercise of reason, Mr. Randall must show that in light of the governing criteria, the sentences were excessive considering any view of the facts. *State v. Broadhead*, 120 Idaho 141, 145 (1991). The governing criteria or objectives of criminal punishment are: "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility

of rehabilitation; and (4) punishment or retribution for wrongdoing." *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978).

In light of the mitigating factors present in this case, Mr. Randall's sentence is excessive considering any view of the facts.

As Mr. Randall explained:

> Well, Your Honor, this is -- the biggest mistake that I've ever made. This is the worst decision. Like Mr. Pacyga said, I had no idea about the broader scope of how this affects communities. I was very -- extremely naïve about it. I -- I realize, you know, that although I'm nonviolent, as a nonviolent person, that a lot of bad things happened around drug trafficking.
>
> I realize that, you know, that the cost to the state of Idaho is paid by the people of Idaho to enforce this -- is -- is increased by people doing what I did. There's more potential -- it brings more potential for violence. I mean, sixty-five pounds is a lot, and I didn't -- I wasn't worried about getting robbed or anything, but I know that that happens. I know that violence does occur because of it, drug trafficking.
>
> I endangered people that I didn't even know. It's dangerous for officers. And I wish I had never done it.
>
> Yeah, my mother and my older sister are here with me today, and I -- I deeply regret the pain that I have caused them and the rest of my family, and the same is true for my friends in my community. I have a great community. A very strong, loving family. I'm the youngest of five and -- it's a horrible decision.
>
> It's -- this has been the most difficult situation in my life. And looking back at it now, for fast money, it's ridiculous the idea of the concept that I even though that was okay.
>
> I can't undo what's been done, but I can do my best moving forward to impact, get back into my community, and get back into my family, and be there for them. I'm not going to be there for -- my dad is a veteran with MS and mostly in a wheelchair, and it's just him and my mom at home, and I have been the one to be there to work with them and take care of them. My grandmother -- I work for myself, so if somebody needed something, I could -- I could get off work, and I could go do what needed to be done.
>
> So all of these things that I have been able to do, I'm not going to be able to do because I went after fast money. When I get out, I've had a huge outpouring of support from all of my friends and family to get through this, and I'm very

> confident that when I get out, that I'll be able to get that house and that land and those things that I want without having to touch anything. And I have zero desire to do anything that would possibly get me one day further in any jail anywhere or in any trouble or cause any of these people that I have hurt any more pain. Thank you.

(2/11/19 Tr., p.111, L.17 – p.113, L.24.)

Mr. Randall does have a supportive family to assist him in his rehabilitation. (PSI, p.4.) Mr. Randall's mother and sister were present in the courtroom to support him during his sentencing hearing. (2/11/19 Tr., p.109, Ls.22-23; p.112, Ls.13-14.) Mr. Randall also has a strong relationship with his 94-year old grandmother, for whom he helps to care for. (Letters of Support, [10] pp.6-7; 2/11/19 Tr., p.109, L.23 – p.110, L.13.) Mr. Randall received nine letters of support from family members and friends in Minnesota. (Letters of Support, pp.4-9.)

Further, Mr. Randall expressed remorse and accepted responsibility for his actions. (2/11/19 Tr., p.111, L.17 – p.113, L.24.) Idaho recognizes that some leniency is required when a defendant expresses remorse for his conduct and accepts responsibility for his acts. *State v. Shideler*, 103 Idaho 593, 594-595 (1982); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991).

Based upon the above mitigating factors, Mr. Randall asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his remorse and his family support it would have imposed a less severe sentence.

[10] The electronic file "Letters of Support" contains a Certificate of Exhibits and nine letters submitted to the district court in support of Mr. Randall.

CONCLUSION

Mr. Randall respectfully requests that this Court vacate the district court's judgment and conviction and reverse the order which denied his motion to suppress. Alternatively, Mr. Randall respectfully requests that this Court reduce his sentence as it deems appropriate or remand his case to the district court for a new sentencing hearing.

DATED this 31st day of October, 2019.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

SJC/eas