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ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

SALLY J. COOLEY
Deputy State Appellate Public Defender
I.S.B. #7353
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

STATEMENT OF THE CASE

Nature of the Case

Jacob Steele Randall asks the Idaho Supreme Court to review the Idaho Court of Appeals' Opinion in *State v. Randall*, No. 46893 (Ct. App. Aug. 28, 2020) (*hereinafter*, Opinion), which affirmed his Judgment of Conviction. Mr. Randall seeks review of his case because the Court of Appeals concluded that Trooper Scheierman had reasonable articulable suspicion of drug-related activity based on Mr. Randall's travel plans and associated nervousness. The Court of Appeals' Opinion is therefore contrary to its own precedent, *State v. Kelley*, 160 Idaho 761 (Ct. App. 2016) (holding an individual driving on the interstate, who

appears visibly nervous when encountering law enforcement, who had non-traditional travel plans, does not give rise to reasonable suspicion such that a drug investigation is permissible).

Additionally, the Court of Appeals' conclusion that the drug detection dog's entry into the interior of Mr. Randall's car was "assisted" by Trooper Scheierman, but not "facilitated" by law enforcement, is inconsistent with its own precedent. *See State v. Cox*, 166 Idaho 894, 899, 465 P.3d 1133, 1138 (Ct. App. 2020) (defining "instinctive" to mean "the dog enters the car without assistance, facilitation, or other intentional action by its handler.").

Review is warranted.

Statement of the Facts & Course of Proceedings

Most of the pertinent facts of this case are not in dispute. As stated in the Opinion:

> On September 3, while parked in an interstate median, Idaho State Police Trooper Scheierman observed a car traveling east at approximately eighty miles per hour near Pocatello. Although this speed was within the speed limit, the car slowed down upon approaching Scheierman's patrol car. As Scheierman watched the car pass, he noticed the driver sitting in a very rigid, uncomfortable, and unnatural driving position and pressing himself backwards in the seat. Scheierman believed this to be abnormal behavior and followed the car. After witnessing the driver fail to use his turn signal for the requisite five seconds before changing lanes, Scheierman activated his emergency lights and initiated a traffic stop.
>
> Scheierman made contact with Randall, the driver, explained the basis for the stop, and asked for Randall's driver's license, proof of registration, and insurance. After Randall complied with these requests, Scheierman learned the car was a rental. Randall stated that because of low airline fares, he decided to fly to Las Vegas for a vacation. Randall said he purchased an airline ticket from Saint Paul, Minnesota, to Las Vegas, Nevada, for seventy-five dollars and arrived in Las Vegas late in the evening of August 30. Randall explained he rented a car to drive back to Saint Paul; the rental car paperwork indicated he rented the car on August 31. After renting the car, Randall told Scheierman that he drove west to Reno, Nevada, about a seven-hour drive from Las Vegas. During this conversation, Scheierman noticed Randall's hands were shaking, his carotid artery was pulsating, and the car had a lived-in look, with food wrappers, gallons of water, and toiletries scattered throughout the interior.

Scheierman asked Randall to step out of the car to speak with him by Scheierman's patrol car. Randall complied. While Scheierman checked for outstanding warrants, Scheierman and Randall continued to speak about Randall's travel destinations over the previous few days. When Scheierman checked Randall's driver's license, the law enforcement database did not indicate any outstanding warrants or anything else that required further action by law enforcement.

Nevertheless, Scheierman thought several of Randall's statements were suspicious. First, Randall only paid seventy-five dollars for airfare from Saint Paul to Las Vegas, but paid more than $500 to rent the car for the trip home. Second, Randall stated he wanted to vacation in Las Vegas, but then spent very little time there, instead spending the vast majority of his time driving west to Reno before heading northeast towards Saint Paul. Third, Randall initially denied traveling anywhere but Las Vegas, but later admitted driving to Reno. Based upon Randall's unusual travel, which included known drug trafficking destinations, his level of nervousness, and the physical state of the interior of the rental car, Scheierman had concerns about Randall's possible involvement in drug trafficking and expressed these concerns to Randall. Randall denied any involvement in drug trafficking and, upon Scheierman's request, consented to Scheierman running his drug-detection dog, Bingo, around the car. Bingo approached the driver's side door of Randall's rental car, sniffed, and jumped through the open window, becoming stuck halfway inside the car and halfway outside the car. When Scheierman realized Bingo jumped into the car and became stuck, Scheierman assisted the dog further into the car to prevent injury to the animal and the car. Bingo entered the back seat of Randall's rental car, intensely sniffed, and alerted on the back seat, facing the trunk. Scheierman then walked Bingo around the exterior of the car and Bingo again alerted at the trunk. A subsequent search of the car's trunk revealed sixty-five pounds of marijuana. The State charged Randall with felony trafficking in marijuana.

Randall filed a motion to suppress all evidence obtained as a result of the stop of his rental car by law enforcement arguing, in part, that the initial purpose of the stop was unconstitutionally expanded to include a drug investigation even though Scheierman did not have reasonable suspicion of drug activity and that Bingo's entry into the interior of the car was facilitated by Scheierman and, thus, constituted an illegal search. The district court found Scheierman had reasonable suspicion of drug activity, which justified the subsequent drug investigation, the use of a drug-detection dog, and the search of the car. Additionally, the district court found Bingo's sniff in the interior of Randall's rental car was not unconstitutional because Bingo independently entered Randall's rental car after detecting an odor emanating from the car. Accordingly, the district court denied Randall's motion to suppress.

Randall pled guilty to an amended charge of trafficking in marijuana of at least five pounds, but less than twenty-five pounds, Idaho Code § 37-2732B(a)(1)(B),

> but reserved the right to appeal the district court's denial of his motion to suppress. The district court sentenced Randall to a unified sentence of seven years, with three years determinate. Randall timely appeals.

(Opinion, pp.1-3.) On appeal, Mr. Randall argued that the district court erred in denying his motion to suppress because reasonable articulable suspicion of criminal wrongdoing, allowing the officer to expand the scope of the traffic stop into a drug investigation, did not exist. (Opinion, p.1.) Mr. Randall also asserted that the drug detection dog's entry into the interior of his car constituted an unlawful search under the Fourth Amendment. (Opinion, p.1.)

The Court of Appeals issued a published Opinion, affirming the judgment of conviction. (Opinion, p.1.) The Court found that reasonable suspicion existed to expand the scope of the traffic stop to a drug investigation. (Opinion, p.5.) The Court of Appeals recognized its prior holding in *Kelley*, but distinguished that case from the facts of Mr. Randall's case:

> Here, unlike *Kelley*, Scheierman was not just confronted with facts that were true of the general public, like nervousness or travelling on a heavily used interstate, but also with facts that linked Randall's behavior to criminal activity. Scheierman testified that Randall's nervousness increased when the officer asked specific questions about Randall's travel plans. Randall told Scheierman that he had purchased a seventy-five dollar airplane ticket to Las Vegas because of the low price. When Scheierman asked Randall if he had been anywhere besides Las Vegas, Randall paused, and initially indicated he had not. When asked if he was sure, Randall paused and then admitted he had driven to Reno, Nevada. Scheierman though these explanations were suspicious because: (1) instead of taking advantage of the low price for a return flight, Randall spent more than $500 to drive back to St. Paul, negating any of the benefits of the affordability of the original airfare, one of the reasons Randall said he purchased the ticket; (2) by driving back to Saint Paul, Randall's travel itinerary included far more driving time than it did vacation time in Las Vegas; (3) driving west to Reno, instead of northeast to St. Paul, was inconsistent with a vacation from St. Paul to Las Vegas; (4) the travel itinerary was inconsistent with what average travelers would do, but was consistent with the type of itinerary drug traffickers use; (5) Scheierman knew that Reno and St. Paul were source and destination cities for drug traffickers; (6) Randall's nervousness increased when asked about his travel plans; and (7) the lived-in look of the car.

(Opinion, pp.7-8.)

The Court of Appeals concluded that "Randall's answers to questions that arose during the traffic stop, and the reasonable inferences therefrom, provided Scheierman more information than was available to the officer in *Kelley* and provided reasonable suspicion that Randall's specific behavior was linked to criminal activity." (Opinion, p.8.)

Next, the Court of Appeals analyzed the drug detection dog's entry into the interior of Mr. Randall's car and its subsequent alert, and concluded that the entry was not a search violative of the Fourth Amendment. (Opinion, pp.8-12.) The Court of Appeals described the applicable law as:

> When a drug dog follows a scent into a vehicle's interior, it is not a search under the Fourth Amendment if the dog's actions were instinctual and not encouraged or facilitated by the police. *State v. Naranjo*, 159 Idaho 258, 260, 359 P.3d 1055, 1057 (Ct. App. 2015). A dog's entry into a vehicle is instinctive when the entry occurs without assistance, facilitation, or other intentional action by the dog's handler. *State v. Cox*, 166 Idaho 894, 899, 465 P.3d 1133, 1138 (Ct. App. 2020). This analysis does not turn on whether the officer intended for the dog to enter the vehicle; instead it turns on objective facts. *Id.* at 901, 465 P.3d at 1140. Because the inquiry is whether the dog's actions were instinctual and whether the officer encouraged or facilitated the actions, the analysis does not depend on how much of the dog enters the vehicle; it applies whether the dog places its nose in an open window, *Naranjo*, 159 Idaho at 260, 359 P.3d at 1057, an open door, or actually enters the vehicle. *See Cox*, 166 Idaho at 899, 465 P.3d at 1138. Because our previous cases have concerned a dog's sniff of a vehicle's interior through an open window or door, but not a dog's physical entry into the interior compartment of a vehicle, we have only considered whether the dog's sniff into the vehicle's interior was instinctual. However, other courts that have addressed situations where a dog physically entered a vehicle by jumping through an open door or window have focused on whether the dog's entry into the vehicle was instinctual and concluded that, as with sniffs of the interior, if the entry is instinctual and not facilitated or encouraged by law enforcement there is no Fourth Amendment violation. *See United States v. Sharp*, 689 F.3d 616, 620 (6th Cir. 2012) ("We now join our sister circuits in holding that a trained canine's sniff inside of a car after instinctively jumping into the car is not a search that violates the Fourth Amendment as long as the police did not encourage or facilitate the dog's jump.").

(Opinion, pp.10-11.)

The Court of Appeals concluded, "nothing in the record indicates that Bingo's jump or initial entry into or subsequent sniff of the interior of Randall's rental car was facilitated or encouraged by Scheierman." (Opinion, p.11.) The Court of Appeals found, "Scheierman testified that Bingo jumped inside of the car, but became stuck on the window area when he was 'halfway in' and so Scheierman assisted Bingo to prevent injury to the dog or car." (Opinion, p.11.) "The undisputed evidence indicates that Bingo instinctually jumped halfway into the car before getting stuck and before Scheierman provided any assistance." (Opinion, p.12.) Because the dog was acting on instinct and the jump and entry were not facilitated by Trooper Scheierman, the entry and sniff of the interior of the car were not a search under the Fourth Amendment. (Opinion, p.12.)

Mr. Randall filed a timely Petition for Review.

ISSUE

Should this Court grant Mr. Randall's Petition for Review?

ARGUMENT

This Court Should Grant Mr. Randall's Petition For Review

A. Introduction

Mr. Randall respectfully asks this Court to review his case, first because the Court of Appeals' holding that Mr. Randall's travel plans constituted reasonable articulable suspicion of drug-related activity, was contrary to its own precedent. Second, the Opinion holding that Trooper Scheierman did not facilitate the dog's entry into the interior of the car, but only assisted it when it got stuck, was also contrary to its own precedent.

B. Standards For Granting Review

The Idaho Appellate Rules provide that a petition for review "will be granted only when there are special and important reasons." I.A.R. 118(b). The Court's grant of review is discretionary, and the Court may consider a number of factors. I.A.R. 118(b). Among the criteria this Court should consider includes "[w]hether the Court of Appeals has rendered a decision in conflict with a previous decision of the Court of Appeals." I.A.R. 118(b)(3).

C. Review Is Warranted As The Opinion Is Contrary To Precedent Where It Concludes That The Officer Had Reasonable Articulable Suspicion To Initiate A Drug Investigation Based On Mr. Randall's Travel Plans

The Opinion is contrary to the Court of Appeals' own precedent holding that when an individual exhibits characteristics common among the general public, those characteristics are "of limited significance in establishing the presence of reasonable suspicion." (Opinion, p.6 (quoting *State v. Neal*, 159 Idaho 919, 924 (Ct. App. 2016) (holding that Neal's nervousness, marijuana t-shirt attire, the time of day, and his refusal to consent to a search of his automobile,

when taken together, did not support a reasonable suspicion that Neal was engaged in criminal activity).)

Further, the Idaho Court of Appeals has previously concluded that an individual driving on the interstate, who appears visibly nervous when encountering law enforcement, and who had non-traditional travel plans, *does not* give rise to reasonable suspicion such that a drug investigation is permissible. *See 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. *Kelley*, 160 Idaho at 762.

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. *Id.* 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 Court of Appeals' decision to the contrary is inconsistent with precedent.

The Court of Appeals analyzed *Kelley*, noting that the following seven explanations by Trooper Scheierman distinguished Mr. Randall's case from the facts of *Kelley*:

> Here, unlike *Kelley*, Scheierman was not just confronted with facts that were true of the general public, like nervousness or travelling on a heavily used interstate, but also with facts that linked Randall's behavior to criminal activity. Scheierman testified that Randall's nervousness increased when the officer asked specific questions about Randall's travel plans. Randall told Scheierman that he had purchased a seventy-five dollar airplane ticket to Las Vegas because of the low price. When Scheierman asked Randall if he had been anywhere besides Las Vegas, Randall paused, and initially indicated he had not.[1] When asked if he was sure, Randall paused and then admitted he had driven to Reno, Nevada. Scheierman thought these explanations were suspicious because: (1) instead of taking advantage of the low price for a return flight, Randall spent more than $500 to drive back to St. Paul, negating any of the benefits of the affordability of

[1] The Opinion misstates the trooper's question, which was, "You didn't go any further west than Vegas?" (Exh. 1: 8:39:52-8:39:55.) The fact that Mr. Randall took a minute to contemplate whether Reno was further west than Las Vegas does not precipitate a conclusion that Mr. Randall was drug trafficking. (Exh. 1: 8:39:52-8:40:07.)

> the original airfare, one of the reasons Randall said he purchased the ticket; (2) by driving back to Saint Paul, Randall's travel itinerary included far more driving time than it did vacation time in Las Vegas;[2] (3) driving west to Reno, instead of northeast to St. Paul, was inconsistent with a vacation from St. Paul to Las Vegas; (4) the travel itinerary was inconsistent with what average travelers would do, but was consistent with the type of itinerary drug traffickers use; (5) Scheierman knew that Reno and St. Paul were source and destination cities for drug traffickers; (6) Randall's nervousness increased when asked about his travel plans; and (7) the lived-in look of the car.

(Opinion, pp.7-8.)

However, the car's "lived-in" look and unstructured 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. These facts, when taken together, add up to a hunch. *See Neal*, 159 Idaho at 925 (concluding "none of these factors alone bears more than little significance in a reasonable suspicion analysis. Taken together, they still do not support a reasonable suspicion, even considering the officer's experience, that Neal was engaged in criminal activity. The sequence of events resembles an experienced officers 'hunch' that something was out of the ordinary, but a hunch is not sufficient to meet the stringent requirements of the Fourth Amendment.") (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989). "A nervous demeanor during an encounter with law enforcement is of limited significance in establishing the presence of reasonable suspicion because it is common for people to exhibit signs of nervousness when confronted with law enforcement regardless of criminal activity." *Neal*, 159 Idaho at 924 (internal citations omitted); *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 does not create a reasonable suspicion that he had committed or was about to commit a drug-related crime.

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[2] The Opinion also fails to consider the fact that Mr. Randall told the trooper he was planning to stop and visit Yellowstone. (Exh. 1: 8:37:05-8:37:24.)

Additionally, 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 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 State v. Morgan*, 154 Idaho 109, 112 (2013). 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.

In determining that Trooper Scheierman had reasonable articulable suspicion to begin a drug investigation, the Court of Appeals' Opinion conflicts with its own precedent in *Kelley*.

D. Review Is Warranted As The Opinion Is Contrary To Precedent Where It Concludes That The Dog's Entry Through The Window Of Mr. Randall's Car Was Assisted By, But Not Facilitated By, Trooper Scheierman

In its Opinion, the Court of Appeals stated the applicable law as:

> When a drug dog follows a scent into a vehicle's interior, it is not a search under the Fourth Amendment if the dog's actions were instinctual and not encouraged or facilitated by the police. *State v. Naranjo*, 159 Idaho 258, 260, 359 P.3d 1055, 1057 (Ct. App. 2015). A dog's entry into a vehicle is instinctive when the entry occurs without assistance, facilitation, or other intentional action by the dog's handler. *State v. Cox*, 166 Idaho 894, 899, 465 P.3d 1133, 1138 (Ct. App. 2020). This analysis does not turn on whether the officer intended for the dog to enter the vehicle; instead it turns on objective facts. *Id.* at 901, 465 P.3d at 1140. Because the inquiry is whether the dog's actions were instinctual and whether the officer encouraged or facilitated the actions, the analysis does not depend on how much of the dog enters the vehicle; it applies whether the dog places its nose in an open window, Naranjo, 159 Idaho at 260, 359 P.3d at 1057, an open door, or actually enters the vehicle. *See Cox*, 166 Idaho at 899, 465 P.3d at 1138. Because our previous cases have concerned a dog's sniff of a vehicle's interior through an open window or door, but not a dog's physical entry into the interior compartment of a vehicle, we have only considered whether the dog's sniff into the vehicle's interior was instinctual. However, other courts that have addressed situations where a dog physically entered a vehicle by jumping through an open door or window have focused on whether the dog's entry into the vehicle was instinctual

> and concluded that, as with sniffs of the interior, if the entry is instinctual and not facilitated or encouraged by law enforcement there is no Fourth Amendment violation. *See United States v. Sharp*, 689 F.3d 616, 620 (6th Cir. 2012) ("We now join our sister circuits in holding that a trained canine's sniff inside of a car after instinctively jumping into the car is not a search that violates the Fourth Amendment as long as the police did not encourage or facilitate the dog's jump.").

(Opinion, pp.10-11.)

The Court of Appeals concluded, "nothing in the record indicates that Bingo's jump or initial entry into or subsequent sniff of the interior of Randall's rental car was facilitated or encouraged by Scheierman." (Opinion, p.11.) In fact, Trooper Scheierman testified that he boosted Bingo through the window: "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; App. Br., p.19.) Nonetheless, the Court of Appeals found, "Scheierman testified that Bingo jumped inside of the car, but became stuck on the window area when he was 'halfway in' and so Scheierman *assisted* Bingo to prevent injury to the dog or car." (Opinion, p.11 (emphasis added).) "The undisputed evidence indicates that Bingo instinctually jumped halfway into the car before getting stuck and before Scheierman provided any *assistance*." (Opinion, p.12 (emphasis added).) However, "assist" and "facilitate" are synonyms.[3] As the Court of Appeals recently quoted in *Cox*, " '[I]nstinctive' implies the dog enters the car without assistance, facilitation, or other intentional action by its handler." 166 Idaho at __, 465 P.3d at 1138 (quoting *United States v. Pierce,* 622 F.3d 209, 214 (3rd Cir. 2010).)

The Court of Appeals' Opinion holding that Trooper Scheierman did not facilitate the dog's entry into or sniff of the interior of the car, but only assisted it when it got stuck halfway inside, is contrary to its own precedent in *Cox*.

[3] https://www.merriam-webster.com/thesaurus/facilitate

CONCLUSION

Review is warranted to address the Court of Appeals' erroneous application of its own precedent. For the reasons articulated in his Appellant's Brief, Appellant's Reply Brief, and herein, Mr. Randall respectfully requests that this Court grant review and vacate his judgment of conviction.

DATED this 14th day of October, 2020.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of October, 2020, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW 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