

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0229

STATE OF MONTANA,

Plaintiff and Appellee,

v.

HALIE MARIA HERZOG,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, The Honorable Wm. Nels Swandal, Presiding

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STATEMENT OF THE ISSUE

Whether the district court properly denied Appellant's motion to suppress evidence found pursuant to a consensual search of a vehicle after an officer encountered it parked off-road late at night in rural Montana, learned that the driver's license was suspended, and smelled burnt methamphetamine and marijuana from inside the vehicle.

STATEMENT OF THE CASE

On July 25, 2022, the State charged Appellant Halie Herzog (Herzog) by Information with four counts of felony Criminal Possession of Dangerous Drugs (CPDD) and one count of misdemeanor Criminal Possession of Drug Paraphernalia. (Doc. 4.)

Herzog filed a motion to suppress evidence obtained pursuant to the traffic stop. (Doc. 20.) Herzog asserted law enforcement had "effectuated or prolonged a *Terry*-stop without sufficient justification." (*Id.* at 1.) The district court conducted an evidentiary hearing on December 6, 2022. (Docs. 24, 27; 12/6/2022 Suppression Hearing Transcript (Tr.)) On January 3, 2023, the court issued its Findings of Fact and Conclusions of Law and Order Denying Motion to Suppress. (Doc. 42, attached as App. 1.)

Based on the totality of the circumstances, the district court concluded that the officer had particularized suspicion to initiate a traffic stop and, based on reasonable suspicion that dangerous drugs were inside the vehicle, to expand the scope of the stop.

The parties subsequently reached a plea agreement in which Herzog reserved the right to appeal the denial of her motion to suppress. (Doc. 45.) Herzog pled guilty to one count of CPDD. (Doc. 44.) The State moved to dismiss the remaining counts, and the district court granted the motion. (*Id.*) The court received a presentence investigation report (PSI) dated January 23, 2023. (Doc. 46.)

The district court sentenced Herzog on February 27, 2023, to the Montana Department of Corrections for three years, to run concurrently with her sentence in Flathead County Cause No. DC-20-150(B), and recommended screening her for drug treatment at the Elkhorn program and for prerelease. (Docs. 49, 50.) Herzog filed a notice of appeal on April 20, 2023. (Doc. 56.)

STATEMENT OF THE FACTS

Brandon Holzer (Holzer) began his career in law enforcement in 2009 with the Lincoln County Sheriff's Office (LCSO). (Tr. at 7.) He started as a patrol deputy, was promoted to the position of sergeant of the patrol, and in 2018 was

promoted to a detective position assigned to the narcotics division, where he then became the lead narcotics detective. (*Id.*) In addition to completing the Montana Law Enforcement Academy, Holzer completed extensive training and education regarding drug investigation and interdiction. (*Id.* at 7-8.) LCSO assigned Holzer to work as part of the Northwest Drug Task Force (NDTF). (*Id.* at 8.)

While working with NDTF, Holzer became familiar with Herzog. (Tr. at 8.) Prior to his contact with her on July 18, 2022, Holzer knew that NDTF had identified Herzog during its investigations into other known drug traffickers with whom she had had contact and suspected that she was involved in drug trafficking. (*Id.*) Holzer knew that law enforcement had seized dangerous drugs from Herzog in the past. (*Id.* at 9.) Holzer also knew that Herzog and one of her associates, Todd Pyles (Pyles), had been identified by NDTF as known drug users. (Doc. 2, Ex. D at 1; Tr. at 26-27.) Herzog's criminal history showed prior drug-related convictions, including a 2017 conviction in Idaho for felony Possession of a Controlled Substance with the Intent to Deliver and a 2019 conviction in Montana for felony Criminal Possession of Dangerous Drugs. (Doc. 46 at 2.)

Sometime prior to July 18, 2022, an agent with the United States Border Patrol (USBP) informed Holzer that on July 5, 2022, USBP had stopped a vehicle occupied by Herzog and Pyles. (Doc. 2, Ex. D at 1; Tr. at 9-10.) The vehicle was a yellow Volkswagen GTI bearing Oregon license plates registered to a woman in

Hood River, Oregon. (Doc. 2, Ex. D at 1; Tr. at 10-11, 27.) LCSO Deputy Anthony Jenson (Jenson) was on shift on July 5 and heard the radio traffic as the USBP agent conducted a welfare check. (Doc. 2, Ex. C at 1.) The USBP agent informed Holzer that the vehicle and occupants had been released after the agent found they did not need assistance. (Doc. 2, Ex. D at 1; Tr. at 9-10.)

After Holzer's contact with the USBP agent, he looked up Herzog and Pyles in law enforcement databases and learned that Pyles' driver's license was suspended and that Herzog was under supervision by Montana Probation and Parole. (Doc. 2, Ex. D at 1; Tr. at 10.) About a week prior to the July 18, 2022 traffic stop, Holzer contacted Montana Probation and Parole Officer Steve Watson (Watson), who requested that if LCSO had contact with Herzog, that LCSO detain her and contact him. (Doc. 2, Ex. D at 1; Tr. at 10, 25.)

Watson informed Holzer he suspected Herzog of violating her conditions of probation by going out of state without permission and by having contact with other known drug users. (Tr. at 25-26.) Holzer communicated Watson's request to other members of LCSO, informed them generally of NDTF's ongoing investigation regarding Herzog, and requested that they notify him of any contact with her. (Tr. at 10-11, 38-39.)

On July 18, 2022, at approximately 2:30 a.m., Jenson was on duty and patrolling U.S. Highway 2 when he observed a yellow Volkswagen with Oregon

license plates parked at a fuel pump at Town Pump. (Doc. 2, Ex. C at 1; Tr. at 11.) Jenson knew that Herzog and Pyles had been in the same vehicle when stopped by USBP. (Doc. 2, Ex. C at 1.) Jenson recalled that, shortly after the USBP stop, he had learned from Holzer that Herzog and Pyles were suspected of drug trafficking. (*Id.*) Jenson requested that Holzer be contacted to report that Jenson had observed the Volkswagen and would follow it. (*Id.*; Tr. at 11.)

When the Volkswagen pulled out of the Town Pump heading eastbound, Jenson entered the highway behind it, and the Volkswagen abruptly pulled into the Saverite South gas station and parked at a fuel pump. (Doc. 2, Ex. C at 1.) Jenson identified the driver as a male but could not confirm whether it was Pyles. (Doc. 2, Ex. 3 at 1; Tr. at 12, 27.) Review of surveillance video from Saverite later that day confirmed that Pyles was driving the vehicle at that point. (Doc. 2, Ex. C at 2.)

Jenson did not follow the Volkswagen into the gas station, remaining on the highway as he passed it, and, after a couple of miles, pulling over and parking alongside the roadway. (Doc. 2, Ex. C at 1.) Shortly thereafter, the Volkswagen drove eastbound past Jenson and turned onto Farm to Market Road. (Doc. 2, Ex. C at 1.) Jenson thought that turning onto that road was odd because it was a slow and indirect route to Kalispell, where he knew Herzog and Pyles resided. (*Id.*)

Jenson and other deputies coordinated by radio to try to keep the Volkswagen in sight and observed it turning on and off of Highway 2 at a number

of intersecting roads. (Doc. 2, Ex. C at 1; Tr. at 12.) By listening to the radio communications, and based on his training and experience, Holzer believed the driver of the vehicle was trying to avoid law enforcement. (Tr. at 13.) The deputies could not confirm whether the male who had been observed driving was Pyles, whose license was suspended. (Doc. 2, Ex. 3 at 1; Tr. at 12, 27.)

None of the deputies observed any traffic violations and therefore did not pull over the Volkswagen. (Doc. 2, Ex. D at 1; Tr. at 39.) Jenson observed and radioed that the Volkswagen was driving east past the Libby Airport, at which time Holzer told Jenson and the other deputies to return to Libby as he believed that he was ahead of the Volkswagen on Highway 2 and he would watch to see if it continued toward Kalispell. (Doc. 2, Ex. C, p. 1; Tr. at 13.)

Holzer parked at a motel along Highway 2 and waited for the Volkswagen to pass. (Doc. 2, Ex. D at 1; Tr. at 13.) After about 45 minutes, the Volkswagen had not passed. (*Id.*) Holzer left the motel parking lot and headed back toward Libby. (Doc. 2, Ex. D, p. 1; Tr. 14.) Near mile marker 50 of Highway 2, Holzer's attention was drawn by a light or strike of light coming from behind a line of trees and shrubs off the left side of the highway. (Doc. 2, Ex. D at 1; Tr. at 14.) Holzer observed that the source of the light was a vehicle parked off-road away from Highway 2 and backed up into the line of trees and shrubs. (*Id.*) An actual road did not lead to the vehicle, but Holzer could get to it from a dirt pull-out. (Tr. at 29.)

Holzer neared the vehicle, observed it was the yellow Volkswagen, and turned on the grill lights of his patrol car to signal himself as law enforcement. (Doc. 2, Ex. D at 1; Tr. at 14, 30, 33.) He observed two individuals in the Volkswagen, and as he exited his patrol car the Volkswagen started to pull forward as if to leave. (Doc. 2, Ex. D at 1; Tr. at 30.) Holzer announced that he was a sheriff's deputy and told the driver to stop. (Doc. 2, Ex. D, p. 1; Tr. at 30.)

Holzer walked up to the Volkswagen and immediately recognized the driver as Pyles and the passenger as Herzog. (Doc. 2, Ex. D at 1; Tr. at 15.) Holzer knew that Pyles' driver's license was suspended. (*Id.*) He asked them if they were okay and inquired what they were doing. (Doc. 2, Ex. D at 1.) One of them responded that they were in the woods watching the storm and having sex. (*Id.*)

Holzer observed right away that Pyles was extremely nervous and physically shaking and that Herzog was moving and reaching into the areas around her seat. (Doc. 2, Ex. D at 2; Tr. at 30-31.) Holzer instructed Herzog several times to stop moving and reaching around, which she would do for a moment and then start moving and reaching around again. (Doc. 2, Ex. D at 2.) Holzer also observed that both were fully clothed, which was inconsistent with them engaging in sex. (*Id.*; Tr. at 31.)

Holzer could smell odors coming from inside the Volkswagen—odors so overpowering that he stepped farther back from the vehicle than he normally

would. (Doc. 2, Ex. D at 2.) In the past, Holzer had been exposed to the odor of burning methamphetamine (meth), which to him smelled like cat urine and was very recognizable. (Tr. at 16.) The odor of burnt meth was the strongest odor he could smell coming from inside the vehicle, but he also could smell the odors of marijuana and heavy cologne. (Doc. 2, Ex. D at 2; Tr. at 36-37.) Through his training and experience, Holzer knew that drug users often spray cologne to try to mask the scent of burnt drugs. (Tr. at 41.)

Pyles told Holzer that he had been at his daughter's ballet recital in Spokane, that he had picked up Herzog in Libby where she had left her car, and that someone else had driven Herzog's car back to Kalispell. (Doc. 2, Ex. D at 2.) Pyles asked Holzer why law enforcement personnel had been following and harassing him. (Tr. at 19, 32.) Holzer informed Pyles that his license was suspended and that it was illegal for him to drive. (*Id.*)

Due to the strong odor of burnt meth that he could smell, Herzog's prior drug convictions, and the behaviors of Herzog and Pyles that he observed, Holzer believed that he had sufficient particularized suspicion to prolong the investigation and to call for a drug-sniffing dog to conduct a search around the exterior of the vehicle. (Doc. 2, Ex. D at 2; Tr. at 17.) At approximately 4:19 a.m., Holzer radioed dispatch and asked them to call LCSO Deputy John Hyslop (Hyslop), the handler of LCSO's drug-sniffing dog, and have him report to Holzer's location. (Doc. 2,

Ex. A at 1; Tr. at 40.) This upset Pyles, and Holzer explained to him again that he would not be allowed to drive the vehicle away at any point because his driver's license was suspended. (Doc. 2, Ex. D at 2.)

Herzog told Holzer that her driver's license was valid and that she could drive. (Doc. 2, Ex. D at 2; Tr. at 32-33.) Holzer agreed to verify the status of her license. (Doc. 2, Ex. D at 2; Tr. at 18, 33.) He also wanted to contact Montana Probation and Parole to determine whether Watson's prior request to detain Herzog was still in place. (*Id.*)

At this point, Herzog asked Holzer if she could smoke. (Doc. 2, Ex. D at 2.) Holzer said, "Yes," and Herzog took out a marijuana pipe and started smoking marijuana. (*Id.*) Based on his training and experience, Holzer believed Herzog may have started smoking marijuana so the drug-sniffing dog would alert to the marijuana. (*Id.*) Holzer informed Herzog that the dog would not alert to marijuana and that he would not allow her to drive the vehicle after smoking marijuana, an intoxicant, in his presence. (*Id.*) Holzer observed Pyles become angrier at what was happening and begin to whisper to Herzog. (*Id.*)

Pyles and Herzog remained seated inside the Volkswagen under Holzer's constant observation. (Doc. 2, Ex. D at 2.) Minutes before the deputy and drug-detecting dog arrived, Holzer observed both Pyles and Herzog "go on the nod," or

start to fall asleep, which based on his training and experience was an indicator of the use of opiates or other narcotics. (*Id.*)

Hyslop arrived at Holzer's location at 4:57 a.m. (Doc. 2, Ex. A at 1; Tr. at 40.) Holzer asked Hyslop to direct the dog to the Volkswagen to conduct a sniff search. (Doc. 2, Ex. A, p. 1.) The drug-detecting dog sniffed the exterior of the vehicle, and at the lift handle of the rear hatch door it alerted to the odor of illegal narcotics, which was indicated when the dog's body stance became erect, its nose pointed at the handle of the rear hatch door, its tail wagging increased, and its stance remained frozen. (*Id.*) Hyslop informed Holzer of the positive result and returned the dog to his patrol vehicle. (*Id.*)

Holzer radioed dispatch and requested that the dispatcher contact Montana Probation and Parole because he knew Herzog was on probation. (Doc. 2, Ex. D at 2.) Dispatch did so and reported back to Holzer that Montana Probation and Parole had authorized him to detain Herzog and to search her person and personal belongings. (*Id.*) Holzer relayed the request to Hyslop and asked him to have Herzog exit the vehicle to be searched. (*Id.*)

When Herzog got out, Hyslop saw a purse on the passenger-side floor where she had been seated. He asked Herzog if the purse belonged to her, and Herzog stated it did. (Doc. 2, Ex. A, p. 1.) Hyslop conducted a pat search of Herzog and located only a small pocketknife. (*Id.*) He then searched the purse and located a

snort tube, a melted pen container with a burnt tip that appeared to be a pipe, and a spoon. (*Id.*) Herzog volunteered that she did not realize the pipe was still in her purse and that she may or may not have used the snort tube once. (*Id.*) Hyslop informed Herzog that she was being detained and placed her in his patrol vehicle. (*Id.*)

While Hyslop was searching Herzog, Holzer called for a tow truck to come to his location. (Doc. 2, Ex. D at 2.) Pyles overheard Holzer's request for the tow truck and became very angry, stating that he just wanted the deputies to do an immediate search of the car because they would not find any drugs or other illegal items. (*Id.*) Holzer specifically asked Pyles if he had given permission to search; Pyles confirmed that he had, and Holzer informed Pyles that he could withdraw his permission at any point. (*Id.* at 1.) Hyslop then leaned inside the cabin from the passenger door and immediately observed a black case wedged down between the passenger seat and the center console. (*Id.*) He dislodged the case, opened it, and observed a glass pipe, a plastic container containing white residue, and a white container labeled as moisturizing cream, which he opened and observed inside a large crystal and some smaller crystals consistent with meth. (*Id.*) Subsequent testing of the crystals confirmed that they were meth. At this point, Holzer stopped the search, informing Hyslop that he would obtain a warrant before continuing. (*Id.*)

SUMMARY OF THE ARGUMENT

The district court correctly denied Herzog's motion to suppress evidence based on her theory that Holzer had no authority to approach the vehicle, in which she was a passenger, and which was parked off-road beyond a dirt turn-out, backed into trees and shrubs, late at night in rural Montana. Under these circumstances, it was appropriate for Holzer to check on the vehicle and any of its occupants. When he approached the vehicle and activated his grill lights to identify himself as law enforcement, Holzer had recognized the vehicle as the yellow Volkswagen with Oregon license plates.

Because the vehicle was parked, Holzer's activation of his patrol vehicle's grill lights did not constitute a traffic stop, and, in fact, the vehicle then began to drive away. When the parked vehicle started to drive away, Holzer instructed the driver to stop because he had reasonable suspicion that Pyles was the driver and knew that Pyles' driver's license was suspended.

Nearing the driver's window, Holzer immediately identified the driver as Pyles, whose license was suspended, and the passenger as Herzog, who was on probation for a felony drug offense. Holzer immediately smelled the overpowering odor of burnt meth coming from inside the vehicle. He also smelled the odor of a heavy cologne, which he knew drug users commonly spray to cover the odor of burnt drugs. Holzer observed that Pyles was visibly shaking and behaving

nervously. He observed Herzog repeatedly move and reach around her seat, and when he asked her to sit still, she would do so for a moment but then start moving and reaching again. Holzer also knew that NDTF had identified Herzog and Pyles as drug users, and that Herzog was on probation for a drug offense. Holzer believed the totality of his knowledge, observations, and inferences allowed him to expand the scope of the investigation to determine whether illegal drugs had been consumed and were in the vehicle and to request a deputy with a drug-sniffing dog to respond to the location.

The drug-detecting dog arrived, sniffed the exterior of the vehicle, and alerted to the presence of illegal drugs. Holzer requested that dispatch contact Montana Adult Probation and Parole. Dispatch did so and Adult Probation and Parole requested that Herzog be detained and her person and personal items be searched. Herzog admitted the purse in front of the passenger seat was hers, and when it was searched, the deputy found drug paraphernalia. Herzog was lawfully detained at the request of probation and parole.

Pyles told Holzer that officers could search the vehicle because he had nothing illegal inside it. Within moments of starting the search, Hyslop located a container wedged between the passenger seat and the center console. He opened the container, found crystals consistent with meth, which later tested positive as meth. Herzog has never challenged that the meth was hers.

ARGUMENT

I. Standard of review

The standard of review of a district court’s denial of a motion to suppress is whether the court’s findings of fact are clearly erroneous, and whether those findings were correctly applied as a matter of law. *State v. O’Howell*, 2024 MT 209, ¶ 16, 418 Mont. 121, 556 P.3d 534; *State v. Angeline*, 1998 MT 139, ¶ 10, 289 Mont. 222, 961 P.2d 1251. A finding is clearly erroneous if it is not supported by substantial credible evidence, if the lower court misapprehended the effect of the evidence, or if review of the record on appeal gives this Court a firm conviction that the trial court made a mistake. *O’Howell*, ¶ 16.

II. The district court correctly denied Herzog’s motion to suppress based on the substantial evidence that the State presented.

A. Controlling law

The Fourth Amendment to the United States Constitution and art. II, § 11, of the Montana Constitution protect persons from unreasonable searches and seizures, including brief investigatory stops such as traffic stops. *State v. Wilson*, 2018 MT 268, ¶ 25, 393 Mont. 238, 430 P.3d 77. The fundamental purpose of the Fourth Amendment and art. II, § 11, is “to protect the privacy and security of individuals” from unreasonable intrusion or interference by government agents such as law enforcement officers. *State v. Hoover*, 2017 MT 236, ¶ 14, 388 Mont. 533,

402 P.3d 1224 (quoting *State v. Clayton*, 2002 MT 67, ¶ 11, 309 Mont. 215, 45 P.3d 30).

To conduct a traffic stop, an officer must have particularized suspicion that an occupant of the vehicle “has committed, is committing, or is about to commit an offense.” Mont. Code Ann. § 46-5-401(1). Particularized suspicion for an investigative stop requires an officer to possess “(1) objective data and articulable facts from which he or she can make certain reasonable inferences; and (2) a resulting suspicion that the person to be stopped has committed, is committing, or is about to commit an offense.” *State v. Hoang Vinh Pham*, 2021 MT 270, ¶ 21, 406 Mont. 109, 497 P.3d 217 (citation omitted).

The Court considers the quantity, substance, quality, and degree of reliability of information known to and observed by the officer. *Hoang Vinh Pham*, ¶ 21. The existence of particularized suspicion is determined by looking at the totality of the circumstances, but the related question of whether the circumstances indicate illegal activity is a question of law. *Id.* This standard does not require that an officer be certain, or even correct, that a person is engaged in criminal activity. *Id.* However, particularized suspicion requires more than mere generalized suspicion or an undeveloped hunch of criminal activity. *Id.*

A traffic or investigative stop “may not last longer than is necessary to effectuate the purpose of the stop.” Mont. Code Ann. § 46-5-403. Law

enforcement personnel must exercise reasonable diligence to confirm or dispel the particularized suspicion, and any subsequent expansion in duration or scope must be based on new or additional particularized suspicion. *State v. Panasuk*, 2024 MT 113, ¶ 14, 416 Mont. 430, 549 P.3d 432. An investigative stop may be prolonged and the scope of the investigation enlarged if the totality of the facts and suspicions of the officer warrants additional time and investigation. *State v. Estes*, 2017 MT 226, ¶ 15, 388 Mont. 491, 403 P.3d 1249.

A drug-detecting dog sniff of a vehicle constitutes a search within the meaning of the Montana Constitution. *State v. McElroy*, 2024 MT 133, ¶ 13, 417 Mont. 68, 551 P.3d 282; *State v. Loberg*, 2024 MT 188, ¶ 10, 418 Mont. 38, 554 P.3d 698; *Estes*, ¶ 16. Officers may conduct a canine search without a warrant provided they have particularized suspicion of narcotics activity. *Id.* Therefore, an officer may prolong a traffic stop to conduct a canine search when the officer has a particularized suspicion of narcotics activity. *Id.*

B. Herzog’s arguments on appeal

Herzog argues on appeal that “the district court relied on clearly erroneous findings of fact when it denied her motion to suppress” in which she argued “that Detective Holzer lacked sufficient particularized suspicion of criminal activity to conduct an investigative *Terry* stop.” (Appellant’s Br. at 5.) Herzog asserts that

“the district court’s findings of fact are clearly erroneous because they are either conjecture, irrelevant, implausible, or infeasible.” (*Id.* at 16.) Herzog challenges individual components of the court’s findings and conclusions in isolation from other components instead of in their totality, and, as a result, her assertions do not accurately reflect the court’s findings and conclusions. A careful review of the findings and conclusions demonstrates that the district court fully considered and apprehended the totality of the evidence that the State presented, and based its decision on the totality of the circumstances.

C. The district court correctly concluded that Holzer possessed sufficient particularized suspicion to stop the vehicle when it started to drive away to determine if it was being driven by a person whose driver’s license Holzer knew was suspended.

Herzog does not dispute that Pyles’ driver’s license was suspended. She does not dispute that she and Pyles were in the same Volkswagen when it was stopped earlier in July by USBP and that they were both affirmatively identified at that time. She does not dispute that around 2:30 a.m., on July 18, 2022, a deputy observed a male driving the same Volkswagen from one gas station to another. She does not dispute that Holzer was aware of the foregoing facts prior to approaching the Volkswagen. And she does not dispute that, when Holzer first observed the Volkswagen and confirmed that it was the yellow Volkswagen with Oregon license plates, it was parked. It is only when Holzer exited his patrol vehicle to walk

toward the Volkswagen that it started to drive away and Holzer instructed the driver to stop.

The State presented substantial evidence to the court of each of the foregoing facts, and Herzog does not dispute those facts. The court correctly cited the evidence in its findings of fact, and the court correctly concluded that, when the parked vehicle started to drive away, Holzer suspected the driver was Pyles, knew that Pyles' license was suspended and that his driving would be a violation of the law, and had particularized suspicion to investigate. (App. 1.)

Herzog's dispute with this conclusion is that Holzer did not identify the driver before he told the driver to stop. (Appellant's Br. at 28-29.) As this Court has held, however, the particularized suspicion standard "does not require that an officer be certain, or even correct, that a person is engaged in criminal activity." *Wilson*, ¶ 28. Additionally, the totality of the circumstances can be made up of both objective data and circumstantial evidence to meet the particularized suspicion standard. *See State v. Thomas*, 2008 MT 206, ¶ 16, 344 Mont. 150, 186 P.3d 864 (totality of circumstances, made up of objective data and circumstantial evidence, support district court's determination that particularized suspicion existed).

The particularized suspicion standard requires that the law enforcement officer possesses "(1) objective data and articulable facts from which he or she can make certain reasonable inferences; and (2) a resulting suspicion that the person to

be stopped has committed, is committing, or is about to commit an offense.”

Howell, ¶ 21; *Hoang Vinh Pham*, ¶ 21. Holzer possessed objective data that Pyles’ license was suspended, that the Volkswagen had previously been occupied by Pyles and Herzog, and that deputies had observed a male driving the Volkswagen earlier that night. From this objective data and circumstantial evidence, a trained and experienced officer like Holzer could reasonably suspect Pyles was the driver when the Volkswagen started to drive away, and, because Pyles’ license was suspended, Holzer had particularized suspicion that the offense of driving while suspended was being committed.

D. The district court correctly concluded that Holzer’s objective observations and resulting inferences immediately upon contact with Herzog and Pyles justified expanding the investigation and conducting a dog-sniff search of the vehicle.

When evaluating the “reasonableness of the duration and scope of an investigative stop [the reviewing court] must recognize that the State’s compelling interest in ‘effective law enforcement’ demands that officers in the field have reasonable ‘latitude’ to reach, follow up on, and confirm or dispel initial suspicions of criminal activity.” *City of Missoula v. Kroschel*, 2018 MT 142, ¶ 13, 391 Mont. 457, 419 P.3d 1208 (citing *State v. Sharp*, 217 Mont. 40, 47, 702 P.2d 959, 963 (1985)); *State v. Nelson*, 2004 MT 310, ¶ 23, 323 Mont. 510, 101 P.3d 261 (“[W]hile law enforcement officers conducting an investigation or investigatory

stop should be guided by principles of reasonableness, ‘effective law enforcement requires some latitude to be given to investigating officers to react to and follow up on their observations.’”).

It is a “well-established rule that factual determinations,” such as whether or not an officer had particularized suspicion, “are within the purview of the trial courts.” *State v. Deines*, 2009 MT 179, ¶ 20, 351 Mont. 1, 208 P.3d 857.

Therefore, this Court generally defers to the trial court regarding the credibility of witnesses and the weight to be accorded their testimony. *State v. Lally*, 2008 MT 452, ¶ 24, 348 Mont. 59, 199 P.3d 818; *see also State v. Wagner*, 2013 MT 159, ¶ 15, 370 Mont. 381, 303 P.3d 285 (Court’s obligation on appeal is not “to reweigh conflicting evidence or to substitute [its] evaluation of the evidence for that of the trial court” as the trial court “had the benefit of observing the demeanor of witnesses and rendering a determination of the credibility of those witnesses”).

In its findings of fact, the district court specifically cited the evidence observed by Holzer that justified the expansion of the investigation: (1) Holzer observed that Pyles was extremely nervous and visibly shaking; (2) Holzer observed Herzog repeatedly moving around and reaching for things around her seat even though he repeatedly asked her to stop doing so; (3) Holzer immediately smelled an overpowering odor that he recognized as the odor of freshly smoked meth; (4) Holzer also smelled marijuana and heavy cologne, and he knew from his

training and experience that drug users often attempt to use cologne to mask the odor of dangerous drugs; (5) Holzer had personal knowledge from working with NDTF that it had identified Holzer and Pyles as known drug users; and (6) Holzer knew that Herzog was currently on felony probation for a drug offense. Based on these objective observations, inferences, and circumstantial evidence, the district court concluded that Holzer reasonably suspected that Pyles and/or Herzog had very recently smoked meth, a criminal offense.

Herzog argues the “district court found Holzer’s ‘ongoing drug investigation’ was sufficient to establish particularized suspicion to justify an investigative stop” (Appellant’s Br. at 19) and that the “district court determined that Holzer knew Pyles and Herzog ‘had dangerous drugs’ before the stop” (*id.* at 24). Contrary to Herzog’s assertions, however, the district court did not conclude that those two components by themselves established particularized suspicion. Instead, the district court properly considered the two components as part of the totality of the circumstances, which included inferences made by a trained and experienced detective, based on his objective observations (overpowering odor of burnt meth, Pyles’ nervous demeanor and physical shaking, and Herzog’s reaching around her seat after being repeatedly instructed to stop) and circumstantial evidence (Herzog’s status as a probationer due to a prior felony drug offense and

NDTF's ongoing investigations and identification of Pyles and Herzog as known drug users).

Herzog incorrectly argues that the circumstances in this case are analogous to those in *State v. Anderson*, 258 Mont. 510, 511, 515-16, 853 P.2d 1245, 1246, 1248-49 (1993) (Appellant's Br. at 19-24). In *Anderson*, officers received a tip from an informant that a blue Toyota pickup was making a round-trip from Libby to Washington to bring back a large amount of marijuana. Based solely on this tip, officers stopped the pickup. (*Id.*) The facts in this case are not analogous: the yellow Volkswagen was *not* pulled over by LCSO deputies who spotted it and tailed it, but, as Herzog points out in her statement of facts, could not affirmatively identify the male driver as Pyles, whose license was suspended, and did not observe any traffic offenses in order to pull over the Volkswagen. It was only upon heading back to Libby after 4 a.m. that Holzer's attention was drawn to a flash or strike of light, similar to a lighter, coming from the tree-line a short distance off the main highway in a rural area where there was no cellphone service.

Holzer, acting well within his discretion as a law enforcement officer to determine the source of the light, made a U-turn and proceeded off the highway into a dirt pullout and then off-road toward the trees and bushes where he had observed the light. In only moments, Holzer observed that the light had come from a parked vehicle and identified the parked vehicle as the yellow Volkswagen. To

identify himself as law enforcement, Holzer turned on the grill lights of his patrol vehicle but did not turn on the overhead emergency lights, shine a spotlight, turn on his siren, or use his loudspeaker. He could see two individuals in the car, and as he exited his patrol vehicle, the parked vehicle started to drive away, so he ordered the driver to stop. Within seconds, Holzer confirmed the driver was Pyles, whose license was suspended, and the passenger was Herzog, who was on felony probation and Holzer had been instructed by her probation officer to detain upon contact.

The district court concluded that the additional objective observations and inferences made by Holzer immediately upon making face-to-face contact with Pyles and Herzog constituted additional particularized suspicion to prolong the investigation and to call for a drug-detecting dog to conduct a sniff search. (App. 1, ¶¶ 4-6.) As established during the suppression hearing, at 4:19 a.m. Holzer radioed dispatch to request the LCSO deputy and drug-detecting dog be sent to his location to conduct a sniff search, and the deputy with the drug-detection dog arrived at 4:57 a.m. Given the rural location and it being late night/early morning hours, the additional amount of time it took to call for the drug-detecting dog and to then complete the sniff-search, approximately 40 minutes, was reasonable.

Under the totality of the circumstances presented, Holzer did not improperly prolong the stop. *State v. Laster*, 2021 MT 269, ¶ 14, 406 Mont. 60, 497 P.3d 224

("[B]ased on additional information developed during the lawful duration and scope of the initial stop, new or broader particularized suspicion of criminal activity may develop and thus expand the permissible duration and scope of the stop beyond its initial purpose.").

E. Law enforcement personnel lawfully detained and searched Herzog at the request of Montana Probation and Parole.

Montana Code Annotated § 46-23-1012(2) provides that a probation officer may conduct a warrantless arrest, or orally authorize another officer to conduct a warrantless arrest, of a probationer if the probation officer reasonably believes the probationer has violated a condition of probation. This Court has long held that a probationer remains subject to search at any time for reasonable cause at the request of her probation officer. *State v. Thomas*, 2008 MT 206, ¶ 11, 344 Mont. 150, 186 P.3d 864 (citing *State v. Burchett*, 277 Mont. 192, 195, 921 P.2d 854, 856 (1996)).

The district court in the instant case found that when the drug-detecting dog had alerted to illegal drugs, Holzer requested that dispatch contact Montana Probation and Parole because he knew Herzog was under their supervision. (App. 1, ¶ 10). Dispatch did so, and probation and parole directed LCSO to detain Herzog and to search her person and personal belongings. (*Id.*) The deputy located a snort tube during the search of Herzog's purse. (*Id.*) As directed by probation and

parole, Herzog and her purse were lawfully searched and she was detained at the direction of probation and parole. (*Id.*)

F. Pyles consented to the search of the vehicle.

The court correctly found, based on the evidence presented, that after Herzog was placed in the patrol vehicle, Holzer radioed for a tow truck to come to his location to seize the Volkswagen pending a search warrant. The request for a tow truck upset Pyles, who told Holzer to conduct an immediate search because he had nothing illegal in the car. (App. 1, ¶ 10.) Holzer asked Pyles to confirm that he was consenting to the search of the vehicle, and Pyles confirmed he was. Holzer further advised Pyles that he could withdraw consent at any point. Within seconds of the search beginning, Hyslop located a container of meth next to the passenger seat. (*Id.*) Holzer halted any further search in order to obtain a search warrant. (*Id.*) Herzog has never disavowed that she possessed the meth, and, by pleading guilty, she admitted that the meth was hers.

Based on the totality of the circumstances, the district court properly denied Herzog's suppression motion.

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CONCLUSION

The State requests the Court affirm the district court's denial of Herzog's motion to suppress.

Respectfully submitted this 13th day of March, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,145 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Carrie Garber
CARRIE GARBER

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0229

STATE OF MONTANA,

Plaintiff and Appellee,

v.

HALIE MARIA HERZOG,

Defendant and Appellant.

APPENDIX

Findings of Fact and Conclusions of Law and Order Denying Motion
to Suppress, filed January 3, 2023 (Doc. 42) Appendix 1

CERTIFICATE OF SERVICE

I, Carrie L. Garber, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-13-2025:

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