

**FILED**

February 16, 2023  
08:00:00 AM

CASE NUMBER: S-22-0282

**IN THE SUPREME COURT, STATE OF WYOMING**

JACKSON ELLIOTT TARZIA )

Appellant, )

v. )

THE STATE OF WYOMING, )

Appellee. )

No. S-22-0282

---

**BRIEF OF APPELLEE**

---

Bridget Hill #6-3616  
Wyoming Attorney General

Jenny L. Craig #6-3944  
Deputy Attorney General

Kristen R. Jones #7-5203  
Senior Assistant Attorney General

Donovan Burton #8-6698  
Assistant Attorney General  
Wyoming Attorney General's Office  
109 State Capitol  
Cheyenne, WY 82002  
(307) 777-7977

**ATTORNEYS FOR APPELLEE**

**TABLE OF CONTENTS**

TABLE OF CASES AND AUTHORITIES..... ii

STATEMENT OF JURISDICTION ..... 1

STATEMENT OF THE ISSUE ..... 2

STATEMENT OF THE CASE ..... 3

    I. Nature of the Case..... 3

    II. Facts Relevant to the Issue Presented for Review and Relevant Procedural  
        History..... 4

    III. Ruling Presented for Review ..... 6

ARGUMENT..... 8

    The district court properly denied Tarzia’s motion to suppress because a canine  
    sniff of the outside of a car is not a search. .... 8

        A. Standard of Review ..... 9

        B. Tarzia does not show that the Wyoming Constitution offers greater  
            protection than the Fourth Amendment with respect to canine sniffs..... 9

        C. The holdings of Fourth Amendment cases such as *Morgan* and *Caballes*  
            remain valid despite the legalization of hemp. .... 14

CONCLUSION ..... 20

CERTIFICATE REGARDING ELECTRONIC FILING..... 21

## TABLE OF CASES AND AUTHORITIES

Cases	Page No.
<i>C.Y. Wholesale, Inc. v. Holcomb</i> , 965 F.3d 541 (7th Cir. 2020) .....	18
<i>Dines v. Kelly</i> , Civil Action No. 2:22-CV-02248-KHV-GEB, 2022 WL 16762903 (D. Kan. Nov. 8, 2022) .....	17, 18
<i>Florida v. Jardines</i> , 569 U.S. 1 (2013).....	14, 15
<i>Hassler v. Circle C Res.</i> , 2022 WY 28, 505 P.3d 169 (Wyo. 2022) .....	14
<i>Illinois v. Caballes</i> , 543 U.S. 405 (2005).....	passim
<i>Kern v. State</i> , 2020 WY 60, 463 P.3d 158 (Wyo. 2020) .....	6, 9, 14, 15, 16
<i>Klomliam v. State</i> , 2014 WY 1, 315 P.3d 665 (Wyo. 2014) .....	10
<i>Kyllo v. United States</i> , 533 U.S. 27 (2001).....	14
<i>Levenson v. State</i> , 2022 WY 51, 508 P.3d 229 (Wyo. 2022) .....	10, 11
<i>McKenney v. State</i> , 2007 WY 129, 165 P.3d 96 (Wyo. 2007) .....	9
<i>Morgan v. State</i> , 2004 WY 95, 95 P.3d 802 (Wyo. 2004) .....	passim
<i>Moulton v. State</i> , 2006 WY 152, 148 P.3d 38 (Wyo. 2006) .....	9
<i>O’Boyle v. State</i> , 2005 WY 83, 117 P.3d 401 (Wyo. 2005) .....	10, 11

<b>Cases</b>	<b>Page No.</b>
<i>Owens v. State</i> , 317 So.3d 1218 (Fla. Dist. Ct. App. 2021) .....	18
<i>People v. McKnight</i> , 446 P.3d 397 (Colo. 2019) .....	13
<i>Pooley v. State</i> , 705 P.2d 1293 (Alaska Ct. App. 1985) .....	12
<i>Price v. State</i> , 716 P.2d 324 (Wyo. 1986) .....	1
<i>Pryce v. State</i> , 2020 WY 151, 477 P.3d 90 (Wyo. 2020) .....	6
<i>Saldana v. State</i> , 846 P.2d 604 (Wyo. 1993) .....	10, 11
<i>State v. Garcia</i> , 535 N.W.2d 124 (Wis. 1995) .....	15
<i>State v. McCarthy</i> , 501 P.3d 478 (Ore. 2021) .....	8
<i>State v. Pellicci</i> , 580 A.2d 710 (N.H. 1990) .....	12
<i>State v. Tackitt</i> , 67 P.3d 295 (Mont. 2003) .....	12
<i>State v. Walters</i> , 881 S.E.2d 730 (N.C. Ct. App. 2022) .....	18
<i>United States v. Bignon</i> , No. 18-CR-783 (JMF), 2019 WL 643177 (S.D.N.Y. Feb. 15, 2019) .....	18
<i>United States v. Clark</i> , No. 3:19-CR-64-PLR-HBG, 2019 WL 8016712 (E.D. Tenn. Oct. 23, 2019) .....	18, 19
<i>United States v. Harris</i> , No. 4:18-CR-57-FL-1, 2019 WL 6704996 (E.D.N.C. Dec. 9, 2019) .....	19
<i>United States v. Hayes</i> , No. 3:19-CR-73-TAV-HBG, 2020 WL 4034309 (E.D. Tenn. Feb. 21, 2020) .....	18

<b>Cases</b>	<b>Page No.</b>
<i>United States v. Morales-Zamora</i> , 914 F.2d 200 (10th Cir. 1990) .....	15, 16, 19
<i>United States v. Place</i> , 462 U.S. 696 (1983).....	14, 15
<i>Wallace v. State</i> , 2009 WY 152, 221 P.3d 967 (Wyo. 2009) .....	16
<i>Woods v. State</i> , 2017 WY 111, 401 P.3d 962 (Wyo. 2017) .....	8
 <b>Statutes</b>	
Wyo. Stat. Ann. § 11-51-101.....	16
Wyo. Stat. Ann. § 11-51-102.....	4, 16
Wyo. Stat. Ann. § 35-7-1014.....	13
 <b>Rules</b>	
Wyo. R. App. P. 2.01.....	1
 <b>Other Authorities</b>	
U.S. Const. amend. IV .....	passim
Wyo. Const. art. 1, § 4.....	passim
Wyo. Const. art. 5, § 2.....	1

## STATEMENT OF JURISDICTION

This appeal arises from a criminal conviction in the District Court for the Second Judicial District, Albany County, Wyoming. (R. at 167-69). The district court filed the judgment and sentence on August 24, 2022. (*Id.*). A judgment and sentence is a final, appealable order. *See Price v. State*, 716 P.2d 324, 327 (Wyo. 1986). As required by Rule 2.01 of the Wyoming Rules of Appellate Procedure, Jackson Elliott Tarzia timely filed his notice of appeal within thirty days of the order, on September 20, 2022. (R. at 171). Therefore, jurisdiction is vested in this Court under article 5, section 2 of the Wyoming Constitution.

## **STATEMENT OF THE ISSUE**

Did the district court err when it denied Tarzia's motion to suppress alleging that a canine sniff of the outside of his car was a "search" that required probable cause under article 1, section 4 of the Wyoming Constitution?

## STATEMENT OF THE CASE

### I. Nature of the Case

A police canine unit conducted a sniff of the outside of Tarzia's car and alerted to the presence of controlled substances. Law enforcement officers searched the car and discovered a large quantity of marijuana. Tarzia filed a motion to suppress the marijuana discovered in the search. After the district court denied his motion to suppress, Tarzia entered a conditional guilty plea.

Tarzia raises two issues on appeal. First, he argues that under article 1, section 4 of the Wyoming Constitution, a canine sniff is a search that must be justified by probable cause. Second, he argues that the district court erred when it denied his motion to suppress. For both issues, Tarzia claims that the legalization of hemp defeated the distinction between a canine sniff and a search, as stated in *Morgan v. State*, 2004 WY 95, 95 P.3d 802 (Wyo. 2004) and *Illinois v. Caballes*, 543 U.S. 405 (2005). The State will combine the issues. The State asserts that the result of this case is the same under both article 1, section 4 of the Wyoming Constitution and the Fourth Amendment to the United States Constitution. Tarzia's argument fails because he overlooks the primary holding of *Morgan* and *Caballes* and because Tarzia relies on the unproven factual premise that canines cannot distinguish marijuana from hemp. To resolve this issue, this Court should review the testimony presented at the suppression hearing, the district court's factual findings, and analyze cases such as *Morgan* and *Caballes* to determine whether a canine sniff of the outside of a car is a search.



## II. Facts Relevant to the Issue Presented for Review and Relevant Procedural History

On August 4, 2021, Wyoming Highway Patrol Trooper Brandon Deckert and his canine, Jager, were working “consensual encounter interdiction” at a truck stop. (Suppression Hr’g Tr. at 14-15, 18). Trooper Deckert observed a car at a gas pump. (*Id.* at 20). Trooper Deckert initiated conversation with the driver and passenger of the car, later identified as Tarzia and Keith Curtis. (*Id.* at 24, 26; R. at 5-6). During the conversation, Trooper Deckert developed reasonable suspicion that Tarzia and Curtis were trafficking marijuana. (Suppression Hr’g Tr. at 24-36). Trooper Deckert detained them pending a canine sniff. (*Id.* at 36-38). Jager sniffed the outside of the car and alerted to the presence of controlled substances. (*Id.* at 39). Trooper Deckert searched the car and discovered 150 pounds of marijuana. (*Id.* at 39-40). Trooper Deckert arrested Tarzia and Curtis. (R. at 8).

The State charged Tarzia with felony possession of marijuana and possession of marijuana with intent to deliver. (*Id.* at 3-4). Tarzia filed a motion to suppress evidence containing a nearly identical argument as his appellate brief. (*Compare id.* at 67-82 with Appellant’s Br. at 12-30). He claimed that, due to the legalization of hemp under Wyo. Stat. Ann. § 11-51-102(b), a canine sniff of the outside of a car is a “search” that requires justification by probable cause under article 1, section 4 of the Wyoming Constitution. (R. at 67-82). Relying on the fact that marijuana and hemp both come from the cannabis plant family, Tarzia claimed that a canine sniff detects legal hemp and therefore qualifies as a search. (*Id.*; Suppression Hr’g Tr. at 109-14).

The district court held a hearing on Tarzia's motion. (*See generally* Suppression Hr'g Tr.). Trooper Deckert testified that he has fifteen years of experience with Highway Patrol. (*Id.* at 13). He explained that Jager is a trained and certified narcotics detection canine. (*Id.* at 14-15). Jager is trained to detect cocaine, methamphetamine, heroin, and marijuana. (*Id.* at 15). Jager only alerts when he detects one of the substances that he is trained to detect. (*Id.* at 39). Jager is not trained to detect hemp. (*Id.* at 66). Trooper Deckert testified that, although marijuana and hemp come from the same plant family, they are not the same plant. (*Id.* at 65-66). He explained that the legal difference between marijuana and hemp is the "THC concentration" of the substances. (*Id.* at 66). Trooper Deckert testified that after Jager sniffed the outside of Tarzia's car, he alerted to the presence of controlled substances. (*Id.* at 38-39).

Tarzia called Robert Piper, an attorney from the firm representing Tarzia, to testify. (*Id.* at 92-100). Piper testified that, before becoming an attorney, he had twenty years of law enforcement experience, including experience as a canine handler. (*Id.* at 93-94). Although Piper was not qualified as an expert in chemistry, he explained that in his opinion, "a dog that is properly trained and certified on marijuana will also alert to hemp because the chemical composition is the same." (*Id.* at 96). At no point did Piper testify that he has personally observed a canine alert to hemp. (*See generally id.* at 92-100).

The district court denied Tarzia's motion to suppress. (R. at 120-51). Tarzia pleaded guilty to felony possession of marijuana and reserved his right to appeal the denial of his motion. (Change of Plea Hr'g Tr. at 11, 18, 29). The district court sentenced him to three

to five years of incarceration, suspended in favor of three years of unsupervised probation. (R. at 167-69). Tarzia filed this appeal. (*Id.* at 171).

### **III. Ruling Presented for Review**

In its order denying Tarzia’s motion to suppress, the district court made several factual findings that are pertinent to this appeal. (R. at 120-50). The court found (1) that Trooper Deckert’s testimony was credible, (2) that Jager was properly trained and reliable to alert on narcotics, and (3) that after sniffing the outside of Tarzia’s car, Jager specifically alerted to the odor of marijuana. (*Id.* at 137, 141).

Regarding Tarzia’s hemp argument, the district court recognized that “it may be true that raw hemp may smell identical to raw marijuana,” but the court was “not at all sure that this statement is, in fact, true.” (*Id.* at 137, 140 n.9). The court concluded that Tarzia did not establish that Jager is unable to differentiate between marijuana and hemp. (*Id.* at 137). The court stated “[i]t may be that [canine] Jager would alert to hemp and marijuana alike, though the [c]ourt is unclear as to this premise.” (*Id.*). The court did not specifically reference Piper’s testimony or make any findings regarding his testimony. (*See generally id.* at 120-50).

The district court analyzed Tarzia’s argument concerning whether a canine sniff is a search under both the Fourth Amendment and article 1, section 4. (*Id.* at 133-50). For the Fourth Amendment, the court concluded that law enforcement officers do not need probable cause to conduct a canine sniff of the outside of a car because a canine sniff is not a search. (*Id.* at 133-35) (citing *Kern v. State*, 2020 WY 60, ¶¶ 9-10, 463 P.3d 158, 161-62 (Wyo. 2020) and *Pryce v. State*, 2020 WY 151, ¶ 35, 477 P.3d 90, 98 (Wyo. 2020)). The

court determined that Trooper Deckert properly deployed Jager to sniff Tarzia's car and that Jager's alert provided probable cause to search the car. (*Id.* at 136).

The district court also addressed Tarzia's canine sniff argument under the Wyoming Constitution. (*Id.* at 141-46). The court noted that, although Tarzia analyzed this issue under the Wyoming Constitution, his primary argument was that other states have found canine sniffs to be searches under their state constitutions. (*Id.* at 144-45). The court recognized that this Court "addressed this identical argument" in a previous case. (*Id.* at 145) (citing *Morgan*, ¶¶ 19-21, 95 P.3d at 808). The district court concluded that Tarzia's reliance on out-of-state cases is "insufficient to warrant an independent" analysis under the Wyoming Constitution. (*Id.* at 146). Ultimately, the court found that no violation of Tarzia's constitutional rights occurred and denied his motion to suppress. (*Id.* at 150).

## ARGUMENT

### **The district court properly denied Tarzia’s motion to suppress because a canine sniff of the outside of a car is not a search.**

Tarzia claims that the district court erred when it denied his motion to suppress because a canine sniff of the outside of a car is a “search” under article 1, section 4 of the Wyoming Constitution that must be justified by probable cause. (Appellant’s Br. at 11-30). Although Tarzia performs an analysis specific to the Wyoming Constitution, he essentially argues that the logic behind Fourth Amendment canine sniff cases no longer applies due to the legalization of hemp. (*Id.* at 23-29). Tarzia’s argument fails under both article 1, section 4 and the Fourth Amendment because he did not have a reasonable expectation of privacy in the odors emanating from his car into the public airspace. Further, despite his bald claims to the contrary, Tarzia cannot establish that Jager or any trained canine would actually alert to the presence of hemp when no other controlled substances are present.

Although Tarzia does not raise this issue, he makes two statements concerning the validity of the automobile exception to the warrant requirement under article 1, section 4 in the absence of exigent circumstances. (*Id.* at 27, 30). He bases his claim on an Oregon case that he cites “in its entirety” without providing any analysis. (*Id.*) (citing *State v. McCarthy*, 501 P.3d 478 (Ore. 2021)). This Court should not consider this issue because Tarzia does not present cogent argument, nor does he properly frame the issue as required by this Court’s precedent. *See Woods v. State*, 2017 WY 111, ¶ 24, 401 P.3d 962, 971 (Wyo. 2017) (holding that this Court will not consider issues that are not properly framed and supported by cogent argument). Further, Tarzia fails to address the fact that this Court

has already held that a warrantless search of an automobile based on probable cause is proper under article 1, section 4. *Moulton v. State*, 2006 WY 152, ¶ 16, 148 P.3d 38, 43 (Wyo. 2006). If law enforcement has probable cause to search an automobile, “[n]o further exigent circumstances are required.” *McKenney v. State*, 2007 WY 129, ¶ 12, 165 P.3d 96, 99 (Wyo. 2007). The State will not address this argument any further.

**A. Standard of Review**

When reviewing a district court’s order denying a motion to suppress, this Court accepts the district court’s findings of fact unless those findings are clearly erroneous. *Kern*, ¶ 6, 463 P.3d at 160. This Court views “the evidence in the light most favorable to the district court’s decision because the court conducted the hearing and had the opportunity to assess the witnesses’ credibility, weigh the evidence and make the necessary inferences, deductions and conclusions.” *Id.* (citation and internal quotation marks omitted). “Where the district court did not make specific findings of fact on issues before it, this Court will uphold the general ruling of the district court if it is supported by any reasonable view of the evidence.” *Id.* The ultimate question of whether a constitutional violation occurred is a question of law that this Court reviews de novo. *Id.*

**B. Tarzia does not show that the Wyoming Constitution offers greater protection than the Fourth Amendment with respect to canine sniffs.**

Tarzia argues that, under article 1, section 4, a canine sniff of the outside of a car is a search that requires probable cause. (Appellant’s Br. at 11-24). He raises this issue under the Wyoming Constitution because it is well settled that a canine sniff of a car is not a search under the Fourth Amendment. *Morgan*, ¶ 18, 95 P.3d at 807; *Caballes*, 543 U.S. at

409. Although this Court recognizes that article 1, section 4 of the Wyoming Constitution may provide stronger protection than the Fourth Amendment, this Court will only consider the issue when the appellant uses “a precise and analytically sound approach” designed “to ensure the future growth of this important area of law.” *Morgan*, ¶ 20, 95 P.3d at 808 (citation omitted). This Court has suggested six factors, often referred to as the *Saldana* factors, that an appellant may analyze when arguing that the Wyoming Constitution provides stronger protection than the federal constitution: “1) the textual language of the provisions; 2) differences in the texts; 3) constitutional history; 4) preexisting state law; 5) structural differences; and 6) matters of particular state or local concern.” *O’Boyle v. State*, 2005 WY 83, ¶ 24, 117 P.3d 401, 408 (Wyo. 2005) (citing *Saldana v. State*, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring)).

Under the Fourth Amendment, the question is whether a search or seizure is “reasonable under the totality of the circumstances.” *Levenson v. State*, 2022 WY 51, ¶ 18 n.3, 508 P.3d 229, 235 n.3 (Wyo. 2022) (citation omitted). Under article 1, section 4, the question is whether the search or seizure was “reasonable under all the circumstances.” *Id.* (citation omitted). Almost twenty years ago, this Court said it was open to the question of whether article 1, section 4 “provides greater protection from warrantless canine sniffs than the Fourth Amendment.” *Morgan*, ¶ 20, 95 P.3d at 808. However, in many cases since *Morgan*, this Court has applied the *Saldana* factors in search and seizure cases. See *Klomliam v. State*, 2014 WY 1, ¶ 17, n.1, 315 P.3d 665, 669, n.1 (Wyo. 2014) (citing cases which apply *Saldana* to search and seizure claims). Most of the *Saldana* factors are “of little assistance in analyzing claims brought specifically under [the] search and seizure

provision.” *O’Boyle*, ¶ 24, 117 P.3d at 409. Ultimately, this Court has concluded that there is no significant difference between the state and federal analysis because under either constitutional framework this Court considers “the reasonableness of the government intrusion in light of all the circumstances.” *Levenson*, ¶ 18 n.3, 508 P.3d at 235 n.3.

In his brief, Tarzia repeats this Court’s analysis of the *Saldana* factors from prior cases and concludes that, under article 1, section 4, law enforcement officers must act “reasonably under all of the circumstances.” (Appellant’s Br. at 11-19). The State agrees that law enforcement must act reasonably. *Levenson*, ¶ 18 n.3, 508 P.3d at 235 n.3. However, Tarzia then leaps to the conclusion that article 1, section 4 requires that law enforcement obtain probable cause before conducting a canine sniff of the outside of a car. (Appellant’s Br. at 19). He fails to explain why the Wyoming Constitution or the facts of his case render the canine sniff of his car unreasonable under the circumstances. (*See generally id.*). His analysis suffers from two fatal flaws.

First, Tarzia’s attempt at a *Saldana* analysis does nothing to “ensure the future growth of this important area of law.” *Morgan*, ¶ 20, 95 P.3d at 808 (citation omitted). He merely repeats what this Court has already said about the *Saldana* factors in search and seizure cases without adding anything to the analysis. (*See* Appellant’s Br. at 11-20). Further, he ignores this Court’s conclusion that the analysis is the same for both article 1, section 4 and the Fourth Amendment. *See e.g. Levenson*, ¶ 18 n.3, 508 P.3d at 235 n.3.

Instead of developing his state constitutional analysis, Tarzia supports his argument with the fact that some other states have found canine sniffs to be searches under their state constitutions. (Appellant’s Br. at 20-23). This Court has already rejected this argument



regarding other states' approach to canine sniffs. *Morgan*, ¶ 19, 95 P.3d at 808 (citing same out-of-state cases as Tarzia's brief). In *Morgan*, this Court concluded that relying on out-of-state cases is insufficient to develop an independent analysis under the Wyoming Constitution. *Id.*, ¶ 21, 95 P.3d at 808. The district court reached the same conclusion when analyzing Tarzia's motion to suppress. (R. at 146).

Additionally, as the district court recognized, the out-of-state cases cited by Tarzia do not support his position that canine sniffs must be justified by probable cause. (Appellant's Br. at 20-23; R. at 144-45). For example, he cites the Montana case of *State v. Tackitt* and the Alaska case of *Pooley v. State*. (Appellant's Br. at 20-23) (citing *State v. Tackitt*, 67 P.3d 295, 302 (Mont. 2003) and *Pooley v. State*, 705 P.2d 1239, 1309 (Alaska Ct. App. 1985)). In those cases, the courts held that law enforcement must have reasonable suspicion, not probable cause, before conducting a canine sniff under the state constitution. *Tackitt*, 67 P.3d at 302; *Pooley*, 705 P.2d at 1309-10. Tarzia also cites *State v. Pellicci* for the proposition that the New Hampshire Constitution requires that law enforcement obtain probable cause before conducting a canine sniff. (Appellant's Br. at 21) (citing *State v. Pellicci*, 580 A.2d 710, 715-17 (N.H. 1990)). But Tarzia misinterprets *Pellicci*. In that case, the court held that, under the state constitution, law enforcement needs reasonable suspicion for a canine sniff, not probable cause. *Pellicci*, 580 A.2d at 717.

Although Tarzia never directly challenged whether Trooper Deckert formed reasonable suspicion, the district court analyzed the issue and concluded that Trooper Deckert had reasonable suspicion before requesting the canine sniff. (R. at 129-30). Tarzia does not challenge this conclusion on appeal. (*See generally* Appellant's Br.). Thus, as the

district court concluded, even if the Wyoming Constitution included the higher reasonable suspicion standard for canine sniffs, that standard was met in Tarzia's case. (R. at 146).

Further, Tarzia relies on an improper comparison between Wyoming's legalization of hemp and Colorado's legalization of marijuana. (Appellant's Br. at 22-23) (citing *People v. McKnight*, 446 P.3d 397, 408 (Colo. 2019)). In *McKnight*, the Colorado Supreme Court held that, because of a state constitutional amendment legalizing marijuana, a canine sniff that can detect marijuana is a search under the state constitution. *McKnight*, 446 P.3d at 408, 414. *McKnight's* logic does not apply in Wyoming. *McKnight* relied wholly on the legalization of marijuana and said nothing concerning hemp. *See generally id.* Marijuana is not protected under the Wyoming Constitution—in fact, marijuana remains illegal in Wyoming. Wyo. Stat. Ann. § 35-7-1014(d)(xiii). Thus, like his reliance on the other out-of-state cases, Tarzia's reliance on *McKnight* does nothing to advance the interpretation of the Wyoming Constitution.

Tarzia's state constitutional analysis also fails because, instead of arguing based on the Wyoming Constitution, Tarzia is really asking this Court to find that the logic of Fourth Amendment canine sniff cases no longer applies due to the legalization of hemp. (Appellant's Br. at 23-24, 28-29). This Court should not allow him to challenge Fourth Amendment case law under the guise of a state constitutional analysis. Instead, this Court should analyze Tarzia's argument under the Fourth Amendment to determine whether the legalization of hemp undermines the logic of *Morgan* and *Caballes*.

**C. The holdings of Fourth Amendment cases such as *Morgan* and *Caballes* remain valid despite the legalization of hemp.**

Tarzia claims that a canine sniff of the outside of a car is a search that must be justified by probable cause. (Appellant’s Br. at 11-24). “[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.” *Kyllo v. United States*, 533 U.S. 27, 33 (2001). This Court and the United States Supreme Court have long held that canine sniffs of the outside of a car are not searches because they do not implicate a person’s reasonable expectation of privacy. *Morgan*, ¶ 18, 95 P.3d at 807; *Caballes*, 543 U.S. at 409. Here, Tarzia’s argument that canine sniffs are searches is contrary to the precedent from *Morgan* and *Caballes*. This Court does not depart from precedential case law unless the precedent is “no longer workable, or [is] poorly reasoned.” *Hassler v. Circle C Res.*, 2022 WY 28, ¶ 19, 505 P.3d 169, 175 (Wyo. 2022) (citation omitted). Tarzia has not made either showing in this case.

Two justifications support the rule that canine sniffs of the outside of a car are not searches. First, a canine sniff is “much less intrusive than a typical search.” *United States v. Place*, 462 U.S. 696, 707 (1983). A canine sniff of the outside of a car does not involve opening or rummaging through personal belongings. *Id.*; *Morgan*, ¶ 12, 95 P.3d at 806. Unlike a house, individuals already have a reduced expectation of privacy in their cars. *Morgan*, ¶ 18, 95 P.3d at 807; *cf. Florida v. Jardines*, 569 U.S. 1, 11 (2013) (holding canine sniff outside a house is a search because police physically intrude upon the house). An individual does not have a reasonable expectation of privacy in any odor emanating from his or her car when that odor is detectable from the public airspace. *Kern*, ¶ 10, 463

P.3d at 162 (citing *State v. Garcia*, 535 N.W.2d 124 (Wis. 1995)); *United States v. Morales-Zamora*, 914 F.2d 200, 205 (10th Cir. 1990).

Second, “the information obtained [from a canine sniff] is limited.” *Place*, 462 U.S. at 707. A canine sniff “discloses only the presence or absence of narcotics, a contraband item” that citizens do not have any legitimate privacy interest in possessing. *Caballes*, 543 U.S. at 409. Because a canine sniff of the outside of a car is not a search, “law enforcement does not need probable cause, reasonable suspicion, or consent to run a trained drug dog around vehicles[.]” *Kern*, ¶ 10, 463 P.3d at 161.

Tarzia bases his entire argument on the possibility that a canine can alert to the presence of legal hemp. (Appellant’s Br. at 23-30). However, he completely ignores the primary reason why canine sniffs of the outside of a car are not searches—canine sniffs do not intrude upon a legitimate expectation of privacy. *Caballes*, 543 U.S. at 409; *Morgan*, ¶ 12, 95 P.3d at 806. In this case, Jager’s sniff of the outside of Tarzia’s car did not subject Tarzia “to the embarrassment and inconvenience” that distinguishes a canine sniff from a search. *Place*, 462 U.S. at 707. Jager did not intrude upon the physical boundaries of the car nor did he rummage through the contents of the car. *Cf. Jardines*, 569 U.S. at 11 (recognizing that the Fourth Amendment protects from physical intrusions into a protected area). Instead, Jager stayed outside of Tarzia’s car and detected odors emanating from the car into the public airspace. (Suppression Hr’g Tr. at 38-39). Tarzia already had a reduced expectation of privacy in the contents of his car, which was parked at a gas station. *Morgan*, ¶ 18, 95 P.3d at 807. Tarzia simply did not have a legitimate expectation of privacy in the

odors detectable from outside of his car regardless of whether the substance producing the odor is legal or illegal. *Kern*, ¶ 10, 463 P.3d at 162; *Morales-Zamora*, 914 F.2d at 205.

Tarzia bases his entire argument on his claim that the second justification from *Morgan* and *Caballes* no longer applies because hemp is now legal in Wyoming. (Appellant's Br. at 23-24, 28-29); see Wyo. Stat. Ann. § 11-51-102 (legalizing possession of hemp). Tarzia claims that prior cases holding that canine sniffs are not searches such as *Caballes* and *Wallace* "rel[ied] upon the illegal nature of both hemp and marijuana." (Appellant's Br. at 28-29) (citing *Caballes*, 543 U.S. at 409 and *Wallace v. State*, 2009 WY 152, ¶ 15, 221 P.3d 967, 970-71 (Wyo. 2009)). Tarzia misstates the holding of both cases. Neither *Caballes* nor *Wallace* discussed hemp in any way, let alone relied on its illegality. See generally *Caballes*, 543 U.S. at 405-10; *Wallace*, ¶¶ 1-19, 221 P.3d at 967-71.

The State recognizes that both hemp and marijuana belong to the cannabis plant family and are legally distinguished by the "THC concentration" of the plants. Wyo. Stat. Ann. § 11-51-101. However, Tarzia uses this fact alone to jump to the conclusion that "there is no way" for a trained canine "to distinguish hemp from marijuana." (Appellant's Br. at 24, 28). He cites to no precedential case law or scientific literature to support what he claims is a fact. (See generally *id.*). The only source in the record to establish whether trained canines can distinguish legal hemp from marijuana is the testimony of Piper, an attorney with prior experience as a police canine handler. (*Id.* at 26). Piper thinks a canine would alert to hemp. (Suppression Hr'g Tr. at 96). But he did not present any scientific research or personal experience with hemp to support his opinion. (See generally *id.*). The

district court seems to have recognized the lack of foundation behind Piper’s opinion and did not rely on or even mention Piper’s testimony in its findings of fact. (R. at 120-50).

Instead, the district court found Trooper Deckert’s testimony credible and relied on that testimony to conclude that Jager provided a “trained and reliable alert to the controlled substances” in Tarzia’s car. (*Id.* at 137, 150). Specifically, Trooper Deckert testified that Jager only alerts on odors that he is trained to detect, which do not include hemp. (Suppression Hr’g Tr. at 38, 65-66). Trooper Deckert also explained that marijuana and hemp are not the same plant. (*Id.* at 65-66). This testimony is supported by at least one federal court, which recognized that “[h]emp and marijuana are distinct plants” with different chemical compositions and cultivation methods. *Dines v. Kelly*, Civil Action No. 2:22-CV-02248-KHV-GEB, 2022 WL 16762903, at \*1 (D. Kan. Nov. 8, 2022). Moreover, the search of Tarzia’s car revealed that Jager accurately alerted. (Suppression Hr’g Tr. at 39). Trooper Deckert found 150 pounds of marijuana in the car, not hemp. (*Id.* at 39-40).

Based on the facts before it, the district court concluded that “it **may** be true that raw hemp may smell identical to raw marijuana” but the court was “not at all sure that this statement is, in fact, true.” (R. at 140 n.9). Thus, despite his opportunity to develop facts surrounding the smell of hemp, Tarzia failed to prove that “Jager would alert to hemp and marijuana alike.” (*Id.* at 137). This Court should accept the district court’s factual finding because Tarzia presents nothing to show that the court’s finding of fact was clearly erroneous. Accordingly, the second justification from *Morgan* and *Caballes* still applies—a canine sniff is not a search because it only detects the presence of controlled substances.

Even if this Court looks beyond the record, the State is unable to locate any conclusive law or reliable research to support the contention that a trained canine cannot distinguish hemp from marijuana. Tarzia cites to two civil cases, *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541, 546 (7th Cir. 2020) and *Dines*, 2022 WL 16762903, at \*1, to support his argument that canines are unable to distinguish marijuana from hemp. (Appellant’s Br. at 24). However, neither case is relevant. *C.Y. Wholesale* contains dicta suggesting that “law enforcement officers find it nearly impossible to distinguish between low-THC smokable hemp and marijuana in the field.” *C.Y. Wholesale*, 965 F.3d at 544. The case says nothing about whether properly trained canines can distinguish between the two substances. *See generally id.* *Dines* discusses the history of hemp legalization and the key differences between marijuana and hemp but also says nothing about whether canines can differentiate between the substances. *See generally Dines*, 2022 WL 16762903.

In fact, as the district court recognized, many courts in other jurisdictions have rejected similar arguments despite recognizing difficulties in distinguishing hemp from marijuana. (R. at 140). Some courts have recently held that *Caballes* and other Fourth Amendment precedent still applies despite the legalization of hemp. *State v. Walters*, 881 S.E.2d 730, 739 (N.C. Ct. App. 2022); *Owens v. State*, 317 So.3d 1218, 1220 (Fla. Dist. Ct. App. 2021). Other courts have declined to take judicial notice that hemp and marijuana smell the same and continue to rely on testimony that law enforcement officers smelled marijuana. *United States v. Hayes*, No. 3:19-CR-73-TAV-HBG, 2020 WL 4034309, at \*20 (E.D. Tenn. Feb. 21, 2020); *United States v. Bignon*, No. 18-CR-783 (JMF), 2019 WL 643177, at \*2 (S.D.N.Y. Feb. 15, 2019); *United States v. Clark*, No. 3:19-CR-64-PLR-

HBG, 2019 WL 8016712, at \*5 (E.D. Tenn. Oct. 23, 2019); *United States v. Harris*, No. 4:18-CR-57-FL-1, 2019 WL 6704996, at \*3 (E.D.N.C. Dec. 9, 2019).

Tarzia asks this Court to find that the legalization of hemp negates the premise behind the long held conclusion that canine sniffs are not searches. (Appellant's Br. at 23-30). Like he did before the district court, Tarzia presents this Court with nothing more than conjecture and conclusory opinions to argue that narcotics detecting canines cannot differentiate between marijuana and hemp. (*Id.*). This is an issue of fact that Tarzia has failed to prove. Further, he ignores the fact he had no legitimate expectation of privacy in the odors emanating from his car into the public airspace regardless of the legality of the substance producing the odor. *Morales-Zamora*, 914 F.2d at 205. Thus, this Court should not deviate from *Morgan* and *Caballes* and instead should reaffirm its conclusion that a canine sniff of the outside of a car is not a search under either the Fourth Amendment or article 1, section 4. The district court did not err when it denied Tarzia's motion because Trooper Deckert did not violate Tarzia's constitutional rights.



## CONCLUSION

For the foregoing reasons, the State of Wyoming respectfully requests that this Court affirm the district court's order denying Tarzia's motion to suppress in all respects.

DATED this 16th day of February 2023.

/s/Bridget Hill

Bridget Hill #6-3616  
Wyoming Attorney General

/s/Jenny L. Craig

Jenny L. Craig #6-3944  
Deputy Attorney General

/s/Kristen R. Jones

Kristen R. Jones #7-5203  
Senior Assistant Attorney General

/s/Donovan Burton

Donovan Burton #8-6698  
Assistant Attorney General  
Wyoming Attorney General's Office  
109 State Capitol  
Cheyenne, WY 82002  
Telephone: (307) 777-7977  
donovan.burton1@wyo.gov

Attorneys for Appellee

## CERTIFICATE REGARDING ELECTRONIC FILING

I, Donovan Burton, hereby certify that the foregoing BRIEF OF APPELLEE was served electronically via the Wyoming Supreme Court C-Track Electronic Filing System, this 16th day of February 2023, on the following party:

H. Michael Bennett  
Corthell and King Law Office, P.C.  
PO Box 1147  
Laramie, WY 82073

The undersigned also certifies that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in digital form or scanned .pdf is an exact copy of the written document filed with the Clerk, and that the document has been scanned for viruses and is free of viruses.

/s/Donovan Burton  
Wyoming Attorney General's Office