IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

CALYX E. HARRELL
First Lieutenant (O-2), USAF
Appellant.

Crim. App. No. 38538
USCA Dkt. No. 16-0007/AF

BRIEF OF BEHALF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v.	)	**BRIEF ON BEHALF OF APPELLANT**
	)	USCA Dkt. No. 16-0007/AF
First Lieutenant (O-2) **CALYX E. HARRELL,** USAF, *Appellant.*	)	Crim. App. No. 38538

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER EVIDENCE OBTAINED FROM A POLICE SEARCH OF APPELLANT'S VEHICLE ON OR ABOUT AUGUST 4, 2010, WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT AND SHOULD HAVE BEEN SUPPRESSED.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2006). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

On 22 March 2013, and between 17 and 19 June 2013, and between 4 and 6 November 2013, Appellant was tried by a general court-martial convened by HQ 18th AF (AMC) composed of officer members at Scott AFB, IL. In accordance with her pleas, Appellant was found guilty of one charge and specification of wrongful use of marijuana. J.A. 152. Appellant also entered

conditional pleas of guilty pursuant to Rule for Courts-Martial (R.C.M.) 910(a)(2)(J.A. 145-146), and was found guilty of one specification alleging wrongful possession of some amount of marijuana in violation of Article 112a, Uniform Code of Military Justice (UCMJ), and possession of drug paraphernalia (glass pipes), in violation of Article 133, UCMJ. J.A. 152. Appellant's conditional pleas reserved the right to further appeal the denial of the defense motions to suppress evidence seized in connection with the related traffic stop in Solon, Ohio. J.A. 149-150. All remaining charges and specifications were withdrawn and dismissed after arraignment pursuant to the terms of a pretrial agreement.

Appellant was sentenced to total forfeitures, confinement for 198 days, and a dismissal. J.A. 163. On 18 February 2014, the convening authority approved the sentence as adjudged, and except for the dismissal ordered it executed.

This matter was previously before the AFCCA, which granted in part Appellant's Petition for Extraordinary Relief because the military judge refused to consider Appellant's request for judicial review of the propriety of her continued pretrial confinement. J.A. 164-167. Appellant spent 198 days in pretrial confinement. J.A. 153.

On 1 July 2015, AFCCA affirmed the findings and affirmed the sentence. J.A. 17. Appellant filed a timely petition for

grant of review on September 4, 2015. *United States v. Harrell*, __ M.J. __, No. 16-0007/AF (C.A.A.F. Sep. 4, 2015). This Court granted Appellant's petition for review on November 5, 2015. *United States v. Harrell*, __ M.J. __, NO. 16-0007/AF (C.A.A.F. Nov. 5, 2015).

Statement of Facts

At approximately 0026 hours on 4 August 2012, Patrolman Soltis of the Solon Police Department initiated a traffic stop of a vehicle driven by the appellant on U.S. Highway 422 near Solon, Ohio. J.A. 155-156. The sole reason for the stop was suspected speeding. *Id.* 1st Lt Harrell immediately brought her vehicle to a controlled stop on the side of the highway. *Id.*

Patrolman Soltis exited his vehicle and approached the passenger side of the rental car being driven by Appellant. J.A. 156. Patrolman Soltis was the only officer present at the stop at this time and asked 1st Lt Harrell through the passenger window, "Where are you going so fast?" *Id.* He also asked her where she was coming from, where she was headed, and how fast she thought she was traveling. *Id.* Appellant told the officer she was headed to Nelson Ledges, a campground located near where she was pulled over. *Id.* Appellant provided her driver's license to the officer. *Id*.

Almost exactly two minutes after first exiting his patrol car, Patrolman Soltis told Appellant, "Sit tight. I'll be right

back" and returned to his vehicle. J.A. 83. Upon returning to his patrol car, Patrolman Soltis immediately requested Patrolman Troyer to respond with his K-9 Stryker. J.A. 62.

Patrolman Soltis did not smell marijuana smoke prior to conducting the search of the interior of the vehicle. J.A. 73. Despite his claim that he believed her to be "under the influence of something," Patrolman Soltis did not conduct any field sobriety tests or request that Appellant submit to any test of her breath or blood. J.A. 62, 66. Appellant was never cited for or charged with any impaired driving offense. J.A. 162.

About two minutes later, Appellant exited the vehicle to smoke a cigarette and provided the officer additional information regarding the vehicle's insurance, since it was a rental. J.A. 51. While he was waiting for Patrolman Troyer to arrive, Patrolman Soltis approached Appellant and asked her if she had any illegal drugs in her vehicle. J.A. 79. Appellant indicated that she had legal prescription medication in the vehicle. *Id*. She also informed Patrolman Soltis that she was in the U.S. Air Force and showed him her military identification card. J.A. 80.

Patrolman Soltis told Appellant that the police were going to bring drug detection dogs to search the vehicle. J.A. 81.

When Appellant asked him why, Patrolman Soltis responded as follows:

> Patrolman Soltis: Well, we're stopping you for speeding. So, I'm still trying to figure out if I'm going to give you a ticket for going 20 miles over the speed limit or not, and you fit the profile and everything else matches for drug carrier.
>
> Appellant: Why do I . . .?
>
> Patrolman Soltis: For on this street, and where you're going and where you're coming from and all that stuff is indicators . . . doesn't say bad person, doesn't say you're a drug dealer, drug user . . . I'm just asking certain questions.
>
> *Id.*

According to the Solon Police Department Call Sheet, Patrolman Troyer arrived at 0032 hours and performed a K-9 dog sniff of Appellant's vehicle. J.A. 201-202. During the search by the drug detection dog, the windows to the vehicle were open. J.A. 122. As captured by police video and admitted in his testimony on the defense motion to suppress, Patrolman Troyer allowed the dog to rise up "on his own" and place his forepaws and head inside the vehicle. App. Ex. XLVI – included in an envelope attached to the J.A. A police video of the traffic stop marked as Appellate Exhibit XLVI shows the drug detection dog putting his forepaws onto the windowsill of the driver's side door and putting his two front paws, face and snout through the open window and into the interior of the vehicle at time count 00:35:16. The video is capable of being advanced frame by

frame, which provides a definitive view of the police dog's intrusion into the interior of the vehicle. Immediately thereafter, the dog allegedly "alerted" at the driver's side door of the vehicle by sitting down and staring at the door.

Based upon the positive alert of the dog, Patrolman Soltis then searched the vehicle. J.A. 54. He did not request or obtain a search warrant or Appellant's consent. J.A. 65. Upon searching the front passenger seat, Patrolman Soltis found a Camel Back drinking system. J.A. 159. Inside the Camel Back was a gray bag containing approximately 1.8 grams of suspected marijuana, a multi-colored glass smoking pipe with suspected marijuana burnt residue and a black glass smoking pipe with suspected marijuana residue. J.A. 147.

As a result of the search, Appellant was placed under arrest and transported to the Solon City Jail. J.A. 160. Upon arriving at the jail, Appellant was requested to provide any additional narcotics that she had on her person. *Id.* Appellant removed a glass bottle containing approximately 5.9 grams of suspected marijuana and a plastic baggie containing approximately 3.7 grams of suspected marijuana from her clothing. J.A. 148.

Appellant was released from Solon City Jail at or near 1000 hours on 5 August 2012. She was charged with three misdemeanor offenses under the Ohio criminal code. J.A. 184-190.

Subsequently, the Air Force received jurisdiction of these alleged offenses. Specification 2 of Charge II alleged that Appellant possessed some amount of marijuana on or about 4 August 2012 in violation of Article 112a, UCMJ. Charge Sheet. Specification 1 of Charge III alleged that Appellant possessed drug paraphernalia (glass pipes) on or about 4 August 2012 in violation of Article 133, UCMJ. *Id.*

Additional facts are included in the arguments below.

Summary of Argument

Videotape evidence established that a warrantless search of the interior of the Appellant's vehicle occurred when a police drug detection dog put his forepaws onto the windowsill of the driver's side door and put his two front paws, face and snout through the open window and into the interior of the vehicle. This physical intrusion into Appellant's constitutionally protected property occurred prior to the dog "alerting" on the driver's side door, and thus prior to any time the officers' could have had probable cause to search Appellant's automobile. Because this was a warrantless search of an automobile unsupported by probable cause, it was unreasonable under the Fourth Amendment. Accordingly, the evidence was obtained as a result of an unlawful search and seizure and was therefore inadmissible. M.R.E. 311.

Additionally, the police violated Appellant's Fourth

Amendment rights by unlawfully prolonging the duration of a traffic stop in order to conduct a drug detection dog sniff of the vehicle. Lacking reasonable and articuable suspicion that Appellant was engaged in criminal activity, the patrolman impermissibly added time to the traffic stop by immediately calling for the drug detection dog, and thereafter failing to diligently pursue the alleged traffic violation. Accordingly, the evidence was obtained as a result of an unlawful search and seizure and was therefore inadmissible. M.R.E. 311.

Argument

I.

EVIDENCE OBTAINED FROM A POLICE SEARCH OF APPELLANT'S VEHICLE ON OR ABOUT AUGUST 4, 2010, WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT AND SHOULD HAVE BEEN SUPPRESSED.

Additional Facts

Specification 2 of Charge II alleged that Appellant possessed some amount of marijuana on or about 4 August 2012 in violation of Article 112a, UCMJ. Specification 1 of Charge III alleged that Appellant possessed drug paraphernalia (glass pipes) on or about 4 August 2012 in violation of Article 133, UCMJ. These offenses stemmed from a traffic stop and warrantless search of Appellant’s vehicle near Solon, Ohio. Appellant entered conditional pleas of guilty to these offenses pursuant to R.C.M. 910(a)(2), reserving the right to further

review on appeal of the adverse determinations made on the Defense Motion to Suppress dated 10 May 2013 (App. Ex. XXVI) and Motion for Appropriate Relief (Reconsideration) dated 2 October 2013 (App. Ex. LXIX). J.A. 168-178, 210-217.

Standard of Review

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Ayala,* 43 MJ 296, 298 (1995). This Court reviews fact-finding under the clearly-erroneous standard and conclusions of law under the *de novo* standard. *Id.*

Law and Analysis

The Fourth Amendment guarantees the right to be secure in one's person, "houses, papers and effects, against unreasonable searches and seizures . . ." and "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

A. The Police violated Appellant's Fourth Amendment rights by searching her vehicle without probable cause.

Under Military Rule of Evidence (M.R.E.) 311(d), the prosecution had the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, or that it was otherwise admissible under M.R.E. 311(e)(1). Any derivative evidence obtained as a

direct result of an unlawful search and seizure is inadmissible against an accused. *Wong Sun v. United States*, 371 U.S. 471 (1963); M.R.E. 311(e)(2).

Upon timely objection of the accused, evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused. M.R.E. 311(a). A search is unlawful if it was

> conducted, instigated, or participated in by other officials or agents of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States or any political subdivision of such a State, Commonwealth or possession and was in violation of the Constitution of the United States, or is unlawful under the principles of law generally applied in the trial of criminal cases in the United States.

M.R.E. 311(c)(2).

In *Florida v. Jardines*, 133 S.Ct. 1409 (2013), the U.S. Supreme Court held that law enforcement officers' use of a drug-sniffing dog on the front porch of a home, in order to investigate an unverified tip that marijuana was being grown in the home, was a trespassory invasion of the curtilage that constituted a “search” for Fourth Amendment purposes. The Supreme Court described as “straightforward” cases involving governmental physical intrusions upon property as they are within the core protections of the Fourth Amendment, as distinguished from more difficult cases requiring analysis of a person’s reasonable expectation of privacy.

> The Fourth Amendment provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States v. Jones,* 565 U.S. ––––, ––––, n. 3, 132 S.Ct. 945, 950–951, n. 3, 181 L.Ed.2d 911 (2012). By reason of our decision in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), property rights "are not the sole measure of Fourth Amendment violations," *Soldal v. Cook County,* 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992)—but though *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections "when the Government *does* engage in [a] physical intrusion of a constitutionally protected area," *United States v. Knotts,* 460 U.S. 276, 286, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) (Brennan, J., concurring in the judgment).

Florida v. Jardines, 133 S.Ct. 1409, 1414 (2013).

The Fourth Amendment "indicates with some precision the places and things encompassed by its protections": persons, houses, papers, and effects. *Oliver v. United States,* 466 U.S. 170, 176, (1984). Here, Appellant's automobile was clearly among her effects. "It is beyond dispute that a vehicle is an "effect" as that term is used in the Amendment. *United States v. Jones*, 132 S.Ct. 945, 940 (citing *United States v. Chadwick,* 433 U.S. 1, 12, (1977)).

The Supreme Court specifically rejected the State's reliance upon *Illinois v. Caballes*, 543 U.S. 405 (2005) and its argument that use of drug-detection dogs during a lawful traffic

stop does not constitute a search. *Florida v. Jardines*, 133 S.Ct. 1409, 1417 (2013). Once a physical intrusion into Appellant's vehicle occurred, a search of a constitutionally protected area occurred.

> The State argues that investigation by a forensic narcotics dog by definition cannot implicate any legitimate privacy interest. The State cites for authority our decisions in *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), *United States v. Jacobsen,* 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), and *Illinois v. Caballes,* 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), which held, respectively, that canine inspection of luggage in an airport, chemical testing of a substance that had fallen from a parcel in transit, and canine inspection of an automobile during a lawful traffic stop, do not violate the "reasonable expectation of privacy" described in *Katz.*
>
> Just last Term, we considered an argument much like this. *Jones* held that tracking an automobile's whereabouts using a physically-mounted GPS receiver is a Fourth Amendment search. The Government argued that the *Katz* standard "show[ed] that no search occurred," as the defendant had "no 'reasonable expectation of privacy'" in his whereabouts on the public roads, *Jones,* 565 U.S., at ––––, 132 S.Ct., at 950—a proposition with at least as much support in our case law as the one the State marshals here. See, *e.g., United States v. Knotts,* 460 U.S. 276, 278, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). But because the GPS receiver had been physically mounted on the defendant's automobile (thus intruding on his "effects"), we held that tracking the vehicle's movements was a search: a person's "Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Jones, supra,* at ––––, 132 S.Ct., at 950. The *Katz* reasonable-expectations test "has been *added to,* not *substituted for,*" the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas. *Jones, supra,* at ––––, 132 S.Ct., at 951–952.
>
> Thus, we need not decide whether the officers' investigation of Jardines' home violated his expectation of

> privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.
>
> *Florida v. Jardines*, 133 S.Ct. 1409, 1417 (2013).

In the instant matter, video evidence of the search along with the testimony of Patrolman Troyer conclusively show that the police learned what they learned only by physically intruding upon the interior of Appellant's vehicle while simultaneously engaged in an attempt to find something or obtain information. As captured by police video and admitted in his testimony on the defense motion to suppress, Patrolman Troyer allowed the dog to rise up "on his own" and place his forepaws and head inside the vehicle. When asked on cross-examination whether the dog put any part of its body inside the vehicle prior to alerting, Patrolman Troyer testified, "Umm, he might have had his front paws on the, the, I guess it would be the window seal, so I would assume his head might have broke the plane of the window, very well could have." J.A. 124.

A police video of the traffic stop marked as Appellate Exhibit XLVI shows the drug detection dog putting his forepaws through the open window and onto the windowsill of the driver's side door and putting his paws, face and snout into the interior of the vehicle at time count 00:35:16. The video is capable of being advanced frame by frame by clicking the button marked "|▶"

from the paused position on the video player. Viewing the video in this way provides a definitive view of the police dog's intrusion into the interior of the vehicle. Immediately thereafter, the dog "alerted" at the driver's side door of the vehicle by sitting down. Patrolman Troyer testified, "Canine Stryker is considered a passive alert dog so he's going to sit and stare at the object letting me know that he has indicated a positive alert." J.A. 119.

It is therefore established that a warrantless search of the interior of the vehicle occurred prior to the dog "alerting" on the driver's side door, and thus prior to any time the officers' could have had probable cause to search Appellant's automobile. Because this was a warrantless search of an automobile unsupported by probable cause, it was unreasonable under the Fourth Amendment. Accordingly, the evidence was obtained as a result of an unlawful search and seizure and was therefore inadmissible. M.R.E. 311.

The military judge issued a written ruling dated November 4, 2013, which is found at App. Ex. LXI, in which he found that "Stryker momentarily placed his paws on the door but did not extend his nose into the passenger compartment." J.A. 203-209. The military judge added in a footnote, "To the extent that the defense argues that Stryker's nose "broke the plane" of the open window and entered the passenger compartment, the Court has

found as a fact that that did not occur. While Officer Troyer testified that Stryker's nose "might have" entered the passenger compartment, the Court has concluded otherwise after watching Appellate Exhibit XLVI, the dashboard-camera video." It is respectfully submitted that this particular finding of the military judge based upon his subjective viewing of the video was clearly erroneous and is entitled to no special deference. The Judges of This Honorable Court are respectfully urged to watch the video for themselves, frame by frame, and see the truth that the military judge strained to avoid.

In denying the defense motion to suppress at an Article 39(a) session that took place between 17 – 19 June, 2013, the military judge stated, "Upon the canine's search of the vehicle, excuse me, sniff of the vehicle, the canine alerted upon the driver's side door, which the Court finds established probable cause for the later search of the vehicle." J.A. 136. The military judge reiterated, "Therefore, both subjectively and objectively as will be further identified in the Court's written ruling on this motion, the Court finds that . . . probable cause existed to search the vehicle following the drug dog's alert on the vehicle and that the evidence therefore should not be suppressed." *Id*. Thus, it was the positive alert of the dog that the military judge found gave the officers probable cause to search the vehicle.

However, after the defense raised the issue of the physical intrusion into the vehicle by way of a motion for reconsideration, the military judge attempted to move the goalposts, explaining that probable cause to search the vehicle existed prior to the dog alerting.

> Assuming *arguendo* that Stryker's actions constituted a search and that the accused did have a reasonable expectation of privacy in the interior of the vehicle, the Court concludes that the search was supported by probable cause. Stryker detected the odor of a contraband substance outside the vehicle and before he 'went high.' As he had already detected the odor, probable cause had been established before any intrusion into the passenger compartment, if such an intrusion occurred.

J.A. 203-209.

In a similar vein, the military judge wrote, "There is little doubt that Stryker detected the odor of drugs while outside of the passenger compartment and that he would have alerted even if he had been reined back and prevented from "going high." *Id.*

The voodoo of drug detection dog evidence is strained past any reasonable breaking point where we allow a finding of probable cause to be made prior to the dog actually alerting, as trained. The military judge cannot possible know when the dog began smelling the odor of a contraband substance, or whether he "would have alerted" even if Patrolman Troyer didn't first allow the animal to put its paws and snout into a Constitutionally

protected area. That the military judge would engage in such specious arguments to achieve a particular result should also color the lens through which we view his factual finding that no such intrusion occurred. It did. And thankfully, this Court has access to video evidence showing that it did. App. Ex. XLVI – included in an envelope attached to the J.A.

The discussion in the military judge's written ruling regarding expectation of privacy and the absence of a vehicle's "curtilage" misses the essential point. This Court need not decide whether the officers' investigation of Appellant's vehicle violated her expectation of privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Appellant's property to gather evidence is enough to establish that a search occurred. *Florida v. Jardines*, 133 S.Ct. 1409, 1417 (2013). The law does not sanction warrantless physical intrusion into Constitutionally protected areas absent probable cause, regardless of the duration or distance of the intrusion. Indeed, in *Jones* the U.S. Supreme Court held that tracking an automobile's whereabouts using a GPS receiver was a Fourth Amendment search because the device was physically mounted on the *exterior* of the vehicle. *United States v. Jones*, 132 S.Ct. 945 (2012).

In the United States, police officers that decide to bring German Shepherds to routine traffic stops have an obligation to keep their animals outside our cars. Physical intrusion into our Constitutionally protected effects by law enforcement is *per se* unreasonable and cannot be countenanced by our Federal Courts.

B. The Police violated Appellant's Fourth Amendment rights by prolonging the duration of a traffic stop and, lacking reasonable articulable suspicion, impermissibly broadened the scope of the traffic stop into a drug investigation.

This Honorable Court must suppress all evidence (suspected marijuana and drug paraphernalia) seized from Appellant's person and vehicle by the Solon Police Department on or about 4 August 2012 because police officers unreasonably prolonged the duration of a traffic stop in violation of the Fourth Amendment and, lacking reasonable articulable suspicion, impermissibly broadened the scope of the traffic stop in this case into a drug investigation. Additionally, the Court must suppress evidence taken from and statements made by Appellant after the unlawful search of her vehicle because the evidence and statements are the fruits of the illegal search. Any derivative evidence obtained as a direct result of an unlawful search and seizure is inadmissible against an accused. *Wong Sun v. United States*, 371 U.S. 471 (1963); M.R.E. 311(e)(2).

There are three types of permissible encounter between police and citizens: (1) consensual encounters in which contact is initiated by a police officer without any articulable reason and the citizen is briefly asked some questions, (2) a temporary involuntary detention or *Terry* stop which must be predicated upon "reasonable suspicion," and (3) arrests which must be based on probable cause. *United States v. Alston*, 375 F.3d 408, 411 (6th Cir. 2004) (internal quotations and citations omitted). A typical traffic stop is analogous to a *Terry* stop. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)(citing *Terry v. Ohio*, 392 U.S. 1 (1968)). "Once the purpose of the traffic stop is completed, a motorist cannot be further detained unless something that occurred during the stop caused the officer to have a reasonable and articulable suspicion that criminal activity was afoot." *United States v. Hill*, 195 F.3d 258, 264 (6th Cir. 1999).

"A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005). In *Caballes*, the Supreme Court held that "[T]he use of a well-trained narcotics-detection dog – one that does not expose noncontraband items that otherwise would remain hidden from public view during a lawful traffic stop – generally does not implicate legitimate privacy interests. *Id.* at 409.

However, that particular holding is not controlling and is distinguishable on its facts from the present case.

In *Caballes*, the Court recounted the following facts:

> Illinois State Trooper Daniel Gillette stopped respondent for speeding on an interstate highway. When Gillette radioed the police dispatcher to report the stop, a second trooper, Craig Graham, a member of the Illinois State Police Drug Interdiction Team, overheard the transmission and immediately headed for the scene with his narcotics-detection dog. When they arrived, respondent's car was on the shoulder of the road and respondent was in Gillette's vehicle. While Gillette was in the process of writing a warning ticket, Graham walked his dog around respondent's car. The dog alerted at the trunk. Based on that alert, the officers searched the trunk, found marijuana, and arrested respondent. The entire incident lasted less than 10 minutes.
>
> *Id.* at 406.

The Court explained that its holding was premised upon the fact that the drug detection dog was walked around the respondent's car *while the officer who initiated the stop was in the process of writing the ticket*.

> In an earlier case involving a dog sniff that occurred during an unreasonably prolonged traffic stop, the Illinois Supreme Court held that use of the dog and the subsequent discovery of contraband were the product of an unconstitutional seizure. *People v. Cox,* 202 Ill.2d 462, 270 Ill. Dec. 81, 782 N.E.2d 275 (2002). We may assume that a similar result would be warranted in this case if the dog sniff had been conducted while respondent was being unlawfully detained.
>
> In the state-court proceedings, however, the judges carefully reviewed the details of Officer Gillette's conversations with respondent and the precise timing of his radio transmissions to the dispatcher to determine whether he had improperly extended the duration of the stop to enable the dog sniff to occur. We have not recounted those

> details because we accept the state court's conclusion that the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop.
>
> *Illinois v. Caballes* at 407-08.

Here, within two minutes of initiating the traffic stop, Patrolman Soltis unreasonably prolonged the duration of a traffic stop and, lacking reasonable articulable suspicion, diverted from that mission and impermissibly broadened the scope of the traffic stop in this case into a drug investigation. The duration of a traffic stop must be limited to that which is necessary to satisfy the purpose of the stop. *State v. Chatton*, 11 Ohio St.3d 59, 62-63 (1984).

When detaining a motorist for a traffic violation, a police officer may detain the motorist for a time period sufficient to allow the officer to issue a ticket or warning, or to run a computer check on the driver's license, registration and vehicle plates. *State v. Batchili*, 113 Ohio St. 3d 403 (9th Dist. 2007). "In determining if an officer completed these tasks within a reasonable length of time, the court must evaluate the duration of the stop in light of the totality of the circumstances and consider whether the officer diligently conducted the investigation." *Batchili*, quoting *State v. Carlson*, 102 Ohio App.3d 585, 598-99 (9th Dist. 1995). In the instant case, Patrolman Soltis detained Appellant because he

determined that she was traveling in excess of the posted speed limit, and the facts relevant to that determination, except the identity and licensing of the driver, were all known to him prior to the roadside detention. Because the roadside detention exceeded the duration necessary to issue a speeding ticket, it was an unreasonable seizure of her person under the Fourth Amendment.

In addition to the detention of persons for unreasonable durations, the Fourth Amendment prohibits detention not reasonably related in *scope* to the circumstances which justified the interference in the first place.

In *Terry v. Ohio,* 392 U.S. 1, 27-28 (1968), the Court upheld the temporary detention and frisking of an individual based on a police officer's observation of suspicious behavior and his reasonable belief that the suspect was armed. In a *Terry* stop, "the officer's action [must be] justified at its inception, and ... reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 20. In interpreting the limits of the holding in *Terry,* the Supreme Court has held that the limitation on "scope" is not confined to the duration of the seizure; it also encompasses the manner in which the seizure is conducted. See, e.g., *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt City,* 542 U.S. 177, 188 (2004) (an officer's request that an

individual identify himself "has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop"); *United States v. Hensley,* 469 U.S. 221, 235 (1985) (examining, under *Terry,* both "the length and intrusiveness of the stop and detention"); *Florida v. Royer,* 460 U.S. 491, 500 (1983) (plurality opinion) ("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop [and] the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion ....").

A routine traffic stop is a relatively brief encounter and the government may not "take advantage of a suspect's immobility to search for evidence unrelated to the reason for the detention." *Berkemer v. McCarty,* 468 U.S. 420, 439 (1984). That is exactly what happened here, and the reasons set forth by Patrolman Soltis for impermissibly broadening the scope of the traffic stop amount to nothing more than a vague hunch.

Most recently, the U.S. Supreme Court decided *Rodriguez v. United States*, 575 U.S. ____ (2015), holding that a seizure justified only by a police-observed traffic violation becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation. In that case, the prolonging of the traffic stop by only seven or eight minutes to conduct a drug detection dog sniff was

deemed unlawful, even though the entire encounter lasted only about 29 minutes. The clear message from the Supreme Court in *Rodriguez* is that authority for these seizures ends when tasks tied to the traffic infraction are – *or reasonably should have been* – completed. The critical question is not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff adds time to the stop. Pp. 5-8.

In determining if an officer action's added time to the traffic stop, the Court must evaluate what the officer actually did and how he did it. "The reasonableness of a seizure . . . depends on what the police in fact do." *Rodriguez* at Pp. 8. In this case, it is undisputable that Patrolman Soltis added time to the traffic stop by deciding to call for a drug detection dog two minutes after first exiting his patrol car. There were, at that time, no facts which taken together could justify a reasonable suspicion that the Appellant was engaged in criminal activity.

In fact, Patrolman Soltis called for the drug detection dog prior to radioing dispatch with the Appellant's driver's license information. J.A. 78. When calling for the drug detection dog, Patrolman Soltis communicated his reasons stating, "If you're not busy. Heading to Ledges, someone from out of state." *Id.*

Moreover, the evidence indicated that once Patrolman Soltis called for the drug detection dog, he treated the handling of

the alleged traffic offense as an afterthought and failed to diligently pursue the mission of issuing a ticket for the violation. When examined by the military judge, Patrolman Soltis testified that dispatch tried to answer his driver's license query, but he "did not answer them back" because he "didn't want anything to come over the radio." J.A. 93. Patrolman Soltis testified that he never received from dispatch a return on the driver's license query he called in. *Id*. And the record reveals he made no attempt to pursue the traffic infraction until he wrote the speeding citation some time between 0130 and 0200 hours. J.A. 98. Indeed, after the arrival of the Patroman Troyer and the drug detection dog, Patrolman Soltis explained to Appellant, "I'm still trying to figure out if I'm going to give you a ticket for going 20 miles over the speed limit or not . . .." J.A. 81.

Looking at the totality of the circumstances in a fair and objective way, it is obvious that Patrolman Soltis unlawfully prolonged Appellant's roadside detention to engage in a fishing expedition for "drug traffickers." The High Court has now finally explicitly disallowed these infringements upon our liberties.

WHEREFORE, Appellant respectfully requests that this Court suppress all evidence (suspected marijuana and drug paraphernalia) seized from Appellant's person and vehicle by the

Solon Police Department on or about 4 August 2012. The Appellant further requests that this Court suppress evidence taken from and statements made by her after the unlawful search of her vehicle, because the evidence and statements were the fruits of the illegal search. M.R.E. 311(e)(2). Finally, Appellant respectfully requests that the Court direct that she is entitled to the opportunity to withdraw her pleas of guilty. See United States v. Shelton, 64 M.J. 32 (C.A.A.F. 2006).

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 7 December 2015.

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