

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

---

***REPLY BRIEF OF BEHALF OF APPELLANT***

---

DOUGLAS L. CODY, ESQ.  
Counsel for Appellant  
The Cody Law Firm, L.L.C.  
651 S. White Horse Pike (Rt. 30)  
Hammonton, New Jersey 08037  
Phone: 609.561.1015  
Fax: 609.567.7777  
CAAF Bar No.: 35504

CHRISTOPHER D. JAMES, Maj, USAF  
Appellate Defense Counsel  
U.S.C.A.A.F. Bar No. 34081  
Air Force Legal Operations Agency  
United States Air Force  
1500 W. Perimeter Road, Suite 1100  
Joint Base Andrews, MD 20762  
(240) 612-4770  
Christopher.D.James20.mil@mail.mil  
  
Counsel for Appellant

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Florida v. Jardines</i> , 133 S.Ct. 1409 (2013) .....	8, 9
<i>Rodriguez v. United States</i> , 135 S.Ct. 1616 (2015) .....	1, 4, 7
<i>United States v. Cortez</i> , 449 U.S. 411 (1981) .....	5
<i>United States v. Jones</i> , 132 S.Ct. 945 .....	9, 10
<i>United States v. Shelton</i> , 64 M.J. 32 (C.A.A.F. 2006) .....	11
<b>OTHER AUTHORITIES</b>	
Fourth Amendment .....	passim
M.R.E. 311 .....	11

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

<b>UNITED STATES,</b>	)	<b>REPLY TO GOVERNMENT'S ANSWER</b>
Appellee,	)	
	)	
v.	)	USCA Dkt. No. 16-0007/AF
	)	
First Lieutenant (O-2)	)	Crim. App. Dkt. No. 38538
<b>CALYX E. HARRELL,</b>	)	
United States Air Force,	)	
	)	
Appellant.	)	

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

Pursuant to Rule 19 of this Honorable Court's Rules of Practice and Procedure, Appellant hereby submits her reply to the government's answer.

**1. The police violated Appellant's Fourth Amendment rights by prolonging the duration of a traffic stop.**

The government mischaracterizes the relevant inquiry by attempting to show that the overall duration of the traffic stop was reasonable and that the police did not "measurably extend" the duration of the traffic stop in order to conduct the drug detection dog sniff. Gov. Br. 11 - 17. The critical question, however, is whether conducting the sniff added time to the stop. *Rodriguez v. United States*, 135 S.Ct. 1609, 1616 (2015).

The Government argues that an officer may "incremental[ly]" prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances. Brief for United States 36-39. The Government's argument, in effect, is that by completing all traffic-related tasks

expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation. See also *post*, at 1617 - 1619 (THOMAS, J., dissenting) (embracing the Government's argument). The reasonableness of a seizure, however, depends on what the police in fact do. See *Knowles*, 525 U.S., at 115-117, 119 S.Ct. 484. In this regard, the Government acknowledges that "an officer always has to be reasonably diligent." Tr. of Oral Arg. 49. How could diligence be gauged other than by noting what the officer actually did and how he did it? If an officer can complete traffic-based inquiries expeditiously, then that is the amount of "time reasonably required to complete [the stop's] mission." *Caballes*, 543 U.S., at 407, 125 S.Ct. 834. As we said in *Caballes* and reiterate today, a traffic stop "prolonged beyond" that point is "unlawful." *Ibid*. The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket, as Justice ALITO supposes, *post*, at 1624 - 1625, but whether conducting the sniff "prolongs"—*i.e.*, adds time to—"the stop," *supra*, at 1615.

*Id.*

Here, 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 objectively justify a reasonable suspicion that the Appellant was engaged in criminal activity.

Significantly, 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 actual reasons stating, "*If you're not busy. Heading to Ledges, someone from out of state.*" *Id.* (*italics added*).

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. This did not occur at time 00:33:00 as erroneously indicated in the government's brief. Gov. Br. 14. Rather, review of the police dashboard camera video reveals that it occurred at time 00:31:00 when Patrolman Soltis can be seen manipulating his hand held radio (carried on his waistband)<sup>1</sup> to turn the volume down or off. App. Ex. XLVI. This also occurred prior to the patrolman asking the Appellant if she had drugs in the car. *Id.* Thus, as common sense dictates in watching the video, this question was neither "innocent" nor posed while waiting for a response to the driver's license query.

In fact, Patrolman Soltis testified that he never received a return on the driver's license query he called in from dispatch. *Id.* And the record reveals he made no attempt to

---

<sup>1</sup>The dashboard camera also shows that Patrolman Soltis was wearing a radio microphone transmitter / receiver on his left shoulder and was capable of hearing and transmitting radio messages to dispatch while outside his vehicle. Thus, the notation in the government's brief "(Soltis not in car)" at page 14 is irrelevant.

pursue the traffic infraction until he wrote the speeding citation sometime between 0130 and 0200 hours. J.A. 98. Indeed, after the arrival of the Patrolman 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. This was a transparently false statement by Patrolman Soltis that was immediately followed by his rank speculation that Appellant "fit the profile" for a "drug carrier." *Id.*

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." At a minimum, the entire time between 00:28:21 when the patrolman returned to his vehicle until 00:35:22 when the dog alerted on the vehicle was added to the stop without sufficient particularized and objective justification. This time period is equivalent to the "seven- or eight-minute delay" that the U.S. Supreme Court found intolerable in *Rodriguez*. *Rodriguez v. United States*, 135 S.Ct. at 1614. The High Court has now finally explicitly disallowed these infringements upon our liberties and a faithful reading and application of *Rodriguez* requires suppression.

**2. The police lacked reasonable articulable suspicion at the time they added time to the traffic stop and impermissibly broadened the scope of the traffic stop into a drug investigation**

Reasonable suspicion requires a "particularized and objective basis" for suspecting a particular person of criminal activity. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). In this matter, 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 objectively justify a reasonable and particularized suspicion that the Appellant was engaged in criminal activity.

It is revealing that the call for the drug detection dog was made conditionally - if Patrolman Troyer was not busy. J.A. 78. Presumably, if Patrolman Soltis had ascertained objective facts that actually gave rise to a reasonable suspicion that Appellant was trafficking in drugs, he would have, at a minimum, insisted that every reasonable effort be made to have a drug detection dog at the scene. Instead, the request was more halfhearted, made in pursuit of inchoate hunch that turned out to be false inasmuch as Appellant had only small user amounts of marijuana in her possession.

When calling for the drug detection dog, Patrolman Soltis communicated his actual reasons stating, "If you're not busy.

Heading to Ledges, someone from out of state." J.A. 78. These were essentially the only relevant objective facts known to him at the time Patrolman Soltis decided to divert the traffic stop into a drug investigation.

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. This is particularly revealing because Patrolman Soltis testified that detecting impaired drivers was his primary purpose that evening. J.A. 56, 57. Appellant was never cited for or charged with any impaired driving offense. J.A. 162. Additionally, Appellant told the officer that she was on medication for Idiopathic hypersomnia and was tired from driving all day. J.A. 79-80. Appellant's demeanor was entirely consistent with these reports and the attempts to falsely claim after the fact that she "appeared high" only highlight the overall weakness of the government position.

It is likewise unclear why the government seeks to rely upon the lateness of the hour (Gov. Br. 19) as Appellant was stopped at about 12:26 a.m. on a U.S. Highway where relatively steady traffic could be seen traveling the freeway during the stop. The lateness of the hour can only have logical relevance



in the context of the place and activity, and there was simply nothing suspicious here.

Patrolman Soltis admitted that Nelson Ledges was advertised as a family campground and testified that he had never been there. J.A. at 55, 99-100. He knew remarkably little about the campground. For instance, Patrolman Soltis did not know how far away it was from the place he stopped the Appellant, whether or not families regularly go there, whether it had a quarry or a place for swimming, or whether there were family campgrounds available. J.A. at 100. Patrolman Soltis never asked Appellant how she had heard of the campground, why she was going to the campground, whether she was attending an event advertised to the public, or whether she was meeting friends or family there. He simply heard the word "Ledges" from the mouth of someone who lived out of state, and based upon exactly no personal experience with the place whatsoever, decided to call for a drug detection dog.

Moreover, the government erroneously attempts to rely upon the hokum of "target glancing" and other innocent behavior that occurred after the time that Patrolman Soltis already diverted from his traffic mission, and after he added time to the stop by calling for a drug detection dog. Gov. Br. 19. As explained in *Rodriguez*, however, it matters what the police actually do, and when they do it. *Rodriguez v. United States*, 135 S.Ct. at 1616.

**3. The physical intrusion into Appellant's Constitutionally protected effects by police is not rendered reasonable under the Fourth Amendment because the police allowed the dog to bring about the trespassory intrusion.**

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.

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. App. Ex. XLVI, J.A. 120,123-124.

The cases cited by the government as persuasive authority from other federal circuits regarding the "instinctual" behavior of the dog are inapposite because none of them evaluate the facts in light of the Supreme Court's property-based analyses in *Florida v. Jardines, supra* and *United States v. Jones, ---U.S. ---, 132 S.Ct. 945 (2012)*. In *Jones*, the Supreme Court emphasized that trespassory invasions of constitutionally effects have always been considered searches under Fourth Amendment jurisprudence.

It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765), is a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law'" with regard to search and seizure. *Brower v. County of Inyo*, 489 U.S. 593, 596, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (quoting *Boyd v. United States*, 116 U.S. 616, 626, 6 S.Ct. 524, 29 L.Ed. 746 (1886)). In that case, Lord Camden expressed in plain terms the significance of property rights in search-and-seizure analysis:

"[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law." *Entick, supra*, at 817.

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in

their persons, houses, papers, and effects" would have been superfluous.

Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. *Kyllo v. United States*, 533 U.S. 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001); Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L.Rev. 801, 816 (2004).

*United States v. Jones*, 132 S.Ct. 945, 949-50 (2012).

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).

Additionally, it must be noted that the drug detection dog in this case was trained by the police, brought to the scene of Appellant's detention by police, and handled by the police while on a leash at the time of the trespassory intrusion. When a court is charged with determining the objective facts surrounding a search, under these circumstances, it cannot simply credit the handler's testimony that the dog violated the Constitution "on his own." The handler of a dog has the responsibility to ensure through training and positive control

that it does not jump up on and intrude into the property of another. Trained police officers handling dogs should be required to handle them in a reasonable manner so as to avoid trespassory invasions, particularly when the dog is on a leash.

**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,

FOR:



DOUGLAS L. CODY, ESQ.  
Counsel for Appellant  
The Cody Law Firm, L.L.C.  
651 S. White Horse Pike (Rt. 30)  
Hammonton, New Jersey 08037  
Phone: 609.561.1015  
Fax: 609.567.7777  
CAAF Bar No.: 35504



CHRISTOPHER D. JAMES, Capt, USAF  
Appellate Defense Counsel  
U.S.C.A.A.F. Bar No. 34081  
Air Force Legal Operations Agency  
United States Air Force  
1500 W. Perimeter Road, Suite 1100  
Joint Base Andrews, MD 20762  
(240) 612-4770  
Christopher.D.James20.mil@mail.mil

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to this Honorable Court and the Appellate Government Division on 19 January 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christopher D. James". The signature is fluid and cursive, with a long horizontal stroke at the end.

CHRISTOPHER D. JAMES, Capt, USAF  
Appellate Defense Counsel  
U.S.C.A.A.F. Bar No. 34081  
Air Force Legal Operations Agency  
United States Air Force  
1500 W. Perimeter Road, Suite 1100  
Joint Base Andrews, MD 20762  
(240) 612-4770  
Christopher.D.James20.mil@mail.mil