6 January 2016

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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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[1] 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 pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally accepted.

STATEMENT OF FACTS

On 4 August 2012 at 00:26:00, Officer Robert Soltis of the Solon, Ohio Police Department was conducting a routine patrol on United States Highway 422 in Solon, Ohio when he observed a Silver Kia traveling at a high rate of speed. (J.A. at 48.) Using his radar, Officer Soltis clocked the car traveling 80

[1] According to the record of trial, the traffic stop at issue occurred in 2012 rather than 2010.

miles per hour in a 60 mile per hour zone. (Id.) Officer Soltis made a traffic stop and identified Appellant as the driver by viewing her Pennsylvania driver's license. (J.A. at 49.) According to the video taken of the traffic stop, Officer Soltis first approached Appellant's car at approximately 00:26:32. (App. Ex. XLVI.)

Officer Soltis believed that Appellant was high or intoxicated based on her demeanor and behavior. (J.A. at 50.) She appeared unkempt and unclean with messy hair, and her eyes were not open all the way. (Id.) As Officer Soltis questioned Appellant, he observed that her hands were shaking, she repeatedly said "umm" and "ahh," and she took long pauses to think before answering his questions. (Id.) Appellant was also mumbling as she spoke to Officer Soltis. (J.A. at 55.)

Appellant told Officer Soltis that she was coming from St. Louis and heading to "the Ledges." (J.A. at 51.) Officer Soltis understood "the Ledges" to mean the Nelson Ledges campground, which was known for drug activity. (J.A. at 51, 55) He also believed that most individuals coming from St. Louis would not be familiar with Nelson Ledges. (J.A. at 51.) With Appellant being in a rental car and traveling such a long distance, Office Soltis began "thinking drug trafficking." (Id.) He further testified that in his 15 years of experience, every person that he had stopped or had heard about being

stopped on the way to Nelson Ledges had been carrying drugs with him. (Id.)

Additionally, Officer Soltis testified at trial that the day of the week and time were relevant to his belief that Appellant was carrying drugs. In his experience, he typically saw drugs being transferred state-to-state on Friday evening after work hours, "which would be 5-6 o'clock until two o'clock in the morning." (J.A. at 96.)

Officer Soltis returned to his patrol car at approximately 00:28:21, and contacted the canine officer and asked him to respond. (App. Ex. XLVI; J.A. at 51.) He also called dispatch to ensure Appellant's driver's license was valid and to check for outstanding warrants, per standard procedure. (J.A. at 51.) Since Appellant had an out-of-state driver's license, Officer Soltis had to wait for dispatch to give him a response as to these matters. (Id.)

At approximately 00:30:20, while Officer Soltis was still waiting for a response from dispatch, Appellant got out of her car, leaving the driver's side window open, lit a cigarette, and leaned against the driver side of the car. (App. Ex. XLVI; J.A. at 51, 78.) Officer Soltis testified that based on his experience, this was not normal behavior, as most individuals who have been stopped sit in their cars and wait for the officer to come to them. (J.A. at 56.) He interpreted Appellant's

behavior as "trying to get away from her vehicle" and believed that Appellant's lighting of the cigarette demonstrated her increasing nervousness. (J.A. at 52.)

Within 10 seconds of Appellant exiting her car, Officer Soltis got out of his patrol car and approached Appellant, saying, "[H]ere, come on over here. You're going to get hit by a car." (App. Ex. XLVI; J.A. at 78.) Officer Soltis did not receive any information on Appellant back from dispatch because he left his patrol car to confront Appellant before they responded. (J.A. at 93.)

Appellant then took a piece of paper out of her pocket purporting to show an insurance policy she received from Budget. (App. Ex. XLVI; J.A. at 79.) Officer Soltis asked Appellant if there were any drugs in her car and told her that he was going "to bring a canine in." (Id.) Appellant never directly answered Officer Soltis' questions as to whether there were drugs in her car, which he deemed suspicious. (J.A. at 52.) Appellant also engaged in what Officer Soltis described as "target glancing." (Id.) She turned her head or body and looked at her car every time Officer Soltis asked her if there were drugs in her car. (J.A. at 53.) Officer Soltis had received training on "indicators" of drug possession, such as target glances. (J.A. at 75.) One such training was a four-day

drug interdiction class through the Ohio State Highway Patrol. (Id.)

At approximately 00:30:57, another officer can be seen arriving on scene.[2] (Id.) Then, at approximately 00:32:45, while Appellant and Officer Soltis are still talking outside her car, the canine officer can be seen on the video. (App. Ex. XLVI.) While Officer Soltis is still outside his patrol car engaging with Appellant, at approximately 00:33:00, the female voice of the dispatch officer can be heard on the radio repeating Appellant's name.[3] (Id.) Presumably, this was the response to the records check.

The canine officer, Matthew Troyer, and his dog Stryker, executed the dog sniff of Appellant's vehicle at 00:35:07. (App. Ex. XLVI.) Canine Stryker was a dual purpose narcotics dog, trained to alert on the odor of heroin, cocaine, methamphetamines, ecstasy, and marijuana, and trained on patrol aspects, such as tracking, building search, area search, article search, canine handler protection, and apprehension. (J.A. at 118.) Stryker was a "passive alert" dog, meaning that to indicate a positive alert he would exhibit a breathing change, square off to the object on which he was alerting, and sit down

[2] Officer Soltis explained that it was normal procedure for a second officer to respond automatically when another officer makes a traffic stop on the night shift. (J.A. at 53.)

[3] Isolating the in-Car Audio while playing App. Ex. XLVI, dispatch can be heard saying ". . . Calyx Harrell. Checks okay. Valid until 2015. Nothing in Ohio . . ."

and stare at the object. (J.A. at 119.) The military judge found as a fact that "Officer Troyer and Stryker were properly certified at the time of the traffic stop at issue." (J.A. at 205.)

Officer Troyer began the sniff at the right front corner of the vehicle and walked Stryker counterclockwise around the vehicle. (J.A. 119-20.) When Stryker approached the driver's side door, Officer Troyer observed his breathing change. (J.A. at 120.) Then Stryker "went high," reaching his front paws and nose up to the driver's side window, which had been left open by Appellant. (Id.) This action was unprompted by Officer Troyer and, along with the breathing change, indicated to him that Stryker already smelled marijuana. (J.A. at 120, 129.) Then Stryker squared off[4] on the vehicle, sat down, and stared at the driver's side door. (J.A. at 120.) All of these factors indicated a positive alert to Officer Troyer. (Id.)

Officer Troyer testified at trial that it was possible that Stryker broke the plane of the open driver's side window while conducting the sniff. (J.A. at 124.) However, after reviewing the video of the traffic stop, the military judge found as a fact that Stryker's nose did not break the plane of the window and enter the passenger compartment. (J.A. at 207.)

[4] Officer Troyer explained that "squaring off" meant that Stryker's whole body was turned so that he was facing the vehicle. (Id.)

After Stryker's positive alert, Officer Soltis opened the passenger side door of the vehicle and smelled a burnt marijuana odor. (J.A. at 54.) Officer Soltis found 1.8 grams of marijuana and two glass smoking pipes with burnt marijuana residue in a camouflage backpack in the vehicle. (J.A. at 54, 190, 201.) As Officer Soltis was arresting Appellant, she confessed that there was a small amount of marijuana in the car for personal use. (App. Ex. XLVI; J.A. at 85.) When Appellant arrived at the Solon County jail, Officer Soltis asked her if she had any more drugs on her person, and Appellant produced a jar containing 5.9 grams of marijuana and a plastic bag containing 3.7 grams of marijuana from her pants. (J.A. at 160, 190, 201-02.)

At trial, Appellant sought to suppress the evidence seized from her vehicle and person as a violation of the Fourth Amendment and Military Rule of Evidence 311(d). (J.A. at 168-78.) She also requested that any statements she made after the search be excluded as the fruits of an illegal search. (Id.) The military judge denied the motion to suppress, as well as a motion for reconsideration, finding that the search did not violate the Fourth Amendment. (J.A. at 203-9.) On appeal, the Air Force Court of Criminal Appeals concurred that there was no violation of the Fourth Amendment and affirmed Appellant's conviction. (J.A. at 4-9, 17.)

SUMMARY OF THE ARGUMENT

The military judge did not abuse his discretion in finding that the dog sniff and subsequent search of Appellant's car did violate the Fourth Amendment's protection against unreasonable searches and seizures. Appellant was lawfully stopped to investigate a traffic violation, and Officer Soltis did not measurably extend that stop in order to conduct the dog sniff. Under the circumstances of this case, the dog sniff was conducted within the time the tasks related to the traffic stop reasonably should have been completed. Even if Officer Soltis did extend the length of the traffic stop, that extension was justified based on his reasonable and articulable suspicion that Appellant was transporting drugs.

Furthermore, the dog sniff conducted by Officer Troyer and Canine Stryker did not constitute a search within the meaning of the Fourth Amendment. The military judge found as fact that Stryker did not enter the passenger compartment of Appellant's vehicle during the sniff, and that finding is supported by the record and not clearly erroneous. Even if Stryker did enter into the passenger compartment, such an action still did not constitute a search within the Fourth Amendment because Appellant herself left the window open, Stryker acted instinctively, and he was not directed or encouraged to enter the car by Officer Troyer. Finally, Stryker alerted with a

breathing change even prior to any supposed intrusion into the passenger compartment. Thus, even if Stryker entered the vehicle, and even if such entry constituted a search, that search was supported by probable cause. Since there was no violation of Appellant's Fourth Amendment rights, the military judge correctly declined to suppress the evidence against Appellant.

ARGUMENT

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN FINDING THAT THE DOG SNIFF AND SUBSEQUENT SEARCH OF APPELLANT'S VEHICLE DID NOT VIOLATE THE FOURTH AMENDMENT. THE EVIDENCE FROM THE SEARCH OF APPELLANT'S VEHICLE SHOULD NOT HAVE BEEN SUPPRESSED.

Standard of Review

A military judge's "denial of a motion to suppress is reviewed for an abuse of discretion." United States v. Rader, 65 M.J. 30, 32 (C.A.A.F. 2007) (citing United States v. Khamsouk, 57 M.J. 282, 286 (C.A.A.F. 2002)). "Findings of fact are affirmed unless they are clearly erroneous; conclusions of law are reviewed de novo." Id. "In reviewing a ruling on a motion to suppress, [this Court] considers the evidence 'in the light most favorable to the prevailing party.'" United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996) (quoting United States v. Sullivan, 42 M.J. 360, 363 (C.A.A.F. 1995)). Specifically, issues involving reasonable suspicion are reviewed

de novo. United States v. Robinson, 58 M.J. 429, 433 (C.A.A.F. 2003).

Law and Analysis

The Fourth Amendment[5] provides 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." Evidence directly obtained through a violation of the Fourth Amendment as well as evidence that is the "fruit" of such a violation is subject to exclusion at trial. Wong Sun v. United States, 371 U.S. 471, 488 (1963). The touchstone of the Fourth Amendment is "reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991).

This case presents two main questions which address both search and seizure: first, was the "seizure" of Appellant and her vehicle during a traffic stop, which included a dog sniff, reasonable; and second, was the dog sniff, as conducted on Appellant's car, a "search" within the meaning of the Fourth Amendment? For the reasons discussed below, the seizure of Appellant and her vehicle for the entire duration of the traffic stop was reasonable under the circumstances, and the dog sniff did not constitute a search within the meaning of the Fourth Amendment. Appellant's Fourth Amendment rights were not

[5] U.S. Const. amend. IV.

violated, and the evidence found as a result of the officers' subsequent search of her vehicle was correctly not suppressed.

a. The "seizure" of Appellant and her vehicle was reasonable for the entire duration of the traffic stop.

1. Officer Soltis did not measurably extend the traffic stop to conduct the dog sniff of Appellant's vehicle.

Stopping an automobile and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment. Delaware v. Prouse, 440 U.S. 648, 653 (1979). A lawful stop begins when the vehicle is pulled over for a suspected traffic violation, and the "temporary seizure" of the driver and passengers continues and remains reasonable for the duration of the stop. Arizona v. Johnson, 555 U.S. 323, 333 (2009). Normally, such a traffic stop ends "when the police have no further need to control the scene, and inform the driver and passengers that they are free to leave." Id. The Supreme Court has recognized that a routine traffic stop, like the one that occurred in this case, is analogous to a "Terry stop," rather than a formal arrest, and therefore,

> Like a Terry stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission" –to address the traffic violation that warranted the stop, and to attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. Authority for the seizure thus ends

> when tasks tied to the traffic infraction are – or reasonably should have been – completed.

United States v. Rodriguez, 135 S.Ct. 1609, 1614 (2015) (citing Berkemer v. McCarty, 468 U.S. 420, 439 (1984); Terry v. Ohio, 392 U.S. 1 (1968); Illinois v. Caballes, 543 U.S. 405, 407 (2005)).

The Supreme Court acknowledges that during a lawful traffic stop, a police officer's "mission" includes steps such as determining whether to issue a traffic ticket, checking the driver's license, determining whether there are any outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. Id. at 1615. However, the Court has said that "a dog sniff is not fairly characterized as part of the officer's traffic mission." Id.

Nonetheless, an officer may inquire into matters wholly unrelated to the justification for the stop, but such inquiries may not "measurably extend" the duration of the stop absent reasonable suspicion of other criminal activity. Id.; Johnson, 555 U.S. at 333. Similarly, an officer may conduct a dog sniff of a vehicle during a concededly lawful traffic stop without reasonable suspicion, if the duration of the traffic stop is not "prolonged beyond the time reasonable to complete the mission" of issuing a warning ticket for the traffic infraction. Caballes, 543 U.S. at 407-10. Recently, in United States v.

Rodriguez, the Supreme Court clarified that police may not extend an *otherwise-completed* traffic stop in order to conduct a dog sniff, absent reasonable suspicion. Id. at 1614. (emphasis added.)

Appellant does not contest that she was lawfully stopped based on probable cause that she was speeding. (J.A. at 186.) *See* United States v. Whren, 517 U.S. 806, 810 (1996). ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe a traffic violation has occurred.") Therefore, Officer Soltis had the authority to ask for Appellant's license and insurance, conduct a records check, and decide whether to issue Appellant a ticket. This case immediately differs from Rodriguez in that Officer Soltis had not finished writing a ticket for Appellant's underlying traffic infraction before the dog sniff was conducted. Unlike Rodriguez, who had to wait seven or eight minutes after his traffic stop was completed for the dog sniff to occur, Appellant was not detained for additional time *after* the stop waiting for the canine unit. Therefore, the question becomes whether Officer Soltis, in conducting the traffic stop, "diligently pursued a means of investigation that was likely to confirm or dispel [his] suspicions quickly." United States v. Sharpe, 470 U.S. 675, 686 (1985). Stated another way, did the dog sniff of Appellant's car occur within the time the "tasks

tied to the traffic infraction . . . reasonably should have been completed?" Rodriguez, 135 S.Ct. at 1609.

The following timeline created based on Office Soltis' dashboard camera (App. Ex. XLVI) details the pertinent events of the traffic stop:

Appellant stopped her car on the side of the road:	**00:26:00**
Officer Soltis approached Appellant's car:	**00:26:32**
Officer Soltis returned to his patrol car:	**00:28:21**
Officer Soltis called canine unit:	**00:28:33**
Officer Soltis called dispatch for records check:	**00:29:10**
Appellant got out of her car:	**00:30:20**
Officer Soltis re-approached Appellant:	**00:30:30**
Appellant showed her insurance policy:	**00:30:38**
Back-up Officer arrived:	**00:30:57**
Officer Soltis asked Appellant about drugs in her car:	**00:31:28**
Canine Unit arrived:	**00:32:44**
Dispatch responded on records check (Soltis not in car):	**00:33:00**
Dog Sniff began:	**00:35:05**
Stryker alerted on the car by sitting:	**00:35:22**
Officers searched the car:	**00:36:51**
Appellant was arrested:	**00:38:57**

The facts of this case demonstrate that Officer Soltis did not "measurably extend" the traffic stop to conduct the dog sniff. Rather, he diligently pursued addressing the original traffic violation, as he was required to do. Officer Soltis spent less than two minutes speaking to Appellant about her origin and intended destination and obtaining her license for a records check. "Such questions are permissible under Rodriguez, and any suggestion to the contrary would ask that officers issuing traffic violations temporarily become traffic ticket automatons while processing a traffic violation." United States

v. Iturbe-Gonzalez, 100 F.Supp.3d. 1030 (D. Mont. 2015)(internal citations omitted).

Although Officer Soltis first made a call requesting the canine unit to respond, he called dispatch regarding the records check within 50 seconds of returning to his patrol car. Because Appellant had an out-of-state driver's license, Officer Soltis had to wait for dispatch to conduct the records check for outstanding warrants. While Officer Soltis was waiting for a response on the records check, Appellant got out of the car of her own volition and lit a cigarette. She then leaned against the side of her vehicle closest to the 60 mile-per-hour highway, where other vehicles were racing by, as can be seen on the dashboard camera video. (App. Ex. XLVI.) This was an undeniably dangerous location for Appellant to be standing, and Officer Soltis temporarily and prudently abandoned his original mission of conducting the records check in order to ensure Appellant's safety. Notably, "attending to related safety concerns" was identified by the Supreme Court in Rodriguez as being part of a police officer's mission during a traffic stop. Moreover, Appellant's own actions in this case contributed to any delay in the processing of the traffic stop, and she should not now be heard to complain that the stop was unreasonably extended. The Supreme Court has declined to find the length of a traffic stop to be unreasonable where the police acted

diligently and the "suspect's actions contribute[d] to the added delay about which he complains." Sharpe, 470 U.S. at 688.

After Officer Soltis approached Appellant the second time, she attempted to show him an insurance policy that she received through the rental car agency. Pursuant to Rodriguez, such a discussion was also a reasonable task related to conducting the traffic stop. Then, Officer Soltis began questioning Appellant as to whether she had drugs in her car. This was also a reasonable inquiry into an unrelated matter under Johnson because Officer Soltis was still waiting for a response from dispatch as to the records check. Under such circumstances, the additional questioning of Appellant about drugs did not extend the time of the traffic stop.

The overall length of the traffic stop was quite short. Appellant was arrested within 13 minutes of pulling her car over to the side of the road. Given that Appellant caused part of the delay herself by getting out of her car and preventing Officer Soltis from receiving a response on the records check, it is unlikely that Officer Soltis would have completed issuing the ticket within that 13 minute time span. By means of comparison, the traffic stop in Rodriguez took 21-22 minutes from the time Rodriguez's vehicle was stopped until the police officer issued Rodriguez the warning and returned his documents.

Then there was a further 7-8 minute delay until the drug dog alerted. Rodriguez, 135 S.Ct. 1612-13.

Even assuming Officer Soltis received the response on the records check at 00:33:00 when dispatch appeared to have radioed to him, it is highly unlikely that Office Soltis could have completed writing a traffic ticket within the two minute timeframe before the dog sniff was conducted. Therefore, the dog sniff occurred within the time the tasks related to the traffic stop reasonably should have been completed. Since the dog sniff did not prolong or add time to the original traffic stop, Appellant's "seizure" during the traffic stop was reasonable, and her Fourth Amendment rights were not violated.

2. Even if the traffic stop was extended longer than was reasonably necessary to issue Appellant a ticket, the officers had reasonable suspicion to prolong the stop to investigate possible drug possession.

Rodriguez made clear that a routine traffic stop may be extended to conduct a dog sniff if the officers have reasonable suspicion of criminal activity.[6] Rodriguez, 135 S.Ct. at 1616. Reasonable suspicion is a "particularized and objective basis" for suspecting the particular person of criminalized activity and is based on the "whole picture" or the totality of the circumstances. United States v. Cortez, 449 U.S. 411, 417-18

[6] The Supreme Court did not answer the question of whether the officers in Rodriguez had reasonable suspicion to conduct the dog sniff after the completion of the initial stop. Since the Eighth Circuit Court of Appeals did not review that determination, the Supreme Court remanded the case for consideration of that issue. Rodriguez, 135 S.Ct. at 1616.

(1981). The totality of the circumstances includes inferences and deductions made by trained officers "that might well elude an untrained person." Id. Acts that by themselves might seem innocent can give rise to reasonable suspicion when considered as a whole. United States v. Arvizu, 534 U.S. 266, 274-75 (2002); Terry, 392 U.S. at 22.

The standard for reasonable suspicion is lower than that of a preponderance of the evidence or probable cause, and requires more than an "inchoate and unparticularized suspicion or hunch." Reasonable suspicion requires "some minimal level of objective justification." United States v. Sokolow, 490 U.S. 1 ,7 (1989). "Reasonable suspicion is not, and is not meant to be, an onerous standard.[7]" United States v. Simpson, 609 F.3d 1140, 1153 (10th Cir. 2010).

Officer Soltis articulated several factors which gave rise to his suspicion that Appellant may have been transporting drugs in her vehicle: Appellant appeared high or intoxicated when confronted; she was driving a rental car to a destination known for drug activity that would be unknown to most people coming from St. Louis; she was traveling on a day and at a time when Officer Soltis often saw motorists transporting drugs; she

[7] The Tenth Circuit has also gone so far as to say "as long as an officer has a particularized and objective basis for suspecting an individual may be involved in criminal activity, he may initiate an investigatory detention even if it is more likely than not that he individual is *not* involved in any illegality." United States v. Pettit, 785 F.3d 1374, 1379 (10th Cir. 2015).

appeared nervous; she did not directly answer Officer Soltis' questions when asked if she had drugs in her car; she engaged in "target glancing" when such questions were posed; and she left her vehicle to smoke, which Officer Soltis interpreted as her trying to distance herself from whatever was in her vehicle.

Federal Courts have recognized most of these factors as positively contributing to a finding of reasonable suspicion. Several Courts have noted that the fact that the suspect was driving a rental car can provide support for reasonable suspicion, since it is well-known that drug couriers often use rental cars. United States v. Contreras, 506 F.3d 1031, 1036 (10th Cir. 2007); United States v. Finke, 85 F.3d 1275, 1277 (7th Cir. 1996); United States v. Thomas, 913 F.2d 1111, 1116 (4th Cir. 1990). Similarly, "an area's propensity toward criminal activity is something than an officer may consider" in formulating reasonable suspicion. United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993). "The lateness of the hour is another fact that may raise the level of suspicion." Id. (citing United States v. Knox, 950 F.2d 516, 519 (8th Cir. 1991)). *See also* Robinson, 58 M.J. at 433 (C.A.A.F. 2003)(The location and time of day are relevant in a reasonable suspicion determination); Illinois v. Wardlow, 525 U.S. 119, 124 (2000) ("Officers are not required to ignore the relevant characteristics of a location in determining whether

circumstances are sufficiently suspicious to warrant further investigation.")

Significantly, in this case, Officer Soltis was not merely repeating rumor or baseless speculation about people traveling to "the Ledges." He testified specifically to his own extensive knowledge and experience of the characteristics of drug couriers in that particular area, based on 15 years as a police officer in Ohio. *See* Arvizu, 534 U.S. at 276 (Officer "entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants.") Thus, it was entirely appropriate for Officer Soltis consider that Appellant was driving a rental car from St. Louis to "the Ledges," a known drug destination, late on a Friday night in developing reasonable suspicion that criminal activity was afoot.

Furthermore, the Supreme Court has credited the idea that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." Wardlow, 528 U.S. at 124. *See also* Simpson 609 F.3d at 1150 (Vague, inconsistent or evasive answers to officer's questions can be supportive of reasonable suspicion.) Federal Courts have also recognized that "target glancing,[8]" by a suspect can be relevant to a reasonable

[8] Much like Officer Soltis' own description, these cases describe "target glancing" as a suspect looking in a particular direction, either because he

suspicion determination. United States v. Carlisle, 614 F.3d 750, 755-56 (7th Cir. 2010); United States v. Keys, 2011 U.S. Dist. LEXIS 87954, 16-7 (D. Ohio 2011). Finally, an officer's suspicion that a driver is under the influence of drugs can contribute to a determination of reasonable suspicion justifying the expansion of the scope of the stop and the conducting of a dog sniff of the vehicle. United States v. Hogan, 539 F.3d 916, 921 (8th Cir. 2008); United States v. Miller, 188 Fed. Appx. 287, 288-89 (5th Cir. 2006)(unpub. op.) Therefore, Appellant's shaking hands and other nervous behaviors, her evasive responses and "target glances" when Officer Soltis questioned her about drugs, and Officer Soltis' observations that she may have been high are all "relevant contextual considerations" in determining whether reasonable suspicion existed. Wardlow, 528 U.S. at 124.

While each of the factors recounted by Officer Soltis might not have established reasonable suspicion on its own, together they indeed raised reasonable suspicion that Appellant was transporting drugs. This Court should also give appropriate deference to Officer Soltis' "ability to distinguish between innocent and suspicious circumstances," considering he was a 15-year veteran of the local police force. United States v. Williams, 271 F.3d 1262, 1269 (10th Cir. 2001). *See also* Lender, 985 F.2d at 154 ("Courts are not remiss in crediting the

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is looking at someone to attack, looking at a place to escape, or subconsciously looking at something he does not want the officer to see.

practical experience of officers who observe on a daily basis what transpires on the streets.") Under the totality of the circumstances, Officer Soltis had reasonable suspicion to allow him to extend the traffic stop and conduct the dog sniff of Appellant's vehicle.

b. The dog sniff conducted by Officer Troyer and Stryker was not a "search" within the meaning of the Fourth Amendment.

1. The most current Supreme Court precedent still holds that a dog sniff of a vehicle is not a search implicating the Fourth Amendment.

The Supreme Court has held that a dog sniff of a vehicle during a traffic stop by a trained narcotics detection dog is not a search within the meaning of the Fourth Amendment. Caballes, 543 U.S. at 409. Nonetheless, Appellant insists that this case is governed by Florida v. Jardines, 133 S.Ct. 1409 (2013) where the Supreme Court held that using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home was a search under the Fourth Amendment. Appellant thus contends that the dog sniff in this case constituted an unlawful search conducted without probable cause.[9] (App. Br. at 9-13.) However, this case is unmistakably distinguishable from Jardines, in that it involves the dog sniff outside of a vehicle rather than the outside of a home. As Justice Kagan reiterated in her concurring opinion in Jardines, "we have held, over and

[9] Appellant does not challenge Officer Troyer and Stryker's qualifications to conduct the dog sniff.

over again, that people's expectations of privacy are much lower in their cars than in their homes." Jardines, 133 S.Ct. at 1419 (J. Kagan, concurring.)

Neither Jardines nor Rodriguez gives any indication that the Supreme Court intended to overturn Caballes or any prior precedent involving dog sniffs. In fact, just last year in Rodriguez, the Supreme Court restated the holding of Caballes – "a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's proscription of unreasonable seizures,"-- and then asserted that the question in the current case was "whether the Fourth Amendment tolerates a dog sniff conduct *after* completion of a traffic stop." Rodriguez, 135 S.Ct. at 1609 (emphasis added.) Under these circumstances, Caballes is still good law, and Jardines is inapposite to the facts of this case.

2. Stryker did not extend his head into the passenger compartment of Appellant's vehicle during the dog sniff.

Next, Appellant contends that the military judge's finding of fact that Stryker's nose did not break the plane of the window was clearly erroneous, and therefore Stryker's "intrusion into the vehicle" constituted an unlawful, warrantless search. (App. Br. at 14-15.) Even advancing the video frame-by-frame, as Appellant requests, there is no definitive basis for asserting that Stryker's nose, face or paws entered into the

vehicle through the open window. Consequently, the military judge's finding of fact was supported by the record, and not clearly erroneous. There is no factual basis to consider Stryker's actions a "search" of Appellant's vehicle.

3. Even if Stryker did enter the vehicle through the window left open by Appellant, this act was unprompted by the canine officer, and thus, did not constitute a search implicating the Fourth Amendment.

The Supreme Court has reasoned that the use of a narcotics detection dog during a lawful traffic stop is not a search implicating legitimate privacy interests because it "does not expose noncontraband items that otherwise would remain hidden from public view." . . . Caballes, 543 U.S. at 409 (citing United States v. Place, 462 U.S. 696, 707 (1983)). A dog sniff is quite different from a police officer rummaging through a suspect's personal effects, thereby exposing noncontraband personal items to public view. Further, it does not subject the suspect to "the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." Place, 462 U.S. at 707.

Appellant fails to cite any case law to support her contention that Stryker's alleged entry into the passenger compartment of the vehicle through an open window constituted a "search" within the meaning of the Fourth Amendment. In fact, the Federal Circuits that have addressed this issue have reached

the opposite holding. For example, the Sixth Circuit Court of Appeals has held that "a trained canine's sniff inside of the car after instinctively jumping into the car is not a search that violates the Fourth Amendment as long as the police did not encourage or facilitate the jump." United States v. Sharp, 689 F.3d 616, 620 (6th Cir. 2012). *See also* United States v. Pierce, 622 F.3d 209, 214-15 (3rd Cir. 2010) (No Fourth Amendment violation where narcotics dog instinctively jumped in vehicle without being pushed, directed or ordered into the car by his handler.); United States v. Lyons, 486 F.3d 367, 373 (8th Cir. 2007)("Absent police misconduct, the instinctive actions of a trained canine do not violate the Fourth Amendment." Also, officers had no affirmative duty to close the open car windows prior to the dog sniff.); United States v. Stone, 866 F.2d 359 (10th Cir. 1989)(Fourth Amendment not violated when narcotics dog jumped into vehicle's open hatchback and alerted.) Cf. United States v. Winningham, 140 F.3d 1328, 1330-31 (10th Cir. 1998)(Dog sniff of interior of vehicle violated Fourth Amendment where officers opened the hatchback themselves allowing the dog to jump inside.)

There is no reason for this Court to deviate from the reasoning of other Federal courts. The Circuit Courts' holdings make sense when considered in light of the Supreme Court's original treatment of the issue in Place. In most cases, a

police dog is not exposing any noncontraband personal items to public view by instinctively entering an already open vehicle. Certainly, in Appellant's case, any momentary entry by Stryker's face and paws into the car through the window (assuming that it happened) did not equate to him rummaging through or exposing any noncontraband personal items in her vehicle, nor did it subject her to embarrassment or inconvenience. This is especially true since Appellant herself left the car window open.

Moreover, the military judge found as a fact that "Officer Troyer did not facilitate or encourage Stryker to climb the door or put his paws or nose through the open window." (J.A. at 205.) This finding is amply supported both by Officer Troyer's testimony and the video of the dog sniff, and not clearly erroneous. Following the persuasive authority of the other Federal Courts who have addressed this issue, Stryker's instinctive actions, even if he did enter the car, did not constitute a search that implicated or violated the Fourth Amendment.

4. Stryker alerted even before extending his paws and nose up to the window, thereby giving the officers probable cause to search the vehicle.

Finally, even if this Court were to find that Stryker entered Appellant's vehicle and that entry constituted a search within the Fourth Amendment, the police officers would have

already had probable cause to search the vehicle by that point. The military judge found that Stryker "exhibited signs consistent with his detection of the odor of contraband" by changing his breathing and climbing up the outside of the driver's door. (J.A. at 208.) Further, the military judge found that "Stryker detected the odor of a contraband substance outside the vehicle and before he 'went high'" and therefore, would have alerted even if he had been prevented from putting his paws and nose up to the window. (Id.) Whether a drug dog alerts before entering a vehicle is a finding of fact reviewed under a clearly erroneous standard. United States v. Mason, 628 F.3d 123, 130 (4th Cir. 2010); United States v. Vazquez, 555 F.3d 923, 930 (10th Cir. 2009).

In this case, the military judge's finding of fact was reinforced by the video of the dog sniff and the testimony of Officer Troyer, who stated that Stryker's breathing change and the action of "going high" indicated to him that Stryker already smelled the narcotics. The finding was therefore not clearly erroneous. Based on this finding of fact, the military judge then concluded that the officers already had probable cause "before any intrusion into the passenger compartment, if such an intrusion occurred." (J.A. at 208.)

Although Appellant criticizes this ruling as straining "the voodoo of drug detection dog evidence," the military judge's

reasoning is well-supported by federal case law. The Tenth Circuit Court of Appeals has held that "an alert, or a change in a dog's behavior in reaction to the odor of drugs, is sufficient to establish probable cause to search a vehicle . . . a final indication is not necessary." United States v. Moore, 795 F.3d 1224, 1232 (10th Cir. 2015.); *See also* Lyons, 486 F.3d at 374 (Crediting the district court's determination that the drug dog would have ultimately alerted on the vehicle even if he had not stuck his head inside the window.)

Here, the military judge found that Stryker alerted before any intrusion into the vehicle, a finding of fact that was not clearly erroneous. Once Stryker alerted on the vehicle, the police officers had probable cause to conduct a search of the vehicle without a warrant.[10] United States v. Alexander, 34 M.J. 121, 125 (C.M.A. 1992.) Therefore, the military judge correctly concluded that even if Stryker had intruded into the passenger compartment, there was no violation of the Fourth Amendment, since probable cause existed by then to search the vehicle.

Considering the above evidence in the light most favorable to the Government, the military judge's ruling that the dog sniff and subsequent search of Appellant's vehicle did not violate the Fourth Amendment is amply supported by the record

[10] "Police officers who have probable cause to believe there is contraband inside an automobile that has been stopped on the road may search it without obtaining a warrant." Florida v. Meyers, 466 U.S. 380, 381 (1984)(per curiam).

and should not be disturbed. Since there was no violation of Appellant's Fourth Amendment rights, the military judge did not abuse his discretion in declining to suppress the evidence against Appellant.

CONCLUSION

WHEREFORE the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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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 Appellate Defense Division on 6 January 2016.

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