STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No 2020AP1813-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ASHLEY JEAN CAMPBELL,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
entered in the Sawyer County Circuit Court,
the Honorable John M. Yackel presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did law enforcement violate Ms. Campbell's Fourth Amendment rights by allowing a police canine to enter her vehicle to sniff for drugs in the absence of probable cause?

The circuit court answered no and denied Ms. Campbell's suppression motion. This Court should reverse and remand with directions to grant the suppression motion.

2. Should this Court adopt a broad "instinct" exception for otherwise unlawful dog sniffs?

The circuit court ruled that there is an instinct exception when a canine enters a vehicle based on instinct and without officer facilitation. This Court should decline to adopt the exception.

3. If there is an instinct exception was it met in Ms. Campbell's case?

The circuit court ruled that the canine entered Ms. Campbell's vehicle instinctively and without officer facilitation. If this Court does adopt an instinct exception, the Court should hold that it was not met here.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested given the undeveloped nature of the law at issue in this appeal. A request for publication is not authorized, given that this is a one-judge appeal under Wis. Stat. § 752.31(2). However, this Court may decide to convert to a three-judge panel given the novel legal issue presented.

STATEMENT OF THE CASE AND FACTS

On December 15, 2017, Wisconsin State Trooper M. Kraetke observed a vehicle that was missing its front license plate, being operated by a driver who was not wearing a seatbelt. R.25:1-2; App.111-12. He conducted a traffic stop of the vehicle and determined that Ms. Campbell was the driver.[1] Ms. Campbell's driver's license was suspended. R.25:8; App.108. Trooper Kraetke called for a canine unit while addressing the violations.

While Trooper Kraetke was completing a citation, Sergeant Nick Al-Moghrabi of the Sawyer County Sheriff's Department responded to the call. R.25:7. He brought his canine, Trace R.25:7-8, 12; App.107-08, 112. Trace was a highly trained "partner" to Sergeant Al-Moghrabi. R.25:12 App.112. The team had been through extensive training,

[1] These facts were adduced at a motion hearing held on March 28, 2019, at which Sergeant Nick Al-Moghrabi was the State's sole witness.

including many months of training at the St. Paul Police Department. R.25:4; App. 104. In addition to the initial training, the team engaged in mandatory training inhouse every month. R.25:4; App.104. They also trained with a K-9 group that included teams from multiple surrounding counties. *Id.* Sergeant Al-Moghrabi and Trace were first certified by the United States Police K-9 Association in 2013, and were certified annually thereafter. R.25:5; App.105. Trace was trained to detect the odor of several drugs and was also trained in subject search, handler protection, suspect apprehension, obedience, and agility. R.25:6; App.106. Sergeant Al-Moghrabi and Trace always trained as a team. R.25:7; App.107.

Sergeant Al-Moghrabi approached Ms. Campbell's vehicle and identified himself as a K-9 handler. R.25:10; App.110. He explained that he intended to have Trace walk around the vehicle sniffing for drugs. Sergeant Al-Moghrabi told Ms. Campbell and her passenger to "[s]tep out here." *Id*. They complied with the directive and stepped out. Sergeant Al-Moghrabi asked them to step back toward Trooper Kraetke's patrol car. R.25:12; App.112. Again, they complied. The driver's side door remained open. R.25:14-15, 25; App.114-15, 125.

Sergeant Al-Moghrabi went to his squad car to retrieve Trace. R.25:12; App.112. He then put Trace on a 6-foot leash with a pinch collar and brought him up to the vehicle. Sergeant Al-Moghrabi "placed [Trace] in a prescribed stance" and commanded him to "start working the vehicle in a scan." *Id.* The sergeant distinguished "scanning" from "detailing."

A scan is where Trace is allowed to sniff around the vehicle without direction, whereas detailing is where Sergeant Al-Moghrabi points out areas for Trace to check. R.25:13; App.113. Trace began sniffing at the front of the vehicle and proceeded down the driver's side. Sergeant Al-Moghrabi kept Trace on a leash. There was "some slack" to the leash, but the sergeant stayed ahead of Trace while holding the leash so that he could "slow [Trace's] search" if necessary and to keep Trace out of traffic. R.25:15; App.115.

Trace then climbed into Ms. Campbell's vehicle through the open driver's side door. R.25:14; App.114. Sergeant Al-Moghrabi testified that Trace entered "without [ ] direction." *Id.* Trace sniffed intently and scratched at a brown purse on the floor. R.25:16; App.116. This indicated to Sergeant Al-Moghrabi that Trace had detected the odor of a drug. *Id.* Although Trace had not sat down, which was the formal alert he had been taught, the sergeant testified that "it is an alert to me." R.25:17; App.117. The sergeant pulled Trace out of the vehicle, and two "continue[d] working the vehicle." *Id.*

After Trace completed his first circuit around the vehicle, Sergeant Al-Moghrabi started using Trace to detail the vehicle. R.25:17; App.117. As Sergeant Al-Moghrabi was detailing, he directed Trace to enter the vehicle through the driver's side door. *Id.* Trace began biting at the brown bag, demonstrating to Sergeant Al-Moghrabi that "it's clear to me he's not going to leave this item." R.25:18; App.118. At this point, Trace sat down, which was the "full blown alert." R.25:19; App.119.

After the alert, Sergeant Al-Moghrabi took Trace back to the squad car. R.25:18; App.118. He then returned to the vehicle, seized the brown bag, and searched it, finding marijuana. R.25:20, 23; App.120, 123.[2] The State charged Ms. Campbell with count one, possession of tetrahydrocannabinols (THC), a violation of Wis. Stat. § 961.41(3g)(e), and count two, possession of drug paraphernalia, a violation of Wis. Stat. § 961.573(1). R.1:1-5.

Ms. Campbell filed a motion to suppress the marijuana, arguing that law enforcement violated her Fourth Amendment rights. R.10:1-7. On March 28, 2019, the circuit court held a hearing on the suppression motion. R.25; App.101-151. The State presented the testimony of Sergeant Al-Moghrabi, as stated above. The State also introduced video footage of the encounter as Exhibit 1. R.30. The footage is approximately four minutes between 20:58 and 25:11. R.25:21-22; App.121-22. Ms. Campbell asks this Court to independently review the footage. *See State v. Reed*, 2018 WI 109, ¶¶14, 76, 384 Wis. 2d 469, 920 N.W.2d 56 (facts in decision "primarily drawn" from body camera footage where "footage [wa]s unambiguous and conclusive").[3] The video shows that

[2] A separate argument was not made as to the search of the purse. *See Wyoming v. Houghton*, 526 U.S. 295, 302 (1999) (probable cause to search vehicle includes containers and packages inside).

[3] *See also, State v. Jimmie R.R.*, 2000 WI App 5, ¶39, 232 Wis. 2d 138, 606 N.W.2d 196 (1999) (when the only evidence on a factual question is reflected in a video recording, the court of appeals is in the same position as the circuit court to determine a question of law based on the recording).

Trace was leashed at all times. R.30. Sergeant Al-Moghrabi held him a an approximately one-to-two-foot section of leash. R.30: timestamp 22:37. Trace went into the vehicle three separate times. The first two entries occurred in succession during the first circuit around the vehicle. R.30: timestamp 22:43. The third entry occurred during the second circuit. R.30: timestamp 23:50.

After accepting the evidence, the court invited arguments from the parties. R.25:26; App.126. Defense counsel argued that dog sniffs that occur in the interior of a person's vehicle are searches, *citing Florida v. Jardines*, 569 U.S. 1 (2013).[4] Accordingly, when Trace entered Ms. Campbell's vehicle to sniff inside, a search occurred. R.25:27; App.127. Counsel argued that Trace's entry was tantamount to a human officer's entry: "If a police officer can't reach his hand into it, a dog can't insert its body into it." R. 25:40; App.140. Finally, the search was conducted without probable cause. Therefore, it was unconstitutional. R.25:28; App.128. Defense counsel noted that it would be different had Trace detected the odor of drugs *prior* to entering the vehicle because in that case, there would have been probable cause to search. R.25:40; App.140.

In its argument, the State proposed an instinct exception for otherwise unlawful dog sniffs. It primarily relied on nonbinding cases from federal

[4] Here, the term "search" includes both an interior drug sniff and the more traditional search whereby a human officer physically enters and examines the space.

courts, explaining that there was no Wisconsin case to support its argument. R.25:34; App.134. The State argued that when a police dog enters a vehicle based on instinct, a Fourth Amendment search does not occur. "[A]s long as law enforcement does not direct the dog to a location or give a command that says, hey, you need to search here, then it's a fair search." R.25:46; App.146. The State emphasized that Ms. Campbell did not close the door behind her when she was directed out of the vehicle. R.25:33; App.133. Defense counsel countered that law enforcement had control over both Ms. Campbell and Trace, and therefore, "they could have ordered [Ms. Campbell] to close the door or they could have used a check command to make sure the dog doesn't enter. An officer can't just have a dog free wheel, I have no control over this." R.25:41; App.141.

According to the State, because Trace was initially "scanning" instead of "detailing," no search occurred. R.25:35-36; App.135-36.

> Mr. Poquette: So you can't direct the dog. You can't say go into the car. You can't give him a command, get in that car and find the drugs. None of those things can happen.
>
> The Court: But if you are scanning and he is on a leash and he does it himself then that the [sic] okay, right?
>
> Mr. Poquette: Right.

R.25:35-36; App.135-36.

The circuit court deferred its decision and subsequently issued an oral ruling on July 9, 2019. The court denied the suppression motion as follows:

> I think that I made some findings because based on the testimony I guess what is basically relevant is the fact that the Court does find credible the testimony of Deputy, excuse me, Sergeant Al-Moghrabi regarding what took place. That the door to the vehicle was left open. That the dog was on a loose leash. At the initial search, or the initial sniff of the vehicle the dog, without any direction from the law enforcement officer, jumped into the vehicle that was left open by the passenger. The cops did not ask them to open the door, did not tell them to leave the door open, it was just left open.
>
> It's pretty clear to me after having reviewed the case law, and I'm looking at one of the more recent cases, the "*Guidry*" case,[5] that there is no 4th Amendment violation here when a dog jumps instinctively through an open car door without any facilitation by its handler. If, in some of these cases, like "*Winningham*"[6] there appears to be an order by the cop to keep the door open and either a command to go into the car. But what is relevant here is that there was no requirement by the police officers to keep the door open. No order by the cops to have the dog jump in. The dog jumped in. And I think under the case law that is not a violation of the 4th Amendment.

R. 22:2-3; App.153-54.

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[5] *United States v. Guidry*, 817 F.3d 997 (7th Cir. 2016).

[6] *United States v. Winningham*, 140 F.3d 1328 (10th Cir. 1998).

Following the denial of her suppression motion, Ms. Campbell entered a no contest plea to Possession of THC, a violation of Wis. Stat. § 961.41(3g)(e). R.11. This appeal follows.[7]

SUMMARY OF ARGUMENT

A dog sniff conducted inside a person's vehicle is a search. Before Trace climbed into Ms. Campbell's vehicle to sniff for drugs, there was no probable cause to search. Therefore, this was a violation of Ms. Campbell's Fourth Amendment rights. This was a straightforward case until the State proposed an exception to the Fourth Amendment for a category of otherwise unlawful dog sniffs: those attributable to the canine's uncontrolled instinct. This Court should decline to adopt the proposed instinct exception. However, even if the Court applies an instinct exception, Ms. Campbell still prevails because the State cannot meet the exception in her case.

[7] An order denying a motion to suppress evidence may be reviewed upon appeal despite a plea. Wis. Stat. § 808.03(3).

ARGUMENT

I. Law Enforcement Violated Ms. Campbell's Fourth Amendment Rights by Allowing a Police Dog to Enter Her Vehicle to Sniff for Drugs.

A. Standard of review

An order denying a motion to suppress evidence is a question of constitutional fact, reviewed under a two-step standard. *State v. Hajicek*, 2001 WI 3, ¶2, 240 Wis. 2d 349, 620 N.W.2d 781. The circuit court's findings of fact are reviewed for clear error. Application of the law to those facts is de novo. *Id.* The State bears the burden of proving the lawfulness of a warrantless search. *State v. Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998).

B. A dog sniff conducted inside a person's vehicle is a search.

The Fourth Amendment's protection against unreasonable search and seizures extends to vehicles. *United States v. Jones*, 565 U.S. 400, 404 (2012).[8] In general, searches conducted without a warrant are unreasonable. However, there are "a few specifically established and well-delineated exceptions" to the

[8] The seizure is not challenged in this case. Whether a seizure is reasonable depends on whether (1) "the seizure was justified at its inception" and (2) the "officer's action 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Terry v. Ohio*, 392 U.S. 1, 20, (1968)).

warrant requirement *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception is the automobile exception. Under the automobile exception, police may conduct a warrantless search if the vehicle is readily mobile and there is probable cause to believe contraband is in the vehicle. *State v. Jackson*, 2013 WI App 66, ¶¶8, 27, 248 Wis. 2d 103, 831 N.W.2d 426 (citing *Carroll v. United States*, 267 U.S. 132 (1925)).[9]

Law enforcement officers routinely deploy specially trained drug-sniffing canines in order to develop probable cause to search a vehicle. In the most common scenario, handlers walk their forensic canines around the outside of the vehicle, and if the canine alerts to the odor of drugs, this amounts to probable cause to search the vehicle. *See State v. Miller*, 2002 WI App 150, ¶12, 256 Wis. 2d 80, 647 N.W.2d 348 (police dog reliably alerting to the presence of drugs from the exterior of the vehicle supplied probable cause to search).[10]

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[9] There is no dispute in this case that Ms. Campbell's vehicle was readily mobile. The issue is probable cause, or lack thereof.

[10] Although the seizure is not at issue in this appeal, it is helpful to note that many dog sniff cases center on the effect of the dog sniff on the validity of a seizure. When there is no reasonable suspicion to believe that a car contains drug evidence, a traffic stop may not be prolonged to enable a drug dog to arrive on scene. *Rodriguez v. United States*, 575 U.S. 348, 354 (2015). However, if a drug dog arrives while the traffic stop is ongoing (i.e. the mission of the traffic stop has not yet completed), the dog sniff does not affect the Fourth Amendment analysis. *Id.* at 355.

Ordering a police canine to sniff a person or property for the odor of drugs can amount to a Fourth Amendment search, depending on where the dog sniff takes place. The United States Supreme Court first considered whether dog sniffs were searches in situations where the sniffs occurred in public places. In the context of a public place, the dog sniffs were not deemed searches. *United States v. Place*, 462 U.S. 696, 707 (1983) (dog sniff of luggage at the airport was not a search); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (dog sniff around exterior of vehicle not a search); *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (reiterating that dog sniff around exterior of vehicle not a search).[11]

Subsequently, in *Florida v. Jardines*, 569 U.S. at 7, the Supreme Court held that dog sniffs conducted in constitutionally protected places (as opposed to public places) are searches. In *Jardines*, law enforcement walked up to a person's front porch with a drug sniffing canine. The canine alerted to the odor of drugs. The United States Supreme Court held that because the dog sniff occurred on the defendant's front porch, which was part of the home's curtilage,

[11] *See also*, *State v. Garcia*, 195 Wis. 2d 68, 74-75, 535 N.W.2d 124 (Ct. App. 1995) (a person does not have a reasonable expectation of privacy in the "air space surrounding a vehicle that is occupying a public place.").

the sniff amounted to a search. *Id.*[12]

Vehicles, like homes, are constitutionally protected places; therefore, a dog sniff that occurs inside a vehicle is a search within the meaning of the Fourth Amendment. *See Miller*, 256 Wis. 2d 80, ¶12. As with any search, probable cause is required. *Id.*, ¶12.

C. There was no probable cause to search Ms. Campbell's vehicle.

There was no probable cause to search Ms. Campbell's vehicle when Trace entered her vehicle to sniff for drugs. The State has not argued otherwise. This was a routine traffic stop. The basis for the stop was a missing front license plate and a seatbelt violation. R.25:1-2; App.101-02. It was then determined that Ms. Campbell's driver's license was suspended. R.25:8; App.108. There was no reason to suspect drug activity until after Trace entered the vehicle and alerted to the odor of marijuana. A reliable alert can amount to probable cause for police to enter and examine the vehicle. *Miller*, 256 Wis. 2d 80, ¶12. However, by the time of the alert (and hence the formation of probable cause) an unlawful search had already occurred.

[12] There are two ways that police conduct an amount to a search within the meaning of the Fourth Amendment: (1) physical intrusion into a protected place (common law trespass) and (2) intrusion into a person's reasonable expectation of privacy. *Jones*, 566 U.S. at 406-07. The trespass rule formed the basis for the Court's holding in *Jardines*. 569 U.S. at 11.

Law enforcement conducted a dog sniff search inside Ms. Campbell's vehicle without probable cause, in violation of her Fourth Amendment rights. The marijuana evidence discovered as a direct result of the search must be suppressed. *Wong Sun v. U.S.*, 371 U.S. 471, 484-85 (1963) (the exclusionary rule is the remedy for a Fourth Amendment violation); *see also*, *State v. Washington*, 2005 WI App 123, ¶10, 284 Wis. 2d 456, 700 N.W.2d 305.

To avoid this straightforward result, the State advocates for a novel Fourth Amendment exception, as discussed next.

II. This Court Should Decline to Adopt a Broad "Instinct" Exception for Otherwise Unlawful Dog Sniffs.

A. Standard of review.

Whether police action amounts to a search within the meaning of the Fourth Amendment is a question of law, reviewed de novo. *Miller,* 256 Wis. 2d 80, ¶5 (internal citation omitted).

B. The Fourth Amendment cannot be sidestepped by labeling certain police canine activity "instinctual."

In the circuit court the State did not dispute that a dog sniff conducted in the interior of a vehicle is normally a Fourth Amendment search. It also did not dispute that there was no probable cause in Ms. Campbell's case prior to Trace's entries into her vehicle. However, it argued that there should be an

exception made where a police dog instinctively enters a vehicle without direction from its handler. The State argued "[A]s long as law enforcement does not direct the dog to a location or give a command that says, hey, you need to search here, then it's a fair search." R.25:46; App.146. The circuit court agreed and determined that: "there is no 4th Amendment violation here when a dog jumps instinctively through an open car door without any facilitation by its handler." R. 22:2-3; App.153-54.

This Court should reject the State's position and the circuit court's broad ruling. Wisconsin has never recognized this type of instinct exception for otherwise unlawful police dog activity. Nor has the United States Supreme Court. For support, the State and circuit court relied upon nonbinding decisions from federal circuit courts. As will be demonstrated, the reasoning from these cases should not be followed, primarily because the cases pre-date *Jardines* and for additional reasons as well.

The instinct exception appears to have originated in the Tenth Circuit, in *United States v. Stone*, 866 F.2d 359 (10th Cir. 1989); *See United States v. Sharp*, 689 F.2d 616 (6th Cir 2012) (identifying the 10th Circuit as the originating jurisdiction and naming *Stone*). In *Stone*, an officer let go of his dog's leash, and the dog jumped into the vehicle. The court found that the handler did not encourage the dog to jump into the vehicle, and the defendant had left the door open. As such, the entry was deemed "instinctive." 866 F.2d at 364. In addition, there was reasonable suspicion to believe

that the vehicle contained drugs. *Id.* The existence of reasonable suspicion was central to *Stone*'s holding. *Id.* ("In these circumstances, we think the police remained within the range of activities they may permissibly engage in when they have reasonable suspicion. . .."). *See Winningham*, 140 F.3d at 1331 (the "range of acceptable police activity" differs considerably when there exists reasonable suspicion).

Under *Stone*, the instinct exception is met where law enforcement does not facilitate the dog's entry and there is reasonable suspicion to believe the vehicle contains drug evidence. 866 F.2d at 364.[13] When evaluating whether law enforcement facilitated a dog's entry, the cited decisions focus on the degree of officer involvement, including whether the point of entry was opened by officers.[14] In all but one of the cited decisions there was either probable cause or reasonable suspicion to believe that drug evidence would be found in the vehicle prior to the dog's

[13] In the circuit court, the State did not mention the reasonable suspicion requirement and the circuit court omitted this requirement as well. However, based on the decisions cited, it is likely that State intended to propose the *Stone* rule, and not some broader variation.

[14] The State identifies cases from five of the twelve circuit courts, the third, sixth, seventh, eighth, and tenth, and one case from the district court of Maryland.

entry.[15] The only cited case in which there was neither probable cause nor reasonable suspicion is *Winningham*, 140 F.3d 1328. Not coincidentally, that case held that a Fourth Amendment violation occurred.

There are several reasons why the reasoning from these decisions should not be followed, and accordingly, why an instinct exception should not be adopted in Wisconsin. Most importantly, all of the cases except *Guidry* were decided prior to *Jardines*. As explained above, *Jardines* was a pivotal moment in the legal development of dog sniffs. The earlier Supreme Court dog sniff cases held that dog sniffs conducted in public places were not searches. *Place*, 462 U.S. at 707; *Edmond*, 531 U.S. at 40; *Caballes*, 543 U.S. at 409.

Years later, in *Jardines*, the Supreme Court clarified that a different rule applied when dog sniffs occurred in constitutionally protected places: those

[15] The cases where there was probable cause to believe drug evidence would be located in the vehicle prior to the dog's entry are: *United States v. Guidry*, 817 F.3d 997, 1006 (7th Cir. 2016); *United States v. Pierce*, 622 F.3d 209, 215 (3d Cir. 2010); *United States v. Vazquez*, 555 F.3d 929, 930 (10th Cir. 2009); *United States v. Wilson*, 278 F.R.D. 145, 152-53 (D. Md. 2011); *See also*, *United States v. Sharp*, 689 F.2d 616 (6th Cir. 2012) (although decision does not reiterate, the Brief of the United States, 2011 WL 260303, *8 confirms that the dog alerted prior to entering). The cases where there was reasonable suspicion to believe drug evidence would be located in the vehicle prior to the dog's entries are: *Stone*, 866 F.2d at 364 and *United States v. Lyons*, 486 F.3d 367, 372 (8th Cir. 2007).

dog sniffs are searches. 569 U.S. at 7. In the interim, many courts had erroneously concluded that *no* dog sniffs were searches regardless of where they occurred. *E.g.*, *United States v. Scott*, 610 F.3d 1009, 1016 (8th Cir. 2010) (dog sniff of the front door of an apartment is not a search because the dog sniff discloses only contraband); *United States v. Brock*, 417 F.3d 692, 695-96 (7th Cir. 2005) (dog sniff inside a home was not a Fourth Amendment search); *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993) (canine sniff inside warehouse not a search); *See also, Miller*, 647 N.W.2d 348, ¶9 (discussing dog sniff in public place but opining that "the logic of *Place*-that dog sniffs reveal only illegal conduct so they intrude on no legitimate privacy interest-would apply equally in any setting"). *Jardines* corrected this misunderstanding, clarifying that there is a legal distinction between dog sniffs conducted in public places such as airports and streets (not searches) and those conducted in constitutionally protected places, such as homes and vehicles (searches).[16]

The *Jardines* decision also disavows the premise that drug dogs are permitted to engage in investigative actions that exceed the lawful authority of their human handers. As discussed above, in *Jardines* law enforcement officers approached the

[16] Curiously, reasonable suspicion is central to the *Stone* rule. However, reasonable suspicion is not sufficient for a vehicle search. "Reasonable suspicion is a less demanding standard than probable cause. . .". *Alabama v. White*, 496 U.S. 325, 330 (1990). This is further demonstration that these cases were not properly analyzing the dogs' entries as searches.

defendant's front porch with a leashed canine. 569 U.S. at 3-4. The dog was on a six-foot leash. The officer testified that the latitude was necessary due to the dog's "wild nature," and "tendency to dart around." *Id.* at 4. The *Jardines* Court did not apparently find the dog's wild nature relevant. Instead, it characterized the dog's sniff as law enforcement action. Specifically, the dog was the one who detected contraband through its enhanced sense of smell. Yet the sniff meant that "[t]he officers were gathering information in an area belonging to Jardines. . .". *Id.* at 5-6. The Court discussed the situation as a "canine forensic investigation" and specifically emphasized that "[i]t is not the dog that is the problem, but the behavior that here involved use of the dog." *Id.* at 9 n.3.

Further reason not to adopt the proposed instinct exception is that in the majority of the cited decisions the discussion of whether the dog's entry was a search was irrelevant because the dog alerted prior to entering the vehicle. *Supra* n.12. A reliable alert supplies probable cause to search, and if there was probable cause to search, it does not matter whether the dog's entry was a search because a human officer would have been authorized to search regardless. *See Pierce*, 622 F.3d at 215 (given probable cause prior to entry, the instinct issue was a "*pro forma* exercise…"); *Wilson*, 278 F.R.D. at 153 (because of the alert, drugs would have inevitably been discovered).

Finally, the cited decisions are unpersuasive because they do not undertake prototypical search

analyses let alone explain why the "instinctive" finding is dispositive.[17] A decision cannot persuade if it contains no legal analysis. Again, it may be that the courts in those decisions were operating under the mistaken belief that a dog sniff is not a search, regardless of where it occurs—which was corrected by *Jardines*.

One possible rationale is the foundational rule that the Fourth Amendment constrains government action, not actions taken by private individuals. *Burdeau v. McDowell*, 256 U.S. 465, 572 (1921) (no Fourth Amendment search where "no official of the federal government had anything to do with the wrongful" search and seizure by private detectives). [18]

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[17] The basic premise itself—that jumping into a vehicle is an instinctual behavior for a dog—is not self-evident.

[18] The Eighth Circuit has suggested a similar rationale—that it comes down to the subjective motivation of the police—with reference to its earlier decision in *Lyons*, 957 F.2d 615. This rationale should be disavowed:

> [S]ince the *Lyons* cases, the Supreme Court has emphasized that with two "limited exception[s]" for special-needs and administrative searches, the subjective intent of police officers is almost always irrelevant to whether an action violates the Fourth Amendment. *Ashcroft v. al-Kidd*, 563 U.S. 731, 736–37, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) There is reason to doubt, therefore, whether the district court's reading of the *Lyons* cases endures.

United States v. Javier Pulido-Ayala, 892 F.3d 315, 319 (8th Cir. 2018).

The distinction between government action and private action matters because it determines the applicability of the exclusionary rule. When there is no police involvement in an illegal action, the exclusionary rule should not apply because there is no police misconduct to deter. *State v. Jenkins*, 80 Wis. 2d 426, 431, 259 N.W.2d 109 (1977). However, in the context of police canine activity, there is always law enforcement involvement. Police canines do not independently investigate crime. They obey their handlers' commands. Officers who command their dogs to sniff for drugs, as occurred here, cannot later disclaim responsibility for the dog's sniffing. As defense counsel aptly put it, "An officer can't just have a dog free wheel, I have no control over this." R.25:41; App.141. Police canines are either highly-trained partners to law enforcement or uncontrollable wild animals, but they cannot be both.

Applying the exclusionary rule in cases like Ms. Campbell's serves its purpose by incentivizing officers to train and control their canine partners. The exclusionary rule exists not only to deter intentional misconduct, but also to encourage law enforcement to develop and apply policies that will protect individual rights. *See Stone v. Powell*, 428 U.S. 465, 492 (1976) (the rule encourages officers who develop policies and implement them "to incorporate Fourth Amendment ideals into their value system."). The need for adequate training is of paramount importance in the context of dog sniffs. Full-blown searches are permitted on the basis of dog alerts. *Miller*, 256 Wis. 2d 80, ¶¶11-12. This Court should

not approve Fourth Amendment loopholes for police canines. Officers must be incentivized to keep their dogs well-trained and under handler control.[19]

If this Court chooses to adopt an instinct exception, it should not be as broad as the State and circuit court advocate. At minimum, it should require proof of reasonable suspicion before the entry into the vehicle, as established in *Stone*. *See Stone*, 866 F.2d at 364. Additionally, any instinct exception should be reserved for extraordinary circumstances in which, despite a handler's best efforts, the dog escapes and the handler is unable to prevent the dog from entering the vehicle. Only in such circumstances can it reasonably be argued that application of the exclusionary rule fails to serve its purpose. As demonstrated next, Ms. Campbell's case does not involve such circumstances. [20]

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[19] *See Herrera-Amaya v. Arizona*, 2016WL7664134, unreported (D. AZ 2018) at *10 (disagreeing "with the recurring theme present in those cases that because dog handlers do not actively encourage the dog into a person's vehicle, there is no search" because "it would undermine that training and the role we allow dogs to play as law enforcement.")

[20] This Court does not need to issue a broad holding that there could *never* be an instinct exception because there is no reasonable interpretation of the exception that would justify the unlawful dog sniffs in Ms. Campbell's case.

III. If an Instinct Exception Applies, It Cannot be Met in Ms. Campbell's Case.

A. Standard of review.

As with any analysis of whether police action amounts to a search, whether the dog entries in this case met the proposed instinct exception is a mixed question of fact and law. The ultimate legal question should be reviewed de novo. *See Miller,* 256 Wis. 2d 80, ¶5.

B. The instinct exception cannot be met in Ms. Campbell's case because Sergeant Al-Moghrabi unlawfully facilitated his canine's entry into her vehicle.

Under the instinct exception from *Stone*, the State was required to prove that Sergeant Al-Moghrabi did not facilitate Trace's entries and that there was (at minimum) reasonable suspicion to believe Ms. Campbell's vehicle contained drug evidence before entering. *See Stone*, 866 F.2d at 364.[21] The State cannot meet the instinct exception because Sergeant Al-Moghrabi did facilitate Trace's entries and there was no reasonable suspicion.

The circuit court did not separately address the three separate entries. The State conceded that the third entry did not meet the exception because

[21] Again, Ms. Campbell does not discern a basis for permitting searches based on reasonable suspicion, but the *Stone* rule incorporates this requirement so Ms. Campbell will address it.

Sergeant Al-Moghrabi was detailing Trace at that point. R.25:35-36; App.135-36; R.30: timestamp 23:50. The first and second entries occurred in succession. R.30: timestamp 23:45. From the video it is not clear when the scratching happened—whether it was between the first and second entries or after the second entry. *Id.*

As to what it referred to as the "initial sniff," court found:

> That the door to the vehicle was left open. That the dog was on a loose leash. At the initial search, or the initial sniff of the vehicle the dog, without any direction from the law enforcement officer, jumped into the vehicle that was left open by the passenger. The cops did not ask them to open the door, did not tell them to leave the door open, it was just left open.
>
> It's pretty clear to me after having reviewed the case law, and I'm looking at one of the more recent cases, the "*Guidry*" case, that there is no 4th Amendment violation here when a dog jumps instinctively through an open car door without any facilitation by its handler. If, in some of these cases, like "*Winningham*" there appears to be an order by the cop to keep the door open and either a command to go into the car. But what is relevant here is that there was no requirement by the police officers to keep the door open. No order by the cops to have the dog jump in. The dog jumped in. And I think under the case law that is not a violation of the 4th Amendment.

R. 22:2-3; App.153-54.

Even accepting the court's factual finding that Sergeant Al-Moghrabi did not initially direct Trace into the vehicle, as the court acknowledged, this does not resolve the issue. Instead, the question is whether there was "facilitation by [the] handler." R. 22:3; App.154.

This Court should determine that Sergeant Al-Moghrabi facilitated Trace's entries. One of the common definitions of "facilitate" is to "help bring about."[22] Sergeant Al-Moghrabi held Trace on a one-to-two-foot section of leash, placed him in a "stance," and ordered him to sniff Ms. Campbell's vehicle. R.25:12; App.112; R.30: timestamp 22:29. The sergeant stayed ahead of Trace while holding the leash so that he could "slow [Trace's] search" if necessary and keep Trace out of traffic. R.25:15; App.115. Trace began sniffing at the front of the car making his way around toward the driver's side. R.30: timestamp 22:29. Upon reaching the driver's side door, he climbed inside. R.30: timestamp 22:37.

As shown on the video recording, Sergeant Al-Moghrabi made no attempt to keep Trace out of the vehicle. R.30: timestamp 22:29-23:06. Instead, he simply stood by. Once Trace was inside, Sergeant Al-Moghrabi did not attempt to pull him out. He allowed Trace sniff around. After a several seconds, Trace backed out of the vehicle but immediately climbed back in. Again, Sergeant Al-Moghrabi made

[22] "Facilitate," Merriam-Webster Dictionary, online edition, *available at* https://www.merriam-webster.com/dictionary/facilitate.

no attempt to prevent this from happening. After several more seconds, Trace climbed out again. At that point the pair went on to complete their first circuit, and began to circle the vehicle a second time. R.30: timestamp 23:45. On this second circuit, the sergeant directed Trace into the vehicle for the third and final entry. R.25:17; App.117.; R.30: timestamp 23:50. By ordering Trace to sniff for drugs, controlling Trace's pace and direction, allowing Trace to enter the first time, failing to promptly pull Trace out, allowing Trace to enter a second time, again failing to promptly pull him out, directing Trace to enter a third time, Sergeant Al-Moghrabi helped bring about the entries. This was facilitation.

The court analogized Ms. Campbell's case to *Guidry*, 817 F.3d at 1001. R. 22:3; App.154. In that case, an officer directed the defendant out of his vehicle during a traffic stop. 817 F.3d at 1001. The defendant did not close his door as he exited. A drug dog began sniffing around the vehicle. As it arrived at the driver side door, it sat down. Sitting down was the "alert" for the odor of drugs. *Id.* at 1002. The dog then stuck its head in the car. The court presumed this was a search. However, it was not unlawful for two reasons. First, the dog had gotten away from its handler "despite [the handler's] efforts," who had attempted to keep the dog away from the car. *Id.* at 1006. Second, the dog alerted to drugs before entering the vehicle, thus supplying probable cause for any search. *Id.* ("As important, at the point that Bud's head supposedly entered Guidry's car, the officers had probable cause to search the interior. . .").

Guidry is readily distinguishable from Ms. Campbell's case. First and foremost, unlike in *Guidry*, there was no probable cause to search prior to Trace's entry into the vehicle. Trace did not alert until after he had entered the vehicle. R.25:19; App.119. As already noted, given the existence of probable cause, the instinct discussion in *Guidry* is irrelevant. If there was probable cause to search, it did not matter whether it was the dog or a human doing the searching because there was constitutional authorization for the search.

Second, Trace did not get away from Sergeant Al-Moghrabi "despite [his] efforts." *C.f. Guidry*, 817 F.3d at 1006. To the contrary, there was no evidence that Sergeant Al-Moghrabi ever attempted to keep Trace out of the vehicle. Instead, he simply stood by while it happened. Nor was there any suggestion that he would not have been able to keep Trace out of the vehicle had he attempted to do so. Sergeant Al-Moghrabi stayed ahead of Trace so that he could slow Trace down if necessary and keep Trace out of traffic. R.25:15; App.115. If Sergeant Al-Moghrabi was positioned to slow Trace's search or keep him out of traffic he was positioned to keep Trace out of Ms. Campbell's vehicle. Considerable detail was adduced at the suppression hearing establishing that Trace was highly trained and that he was trained to obey Sergeant Al-Moghrabi, specifically. In fact, Trace was described as Sergeant's Al-Moghrabi's "partner." R.25:12 App.112. There is no evidence to show that Trace escaped Sergeant Al-Moghrabi's control.

Instead, this case is like *Winningham*, and as there, this Court should find that a Fourth Amendment violation occurred. *See Winningham*, 140 F.3d 1328. In that case, an officer opened the hatchback to the defendant's van and left it open. Another officer unleashed a drug dog, and the dog jumped into the van. *Id.* at 1329-1330. There was no reasonable suspicion to believe that drug evidence would be found in the van. *Id.* A Fourth Amendment violation was found. *See also, Kansas v. Freel*, 32 P.3d 1219, 1225 (Kan. App. 2001) (violation where officer encouraged dog to enter through open window).

There was arguably more facilitation in Ms. Campbell's case than in *Winningham*. Unleashing a dog amounts to relinquishment of control. But here, as discussed above, Sergeant Al-Moghrabi did not relinquish control. He maintained control and simply chose to allow Trace to climb into Ms. Campbell's vehicle. Unlike in *Winningham*, law enforcement did not physically open Ms. Campbell's door. However, Ms. Campbell would not have opened her door had Sergeant Al-Moghrabi not ordered her out of the vehicle. The State asked Sergeant Al-Moghrabi "And did you tell anybody to open a door?" and the sergeant candidly answered, "Well I told them to open it to get out." R.25:15; App.115.[23]

[23] Ms. Campbell does not argue that the sergeant was obligated to direct Ms. Campbell to close the door or close it for her. And if Trace had detected the odor of drugs through the open door, while remaining outside of the vehicle, there would be no Fourth Amendment violation. But Trace did not remain outside of the vehicle, and that is the problem.

Second, as in *Winningham*, there was no reasonable suspicion to believe that drug evidence would be found in Ms. Campbell's vehicle. Again, this was a routine traffic stop. The State presented no evidence, or argument, that there was reason to suspect drug activity. As defense counsel, argued, "the Court heard no testimony that Ms. Campbell was suspected of drugs. She was just stopped for operation while suspended" to which the court responded, "Believe me, I am aware of that." R.25:39; App. 139. The lack of reasonable suspicion means that the *Stone* instinct exception was not met.

There is one additional factor in this case that sets it apart from all of the other cited decisions that admitted evidence based on the *Stone* instinct rule: the fact that Trace entered the vehicle not once, but *three times*. In no other cited decision did the dog enter more than once. At minimum, a canine handler should be expected to keep his or her dog out of the vehicle a second or third time, having full knowledge that the dog was likely to go inside again. The purpose of the exclusionary rule would be served by applying it here.

Trace's entries into Ms. Campbell's vehicle cannot be justified by labeling them instinctual. These were searches under the meaning of the Fourth Amendment and there was no probable cause to justify them. Ms. Campbell's suppression motion should be granted.

CONCLUSION

For the reasons stated above, Ms. Campbell respectfully asks this Court to reverse the circuit court and remand with directions to grant her suppression motion.

Dated this 18th day of March, 2021.

Respectfully submitted,

Electronically Signed by
Colleen Marion

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,816 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief of appellant, including the appendix as a separate attachment, if any, which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Court Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated this 18th day of March, 2021.

Signed:

Electronically Signed by
Colleen Marion

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