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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

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

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

A. This Court should reject an instinct exception for unlawful dog sniffs.

Wisconsin has never recognized an “instinct” exception for otherwise unlawful police dog sniffs and neither has the United States Supreme Court. Instead, the State relies on a selection of nonbinding cases from other jurisdictions.¹ The State does not explain why this Court should find those cases persuasive. Instead, it simply asserts that they exist and therefore, this Court should adopt them. Response Brief at 8-10, 12-13. The cited cases are in fact very unpersuasive for the reasons set forth in detail in Ms. Campbell's Appellant's Brief at 17-20.²

The State also cites three inapposite decisions from the United States Supreme Court. Response Brief at 7-9. Those cases held that dog sniffs that occurred in public places were not searches within the meaning of the Fourth Amendment. In *United States*

¹ The State cites cases from the Third, Sixth, Seventh, Eighth, and Tenth Circuits.

² As an initial matter, the premise that entering a vehicle is instinctual canine behavior is illogical. Dogs instinctively hunt, guard food, and dig holes. They do not instinctively enter vehicles. They do it because a human trained them to do so. Nor do dogs instinctively sniff for narcotics. They do it because law enforcement trained them to do so.

v. Place, 462 U.S. 696, 707 (1983), a dog sniff of luggage at the airport was not a search. In *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) and *Illinois v. Caballes*, 543 U.S. 405, 409 (2005), dog sniffs around the exterior of vehicles that were parked in public were not searches. These cases did not address any purported “instinct” exception to otherwise unlawful drug dog sniffs.

Subsequently, in *Florida v. Jardines*, 569 U.S. 1 (2013), the Supreme Court held that a drug dog sniff that occurred on a person’s front porch *was* a search within the meaning of the Fourth Amendment. The Court held that *Place* and *Caballes* did not control because a person’s porch is a constitutionally protected place. *Id.* at 7-10. The State notes that *Jardines* involved the curtilage to a home. Response brief at 12. However, the State does not explain nor cite authority for why this compels a different result. Response Brief at 12. To be sure, courts do recognize that there are differences in the privacy interests of homes and vehicles. Those differences form the basis for the automobile exception to the warrant requirement. This exception allows police to search a vehicle without a warrant based on probable cause. But it does not allow police to dispense with probable cause altogether. Indeed, the cases cited by the State would have had no occasion to discuss an instinct *exception* if a drug dog sniff inside a person’s vehicle was not a search under any circumstances.

The State refers to what happened in Ms. Campbell’s case as a “free air sniff.” Response Brief at 1. To be clear, there would be no Fourth

Amendment violation had the dog stayed outside of Ms. Campbell's vehicle and sniffed for odors that may have emanated from inside the vehicle. That would have been in line with *Edmond*, and *Caballes*. But as soon as the drug dog entered Ms. Campbell's vehicle, *Jardines* controlled. Probable cause was required. And it is undisputed that probable cause did not exist. Ms. Campbell's suppression motion should be granted.

B. Even if this Court does adopt an instinct exception, the exception was not met in Ms. Campbell's case.

As set forth in the cases cited by the State, two elements to the instinct exception can be discerned: (1) proof of reasonable suspicion to believe contraband will be found in the car, and (2) proof that the human handler did not facilitate the dog's entry into the vehicle. *United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989). Neither element is met here.

First, there was no reasonable suspicion in Ms. Campbell's case. This was a routine traffic stop. R.25:1-2, 8; App.101-02, 108.³ There was no reason to suspect drug activity until after Trace entered Ms. Campbell's vehicle and alerted to the presence of drugs, *i.e.* until after the illegal search. The State does not argue that there was reasonable suspicion. Instead, as it did in the circuit court, the State ignores the reasonable suspicion requirement entirely.

³ Appendix citations are to the appendix to Ms. Campbell's Appellant's Brief.

Second, the State fails to prove that police did not facilitate the search. Trace did not “accidentally” end up in Ms. Campbell’s vehicle, as the State argues. Response Brief at 16. Trace was leashed at all times. Sergeant Al-Moghrabi placed him in a stance and ordered him to sniff around the vehicle for drugs. R.25:12; App.112. He had ordered Ms. Campbell and her passenger to exit the car and step away. Thus, although the door remained open, the door was only opened in the first place upon command of the officer. The State asked Sergeant Al-Moghrabi “And did you tell anybody to open a door?” and the sergeant answered, “Well I told them to open it to get out.” R.25:15; App.115.

This is not like *United States v. Guidry*, 817 F.3d 997, 1006 (7th Cir. 2016) where the dog got away from its handler “despite [the handler’s] efforts” to keep the dog away from the car. Sergeant Al-Moghrabi testified that he 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. However, when it came to Ms. Campbell’s vehicle, the sergeant made no similar effort to control Trace.⁴ Instead, he simply stood by as the dog climbed into the car—not once but three times. The State asserts that Trace’s entries were “brief,” Response Brief at 12, yet

⁴ Ms. Campbell requests that this Court independently review the facts as depicted in the footage of the traffic stop. See *State v. Reed*, 2018 WI 109, ¶¶14, 76, 384 Wis. 2d 469, 920 N.W.2d 56; *State v. Jimmie R.R.*, 2000 WI App 5, ¶39, 232 Wis. 2d 138, 606 N.W.2d 196 (1999). The State does not dispute this request.

the illegality of a Fourth Amendment violation is not measured by its duration. And three separate entries into a person's vehicle cannot reasonably be dismissed as a de minimis intrusion.

Therefore, even if this Court adopts an instinct exception, the exception was not met here. Ms. Campbell's suppression motion should be granted.

CONCLUSION

For the reasons stated above and in Ms. Campbell's Appellant's Brief, Ms. Campbell respectfully asks this Court to reverse the judgment of conviction and to remand to the circuit court with directions to grant her suppression motion.

Dated this 6th day of July, 2021.

Respectfully submitted,

*Electronically Signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 1,133 words.

Dated this 6th day of July, 2021.

Signed:

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