STATE OF WISCONSIN

COURT OF APPEALS—DISTRICT III

Case No. 2020AP001813 – 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

SUBSTITUTE REPLY BRIEF OF DEFENDANT-APPELLANT

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

INTRODUCTION

On March 18, 2021, Ms. Campbell filed an Appellant's Brief. On June 21, 2021, the State, by District Attorney Bruce R. Poquette, filed a Respondent's Brief. On July 6, 2021, Ms. Campbell filed a Reply Brief. On July 11, 2022, this Court converted the appeal to a three-judge appeal, and invited the Attorney General to file a substitute brief. On October 3, 2022, the State filed a Substitute Respondent's Brief.

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.

The State acknowledges that Wisconsin has never recognized an "instinct" exception for police dog sniffs. (Substitute Respondent's Brief at 5). Instead, the State relies on a selection of nonbinding cases from other jurisdictions. (*See id.* at 12-16). The cited cases are unpersuasive for the reasons set forth in detail in Ms. Campbell's Appellant's Brief at 17-20.

Ms. Campbell agrees with the State that this Court should consider logic and common sense. (*See* Substitute Respondent's Brief at 15) ("[l]ogically this approach makes sense"). The State asserts that, "[a] canine that enters a suspect's vehicle without the direction or facilitation of his handler is likely to be following its instinct by either (a) seeking out an odor that it is *trained* to seek out, or (b) pursuing a scent that it already detected outside the vehicle." (*Id.*) (emphasis added).

The State's use of the word "trained" is revealing. It defies logic to argue that an animal is instinctively doing what a person trained them to do. Dogs do not instinctively sniff for narcotics. They do it because law enforcement trained them to. In Ms. Campbell's case, the testimony showed that Trace had been through extensive training with Sergeant Al-Moghrabi. (R.25:6; A-App. 104). This training included handler protection, agility, and obedience training. A highly-trained police canine's intrusion into a constitutionally protected place, while leashed by its handler, cannot be excused as "dogs just being dogs." *See State v. Randall*, 496 P.3d 844, 855 (Idaho 2021) (rejecting the state's argument that the dog's entry was "no more than a dog being a dog").

Ms. Campbell has acknowledged that a dog sniff that occurs around the *exterior* of a vehicle parked in a public place is not a search. (*See* Substitute Respondent's Brief at 9-12). That principle is well established. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *Illinois v. Caballes*, 543 U.S.

405, 409 (2005); *State v. Arias*, 2008 WI 84, ¶3, 311 Wis. 2d 358, 752 N.W.2d 748.

Yet in *Florida v. Jardines*, 569 U.S. 1, 9 (2013), the United States Supreme Court held that a dog sniff that occurred on a person's front porch, as opposed to a public place, *was* a search. The Supreme Court specifically ruled that *Caballes* did not control because a person's porch is a constitutionally protected place. *Id.* at 7-10.

Ms. Campbell acknowledges that there are certain differences in the privacy interests in homes and vehicles. Those differences have been held to permit searches of vehicles without a warrant in certain circumstances. *See e.g., State v. Marquardt*, 2001 WI App 219, ¶31, 247 Wis. 2d 765, 635 N.W.2d 188 (warrantless search of automobile permissible if there is probable cause and the vehicle is readily mobile).

The State notes that *Jardines* involved the curtilage to a home. (Substitute Respondent's Brief at 12). Again, Ms. Campbell acknowledges that there are differences between homes and vehicles. This is why in *Jardines*, a warrant was required. *See id.* at 8. Here, Ms. Campbell does not argue that a warrant was required. She argues that probable cause was required. This reflects the differences between homes and vehicles.

To be clear, there would be no constitutional violation had Trace 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 *Caballes*. But as soon as Trace entered Ms. Campbell's vehicle, this became a search and probable cause was required. It is not clear whether or not the State is conceding that the Trace's entry was a search. It does not explicitly argue it was *not* a search.[1] However, the cases relied upon 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 at all.

The State argues that it would be a "windfall" to a defendant if probable cause was required for a drug dog to enter a vehicle because, "police actually may have developed probable cause for a search in the moments preceding the dog's entry, but establishing the probable cause may prove difficult after the fact given the rapid succession of events." (Substitute Respondent's Brief at 15). The response to this red herring "windfall" is simple. The officer keeps the dog on a leash. The officer does not permit the dog to enter the vehicle. If the dog smells an odor of

[1] The State cites to *United States v. Stone*, 866 F.2d 359, 362-64 (1989), and asserts that the court there "rejected Stone's argument that the dog's entry into the hatchback constituted a search." (Substitute Respondent's Brief at 13). In fact, the *Stone* court rejected the argument that the sniff *outside* the vehicle was a search. 866 F.2d at 363. The court acknowledged that the entry into the vehicle was a "troubling issue" because "police may not search an automobile unless they have probable cause to believe it contains contraband." (citation omitted). *Id*. The court concluded, however, that it was not a constitutional violation due to the instinct exception.

contraband from outside the vehicle, the dog alerts. Upon an alert, the police may search the vehicle. Keeping a dog leashed is a simple solution to a nonexistent problem, and does not result in a windfall to a defendant.

As set forth in the cases cited by the State, two prongs to the instinct exception can be discerned: (1) proof of reasonable suspicion to believe contraband will be found in the vehicle, and (2) proof that the human handler did not facilitate the dog's entry into the vehicle. *See Stone,* 866 at 364.

The State discounts the instinct cases' reliance on reasonable suspicion because the decisions predate the United States Supreme Court's seminal dog sniff cases. (Substitute Respondent's Brief at 14 n.4). The State asserts that, "[t]hus, while *Stone* and *Winningham*[2] can be read as placing an emphasis on the presence of reasonable suspicion, the State would argue that the discussions of reasonable suspicion therein primarily go to the principles later espoused in *Caballes* and *Rodriguez*."[3] (*Id.*). Yet, *Winningham* distinguished *Stone* on two points, one of which was the existence of reasonable suspicion. The court held, "[f]irst, our holding in *Stone* was driven not by what the officers *did*, but what they did *not* do…" (emphasis in original). And "[s]econd, the officers in *Stone* acted

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

[3] *Rodriguez v. United States,* 575 U.S. 348, 354 (2015) (dog sniff that prologs a stop requires reasonable suspicion).

under reasonable suspicion, a *circumstance underscored by our limited holding*." (emphasis added). The existence of reasonable suspicion was "underscored" and cannot be dismissed. (*Id.*).[4]

Stone and *Winningham* are the foundational cases for the instinct exception. The fact that they predate important United States Supreme Court cases is not a reason to modify the rule that the State wants this Court to adopt; it is a reason to reject the rule altogether. Ultimately, the cases relied upon by the State are dated and unpersuasive.[5] This Court should not adopt their reasoning.

The State acknowledges the existence of a recent Idaho Supreme Court decision that rejects the instinct exception. (Substitute Respondent's Brief at 16). In *Randall*, 496 P.3d at 854-55, the Idaho Supreme Court held that when a drug dog enters a person's vehicle,

[4] The State further asserts that in *Pierce*, "the presence or absence of reasonable suspicion did not seem to factor into the court's decision." (Substitute Respondent's Brief at 18) (citing *United States v. Pierce,* 622 F.3d 209, 213-15 (3d Cir. 2010). Ms. Campbell does not agree with this characterization. Regardless, in *Pierce* there was probable cause, so reasonable suspicion was a given. *Id.* at 215. The State also cites *Lyons* as a case that purportedly did not focus on reasonable suspicion. (Substitute Respondent's Brief at 18) (citing *Lyons*, 486 F.2d at 373-74). In *Lyons*, the dog alerted to the odor before even entering the vehicle, and therefore the court found that the search was inevitable. *Id.* at 374.

[5] All of the cases except *United States v. Guidry,* 817 F.3d 997, 1006 (7th Cir. 2016), were decided prior to *Jardines*.

this is a trespass, and thus amounts to a search.[6] In *Randall*, a police officer pulled the defendant over after he had an unnatural response to seeing the squad car. *Id*. at 847. When the officer spoke to Randall, the officer gathered additional information that amounted to reasonable suspicion of drug trafficking. *Id*.

The officer retrieved his drug dog and asked Randall to step out of his vehicle. Randall complied, and when he got out of the vehicle, he left his window open. *Id*. The dog jumped in through the window. As the dog jumped in, the officer boosted him because he was worried about the dog hurting himself. *Id*. at 847. The dog got out and then jumped back in a second time. *Id*. at 848. The dog alerted inside the vehicle and a full-blown search ensued. *Id*. Randall argued, first, that the stop was unlawfully prolonged, and second, that the dog entering his vehicle was an unlawful search. *Id*. The *Randall* court held that the stop was permissibly extended. *Id*.

However, the court rejected the state's claim that the interior sniff was "instinctual." *Id*. at 853. In so finding, the court disavowed the very cases that the State relies upon in Ms. Campbell's case: *Sharp*,

[6] Ms. Campbell did not previously have the opportunity to address *Randall* because it was issued after she filed her Appellant's and Reply Briefs. However, the State acknowledges that her position "echoes" the analysis in *Randall*. (Substitute Respondent's Brief at 16).

Pierce, *Lyons*, and *Winningham*.[7] *See Randall*, 496 P.3d at 853. Instead, the court held that "*Jones* and *Jardines* make clear that a drug dog's trespass into a vehicle during an exterior sniff converts what would be a non-search under *Caballes* into a search." *Id*.

The *Randall* court further noted that there was not a persuasive trend toward the instinct exception. *Randall*, 496 P.3d at 853. The federal circuits that had adopted the rule all pre-dated *Jones*,[8] except for one. The one exception was decided only six months after *Jones*, and its opinion did not suggest that *Jones* was considered by the parties or court. *Id*. (citing *Sharp*, 689 F.3d at 616). Furthermore, only two state appellate courts had adopted the rule in opinions published after *Jones*. *Id*. (citing *State v. Miller*, 766 S.E.2d 289, 294 (NC 2014); *People v. Canizalez-Vehicledena*, 979 N.E.2d 1014, 1021 (Ill. App. Ct. (2012)).[9]

Finally, *Randall* correctly noted that the instinct exception disincentives good training. "If dogs

---

[7] *United States v. Sharp,* 689 F.2d 616 (6th Cir 2012); *United States v. Pierce,* 622 F.3d 209; *United States v. Lyons,* 486 F.3d 367 (8th Cir. 2007); *Winningham,* 140 F.3d 1328.

[8] *United States v. Jones,* 565 U.S. 400, 404-05 (2012) (installation of a GPS on a suspect's vehicle was a physical occupation that amounted to an unlawful search).

[9] *Miller* involved a dog entering a closet during a lawful protective sweep, not a vehicle search. *Id*. at 290. In *Canizalez-Vehicledena*, there was already probable cause prior to the dog's entry into the vehicle. *Id*. at 1021-22.

can be trained to seek out substances they have no natural inclination to seek, and then to respond to their presence with specific and predictable behaviors, then surely they can be trained not to jump through vehicle windows in the process." *Id*. at 856.

Randall's facts are akin to Ms. Campbell's. Randall was directed to exit the vehicle and left his window open, and likewise, Ms. Campbell was directed to exit the vehicle and left her door open. (R.25:14-15, 25; A-App.114-15, 125). However, at least in *Randall* there was reasonable suspicion of drug activity. *Randall*, 496 P.3d at 851. In Ms. Campbell's case, it is undisputed that there was not. The officer pulled Ms. Campbell over because she was not wearing a seatbelt and her front license plate was missing. (R.25:1-2; A-App.111-12). The officer then learned that her license was suspended. (R.25:8; A-App.108).

Probable cause was required for Trace to enter Ms. Campbell's vehicle. 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.

There is good reason to reject the instinct exception, in which case this Court need not reach Ms. Campbell's alternative argument that, even if the exception were to apply, her case would not satisfy the exception.

The instinct exception would not be met here. First, there was no reasonable suspicion in Ms. Campbell's case. This was a routine traffic stop. (R.25:1-2, 8; A-App.101-02, 108). 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 of drug activity.

Second, the State fails to prove that Sergeant Al-Moghrabi did not facilitate the search. Sergeant Al-Moghrabi ordered Ms. Campbell and her passenger to exit the vehicle and step away. Thus, although the door remained open, the door was only opened 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; A-App.115). He placed Trace in a stance and ordered him to sniff around the vehicle for drugs. (R.25:12; A-App.112). Trace was leashed at all times.

This is unlike *Guidry,* 817 F.3d at 1006, where the dog got away from its handler "despite [the handler's] efforts" to keep the dog away from the vehicle. 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; A-App.115). However, when it came to Ms. Campbell's vehicle, the sergeant made no

similar effort to control Trace.[10] Instead, he simply stood by as the dog climbed into the vehicle—not once but three times. The State brushes past the fact that Trace entered the vehicle multiple times. (Substitute Respondent's Brief at 17-19). These facts show a blatant disregard for Ms. Campbell's privacy rights—the kind of blatant disregard the exclusionary rule is designed to deter.

Even if this Court adopts an instinct exception, the exception was not met here. The State does not dispute that, if the dog's entry was unlawful, the remedy is suppression of all of the evidence found inside the vehicle, pursuant to the exclusionary rule.

[10] This Court may 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).

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 18th day of October, 2022.

Respectfully submitted,

Electronically Signed by Colleen Marion

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-7125
marionc@opd.wi.gov

Attorney for Defendant-Appellant

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 2,620 words.

Dated this 18th day of October, 2022.

Signed:

Electronically Signed by Colleen Marion
COLLEEN MARION
Assistant State Public Defender