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STATE OF MONTANA,

Plaintiff and Appellee,

v.

WILLIAM JAMES HARNING,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana Thirteenth Judicial District Court,  
Yellowstone County, the Honorable Colette Davies, Presiding

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## **STATEMENT OF THE ISSUES**

Did Trooper Tyler DiGiovanna have a particularized suspicion, based on an odor of marijuana and an admission to smoking hours prior and 80 miles from the stop, that William Harning possessed marijuana when DiGiovanna extended the traffic stop and requested a canine search? Was the subsequent search warrant supported by probable cause?

## **STATEMENT OF THE CASE**

William Harning loaded his truck full of pottery at the Archie Bray in Helena and headed to an art show in Carbondale, Colorado. (State's Ex. A at 10:20:12-10:20:26; 10:43:01-10:43:07.) Along the way, he stopped in Big Timber to pick up more pottery. (State's Ex. A at 10:36:33-10:36:38.) He was in a hurry to deliver the pottery on time when Trooper Tyler DiGiovanna stopped him for speeding on I-90 near Billings. (State's Ex. A. at 10:19:51.) While speaking with William, DiGiovanna thought he smelled marijuana. (State's Ex. A. at 10:20:31-10:20:33.) William told him that he smoked in Big Timber. (7/17/18 Hrg. Track 2 at 00:53.) DiGiovanna performed a DUI investigation. (State's

Ex. A. at 10:29:33-10:35:59.) William fully cooperated. (*See* State’s Ex. A. at 10:29:33-10:35:59.) DiGiovanna determined that William was not impaired. (State’s Ex. A. at 10:36:00)

William then asked if he was free to go. (State’s Ex. A at 10:36:15-10:36:17.) Instead, DiGiovanna locked William in the back of his patrol car and started a drug investigation. (State’s Ex. A at 10:37:23-10:37:28.) DiGiovanna requested a canine and the dog alerted to the passenger side cabin of the truck. (State’s Ex. A. at 10:54:30-10:56:36.) The trooper obtained a search warrant and located a glass marijuana pipe and a grinder between the front seats. (7/17/18 Hrg. Track 3 at 03:15-03:23.) William was charged in Yellowstone County justice court with Criminal Possession of Drug Paraphernalia, in violation of Mont. Code Ann. § 45-10-103, and Criminal Possession of Dangerous Drugs – Marijuana [1<sup>st</sup>], in violation of Mont. Code Ann. § 45-9-102(2). (J.C. Notices to Appear and Complaints; J.C. Acknowledgement of Rights and Penalties.)<sup>1</sup>

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<sup>1</sup> The record in this case contains unnumbered Justice Court documents and numbered District Court documents. Citations to Justice Court documents are made by reference to “J.C.” and the title to the document. Citations to District Court documents are made by reference to “D.C.” and the document number.

William moved to suppress the State's evidence as the product of an illegal extension of the stop and as the result of an invalid search warrant. (J.C. Motion to Suppress.) The court held a hearing. (7/17/18 Hrg.) The justice court issued an order denying William's motion. (J.C. Opinion and Order.)

William pled guilty to both charges and reserved his right to appeal to district court. (J.C. Acknowledgment and Waiver of Rights; J.C. Sentencing Order.) The justice court stayed execution of his sentence pending appeal. (J.C. Order Staying Sentence.)

On appeal to district court, the district court affirmed the denial of William's suppression motion. (D.C. Doc. 9.) William timely appealed to this court. (D.C. Doc. 1.)

### **STATEMENT OF THE FACTS**

On March 1, 2018, William Harning was driving a truck full of ceramics to an art show in Colorado when he was pulled over for going 74 MPH on the stretch of I-90 near Billings where the speed limit reduces to 65 MPH. (State's Ex. A at 10:19:51 and 10:28:00)

Trooper Tyler DiGiovanna, who had been a trooper for about a year, stopped William and approached his truck. (7/17/18 Hrg. Track 4

at 00:28-00:33; State's Ex. A at 10:19:27.) DiGiovanna asked William about the boxes in the back of the truck. (State's Ex. A at 10:20:10-10:20:13.) William said that he was in "Helena" at "Archie Bray" and explained that he was transporting pottery. (State's Ex. A at 10:20:13-10:20:26.) DiGiovanna thought he smelled marijuana and asked William if he had a medical marijuana card. (State's Ex. A at 10:20:27-10:20:33.) William told him that he did not have a medical card and did not have marijuana on him, but that he smoked in Big Timber. (State's Ex. A at 10:20:34-10:20:48; 7/17/18 Hrg. Track 2 at 00:53.) DiGiovanna asked William for his driver's license, registration, insurance and phone number, which William provided. (State's Ex. A at 10:20:52-10:21:38.) William answered all the trooper's questions quickly and willingly. (State's Ex. A at 10:19:31-10:21:39.) The entire conversation lasted just over two minutes. (State's Ex. A at 10:19:31-10:21:39.)

After checking William's information, DiGiovanna asked William to step out of the vehicle and complete some tests to make sure he was safe to drive. (State's Ex. A at 10:28:10.) William complied and exited the vehicle. (State's Ex. A at 10:28:20.) DiGiovanna conducted a patdown search and did not locate any drugs or paraphernalia. (State's

Ex. A at 10:28:53-10:29:26.) William completed the tests as instructed. (State's Ex. A at 10:29:33-10:35:59.) The two spoke cordially. (State's Ex. A at 10:29:33-10:35:59.) William was not impaired. (State's Ex. A at 10:36:00.)

After successfully completing the tests, William asked if he could leave. (State's Ex. A at 10:36:15-10:36:17.) DiGiovanna told him no. (State's Ex. A at 10:36:15-10:36:17.) DiGiovanna told William they were now going to "do the drug process." (State's Ex. A at 10:36:22-10:36:27.) William again told DiGiovanna that he did not have any marijuana in the vehicle. (State's Ex. A at 10:37:00-10:37:03.) DiGiovanna asked William for consent search his truck and William told him that he needed to get on his way. (State's Ex. A at 10:37:04-10:37:10.) Trooper DiGiovanna ordered William into the back of his police car because "that's the next process." (State's Ex. A at 10:37:23-10:37:28.) William complied. (State's Ex. A at 10:37:43.)

Once in the back of the police car, William asked DiGiovanna if he was under arrest. (State's Ex. A at 10:37:50.) DiGiovanna told him no. (State's Ex. A at 10:37:51-10:37:53.) William asked if he was free to go. (State's Ex. A at 10:37:54-10:37:55.) DiGiovanna told him no. (State's

Ex. A at 10:37:55.) DiGiovanna told William that he understood that it was a “weird situation” and reiterated to William that he was not free to leave. (State’s Ex. A at 10:38:00-10:38:05.) William asked about his rights and DiGiovanna said, “You’re not under arrest so therefore your *Miranda* does not apply here, ok?” (State’s Ex. A at 10:38:07-10:38:14.) DiGiovanna told William that he was not going to ask him anymore questions and closed the door. (State’s Ex. A at 10:38:32-10:10:38:39.)

DiGiovanna requested “a canine come and uh, not search the vehicle, but, uh, be deployed.” (7/17/18 Hrg. Track 2 at 04:47-04:55.) DiGiovanna went back to his car and told William that he could leave or stick around for the dog. (State’s Ex. A at 10:39:40-10:40:00.) Although DiGiovanna previously told William he was not going to ask him anymore questions, DiGiovanna again asked William where he was heading. (State’s Ex. A at 10:43:00-10:43:01.) William told him that he was driving to an art gallery in Carbondale, Colorado to deliver the pottery. (State’s Ex. A at 10:43:01-10:43:07.) The canine arrived about ten minutes later. (State’s Ex. A at 10:54:30.) The dog alerted to the “front side door” of the truck. (State’s Ex. A at 10:57:41-10:57:45.) DiGiovanna obtained a search warrant.

At the suppression hearing, DiGiovanna testified three different times about why he thought he had a particularized suspicion to investigate William for drug possession and gave three varying answers. First, he said it was because of “the odor, his [William’s] behavior, um, just his interactions with me and the questions.” (7/17/18 Hrg. Track 2 at 02:25-02:35.) Second, he testified that he extended the stop because of “defense behavior and the odor of marijuana coming from the vehicle.” (7/17/18 Hrg. Track 3 at 00:01-00:04.) Third, when the State asked, “Just one more time, what was that suspicion based on?” DiGiovanna replied, “The smell, um, his behavior and his actions.” (7/17/18 Hrg. Track 8 at 00:03-00:10.)

The justice court denied William’s motion, holding “that the Trooper did not unconstitutionally expand the scope of the stop by conducting a drug investigation” and “that the search warrant in this case was based upon probable cause to believe that the Defendant’s vehicle would contain drugs.” (J.C. Order Denying Motion to Suppress at ¶ 29 and 33.) The court also found that the “Defendant was not seized within the meaning of the Fourth Amendment following the

conclusion of the DUI investigation.” (J.C. Order Denying Motion to Suppress at ¶ 32.)

The district court affirmed the justice court’s holding (D.C. Doc 9.) However, the district court found that the justice court erred in finding that William was not seized within the meaning of the Fourth Amendment after the DUI investigation. (D.C. Doc 9 at 9.) William appeals. (D.C. Doc 11.)

### **STANDARD OF REVIEW**

On appeal of a district court’s review of the decision of a justice court of record, this Court reviews the lower court ruling as if appealed directly without district court review. *State v. Hoover*, 2017 MT 236, ¶ 12, 388 Mont. 533, 402 P.3d 1224.

This Court reviews the denial of a motion to suppress to determine whether the lower court’s findings were clearly erroneous and whether those findings were correctly applied as a matter of law. *Hoover*, ¶ 12. “Findings of fact are clearly erroneous if they are not supported by substantial credible evidence, if they are based upon misapprehension of the evidence or if review of the record convinces the Court that a mistake has been made.” *State v. Flynn*, 2011 MT 48, ¶ 6,

359 Mont. 376, 251 P.3d 143. The lower court's conclusions of law and application of legal standards are reviewed de novo. *Hoover*, ¶ 12.

### **SUMMARY OF THE ARGUMENT**

Trooper DiGiovanna did not have a particularized suspicion to call in a drug dog and extend the stop from a DUI investigation to a drug investigation. The odor of marijuana and admitted marijuana use hours earlier at a location far from the stop do not justify calling a drug dog. At the suppression hearing, DiGiovanna provided vague, conclusory answers to support the extension of the stop. He did not provide any specific facts from which he could conclude, from his limited experience, that marijuana was inside the vehicle.

The search warrant application was not supported by probable cause. Information obtained after the illegal extension of the stop must be excised from the warrant. The information left in the four corners of the application is insufficiently detailed and does not establish probable cause to believe that drugs would be found in William's truck.

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## ARGUMENT

- I. Because Trooper DiGiovanna did not have a particularized suspicion William possessed drugs, DiGiovanna illegally extended the traffic stop when he requested a canine search.**

Once Trooper DiGiovanna knew that William was not impaired, the search should have ended. The smell of marijuana and admission of earlier drug use cannot justify a full canine search.

“The Fourth Amendment to the United States Constitution and Article II, Section 11 of the Montana Constitution protect persons against unreasonable searches and seizures, including brief investigatory stops such as traffic stops.” *State v. Elison*, 2000 MT 288, ¶ 15, 302 Mont. 228, 14 P.3d 456. To initiate or extend a traffic stop, a law enforcement officer must have particularized suspicion that the occupant of the vehicle is or has been engaged in unlawful conduct. Mont. Code Ann. § 46-5-401(1). The burden is on the State to show that “based on *specific and articulable facts known to the officer*, including rational inferences therefrom based on the officer's training and experience, the officer has an objectively reasonable, particularized suspicion that the person is engaged, or about to engage, in criminal

activity.” *City of Missoula v. Kroschel*, 2018 MT 142, ¶ 11, 391 Mont. 457, 419 P.3d 1208 (emphasis in original).

After making an investigative stop, “law enforcement officers must act with reasonable diligence to quickly confirm or dispel the predicate suspicion for the stop.” *City of Missoula v. Kroschel*, ¶ 13. “The duration and scope must be carefully limited to its ‘underlying justification.’” *Kroschel*, ¶ 13 (citing *Fla. v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325–26, 75 L. Ed. 2d 229 (1983)). Montana codified these principles into law: a traffic stop “may not last longer than is necessary to effectuate the purpose of the stop.” Mont. Code Ann. § 46-5-403. Evidence obtained after an illegal extension of a stop must be suppressed. *See Kroschell*, ¶ 36.

A canine sniff of a vehicle is also search under Article II, Sections 10 and 11 of the Montana Constitution. *State v. Tackitt*, 2003 MT 81, ¶ 22, 315 Mont. 59, 67 P.3d 295. As such, the search must be supported by a particularized suspicion. *Tackitt*, ¶ 31. Absent a particularized suspicion, all evidence obtained from an illegal canine search must be suppressed. *Tackitt*, ¶ 11.

Here, the stop should have ended when Trooper DiGiovanna determined that William was not driving under the influence. DiGiovanna did not have specific and articulable facts to support his next suspicion—that William possessed marijuana. For this reason, DiGiovanna illegally extended the stop when he requested a canine search. All evidence obtained after the illegal extension of the stop and from the canine search must be suppressed.

**A. Trooper DiGiovanna only had a generalized suspicion when he began the drug investigation.**

“[P]articulized suspicion requires more than mere generalized suspicion or an undeveloped hunch of criminal activity.” *Hoover*, ¶ 18. Basing inferences “on nothing more than inarticulable hunches, are not the building blocks of particularized suspicion but rather subject drivers to the perils of profiling and other impermissible motives for initiating traffic stops.” *State v. Reeves*, 2019 MT 151, ¶ 13, 396 Mont. 230, 444 P.3d 394.

“When the only basis for suspecting a specific person of wrongdoing is inferences that could be drawn from the conduct of virtually any law-abiding person, the resulting suspicion cannot, by

definition, be particularized.” *Reeves*, ¶ 13. For example, in *Hoover*, the officer lacked a particularized suspicion to stop an occupied vehicle parked at night in a relatively secluded location at a private mini-storage complex. While the officer “articulated a reasonable suspicion that an illegal break-in *might possibly* be in progress, thus warranting additional investigation in the performance of his official duty,” the initial suspicion “was, as yet, no more than an undeveloped, *generalized* suspicion of criminal activity” “without observation or knowledge of additional facts.” *Hoover*, ¶ 19 (emphases in original).

Like in *Hoover*, Trooper DiGiovanna only had an undeveloped, generalized suspicion. DiGiovanna gave three different versions of why he believed he had a particularized suspicion to start the drug investigation. Each version contained a vague statement about William’s behavior and showed that DiGiovanna thought that a crime *might possibly* be in progress. DiGiovanna said that William was being evasive, but when asked by the State what he meant by evasive, DiGiovanna said, “He, again, hemmed and hawed and didn’t give me a straight answer.” (7/17/18 Hrg. Track 2 at 00:14-00:17.) Regardless of the fact that DiGiovanna’s dash camera shows that William answered

DiGiovanna’s questions quickly, hemming and hawing does not indicate criminal behavior. Nervousness is normal during a traffic stop. When asked to explain how he differentiates between evasiveness and nervousness, DiGiovanna simply replied, “It’s just subtle kind of things, yeah.” (7/17/18 Hrg. Track 7 at 04:29-04:44.) And DiGiovanna is correct—there are subtle differences between someone who is just nervous and someone who is being evasive. For that reason, he needed to be more specific.

**B. A review of the totality of the circumstances confirms that Troper DiGiovanna did not have a particularized suspicion.**

“Whether particularized suspicion exists at the time of an investigative stop is a question of fact which is determined by considering the totality of the circumstances.” *Elison*, ¶ 16. “Relevant considerations include the quantity, substance, quality, and degree of reliability of information known to the officer.” *State v. Wilson*, 2018 MT 268, ¶ 28, 393 Mont. 238, 430 P.3d 77.

Here, the totality of the circumstances weigh in William’s favor.

First, DiGiovanna said he smelled marijuana and William admitted to smoking. (State’s Ex. A at 10:20:27-10:20:46.) Singled out,

these facts appear to strengthen the State’s argument. However, the Court must look at this information as part of the totality of the circumstances.

DiGiovanna did not testify how many drug investigations—if any—he had completed. He did not testify how he identified the odor as marijuana. He did not say if it was a strong or weak odor. He did not say if it was a burnt or fresh odor. Since the odor of marijuana can linger, DiGiovanna needed to provide more information to support his suspicion that there was marijuana currently in the vehicle. *See State v. Schoendaller*, 176 Mont. 376, 382, 578 P.2d 730 (1978). In *State v. Schoendaller*, police conducted a warrantless search of a vehicle after two officers smelled a strong odor of marijuana and incense. *Schoendaller*, 176 Mont. at 382. At the suppression hearing, the officer acknowledged that he could not determine, based on the smell, at what time the defendants may have smoked marijuana in the vehicle. *Schoendaller*, 176 Mont. at 382. The smell could linger in a car “for more than a day.” *Schoendaller*, 176 Mont. at 382. The Court held “such perception falls closer to the realm of bare suspicion than probable cause.” *Schoendaller*, 176 Mont. at 382. Absent more detail,

DiGiovanna's conclusory statement about an odor of marijuana is the same as in *Schoendaller*: a bare suspicion.

William admitted to smoking marijuana, but he did not admit to smoking marijuana in his truck. William said he smoked in Big Timber—a town at least 80 miles away from where DiGiovanna stopped him. (J.C. Motion to Suppress and Brief in Support, Ex. A, Application for Search Warrant at 4.) This fact is not specific to marijuana being in the vehicle. Further, while William admitted to smoking, he was not impaired. If DiGiovanna thought that the odor was from William smoking in the car, the DUI investigation dispelled that suspicion. Just because William uses marijuana does not mean that his vehicle will contain evidence of a drug offense. *See State v. Griffin*, 2004 MT 331, ¶ 6, 324 Mont. 143, 102 P.3d 1206 (“Just because a person has a pipe in his pocket with untested white residue on it, does not mean his vehicle will contain evidence of a drug offense.”).

Instead, DiGiovanna was a new trooper thwarted from making a DUI arrest but eager to score one of his first drug busts. At one point, William explained to DiGiovanna that he had stopped in Big Timber to pick up the rest of the pots. “Picking up the rest of the *pot*?” DiGiovanna

asked accusingly. (State's Ex. A at 10:36:37-10:36:39.) Sergeant Hayter, who arrived as backup, quickly explained to DiGiovanna that William was talking about pottery and not marijuana. (State's Ex. A 10:36:37-10:36:45.) DiGiovanna later told a colleague twice how "pumped" he was to search William's truck. (State's Ex. A at 12:01:08 and 12:01:21.) While DiGiovanna did not need to have a specific amount of experience to have a valid particularized suspicion, his experience—or inexperience—is a "factor in determining what sort of reasonable inferences he or she is entitled to make from his or her objective observations..." *Brown v. State*, 2009 MT 64, ¶ 20, 349 Mont. 408, 203 P.3d 842.

Additionally, DiGiovanna testified, contrary to clearly established law, that deploying a drug dog to completely search the outside of a seized vehicle was not actually a search. (See 7/17/18 Hrg. Track 2 at 04:47-04:55.) If he did not think a canine sniff was a search, he may not have thought he needed a particularized suspicion to request the drug dog search. Given DiGiovanna's limited time on the job and having seemingly no drug detection experience, DiGiovanna was not qualified to make the decision to call out the drug dog.

Second, nothing about William's behavior objectively indicated to DiGiovanna that William had marijuana in his truck. William passed the field sobriety tests and DiGiovanna confirmed he was not impaired. William cooperated with DiGiovanna. (State's Ex. A at 10:19:30-10:37:20.) He provided his license, registration and insurance. (State's Ex. A at 10:20:52-10:21:38.) DiGiovanna's dash camera footage shows William did not hesitate when answering DiGiovanna's questions. (State's Ex. 1 at 10:19:31-10:21:39.) He told DiGiovanna where he came from and where he was heading. (State's Ex. 1 at 10:19:31-10:21:39.) During the DUI investigation, William remained polite and cooperative. (See State's Ex. A at 10:28:10-10:36:17.) In all, DiGiovanna's lack of experience prevented him from making any inferences from William's innocuous behavior.

A new officer with no drug investigation experience, conclusory statements about an odor and behavior, and a suspect who previously smoked but is currently sober make up the circumstances in which DiGiovanna claimed to have a particularized suspicion. Looking at these facts together, DiGiovanna lacked the quantity, substance and

reliability of information to justify extending the stop from DUI to a drug investigation.

**C. The cases relied upon by the justice court do not support a finding of a particularized suspicion.**

The justice court relied on three cases in denying William's motion. (J.C. Order Denying Motion to Suppress at 8-15.) However, these cases do not support the lower court's holding. First, in *State v. Marino*, the Court found a particularized suspicion to support a canine search of the defendant's vehicle based on the following: no headlights, extremely dark window tinting, missing rear license plate, discovery of a concealed knife, roll of cash (almost \$3,000) and an unlicensed concealed weapon. *State v. Marino*, 2016 MT 220, ¶ 19, 384 Mont. 490, 380 P.3d 763. Additionally, the defendant told deputies that "his girlfriend told him to take them [license plates] off because they would attract attention to himself." *Marino*, ¶ 5. In all, the officers had sufficient, objective information to suspect that the defendant was engaged in illegal narcotics trafficking. None of the facts relied on by the officers in *Marino* are present here. Additionally, the officers in

*Marino* had a larger, more specific volume of information to rely on.

*Marino* is not sufficiently analogous.

Second, in *State v. Roy*, law enforcement received a tip that a woman named Karrie was dealing marijuana out of her home. *State v. Roy*, 2013 MT 51, ¶ 3, 369 Mont. 173, 296 P.3d 1169. The informant told officers that Karrie drove a Jeep Cherokee with a Yellowstone National Park sticker and would drive to California to pick up large quantities of marijuana and then drive back to Montana to distribute the drugs. *Roy*, ¶ 3. The informant gave officers Karrie’s address and described her as over six feet tall with red hair. *Roy*, ¶ 3. An officer located the suspect and stopped her for speeding and to investigate drug trafficking. *See Roy*, ¶ 17. The officer smelled “a heavy odor of vehicle deodorizer” coming from the vehicle. *Roy*, ¶ 17. The officer had 20 years of law enforcement experience, was trained in drug interdiction and had conducted over 100 stops in which he investigated the presence of illegal drugs—the majority of which involved marijuana. *Roy*, ¶ 17. The officer testified that excessive deodorizer is a red flag because “it’s commonly used as a masking agent for marijuana.” *Roy*, ¶ 17. The

Court held that these facts constituted a particularized and objective suspicion that the defendant was engaged in drug trafficking. *Roy*, ¶ 18.

Again, *Roy* does not support a finding of a particularized suspicion in this case. The officers in *Roy* obtained most of their information that the defendant was trafficking marijuana from an informant. *See Roy*, ¶ 18. Here, no reliable confidential informant contributed to DiGiovanna's suspicion. Also, the officer in *Roy* had decades more experience than Trooper DiGiovanna. In all, DiGiovanna's suspicion falls short of the benchmark for a particularized suspicion described in *Roy*.

Third, in *State v. Estes*, the defendant was stopped for expired registration. *State v. Estes*, 2017 MT 226, ¶ 3, 388 Mont. 491, 403 P.3d 1249. The trooper observed two cell phones and cash in the car's console, food wrappers and energy drink bottles strewn around, and a sleeping bag in the back seat covering a cardboard box. *Estes*, ¶ 3. The suspect was inordinately nervous and physically shaking. *Estes*, ¶ 3. At the suppression hearing, the trooper, who had 11 years of law enforcement experience, testified that the defendant's "travel locations, Oregon and North Dakota, are 'source and destination areas' for drug

traffic; that food wrappers and garbage are a sign the occupant of the vehicle wanted to get from point A to point B quickly; that Estes had two cell phones and cash in the console; and that the vehicle had numerous air fresheners, which are often used to mask illicit drug odors.” *Estes*, ¶ 3. The Court, looking at the totality of the circumstances, found that a particularized suspicion existed to extend the stop and request a canine search. *Estes*, ¶ 18. The trooper’s testimony clearly and specifically described how his observations were consistent with drug trafficking. *See Estes*, ¶ 18.

The Court distinguished *Estes* in another stop case where the officer relied on otherwise innocent conduct to improperly extend the initial valid stop. In *State v. Wilson*, 2018 MT 268, ¶ 3, 393 Mont. 238, 430 P.3d 77, the defendant was the passenger in a car stopped for expired registration. The car had out-of-state plates. *Wilson*, ¶ 3. The deputy testified that both occupants of the car were unusually nervous. *Wilson*, ¶ 4. The driver was trembling, and the passenger avoided eye contact. *Wilson*, ¶ 4. The driver told the officer that he borrowed the vehicle from an acquaintance, who he had only known for four or five months, to drive from his wedding in Idaho back to North Dakota.

*Wilson*, ¶¶ 9 and 6. His new wife was not with him. *Wilson*, ¶ 6. The car was messy with old food items on the floor and had a “somewhat lived in appearance.” *Wilson*, ¶¶ 9 and 4. The driver could not provide a valid license, registration or insurance. *Wilson*, ¶ 5. The deputy ran the driver’s name and found that he had a history of drug charges. *Wilson*, ¶ 10. The deputy requested a canine sniff and eventually located 262.2 grams of marijuana in the car. *Wilson*, ¶ 18. The deputy testified that during the stop he was “compounding...indicators on top of each other” as he developed a particularized suspicion to request the canine. *Wilson*, ¶ 34.

While the Court acknowledged similarities in the facts to *Estes*, the Court held that the officer in *Wilson* “failed to identify details that were objectively indicative of illegal drug activity.” *Wilson*, ¶ 35. The Court concluded that there was “only a generalized hunch and not an articulation of specific facts demonstrating criminal behavior” and found that the deputy illegally extended the stop when he requested a canine. *Wilson*, ¶ 34. Although *Estes* and *Wilson* are factually similar, the Court declined to find a particularized suspicion in *Wilson* because

the officer did not articulate specific facts indicative of criminal behavior. *See Wilson*, ¶ 34.

The justice court's reliance on *Marino*, *Roy* and *Estes* was misplaced. The facts in those cases are not present here. William did not have dark window tinting, he was not missing a license plate, he did not have a concealed weapon, he did not have a roll of cash, he did not have multiple cell phones, the truck was not messy and lived in, he did not avoid eye contact, he had a valid license and insurance, there was no informant, and he was not inordinately nervous. Additionally, like in *Wilson*, DiGiovanna did not testify how the behavior he did observe was consistent with criminal conduct.

Further, it is not the Court's function to make a case for the State. *State v. Martinez*, 2003 MT 65, ¶ 73, 314 Mont. 434, 67 P.3d 207. It is the State's burden to show that law enforcement had a particularized suspicion. *Martinez*, ¶ 73. In *Martinez*, detectives executed a search warrant based on information from a confidential informant, a marijuana bud found in the defendant's car and a canine that alerted positively to the defendant's vehicle. *Martinez*, ¶¶ 3-10. After a careful examination of the testimony taken at the suppression hearing, the

Court held that the detectives lacked a particularized suspicion to extend the stop and request a canine search. *Martinez*, ¶ 74. The Court stated that “... the majority Opinion is grounded in the evidence at the suppression hearing—or more correctly, the lack of evidence.” *Martinez*, ¶ 71. “No officer testified at the suppression hearing that the bud was ‘highly relevant in confirming the informant's report that Martinez was transporting larger quantities of marijuana’...” *Martinez*, ¶ 69. “The totality of the circumstances is the standard for assessing the inferences drawn by experienced police officers and the fact that the officers placed no importance on Martinez's unsubstantiated association with a marijuana bud is relevant to our inquiry on appeal.” *Id.* The Court cannot assume the thought process of an officer if it is not supported by the record.

The lower courts here bolstered DiGiovanna’s testimony. The justice court considered William “smoking in Big Timber, Montana, only 80 miles away,” “out of state plates,” “speeding” and “the Defendant being evasive in his answers to the Trooper’s questions” as “objective facts which led the Trooper to believe that drugs would be found in the vehicle.” (J.C. Order Denying Motion to Suppress at 15, ¶ 26.)

Perhaps if DiGiovanna testified that the out-of-state plates or Colorado as a drug “destination” state as reasons for his suspicion of drug activity, there would be a stronger argument for a particularized suspicion. However, he did not. William did not have a criminal record, so it is just as likely that the area around Aspen, Colorado, where marijuana has been legal since 2014, is a legitimate destination for selling world class pottery.

In all, a review of the cases cited by the justice court do not undercut the argument that DiGiovanna did not have a particularized suspicion to extend the stop from a DUI to a drug investigation. For this reason, all evidence obtained after the illegal extension of the stop must be suppressed.

## **II. The search warrant was not supported by probable cause.**

Without the unjustified dog search and truck seizure, DiGiovanna would not have been able to obtain a warrant to search William’s truck.

An application for a search warrant must state facts sufficient to show probable cause for issuance of the warrant. Mont. Code Ann. § 46-5-221. This Court reviews the issuance of a search warrant to ensure that the issuing judge had a “substantial basis” to determine probable

cause existed. *State v. Pierce*, 2005 MT 182, ¶ 27, 328 Mont. 33, 116 P.3d 817, 822. “[W]hen the issuance of a search warrant is based in part on illegal information, the reviewing court shall excise the illegally obtained information from the application for search warrant and review the remaining information de novo to determine whether probable cause supported the issuance of a search warrant.” *State v. Kuneff*, 1998 MT 287, ¶ 19, 291 Mont. 474, 970 P.2d 556.

After excising the information obtained after the illegal extension of the stop, the facts in the search warrant application are insufficiently detailed to support a finding of probable cause. The application did not establish the existence of a fair probability that evidence related to a crime would be found in William’s truck. For this reason, the results of the search must be suppressed.

### **CONCLUSION**

Montana’s heightened protection of individual privacy required more of Trooper DiGiovanna. His generalized suspicion did not ripen into a true particularized suspicion of drug possession. The State cannot justify the extension of the stop. The denial of William’s motion must be reversed. William’s plea must be withdrawn pursuant to Mont. Code

Ann. § 46-12-204(3) and the evidence arising from the illegal extension of the stop and invalid search warrant must be suppressed.

Respectfully submitted this 11th day of August, 2021.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,340, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Jeavon Lang \_\_\_\_\_  
JEAVON LANG

**APPENDIX**

Order Denying Motion to Suppress .....App. A  
Order Affirming Justice Court Order .....App. B

## CERTIFICATE OF SERVICE

I, Jeavon C. Lang, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-11-2021:

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