IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0724

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAY LE CLEVELAND,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, the Honorable Molly Owen, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Montana Constitution

Other State Constitutions

REPLY

I. Doyle seized Cleveland by requesting his driver's license.

The State's argument that Doyle's request for Cleveland's license did not constitute a seizure rests on a cursory analysis of Montana cases, and on cases from other jurisdictions that do not share the heightened right to privacy the Montana Constitution provides. (Appellee's Br. at 18–20.) The State also ignores the coercive circumstances of Doyle's and Booth's conduct, as well as the plain language regarding seizures in the community caretaker context from *City of Missoula v. Metz*, 2019 MT 264, ¶¶ 15, 17, 397 Mont. 467, 451 P.3d 530.

A. The State fails to show Doyle did not seize Cleveland.

The State cites *State v. Wilkins*, 2009 MT 99, ¶ 10, 350 Mont. 96, 205 P.3d 795, where this Court quoted Professor LaFave's statement that an officer could "put[] a question to" a person, make a "basic inquiry" or could "tap on the window of a car to get the person's attention" without transforming the encounter into a seizure. (Appellee's Br. at 19.) The questions asked by the officer in *Wilkins* remain unknown. Doyle, however, already made a "basic inquiry" into

Cleveland's welfare before asking Cleveland for his driver's license, which is the sort of question a reasonable person would not feel free to ignore. *Wilkins* is not informative to the circumstances here.

The State also cites *State v. Questo*, 2019 MT 112, ¶¶ 18–19, 395 Mont. 446, 443 P.3d 401, to support its argument that not all officer-citizen encounters are seizures. In *Questo*, the officer responded to a tip of a potentially impaired driver by parking on the opposite side of a gas station parking lot from Questo; he then approached Questo on foot as Questo refueled his vehicle, advised Questo of the report, immediately smelled alcohol on Questo, asked Questo questions, and requested Questo perform field sobriety tests, to which Questo agreed. *Questo*, ¶¶ 3–4, 15.

This Court found the officer did not seize Questo when he approached and engaged him because the officer did not restrain Questo's liberty by means of physical force or show of authority. *Questo*, ¶¶ 17–18. We do not know whether this officer asked Questo for his driver's license during the exchange, but we know that Doyle asked for Cleveland's—a show of authority that a reasonable person would not feel free to ignore. *Questo* does not control here. *See State v. Pham*, 2021

MT 270, ¶¶ 16, 19–20, 406 Mont. 109, 497 P.3d 217 (distinguishing *Wilkins* and *Questo* from more recent traffic stop where this Court found an unlawful seizure).

State v. Merrill, 2004 MT 169, ¶¶ 3–4, 322 Mont. 47, 93 P.3d 1227, does not help the State either. Merrill was stopped for a traffic violation, given a warning, told she was free to go as the officer stepped away, then asked if she could talk for a minute, consented, asked permission to search her car and person, to which she also consented. *Merrill*, ¶¶ 3–4. Merrill was not seized, but a consenting individual. *Merrill*, ¶ 15.

Doyle initially approached Cleveland to investigate whether he was in peril. Almost immediately, he determined Cleveland was not in peril. Doyle instructed medical responders to hold off, and—rather than notify Cleveland he was free to go or ask to talk for a minute—Doyle requested identification. A reasonable person would not feel free to ignore the request under the circumstances.

The State also relies on cases from Nebraska, Virginia, and Wyoming, which do not share Montana's heightened right to privacy. Nebraska's constitution uses language identical to the Fourth

Amendment. Neb. Const. art. I, sec. 7. Virginia's search and seizure protections are "substantially the same as those contained in the Fourth Amendment." *Lowe v. Virginia*, 337 S.E.2d 273, 274 n.1 (1985). Wyoming has held that its constitution "provides greater protections than the Fourth Amendment in certain circumstances." *Gibson v. Wyoming*, 2019 WY 40, ¶ 12, 438 P.3d 1256 (provision corresponding to the Fourth Amendment requires search warrants to be supported by written affidavits). But Wyoming permits the canine sniff of a vehicle "even in the complete absence of reasonable suspicion," which shows it does not maintain the heightened right to privacy that Montana maintains in the context of traffic stops and investigations. *Gibson*, ¶ 10; *contrast with State v. Tackitt*, 2003 MT 81, ¶ 29, 315 Mont. 59, 67 P.3d 295 (particularized suspicion required for use of drug-detecting canine). These non-Montana cases do not inform the analysis of Cleveland's unlawful seizure.

B. Doyle unlawfully seized Cleveland once he determined Cleveland was not in peril and requested his license without particularized suspicion of a crime.

"[T]he *Lovegren* test set a limitation on the use of the community caretaker doctrine by holding that once an 'officer is assured that the

citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated, then **any actions beyond that constitute a seizure** implicating not only the protections provided by the Fourth Amendment, but more importantly, those greater guarantees afforded under Article II, Sections 10 and 11 of the Montana Constitution as interpreted in this Court's decisions.'" *Metz*, ¶¶ 15, 17 (quoting *State v. Lovegren*, 2002 MT 153, ¶ 25, 310 Mont. 358, 51 P.3d 471) (emphasis added).

The State correctly argues that "Doyle had a duty to approach and investigate Cleveland's situation" under the community caretaker doctrine. (Appellee's Br. at 17–18.) But, once Doyle determined Cleveland was not in peril, "any action beyond" assuring himself that Cleveland was "no longer in need of assistance" "constitute[d] a seizure." *Metz*, ¶¶ 15, 17. Doyle concluded Cleveland was not in peril once he saw Cleveland was upright, alert, and responsive to Doyle's presence. When asked, Cleveland said he was doing alright and mentioned his eyes were bothering him. Doyle called off the medical responders and asked no further questions to assess whether Cleveland needed help. Doyle made no inquiry about drug use or otherwise

indicated a concern for a possible overdose. Assured that Cleveland was not in peril, Doyle requested Cleveland's driver's license. There is no reason to request a driver's license to determine whether a person needs help.

Under the *Lovegren* test Doyle's request of Cleveland's license constituted a seizure, which was unlawful because Doyle lacked particularized suspicion of criminal wrongdoing leading up to that moment. The State does not attempt to explain why the *Lovegren* test should not apply here, nor does it argue Doyle had particularized suspicion of a crime to justify the license request.

C. Polson Police made a show of authority in multiple ways, demonstrating the license request was a seizure.

Doyle's request for a driver's license constituted a seizure under the broader test defining seizures. A person is "seized if a government officer in some way restrains the person's liberty, however briefly, by means of physical force or exercise or show of authority which under the totality of the circumstances would cause an objectively reasonable person to feel not free to leave the presence of the government officer." *State v. Noli*, 2023 MT 84, ¶ 27, 412 Mont. 170, 529 P.3d 813 (internal punctuation omitted); *see also United States v. Mendenhall*, 446 U.S.

544, 554 (1980). Doyle approached Cleveland in a grocery store parking lot while in full uniform. Though he did not block Cleveland's vehicle from exiting with his patrol truck, Doyle parked in an irregular manner, indicating he was there for Cleveland, not groceries.

Doyle approached Cleveland's driver-side window, identified himself as a Polson Police officer, and stated the reason for his presence, which was to respond to, i.e., investigate, the report of a man slumped over the steering wheel in a black SUV. Simultaneous to Doyle's explanation for approaching Cleveland, Doyle's partner, Booth, appeared in Cleveland's passenger-side mirror, standing watch over the passenger side of the SUV. (Exhibit B, Body Cam Footage, at 0:45–1:00.) Doyle made a "show of authority" by identifying himself as a police officer and by stating the reason for his presence. Booth made a show of authority by appearing and remaining on the passenger side of the SUV to stand watch. Booth parked his unmarked truck in an irregular manner similar to Doyle, indicating he too, was there for Cleveland. (Ex. B at 0:38–1:20.)

Doyle then asked for Cleveland's driver's license—yet another showing of authority and a signal that Doyle intended to identify

Cleveland before he could leave. A reasonable person would not feel free to ignore this request, even if Doyle spoke politely and did not expressly "demand" to see the license. Doyle made it clear that he was there in his capacity as a government official conducting an investigation and wanted documentation to identify Cleveland. Doyle was not at Cleveland's window for a friendly, voluntary conversation.

The State claims Cleveland "promptly volunteered to provide" his name. (Appellee's Br. at 20.) Characterizing Cleveland's statement as "volunteered" is a stretch. Doyle had just asked Cleveland for his driver's license. Because Cleveland did not have it on his person, he stated he could provide his name *in response to* the request for identification. A reasonable person would feel compelled to comply with Doyle's requests. The request constituted a seizure.

D. *Strom* supports Cleveland's argument.

The State fails to distinguish Cleveland and Doyle's interaction from that in *State v. Strom*, 2014 MT 234, ¶ 13, 376 Mont. 277, 333 P.3d 218. (Appellee's Br. at 21–22.) The State notes that the first communication from the officer in *Strom* with the vehicle occupants was to "demand" identification. The State italicizes "demand" to contrast it

with its assertion that Doyle did not "demand" to see Cleveland's license. (Appellee's Br. at 22.) But the recited facts in *Strom* demonstrate the officer "asked" for identification, he did not expressly demand it. Sgt. Heard "noticed 'how young [S.J.] was' so he *asked* for her driver's license." *Strom*, ¶ 5 (emphasis added). "Heard then *asked* Strom for identification." *Strom*, ¶ 5 (emphasis added). This Court described the request for identification as a "demand" later in the opinion because this Court understood that an officer who approaches a vehicle and requests identification from the occupants has effectively demanded identification. *See Strom*, ¶ 13. A reasonable person would not feel free to reject the request. *Strom*, ¶ 13. Doyle's request for Cleveland's driver's license was as much a "demand" for identification as Sgt. Heard's request in *Strom*.

The State also attempts to contrast Doyle's unlawful seizure from *Strom* because Sgt. Heard took both occupants' IDs to his patrol car and instructed them to wait while he checked the driver's status and for warrants. (Appellee's Br. at 22.) There is no reason to believe—had Cleveland provided his driver's license instead of his name and date of birth—that Doyle would have acted any differently than Sgt. Heard.

When Cleveland said he had no license with him, Doyle told him to "hang tight" while Doyle retrieved a notepad so he could record Cleveland's information. Doyle did not want to record Cleveland's information for his own amusement. He recorded the information so he could check it like Sgt. Heard did—to identify and investigate the occupant(s) of the vehicle.

After asking additional questions regarding the owner of the SUV, Cleveland's reason for being in Polson, and whether he was on probation, Doyle did just what Sgt. Heard did—he told Cleveland to "hang tight" and contacted dispatch to investigate Cleveland's information. (Ex. B. at 2:50–3:40.) Similar to Sgt. Heard's conduct in *Strom*, Doyle's conduct amounted to a seizure despite not taking more compelling actions such as using his emergency lights, drawing a weapon, or parking in a way that prevented Cleveland from driving away. *See Strom*, ¶ 13.

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II. Doyle never indicated he was investigating Cleveland for failing to carry his license.

The State argues that Doyle had particularized suspicion Cleveland violated Montana Code Annotated § 61-5-116(1)[1] when Cleveland admitted that he did not have his license in his possession, which justified extension of the stop. (Appellee's Br. at 23–24.) This argument fails for two reasons: First, assuming arguendo that Doyle's request for Cleveland's license did not constitute a seizure, Doyle gave zero indication he was investigating a violation of § 61-5-116(1) throughout the entirety of the stop and lacked particularized suspicion of any other crime. Second, assuming arguendo that Doyle investigated Cleveland under valid, particularized suspicion of a § 61-5-116(1) violation, then Doyle failed to effectuate the purpose of the stop by never addressing any violation of § 61-5-116(1). Mont. Code Ann. § 46-5-403 (a stop may not last longer than is necessary to effectuate the purpose of the stop); *see also State v. Carrywater*, 2022 MT 131, ¶¶ 22–24, 409 Mont. 194, 512 P.3d 1180 (officer declined to effectuate purpose

[1] A licensee must have driver's license in licensee's immediate possession when operating a motor vehicle.

of the traffic stop and lacked particularized suspicion for the investigation he pursued).

Doyle never investigated Cleveland for failing to carry his license in his immediate possession. When asked for his license, Cleveland told Doyle he lost his wallet the day before. Doyle never said a word about it, nor did he articulate this as a suspicion he relied on to extend the stop. Doyle never advised Cleveland that he was required to carry his license, never cited him for failing to do so, nor gave him a warning. When Cleveland offered to provide his "insurance and stuff" about four minutes into the stop, Doyle advised that he did not need insurance information, he was there to check Cleveland's welfare. (Ex. B. at 3:40–4:30.) Even if Cleveland violated § 61-5-116(1), it did not concern Doyle.

If Doyle had authority to extend the stop based on a violation of § 61-5-116(1), then Doyle violated Cleveland's protections against unreasonable seizures by failing to effectuate the purpose of the stop. Law enforcement officers must act with reasonable diligence to quickly confirm or dispel the underlying particularized suspicion that justified the initial stop and any continuation of it. *State v. Zeimer*, 2022 MT 96, ¶ 29, 408 Mont. 433, 510 P.3d 100. Instead of issuing a warning or

citation for Cleveland's failure to carry his license, Doyle asked unrelated questions. Doyle never made any statement, nor took any action, to effectuate the stop as a violation of § 61-5-116(1). The State argues that Cleveland's failure to carry his license authorized Doyle to "ask additional, unrelated questions, as long as they did not unnecessarily prolong the duration of the seizure." (Appellee's Br. at 23–24.) Surely Doyle would have to ask *some* questions or take *some* action related to the purported purpose of the stop to justify additional, unrelated questions. Doyle's inaction regarding any violation of § 61-5-116(1) demonstrates it was not his basis for extending the stop.

III. The State bungles the facts to support its argument that Doyle obtained particularized suspicion Cleveland was impaired by drugs and the probation search was reasonable.

The State confuses the facts and imputes nefariousness to innocuous circumstances in its effort to argue Doyle gained particularized suspicion of drug impairment.

A. Doyle did not articulate any suspicions of drug impairment to his partner nor Cleveland's probation officer.

The State argues Doyle "consistently articulated his suspicions" to Booth and Wolfe that Cleveland might be impaired by drugs. (Appellee's

Br. at 28.) But Doyle did not articulate any suspicion that Cleveland was impaired by drugs to either one, let alone "consistently." Every detail Doyle gave Wolfe about the situation took place during one telephone conversation. (Ex. B. at 6:00–8:20.) Not once during that call did Doyle say he was suspicious that Cleveland was under the influence of drugs. To the contrary, in his report, Doyle stated that he told Wolfe Cleveland "didn't seem impaired[.]" (Ex. C at 2.) In a footnote, the State admits Doyle never told Wolfe he thought Cleveland may be impaired. (Appellee's Br. at 10.) Yet it argues Doyle "consistently" gave Wolfe this information. The State is wrong.

With regard to Booth, the State fails to cite any statement from Doyle indicating he ever told Booth that Cleveland was impaired. When Booth asked if Cleveland had been drinking, Doyle said, "he doesn't seem to be." At no point prior to searching the SUV did Doyle advise Booth that he believed Cleveland was impaired. Doyle did not "consistently articulate[] his suspicions" to Booth that Cleveland was impaired. The State gets these facts wrong.

B. The State inaccurately cites facts that Doyle never articulated as reasons to suspect drug impairment.

To support its argument that Doyle had particularized suspicion Cleveland "was" or "might be" under the influence of drugs, the State inaccurately refers to facts that Doyle never articulated as bases for his suspicions. (Appellee's Br. at 12, 25.)

First, the State repeatedly mentions how Cleveland was wearing sunglasses, and said his eyes were burning, despite it being an overcast day, at one point calling it "nonsensical[.]" (Appellee's Br. at 6, 18, 23, 26–27.) The State tries to suggest that Cleveland was either concealing his eyes because he was impaired, or lying about the reason he was slumped over because he was impaired. But the State offers no evidence that it was overcast that entire morning. Weather patterns change. Cloud formations change. Doyle never inquired about the cause of Cleveland's eye problem. Cleveland may have had an eye condition or uniquely sensitive eyes. The State imputes nefariousness to these circumstances in a failed attempt to cast suspicion upon them.

Any suggestion Cleveland sought to hide his eyes is contradicted by Doyle's video footage. Upon Doyle's second approach to the vehicle, Cleveland's sunglasses were raised above his eyes and resting on his

forehead. (Ex. B. at 1:46, 2:05–3:00.) Cleveland was not hiding his eyes behind his sunglasses.

The State also tries to portray Cleveland as impaired by arguing he "did not initially realize he had been slumped over the steering wheel." (Appellee's Br. at 10, 18, 23.) This ineffective portrayal is based on Cleveland's four-second response to Doyle informing Cleveland that he was there due to a report of a man slumped over the steering wheel. (Appellee's Br. at 4.) "Oh, was I? Um . . . yea, I was for a minute." (Ex. B at 0:49–0:52.) This one statement contains Cleveland's purported inability to recall being slumped over the wheel. If Cleveland did not initially realize he was slumped over the wheel, it took all of one or two seconds for him to remember. The State fails in its attempt to make a mountain out of a molehill. (*See also* Appellant's Br. at 17–18.)

Next, the State tries to portray Cleveland as impaired or lying by inaccurately explaining his statement that he went to an NA meeting the previous evening. The State argues that Cleveland "explained being slumped over his steering wheel in a grocery store parking lot by claiming to have had a NA meeting the previous evening." (Appellee's Br. at 26, 28, 33–34.) Cleveland said he went to an NA meeting in

Kalispell the day before in response to Doyle asking, "What brings you to Polson?" (Ex. B at 2:20–2:50.) Cleveland's mention of the NA meeting the day before was not an explanation of why he was slumped over a steering wheel, it was an answer to Doyle's question as to why he was in Polson that morning. Cleveland had already explained his eyes were bothering him when confronted with the report of being slumped over the wheel. The State's argument is based on a bungled version of the facts.

C. Wolfe did not rely on Cleveland having no license in his possession to request the probation search.

The State's poor grasp of the facts carries into its argument that the probation search was reasonable. The State argues that Wolfe knew Cleveland was driving a vehicle in Polson and "did not have his driver's license in his possession[.]" (Appellee's Br. at 33–34.) Wolfe got all of her information regarding the traffic stop from Doyle. Doyle never told Wolfe that Cleveland did not possess a license. Thus, Wolfe could not have factored Cleveland's lack of license into her decision to request a search.

CONCLUSION

Based on the arguments in his opening brief and in this Reply, Cleveland respectfully requests this Court reverse the district court's ruling and suppress all evidence obtained after Doyle asked for Cleveland's license. Alternatively, if this Court finds Doyle had a legal basis to extend the stop, Cleveland requests this Court reverse the district court's ruling and suppress all evidence obtained during the probation search. If this Court affirms the district court's denial of Cleveland's motion to suppress, Cleveland requests the Court order the Judgment be amended to strike the $300 prosecution fee and impose a $100 prosecution fee.

Respectfully submitted this 17th day of April 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 3508, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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CERTIFICATE OF SERVICE

I, Jeff N. Wilson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 04-17-2024:

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