

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0365

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONNA ELIZABETH SUMMERS,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from Montana's Twenty-First Judicial District Court,
Ravalli County, the Honorable Howard F. Recht, Presiding

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Montana Code

§ 16-12-101, MCA 45

Montana Constitution

Mont. Const. Art. II, § 10 17

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United States Constitution

U.S. Const. Amend. IV *passim*

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STATEMENT OF THE ISSUES

1. Did Detective Monaco have particularized suspicion to transition a routine traffic stop into a drug investigation at 1:22:14 p.m.?

STATEMENT OF THE CASE

In the early afternoon of May 21, 2022, Donna Elizabeth Summers (“Summers”) and her passenger Ben Ryan (“Mr. Ryan”) were traveling on Eastside Highway near Florance when she was stopped for speeding by Ravalli County Detective Nick Monaco (“Detective Monaco”). (D.C. Doc. 1, at 2.)¹ Over nine minutes into the stop—at 1:22:14 p.m.—Detective Monaco transitioned the routine traffic stop into a drug investigation. (Id.; see also Ex. A, at 1:22:14.) Summers eventually consented to a vehicle search during which Detective Monaco found a pipe along with a small bag of methamphetamine. (D.C. Doc. 1, at 2.)

Summers was charged by Information with Count I: felony possession of dangerous under § 45-9-102(3), MCA; and Count II: misdemeanor possession of drug paraphernalia under § 45-10-103, MCA. (D.C. Doc. 3, at 1-2.)

Summers filed a motion to suppress arguing Detective Monaco violated her Fourth Amendment rights by converting the traffic stop into a drug investigation without particularized suspicion. (D.C. Doc.

¹ All dates refer to the year 2022 unless otherwise stated.

12, at 1-11.) The State filed a Response opposing Summers' suppression motion. (D.C. Doc. 15.) The State argued Detective Monaco did have particularized suspicion to expand the traffic stop into a drug investigation. (D.C. Doc. 15, at 1-9.)²

During the suppression hearing Detective Monaco was the sole witness and his dashcam video (hereinafter "video") was admitted as State's Exhibit A. (9/6/22 Tr., at 20-21.) The district court agreed with the State and denied Summers' motion to suppress. (D.C. Doc. 20.) The court concluded Detective Monaco had particularized suspicion to transition into a drug investigation based on the following eight facts: Summers failed to stop immediately; she was nervous; had a drug history; was with a man she didn't know well; provided contradictory information; failed to follow Detective Monaco's instructions; consented to Detective Monaco's searching her vehicle; and because her parole officer authorized Detective Monaco to search the vehicle. (D.C. Doc. 20, at 5-8.)

Summers eventually pled no contest to Counts I & II. (4/5/23 Tr.,

² The State never argued Summers was not still subject to a Fourth Amendment seizure during the drug investigation. (See D.C. Doc. 15, at 1-9.) Nor did the State argue Summers knowingly and voluntarily consented to the prolonged seizure. *Id.*

at 7.) Prior to changing her plea Summers reserved the right to appeal the denial of her suppression motion. (4/5/23 Tr., at 5-6.) On July 5, 2023, Summers filed a timely notice of appeal with the Montana Supreme Court. (D.C. Doc. 44.)

STATEMENT OF THE FACTS

Below is a timeline of the salient events during the traffic stop as recorded on Detective Monaco's dashcam video:³

1:11:37 p.m.: Detective Monaco's dashcam begins recording.

1:12:07 p.m.: Detective Monaco's turns on his emergency lights.⁴

1:12:13 p.m.: Summers passes the firehouse.

1:12:32 - 1:12:56 p.m.: Summers' brake lights come-on and her vehicle slows to 25-mph, indicating she's looking for a place to pull over.

1:12:57 p.m.: Summers stops at what appears to be the entrance to a residence; Detective Monaco parks directly behind her.

1:13:15 p.m.: Detective Monaco exits his vehicle and approaches Summers' driver's side window—which was rolled down—and for a brief

³ Given the legal question at issue in this case, a second-by-second timeline presents the factual record in the most cogent and easily digestible fashion. Time stamps are approximations only and refer to the time of day e.g. "1:11:37 p.m." on the afternoon of May 21, 2022. The timeline from the video is augmented with Detective Monaco's testimony from the suppression hearing when relevant.

⁴ We know Detective Monaco turned on his emergency lights at 1:12:07 p.m. because of the "L" that appears at the top of his dashcam and because it's common for dashcam videos to begin 30-seconds prior to when the officer turns on the emergency lights. (See Ex. A, at 1:11:37 – 1:12:07; *see also United States v. Lara*, 2023 U.S. Dist. LEXIS 78025, 4 (W.D. Okla. May 4, 2023); *United States v. Yates*, 2024 U.S. Dist. LEXIS 2934, n.1 (N.D. Cal. May 4, 2023); *United States v. Matthews*, 422 F. Supp. 3d 1235, 1242-1243 (W.D. Ky. Oct. 31, 2019); and *Anderson v. Ivey*, 2021 U.S. Dist. LEXIS 41020, 3 (M.D. Fla. Mar. 4, 2021).)

second loud music can be heard playing on her radio.

1:13:16 - 13:13:27 p.m.: Detective Monaco introduces himself and informs Summers he was pacing her “about 10 over.”

1:13:28 p.m.: Detective Monaco asks Summers for her driver’s license, registration, and insurance.

1:13:43 - 1:14:08 p.m.: Detective Monaco asks Summers what took her so long to stop. Summers responds she wasn’t paying attention as she was singing and talking to Mr. Ryan.

During the suppression hearing Detective Monaco also advised that when he was following Summers she “ma[de] some sort of erratic movements[] and it was difficult to ascertain whether she was trying to conceal or retrieve something.” (9/6/22 Tr., at 7.) He quickly clarified, however, that Summers told him “she was dancing and some of those movements could have been consistent with that explanation.” (9/6/22 Tr., at 7.)

1:14:10 - 1:15:06 p.m.: Summers looks for her insurance and registration information. Detective Monaco asks Summers’ if her dogs are friendly and she warns, “they will lick you to death.” Summers then informs Detective Monaco she hasn’t been pulled over in a long time.

1:15:07 - 1:15:08 p.m. Detective Monaco says, “you seem really nervous is everything okay?”

1:15:09 - 1:15:22 p.m. Summers responds that she is fine and just trying to get work done at her home as her sister was there.

During the suppression hearing Detective Monaco testified that Summers appeared “more nervous than the innocent public” as evidence by her rapid speech, jittery movements, slurred speech, and “nonstop chatter...” (9/6/22 Tr., at 8-9.) Detective Monaco advised that in his opinion this can be an “indication of drug activity” but agreed that “not everybody who exhibits those characteristics is an illegal drug user...” (9/6/22 Tr., at 10.)

1:15:23 - 1:15:28 p.m.: Detective Monaco asks Summers if she’s had anything to drink; Summers responds she doesn’t drink.

1:15:29 - 1:15:42 p.m.: Detective Monaco asks Mr. Ryan for his identification and he responds, “I don’t have it with me.” Detective Monaco then asks Mr. Ryan for his name and birthday which he promptly provides.

1:15:43 - 1:16:14 p.m.: Summers informs Detective Monaco it has been a stressful period as her husband passed away 5-months ago and

her sister was in town helping her with an estate sale. Summers then tells Detective Monaco she just went to the hardware store. Detective Monaco asks where she lives and Summers confirms her address was on one of the documents in his possession.

1:16:15 p.m.: Detective Monaco tells Summers to give him a couple minutes and he returns to his patrol vehicle.

1:16:49 p.m.: Summers can be seen reaching back and petting her dogs in the backseat.

1:17:45 p.m.: Detective Monaco calls dispatch for information on “both subjects.”

1:18:48 - 1:18:59 p.m.: Dispatch advises that Summers has a valid driver’s license and no warrants (negative 29).⁵

1:18:54 - 1:18:59 p.m.: Dispatch informs Detective Monaco that Summers has an alert for a history of “PODD” (possession of dangerous drugs) and “PODP” (possession of drug paraphernalia).⁶ During the

⁵ “‘29 Negative’ means that there are no outstanding arrest warrants for [the] Defendant.” *United States v. Maddox*, 2019 U.S. Dist. LEXIS 109200, at 5 (N. D. Ala Jul. 1, 2019).

⁶ Presumably “PODD” stands for possession of dangerous drugs and “PODP” for possession of drug paraphernalia.

suppression hearing Detective Monaco testified he believed dispatched told him Summers “had [a] history with illegal drug use.” (9/6/22 Tr., at 12.)

1:19:03 - 1:19:17 p.m.: Dispatch informs Detective Monaco that Mr. Ryan has no warrants.⁷

1:19:54 - 1:19:58 p.m.: Detective Monaco reverses his vehicle a few feet to create more space between his front bumper and Summers’ rear bumper. In doing so Detective Monaco reveals Summers’ Ravalli County (Number 13) license plate.

1:20:20 – 1:20:33 p.m.: Detective Monaco approaches Summers’ driver’s side window and asks her to exit the vehicle. Summers removes her seatbelt and follows Detective Monaco to the rear of her car.

1:20:34 - 1:20:03 p.m.: Detective Monaco says to Summers something to the effect of, “it was my hope that you would have stopped back there by the firehall as it would have been safer.”⁸ Detective

⁷ Dispatch did not mention Mr. Ryan’s having a drug history alert.

⁸ During the suppression hearing Detective Monaco testified that he was driving an unmarked patrol vehicle. (9/6/22 Tr., at 8.) Detective Monaco’s emergency lights can be seen, albeit faintly, reflecting off the back of Summers’ car. (See Ex. A, at 1:13:03 – 1:13:10.)

Monaco then informs Summers that her insurance card is expired, prompting Summers to advise she does have insurance.

1:21:04 - 1:21:47 p.m.: Summers approaches the passenger window and asks Mr. Ryan for her purse. Summers begins sifting through the purse looking for her updated insurance card while repeatedly telling Detective Monaco she has insurance. Detective Monaco confirms through dispatch that Summers does have a valid auto insurance policy.

1:21:55 - 1:22:02 p.m.: Detective Monaco hands Summers her driver's license, registration, and insurance card. He then gives her a warning for speeding and tells her to be mindful that the speed limit on Eastside Highway is 60-mph.

1:22:03 - 1:22:13 p.m.: Summers tells Detective Monaco she had her cruise control on. Detective Monaco responds by informing Summers she was "dipping" from about 62 – 71 [mph]." Summers opines that perhaps her cruise control was malfunctioning.

1:22:14 - 1:22:16 p.m.: Detective Monaco says to Summers, "since I got you here, do you mind if I ask you a couple questions"?

1:22:17 p.m.: Summers responds, "go ahead."

1:22:18 - 1:22:22 p.m.: Detective Monaco proceeds to ask if there was anything illegal in the vehicle and Summers says no.

1:22:23 - 1:22:53 p.m.: Detective Monaco says—in a rhetorical fashion—“you just seem really nervous” and “jittery”, prompting Summers to retort, “no I am not.” Summers reiterates it has been a stressful period given her husband’s recent death, her work obligations, and advises that she has been busy trying to complete tasks around her home.

1:22:55 - 1:23:07 p.m.: Detective Monaco asks where she was coming from and Summers advises she had gone to the hardware store, picked up a pizza, and was now heading home. She then motions with her arm suggesting her house was just down the road.

1:23:08 - 1:23:28 p.m.: Detective Monaco asks Summers how she was acquainted with Mr. Ryan. Summers advises she was introduced to Mr. Ryan by a mutual friend and that she’d hired him to install a hot water heater. Detective Monaco then asks how long she had known Mr. Ryan and Summers says a couple weeks.

1:23:37 - 1:24:07 p.m.: Detective Monaco tells Summers he has particularized suspicion of drug activity based on the circumstances and

her behavior. Detective Monaco asks if there was any marijuana in the vehicle and she says no. Detective Monaco then asks if there were any syringes or pipes and she says no.

1:24:08 - 1:24:13 p.m.: Detective Monaco asks Summers if she was a drug user and she says not anymore. Detective Monaco then asks when she stopped using drugs and Summers says a few years ago.

1:24:14 - 1:24:20 p.m.: Detective Monaco follows-up by asking Summers when was the last time she used drugs and she advises when her husband died 5-months ago.

1:25:21 - 1:24:50 p.m.: Detective Monaco then asks about her husband's death and she explains he died at work the day after her birthday.

1:25:15 - 1:25:32 p.m.: Detective Monaco once again asks if there is any contraband, pills, methamphetamine, cocaine, or heroin in the vehicle and Summers confirms there was nothing—prompting Detective Monaco to retort, “not even a little bit?”

1:25:33 - 1:25:49 p.m.: Detective Monaco then asks, “would it be alright if I just took a quick search” and Summers responds, “go ahead.” Detective Monaco informs Summers it will be just a couple of seconds

and that he will need Mr. Ryan to exit the vehicle.

1:25:50 - 1:25:57 p.m.: Summers asks if she can put her license and registration back in her purse (as the items were still sitting on the back of her car).

1:25:59 p.m.: Summers informs Detective Monaco she is on parole and he responds, “you are?”

1:26:16 - 1:26:25 p.m.: Mr. Ryan exits the vehicle and Detective Monaco calls dispatch to request a “P&P [check] on the female.”

1:26:47 - 1:27:02 p.m.: Detective Monaco asks Mr. Ryan if there was any illegal contraband in the vehicle or on his person? Mr. Ryan says no but that, “I’ve got a little pot in my pocket”, to which Detective Monaco responds, “I don’t get excited about the weed anymore.”

1:28:30 - 1:28:42 p.m.: Dispatch informs Detective Monaco that “con-web” shows Summers is “P&P” and then says something to the effect that Summers’ being on parole was not indicated earlier.

1:29:52 p.m.: Detective Monaco calls probation and parole and obtains permission to search Summers’ vehicle.

1:31:47 p.m.: Detective Monaco informs Mr. Ryan he is free to leave.

1:32:51- 1:32:59 p.m.: Detective Monaco tells Summers and Mr. Ryan to stand away from the vehicle and begins searching Summers' purse, which was sitting on the back of her car.

1:34:14 p.m.: Detective Monaco advises Mr. Ryan to stay where he was told and don't walk around as it makes him uneasy.

1:35:52 p.m.: Detective Monaco begins searching Summers' car.

1:37:42 p.m.: Detective Monaco steps away from Summers' vehicle and says, "whose meth pipe?"

1:39:16 p.m.: Summers admits the pipe was hers. At the suppression hearing Detective Monaco testified he found the pipe under the passenger seat and also discovered a small bag of methamphetamine in the glove compartment. (9/6/22 Tr., at 19.)

1:42:05 p.m.: Detective Monaco's dashcam video ends.

STANDARDS OF REVIEW

A lower court’s denial of a motion to suppress is reviewed to determine whether the findings of fact are clearly erroneous and whether the findings were correctly applied as a matter of law. *City of Missoula v. Metz*, 2019 MT 264, ¶12, 397 Mont. 467, 451 P.3d 530. “A [factual] finding is clearly erroneous if it is not supported by substantial evidence, if the lower court has misapprehended the effect of the evidence, or if our review of the record leaves us with the firm conviction that a mistake has been made.” *State v. Gill*, 2012 MT 36, ¶10, 364 Mont. 182, 272 P.3d 60.

While factual findings are generally reviewed for clear error, appellate courts will not ignore objective and neutral video evidence even when it contradicts an officer’s testimony. *Metz*, ¶30 citing *Wiggins v. Florida Dep’t of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1172 (Fla. 2017); see also *Scott v. Harris*, 550 U.S. 372, 380–81 (2007) (Advising that when a party’s version of events is contradicted by video evidence Appellate Courts should “view[] the facts in the light depicted by the videotape.”)

SUMMARY OF THE ARGUMENT

Over nine minutes into the stop—at 1:22:14 p.m.—Detective Monaco transitioned what had been a routine traffic stop into a drug investigation which required particularized suspicion that Summers’ vehicle contained drugs. Of the eight facts the district court used to justify its conclusion that Detective Monaco had particularized suspicion, only the following three came to light *before* the mission of the traffic stop ended at 1:22:13 p.m.: (1) Summers was purportedly slow to pull over; (2) she was nervousness; and (3) dispatch had informed Detective Monaco that Summers had an alert indicating a prior drug history. Even if true this paucity of facts does not equate to particularized suspicion under the totality of circumstances—not even close.

ARGUMENT

The Fourth Amendment protects individuals against unreasonable searches and seizures and is enforced against the States through the Fourteenth Amendment's Due Process Clause. *United States v. Jones*, 565 U.S. 400, 404 (2012); *see also Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Article II, Sections 10 & 11 of the Montana constitution also prohibit unreasonable searches and seizures and together provide greater protection than the Fourth Amendment. Mont. Const. art. II, §§ 10 & 11; *see also State v. Nixon*, 2013 MT 81, ¶27, 369 Mont. 359, 298 P.3d 408.⁹ Evidence emanating from unlawful searches or seizures is suppressed. *State v. McElroy*, 2024 MT 133, ¶15, 417 Mont. 68, 551 P.3d 282; *see also Wong Sun v. U.S.*, 371 U.S. 471, 484-85 (1963).

- I. **Detective Monaco violated the Fourth Amendment by transitioning a routine traffic stop into a drug investigation without particularized suspicion that Summers or her vehicle possessed drugs.**
 - A. **Summers concedes Detective Monaco lawfully stopped her for speeding.**

⁹ Summers contends Detective Monaco violated her search and seizure rights under both the United States and Montana constitutions. In the interest of brevity, however, Summers will refer to Detective Monaco's unlawful search and seizure as "Fourth Amendment violation(s)" rather than violation(s) of both the Fourth Amendment and Article II, Sections 10 & 11 of the Montana Constitution.

Warrantless searches and seizures are per se unreasonable unless conducted in strict accordance with certain narrow exceptions to the warrant requirement. *State v. Zeimer*, 2022 MT 96, ¶26, 408 Mont. 433, 510 P.3d 100. The State bears the burden of proving warrantless searches or seizures were conducted in accordance with a recognized exception. *State v. Loberg*, 2024 MT 188, ¶8, 418 Mont. 38, 2024 Mont. Lexis 941.

The most common exception to the warrant requirement are so-called *Terry*-seizures, which mandate that officers have particularized suspicion of criminal wrongdoing. *State v. Harning*, 2022 MT 61, ¶15, 408 Mont. 140, 507 P.3d 145. Routine traffic stops are *Terry*-seizures. *State v. Carrywater*, 2022 MT 131, ¶12, 409 Mont. 194 (“[A] traffic stop is a seizure subject to constitutional scrutiny[]”); *see also Berkemer v. McCarty*, 468 U.S. 420, 436 (1984) (Traffic stops constitute Fourth Amendment seizures because it is a criminal offense “to ignore a policeman’s signal to stop one’s car or, once having stopped, to drive away without permission.”) Summers concedes Detective Monaco had particularized suspicion to stop her for speeding.

B. The “mission” of the traffic stop ended at 1:22:13 p.m.

after Detective Monaco returned Summers' driver's license and issued her a warning for speeding.

The authority for a traffic stop “ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.” *Rodriguez v. United States*, 575 U.S. 348, 354 (2015). When a person is stopped for speeding the “mission” of the seizure is to address the traffic violation and attend to safety related concerns. *State v. Panasuk*, 2024 MT 113, ¶14, 416 Mont. 430, 549 P.3d 432. Accordingly, the permissible scope of a speeding seizure ends when the officer returns the individual's driver's license and issues a citation or warning. *Id.*, ¶15; *see also McElroy*, ¶17.

In this case, at approximately 1:21:55 p.m., Detective Monaco returned Summers' valid driver's license and warns her to be mindful that the speed limit on the Eastside Highway was 60-mph. (Ex. A, at 1:21:55 - 1:22:02.) Summers responds by advising that her cruise control was on and suggests that perhaps it was malfunctioning. (Ex. A, at 1:22:03 – 1:22:13.) Thus, the “mission” of the traffic stop was complete at 1:22:13 p.m. (See Ex. A, at 1:22:13.)

C. At 1:22:14 p.m. Detective Monaco transitioned into a drug investigation which unlawfully added time to the stop.

This Court recently held that:

An officer conducting a traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation. However, when the driver has produced a valid driver's license and proof that he may operate the car, he must be allowed to proceed on his way, without being subject to further delay by additional police questioning. Everything that comes *after* what is necessary to resolve the initial traffic violation comes too late to support continued detention of the offender. *Panasuk*, ¶15 (Court's emphasis, internal citations omitted).

At 1:22:14 p.m.—*after* returning Summers' valid driver's license and issuing her a warning for speeding—Detective Monaco transitioned into a drug investigation when he said, “since I got you here, do you mind if I ask you a couple questions?” (Ex. A, at 1:22:14 - 1:22:16.) Summers responded, “go ahead.” (Ex. A, at 1:22:17.) Detective Monaco then began peppering Summers with a legion of questions concerning drugs—not speeding—which added time to the stop.

To illustrate, consider the 49-second conversation that ensued from 1:22:18 - 1:23:07 p.m. During this 49-second conversation Detective Monaco asks Summers if there was anything illegal in her vehicle and she confirms there was not. (Ex. A, at 1:22:18 – 1:22:22.) Detective Monaco then says in a rhetorical fashion, “you just seem

really nervous and “jittery” to which Summers responds, “no I am not.” Summers reiterates it has been a stressful period given her husband’s recent death and that she has been very busy trying to get her home in order. (Ex. A, at 1:22:55 – 1:23:05.) Detective Monaco then asks where Summers was coming from and she advises she had gone to the hardware store and to pick up a pizza and was now heading home. (Ex. A, at 1:22:55 – 1:23:07.)

As the above makes clear, none of the questions posed by Detective Monaco during the 49-second period from 1:22:18 - 1:23:07 p.m. pertained to speeding or were necessary to complete the mission of the traffic stop—which as noted was complete at 1:22:13 p.m. Accordingly, Ms. Summers’ seizure became unlawful beginning at 1:22:14 p.m. *See inter alia Rodriguez*, 575 U.S. at 357 (2015) (“The critical question... [is] whether conducting the sniff prolongs—i.e., adds time to—the stop[]”); (internal citations and quotations omitted); *Panasuk*, ¶15 (“Everything that comes *after* what is necessary to resolve the initial traffic violation comes too late to support continued detention of the offender[]”); (Court’s emphasis); *Harning*, ¶24 (“An officer who impermissibly extends a detention just to fish for further evidence of

wrongdoing breaches the protections afforded by the Fourth Amendment[]”); *State v. Noli*, 2023 MT 84, ¶38, 412 Mont. 170, 529 P.3d 813 (Observing that the United States Supreme Court rejected the *de minimis* intrusion theory in *Rodriguez*); *City of Missoula v. Kroschel*, 2018 MT 142, ¶10, 391 Mont. 457, 419 P.3d 1208 (“Even a brief restraint of a person’s liberty constitutes a constitutional seizure[]”); *United States v. Campbell*, 26 F.4th 860, 885 (11th Cir. 2022) (Prolonging the stop by 25-seconds to ask unrelated questions violates the Fourth Amendment); and *State v. Karst*, 170 Idaho 219, 227 (2022) (Holding that an officer radioing for a drug dog added 19-seconds to the stop rendering the seizure unlawful as the Fourth Amendment has no exception for *de minimis* intrusions.)

D. Summers was still subject to a Fourth Amendment seizure when Detective Monaco transitioned into a drug investigation at 1:22:14 p.m.

- 1. As a threshold matter, the State waived and/or forfeited arguing that Summers was not seized during Detective Monaco’s drug investigation or that she voluntarily consented to the prolonged seizure.**

During the district court proceedings, the State never argued that Summers was not still subject to a Fourth Amendment seizure when

Detective Monaco transitioned into a drug investigation at 1:22:14 p.m. (See D.C. Doc. 15.) Or put another way, the State did not argue that beginning at 1:22:14 p.m. a reasonable person in Summers position would have felt free to leave Detective Monaco's presence, disregard his requests, or terminate the encounter. *See State v. Emerson*, 2015 MT 254, ¶17, 380 Mont. 487, 355 P.3d 763 (In determining whether a person is seized the dispositive inquiry is not whether the person was free to leave a given location, but “whether a reasonable person would have felt free to leave the presence of the law enforcement officers entirely[]”); *see also Florida v. Bostick*, 501 U.S. 428, 433 (1991) (A person is seized when—as a result of police authority—a reasonable person would not feel free to disregard police requests or otherwise end the encounter).

Nor did the State argue or establish that Summers knowingly and voluntarily consented to Detective Monaco's prolonging the stop. *See State v. Munson*, 2007 MT 222, ¶50, 339 Mont. 68, 169 P.3d 364 (Advising that knowingly and voluntarily consenting to a search or seizure is a recognized exception to the warrant requirement.) The State bears the burden of proving the defendant's consent was voluntary. *State v. Lacey*, 2009 MT 62, ¶37, 349 Mont. 371, 204 P.3d

1192.

Rather, the State’s only argument was that Detective Monaco had particularized suspicion to transition into a drug investigation before the mission of the initial traffic stop was complete. (D.C. Doc. 15, at 7 (“Detective Monaco made observations and witnessed behavior from [the] Defendant during the initial lawful duration and scope of the speeding stop that caused him to have particularized suspicion that Defendant was involved in illegal drug related activity.”))

Accordingly, the State waived and/or forfeited arguing on appeal that Summers was not seized when Detective Monaco transitioned into a drug investigation at 1:22:14 p.m., or that Summers voluntarily consented to Detective Monaco’s expanding the scope of the traffic stop. *State v. LaFreniere*, 2008 MT 99, ¶11, 342 Mont. 309, 180 P.3d 1161 (The Court will not consider “new arguments and changes in legal theory” argued for the first time on appeal); *State v. Sedler*, 2020 MT 248, ¶22, 401 Mont. 437, 473 P.3d 406 (“The failure to raise an issue in the District Court is often referred to, both colloquially and in court opinions, as a ‘waiver’ of the issue for purposes of appellate review[]”); *see also United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.1 (1994)

(Advising that Fourth Amendment arguments are waived if not raised in the trial court.)

2. **But even if the State had raised the arguments they are meritless because Summers was seized during Detective Monaco’s drug investigation—which she never voluntarily consented to.**

As addressed below, Summers was still subject to a Fourth Amendment seizure when Detective Monaco transitioned into a drug investigation at 1:22:14 p.m. because a reasonable person in her position would not have felt free to leave Detective Monaco’s presence or disregard his requests.

First, Detective Monaco never informed Summers the traffic stop was over or that she had permission to leave.¹⁰ *State v. Bailey*, 2021 MT 157, ¶30, 404 Mont. 384, 489 P.3d 889 (“[A] person is typically not free to leave until released by the investigating officer...”) (internal citations omitted); *State v. Estes*, 2017 MT 226, ¶6, 388 Mont. 491, 403 P.3d 1249 (“Trooper Fetterhoff informed Estes that Montana law requires him to make sure Estes feels he is free to leave and he will not

¹⁰ It is noteworthy that Detective Monaco’s decision to not inform Summers she was free to leave was clearly intentional as evidenced by the fact that Detective Monaco explicitly informed Mr. Ryan he was free to leave after obtaining permission to search Summers’ vehicle. (See Ex. A, at 1:31:47 p.m.)

run the dog until Estes confirms he feels free to leave[]”); and *Berkemer*, 468 U.S. at 436 (Traffic stops are seizures because it is a criminal offense “to drive away *without permission*.”) (Emphasis added.)

Second, immediately *after* the mission of the traffic stop concluded at 1:22:13 p.m. Detective Monaco said to Summers—without pausing—“***since I got you here***, do you mind if I ask you a couple questions?” (Ex. A, at 1:22:14 – 1:22:16 (emphasis added).) Detective Monaco’s telling Summers “***since I got you here***...” is a clear indication that she was *not* free leave. *State v. Case*, 2007 MT 161, ¶30, 338 Mont. 87, 162 P.3d 849 (“When a police officer states that he has a question before you take off, that means, to the reasonable person, you have to stay and answer the question before you are free to leave, especially when the officer’s patrol car is parked directly behind your car[]”); *see also Shaw v. Jones*, 683 F. Supp. 3d 1205, 1247 & 1255 (D. Kan Jul. 21, 2023) (“[T]he theory that a driver who remains on the scene gives knowing and voluntary consent to further questioning is nothing but a convenient fiction.... A one-second break in contract [*sic*] with a trooper, or even a three-second or five-second break, does not create a clear ‘end’ to a traffic stop in the mind of a reasonable driver... [especially when]

the troopers who performed these maneuvers remained very close to the detained vehicles...”¹¹

Third, when Detective Monaco transitioned into a drug investigation—at 1:22:14 p.m.—Summers was not inside her car ready to drive away, but rather standing behind it trying to gather her documents. (Ex. A, at 1:22:14 – 1:22:18.) This is significant because the critical inquiry in determining if a person is seized is “whether a reasonable person would have felt free to leave the presence of the law enforcement officers *entirely*.” *Emerson*, ¶17 (emphasis added).

Summers could not have immediately left Detective Monaco’s presence

¹¹ *Jones* is a civil case where a federal district in the Tenth Circuit recently declared the so-called “Kansas-Two Step” unconstitutional. *Jones*, 683 F. Supp. at 1247. The Kansas Two-Step is what Detective Monaco attempted to perform on Summers—although he did so improperly. Here’s how it works: Once the mission of a traffic stop is complete the officer signals to the driver she is free to leave, takes a couple steps back, then re-engages the driver in what the officer now contends has become a “consensual encounter.” *Id.*, at 1247. What is particularly disturbing is the revelation in *Jones* that officers are being *trained* to perform this song and dance. *Id.* Gamesmanship by law enforcement should never be tolerated and is particularly repugnant to Montanas. *State v. Nicholls*, 200 Mont. 144, 149-150, 649 P.2d 1346 (Mont. 1982) (“The court should never indulge in or permit gamesmanship based on technicalities, which in the end may result in injustice to the State or to a defendant[]”); *State v. Minett*, 2014 MT 225, ¶16, 376 Mont. 260, 332 P.3d 235 (“In Montana the law has a strong preference for search warrants and the policy of this state is to encourage law enforcement officers to seek prior judicial approval before conducting searches...”); *see also United States v. Gorman*, 2017 U.S. App. LEXIS 18610, 25-26 (9th Cir.) (“[I]mpermissible gamesmanship” by law enforcement is precisely what the Fourth Amendment was enacted to proscribe.)

because she was outside her vehicle gathering up documents and Detective Monaco was standing only feet away.

Fourth, Detective Monaco's emergency lights were still on when he transitioned into his drug investigation at 1:22:14 p.m. (See Ex. A, at 1:22:14; see also 9/6/22 Tr., at 8.)¹² “[O]nce [Officer] Juhl activated her emergency lights, a reasonable person in Graham’s shoes would not have felt free to walk away...” *State v. Graham*, 2007 MT 358, ¶16, 340 Mont. 366, 175 P.3d 885.

E. The district court erred in concluding Detective Monaco had particularized suspicion to prolong the stop.

To expand a traffic stop into a drug investigation an officer must have particularized suspicion that the individual or her vehicle contains drugs. *Harning*, ¶15. The State bears the burden of proving the officer had particularized suspicion. *State v. Elison*, 2000 MT 288, ¶15, 302 Mont. 228, 14 P.3d 456. Particularized suspicion requires objective data; “[r]elevant considerations include the quantity, substance, quality, and degree of reliability of information known to the officer.”

¹² We know Detective Monaco's emergency lights were on when he transitioned into his drug investigation because of the “L” at the top of his dashcam video. (*Compare* Ex. A, at 1:22:14 *with* 1:12:06.)

Harning, ¶17; *see also Zeimer*, ¶28 (Particularized suspicion requires more than a generalized suspicion or an undeveloped hunch of criminal wrongdoing.)

Here, the district court found the following eight facts supported its conclusion that Detective Monaco had particularized suspicion to expand the traffic stop into a drug investigation:

- Fact #1: Summers failed to stop immediately after Detective Monaco turned on his emergency lights. (D.C. Doc. 20, at 5-6.)
- Fact #2: Summers was nervous as evidenced by her being “jittery”, having slurred speech, and providing unprompted details. (Id., at 6-7.)
- Fact #3: Summers had a drug history. (Id., at 6.)
- Fact #4: Summers was with a man she didn’t know well. (Id.)
- Fact #5: Summers “provided contradictory information.” (Id.)
- Fact #6: Summers “failed to follow Detective Monaco’s instructions.” (Id.)
- Fact #7: Summers consented to Detective Monaco’s request to search her vehicle. (Id., at 8.)
- Fact #8: Summers’ parole officer authorized Detective Monaco to search the vehicle. (Id., at 8.)

The eight facts above can easily be divided into two buckets. In

reverse order, the first bucket consists of facts Detective Monaco discovered *after* he transitioned into a drug investigation at 1:22:14 p.m.—rendering them irrelevant. The second bucket consists of facts Detective Monaco purportedly knew *before* the mission of the traffic stop ended at 1:22:13 p.m.

1. First Bucket: Facts the court erred in considering because they came to light *after* Detective Monaco transitioned into a drug investigation at 1:22:14 p.m.

“Everything that comes *after* what is necessary to resolve the initial traffic violation comes too late to support continued detention of the offender.” *Panasuk*, ¶15 (Court’s emphasis.) Here, the district court erroneously used Facts 4-8 to justify its conclusion that Detective Monaco had particularized suspicion because each of these facts came to light *after* the mission of the traffic stop ended at 1:22:13 p.m.:

- Fact #4: Summers was with a man she did not know well. (D.C. Doc. 20, at 6.)

Fact #4 is irrelevant because Detective Monaco did not discover how long Summers had known Mr. Ryan until 1:23:07 p.m.—approximately 54-seconds *after* the mission of the traffic seizure ended at 1:22:13 p.m. (*Compare* Ex. A at 1:23:07 *with* Ex. A at 1:22:13.)

- Fact #5: Summers “provided contradictory information” as evidenced by her first telling Detective Monaco she had not used drugs in years then moments later admitting she used drugs a few months ago when her husband died. (See D.C. Doc. 20, at 6.)

Fact #5 is irrelevant because Detective Monaco didn’t ask Summers about her prior drug use until 1:24:07 p.m.—over 2-minutes *after* the mission of the traffic stop ended at 1:22:13 p.m. (*Compare* Ex. A at 1:24:07 *with* Ex. A at 1:22:13.)

- Fact #6: Summers consented to Detective Monaco’s request to search her vehicle. (D.C. Doc. 20, at 7.)

Fact #6 is irrelevant because Summers did not consent to Detective Monaco’s searching her vehicle until 1:25:33 p.m.—over 3-minutes *after* the mission of the traffic seizure ended at 1:22:13 p.m. (*Compare* Ex. A at 1:25:33 *with* 1:22:13.)

- Fact #7: Summers’ parole officer authorized detective Monaco to search her vehicle. (D.C. Doc. 20, at 8.)

Fact #7 is irrelevant because Detective Monaco did not become aware that Summers was even on parole until 1:25:59 p.m.—nearly 4-minutes *after* the mission of the traffic seizure ended at 1:22:13 p.m.

(Compare Ex. A at 1:25:59 with 1:22:13.)¹³

- Fact #8: Summers “failed to follow Detective Monaco’s instructions”—presumably referring to when Detective Monaco told Summers and Mr. Ryan to stand away from the vehicle while he searched it. (See D.C. Doc. 20, at 6.)

Fact #8 is irrelevant because Detective Monaco didn’t tell Summers and Mr. Ryan to stand away from the vehicle while he searched it until 1:32:51 p.m.—over 10-minutes *after* the mission of the traffic seizure ended at 1:22:13 p.m. (Compare Ex. A at 1:32:51 with 1:22:13.)¹⁴

2. Second Bucket: Facts that came to light before Detective Monaco transitioned into a drug investigation at 1:22:14 p.m.

Of the eight facts the district court used to justify its conclusion that Detective Monaco had particularized suspicion to transition into a drug investigation, only the following three came to light *before* the mission of the traffic stop ended at 1:22:13 p.m.:

- Fact #1: Summers failed to immediately stop after Detective

¹³ Detective Monaco did not receive authorization from Summers’ parole officer to search the vehicle until 1:29:52, over seven-minutes after the mission of the traffic stop ended at 1:22:13 p.m. (Compare Ex. A at 1:29:52 with Ex. A at 1:22:13.)

¹⁴ It is further noteworthy that Summers never moved from the spot she was told to stand as asserted by the district court; rather, it was Mr. Ryan who walked towards the vehicle and was reprimanded for doing so by Detective Monaco. (Ex. A, at 1:34:14.)

Monaco turned on his emergency lights. (D.C. Doc. 20, at 5-6.)

- Fact #2: Summers was nervous as evidenced by her being “jittery”, having slurred speech, and giving unprompted details. (Id., at 6-7.)
- Fact # 3: Summers had a history of drug use. (Id., at 6.)

As discussed in detail below, the court erred in finding Facts 1-3. The court further erred in concluding Facts 1-3 supported its legal determination that Detective Monaco had particularized suspicion to justify transitioning into a drug investigation at 1:22:14 p.m.

Recognizing that Facts 1-3 must be considered in the aggregate, Summers will nevertheless address each fact individually before explaining why Detective Monaco lacked particularized suspicion under the totality of circumstances.

(a) Fact #1: Slow to pull over.

During the suppression hearing Detective Monaco testified that in his opinion Summers was slow to pull over. (9/6/22 Tr., at 6-7.)

Detective Monaco explained that he had hoped Summers would have stopped at the Three Mile Fire Station but she failed to do so. (Id., at 7.) Based on Detective Monaco’s testimony the court found Summers’ “fail[ure] to stop immediately” was a fact supporting its conclusion that

Detective Monaco had particularized suspicion to expand the traffic stop into a drug investigation. (D.C. Doc. 20, at 6.)

(i) Detective Monaco’s video does not support the court’s finding that Summers was slow to pull over.

At 1:12:13 p.m. Summers can be seen passing the firehouse—a mere 6-seconds after Detective Monaco turned on his emergency lights at 1:12:07 p.m. (See Ex. A., at 1:12:13 - 1:12:07.)¹⁵ Accordingly, Detective Monaco’s assertion that Summers should have stopped at the fire station is completely unreasonable.

At 1:12:32 p.m., or 25-seconds after Detective Monaco turned on his emergency lights, Summers’ brakes lights came on indicating she was looking for a place to pull over. (See Ex. A, at 1:12:32.) Summers attempting to pull over 25-seconds after Detective Monaco turned on his lights is not a delayed reaction. *See State v. Smith*, 134 N.J. 599, 604 (1994) (Trooper testified that the average driver takes 30-45 seconds to pull over.)

¹⁵ We know Detective Monaco turned on his emergency lights at 1:12:07 because of the “L” that appears on his dashcam and because the video began recording at 1:11:37 p.m. (See Ex. A., at 1:11:37– 1:12:08; see also *inter alia Lara*, 2023 U.S. Dist. LEXIS 78025, at 4 (Officer testified that dashcam video begins 30-seconds prior to turning on the emergency lights.))

It is further noteworthy that Detective Monaco was driving an unmarked patrol vehicle. (9/6/22 Tr., at 8.) Accordingly, Summers was unaware she was being followed by a law enforcement officer, which in turn means her reaction time would naturally be slower. Because as we can all attest from common experience, it is natural to incessantly monitor one's mirror(s) when we know we are being trailed by an officer.

Another important factor is that the stop occurred in broad daylight when emergency lights are far less visible than at night—especially given that Detective Monaco was driving an unmarked patrol vehicle. (9/6/22 Tr., at 8.) In fact, Detective Monaco's emergency lights can be seen faintly reflecting off the back of Summer's car, suggesting the lights were small and not highly visible. (See Ex. A, at 1:13:03 – 1:13:10; *see also State v. Ezell*, 314 Neb. 825, 827 (2023) (Noting that the unmarked police sedan “was equipped with small police lights on one of its visors...”)) Detective Monaco also failed to provide testimony concerning the visibility of his emergency lights; nor did Detective Monaco testify how drivers' reaction times vary when an officer is driving an unmarked patrol vehicle.

It is also important that no audible siren can be heard, and when Detective Monaco first approached Summers' driver's side window loud music is playing on her radio. (See Ex. A, at 1:12:11 - 1:13:15.)

Additionally, when Detective Monaco asked Summers why she hadn't stopped sooner Summers advised she wasn't paying attention as she was singing and talking with Mr. Ryan. (Ex. A, at 1:13:43 - 1:14:08.)

In sum, as the video evidence makes clear, the district court erred as a factual matter in finding that Summers was slow to pull over. *See Metz*, ¶30; and *Harris*, 550 U.S. at 380–81.

(ii) But even if Summers was slow to pull over, the court erred in concluding her being slow to pull over supported its legal determination that Detective Monaco had particularized suspicion.

As an initial matter, Detective Monaco's testimony that Summers was slow to pull over was offered to justify his removing Summers from the vehicle because of where she was parked—not as evidence supporting particularized suspicion to justify a drug investigation. (See 9/6/22 Tr., at 6-7.) It is true Detective Monaco testified that Summers was “making some sort of erratic movements[] and it was difficult to ascertain whether she was trying to conceal or retrieve something.”

(9/6/22 Tr., at 7.) But Detective Monaco later clarified that Summers “told me that she was dancing and some of those movements could have been consistent with that explanation.” (9/6/22 Tr., at 7.) Regardless, what matters is that Detective Monaco *never testified* that Summers purportedly being slow to pull over was in fact evidence of possible drug activity. It is further noteworthy that Summers had dogs in the backseat and during the stop she can be seen reaching back and petting them. (Ex. A, at 1:16:49.)

Most important of all, the district court never made a *factual finding* that Summers made erratic movements; nor did the court mention said movements as a fact supporting the existence of particularized suspicion. (See D.C. Doc. 20, at 1-8.)¹⁶ The court also did not explain how Summers’ purportedly being slow to pull over justified transitioning into a drug investigation nearly 10-minutes into the stop. (See D.C. Doc. 20, at 5-8.) Accordingly, even if Summers was slow to pull over the court erred in concluding her doing so supported its legal determination that Detective Monaco had particularized suspicion to

¹⁶ The district court’s only mention of Summers’ purported “furtive movements” was in its summary of the parties’ arguments. (D.C. Doc. 20, at 4.)

transition into a drug investigation. Put another way, there is simply no link between Summers' purportedly being slow to pull over and her possessing drugs—nor did the court identify one.

(b) Fact #2: Nervousness.

Detective Monaco testified that Summers was “more nervous than the innocent public” as evidenced by her having rapid and slurred speech, jittery movements, and nonstop chatter i.e. an “inability just to remain quite or endure the awkward pauses.” (9/6/22 Tr., at 8-9.)

Detective Monaco further testified that Summers spontaneously mentioned that her husband died which seemed “out of context.” (Id., at 8.) Based on Detective Monaco's testimony, the court concluded Summers' purported nervousness supported its conclusion that Detective Monaco had particularized suspicion to expand the stop. (D.C. Doc. 20, at 6-7.)

(i) Detective Monaco's video does not support the court's finding that Summers was more nervous than an average citizen.

While Detective Monaco testified that Summers' speech was slurred, the video makes clear this was not true. (*Compare* 9/6/22 Tr., at 8 *with* Ex. A.) Summers was also not “jittery”—whatever that

means. (*Compare* 9/6/22 Tr., at 8 *with* Ex. A.) Summers also flatly denied being nervous and jittery. (Ex. A, at 1:22:23 - 1:22:53.) Nor was Summers chatting nonstop as suggested by Detective Monaco; to the contrary, it was Detective Monaco that was issuing rapid-fire questions. (See *inter alia* Ex. A, at 1:15:07 – 1:15:37.)

Concerning Detective Monaco’s assertion that Summers mentioning her husband’s passing was “out of context”, the video belies this characterization as well. At 1:15:07 p.m. Detective Monaco tells Summers she seems nervous and asks whether everything was okay. (Ex. A, at 1:15:07- 1:15:08.) Summers responded she was fine and just trying to get projects finished at home. (Ex. A, at 1:15:09 - 1:15:22.)

Detective Monaco then immediately asks if she’s had anything to drink and Summers advises she doesn’t drink. (Ex. A, 1:15:23 - 1:15:28.) The very next second—at 1:15:29 p.m.—Detective Monaco asks Mr. Ryan for his name, date of birth, etc. (Ex. A, 1:15:29 – 1:15:42.) Once Mr. Ryan is finished answering Detective Monaco’s questions—approximately 14-seconds later—Summers tells Detective Monaco it has been a stressful period in her life given her husband’s recent passing and that her sister was in town helping with an estate

sale. (Ex. A, at 1:15:43 – 1:16:14.)

As the above illustrates, Summers' commenting on her husband's passing was absolutely not "out of context" as suggested by Detective Monaco. To the contrary, it was in direct response to Detective Monaco's suggestion that she was either nervous or drunk. And the reason for the delay in her response was Detective Monaco's switching his rapid-fire inquires to Mr. Ryan before Summers was able to fully respond to his inquires. (See Ex. A, at 1:15:07 – 1:15:52.)

Moreover, it is clear from the video that Detective Monaco had never met Summers, meaning his belief that she was overly nervous was pure conjecture as he had no baseline of her normal demeanor. *See United States v. Salzano*, 158 F.3d 1107, 1113 (10th Cir. 1998) (Advising that an officer's testifying that a suspect was nervous is of little value unless the officer is aware of the suspect's normal conduct and demeanor.)

It is also noteworthy that Detective Monaco never claimed Mr. Ryan was nervous, nor does the video suggest he was. (See Ex. A.) This further evidences that what Detective Monaco labeled "nervous behavior" was nothing more than Summers' natural demeanor under

the circumstances. Because if Summers and Mr. Ryan were together for the purpose of using drugs as suggested by Detective Monaco, *both* of them should have exhibited “overly nervous” behavior. (See 9/6/22, at 10-11; see also *McElroy*, ¶19 (Where the State argued *inter alia* that officers had particularized suspicion to expand a traffic stop into a drug investigation given “the level of nervousness exhibited by *both* Delavergne [driver] and McElroy [passenger].” (Emphasis added.))

Thus, as the video makes clear, the court erred as a factual matter in finding that Summers was overly nervous. *See Metz*, ¶30; and *Harris*, 550 U.S. at 380–81.

(ii) But even if Summers was overly nervous, the court erred in concluding Summers’ nervousness supported a legal determination that Detective Monaco had particularized suspicion.

This Court has been crystal clear that “[n]ervous behavior during a traffic stop is not uncommon and does not establish particularized suspicion to extend a traffic stop into a drug investigation...” *Harning*, ¶24; *see also Panasuk*, ¶17 (A driver’s being “‘extremely nervous’ does not, on its own, create particularized suspicion justifying the expansion of a routine traffic stop into a drug investigation.”) Indeed, Detective

Monaco himself conceded “not everybody who exhibits... [nervous behavior] is an illegal drug user...” (9/6/22 Tr., at 10.)

Moreover, particularized suspicion mandates that the officer have “*objective data* and articulable facts...” *State v. Hoang Vinh Pham*, 2021 MT 270, ¶21, 406 Mont. 109, 497 P.3d 217; (emphasis added); *see also In re License Suspension of Cybulski*, 2008 MT 128, ¶18, 343 Mont. 56, 183 P.3d 39 (Holding that an officer’s subjective opinion is irrelevant for Fourth Amendment purposes.) Accordingly, as a matter of law an individual’s purported nervousness should *never* be used to establish particularized suspicion because nervousness “is not an objective fact, but [rather] a subjective assessment derived from the officer’s perceptions.” *State v. Syhavong*, 661 N.W.2d 278, 282 (Minn. App. 2003). This is especially true when, as in this case, the investigating officer has had no prior interactions with the suspect. *See Salzano*, 158 F.3d at 1113.

Accordingly, even if Summers was nervous the court erred in concluding her nervousness supported its legal determination that Detective Monaco had particularized suspicion to transition into a drug investigation at 1:22:14 p.m.

(c) Fact # 3: Drug alert.

At 1:18:54 p.m. dispatch informed Detective Monaco that Summers had an alert for a history of “PODD” (possession of dangerous drugs) and “PODP” (possession of drug paraphernalia). (Ex. A, at 1:18:54 - 1:18:59.) During the suppression hearing Detective Monaco testified he believed dispatched told him Summers “had [a] history with illegal drug use.” (9/6/22 Tr., at 12.) Based on Detective Monaco’s testimony the court concluded Detective Monaco was aware that Summers had a “history of drug use” and used this fact to support its legal conclusion that Detective Monaco had particularized suspicion to transition into a drug investigation. (D.C. Doc. 20, at 6.)

(i) Summers concedes Detective Monaco received a “drug alert” prior to transitioning into a drug investigation.

Summers does not dispute that prior to Detective Monaco’s transitioning into a drug investigation he was advised by dispatch that she purportedly had a drug history. (*Compare* Ex. A, at 1:18:54 - 1:18:59 *with* 1:22:14.)

(ii) The court erred, however, in using Summers’ “drug alert” as a factor supporting its legal conclusion that Detective Monaco had particularized

suspicion.

As addressed below, there are numerous reasons Summers’ “drug alert” did not support the district court’s legal determination that Detective Monaco had particularized suspicion to transition into a drug investigation at 1:22:14 p.m.:

First and foremost,

[K]nowledge of a person’s prior criminal involvement is alone insufficient to give rise to the requisite reasonable suspicion because: If the law were otherwise, any person with any sort of criminal record—or even worse, a person with arrests but no convictions—could be subjected to a Terry-type investigative stop by a law enforcement officer at any time without the need for any other justification at all. Any such rule would clearly run counter to the requirement of a *reasonable* suspicion, and of the need that such stops be justified in light of a balancing of the competing interests at stake. *Panasuk*, ¶22 (Court’s emphasis).

Second, dispatch did not inform Detective Monaco *when* Summers had purportedly possessed drugs or paraphernalia. This is significant because a possession charge 25-days before would be stronger evidence than an allegation from 25-years ago. *See Loberg*, ¶22 (“Old, stale reports... are particularly unlikely to indicate that contraband or evidence would presently be at the place to be searched[]” (internal

citations and quotations omitted); *see also Jones*, 36 F.4th at 1016 (The passage of time since a criminal arrest decreases its weight as a reasonable suspicion factor.)

Third, dispatch did not advise Detective Monaco what type of “dangerous drug” and related paraphernalia Summers had allegedly possessed in her past. This matters because the sale of recreational marijuana became legal in Montana on January 1, 2022, a mere 5-months before the stop. *See* § 16-12-101, MCA. Accordingly, if Summers’ “drug history alert” was for possession of marijuana and associated paraphernalia, the alert would provide zero evidentiary support that she possessed *illegal* drugs at the time of the stop (May of 2022).

Fourth, dispatch did not clarify whether Summers had actually been convicted of a drug related crime, and it should go without saying that a conviction would provide more evidentiary weight than a mere allegation.

Fifth, Mr. Ryan did not have a drug alert as evidenced by dispatch’s silence on the issue. (See Ex. A, at 1:18:54 - 1:19:20.) Accordingly, even assuming *arguendo* Summers’ drug alert could in

theory support a finding that Detective Monaco had particularized suspicion, the fact that Mr. Ryan *did not have* a drug history must support the opposite conclusion. *See Panasuk*, ¶19 (The fact that the passengers were known drugs users is a factor to be considered in determining the existence of particularized suspicion.) This is especially true given Detective Monaco’s implication that Summers and Mr. Ryan were using drugs together. (See 9/6/22 Tr., at 10-11.)

In light of the above, the court erred in concluding Summers’ purported drug history supported its legal conclusion that Detective Monaco had particularized suspicion to transition into a drug investigation at 1:22:14 p.m.

3. Under the totality of circumstances Detective Monaco lacked particularized suspicion to transition into a drug investigation at 1:22:14 p.m.

As addressed in detail above, even if true the fact that Summers failed to stop immediately, was nervous, and had a “drug alert” provided little if any evidence that Ms. Summers’ vehicle contained drugs on the afternoon of May 21, 2022. Put more succinctly, even in the aggregate these three facts don’t even come close to particularized suspicion. The scant evidentiary value of the three facts is further

diminished when the totality of additional facts and circumstances are taken into account.

For example, the State failed to establish that Detective Monaco had extensive training or experience performing narcotics investigations. This matters because “a peace officer’s experience and training may be 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; *see also Estes*, ¶18 (Emphasizing the importance of Trooper Fetterhoff’s vast experience with narcotics including 11-years as Highway Patrol Officer and over 700 hours of drug and K-9 handling experience.)

But unlike in *Estes*, the record is silent concerning Detective Monaco’s training and experience because the parties “stipulated” to his training at the suppression hearing. (See 9/6/22 Tr., at 5.) But what exactly the parties stipulated to remains a mystery. All we know is Detective Monaco had worked full-time for Ravalli County for 5-years and 3-years as a part-time reserve deputy. (9/6/22 Tr., at 5.) The State bears the burden to prove the existence of particularized suspicion.

Elison, ¶15.

It is further noteworthy just how many particularized suspicion factors were *not present* in this case. For instance, Montana law enforcement officers have recently testified to having particularized suspicion to transition traffic stops into drug investigations based on *inter alia* the following 21-factors—none of which were present in this case:

- The driver was smoking cigarettes, which can be used “to mask the odors of drugs coming from the vehicle.” *Noli*, ¶45.
- The driver had numerous air fresheners. *Estes*, ¶18.
- The driver was in a rental car and “it is common for somebody that is trafficking drugs to drive a rental vehicle.” *Noli*, ¶5.
- The driver had multiple cell phones. *Estes*, ¶18.
- The driver had cash in the console. *Estes*, ¶18.
- The driver was traveling in a vehicle with out-of-state license plates. *Estes*, ¶¶3, 18.
- The driver was traveling to and from out-of-state drug hubs. *Noli*, ¶9.
- The driver was traveling on a road known to be a drug corridor. *Estes*, ¶18.
- The driver was returning from a casino, which historically

are hangouts for drug users and dealers. *Loberg*, ¶¶6, 19.

- The driver had blankets, pillows, and trash in the vehicle suggesting “hard travel”, which can be indicia of drug trafficking. *Estes*, ¶18.
- The driver was confused about travel plans suggesting deception. *Noli*, ¶13.
- The driver had trouble answering simple questions. *Noli*, ¶14.
- The driver lacked attention to detail. *Noli*, ¶14.
- The driver did not roll the window down all the way when speaking to the officer. *Harning*, ¶3.
- The driver was “hesitant” to answer the officer’s questions and was evasive. *Harning*, ¶¶20, 24.
- The driver avoided eye-contact. *Wilson*, ¶31.
- The officer smelled unlawful drugs in the vehicle. *Harning*, ¶19.
- The driver admitted to using drugs earlier in the day. *Harning*, ¶26.
- The driver had “constricted” pupils. *Zeimer*, ¶43.
- The driver was breathing heavily. *Noli*, ¶14.
- The driver was constantly rubbing her face. *Noli*, ¶14.

Here, Summers was not driving a rental car and did not have out-of-state license plates. She was not traveling from an out-of-state drug

hub, driving on a well-known drug corridor, or leaving a casino. To the contrary, Summers was driving home after visiting the local hardware store and pizza shop—perhaps the most innocent businesses in town. Summers had no unusual travel plans and was not confused about her travel plans. Summers was not smoking, nor is there evidence her vehicle contained multiple air fresheners or showed signs of “hard travel.” Summers did not have multiple cell phones or cash in her console. Detective Monaco never smelled drugs and Summers never admitted to using drugs.

When Detective Monaco approached Summers’ vehicle her window was already down and she had no trouble answering his questions. There is no evidence Summers avoided eye contact, was hesitant to answer Detective Monaco’s questions, or was evasive in any fashion. To the contrary, Detective Monaco argues he had particularized suspicion because Summers was not hesitant/ evasive enough i.e. she was *too talkative*. (9/6/22 Tr., at 8-9.)

Additionally, there is no evidence that Summers had constricted pupils, was breathing deeply, or constantly rubbed her face. Summers also did not have open facial sores which are common for individuals

using methamphetamine. *See State v. Cox*, 259 N.C. App. 650, 662 (2018) (Justifying the extension of a traffic stop based in part on the officer's observation of meth sores on the suspect's face.)

In sum, when the totality of circumstances are taken into account, it is clear beyond cavil that the State failed to satisfy its burden of proving Detective Monaco had particularized suspicion to transition the traffic stop into a drug investigation at 1:22:14 p.m. To the contrary, Detective Monaco's belief that Summers' vehicle contained drugs was nothing more than an inarticulable hunch based on nefarious inferences drawn from completely innocent conduct.

CONCLUSION

Beginning at 1:22:14 p.m. Detective Monaco violated the Fourth Amendment when he transitioned a routine traffic stop into a drug investigation without particularized suspicion. The pipe and small amount of methamphetamine he discovered during the unlawful seizure should have been suppressed. Summers respectfully requests this Court issue an Order reversing the denial of her suppression motion and remanding with instructions allowing Summers to withdraw her conditional guilty plea.

APPENDIX

Judgement & Commitment App. A

CERTIFICATE OF SERVICE

I, Peter Allan Wood, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-20-2024:

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