

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 23-0229

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CITY OF MISSOULA

Plaintiff and Appellee,

v.

HALIE MARIA HERZOG

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana Nineteenth Judicial District Court,  
Lincoln County, the Honorable Wm. Nels Swandal, Presiding

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## **STATEMENT OF THE ISSUE**

(1) Whether the district court relied on clearly erroneous findings of fact when it denied Herzog's motion to suppress on the grounds that Detective Holzer lacked sufficient particularized suspicion of criminal activity to conduct an investigative *Terry* Stop.

## **STATEMENT OF THE CASE**

Halie Herzog was the occupant of a car stopped by law enforcement in Lincoln County. Before the investigatory stop, none of the officers involved possessed objective data to support a reasonable suspicion that a person had committed, is committing, or is about to commit a criminal offense. Herzog challenged the investigatory stop as illegal in district court, moving to suppress all evidence obtained, which was denied. Herzog was sentenced for criminal possession of dangerous drugs, reserving the right to appeal the district court's decision.

## **STATEMENT OF THE FACTS**

On July 5, 2022, a Border Patrol Agent stopped a yellow 2003 Volkswagen with Oregon plates registered to Laura Aguilar of Hood River, Oregon. (Doc. 2, Exh. D: Supplemental Narrative, 7/20/2022,

Detective Brandon Holzer, *hereafter named* “Doc. 2, Holzer” at 1; (Suppression Hearing Transcript, *hereafter named*, “Supp. Hrg Tr.” at 11 and 27.) The day before this stop, on July 17, 2022, the agent informed Detective Holzer of the Lincoln County Sheriff’s Department and the Northwest Drug Task Force of a July 5<sup>th</sup> stop involving the yellow car. The agent explained that the purpose of the stop was to conduct a “suspicious activity welfare check” that occurred in northwestern Montana. (Supp. Hrg. Tr. at 9; Doc. 2, Holzer at 1.) The agent didn’t locate any information on Todd Pyles, the driver, and Halie Herzog, the passenger, and they were not engaged in illegal activity, so he released them. (Supp. Hrg. Tr. at 8; Doc. 2, Holzer at 1.) This July 5<sup>th</sup> contact was the only contact the agent had with Herzog. (Supp. Hrg. Tr. at 9.) Holzer testified that this was his first awareness of Herzog in the area. (Supp. Hrg. Tr. at 8- 9. )

Holzer testified that he knew Herzog had been involved with the Northwest Drug Task Force in the past, but he could not recall the details of that interaction or when it had occurred and estimated it may have been “months” ago. (Supp. Hrg. Tr. at 9.) Holzer testified that he

knew Herzog had been convicted some months prior of a drug charge in 2021 but that he was “not familiar with” [her or that case]--and couldn’t recall when the conviction occurred. (Supp. Hrg. Tr. at 26-27.)

Lincoln County Sheriff’s Deputies also received information from the agent about the July 5<sup>th</sup> stop. (Doc. 2, Holzer at 1.) Holzer checked Pyles and found he had a suspended Driver’s License. (Supp. Hrg. Tr. at 8; Doc. 2, Holzer at 1.) The Deputies that Montana Probation and Parole presently supervised Herzog for a previous felony drug conviction and also found that Pyles had a suspended driver’s license. (Doc. 2, Holzer, at 1; Doc. 46 at 11.)

Holzer reported that he knew Pyles and Herzog were “suspected” drug traffickers and drug users. (Doc. 2, Holzer at 1.) Holzer testified that he had no empirical evidence to give as to how Pyles and Herzog became suspects, and instead, stated that he relied on “Just my knowledge and what I have going on would be all I could give.” (Supp. Hrg. Tr. at 44-45; Doc. 2, Holzer at 1.) Holzer testified that he knew the Pyles and Herzog were from the “Flathead area.” (Supp. Hrg. Tr. at 12.)

Sometime after July 17<sup>th</sup> but before the stop on the 18th, Holzer called Lincoln County Probation and Parole Officer Steve Watson. (Supp. Hrg. Tr. at 10; Doc. 2, Holzer at 1.) Holzer testified that he spoke to Officer Watson regularly and had, through contacts, talked to him about a week before the stop. The record is unclear if they discussed Herzog about a week before the stop or if they discussed Herzog the day before the stop when Holzer first learned Herzog was in the area. (Supp. Hrg. Tr. at 25; Doc. 2, Holzer at 1.)

Holzer reported he learned *after* the stop that Herzog's car was in Kalispell and that Pyles had traveled to Spokane, WA, and upon his return, picked up Herzog in Libby the day the subject stop occurred. (Doc. 2, Holzer at 1.)

Holzer reported that P.O. Watson gave him several reasons to detain Herzog and contact him before the stop. ( Supp. Hrg. Tr. at 26; Doc. 2, Holzer at 1.) Watson first wanted him to detain Herzog if Holzer observed her traveling into Lincoln County from another state. The record does not contain reports of Holzer observing Herzog traveling from another state. (Doc. 2, Holzer at 1.) The second reason to detain



Herzog, which was not mentioned in Holzer's police report, was that she may or may not have (was suspected of) committed a compliance violation by traveling out of state without permission or proper trip tickets. (Supp. Hrg. Tr. at 26; Doc. 2, Holzer at 1.) The third reason to detain Herzog, also not mentioned in Holzer's police report, was that Herzog may or may not have (was suspected of) committed a compliance violation of previously driving at night with known drug users. (Supp. Hrg. Tr. at 26; Doc. 2, Holzer at 1.)

Watson and Holzer did not contact Herzog's assigned Montana Felony Probation Officer, Shelley Dargan, at the Flathead County P & P Office in Kalispell. (Supp. Hrg. Tr. at 27; Doc. 46, at 11.)

On July 18, 2022, at about 2:30 a.m., Deputy Breiland messaged Holzer, who was at home, that he had spotted the yellow car in Libby. (Supp. Hrg. Tr. at 11; Doc. 2, Holzer at 1.) Holzer and Breiland went out together to try to locate the yellow car. (Doc. 2, Holzer at 1.) Other Deputies were enlisted to search for and stop the yellow car. (Doc. 2, Holzer at 1.)

Deputy Jenson reported that he could not contact Holzer or Breiland directly by phone at 2:30 a.m. on July 18, 2022, to report seeing the yellow car driven by a male enter the Town Pump Gas Station. (Doc. 2, Exh. C: Supplemental Narrative, 7/19/2022, Deputy Anthony Jenson. Hereafter “Doc. 2, Jenson” at 1.) Communications were available through dispatch or police radio channels, and the officers updated their respective locations and observations as they all looked for a reason to stop the yellow car. (Supp. Hrg. Tr. at 12, 28; Doc. 2, Jenson at 1.)

Sometime after 2:30 a.m. but before 2:41 a.m. Holzer heard on the radio that the yellow car was at “a gas station,” and the driver was possibly male, but the Deputies could not identify the driver as Pyles. (Supp. Hrg. Tr. at 27; Doc. 2, Holzer at 1; Doc. 2, Jenson at 2.) None of the officers reported identifying a passenger, and no one knew if Herzog was in the yellow car. (Supp. Hrg. Tr. at 42.)

Surveillance footage collected after the stop shows that at 2:41 a.m., a yellow car, driven by a male, entered the Saverite South Gas Station and parked at a pump. (Doc. 2, Jenson at 1.) Law enforcement

did not report whether or not the yellow car had refueled at either location. (Doc. 2; Compare Doc. 42 at 5 ¶ 2, last sentence of section 4.) The footage shows a male driver and a female passenger exit the car. (Doc. 2, Jenson at 2.) At 2:53 a.m., the female took over as driver, and the male became the passenger. (Doc. 2, Jenson at 2.) She drove out of Saverite South, on US Highway 2, past Deputy Jenson, who had parked his patrol car on the highway to observe the yellow car. (Doc. 2, Jenson at 1.) None of the Supplemental Narrative reports indicate that after the yellow car left the Savorite South gas station and Libby, a female was driving it, or a female passenger was involved. (Supp. Hrg. Tr. All; Doc. 2 All)

Holzer believed Pyles and Herzog were from the Kalispell area. (Doc. 2, Holzer at 1.) When the officers were trying to locate the yellow car on roads outside Libby, they observed that the car did not travel in a pattern law enforcement expected, assuming it was heading to Kalispell as its final destination. (Supp. Hrg. Tr. at 13; Doc 2, Jenson at 1.)

Because the car took different routes than expected, Jenson reported, and Holzer testified and reported that it appeared the driver's actions were to avoid law enforcement. (Supp. Hrg. Tr. at 12-13; Doc. 2, Jenson at 1; Doc. 2 Holzer at 1) None of the Deputies reported that the occupants of the yellow car saw their patrol cars or that any of them had made eye contact with the occupants. (Supp. Hrg. Tr. all; Doc 2, all)

As the pursuit of the yellow car progressed, Holzer heard on the radio that despite their efforts, the deputies could not identify the driver as Pyles and that none of them had observed a traffic infraction; therefore, they could not find a lawful reason to stop the yellow car. (Doc. 2, Holzer at 1.) At that point, Holzer told the Deputies to stop searching for the yellow car. (Supp. Hrg. Tr. at 13.)

Holzer continued pursuing the yellow car on his own. He testified that his purpose for locating the yellow car was "to find probable cause to stop the car and investigate the occupants for trafficking narcotics." (Supp. Hrg. Tr. at 23.) Holzer testified that he had particularized suspicion to stop the yellow car for drug activity because Pyles and Herzog were suspects, and he had information from the past. (Supp.

Hrg. Tr. at 44-45) Holzer gave generalized information “from the past,” not connected to any present criminal actions of the “suspects.” (Supp. Hrg. Tr. at 24.) Holzer did not present corroborating evidence connecting Pyles and Herzog to criminal drug offenses, as he suspected. (Supp. Hrg. Tr. at 24, 44-45)

Holzer believed the yellow car was heading to Kalispell on US Highway 2. (Supp. Hrg. Tr. at 12-13) He parked at Happy’s Inn some forty miles east of Libby and waited for the yellow car to pass. (Supp. Hrg. Tr. at 13; Doc. 2, Holzer at 1.) Holzer waited about 45 minutes, but the yellow car was not traveling to Kalispell after all, so he returned to Libby. (Supp. Hrg. Tr. at 13; Doc. 2, Holzer at 1.)

At no time did any of the Deputies or Holzer receive a report that the yellow car was in distress or mechanical trouble before the stop. (Supp. Hrg. Tr. at 29-30.) Holzer said he did not have cellphone service at Happy’s Inn, and his report indicates a storm was occurring. (Supp. Hrg. Tr. at 29; Doc. 2, Holzer at 1.)

As Holzer drove back towards Libby near mile marker fifty, he testified that he saw “a light” or “some type of light” like a lighter

through the storm about fifty feet from the highway. (Supp. Hrg. Tr. at 14; Doc. 2, Holzer at 1.) At that point, he knew he was seeing a vehicle but didn't know it was the yellow car. (Supp. Hrg. Tr. 14; Doc 2. Holzer at 1; Doc 46, SW Affidavit at 6.) He turned his patrol car around and entered a little road that dead-ended after about fifty feet. (Supp. Hrg. Tr. 29; Doc. 2, Holzer at 1.) Once at the end of the road, he observed the yellow car backed up into the brush. (Supp. Hrg. Tr. 14; Doc 2. Holzer at 1; Doc 46, SW Affidavit at 6.)

He turned on his grill lights to identify himself and made contact. (Supp. Hrg. Tr. at 30.) Holzer reported, " I could see two individuals on my approach, and the car's driver started pulling forward, and I identified myself as a Sheriff's Deputy and told him to stop." (Doc. 2, Holzer at 1; Doc 46 SW Affidavit at 6.)

Holzer testified that he had detained them at that point, equivocating that it was only a verbal detention and also admitting he believed the suspects would not have felt free to leave. (Supp. Hrg. Tr. at 30.) Holzer asked the driver if they were okay and what they were doing. (Supp. Hrg. Tr. at 29; Doc. 2, Holzer at 1.) Holzer never testified

or reported a community caretaker exception to the warrantless search and seizure requirements. However, he alluded to some sort of community caretaker role with his inquiry about whether or not the occupants were okay. (Doc. 2, Holzer at 1.)

It wasn't until *after* the driver responded to Holzer's questions that Holzer identified the car's occupants, *for the first time*, as Pyles, in the driver's seat, and Herzog, in the passenger's seat. (Supp. Hrg. Tr. at 42; Doc. 2, Holzer at 1.)

After the stop, Holzer noticed Pyles and Herzog exhibit behaviors he thought were indicative of drug use. (Supp. Hrg. Tr. at 16; Doc. 2, Holzer at 2.) He believed he did not have enough to detain them even though he had already detained their vehicle. (Supp. Hrg. Tr. at 18, 31; Doc. 2, Holzer at 2.) He did, however, believe he had enough from his observations after the stop to request a K9 sniff of the car. (Supp. Hrg. Tr. at 21; Doc. 2, Holzer at 2.)

After stopping the car, Holzer testified that he did not detain Herzog as Officer Watson had requested. (Supp. Hrg. Tr. at 18.) It wasn't until after the K9 arrived, had signaled affirmative for drugs in

the car, and Holzer knew he had probable cause to apply for a search warrant that he instructed dispatch to contact Officer Watson. Upon learning of the circumstances, Watson instructed Holzer to detain Herzog. (Supp. Hrg. Tr. at 21; Doc. 2, Holzer at 2.)

### **SUMMARY OF THE ARGUMENT**

In its findings of fact, the district court determined that the arresting officer, Detective Holzer, possessed objective data necessary to establish particularized suspicion that the crime of drug possession /trafficking had occurred, was occurring, or was about to occur when he conducted an investigative *Terry* stop.

Herzog argues that the district court's findings of fact are clearly erroneous because they are either conjecture, irrelevant, implausible, or infeasible. Because the findings are clearly erroneous, the court incorrectly interpreted and applied the pertinent law to these facts in its legal conclusions.

Herzog argues that the district court's decision not to suppress evidence obtained due to Detective Holzer's unlawful stop should be reversed with instructions to the district court to exclude all evidence



unlawfully obtained by law enforcement as the fruit of the poisonous tree.

### **STANDARD OF REVIEW**

This Court has applied the standard of review of a lower court denial of a motion to suppress evidence in a criminal case to determine whether the court's pertinent findings of fact are clearly erroneous and whether it correctly interpreted and applied the applicable law to those facts. *State v. Hoover*, 2017 MT 236, ¶ 12. Lower court findings of fact are clearly erroneous if not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if, upon our independent review of the record, we are firmly convinced that the court was otherwise mistaken. *Hoover*, ¶ 12. Whether a lower court correctly interpreted and applied the pertinent law to the facts at issue is a question of law subject to de novo review. *State v. Noli*, 2023 MT 84, ¶ 15, 412 Mont. 170, 529 P.3d 813 (citing *Hoover*, ¶ 12)

## ARGUMENT

- I. **The district court relied on clearly erroneous findings of fact when it denied Herzog's motion to suppress on the grounds that Detective Holzer lacked the necessary particularized suspicion before conducting an investigative *Terry Stop*.**

The Fourth Amendment of the United States Constitution and Article II, Section 11 of the Montana Constitution guarantee people the right to be free from "unreasonable" government "searches and seizures" of their persons, homes, and other areas or things regarding which they have a reasonable expectation of privacy. Mont. Const. art. II. § 11.

The fundamental purpose of the federal and state protections against unreasonable searches and seizures is "to protect the privacy and security of individuals from unreasonable government intrusion or interference." *State v. Hoover*, 2017 MT 236, ¶ 14, 388 Mont. 533, 402 P.3d 1224 (citing *United States v. Mendenhall*, 446 U.S. at 552-54, 100 S. Ct. at 1876-77 ("purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry"—only "to

prevent arbitrary and oppressive interference by [government] officials with the privacy and personal security of individuals").

Unless “conducted in strict accordance” with one of “certain recognized and narrowly limited exceptions” to the Fourth Amendment and Montana’s Article II, Sections 10 and 11 warrant and probable cause requirements, warrantless searches and seizures are *per se* unreasonable and thus illegal. *State v. Zeimer*, 2022 MT 96, ¶ 24, 408 Mont. 433, 510 P.3d 100

A temporary investigative stop, or Terry stop, is a recognized exception to the Fourth Amendment and Article II, Section 11 warrant and probable cause requirements. *State v. Gopher*, 193 Mont. 189, 192-94 (1981) (citations omitted); *United States v. Cortez*, 449 U.S. 411, 417-22, 101 S. Ct. 690 (1981); *Terry v. Ohio*, 392 U.S. 1, 15-16, 88 S. Ct. 1868 (1968) Under this exception, law enforcement officers may conduct an investigatory stop if the officer has a particularized suspicion that the person has committed, is committing, or is about to commit a criminal offense. Mont. Code Ann. § 46-5-401(1).

The “demand for specificity in the information upon which police action is predicated” is the central requirement of the investigative *Terry* stop exception to the Fourth Amendment warrant and probable cause requirements. *Terry*, 392 U.S. at 21, 88 S. Ct. 1868. Reasonable particularized suspicion requires “more than mere generalized suspicion, possibility, an undeveloped hunch, or good faith belief. *Illinois v. Wardlow*, 528 U.S. 119, 123-24, 120 S. Ct. 673 (2000).

“Where 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.” *State v. Reeves*, 2019 MT 151, ¶ 13, 396 Mont. 230, 444 P.3d 394. This Court noted that “objective data may be based on ‘various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers.’” *State v. Anderson*, 258 Mont. 510, at 514, 853 P.2d at 1245, at 1248 (quoting *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621 (1981)).

Particularized suspicion does not require the law enforcement officer to be certain that an offense has been committed. Rather, courts must look at the totality of the circumstances to determine if the officer had the objective data necessary to justify the stop. *State v. Schlichenmayer*, 2023 MT 79, 412 Mont. 119, 529 P.3d 789. When evaluating the totality of the circumstances, "this Court considers the quantity, or content, and quality, or degree of reliability, of the information available to the officer at the time of the investigatory stop." *State v. Van Kirk*, 2001 MT 184, P15, 306 Mont. 215, P15, 32 P.3d 735, P15 (citations omitted). Whether an officer possessed particularized suspicion of criminal activity is a question of fact assessed under the totality of circumstances. However, the related question of whether the circumstances indicated illegal activity is a question of law. *State v. Kaufman*, 2002 MT 294, ¶ 11, 313 Mont. 1, 59 P.3d 1166.

If the officer lacks particularized suspicion and no other exceptions to the search warrant requirement apply, the search and seizure are unconstitutional. All evidence emanating from unlawful law

enforcement action must be suppressed. *State v. Harning*, 2022 MT 61, ¶¶ 17-18, 408 Mont. 140, 147, 507 P.3d 145, 150 (citations omitted).

“It is well-established that peace officers must have reasonable grounds, or particularized suspicion, *before* conducting an investigative stop.” *State v. Martinez*, 2003 MT 65, 314 Mont. 434. *Anderson*, 258 Mont. at 514, 853 P.2d at 1249, *Ala. v. White*, 496 U.S. 325, 110 S. Ct. 2412 (1990).

### **The District Court’s Findings of Fact**

The district court relied on erroneous findings of facts to conclude that Detective Holzer knew articulable, objective facts before the stop to justify conducting it.

The six sections below designate the findings of fact presented by the district court in denying the motion to suppress: 1) There was an ongoing drug investigation, 2) Holzer knew Pyles and Herzog were in possession of dangerous drugs, 3) Holzer was instructed to detain Herzog, who was a Montana State Felony Probationer, 4) Todd Pyles’ suspended driver's license was independent criminal activity, 5) The

driver exhibited a desire to avoid law enforcement, 6) Holzer recognized the defendants after they were stopped.

***1. Ongoing Drug Investigation.***

The district court found Holzer’s “ongoing drug investigation” was sufficient to establish particularized suspicion to justify an investigative stop. However, the record indicates that Holzer lacked specific objective facts. Holzer’s underdeveloped investigation remained nothing more than a suspicion that Pyles or Herzog were committing a criminal offense. (Supp. Hrg. Tr. at 8- 9; 12; 21; 23; 24; 25; 26-27; 44-45; Doc. 2, Holzer, at 1.)

*State v. Anderson* contains facts analogous to this case. In *Anderson*, an informant told police that Anderson was planning to leave Libby, Montana, in a blue Toyota pickup to go to Washington to pick up a large quantity of marijuana and planned to return to Montana in that pickup that evening. Police dispatched two patrol cars to separate highways near the Idaho–Montana border. Officers located the described pickup truck confirmed it matched the informant’s description, and pulled it over. The court held that the informant’s tip

was insufficient objective data to form a particularized suspicion. *State v. Anderson* (1993), 258 Mont. 510, at 515, 853 P.2d 1245.

Here, Holzer stopped the yellow car with less information than the officers' in the Anderson case. The agent's tip given to Holzer is analogous to the tip given to the officers in *Anderson* in that it was *insufficient* to form reasonable suspicion of criminal activity presently occurring or about to occur.

The agent contacted Holzer the day before the stop to discuss a citizen contact he had two weeks prior with a yellow car with Oregon plates on Montana roads. The agent told Holzer he stopped the car while conducting a "suspicious community caretaker" stop. The details of this stop were never explained, but no illegal activity was observed. (Doc. 2, Holzer at 1.) The agent identified Todd Pyles as the driver and Halie Herzog as the passenger. He also informed Holzer that the yellow car was registered with Laura Aguilar of Fort Hood, Oregon, who was not in the car. (Doc. 2, Holzer at 1.), (Supp. Hrg. Tr. at 6, 8.) Holzer testified that this was the first he knew of Herzog in the area. (Supp. Hrg. Tr. at 8- 9.)



Although the agent's tip reported only lawful activity by Pyles or Herzog, Holzer formed a generalized suspicion of Pyles and Herzog as suspects involved in dangerous drugs. (Supp. Hrg. Tr. at 8; Doc. 2, Holzer at 1.) Thus, Holzer initiated a drug investigation on Pyles and Herzog by researching their criminal history, probationary status, and driving privileges. (Supp. Hrg. Tr. at 8- 9; Doc. 2, Holzer at 1.)

Having just received the information a day earlier, Holzer did not have time to develop his investigation or corroborate his unsubstantiated suspicion about the yellow car's occupants by gathering evidence connecting Pyles and Herzog to drug activity. Thus, his investigation was significantly underdeveloped before he stopped the yellow car. (Doc. 2, Holzer at 1-2.), (Supp. Hrg. Tr. all)

Unlike *Anderson*, this Terry stop was not based on any specific tip about the suspected car's destination, future travel involving drugs, where it had come from that made it suspect, or any other details or corroborating evidence to support the vehicle as "suspicious" in the first place. No evidence was presented of any surveillance or stakeout, no personal observation of arrival or departure to a known drug house, or

witness of a hand-to-hand drug transaction just before the yellow car was stopped.

No other law enforcement officer or Northwest Drug Task Force team member was involved in Holzer's drug investigation. (Doc. 2, Holzer at 1.) Holzer testified that none of Lincoln County Deputies knew details about his drug investigation. (Supp. Hrg. Tr. at **6, 8**.) Neither Holzer nor any of the officers involved reported or testified to any personal knowledge or hearsay evidence corroborating Holzer's suspicion of Pyles and Herzog as involved with "narcotics trafficking" before he initiated the pursuit of the yellow car.. (Doc. 2, Holzer at 1-2.), (Supp. Hrg. Tr. all)

When pressed for detailed information, Holzer refused to give substantial facts that would evolve speculation and general suspicion into objective data sufficient to qualify as particularized suspicion. In Holzer's reports and testimony, he frequently used catchphrases around the term "ongoing investigation," referring to Pyles and Herzog as "suspects," "known drug users," and "drug traffickers," While at the same time, the record remains devoid of even a hint of empirical

corroborating evidence connecting Pyles and Herzog to criminal activity of dangerous drugs *before* that stop.

Unable to point to any objective data or articulable facts, Holzer described it as “a suspicion” at the suppression hearing. (Supp. Hrg. Tr. at 45.) Holzer had no intention of giving the district court any objective or articulable facts to justify the stop when he proclaimed at the suppression hearing that “my knowledge and what I have going on is all I could give.” (Supp. Hrg. Tr. at 45.)

In *Anderson*, this Court concluded that instead of conducting an independent investigation to corroborate the tip, the officers relied on the tip to stop the pickup and then gathered information to justify the stop in the first place. The arresting officer in *Anderson* testified that the purpose of stopping and searching Anderson’s pickup was to investigate whether Anderson was transporting drugs and to confirm that the tip was reliable to reach probable cause so that a search warrant could be obtained. *State v. Anderson* (1993), 258 Mont. at 516, 853 P.2d at 1249.

Here, as in *State v. Anderson*, Holzer's stated objective in stopping the yellow car was to find evidence that would corroborate his suspicions that the occupants were involved with drugs. Holzer testified at the suppression hearing that his purpose for locating the yellow car was to find "probable cause to stop the car and investigate the occupants for trafficking narcotics." (Supp. Hrg. Tr. at 23, 20-26)

As was the case in *Anderson*, here, instead of conducting an independent investigation to corroborate the agent's tip, Holzer relied on the tip to stop the yellow car and then gathered information to justify the stop in the first place. His conduct is what this Court warned of in *Anderson* when it rejected the State's claim that a stop is justified to corroborate a tip.

***2. Holzer Did Not Know Pyles and Herzog Had Dangerous Drugs Before He Stopped them.***

The district court determined that Holzer knew Pyles and Herzog "had dangerous drugs" before the stop. No evidence in the record supports this factual finding by the court. (Doc. 2, all) , (12/20/22 Tr. All)

Holzer did not know the occupants of the yellow car had drugs before the stop, which is why he was burdened with “finding a reason to stop them.” Such an important fact as knowing they had drugs in the car by empirical corroborating evidence eliminating a simple suspicion would have been included in his reports or testimony. (Doc 2, Holzer at 1-2) Instead, he gave a cryptic statement to the effect that “he knew what he knew,” which was not confirmation he knew they had drugs. (Supp. Hrg. Tr. at 45) It was only *after the stop* that he obtained sufficient reasonable suspicion based on their behaviors to suspect they might be engaged in a criminal drug offense.

***3. Herzog Was On Felony Probation for Prior Drug Possession, and Holzer Had Instructions to Detain Her.***

The district court factored Herzog’s probationary status and Holzer’s testimony that P.O. Watson instructed him to detain her when they denied Herzog’s Motion to Suppress. However, this fact is irrelevant because Holzer did not know Herzog was a passenger or driver of the yellow car until *after* he stopped it. (Supp. Hrg. Tr. at 42.) No evidence in the record supports the district court’s factual finding

that Holzer stopped the car to detain Herzog or that he even knew she was in the car. (Supp. Hrg. Tr. All; Doc. 2, All)

Instead, the record reflects that Holzer did not “detain” Herzog as instructed by Watson. His actions were unusual enough that the district court asked Holzer during his testimony why he didn’t detain Herzog upon stopping the car. (Supp. Hrg. Tr. at 18, 31; Doc. 2, Holzer at 2.) It was only *after* the stop, *after* a K9 sniff, and *after* the dog alerted positive for drugs that Holzer officially contacted Watson to see if Watson wanted Herzog “detained.” (Supp. Hrg. Tr. at 21; 42; Doc. 2, Holzer at 1, 2.)

#### ***4. Irrelevant Independent Criminal Activity.***

The district court misinterpreted the evidence in the record by concluding that Todd Pyles's suspended driver's license alone was “independent criminal activity” sufficient to support particularized suspicion to conduct a Terry stop. The district court’s reliance on Pyles's suspended driver’s license is irrelevant because no “independent criminal activity” was observed by law enforcement before the stop was

initiated. (Supp. Hrg. Tr. at 27; 28; 42; Doc. 2, Holzer at 1; Doc. 2, Jensen at 2.)

To obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense. Mont. Code Ann. § 45-5-401. Here, none of the Deputies, including Holzer, observed the yellow car in a traffic infraction. (Supp. Hrg. Tr. at 27; 28; 42; Doc. 2, Holzer at 1; Doc. 2, Jensen at 2.)

Suppose Pyles had been the car's registered owner. Under that circumstance, law enforcement could legally stop a vehicle when a traffic infraction is observed or once an officer has ascertained that the registered owner's driver's license has been suspended. *State v. Idland*, 2024 MT 44N, 416 Mont. 553, 544 P.3d 857; Mont. Code Ann. § 61-5-212.

In this case, all law enforcement who sought a reason to stop the yellow car knew Pyles was not the registered owner because the car was registered to Laura Aguilar. (Supp. Hrg. Tr. at 8; Doc. 2, Jenson at 1.)

A deputy told the others that he had observed a male driving a yellow car leaving “a gas station.” (Doc. 2, Jenson at 1.) The first stop was at a Town Pump, and the second was at Savorite South. (Supp. Hrg. Tr. at 11; Doc. 2, Holzer at 1.) Surveillance footage confirms that the yellow car, driven by a male driver, arrived at the Savorite Gas Station. (Doc. 2, Jenson at 1.) However, surveillance footage from Savorite South contradicts the police report of a male driver continuously driving the yellow car because when the yellow car left the Savorite South gas station and drove past Deputy Jenson on Highway Two, a female was driving the yellow car, not a male. (Doc. 2, Jenson at 2.) These additional facts confirm that no one, including Holzer, knew who was driving that car before he stopped it.

Therefore, in the present case, law enforcement needed to observe Pyles driving to rely on his suspended license status to give them a lawful reason to stop the yellow car. However, none of the deputies,



including Holzer, could identify Pyles as the driver before Holzer stopped the car; thus, Pyles was never observed driving or engaged in any “independent criminal activity” and could not be lawfully suspected of “driving while suspended” before the stop. (Supp. Hrg. Tr. at 27; Doc. 2, Holzer at 1; Doc. 2, Jenson at 2.)

***5. The Driver Did Not Exhibit a Desire to Avoid Police.***

The district court concluded that the driver exhibited a “desire to avoid law enforcement” when it denied Herzog’s Motion to Suppress. However, Herzog argues that this fact is also irrelevant because there is no evidence Holzer or any of the deputies knew the identity of the car’s occupants to believe it was headed to Kalispell. The car’s path couldn’t reasonably be considered “odd” or “evasive” when no officers had information about the occupants despite Holzer’s subjective belief it was Pyles and Holzer.

Thus, the alleged evasive behavior of the yellow car driver cannot be considered an objectively observed fact, specifically because the officers subjectively inferred that the assumed occupants of the yellow

car were Pyles and Herzog and that the yellow car's destination was Kalispell.

In *State v. Fisher*, the State, “strictly relying on suspicious driving,” argued that a car observed in the area of a reported crime that there was sufficient objective data to support particularized suspicion that Fisher was involved in criminal activity because of his driving patterns. On appeal, the State argued that the district court did not rely upon Fisher's “unprovoked evasion” as conclusive evidence that a particularized suspicion existed when considered in the context of the other available information, and it should be considered sufficient to form particularized suspicion. *State v. Fisher*, 2002 MT 335, ¶ 11, 313 Mont. 274, 278, 60 P.3d 1004, 1007

This Court countered the State's argument by discussing the facts in *Wardlow*, where the Supreme Court found that a stop in a “high crime area” was a “relevant contextual consideration” for determining whether there is a particularized suspicion. *Illinois v. Wardlow* (2000), 528 U.S. 119, at 124, 120 S. Ct. 673 at 676. In addition, the Supreme Court held that “nervous, evasive behavior is a pertinent factor in

determining reasonable suspicion.” Additionally, the Supreme Court reasoned that “headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.” *Wardlow*, 528 U.S. at 124–25, 120 S. Ct. 673 (citation omitted).

The officer in *Fisher* admitted that he had no difficulty following Fisher, that he remained within one block and two car lengths from Fisher's car, that Fisher violated no traffic laws and made no unusual turns nor movements, and that Fisher maintained an appropriate speed. The driver likely knew he was being followed by law enforcement, but the officer did not indicate he wanted them to stop as they drove around the neighborhood. The only additional objective data the officer observed while following Fisher was that it drove back to the original street where it was first observed. In addition, nothing in the record suggested that the officer sufficiently observed Fisher himself to describe him as nervous and evasive. Without more objective data, this Court concluded that under those circumstances, Fisher's operation of his motor vehicle did not provide sufficient objective data from which an

officer could form a particularized suspicion that the driver was engaged in criminal activity and that the officer's stop violated Fisher's right to be free from unreasonable searches and seizures. *Fisher*, 2002 MT 335, ¶ 11

The facts here are similar to those in *Fisher*, except neither Holzer nor the Lincoln County Deputies were responding to a report of criminal activity in the area involving a yellow car, Todd Pyles, or Halie Herzog. Holzer and the deputies reported they could not identify the yellow car's driver; thus, presumably, they did not observe the driver's demeanor as nervous or evasive.

Similar to the facts in *Fisher*, Holzer, and the deputies reported, they observed the yellow car take paths the officers wouldn't have taken if they had been trying to get to Flathead County. (Supp. Hrg. Tr. at 13; Doc 2, Jenson at 1.) Once again, none of them knew who was driving or occupied the yellow car to believe it was headed to Flathead County. The record confirms it was, in fact, not headed to Flathead County. (Supp. Hrg. Tr. at 13; Doc. 2, Holzer at 1.) In any event, the yellow car was not observed in headlong flight. Thus, Holzer and the

deputies reported their subjective inference of evasion based solely on the driving patterns of the yellow car, which is insufficient to establish reasonable suspicion. (Supp. Hrg. Tr. at 12-13; Doc. 2, Jenson at 1; Doc. 2 Holzer at 1)

***6. Immediately upon Making Contact, Holzer Recognized Pyles and Herzog.***

When the district court denied Herzog's Motion to Suppress, it determined that because Holzer recognized Pyles and Herzog *after* he stopped the car, he had sufficient objective data to form particularized suspicion *before* he stopped the car. Law enforcement must know objective, articulable data *before* an investigative stop to support particularized suspicion to lawfully an investigative stop; Holzer's recognition of Pyles and Herzog *after* the stop is irrelevant.

**CONCLUSION**

Detective Holzer lacked particularized suspicion to justify a lawful Terry stop. No other applicable exception to the warrant requirement is found in the record. Therefore, the search and seizure of the car occupied by Herzog is unconstitutional, and any evidence emanating

from the illegal search must be suppressed. *State v. McElroy*, 2024 MT 133, ¶ 15, 417 Mont. 68, 551 P.3d 282 (citing *State v. Zimmerman*, 2018 MT 94, ¶ 17, 391 Mont. 210, 417 P.3d 289); *State v. Loberg*, 2024 MT 188, ¶ 13, 418 Mont. 38, 554 P.3d 698.

Several lawful instruments exist for officers to investigate potential crimes. The Supreme Court noted, "When we condone officers' use of these devices without adequate cause, we give them a reason to target pedestrians arbitrarily. We also risk treating members of our communities as second-class citizens." *Utah v. Strieff*, 579 U.S. 232, 252, 136 S. Ct. 2056, 2069 (2016).

"It thus follows that any incriminating evidence discovered as a *result* of an unlawful investigatory stop, or beyond the lawful scope and duration of a valid investigatory stop, is irrelevant and immaterial to whether the officer had sufficient particularized suspicion of criminal activity to justify the antecedent stop or expansion of stop that resulted in the discovery." (emphasis added) *State v. Harning*, 2022 MT 61, ¶ 24, 408 Mont. 140, 507 P.3d 145 (noting the temptation "to forgive an officer's illegal extension of a stop" however minimal, when it leads to

the discovery of evidence of illegality but that such temptation “belies the basic principle at the heart of search and seizure jurisprudence” that “[t]wo wrongs do not make a right”—citing *Weeks v. United States*, (1914), *Weeks v. United States*, 232 U.S. 383 (1914). *State v. Zeimer*, 2022 MT 96, ¶ 31, 408 Mont. 433, at 468, 510 P.3d 100, at 125.

When Holzer stopped the yellow car, he, like his associates, did not have the requisite particularized suspicion to justify an investigatory stop, violating Herzog’s right to be free of unreasonable investigatory stops and seizures.

Herzog respectfully requests this Court to reverse the district court's denial of the Motion to Suppress Evidence and instruct the district court to exclude all evidence collected due to the unlawful Terry stop.

Respectfully submitted this 7th day of October 2024.

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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 quoted and indented material, and the word count calculated by Microsoft Word for Windows is 6,606, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance and Appendices.



## **CERTIFICATE OF SERVICE**

I, Darcy Ann Critchfield, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-07-2024:

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