IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 23-0229

STATE OF MONTANA,

Plaintiff and Appellee,

v.

HALIE MARIA HERZOG

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

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

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REPLY

I. Herzog presented a Complete and Accurate Review of the District Court's Findings and Conclusions.

The State asserts that Herzog cherry-picked the District Court's findings and conclusions and did not accurately reflect their totality in her Opening Brief. (Appellee's Br. at 17, para.1.) Contrary to the State's opinion, Herzog presented all of the District Court's findings and conclusions related to the issue of Holzer's unlawful investigatory stop and challenged the District Court's errors each in turn. (Appellant's Br. at 18-33.)

The State argues that Herzog challenged only individual components, quoting, "the district court's findings are clearly erroneous because they were either conjecture, irrelevant, implausible, or infeasible. (Appellant's Br. at 16.)"(Appellee's Br. at 16-17, para.1.)

The court erroneously concluded that Holzer had empirical evidence and knew that Herzog had dangerous drugs *before* the stop. (Doc. 42 at 1, sec. 2; at 5, sec 4.) Herzog challenged the findings as "conjecture" because there is no evidence that Holzer "knew" Herzog

possessed dangerous drugs before the stop. Holzer, by admission, "suspected" she had drugs, but he had not observed Herzog handling or ingesting drugs that day. (Doc. 1, Ex. C, at 1 para 1.), (Doc. 1, Ex. D, at 1 para 1,4.), (Doc. 42 at 5, sec 4; at 1, sec 1.), (Tr. at 8, 24, 26, 43.)

Herzog also challenged some of the District Court's conclusions as "irrelevant" arguing that any fact in the record that was learned by Holzer or occurred *after* the stop is irrelevant to establish the requisite particularized suspicion needed *before* the stop, no matter the quantity of evidence collected or presented by the State at every stage of arrest after the stop. (Appellant's Br. at 26-28.) The court erroneously concluded Holzer "was justified in making the stop" because "immediately upon making contact with the vehicle".....Pyles appeared nervous and was visibly shaking and Herzog was moving around in the car which smelled of meth. (Doc. 42 at 5, sec 5.) This fact occurred after the stop, once Holzer had made contact, inquired of them what they were doing, and expanded an unlawful stop. (Doc. 1, Ex. D, at 2.)

Herzog also challenged some of the District Court's findings as "infeasible." (Appellant's Br. at 5.), (Appellee's Br. at 17.)

In one example, the court erroneously concluded that, simply because Holzer *knew* Herzog was on felony probation and P.O. Watson had given a directive at least a week earlier, Holzer *relied* on Herzog's probationer status and Watson's directive, without more, as sufficient to form particularized suspicion to stop the car. (Doc. 42 at 5, secs 4-5.)

Holzer testified that he didn't detain Herzog upon request by P.O. Watson when he stopped her because he wanted Watson's directive to be "freshened up." (Tr. at 18.) Instead, it was not until *after* he had expanded the search, seized the car, conducted a K9 sniff, and contacted P.O. Watson that Holzer detained Herzog. (Tr. at 21, 42) (Doc. 1, D at 1, 2.) Holzer thought Watson's directive was unreliable *at the stop*; it follows that it was infeasible, or a better word might be improbable, to believe that Holzer relied on the same unreliable directive approximately two hours *before* the stop to form particularized suspicion to stop the car and make contact. (Doc. 1, Ex. D, at 1 para 1.), (Doc. 1, Ex. A, at 1 para 1.) and (Tr. at 18, 34, 40 .)

Herzog challenged some of the District Court's findings as "implausible," or, a better word might be unconvincing. (Appellant's Br.

at 5.), (Appellee's Br. at 17) An example is that the record reflects Holzer reported he believed he had particularized suspicion to make an investigatory stop because he received a directive from P.O. Watson to detain Herzog, on sight. (Doc. 1, Ex. D at 1.) It wasn't until a District Court Judge asked Holzer during his testimony why he *didn't* detain her immediately upon contact that we learned Holzer considered P.O. Watson's directive unreliable. He said he wanted it to be "freshened up."(Tr. at 18.) It is unconvincing that, given Holzer's doubts about the reliability of P.O. Watson's directive, he would consider the same as sufficient objective particularized suspicion to stop the car, as the court concluded in its findings and conclusions. (Doc. 42 at 5, secs 4-5.)

In its findings and conclusions, the District Court outlined, within twenty-six separate sections, the findings and conclusions it considered when denying Herzog's motion to suppress. (Doc. 42 at 1-4, secs 1-10.) (Doc. 42 at 4-6, secs 1-6.) Herzog's Opening Brief covered the findings and conclusions related to the issue of Holzer's unlawful *Terry* stop. (Appellant's Br. at 19-33.) Herzog addressed each of the findings of fact and conclusions of law related to the unlawful *Terry* stop issue. (Doc. 42

at 1-4, secs 1-8.), (Doc. 42 at 4-6, secs 1-6.), (Appellant's Br. at 18-33.), (Appellant's Br. at 24-25.)[1]

II. The State relies on Alleged Facts not found in the Evidence or presented in the District Court.

The State relies on alleged facts not found in the evidence or presented in the district court, and the Court should disregard them. Herzog identified several obfuscations of facts in the Appellee's Response Brief, so profound as to alter testimony, context, substance, and sequence of the facts. The most notable are listed below.

1. There is no evidence that *before* Holzer had seized the car, he discussed Pyles' driver's license status as the State purports. "…Holzer informed Pyles *that his license was suspended and that it was illegal for him to drive*. (Tr. at 19, 32.)" (Appellee's Br. at 8, para 2.)

[1] Notation of Correction: Herzog's Opening Brief contains a non-substantive factual error on pages two and twenty, discovered in preparation for this Reply. The incorrect passage reads: "The agent identified Todd Pyles *as the driver* and Halie Herzog *as the passenger*.(Doc. 2, Holzer at 1.)" The corrected passage should read "The agent identified Todd Pyles and Halie Herzog *as the occupants*. (Doc. 2, Ex. D at 1.)"

Or, that Holzer *told Pyles twice* that his driver's license was suspended when the State writes, "This upset Pyles, and Holzer explained to him *again* …because his driver's license was suspended. (Doc. 2, Ex. D at 2.)" (Appellee's Br. at 9, para 1.)[2]

2. There is no evidence that "… the Volkswagen started to pull forwards *as if to leave*. (Doc. 1, Ex. D at 1; Tr. at 30.)" (Appellee's Br. at

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[2] Compare (Appellee's Br. at 8, para 1-3.) *with* (Tr. at 19.) (Holzer) "Q. And how did Mr. Pyles react to your seizing the vehicle? A. He was very unhappy. ... Q. Did *you discuss with him his suspended license at all?* A. I did. Q. And did you tell him *he would not be able to drive the vehicle away?* A. Yes."

Compare (Appellee's Br. at 8, para 1-3.) *with* (Tr. at 32.) (Holzer) "Q…at least intimated to you that that is what he wanted to see happen, *he wanted to leave with the car, right?* A. Yes. Q. *And you told him that wasn't going to be possible because you knew at this time that he had a suspended license. A. Correct."*

Compare (Appellee's Br. at 8, para 1-3) *with* (Doc. 42 at 3, sec 7-8.) "The car also smelled of marijuana and heavy cologne. Holzer testified that he is aware that individuals involved in drug activity will often attempt to use cologne to mask the odor of dangerous drugs. Detective Holzer clearly had cause *to prevent* Pyles from driving as he has a suspended license."

Compare (Appellee's Br. at 9, para 1.) *with* (Doc. 1, Ex. D at 2.) (Holzer) "At this point in time, I did not believe I had enough to detain Todd and Halie any further and told them they were free to leave but *I was seizing the vehicle* pending a K9. Todd became [visually] upset and I explained to him that it *did not matter anyway because he has a suspended driver's license*."

7, para 1.) or that "it was driving away….in fact, the vehicle then *began* to *drive away*. When the parked vehicle *started to drive away,...* (no internal citation)" (Appellee's Br. at 12, para 2.); or that, "…when the parked vehicle *started to drive away,* Holzer … (App. 1.)" (Appellee's Br. at 18, para 2.); or that, "the parked vehicle started *to drive away*, so he ordered the driver to stop. (no internal citation.)" (Appellee's Br. at 23, para 1.)[3]

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[3] Compare (Appellee's Br. at 7, para 1.) *with* (Tr. 30) (Holzer) (Holzer) "Q. And you indicated in your report that you turned on your grill lights to identify yourself *as police and ma[k]e contact*. A. Correct. Q. And the driver of the vehicle actually *started to pull forward,* and then you ordered him to stop driving his vehicle, right? A. Correct. Q. At that point, no reasonable person would have felt free to end that interaction, correct? A. No, I don't-I don't feel like that was almost…. once they *started going forward,* that I did stop and detain them, yes. Verbally."

Compare (Appellee's Br. at 12, para 2.) *with* (Doc. 1, Ex. D at 1, para 6.) (Holzer) "I could see two individuals on my approach and the driver of the vehicle started *pulling forward* and I identified myself as a Sheriff's Deputy and told him to stop."

Compare (Appellee's Br. at 18, para 2.) *with* (Doc. 42 at 2, sec 6.) "The driver of the vehicle *started pulling forward* and Detective Holzer identified himself as a deputy sheriff and told him to stop. He asked if they were okay and asked what they were doing." (Doc. 42 at 2, sec 6.)

III. The State's Argument on Appeal.

A. An Investigatory Stop is not limited to a Traffic Stop.

The term *Terry* stop describes an investigatory stop where law enforcement makes contact encroaching on a citizen's constitutional privacy rights to be "left alone" unless law enforcement has specific objective reasons to do so. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968).

In *Terry,* law enforcement was driving around a neighborhood and spotted a group of individuals looking in the windows of businesses and acting like they were scouting places to rob. The officer exited his vehicle, approached the individuals, and inquired about their actions. As he did so, he patted them down, found concealed guns they were not authorized to possess, and arrested them. *(Id.)*

Contrary to the State's argument, an investigatory *Terry* stop does not require a *traffic* stop with lights and sirens and officers parked behind a stopped car. It's the contact made by law enforcement with a citizen investigating an alleged crime without a warrant, and who demands answers to an inquiry about what they are doing.

Here, the State on appeal argues, "Because the vehicle was parked, Holzer's activation of his patrol vehicle's grill lights did not constitute a traffic stop, and, in fact, the vehicle then began to drive away. When the parked vehicle started to drive away, Holzer instructed the driver to stop because he had reasonable suspicion that Pyles was the driver and knew that Pyles' driver's license was suspended." (Appellee's Br. at 12, para. 2.)

The attempt by the State to divide the stop into two separate stops is contrary to the record. Holzer testified that when he identified the vehicle's occupants, the car was "already stopped." (Tr. at 42.) "So the first time that any identification of these two people was made after you stopped the vehicle, right? A. When I made contact, the vehicle was already stopped, but yes." (Tr. at 42-43.)

The yellow car was stopped when Holzer arrived and "pulled his car directly in front of the yellow car and identified himself as a police officer." (Tr. at 14.) Then he approached the driver, asked if they were okay, and inquired about *what they were doing*.

Holzer also testified that the purpose of stopping the yellow car was to investigate it for drug possession or trafficking, not a suspended driver's license. (Tr. at 23, 32.) To further emphasis this point, Pyles was never issued a citation for Driving While Suspended at any time in this stop.

B. The Investigatory Stop

The State Argues "Holzer possessed objective data that Pyles' license was suspended, that the Volkswagen had previously been occupied by Pyles and Herzog, and that deputies had observed a male driving the Volkswagen earlier that night. From this objective data and circumstantial evidence, a trained and experienced officer like Holzer could reasonably suspect Pyles was the driver when the Volkswagen started to drive away, and, because Pyles' license was suspended, Holzer had particularized suspicion that the offense of driving while suspended was being committed." (Appellee's Br. at 19.)

In Grinde v. State, the sheriff's deputies saw the defendant's car properly execute a right-hand turn and drive out of eyesight. After the defendant's car was out of eyesight, the deputies then heard an engine

revving and the squeal of tires. Subsequently, they stopped the defendant. The Court held that the sheriff's deputies were not justified in stopping the defendant's vehicle because they merely heard the squeal of tires but saw no evidence of erratic driving. *Grinde v. State* (1991), 249 Mont. 77, 813 P.2d 473,(overruled on other grounds).

Holzer did not observe Pyles or Herzog in the same car earlier because Jensen and the Border Patrol Agent stopped the yellow car on July 5, 2022, not Holzer. (Doc. 1 Ex. D and C at 1.)

The State ignores that, as Holzer stated, the car was already stopped before he identified the driver. (Tr. at 42.) (Doc. 1, Ex. D at 1.) As mentioned above, the State also argues that there were two incidents of Holzer "encountering" the yellow car, but only the second one was an investigatory stop. The State claims it hadn't already stopped the car and then observed the driver "driving away," which allowed Holzer to form particularized suspicion that the traffic offense of Driving While Suspended was occurring, and thus formed particularized suspicion that a crime needed to be investigated.

(Appellee's Br. at 7, para 1.) (Appellee's Br. at 12, para 2.), (Appellee's Br. at 18, para 2.), (Appellee's Br. at 23, para 1.)

However, there is no evidence in the record that the driver was "driving away". Compare (Appellee's Br. at 7, para 1.) *with* (Tr. 30) Compare(Appellee's Br. at 12, para 2.) *with* (Doc. 1, Ex. D at 1, para 6.), (Tr. 30.), (Doc. 42 at 2, sec 6.) The driver was "pulling forward" out of the bushes to meet Holzer, who was approaching after signaling with his lights that he was law enforcement. (Doc. 1, Ex. D, at 1.), (Tr. at 30.) (Doc. 42, at 2, sec 6.)

The State argues that Holzer notified Pyles of his suspended driver's license early in the stop to investigate the crime of "driving while suspended" as he "drove away." (Appellee's Br. at 12, para 2.), (Appellee's Br. at 18, para 2.) The record reflects that Holzer talked to Pyles about his driver's status *only once.* The context for this conversation was that Holzer wanted to *prevent* Pyles from driving on the highway if he attempted to leave after Holzer had stopped him, expanded the stop, and seized the car. (Tr. at 19, 32.), (Doc. 42 at 3, sec 7-8.), (Doc. 1, Ex. D at 2.)

The State does not discuss how observing Pyles driving away in the woods would result in a conviction. To convict Pyles of "Driving While Suspended" under Mont Code Ann. §61-5-212 requires the driver with a suspended license to drive a motor vehicle on any public highway of this state at a time when the person's privilege to drive is revoked unless they have obtained a restricted-use driving permit under M.C.A §61-5-323. Mont Code Ann. §61-5-212 (2022).

"Public highway" means all streets, roads, highways, bridges, and related structures built and maintained with U.S. funds, dedicated to public use, or roads acquired by eminent domain, or adverse possession. Mont. Code Ann. §60-1-103(23) (2022).

Highway, road, or street, whether the terms appear together or are preceded by the adjective "public," includes the entire area within the "right of way." Mont. Code Ann. §60-1-103(18) (2022) .

"Right-of-Way" is a general term denoting land, property, or any interest in land or property, usually in a strip, acquired for or devoted to highway purposes. Mont. Code Ann. §60-1-103(24) (2022).

The width of all county roads, except bridges, alleys, or lanes, must be 60 feet unless a greater or smaller width is ordered by the board of county commissioners on petition of an interested person. Mont. Code Ann. §7-14-2112. The road is usually twenty feet wide with twenty feet on either side, comprising the total sixty-foot public highway easement. *Weatherwax, et al v. Yellowstone County,* 2003 MT 215, ¶18, 317 Mont. 119, at 123, 75 P.3d 788, 791.

Here, Holzer stopped the yellow car fifty feet off Highway Two at the end of a "little dirt road" or a "pull-off," but not a "turn-out."[4] The right-of-way on Highway Two, a public highway, would be twenty feet, and from the middle of Highway Two, an additional ten feet for the one lane, for a total width of thirty feet, including the right-of-way.

Holzer located the car to his left, thirty feet from the end of the right-of-way. Thus, Pyles was situated on a public highway and not subject to a Driving While Suspended citation until he drove across the right-of-way line included in Highway Two's easement.

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[4] Described by the State only. (Appellee's Br. at 12.)

As mentioned above, the evidence in the record reflects that Holzer did not discuss Pyles' driver's license with him to *investigate* the crime of Driving While Suspended. Instead, Holzer discussed with Pyles his driving status to prevent him from crossing the right-of-way line and entering the Highway because, at that point, Holzer, if he had observed Pyles, would have been able to arrest him for Driving While Suspended. (Tr. at 19, 32.), (Doc. 42 at 3, sec 7-8.), (Doc. 1, Ex. D at 2.)

Absent an observed traffic offense, Holzer simply did not have particularized suspicion when he turned down that little road to check out a lit match. A pretextual traffic stop was not created when, as the State argues, Pyles started to "drive away."

A pretextual traffic stop is not unlawful for a police officer in Montana to effectuate, but the traffic stop observed must be illegal. It is well established that "[a] statutory violation alone is sufficient to establish particularized suspicion for an officer to make a traffic stop." *State v. Schulke*, 2005 MT 77, ¶ 16, 326 Mont. 390, 109 3.Pd 744.

However, suppose law enforcement makes a stop under a misapprehension of the law. In that case, that stop is not grounded in

the governing law and therefore cannot be used as an objective fact to determine particularized suspicion. *United States v. Lopez-Soto,* 205 F.3d 1101, 1106 (9th Cir. 2000).

In *United States v. Lopez-Soto,* a California law enforcement officer stopped a vehicle because he believed the law required the registration sticker to be displayed in a vehicle's rear window. *(Id.)* California law, however, required that the sticker be displayed on the vehicle's front window. In that case, the Ninth Circuit stated: "the traffic stop in the case before us was not objectively grounded in the governing law. . .. This cannot justify the stop under the Fourth Amendment." The Court said, "We have no doubt that [the] Officer held his mistaken view of the law in good faith, but there is no good-faith exception to the exclusionary rule for police who do not act by governing law. To create an exception here would defeat the exclusionary rule's purpose, for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey." *(Id.)*

In *United States v. Twilley,* the Ninth Circuit revisited its holding in *Lopez-Soto*. It stated that "a suspicion based on such a mistaken view of the law cannot be the reasonable suspicion required for the Fourth Amendment, because the legal justification [for a traffic stop] must be objectively grounded." In other words, if an officer makes a traffic stop based on a mistake of law, the stop violates the Fourth Amendment. The court said that while the officer need not perfectly understand the law when he stops the vehicle, his observation must give him an objective basis to believe that the vehicle violates the law. These cases support the proposition that observations made by an officer who does not understand the law are not objectively grounded in the law and, therefore, cannot be the basis for particularized suspicion. *United States v. Twilley* (9th Cir. 2000), 222 F.3d 1092, 1096.

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.

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 27th day of March 2025.

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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 3,054 excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance and Appendices.

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