Case 119721 CLERK OF THE APPELLATE COURTS Filed 2018 Oct 03 PM 4:17

No. 18-119721-A

IN THE
COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellant

v.

CHRISTOPHER PAYTON
Defendant-Appellee

BRIEF OF APPELLANT

Appeal from the District Court of Pottawatomie County, Kansas
Honorable Jeff Elder, District Judge
District Court Case No. 17-CR-305

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STATE OF KANSAS
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BRIEF OF APPELLANT

NATURE OF THE CASE

The State charged Christopher Payton with one count of possession of methamphetamine, one count of unlawful possession of Oxycodone, one count of possession of drug paraphernalia, one count of unlawful possession of Alprazolam, a registration violation, no proof of insurance, and failure to display a license plate. Payton waived his right to a preliminary hearing and was bound over for trial. Payton filed a motion to suppress the evidence, which was granted by the district court. The State appeals the district court's order to suppress the evidence.

STATEMENT OF THE ISSUE

I. The district court erred when it granted Payton's motion to suppress by concluding that Deputy Young's K-9 did not alert to the vehicle.

STATEMENT OF THE FACTS

Payton was charged with one count of possession of methamphetamine, one count of unlawful possession of Oxycodone, one count of possession of drug paraphernalia, one count of unlawful possession of Alprazolam, a registration violation, no proof of insurance, and failure to display a license plate. (R. 1, 4-6.) Payton waived his right to a preliminary hearing and was bound over for trial. (R. 1, 25, 33.)

Payton filed a motion to suppress and argued that Deputy Justin Young's K-9 dog, Turbo, never alerted to Payton's vehicle during the stop, and thus, there was no probable cause to search the car. (R. 1, 48-52.) The State filed a response and argued that Turbo made several alerts when deployed around the vehicle, which provided probable cause to search the car. (R. 1, 55-58.)

A hearing was held on the motion to suppress, and the State called Deputy Young to testify. The State also admitted the video recording of the car stop and several K-9 certificates of training into evidence. (R. 2, generally.) At that hearing, Deputy Young testified that he had been a K-9 handler with the Sheriff's Office for about 3.5 years. (R. 2, 2, 17.) Deputy Young's K-9 was Turbo. (R. 2, 3.) Turbo was certified by the Kansas Police Dog Association and the National Police K-9 Association. (R. 2, 3, 18, 23-24; R. 3, State's Exhibits 2-6.) Deputy Young and

Turbo had monthly maintenance training, a fall seminar, and a spring certification seminar. (R. 2, 3, 24-26.)

Turbo is certified in narcotics. (R. 2, 3-4.) Turbo is certified in four odors: marijuana, heroin, cocaine, and methamphetamine. (R. 2, 3-4.) Turbo notifies Deputy Young of the detection of an odor with an alert to the odor and then a final indication once he comes to the source. (R. 2, 4.) Deputy Young described Turbo's alert as:

> It's a behavior change. It can be – he'll go from just doing a general sniff to a detailed sniff, which means he'll close his nose, and he'll start kind of checking in areas.
>
> He can start bracketing, which is going from point A to point B, which is him trying to locate the center or where that odor's coming from. (R. 2, 4.)

Once Turbo finds something, his final indication "is a sit." (R. 2, 4.) Deputy Young testified that often times you will see a behavior change right before you see a final indication. (R. 2, 4.) In explaining the difference between an alert and a final indication, Deputy Young explained:

> If it's in the center console of the vehicle, it's a really deep find inside the vehicle, only small amounts of odor might be getting out of the car. So that's where you see the alerts. You'll see the alert; you'll see him try to locate where it's coming from. They can't figure out – Turbo – if Turbo cannot locate exactly where it's at, he can't put his nose on exactly where the source is, he will not indicate. He will not give a final response. (R. 2, 31-32.)

Deputy Young testified about how he was trained to search a vehicle with Turbo:

> As a general rule, we do two passes. We do one counterclockwise, and then we come back and do another one clockwise. Then, unless we

> get an alert somewhere on the vehicle, and we'll go back in detail, trying to locate the source of where he was trying to – or back to the area he alerted in trying to find the source. Because of hidden compartments and magnetic boxes and things like that. (R. 2, 5.)

After that, Deputy Young would help Turbo search, by directing him to certain areas. (R. 2, 5-6.) Deputy Young testified that Turbo had no "false-positive" rate. (R. 2, 17.) Deputy Young further testified that Turbo's accuracy had never been called into question. (R. 2, 26.)

Deputy Young testified that on June 21, 2017, he observed Payton driving a vehicle with expired registration. (R. 2, 6.) Deputy Young initiated a traffic stop and asked Payton for some identification. (R. 2, 6.) Due to the fact that the vehicle's registration was expired and displayed an incorrect license tag, Deputy Young did not allow Payton to continue to drive it. (R. 3, State's Exhibit 1, 22:14-22:28.) Deputy Young instructed Payton to leave it parked as it was. (R. 3, State's Exhibit 1, 22:14-22:28.)

After the traffic stop was conducted and Payton and his passenger left on foot, Deputy Young deployed Turbo on the vehicle. (R. 2, 7.) Deputy Young testified that, during the deployment, Turbo alerted to the trunk, as well as the right-rear passenger door or wheel well area. (R. 2, 7, 8, 13, 20, 26-27.) Deputy Young testified that specifically as to the rear passenger door, Turbo attempted to sit down, but due to the sloped ground, he was thrown off and did not want to sit down. (R. 2, 8.) Deputy Young also testified that Turbo's mouth was closed and that he "detailed" at the rear passenger door. (R. 2, 28.) As to the trunk area, Turbo

"actually stopped and froze in place." (R. 2, 8.) Deputy Young testified that Turbo then looked back over at him. (R. 2, 8-9.)

A recording of the car stop and K-9 deployment was admitted as State's Exhibit 1 at the hearing. (R. 3, State's Exhibit 1.) The K-9 deployment takes place from approximately 23:44 to 25:11 on the recording.

The State attempted to ask Deputy Young about the subsequent search of the vehicle and what he ultimately found in the vehicle but Payton objected as "not relevant." (R. 2, 13-14.) The State argued that the location of where Deputy Young ultimately found the drugs inside the vehicle was relevant as to where Turbo alerted on the vehicle. (R. 2, 13.) The district court sustained the objection. (R. 2, 14.) Payton presented no evidence at the hearing.

Following a recess, the district court determined:

> The Court has heard evidence on the defendant's Motion to Suppress, and at the request of counsel, the Court did again review that portion of the video that is contained on State's Exhibit 1, which was shown here in open court regarding the interaction of the K-9 Turbo with the vehicle the defendant was operating on the night in question.
>
> And the Court has reviewed the Motion [and] Response that was filed by the parties, filed, I believe, on the 9th. The Court hasn't looked at all the cases, but I think I've got enough here that I can rule on this case.
>
> First of all, the adequacy of the training of the handler and of the dog, the Court doesn't believe is an issue. The dog was properly certified, has done the training that is required I guess by the State of Kansas. I'm not sure there was testimony that it was required, but the dog is certified by the Kansas and National K-9 Associations who certify these dogs.

The real question in this case is whether the evidence is sufficient to show that the dog alerted, to establish probable cause to search this vehicle.

And the Court did not get to do as much research as it would like on this issue, but the Court will point out that the 10th Circuit refers to alerts and final indications as was argued by the state. The alerts could – the dog could alert to the odor of the drug or drugs the dog is trained to detect, and could have a final indication by sit in this case.

The dog did not give a final indication in this case, in the Court's view, nor can the Court interpret what the dog was seen doing on the videotape be an attempt to make a final indication.

I just don't see it. And I'm the trier of fact, and I don't see it.

But then we get to the question of whether the conduct of the dog testified to by its handler was sufficient alert to establish probable cause.

I don't know how much research counsel's gone into it, but the Court found a case, U.S. v. Wilson, 995 F.Supp.2d 455 (2014) case, which I believe is in the Fifth Circuit – I can't remember what district it was – but the Tenth Circuit has a very liberal view of what an alert is, and what can establish probable cause.

The Fifth Circuit does not have that view. The Fifth Circuit refers to alerts, what – what the Tenth Circuit refers to as alerts the Fifth Circuit refers to as casting, and then, of course, the final indication.

And they talked about that a little bit in the Wilson case, but the Fifth Circuit, as I understand from reading the cases, would not have upheld the search that was upheld in the Tenth Circuit.

Now I understand that Kansas is in the Tenth Circuit. But in the – is Perada – Parada, while the dog in that case wasn't deemed to have given a final indication, if you look at the facts in that case, it said the handler testified that the dog's body stiffened and his breathing became deeper and more rapid and he tried to jump in a window. A lot more, I guess I referred to, as aggressive behavior by the dog than what was testified to in this case.

I found one Kansas case, I'm sure counsels' found it as well, State versus Barker 252 Kan. 885 indicating, and all the Court says there, is if the dog alerts, that can establish probable cause. But at least from my reading of the case, the court does not go on to explain what alert

means, whether that means casting, as referred to by the Fifth Circuit, or final indication, or something else.

But it does say there had to be some evidence that the dog's behavior reliably indicates a likely presence of a controlled substance.

Now, in this case, and the Court watched the video, two things stuck out to me, and that is, in my view, the dog appears to simply be sniffing around the vehicle. Stops at the license tag, and stops at the right rear passenger side. Also appeared to stop a little bit on the driver's side. I couldn't see what was happening at the front of the vehicle. But from comments that the handler could have been saying on the video, it didn't seem that the handler was real confident that there had been an actual alert happening. And in fact, when at the very tail-end when discussing with the other officers, they were trying to come up with different explanations as to why he had stopped at the license plate. Maybe there's some air pockets or maybe – I believe actually Officer Riat was – could be heard being asked if she had been handling any drugs earlier in the day, trying to come up with some explanation.

They read into the record, and the officer testified, that these detailed sniffing and bracketing were things that his dog, as I understood the testimony through his experience with this dog, he has learned as an indication by the dog that it has alerted to the odor of a narcotic. And when his mouth is closed, of course, I couldn't see whether the dog's mouth was closed or half-open, or what the case was.

(as read): And U.S. v. Wilson, the Court stated as follows: "A court cannot accept a handler's subjective determination that a dog has made some otherwise undetectable alert, which conclusion would be, for all practical purposes, immune from review. Given the nature of the constitutional right at issue, the Supreme Court has found this premise to be unacceptable."

And it quotes from Beck v. Ohio, US Supreme Court case. "If an officer's subjective good faith alone were the test, protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects only at the discretion of the police. To allow a search predicated upon a officer's interpretation of the other utterly minimalist lesser showing exhibited by the dog in this case would be tantamount to permitting law enforcement officers to issue their own search warrants based upon their own subjective analysis, something the Framers explicitly prohibited."

> There's just not enough reliable evidence for this Court to find that the dog did alert in this case to establish probable cause.
>
> I think it was very minimalistic as indicated in – or as that term was used in U.S. v. Wilson and the defendant's Motion to Suppress is granted.
>
> [Prosecutor]: I'm sorry, but you're basing it off of U.S. v. Wilson?
>
> The Court: I'm not basing it off that. I'm just referring to that – it's just as in that case, counsel, this was very minimal conduct by the dog. It's not what I would expect. If there had been – I would have expected that dog to have – to have indicated, to have sat at the license plate or to have been more interested in the license plate. I just don't think there was enough. I'm sure that this dog does a lot better job on the other different cases, but not in this one. So I'm going to grant the defendant's Motion to Suppress. Evidence seized as a result of the search is not admissible in court. (R. 2, 38-44.)

The district court granted Payton's motion to suppress. (R. 1, 65; R. 2, 38-44.)

The State now appeals the district court's order granting Payton's motion to suppress. (R. 1, 60, 68.) Additional facts will be discussed as necessary.

ARGUMENTS AND AUTHORITIES

I. The district court erred when it granted Payton's motion to suppress by concluding that Deputy Young's K-9 did not alert to the vehicle.

Jurisdiction

At the suppression hearing, the district court orally granted Payton's motion to suppress. (R. 1, 65; R. 2, 38-44.) The State appealed. (R. 1, 60, 68.) The State may file an interlocutory appeal when a judge of the district court suppresses evidence. K.S.A. 22-3603.

Standard of Review

The factual underpinnings regarding a motion to suppress are reviewed for substantial competent evidence, but the legal conclusion drawn from those facts is reviewed de novo. *State v. Campbell*, 297 Kan. 273, 279, 300 P.3d 72 (2013). "Substantial competent evidence is legal and relevant evidence a reasonable person could accept to support a conclusion." *State v. Bird*, 298 Kan. 393, 399, 312 P.3d 1265 (2013).

Although this Court may consider whether a videotape of a traffic stop supports the district court's factual findings, this Court does not review the videotape in an effort to invade the district court's province of determining witness credibility or weighing the evidence. *State v. Hess*, 37 Kan. App. 2d 188, 191, 153 P.3d 557 (2006).

Argument

Here, Payton did not dispute the validity of the initial traffic stop or Deputy Young's action of deploying Turbo to sniff the vehicle. (R. 1, 48-52.) Thus, this Court should consider those unchallenged actions lawful.

The district court correctly framed the issue presented as "whether the evidence is sufficient to show that the dog alerted, to establish probable cause to search this vehicle." (R. 2, 39-40.) In granting Payton's motion to suppress, the district court made several findings regarding Turbo. The district court's finding as to whether Turbo alerted on the vehicle is the crux of the State's appeal.

The district court concluded that "[t]here's just not enough reliable evidence for this Court to find that the dog did alert in this case to establish probable cause." (R. 2, 43.) Further clarifying its ruling, the district court specifically stated that it was not basing its decision on *U.S. v. Wilson*. The district court explained:

> I'm not basing it off that. I'm just referring to that – it's just as in that case, counsel, this was very minimal conduct by the dog. It's not what I would expect. If there had been – I would have expected that dog to have – to have indicated, to have sat at the license plate or to have been more interested in the license plate. I just don't think there was enough. I'm sure that this dog does a lot better job on the other different cases, but not in this one. (R. 2, 43-44.)

Candidly, this Court normally gives great deference to the factual findings of the district court. *State v. Hardyway*, 264 Kan. 451, 456, 958 P.2d 618 (1998). Nevertheless, the district court's finding that Turbo did not alert to the vehicle was not based on substantial competent evidence. In fact, the district court's findings that Turbo did not alert to the vehicle and did not attempt to make a final indication, or sit, completely disregarded all of the evidence presented at the hearing. Therefore, the district court's order granting Payton's motion to suppress must be reversed.

A. The district court disregarded the unopposed evidence that Turbo alerted to the trunk and the passenger door.

Deputy Young testified that Turbo first alerted to the trunk. (R. 2, 7, 8, 10, 13, 20, 26-27, 29-30.) When asked how Turbo alerted to the trunk, Deputy Young responded, "[t]he trunk area, he actually stopped and froze in place. And he does – and I see it in training constantly where he'll look back over towards me." (R. 2, 8.)

When watching the video recording Deputy Young explained when Turbo alerted to the trunk:

> [s]o there you see he goes around the back of the trunk. I stop there at the corner and he can – you can see him at about the left tail light there. He was – his mouth was closed, and he was starting to detail around the trunk area. And he's working the other way and I'm trying to call him back to go around the driver side so he can continue our counter — or our clockwise. (R. 2, 10.)

Deputy Young's testimony is supported by the video, where Turbo has a change in behavior and stops at the trunk for several seconds, smelling the area and detailing on the first pass. (R. 3, State's Exhibit 1 at 23:55-24:02.) The video recording showed Turbo alert two more times to the trunk. (R. 3, State's Exhibit 1 at 24:51-24:57; 25:06-25:07.) Deputy Young testified that the behavior change at the trunk was when Turbo went the opposite direction and was sniffing the trunk with his mouth closed. (R. 2, 30.)

Deputy Young testified that although another officer had removed the license plate with her hands, in an area where Turbo alerted on the vehicle, Turbo has never alerted or indicated in any area where there was a human odor. (R. 2, 27.) Deputy Young explained:

> We have done training with human odor in our training areas, whether it's clothing, whether it's areas that's been touched by officers that [have had] no narcotics on their hands. So he has been exposed, and it has been in the training areas as an – and in a controlled environment and he's never –never alerted or indicated in any area where there was a human odor. (R. 2, 27.)

Deputy Young also testified that Turbo alerted to the rear passenger door. (R. 2, 8, 28.) Deputy Young testified that the specific behavior change was that

Turbo "detailed" at the rear passenger door with his mouth closed. (R. 2, 28.) Deputy Young explained that Turbo will generally keep his mouth slightly open during the deployment but when he gets an odor "you'll see him cinch up and you'll see that nose start working. Instead of breathing through the mouth and nose, he'll switch to [breathing] directly out of his nose." (R. 2, 28-29.)

Deputy Young testified that after that Turbo again "stopped for a momentary second, looked at that same spot again at the door." (R. 2, 11; R. 3, State's Exhibit 1 at 24:40-42.) Deputy Young stated it was the rear passenger door handle where Turbo stopped again. (R. 2, 11; R. 3, State's Exhibit 1 at 24:40-42.) Then, Deputy Young testified:

> And then right here – I mean you can see all through that you can see him searching and sniffing that back of it. And that there he stops in place and you can kind of see him glance just a little bit back towards me. And on like weak odors, sometimes he will be hesitant to sit because he's not so sure the extent of a source, which means that – his training, he's trained to put his nose on the source of the odor. And in cars it's hard for them to do because they can be buried in backpacks, inner consoles, those kinds of things.
>
> So a lot of times, depending on how strong the odor is and where it's coming from, you'll see just behavioral changes or he'll stop like that and just stand there. (R. 2, 11-12.)

In concluding that Turbo did not alert, the district court also noted that Deputy Young's comments on the video recording indicated that he was not confident that the dog alerted and that he was trying to come up with different explanations for why Turbo stopped at those areas. In the video recording, Deputy Young made numerous comments throughout the deployment but never indicated or said that Turbo did not alert. (R. 3, State's Exhibit 1 at 23:44 to 25:11.) Deputy

Young asks Turbo, “what do you got there dude?” and “what do you got dude?” when Turbo is at the trunk of the vehicle. (R. 3, 24:36-38, 24:55.) State’s Exhibit 1 at Conversely, Deputy Young asks Turbo “not gonna show me nothing there?” when they are at the front of the vehicle. (R. 3, State’s Exhibit 1 at 24:45-46.) These comments support Deputy Young’s determination that Turbo alerted to the trunk of the car.

Next in the recording, Deputy Young explained to the other officers that Turbo alerted to the trunk and how he believed that Turbo attempted to sit at the rear passenger door but was unable to sit as the ground was sloped. (R. 3, State’s Exhibit 1 at 26:03-26:16.) Deputy Young then reported to dispatch that Turbo alerted. (R. 3, State’s Exhibit 1 at 26:28-26:32.) While the district court interpreted this as Deputy Young trying to justify Turbo’s actions as an alert, Deputy Young’s testimony and sworn affidavit support the conclusion that he was simply explaining where he believed Turbo alerted to the vehicle to the other officers.

Further, Deputy Young testified that Turbo would not have alerted to the human smell of the other officer when she removed the license plate, which appeared to be her concern (though it is nearly inaudible) to Deputy Young. Thus, based on Deputy Young’s testimony, Turbo would not have alerted to any smell that may have been associated with the other officer when she removed the license plate. (R. 2, 27.)

This evidence, unopposed by Payton, established that Turbo alerted both at the trunk and at the rear passenger door.

B. The district court disregarded uncontested evidence that Turbo attempted to give a final indication at the rear passenger door.

Additionally, the district court found that Turbo "did not give a final indication in this case, in the Court's view, nor can the Court interpret what the dog was seen doing on the videotape be an attempt to make a final indication. I just don't see it. And I'm the trier of fact, and I don't see it." (R. 2, 39.) The State disagrees with the district court's conclusion, in part.

Deputy Young's testimony and the video recording support the conclusion that Turbo did not give a final indication, or sit, at any time during the deployment. Moreover, in the video recording, Deputy Young did say "well, you're not gonna sit, but…" (R. 3, State's Exhibit 1 at 25:11-13.) However, Deputy Young did testify that Turbo attempted to make a final indication, or sit, after he alerted to the rear passenger door. (R. 2, 8; R. 3, State's Exhibit 1, 26:03-26:16.) Deputy Young testified, "[o]n the passenger door he attempted to sit on it, but due to the terrain of a sloped backwards, he – I believe it was his left rear leg hit it, and it kind of threw him off a little bit and he didn't want to sit at that point." (R. 2, 8.)

When watching the video recording, Deputy Young testified,

> [r]ight there was about the time he starts to hit that door handle. He was coming back and, as you saw, he was – he had turned his rear towards me and was getting ready to sit. And that – I guess it was his right, his right leg – right there, where his leg is – his right rear leg is not, there's a slope. It was backward, and you can see as he turned around, it was right after that he turned around, you can see him sliding on that hill. And he just hit that turn and just didn't like that, so he wasn't going to complete indication there.
>
> And you can see there, I'm at the end of the leash there. And I'm walking that way. He's staying there, and you can see he's just detailing

> the side of that door trying to find the source of that odor. (R. 10-11; R. 3, State's Exhibit 1 at 24:17-19.)

Deputy Young's testimony is supported by the video, where Turbo has a change in behavior and attempts to sit but does not fully sit down. (R. 3, State's Exhibit 1 at 24:17-19, 26:28-32.) Again, the uncontested evidence presented established that Turbo attempted to make a final indication.

Moreover, Deputy Young's affidavit, which is referred to at the motion hearing, also supports his finding that Turbo alerted to the trunk and the rear passenger door. (R. 1, 7-10.) Deputy Young's affidavit has one paragraph describing the dog deployment. Deputy Young wrote:

> K-9 Turbo was walked to the rear of the vehicle and was given the find command. K-9 Turbo began to perform a sniff on the exterior of the vehicle. K-9 Turbo started by going counter clockwise around the vehicle. K-9 Turbo stopped and detailed the side of the passenger side of the vehicle. He had his mouth closed sniffing the side of the vehicle. K-9 Turbo came around the driver's side of the vehicle and showed interest in the hole where the driver's door handle was. He stuck his nose in the hole and stopped there. K-9 Turbo continued around the vehicle. K-9 Turbo was direct[ed] in a clockwise motion around the vehicle. K-9 Turbo came to the passenger rear door where he started detailing the seam between the front and rear door. K-9 Turbo started towards the rear of the vehicle. K-9 [T]urbo stopped at the passenger rear wheel well. He started to sniff back towards the passenger rear door. K-9 Turbo stopped at the back of the door and was detailing the door seam. He stood there and started to lower as if he was going to sit. K-9 Turbo was on an incline away from the vehicle and appeared to feel unstable and stopped and stood back up. K-9 Turbo continued to sniff down the passenger side of the vehicle. K-9 [T]urbo came to the rear bumper of the vehicle and stopped. He looked at the car and then looked backwards behind him. K-9 [T]urbo did not indicate at that time. The behaviors he displayed during the sniff of the vehicle are behaviors consistent with him being in the odor of narcotics. Based on K-9 Turbo's alert to the vehicle a search was going to be completed. (R. 1, 8.)

At the motion hearing, Deputy Young agreed that he did not put the word "alert" in that section of his affidavit. But he explained that an alert is really "a behavior change and I – if I described what I am seeing, it's better than just saying the dog alerted the vehicle. If I can explain the behavior changes that I saw, and you can see the same behavior changes that I saw, it's much more descriptive rather than just saying he alerted." (R. 2, 26.)

C. The district court's conclusions were not based on substantial competent evidence.

The State presented two types of evidence at the hearing, the testimony of Deputy Young and the video recording of the stop and K-9 deployment. The district court appeared to completely ignore Deputy Young's testimony, which provided important context of how Turbo was trained and what his change in behaviors were, all of which supported the conclusion that Turbo alerted to the vehicle at the trunk and at the rear passenger door. In fact, the district court made no reference to Deputy Young's testimony or stated that he even considered it in making his conclusions. It was improper for the district court merely watch the video recording and conclude that Turbo did not alert. The district court could not purely watch the video recording and make its own determination that Turbo did not alert based seemingly on its own opinion. When the district court did so, it undeniably disregarded the uncontested evidence presented at the hearing.

While Payton certainly cross-examined Deputy Young, he provided no witnesses or other independent evidence to dispute Deputy Young's conclusion that, based on his years of training and experience with Turbo, Turbo alerted to the

trunk and rear passenger door of the vehicle. Payton presented no expert witness to challenge Deputy Young's opinion that Turbo alerted to the vehicle. Payton failed present any alternative explanation as to what Turbo was doing at the times when Deputy Young indicated that he alerted to the vehicle. Thus, the district court had no evidence to support his conclusion that Turbo did not alert. This was not a case in which two qualified experts offered conflicting conclusions about whether or not Turbo alerted to the vehicle and the district court was left to make a credibility determination. Here, there was only one conclusion supported by the uncontroverted evidence.

Critically, no adverse credibility determination was made detracting from Deputy Young's testimony in this case. The district court expressed no credibility determinations about Deputy Young's testimony. In fact, the district court made no reference to Deputy Young's testimony at all in making its findings. Therefore, there are no credibility determinations that this Court must give deference to.

As noted above, substantial evidence refers to legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion. *State v. May*, 293 Kan. 858, 862, 269 P.3d 1260 (2012). Here, there is simply no evidence that a reasonable person could accept as being adequate to support the district court's conclusion that Turbo did not alert. Although the district court wanted Turbo to do "more" in order to constitute an alert or expected Turbo to sit, the district court cannot merely disregard Deputy's testimony that, based on his 3.5 years of training and experience with the dog, Turbo's actions constituted an alert.

Moreover, the district court found that Turbo was properly certified and trained, and had no issue with Turbo's reliability. (R. 2, 38.)

Because the district court made its decision to suppress the evidence on this specific finding, which was not supported by substantial competent evidence, it requires reversal.

D. The district court erred when it failed to defer to the training and experience of Deputy Young as a K-9 handler.

Here, the district court failed to defer to Deputy Young's training, experience, and judgment when determining whether or not Turbo alerted to the trunk and rear passenger door of the vehicle. In considering the totality of the circumstances, a reviewing court should accord reasonable deference to a law enforcement officer's experience and training. See *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L. Ed. 2d 740 (2002) (Officers may "draw on their own experience and specialized training to make inferences from and deduction about the cumulative information available to them that 'might well elude an untrained person.' "); *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L. Ed. 2d 911 (1996) (reviewing court must give "due weight" to factual inferences drawn by resident judges and local law enforcement officers).

Similarly, here, the district court should have given some deference to Deputy Young's training and experience with Turbo to know when Turbo has exhibited a change in behavior that amount to an alert to an odor in a vehicle. It was only after reviewing the video recording of Turbo's deployment that the district court simply substituted its own judgment. The district court determined that

Turbo appeared to be "simply sniffing around the vehicle. Stops at the license tag, and stops at the rear passenger side." (R. 2, 41.) The district court also construed Deputy Young's comments when he is explaining the dog deployment to the other officers as "trying to come up with different explanations as to why" Turbo stopped at the license plate. (R. 2, 41-42.) However, the district court failed to take into account Deputy Young's training and experience, which explains the significance of Turbo stopping at the two specific locations on the vehicle.

Deputy Young testified that he had been a Sheriff's Deputy for 7 years and K-9 handler for 3.5 years. (R. 2, 2.) Deputy Young had been working with Turbo for 3 years. (R. 2, 3.) Deputy Young and Turbo completed monthly trainings, and certified once a year, each year. (R. 2, 3.) Deputy Young explained how Turbo alerted, what his changes in behavior were, and how he knew what to look for when working with Turbo. (R. 2, 4-6.)

Here, Deputy Young's training and experience certainly aids the district court in determining whether Turbo alerted to the vehicle. Clearly, the area of drug dog deployment and K-9 drug detection is a specialized area, even within law enforcement itself. A lay person, lawyer, or even a judge does not have the requisite training and experience to know what Turbo's change in behavior is or how he alerts. This specialized knowledge and experience can only be gained after training with K-9's and experience, both of which Deputy Young had and testified to.

For example, the district court would not substitute its judgment for the training and experience of a doctor who diagnosed patients or determined a person's

injuries, or a coroner who determined a person's cause and manner of death, especially if there is no evidence to contradict the doctor or coroner's conclusions. Likewise, here the district court should not substitute its opinion for that of Deputy Young's training and experience.

Also, in the admittedly different context of a K.S.A. 60-1507 hearing, a panel of this Court in *Mullins v. State*, 30 Kan. App. 2d 711, 718, 46 P.3d 1222, 1226 (2002), was compelled to reverse the district court's denial of the defendant's 1507 motion. That panel held:

> [w]e are compelled, primarily, on the essentially uncontroverted record at the 1507 hearing. For whatever reason, the State presented no evidence, no witnesses, and did little cross-examination of Mullins' witnesses to provide the trial court any support for determining Mullins' trial counsel was effective. See *Cellier v. State*, 28 Kan.App.2d 508, 523, 18 P.3d 259, *rev. denied* 271 Kan. ___ (2001). 30 Kan. App. 2d at 718.

Similarly, here, this Court should be compelled to reverse the district court's determination that Turbo did not alert to the vehicle given the absence of evidence to the contrary, including no witnesses challenging the alert. Just as in *Mullins*, there was no support for the district court's conclusion that Turbo did not alert to the vehicle.

The district court failed to defer to Deputy Young's training and experience here, where it was necessary in order to make the final determination regarding whether Turbo alerted to the vehicle. Indeed, the sole determination the district court made in regards to the training and experience of Deputy Young and Turbo was that "the adequacy of the training of the handler and of the dog, the Court doesn't believe is an issue." (R. 2, 39.) Given this determination, the district court

was required to give some deference to Deputy Young's training and experience with Turbo, and erred when it failed to do so by completely disregarding his testimony.

E. The district court erred when it sustained Payton's objection of relevance when the State attempted to question Deputy Young about the search of the vehicle and results of the search.

The district court also erred when it sustained Payton's objection of relevance when the State attempted to ask Deputy Young about the subsequent search of the vehicle and where the drugs were found. Had he been able to answer, Deputy Young would likely have testified, as stated in his sworn affidavit, that he found two plastic baggies containing a fine crystal substance that field tested positive for methamphetamine in a pill bottle inside backpack in the back seat of the vehicle. (R. 1, 9.) Deputy Young also found two mirrors with white residue on them inside the backpack. (R. 1, 9.) Deputy Young further found a black bag under the driver's seat that contained a baggie of what he believed to be methamphetamine and Alprazolam and Oxycodone pills. (R. 1, 9.)

An appellate court exercises de novo review of a challenge to the adequacy of the legal basis of a district judge's decision on the admission or exclusion of evidence. *State v. Holman*, 295 Kan. 116, 133, 284 P.3d 251 (2012). Except as otherwise provided by statute, all relevant evidence is admissible. K.S.A. 60–407(f). Relevant evidence is defined in K.S.A. 60–401(b) as "evidence having any tendency in reason to prove any material fact." A fact is material if it "has a legitimate and effective bearing on the decision of the case and is in dispute." *State v. Stafford*, 296

Kan. 25, 43, 290 P.3d 562 (2012). Review for materiality is de novo. *State v. Ultreras*, 296 Kan. 828, 857, 295 P.3d 1020 (2013). "Evidence is probative if it has any tendency to prove any material fact." *Stafford*, 296 Kan. at 43. An appellate court reviews the district court's assessment of the probative value of evidence under an abuse of discretion standard. *Ultreras*, 296 Kan. at 857.

Here, the evidence was certainly relevant to help establish whether Turbo alerted to the vehicle and where Turbo alerted. The fact that Deputy Young found drugs in the vehicle after Turbo alerted, and in one of the areas where Turbo alerted was both material and probative. The presence of drugs in the car was material as it related to a fact at issue, namely, whether Turbo alerted to the vehicle. The evidence was also probative as the presence of the drugs had any tendency to prove that Turbo alerted to the vehicle.

The evidence would lend weight and credibility to Deputy Young's conclusion that Turbo alerted. If this evidence would have been presented, the district court would have had yet another piece of uncontroverted evidence to support the conclusion that Turbo alerted to the vehicle. As this evidence was relevant, the district court incorrectly excluded it from being presented at the hearing.

F. Any reliance on U.S. v. Wilson*, 995 F. Supp. 2d 455 (2014), was misplaced.*

To the extent that the district court relied on *U.S. v. Wilson*, 995 F. Supp. 2d 455 (2014), in making its conclusion that Turbo did not alert, *Wilson* is distinguishable and actually lends support to the State's position. Notably, *Wilson* is a case from the U.S. District Court, W.D. of North Carolina, and is not binding on

this Court or the district court. In *Wilson*, during a car stop, Detective Cox's K-9, Beck, was deployed. Beck was trained to alert and his final indication was to sit and stare. 995 F. Supp. 2d at 473. Detective Cox indicated that although Beck never made a final indication, by sitting and staring, Beck alerted to the odor of narcotics due to a behavioral change. 995 F. Supp. 2d at 467. The only behavioral change, however, was that Beck's breathing had changed. 995 F. Supp. 2d at 467. Because Beck alerted, the vehicle was subsequently searched. The search of the vehicle revealed no narcotics. 995 F. Supp. 2d at 468.

Ultimately, the court made the finding that Beck did not alert, based on the evidence presented. In making this determination, however, the court was presented with several pieces of evidence that are not present in this case. The court adopted the Magistrate Judge's recommended findings that the testimony of Detective Cox, in nearly all material respects, was not credible. The court also found that the testimony of the expert witness was completely credible, "especially on the issue that a dog's 'change in behavior' cannot be equated to an alert." 995 F. Supp. 2d at 474-75. The court further noted that ultimately, no drugs found in the vehicle. Moreover, Beck had not been trained to detect Oxycodone, the only drugs that were eventually found on the defendant's person and not inside the vehicle. 995 F. Supp. 2d at 474-75.

Unlike the court in *Wilson*, here, the district court did not find that Deputy Young's testimony was not credible. Also, Payton presented no expert witness who provided testimony that a change in behavior does not equal an alert. There was no

contradicting expert witness testimony that the district court found to be credible here. Lastly, there were drugs found in a backpack located in the back seat of Payton's vehicle, one area where Turbo alerted. That evidence was not allowed to be presented at the hearing, however, as district court incorrectly excluded it on the basis of relevancy. Yet, the fact that there were no drugs found in the car in *Wilson*, was a part of the courts findings that the evidence presented in that case supported the conclusion that Beck did not alert. These distinctions are crucial. Without similar credibility findings and evidence in this case, *Wilson* does not support the district court's conclusion.

G. Alternatively, the State requests a remand for additional factual findings by the district court.

Alternatively, if this Court does not agree that the district court's conclusion that Turbo did not alert was not supported by substantial competent evidence, this case should be remanded for further factual findings. See *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 361, 277 P.3d 1062 (2012) (remand appropriate when "the lack of specific findings" stymies appellate review). As noted above, the district court made no determination regarding Deputy Young's credibility. It appears the district court decided it could simply determine, without relying on any admitted evidence, what is sufficient to constitute an alert. Thus, no credibility finding was made. But in doing so, the district court entirely overlooked the credibility of Deputy Young that, based on his training and experience, Turbo alerted. There being no other evidence to support the district court's conclusion, the district court should be required to make a credibility determination about Deputy

Young and his testimony that Turbo alerted. But see *Drach v. Bruce*, 281 Kan. 1058, 1080, 136 P.3d 390 (2006) (district court presumed to have made all necessary factual findings to support its judgment in the absence of an objection to inadequate findings), *cert. denied* 549 U.S. 1278, 127 S.Ct. 1829, 167 L. Ed. 2d 317 (2007); see *State v. Neighbors*, 299 Kan. 234, 240, 328 P.3d 1081 (2014) (noting presumption). Therefore, a remand to the district court for the necessary credibility findings is an alternative remedy in this case.

CONCLUSION

For the above reasons, the State respectfully requests the Kansas Court of Appeals reverse the district court's granting of Payton's motion to suppress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Appellant's Brief was sent by e-mailing a copy to Brenda Mari Jordan at bjordanlaw@twinvalley.net on this 3rd day of October, 2018, and the original was electronically filed with:

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