18-119721-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
APPELLANT
vs.
CHRISTOPHER PAYTON
APPELLEE

BRIEF OF APPELLEE

Appeal from the District Court
Pottawatomie County, Kansas
Honorable JEFF ELDER
District Court Case No. 17 CR 305

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NATURE OF THE CASE

The Defendant was charged by the State with Count 1- distribution or possession with intent to distribute less than 3.5 grams- methamphetamine, Count 2- possession of drug paraphernalia, Count 3 unlawful possession of Alprazolam, Count 4 Unlawful possession of Oxycodone, (R. Vol. I, pp. 4-6). Defendant was also originally ticketed, and charged in a 3rd amended complaint, with Count 5- registration violation, Count 6- no proof of insurance and Count 7- failure to properly display a license plate. (R. Vol. I, pp. 34-35). The charges stemmed from a search following the traffic stop which was performed without a warrant based upon probable cause from an alleged drug dog alert. The Defendant filed a motion to suppress which was granted by the District Court. The State filed this appeal challenging the District Court's Suppression order.

STATEMENT OF ISSUES

ISSUE I: The District Court suppressed the evidence based upon the lack of reliable evidence that the drug dog alerted to the car, thus resulting in a lack of probable cause for the warrantless search of the car.

STATEMENT OF FACTS

On June 21, 2017, Justin Young, Pottawatomie County Deputy, was patrolling in Pottawatomie County along with his K-9, Turbo. (R. Vol. 2, pp. 2, 6). The deputy stopped a vehicle driven by the Defendant based upon an expired license plate or registration. (R. Vol. 2, p. 6). After determining the status of the registration and, due to the Defendant's inability to produce valid insurance, the Defendant was allowed to leave, but the vehicle remained at the scene. (R. Vol. 2, p. 7).

After the Defendant had left the scene, and after an officer had removed the

plate from the car (R. Vol. 2, p. 18), Deputy Young removed Turbo from his patrol unit and walked him around the vehicle (R. Vol. 2, p. 7 and, R. Vol. 3, State's Exhibit 1).

While walking Turbo around the car, the officer is heard commenting to the dog 'nothing' twice at various points, and then makes a comment of 'you are not going to give me anything'. (R. Vol. 3, State's exhibit 1, R. Vol. 2, pp. 21, 41). During the passes around the car, the dog is not seen sitting, which the Deputy Young testified Turbo was trained to do as his 'final response' to indicate he has located drugs. (R. Vol. 2, pp. 4, 15) Deputy Young explained that he was looking merely for an 'alert' and described an alert for Turbo as a 'change in behavior'. (R. Vol 2, pp. 4). Deputy Young testified that upon working this vehicle, Turbo 'tried to sit' near the passenger side of the car but had alerted at the trunk. (R. Vol. 2, p. 8). However, in the affidavit, Deputy Young noted that the dog had 'not indicated at that point'. (R. Vol. 2, pp. 19-20). Additionally, Deputy Young confirmed that he commented that the 'dog had failed to be involved'. (R. Vol 2, p. 21).

After walking the dog around the vehicle, at least 2 times, the officer put Turbo in the patrol unit and then spoke to the other officers on scene. (R. Vol. 2, p. 20). During the conversation with the other officers, a discussion is held about what might have caused the dog to 'sniff' at the trunk area. The discussion includes what the officer who removed the plate had done that day. (R. Vol. 3, State's exhibit 1, R. Vol. 2, pp. 41-42).

The Defendant filed a motion to suppress based upon lack of probable cause to support the warrantless search. (R. Vol. 1, p. 48-54). A hearing was conducted, wherein Deputy Young testified and the video from the stop was played and provided to the Court for review. (R. Vol. 2, R. Vol. 3, State's exhibit 1). Following review of the evidence, the Court found there was insufficient evidence to allow the Court to find that reliable evidence that the Dog had alerted to establish probable cause. (R. Vol. 2, p. 43) . As a result the Court granted the motion to suppress the evidence found during the warrantless search.

ARGUMENTS AND AUTHORITY

Issue 1:

> The District Court properly suppressed the evidence based upon the lack of reliable evidence that the drug dog alerted to the car, thus resulting in a lack of probable cause for the warrantless search of the vehicle.

STANDARD OF REVIEW

An appellate court uses a bifurcated standard to review a district court's decision on a motion to suppress. Without reweighing the evidence, the appellate court reviews the district court's factual findings to determine whether they are supported by substantial competent evidence. *State v. Sanchez–Loredo*, 294 Kan. 50, 54, 272 P.3d 34 (2012). 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). The district court's ultimate legal conclusion is reviewed de novo. *Sanchez–Loredo*, 294 Kan. at 54, 272 P.3d 34.

This court presumes the district court found all facts necessary to support its judgment, unless the record on appeal fails to support that presumption. *State v. Vaughn*, 288 Kan. 140, 143, 200 P.3d 446 (2009). The State has the burden of proving that a search or seizure was lawful. *State v. Anderson*, 281 Kan. 896, 901, 136 P.3d 406 (2006).

> Whether probable cause exists to search a vehicle is determined by examining the totality of the circumstances. *Sanchez–Loredo*, 294 Kan. at 55, 272 P.3d 34. A reliable K–9 alert may alone supply the probable cause necessary to conduct a warrantless vehicle search. *State v. Brewer*, 49 Kan.App.2d 102, 305 P.3d 676 (2013).
>
> The appellate court will no reweigh the evidence or the credibility of the

witnesses as found by the trier of fact. *State v. Daws*, 303 Kan. 785, 789, 368 P.3d 1074 (2016).

The challenge herein is not whether an alert by a K-9 trained in the detection of the odor of controlled substances can support a warrantless search. The issue before the Court in this matter is what is required to confirm or establish an 'alert' or in the words of *Brewer, supra*, a reliable alert, justifying a warrantless search of a motor vehicle. In the instant matter, the question is what substantial competent evidence exists that an alert occurred, thus establishing a 'reliable alert' justifying the search.

The District Court, as the trier of fact, had the ability to hear the testimony and review the recording, in light of that video. After doing so, the court found that sufficient evidence did not exist to support the claim that the dog had alerted, thus, probable cause did not exist. Specifically, the District Court was concerned with allowing the decision to be made based upon a subjective determination by the handler of the dog. (R. Vol. 2, p. 42). This was due to the fact that the District Court did not see nor observe the claimed 'changes in behavior' nor 'attempt to sit' that Deputy Young testified established probable cause for him to proceed with a warrantless search. (R. Vol. 2, pp. 41-42).

Thus, the District Court's findings should be upheld as they were based upon the evidence which allowed the finding that substantial competent evidence did not establish that the dog had alerted as claimed by the deputy.

Sub Issue A

> The alleged evidence that the dog alerted to the trunk and passenger door was not disregarded nor unopposed.

The State's claim that probable cause existed is based upon an assertion that Turbo

attempted to alert on the 'passenger door' by attempting to sit (R. Vol. 2, p. 8) and that he alerted 'out of the trunk area'. At the trunk area, the door purportedly 'froze and looked back over towards' the officer. (R. Vol., 2 p. 8).

These claims were not 'unopposed' as Appellant asserts in sub-issue A and more importantly, they were not disregarded by the Court. The Court found to the contrary upon review of the evidence presented. The district court heard the testimony during the motion to suppress and independently reviewed the videotape of the drug dog sniff

Counsel for the Defendant/Appellee questioned the officer about the claimed 'attempt to sit', she inquired of the frequency of the dog 'sitting' on actual stops versus training, (R. Vol. 2, p. 15); that the training has changed (R. Vol. 2, p. 16); questioned about the 'attempt to sit' that is claimed to be shown in the video As to the alert near the trunk area, counsel cross examined the deputy as to discrepancies in his affidavit versus his testimony during the suppression hearing (R. Vol. 2, p. 19); the other officer's use of gloves when removing the plate (R. Vol. 2, p. 18); pointed out that the dog went passed that license plate more than one time, and only 'indicated' one time (R. Vol. 2, p. 20). Additionally, the fact that during the passes around the car the officer was commenting to the dog, including saying 'nothing' a couple of times and 'nothing for me'; and confirming that the dog 'had failed to be involved'; all challenging the claims being made during the hearing that the dog was 'alerting' to the car. (R. Vol. 2, p. 21). Further, challenge was also posed and thus, called into question, the claim of an alert due to the dog 'closing his mouth when counsel questioned, and the deputy, confirmed, that he had directed the dog to detail. The deputy confirmed that when he directs the dog to detail, he is to close his

mouth. (R. Vol. 2, p. 28-29).

When asked specifically about the 'change' at the passenger door, the deputy explained that the dog '"will cinch up and you'll see that nose start working. Instead of breathing through the mouth and nose, he'll switch to switching directly out of his nose'. (R. Vol. 2, pp. 28-29). This would mean his mouth would be closed. While trying to explain that Turbo would not necessarily have been shutting his mouth to detail (sniff harder) the following transpired:

> Q: Well, you testified earlier what detailing means, and that's where you go back and help the dog is what you said, try to pinpoint the odor; correct?
>
> A. Okay?
>
> Q: Right? Is that right?
>
> A. Yes.
>
> Q. So when you ask the dog to detail, you're asking him to basically sniff more to see if he can locate the odor, correct?
>
> A. Yes.
>
> Q So when you expect him to shut his mouth completely to do what you told him to do?
>
> A. That's not always the case.
>
> (R. Vol. 2, p. 29)

The deputy's response provides confirmation of the danger of allowing an officer subjective determination that the dog made an alert. The deputy's original explanation of detailing and the dog being directed to detail, would mean that the dog is shutting his mouth and sniffing just from his nose. Thus, the deputy has directed him to detail, thereby creating the very 'change in behavior' he is asserting shows an 'alert'. Thus, the allowance of a deputy to determine if the dog alerted creates a situation where there is no

ability to challenge or review the claim.

The District Court heard this information and reviewed the video, not only while the deputy was narrating it (R. Vol. 2, p. 10-12), but also upon cross (R. Vol. 2, p. 22) and independently in chambers during the break (R. Vol. 2, p. 38). The comments by the District Court as to the deputy speaking to the other officers about 'other explanations' further explain or show that the Deputy was not indicating or certain that the dog had alerted. The deputy is heard on the video while deploying the dog around the vehicle commenting at various points "nothing" "nothing" (R. Vol 2, p. 21) and "you've got nothing for me"; all challenging the subjective claim that the dog had alerted on the car which would give the officer probable cause for the warrantless search.

All of these issues raised during the hearing call into question the deputy's credibility as to his belief that the dog had alerted. The district court, having the ability to hear the answers, and see the testimony, and the video, provided the district court judge with the ability to make a determination as to the credibility of the deputy as to the presence of a change in behavior and thus, an alert. By the district court's comments as to the court's observations, make clear the court's determination as to that credibility as to the question of an alert or not.

Sub Issue B

The claimed evidence that the dog attempted to give a final indication was not disregarded nor unopposed.

The District Court, as the trier of fact, watched the video, at least three (3) times. The Court found that the dog did not 'attempt to make a final indication.' State's exhibit 1

is a clear video which the District Court could view; as can this court. The video shows the car is parked on the side of the road with sufficient distance for the dog and deputy to walk around the car on the passenger side several times. (R. Vol. 3, State's 1). Nowhere within the video is the dog, nor the officer for that matter, seen 'stumbling' on a slope of the terrain. Additionally, upon review of the video, there is no indication that the "dog's left rear leg hit" anything as claimed by the deputy. (R. Vol. 2, p. 8) The video clearly shows the dog easily walking around the car and shows no indication of an issue with a slope. (R. Vol 3, State's 1). This is information presented to the trier of fact, which failed to convince the trier of fact that an alert occurred which would provide probable cause for the search. The state failed to produce substantial competent evidence to the trier of fact to establish that a reliable alert occurred to justify the search of the vehicle.

Likewise, Appellate Court has the evidence, State's exhibit 1 (R. Vol 3) available for review to find that the District Court's legal conclusions drawn from the evidence were appropriate.

Sub Issue C

> The District Court's conclusions were properly based upon the evidence presented which sustained the Defendant's claim that the State failed to present substantial competent evidence.

When a motion to suppress is filed, the State bears the burden of proof to establish the lawfulness of the search and seizure. *State v. Boyd*, 275 Kan. 271, 64 Kan. P.3d 419 (2003). As noted herein, the evidence before the Court at the hearing on the motion to suppress included the testimony of Deputy Young (R. Vol. 2), and the video of the stop of the car and resulting use of Turbo, the K-9. (R. Vol. 3, State's #1).

During the hearing, the State had Deputy Young narrate the video, explaining to the Court what he claimed to be the behavioral changes of Turbo. (R. Vol. 2, pp. 10-12). In addition, the video was played during cross examination (R. Vol. 2, p. 22) and the Court reviewed the video in chambers before ruling on the motion (R. Vol. 2, pp. 35, 38).

The District Court's decision was based upon evidence which was presented and the fact that such evidence did not provide substantial competent evidence to sustain the State's burden of proof. Despite Appellant's claim, the evidence presented was not 'uncontested'. The Appellee/Defendant contested the claims by the deputy. Evidence is contested when called into question and contradictory statements and information is elicited. To contest the claims of the deputy, a witness nor expert were required. The Appellee/Defendant's questions to the deputy challenging his claims, inquiry as to other sources of 'smell' on the license plate (R. Vol. 2, pp. 18-19, 22); the discrepancy in the training versus application (R. Vol. 2, pp. 14, 16); the deputy's comments of 'nothing' as the dog was working the car (R. Vol. 2, p. 21); discrepancy in testimony as compared to the affidavit (R. Vol. 2, pp. 19-20); challenging the behavior change claim of the closed mouth when the deputy had directed Turbo to search which would be nature cause him to close his mouth (R. Vol. 2, pp. 28-29); are all examples of challenges, and the resulting answers, evidence for the Court to consider. The Court had sufficient evidence to find that the State had failed to meet it's burden of proof, and thus, grant the motion to suppress.

Sub Issue D

The District Court did not error in consideration of the training and experience of Deputy Young as the K-9 Handler.

The Appellant's assertions within this issue completely disregard the Court's considerations and findings as to the deputies testimony which were contrary to the claims by the deputy. The court did not discredit the dog's training; nor completely the deputies, the court did discredit the deputy's claim that the dog alerted. What the court discounted was the deputies attempt, after the fact, to identify actions or behaviors to substantiate a claim of an alert. The court noted the testimony by the deputy, but discounted it, and by that finding, determined it not credible. The most poignant example of this, is the deputy's claim that Turbo 'attempted to sit' at the passenger door of the car. (R. Vol. 2, p. 39). Further, the Court discounted the deputy's claim that the dog made any observable change in behavior which could be accepted as an alert. The problem for the State in this instance, is within the confines of the video, at the time of the events, the deputy's remarks do not match his testimony; his discussion calls into question his confidence that the dog had alerted. (R. Vol. 2, p. 41-42). "There's just not enough reliable evidence for this Court to find that the dog did alert in this case to establish probable cause." (R. Vol. 2, p. 42).

Sub Issue E

No error occurred when the District Court precluded the State from presenting evidence as to the ultimate findings during the search.

During the hearing on the motion to suppress, the prosecutor inquired of the deputy as to what he found during the search that ensued. The Court sustained an

objection by the Defendant's counsel based upon relevancy. Appellant seeks to have this court find that the deputy's testimony, and or what was ultimately found, is determinative and thus, relevant to the determination regarding whether the drug dog alerted. (R. Vol. 2, p. 13-14).

The issue before the court, as noted by the Court, was 'whether the evidence is sufficient to show that the dog alerted, to establish probable cause.' (R. Vol. 2, p. 39). The point of relevance to this question in the field is when the dog purportedly alerted and the deputy made the decision to search. The question before the Court was whether substantial competent evidence was provided to establish that the dog had shown an alert that justified the search.

In reviewing a decision by a district court regarding the admission of evidence, the appellate court's review is a two step process, first determining if the evidence is relevant, and if so, then the decision of admission is reviewed under an abuse of discretion standard. *State v. Phillips*, 295 Kan. 929, 947, 287 P.3d 245 (2012). Kansas has defined relevant evidence at K.S.A. 60-401(b) as evidence having any tendency in reason to prove any material fact.

In the instant matter, what, if anything, was found during the search is not relevant to the question that was before the District Court- whether there was substantial competent evidence that Turbo alerted at or before the point in time the deputy decided to search the vehicle. The finding of drugs is no more relevant than had the search not yielded drugs or anything; or alternatively, had yielded something other illegal item or evidence, example stolen property, or a murder weapon. In that scenario, the State would

have been objecting to relevance pointing to the fact that the issue before the court was the point of the decision to search, the dog's accuracy record and whether the search was justified by the alert by the dog. The claim would be, the dog alerted providing probable cause, and thus, it is irrelevant that drugs were not found, the search was lawful.

In the instant matter, the point the deputy claims the dog alerted, is the relevant consideration for the Court. Thus, denial of admission of testimony as to the ultimate search of the car, was not relevant to that issue. Had the dog's accuracy ratings been in issue, the findings might have been relevant, but as to the question of 'did the dog display sufficient signs of an alert?' what was found is not relevant.

Should this court decide the outcome of the search is relevant in determining if there was sufficient evidence that the dog alerted, then the second step must be considered, was the denial an abuse of discretion. Given the issue before the Court, an issue that centered on the point the dog purportedly alerted and whether there was sufficient evidence to support the claim of an alert, denial of testimony of what was found during the search was not abuse of discretion.

It is also of note, when on reviews the proffered testimony, reveals that neither finding, nor location is consistent with the locations the deputy claims the dog 'alerted' on the car. The statements in the affidavit as to the location of the purported drugs pointed to by Appellant were 'inside a backpack in the back seat of the vehicle' and a 'black bag under the driver's seat'. (R. 1, p. 9). Neither of these are locations where the deputy asserted the dog alerted, those being the passenger side and the trunk.

The ultimate findings during a search, warrantless or otherwise, is not proper for

consideration by the Court. The claim otherwise, is to suggest that the outcome is all that matters and how it was reached, what constitutional rights were violated, are not relevant. If the findings of a search were the determining factor as to the lawfulness of the search, the exclusionary rule would not have been necessary, nor expansion under the fruit of the poisonous tree doctrine, nor would the constitutional safeguards exist. See *State v. Karson*, 297 Kan. 634, 639, 304 P.3d 317 (2013); *State v. Deffenbaugh*, 216 Kan. 593. 598, 533 P.2d 1328 (1975).

The district court properly found the testimony as to the outcome of the warrantless search was not relevant to the question at the hearing on the motion to suppress.

Sub Issue F

The Court's reliance on *U.S. v. Wilson* was proper in the context it was used.

In considering the motion and claims by the State, the Court independently researched the issue, whether the evidence is sufficient to show that the dog alerted, to establish probable cause to search the vehicle. (R. Vol. 2, p. 39). This is a question that does not appear to have been dealt with, particularly in the State of Kansas. Thus, within the expansion of that search, the court located and considered *U.S. v. Wilson*, 995 F.Supp. 2d 455 (2014) which considered *U.S. v. Parada*, 577 F.3rd 1275 (10th Circ., 2009). In finding the dog in U.S. v. Wilson did not display an 'alert' sufficient to support probable cause, the court also looked to *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964) for some basic principles of Fourth Amendment search protections.

The district court specifically stated it was not making the findings in the instant matter based upon Wilson. (R. Vol. 2, p. 43). The review of Wilson was simply for guidance, absent a case on point within the controlling jurisdiction as to what was sufficient competent evidence to support a claim of an alert providing probable cause. The Court's reference to Wilson, and Beck, clearly emphasis the concern of the district court with the credibility of Deputy Young and his 'claims' as to the 'alert' which supported his belief he could search the vehicle.

In *U.S. v. Wilson*, supra, like the instant matter, was a challenge as to whether the dog alerted to the vehicle that was searched. Also, as in the instant matter, the dog's actions were not his 'trained indication', instead the officer testified that he (officer) was able to discern that the dog alerted by a change in behavior. Also, as in this matter, the Wilson court found that the claim that the dog had changed behavior (either 'cast' or 'alerted' to drugs) was not supported by the evidence. The court in that matter, considered not only the testimony, but also a review of the video and did not believe the dog had made any change in behavior.

As noted in U.S. v. Wilson, supra,

> A Court cannot accept a handler's subjective determination that a dog has made some 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 is unacceptable. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police.' *Beck v. Ohio* (379 U.S.), supra, at 97, 85 S.Ct. at 229,
>
> To allow a search predicated upon an officer's interpretation fo the 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.

(995 F. Supp. 2d 475-476).

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search of seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard; would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Cf. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); Beck v. Ohio, 379 U.S. 89, 96-97, 85 S.Ct. 223, 229, 13 L.Ed 142 (1964). Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. See, e. g., Beck v. Ohio, supra; *Rios v. United States*, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960); *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959).

The district court clearly took issue with the items the deputy was saying occurred which he claimed were 'alerts'; took issue with the subjective considerations by the deputy. The court specifically called out the deputy's comments noting 'it didn't seem that the handler was real confident that there had been an actual alert happening'. (R. Vol. 2, p. 41). Further, the court noted the claimed subjective observations that were not consistent with the video which further support the district court's findings. For example, the deputy commenting 'nothing' to the dog throughout (R. Vol. 3, State's exhibit 1, R. Vol. 2, pp. 21, 41), the discussion that ensued with the other officers once the dog was put up (R. Vol. 2, p. 41), the assertion the dog was closing his mouth, yet the deputy clearly identified that he had 'directed the dog, which would result in him closing his mouth and sniffing harder' R. Vol. 2, p. 28-29). The claim the dog 'attempted to sit', but could not due to the slope of the road.

In the instant matter, with the challenges to the deputy's testimony, observation of

the video, and other matters as outlined, allowing the deputy's claim during the hearing that an alert occurred is contrary to the Fourth Amendment and protections afforded there from. The district Court noted that there must be safeguards, an objective review of the actions of the dog, and in doing so, the Court found no substantial competent evidence was provided that the dog alerted to the vehicle.

Thus, the Court's reliance upon the considerations of *U.S. v. Wilson*, supra, and the constitutional findings contained therein, was not misplaced.

Sub Issue G

The District Court findings clearly addressed the issues before the Court and considered the credibility of the deputy.

While the district court did not come right out and make a statement such as 'I do not believe Deputy Young' or 'the following statement by Deputy Young is false', the credibility of the officer was considered by the Court. The comments and findings of the Court clearly identify that the Court considered the credibility of the deputy as to the subjective claims of observing alert(s) by the dog. As to the claim the dog 'attempted to sit', the court clearly discounted the credibility of Deputy Young. The court noted, 'nor can the Court interpret what the dog was seen doing on the videotape be an attempt to make a final indication'. (R. Vol. 2, p. 39). The court, as noted herein, also had concerns with the deputy's confidence in the dog's actions, that he was testifying were 'alerts'.

Thus, the court did not overlook the credibility of Deputy Young. To the contrary, as noted herein, the Court discredited the deputy's assertions at the hearing as related to claims the dog alerted.

Thus, the issues before the Court were properly considered and addressed. The matter does not need to be remanded. The Court's findings clearly identify that the deputy's credibility was questioned as related to the matters presented to the Court.

CONCLUSION

Thus, the motion to suppress was properly granted as the Court's review of the evidence, taking into account the District Court's ability and decision regarding credibility as to the claims of an 'alert' clearly supported the finding that substantial competent evidence did not exist to support the claim that the dog 'alerted'. Without an alert, there was no probable cause to support the warrantless search of the car. The Court should uphold the District Court's findings of fact and conclusions of law, finding that the Motion to Suppress should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, that on December 31, 2018 that a true and correct copy of the Defendant/Appellee's brief was filed via the electronic filing system and a copy was emailed to:

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