11-2094

To Be Argued By:
MARC H. SILVERMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-2094

UNITED STATES OF AMERICA,
Appellant,

-vs-

LEROY PRESSLEY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

DAVID B. FEIN
United States Attorney
District of Connecticut

MARC H. SILVERMAN
ROBERT M. SPECTOR
Assistant United States Attorneys
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

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Summary of Argument

The Norwalk Police Department's use of a drug detection canine on August 18, 2010 was constitutional under binding precedent of the Supreme Court. As the district court found, the police lawfully detained Leroy Pressley to investigate trespassing. However, in contravention of *Illinois v. Caballes*, 543 U.S. 405 (2005), the district court determined that the use of the drug detection canine to sniff Pressley's car during this investigation exceeded the scope of that in-

vestigation. As *Caballes* makes clear, however, there is no scope limitation restricting the use of a drug detection canine during an otherwise lawful detention and the district court therefore committed reversible error. Moreover, the limited duration of Pressley's detention was proper, and Pressley's arguments to the contrary have been waived and lack merit.

Pressley's alternative arguments—which challenge the accuracy of the drug detection canine, distort the automobile exception, ignore the district court's findings and the relevant case law regarding motor vehicle inventories, and baldly claim pretext—fare no better. The dog's alert on the outside of the car provided probable cause to search Pressley's vehicle. Close to the location of that alert, law enforcement officers recovered a loaded firearm. Pursuant to the automobile exception and the motor vehicle inventory policy, officers subsequently recovered cocaine base and heroin. In short, the police officer's actions fully comported with the requirements of the Fourth Amendment. Accordingly, the contraband recovered in the car is fully admissible and the district committed reversible error in suppressing it.

Argument

I. The use of the drug detection canine was constitutional under binding precedent of the Supreme Court.

In view of the lawfulness of Pressley's initial detention to investigate trespassing, the absence of any scope limitation restricting the use of a drug detection dog, and the limited duration of Pressley's detention, the use of the drug detection dog was constitutional in all respects. The district court therefore committed reversible error in suppressing the firearm, cocaine base, and heroin recovered from Pressley's car on August 18, 2010.

A. The police lawfully detained Pressley to investigate trespassing.

The district court correctly determined that the police officers had reasonable suspicion to detain Pressley to investigate trespassing. *See* JA 195. Despite this determination, Pressley appears to argue that he had an affirmative defense to, and could not be convicted of, any trespassing charge, and that this somehow rendered unlawful his initial detention to investigate trespassing. *See* Def.'s Br. at 30. This argument lacks merit.[1]

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[1] Pressley's argument is entangled with a duration challenge, in which he contends that the information provided by Tanya Smeriglio and Tammy Morales dispelled any reasonable suspicion of trespassing

The relevant question is not whether Pressley ultimately would be convicted of trespassing. Rather, the relevant question is whether the law enforcement officers had reasonable suspicion to detain Pressley to investigate trespassing. And as the district court concluded, the officers plainly had such suspicion: "Considering the circumstances of the encounter as a whole and viewing the facts through the eyes of a reasonable and cautious police officer, the Court finds that the officers had reasonable suspicion that Pressley was trespassing at the [Roodner Court Housing] Complex based on specific and articulable facts of his prior trespasses and thus were justified in detaining him for the time necessary to confirm or dispel that suspicion." JA 195 (footnote omitted).

The district court's conclusion was well founded. Pressley had been convicted of First Degree Criminal Trespass in the housing complex in February 2009 and had been issued a verbal warning for trespass in the housing complex in May 2010. *See* JA 28, 134, 184, 195. At the time that he received the verbal warning, Pressley was sitting in the same vehicle (with a different paint job) in which he was later observed on August 18, 2010 and in which the firearm and drugs were recovered. *See* JA 28-29, 134, 155, 184. When the law enforcement officers

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and required the immediate cessation of his detention. *See* Def.'s Br. at 30, 34. This duration challenge is addressed separately. *See infra* Section I(C).

first saw Pressley on August 18, 2010, he was not accompanied by any resident. *See, e.g.*, JA 185. When asked about his presence in the housing complex, Pressley indicated that he was visiting his cousin, Tanya Smeriglio, *see* JA 30, 185, but she was not with Pressley during his initial police encounter and officers later learned that she did not even reside in the housing complex, *see* JA 35, 135, 156, 186. Accordingly, the district court properly concluded that the police officers lawfully detained Pressley to investigate trespassing.

B. The district court committed reversible error in concluding that the use of a drug detection dog exceeded the scope of the trespassing investigation.

The district court concluded that the police officers had reasonable suspicion to detain Pressley to investigate trespassing but not drug trafficking activity, and therefore determined that the use of the drug detection dog exceeded the permissible scope of the trespassing investigation:

> [B]ecause the *scope* of [the drug] investigation, including the canine sniff of the car, was not reasonably related or carefully tailored to the legitimate basis for the stop—namely, trespass—the officers exceeded the bounds of reasonableness demanded by the Fourth Amendment when they de-

> tained [Pressley] and conducted that investigation.

JA 195 (emphasis added).

As described more completely in the government's opening brief, the district court's reasoning—and the arguments advanced on appeal by Pressley—ignore the binding precedent of the Supreme Court in *Illinois v. Caballes*, 543 U.S. 405 (2005). The use of a drug detection dog "is not a search subject to the Fourth Amendment" and therefore no reasonable suspicion of drug activity is necessary to justify the use of a drug detection dog during an otherwise lawful detention. *Id.* at 408. This holding eviscerates any "scope" limitation on dog sniffs—whether grounded in *Terry v. Ohio*, 392 U.S. 1 (1968), or elsewhere.[2]

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[2] The government notes that the Supreme Court recently granted certiorari in *Jardines v. Florida*, 73 So.3d 34 (Fla. 2011), *cert. granted*, --- S. Ct. ---, 2012 WL 28952, at *1 (U.S. Jan. 6, 2012) (No. 11-564), to answer the following question: "Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause?" This Court has held that "[c]onsistent with the strong expectation of privacy in the sanctity of one's home . . . a canine sniff at the door of an apartment—even if the only function of the sniff is to reveal illegal narcotics inside that apartment—is nonetheless a 'search' subject to the constraints of the Fourth Amendment." *United States v. Hayes*, 551 F.3d 138, 144 (2d Cir.

C. The duration of Pressley's detention was proper in view of the ongoing trespassing investigation.

Pressley waived any challenge to the duration of his detention by failing to argue in the district court that the use of the drug detection dog prolonged the duration of his detention to investigate trespassing. Indeed, there was neither a finding by the district court nor even an allegation by Pressley that law enforcement officers delayed or extended the trespassing investigation to accommodate the arrival and use of the drug detection dog. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see also United States v. Lauersen*, 648 F.3d 115, 115 (2d Cir.) (applying the "general rule that [the Court] will not consider issues raised for the first time on appeal"), *cert. denied*, 132 S. Ct. 431 (2011).

But even if this Court decides to reach Pressley's duration argument, the district court made no determination that the detention was unconstitutionally prolonged and the factual findings could not support such a determination.

2008). Because the dog sniff at issue in this case concerns an exterior check of a vehicle and not the threshold of a home, the Supreme Court's recent grant of certiorari and the *Hayes* decision do not affect the constitutionality of the dog sniff at issue in this case.

Pressley repeatedly misreads the district court's decision, claiming that the district court found that the duration of his detention was unduly expanded to accommodate the use of a drug detection canine. *See* Def.'s Br. at 21, 22, 23, 24. To support this argument, Pressley relies solely on the following line from the district court's opinion: "[T]here is nothing in [the] record showing that, during the initial questioning of Pressley regarding his suspected trespass, the officer developed a reasonable, articulable suspicion that he was involved in drug trafficking that would warrant expanding the scope and duration of the stop." *See* Def.'s Br. at 21 (quoting JA 195). This quote does not bear the weight Pressly sets upon it. As set forth above, no scope limitation restricts the use of a drug detection dog during an otherwise lawful detention. But, with respect to duration, the district court correctly stated an aspect of the governing law, that "a seizure that is lawful at its inception" may be executed in an unreasonable manner "if it is prolonged beyond the time reasonably required to complete [its] mission." *Caballes*, 543 U.S. at 407. A statement that a law enforcement officer may not prolong the duration of a trespassing investigation to explore drug trafficking activity is very different from a finding that the law enforcement officer did so. The district court made no such finding.

Moreover, given the facts that the district court *did* find, the record could not support a conclusion that the law enforcement officers un-

constitutionally prolonged the duration of Pressley's detention for trespassing.

First, the time period of the challenged detention was only approximately ten minutes. The district court noted that "[t]here is no indication of the total amount of time that elapsed between the initial encounter and Pressley's arrest," JA 186, and Pressley seizes on this timeframe to argue that his detention "was unreasonably long," Def.'s Br. at 22. But the time from the initial encounter with police until Pressley's arrest is not the relevant timeframe.[3] The timeframe of the detention at issue starts with Pressley's patdown, *see* JA 192, and ends with the canine's exterior alert. Norwalk Police Officer Suda requested the drug detection canine shortly after the patdown, *see* JA 185; it took approximately ten minutes for the dog to arrive, *see* JA 185; and the canine alerted shortly after arriving at the housing complex, *see* JA 186. Accordingly, the detention at issue lasted only approximately ten minutes.

Second, the trespassing investigation remained ongoing during this entire stretch of time. Pressley contends that the information

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[3] Contrary to Pressley's suggestion, *see* Def.'s Br. at 6, the police did not stop Pressley's vehicle. The undisputed facts show that when the police first encountered Pressley, his car was parked in the housing complex parking lot; although the engine was running, the hood was open and the car was stationary. *See* JA 183-84 & 184 n.2.

provided by Tanya Smeriglio and Tammy Morales played a critical role in the trespassing investigation, *see, e.g.*, Def.'s Br. at 30, 34, and he underscores that the drug detection dog was requested before these women arrived on the scene, *see, e.g.*, Def.'s Br. at 27, 29; *see also* JA 185-86, 190 n.5. But far from helping Pressley, this chronology reinforces the *government*'s position that the arrival and use of the drug detection canine did not prolong the trespassing investigation. Moreover, as shown in Officer Sixto's undisputed report, his interview of the two women remained ongoing when the firearm was recovered from the vehicle. *See* JA 156 ("As I was interviewing Smeriglio and Morales, Off. Suda informed me that a gun was found in the vehicle.").[4] In addition, Officer Suda testified

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[4] Without citation, Pressley asserts that "the record is inconsistent on the Government's assertion that Ms. Morales was being interviewed when the gun was discovered. The testimony of Officer Collins contradicted the police report of Officer Sixto." Def.'s Br. at 34. This assertion mischaracterizes the testimony of Officer Collins, reproduced in relevant part as follows:

Q: Now, Officer, at some point do you remember these women telling you that Mr. Pressley was there to visit them?

A: I did not speak with the women.

Q: Okay. If I showed you the copy of your report, would that refresh your recollection?

A: Perhaps.

Q: Okay. Give me one second. Take a look at the top part of that report there, not the—not just the entire report. Do you remember speaking to these women?

A: I did not speak with them. Officer Sixto spoke with those women.

Q: Okay. Were you with Officer Sixto when he spoke with them?

A: Momentarily, yes.

Q: Okay. Do you remember these women telling Officer Sixto that they were there to visit—Mr. Pressley was there to visit them?

A: I do not. I believe that's what they said, but I was not there.

Q: Okay. But you were under the impression that—So at some point you became aware of the fact that Tammy Morales was one of the people that Mr. Pressley was there to visit?

A: I believe he was there.

Q: Okay. And she lives in Roodner Court?

A: Yes.

JA 113-15; *see also* JA 144-46. In short, Officer Collins never testified about the timing of the interview relative to the recovery of the firearm.

Officer Sixto's police report states: "As I was interviewing Smeriglio and Morales, Off. Suda informed me that a gun was found in the vehicle." JA 156. Like most of the facts set forth in the multiple police reports admitted in evidence at the suppression hearing, Officer Sixto's chronology is uncontradicted by any record evidence and was undisputed in the district court proceedings.

without contradiction at the suppression hearing that he had not completed his field interview of Pressley at the time Pressley was arrested. *See* JA 57 ("We weren't finished with our field interview of him but, you know, based on—due to the crowd, the outcome was that he was under arrest."). These facts establish that the trespassing investigation continued during the entirety of the detention at issue.

Third, Pressley's reliance on the information provided by Tanya Smeriglio and Tammy Morales is misplaced. As a preliminary matter, the district court's finding that "[t]he women said Pressley was there to visit them[,]" JA 186, was clearly erroneous. No evidence in the record establishes that Ms. Morales told law enforcement officers that Pressley was visiting her. *See* JA 35, 49, 156. Pressley's reliance on Officer Collins's testimony to support this factual finding is misplaced. *See* Def.'s Br. at 26-27, 34. As set forth in the margin above, Officer Collins was insistent that he had not spoken to the women and that he did not remember the women telling Officer Sixto that Pressley was in the housing complex to visit them. *See supra* n.4. In relevant part, Officer Sixto's uncontradicted police report states that Ms. Smeriglio informed law enforcement that she knew Pressley, that he is her cousin, and that he was visiting Ms. Smeriglio. With respect to Ms. Morales, Officer Sixto's report states that she told law enforcement that she was Pressley's cousin and that she resided in the housing complex. *See* JA 156. Accordingly, nei-

ther Ms. Smeriglio nor Ms. Morales stated that Pressley was present in the housing complex to visit Ms. Morales.

But even assuming *arguendo* that the women told law enforcement officers that Pressley was present in the housing complex to visit them, such information did not require the officers to immediately cease their trespassing investigation. The officers were not required to blindly accept this account as the truth, particularly in view of Pressley's earlier inconsistent account. Pressley initially stated that he was in the housing complex to visit Ms. Smeriglio and indicated that she lived in the area of Building 19 or 20; Pressley never referenced Ms. Morales, *see* JA 185, and Ms. Smeriglio later admitted that she did not live in the housing complex, *see* JA 186. In view of these inconsistencies, the absence of the two women when law enforcement first encountered Pressley, and Pressley's prior trespassing in the housing complex, law enforcement officers properly and diligently continued their trespassing investigation.

Moreover, even assuming *arguendo* that law enforcement officers were required to accept the veracity of the supposed statement that Pressley was in the housing complex to visit the two women, that statement did not require the *instantaneous* cessation of the trespassing investigation and detention. *See Arizona v. Johnson*, 555 U.S. 323, 333 (2009) ("An officer's inquiries into matters unrelated to the justification for the

traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."); *United States v. Harrison*, 606 F.3d 42, 45 (2d Cir. 2010) (per curiam) (holding that an interval of "five to six minutes" between "the stop and the arrest" did not "prolong the stop so as to render it unconstitutional," and observing that "[l]onger intervals than five to six minutes have been deemed tolerable"); *United States v. Farrior*, 535 F.3d 210, 220 (4th Cir. 2008) (holding that any delay in conducting a dog sniff of the defendant's car was a *de minimis* intrusion on his liberty and thus not a violation of the Fourth Amendment); *United States v. Robinson*, 455 F.3d 832, 834 (8th Cir. 2006) (holding that even if a conversation that "lasted only a few minutes" was "a suspicionless seizure" that "occurred during the period from the conclusion of the lawful traffic stop until the officers unquestionably had probable cause, it was a *de minimis* intrusion that did not constitute an unreasonable seizure within the meaning of the Fourth Amendment").

Finally, Pressley's heavy reliance on the Illinois Supreme Court's pre-*Caballes* decision in *People v. Cox*, 782 N.E.2d 275 (Ill. 2002), is misplaced. In *Cox*, an officer "properly initiated [a] traffic stop" because the defendant's vehicle did not have a rear registration light. 782 N.E.2d at 280. The officer "did not smell marijuana in [the] defendant's vehicle" and "did not have any reason to suspect that [the] defendant's vehicle con-

tained a controlled substance." *Id.* Nevertheless, the officer requested a canine unit, which arrived "approximately 15 minutes after the initial traffic stop," but while the officer was still writing the traffic ticket. *Id.* On these facts, the Illinois Supreme Court affirmed the appellate court's suppression of the evidence, reasoning that (1) the officer impermissibly "broadened the scope of the traffic stop to include a drug investigation," *id.*, *see also id.* at 280-81, and (2) the "defendant's detention, considered in light of the scope and purpose of the traffic stop, was overly long," *id.* at 281. The Supreme Court's *Caballes* decision rejected *Cox*'s scope holding, as the Illinois Supreme Court expressly recognized in *People v. Bew*, 886 N.E.2d 1002, 1007-1008 (Ill. 2008) (noting that *Caballes* had overruled the holding of *Cox* that required articulable suspicion of narcotics activity to justify a dog sniff).

As the *Bew* Court recognized, *see id.*, *Cox*'s duration holding survived *Caballes*, but that portion of *Cox* stands only for the limited and unremarkable proposition that the "use of [a] dog and the subsequent discovery of contraband [a]re the product of an unconstitutional seizure" where the "dog sniff . . . occurred during an unreasonably prolonged traffic stop." *Caballes*, 543 U.S. at 407-08; *see also Bew*, 886 N.E.2d at 1008 ("[T]he Court in *Caballes* cited *Cox* for the limited proposition that a lawful seizure can become unlawful if it is unreasonably prolonged.").

And as explained by the Illinois Supreme Court, its holding that the traffic stop was unreasonably prolonged turned on the facts of the case before it:

> While we will not impose a rigid time limitation on the duration of a traffic stop, we are concerned with the duration of the traffic stop in the present case. We have examined the record and find that it is devoid of circumstances which would justify the length of the detention. Rather, the record leads us to conclude this was a routine traffic stop, which should have resulted in a correspondingly abbreviated detention. [The officer] should have issued a traffic citation or warning ticket to [the] defendant expeditiously. Had he done so, [the] defendant would have left the scene of the traffic stop prior to the arrival of the canine unit.

Cox, 782 N.E.2d at 280 (citations omitted).

But there is a stark difference between *Cox*'s fact pattern and the trespassing investigation at the heart of the instant matter. Here, Pressley and the two women provided inconsistent information material to the trespassing investigation. Rather than rashly arrest Pressley or blindly accept one account over another, the law enforcement officers diligently continued their trespassing investigation. The critical issue is not the identity of the officer requesting the drug detection canine—as suggested by Pressley, *see* Def.'s

Br. at 18—but the contours of the underlying investigation. A traffic stop for the absence of a rear registration light permits the officer to "perform some initial inquiries, check the driver's license, and conduct a speedy warrant check." *Cox*, 782 N.E.2d at 279. A trespassing investigation wherein law enforcement officers receive conflicting information about the defendant's presence in a public housing complex is more complicated and therefore necessitates a longer investigation and detention.

* * *

The use of the drug detection dog to sniff Pressley's car was constitutional in all respects. In view of the legitimate trespassing investigation, Norwalk police officers lawfully detained Pressley. Contrary to the district court's decision, *Illinois v. Caballes* holds that no reasonable, articulable suspicion of drug activity is required for the use of a drug detection dog. Pressley's limited detention remained justified at all times by the ongoing trespassing investigation. Accordingly, the district court committed reversible error in suppressing the firearm, cocaine base, and heroin recovered from Pressley's car on August 18, 2010.

II. Pressley's alternative arguments lack merit.

A. The dog's alert on the exterior of the car triggered probable cause to search the car.

Pressley raises several challenges to the drug detection dog's alert during the exterior check of the car. None of these challenges undermine the probable cause triggered by the alert.

It is well-established that a canine's positive alert during an exterior check of a vehicle gives rise to probable cause to search the vehicle. *See, e.g.*, *United States v. Pierce*, 622 F.3d 209, 213 (3d Cir. 2010) ("It is . . . well-established that, looking at the totality of the circumstances, a dog's positive alert while sniffing the exterior of the car provides an officer with the probable cause necessary to search the car without a warrant."); *United States v. Winters*, 600 F.3d 963, 967 (8th Cir.) ("[A]n alert or indication by a properly trained and reliable drug dog provides probable cause for the arrest and search of a person or for the search of a vehicle."), *cert. denied*, 131 S. Ct. 255 (2010); *United States v. Kelly*, 592 F.3d 586, 592 (4th Cir.) (finding not only that a dog's exterior alert triggers probable cause to search the passenger compartment of the car but also the trunk because "it was reasonable to conclude that the odor which the dog detected may have travelled from the trunk"), *cert. denied*, 130 S. Ct. 3374 (2010); *United States v. Parada*, 577 F.3d 1275, 1281-82 (10th

Cir. 2009) ("A trained narcotic dog's detection of the odor of an illegal substance emanating from a vehicle creates a 'fair probability' that there is contraband in that vehicle."), *cert. denied*, 130 S. Ct. 3321 (2010); *United States v. Tamari*, 454 F.3d 1259, 1265 (11th Cir. 2006) ("We have long recognized that probable cause arises when a drug-trained canine alerts to drugs." (internal quotation marks omitted)); *United States v. Washburn*, 383 F.3d 638, 643 (7th Cir. 2004) ("[W]e have held that a positive alert by a trained drug dog gives rise to probable cause to search a vehicle."); *United States v. Williams*, 69 F.3d 27, 28 (5th Cir. 1995) (per curiam) ("The fact that the dog alerted provided probable cause to search."); *United States v. Diaz*, 25 F.3d 392, 393-94 (6th Cir. 1994) ("A positive indication by a properly-trained dog is sufficient to establish probable cause for the presence of a controlled substance."); *United States v. McKreith*, 708 F. Supp. 2d 216, 220 (D. Conn. 2010) ("[A]n alert during an exterior walk-around provides probable cause for a search . . . ."); *United States v. Rivera*, No. 3:07cr285(EBB), 2008 WL 2229917, at *5 (D. Conn. May 28, 2008) ("After examining the exterior of the vehicle, the drug-sniffing dog alerted officers to the presence of narcotics. At this point, the officers had probable cause to conduct a full search of the vehicle and to continue to detain its occupant.").[5]

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[5] Pressley argues in the alternative that if a drug dog's alert triggers probable cause to search, then

Pressley criticizes the accuracy of the drug detection canine, the absence of any alert to the trunk of the vehicle (where the cocaine base and heroin ultimately were recovered), the absence of any alert during the interior check of the vehicle (where no controlled substances were recovered), and the possibility of an alternative source of the narcotics odor detected at the front license plate. These factors do not undermine the probable cause triggered by the dog's alert on the exterior of the car.

While upholding the constitutionality of dog sniffs, the majority opinion in *Caballes* acknowledged the possibility of "error rates" and "false positives" for canine sniffs. *Caballes*, 543 U.S. at

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the search must be restricted to the location of the alert. *See* Def.'s Br. at 37-38. This contention finds no support in the case law. *See, e.g.*, *United States v. Ross*, 456 U.S. 798, 825 (1982) ("If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."); *Kelly*, 592 F.3d at 592 (finding that a dog's exterior alert at the driver's door of a car provided probable cause to search the trunk because "it was reasonable to conclude that the odor which the dog detected may have travelled from the trunk, which is after all a logical place for drugs to be stored"). But even assuming such a restriction, the firearm in this case was recovered in the glove compartment, located near the front quarter panel on the passenger side of the vehicle where the dog had alerted. JA 186.

409. And although Justice Souter's dissent would have placed limitations on dog sniffs precisely because "[t]he infallible dog . . . is a creature of legal fiction," *id.* at 411, his position failed to attract a single supporting vote. Accordingly, the *Caballes* majority had no trouble upholding the use of drug detection canines where those dogs are "well-trained." *Id.* at 409.

Here, the district court found that the drug dog—Police Service Dog Rainor—was "trained, certified, and accredited." JA 186. The record evidence, including the testimony and exhibits regarding Rainor's training, certifications, and accuracy rate, fully supports this conclusion that he was well-trained and reliable. *See* JA 82-85, 90, 93-94, 98-99, 151-54. And Rainor's trainer, Officer Peterson, explained several factors that could affect the transfer of a narcotics odor, including the weather, wind, temperature, whether a vehicle is running, and whether a window is open. *See* JA 90-92, 99-100, 101-05. *See also Kelly*, 592 F.3d at 592 (after drug dog alerted on driver's side door, upholding search of trunk of car based on testimony by canine officer that odors often travel within a car). In short, on this record, Pressley cannot show that the district court's finding was clearly erroneous.

Pressley fears that upholding probable cause to search a vehicle based on a dog's exterior alert "would eviscerate" the Supreme Court's decision in *Arizona v. Gant*, 556 U.S. 332 (2009). Def.'s Br. at 37; *see also id.* at 35. This fear is un-

founded. *Gant* limited vehicle searches incident to arrest to situations where "the arrestee is within reaching distance to the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Gant*, 556 U.S. at 351. The government explicitly disavowed any reliance on the search incident to arrest exception in this case, *see* JA 172-73 n.1, and, in any event, *Gant* expressly preserved law enforcement's ability to conduct "a search of any area of the vehicle in which the evidence might be found" if "there is probable cause to believe a vehicle contains evidence of criminal activity," *Gant*, 556 U.S. at 347. Accordingly, *Gant* provides no support for Pressley's assorted challenges to the probable cause triggered by the dog's exterior alert.

In view of the evidence and findings regarding the training and accuracy of the drug detection dog and the relevant case law, Pressley's assorted challenges to the probable cause triggered by the dog's exterior alert all lack merit.[6]

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[6] Despite these assorted challenges, Pressley notes that "the police had the dog sniff alert as a basis to impound the vehicle and seek a warrant." Def.'s Br. at 39. This statement appears to concede that the dog's exterior alert triggered probable cause to search the vehicle—whether by way of a search warrant or otherwise.

B. The automobile exception justified the search of the car at the housing complex and at police headquarters.

Pressley contends next that "[o]nce the Norwalk Police impounded the car, it was not readily mobile, a requirement for an after the fact search of the vehicle under the Automobile Exception." Def.'s Br. at 39. This argument overlooks the precedent of this Court, clarifying that the automobile exception turns on "a vehicle's inherent mobility—not the probability that it might actually be set in motion." *United States v. Navas*, 597 F.3d 492, 498 (2d Cir.) (applying the automobile exception to a trailer unhitched from the cab where the suspects were arrested and the location of the trailer was secured by law enforcement), *cert. denied*, 131 S. Ct. 320 and 131 S. Ct. 330 (2010). Under the automobile exception, the police were under no obligation to seek a warrant to continue their investigative search of the vehicle after it was driven to police headquarters. *See California v. Acevedo*, 500 U.S. 565, 570 (1991) ("[I]f the police have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct either an immediate or a delayed search of the vehicle."); *Michigan v. Thomas*, 458 U.S. 259, 261 (1982) ("[W]hen police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody."). Accordingly, the au-

tomobile exception justified the search of the vehicle at the housing complex and at police headquarters.

C. The Norwalk Police Department's motor vehicle inventory policy provided an independent basis for the search of the car at police headquarters.

The district court found that two police officers "performed an inventory search pursuant to Norwalk Police Department's written motor vehicle inventory policy and prepared the required NPD motor vehicle inventory form." JA 187, *see also* JA 140-47. During this search, the officers "found 31.08 grams of crack cocaine, packaging material and nine envelopes of heroin in the 'trunk area' of the car." JA 187.

Disregarding these factual findings, Pressley baldly asserts that the "search may or may not have been in accordance with Norwalk Police Department motor vehicle inventory policy . . . ." *See* Def.'s Br. at 9. In the district court proceedings, Pressley argued that the motor vehicle inventory was pretextual, but he never claimed that it failed to comply with the written, standardized policy of the Norwalk Police Department or challenged the validity of that policy. Accordingly, Pressley waived any such arguments on appeal, *see Lauersen*, 648 F.3d at 115, and his bald assertion in his brief to this Court that the officers may not have complied with that policy is insufficient to demonstrate that

the district court's factual findings of compliance were clearly erroneous.

Moreover, Pressley alleges the motor vehicle inventory search was pretextual and conducted in bad faith because the officers did not obtain a search warrant. *See* Def.'s Br. at 38-39. This circular argument is to no avail. Motor vehicle inventory searches conducted pursuant to a standardized policy are not subject to the warrant requirement. *See United States v. Lopez*, 547 F.3d 364, 369-70 (2d Cir. 2008). The reports of Officers DePanfilis and Collins and the findings of the district court establish that the officers complied with the written, standardized procedures set forth in the Norwalk Police Department policies at Section 13.2.23 in conducting the motor vehicle inventory in this case. *See* JA 140-47, 187. Accordingly, there is no support for the defendant's accusations of pretext and bad faith, *see United States v. Thompson*, 29 F.3d 62, 65-66 (2d Cir. 1994), and the motor vehicle inventory provided an independent basis for the search of the vehicle at police headquarters.

D. The subjective intent of the Norwalk police officers is irrelevant to the Fourth Amendment analysis of their actions.

The law enforcement officers used the drug detection dog to investigate Pressley's role in drug trafficking activity, while concurrently conducting their trespassing investigation. Officer Suda admitted that when he called for the drug

dog, he was looking for evidence of drug activity—not evidence of trespassing—in and around the car. *See* JA 58-59. Indeed, the record establishes that the officers had received information related to Pressley's involvement in drug distribution in the housing complex prior to August 18, 2010. *See* JA 31-33, 77-78, 134, 148-49, 187-89. But the subjective intent of the officers to investigate drug activity—based on this information—is entirely consistent with their concurrent subjective intent to investigate trespassing, even though the district court ultimately disagreed with the officers' assessment that they had reasonable suspicion to investigate drug activity. And as discussed above in Section I, officers investigating non-drug activity concurrently may utilize a drug detection dog to investigate drug activity without reasonable suspicion of drug activity—indeed, even without a "modicum of suspicion" of drug activity. *See Caballes*, 543 U.S. at 407. Accordingly, the dual intent of the Norwalk police officers is entirely consistent with Pressley's Fourth Amendment rights.[7]

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[7] Pressley repeatedly questions why the Norwalk police officers did not seek a search warrant based on the information they had received about his drug trafficking activity. *See, e.g.*, Def.'s Br. at 9, 9 n.2, 10. Although this Court has recognized the constitutionality of anticipatory search warrants in certain circumstances, such as the delivery and acceptance of a package containing cocaine at a particular address, *see United States v. Becerra*, 97 F.3d 669, 671 (2d Cir. 1996) (citing *United States v. Garcia*, 882 F.2d

But even assuming *arguendo* that the trespassing investigation was purely pretextual—as Pressley repeatedly claims, *see* Def.'s Br. at 9, 37, 38, 39, 40—the officers' subjective intent is irrelevant to the Fourth Amendment analysis of their actions. *See Brigham City v. Stuart*, 547 U.S. 398, 404-05 (2006) (collecting cases); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *United States v. Klump*, 536 F.3d 113, 118 (2d Cir. 2008) ("[T]he Supreme Court has made clear that the subjective intent of government agents is irrelevant to determining whether a particular search was reasonable under the Fourth Amendment."); *United States v. Dhinsa*, 171 F.3d 721, 724-25 (2d Cir. 1998) ("[A]n officer's use of a traffic violation as a pretext to stop a car in order to obtain evidence for some more serious crime is of no constitutional significance."). Accordingly, Pressley's claims of pretext do not bear on the constitutionality of his brief detention and the vehicle search.

699, 702-04 (2d Cir. 1989)), such circumstances were not present in the instant case. Based on the information received—which the district court determined to fall short of the reasonable suspicion threshold, much less the probable cause standard for a search warrant—the officers could not know when Pressley next would engage in drug trafficking activity or what vehicle he would be using. Accordingly, the officers faced considerable practical and constitutional hurdles in obtaining a search warrant.

* * *

In sum, Pressley's alternative arguments in support of suppression lack merit. Accordingly, the district court committed reversible error in suppressing the firearm, cocaine base, and heroin recovered from Pressley's car on August 18, 2010.

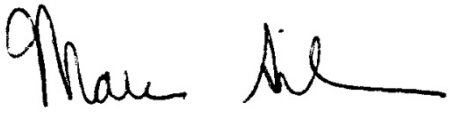
Conclusion

For the foregoing reasons, the judgment of the district court should be reversed.

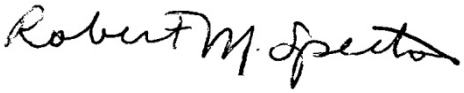
Dated: January 31, 2012

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



MARC H. SILVERMAN
ASSISTANT U.S. ATTORNEY

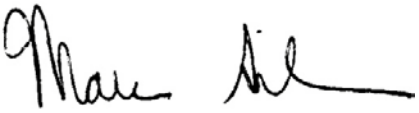


ROBERT M. SPECTOR
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 7,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 6,212 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.



MARC H. SILVERMAN
ASSISTANT U.S. ATTORNEY