

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Table of Contents

Table of Authorities.....	iii
Statement of Jurisdiction.....	vii
Statement of Issue Presented for Review.....	viii
Preliminary Statement.....	1
Statement of the Case.....	2
Statement of Facts and Proceedings	
Relevant to this Appeal.....	4
A. The search.....	4
B. The indictment and motion to suppress.....	8
C. The district court’s May 20, 2011 ruling.....	9
Summary of Argument.....	11
Argument.....	12
I. The district court erred in suppressing the evidence recovered from Pressley’s car on August 18, 2010.....	12
A. Standard of review.....	12
B. The law governing dog sniffs as set forth in <i>Illinois v. Caballes</i>	13

C. The district court failed to apply <i>Caballes</i>	18
D. The dog sniff in this case did not violate the Fourth Amendment.	19
1. The initial seizure of Pressley was lawful because the police had at least reasonable suspicion that Pressley was trespassing. . . .	19
2. The dog sniff did not unreasonably extend the lawful seizure of Pressley.	22
Conclusion.	28

Table of Authorities

Cases

PURSUANT TO “BLUE BOOK” RULE 10.7, THE GOVERNMENT’S CITATION OF CASES DOES NOT INCLUDE “CERTIORARI DENIED” DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

<i>Anderson v. City of Bessemer City</i> , 470 U.S. 564 (1985).....	13
<i>Arizona v. Johnson</i> , 129 S. Ct. 781 (2009).....	15, 23
<i>Illinois v. Caballes</i> , 543 U.S. 405 (2005).....	<i>passim</i>
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....	9, 18
<i>United States v. Bailey</i> , —F.3d —, 2011 WL 2623442 (2d Cir. July 6, 2011).	13
<i>United States v. Bell</i> , 555 F.3d 535 (6th Cir. 2009).	16
<i>United States v. Branch</i> , 537 F.3d 328 (4th Cir. 2008).	16
<i>United States v. Derverger</i> , 337 Fed. App’x 34 (2d Cir. 2009).	23

<i>United States v. Farrior</i> , 535 F.3d 210 (4th Cir. 2008).	24
<i>United States v. Figueroa</i> , Nos. 10-2050-cr and 10-2051-cr, 2011 WL 2040518 (2d Cir. May 26, 2011).	23
<i>United States v. Harrison</i> , 606 F.3d 42 (2d Cir. 2010) (per curiam).	15, 23, 25, 27
<i>United States v. Hayes</i> , 551 F.3d 138 (2d Cir. 2008).	16
<i>United States v. Hernandez</i> , 418 F.3d 1206 (11th Cir. 2005).	24
<i>United States v. Hester</i> , 589 F.3d 86 (2d Cir. 2009), <i>cert. denied</i> , 130 S. Ct. 2137 (2010).	23
<i>United States v. Jensen</i> , 425 F.3d 698 (9th Cir. 2005).	17
<i>United States v. Julius</i> , 610 F.3d 60 (2d Cir. 2010).	12
<i>United States v. Lucky</i> , 569 F.3d 101 (2d Cir. 2009), <i>cert. denied</i> , 130 S. Ct. 1878 (2010).	13

<i>United States v. Ludwig</i> , 641 F.3d 1243 (10th Cir. 2011), <i>pet'n for cert. filed</i> , No. 11-5399 (July 18, 2011).	17
<i>United States v. Padilla</i> , 548 F.3d 179 (2d Cir. 2008).	9
<i>United States v. Pierce</i> , 622 F.3d 209 (3d Cir. 2010).	16
<i>United States v. Place</i> , 462 U.S. 696 (1983).	14, 16
<i>United States v. Robinson</i> , 455 F.3d 832 (8th Cir. 2006).	24
<i>United States v. Rodriguez-Flores</i> , 249 Fed. App'x 317 (5th Cir. Sept. 11, 2007).	16
<i>United States v. Seals</i> , 987 F.2d 1102 (5th Cir. 1993).	16
<i>United States v. Steed</i> , 548 F.3d 961 (11th Cir. 2008).	17
<i>United States v. Suitt</i> , 569 F.3d 867 (8th Cir.), <i>cert. denied</i> , 130 S. Ct. 521 (2009).	17

<i>United States v. Taylor</i> , 596 F.3d 373 (7th Cir.), <i>cert. denied</i> , 130 S. Ct. 3485 (2010).....	17
<i>United States v. Turvin</i> , 517 F.3d 1097 (9th Cir. 2008).....	24

Statutes

18 U.S.C. § 3231.....	vii
18 U.S.C. § 3731.....	vii, 3
18 U.S.C. § 922.....	2, 3
21 U.S.C. § 841.....	2, 3

Rules

Fed. R. App. P. 4.....	vii
------------------------	-----

Regulations

28 C.F.R. § 0.20.....	vii
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Statement of Jurisdiction

The district court (Ellen Bree Burns, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court granted the defendant's motion to suppress in a ruling filed on May 20, 2011. Joint Appendix 7, 182-203 ("JA"). On May 23, 2011, the government filed a timely notice of interlocutory appeal pursuant to Fed. R. App. P. 4(b). JA7, 205.

This Court has jurisdiction over this government appeal pursuant to 18 U.S.C. § 3731. As required by that statute, the United States Attorney certified that this appeal is not taken for the purpose of delay and that the evidence suppressed is a substantial proof of a fact material to this prosecution. JA7. The Solicitor General has authorized this government appeal. *See* 28 C.F.R. § 0.20(b).

**Statement of Issue
Presented for Review**

Whether the Fourth Amendment requires reasonable suspicion of narcotics-related activity to justify a dog sniff during a lawful seizure of a person for trespass.

United States Court of Appeals

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UNITED STATES OF AMERICA,
Appellant,

-vs-

LEROY PRESSLEY,
Defendant-Appellee.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is an interlocutory appeal from the district court's order suppressing the firearm and narcotics that were found in defendant Leroy Pressley's car when he was detained upon suspicion of trespassing. The district court suppressed the firearm and drugs, finding that although Pressley's detention for trespassing was lawful, the dog sniff of his car was unlawful because the police lacked

reasonable suspicion that Pressley was engaged in narcotics trafficking.

The district court erred by failing to apply the Supreme Court's decision in *Illinois v. Caballes*, 543 U.S. 405 (2005), which held that the use of a drug detection canine does not require separate, articulable reasonable suspicion that a defendant is engaged in drug dealing and does not violate a defendant's Fourth Amendment rights provided that the police's use of the canine does not measurably extend the duration of an otherwise lawful investigative seizure.

Thus, as set forth below, the district court erred as a matter of law in granting Pressley's motion to suppress. The district court's ruling should be reversed.

Statement of the Case

On August 18, 2010, Pressley was arrested on various state charges related to trespassing, narcotics, and a firearm. JA133. On September 9, 2010, he was arrested pursuant to a federal criminal complaint. JA2-3. On September 14, 2010, a federal grand jury returned an Indictment charging Pressley in Count One with unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and in Count Two with possession with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). JA3.

On October 11, 2010, Pressley moved to suppress all of the evidence seized on August 18, 2010 and to dismiss the Indictment. JA4. On October 21, 2010, the government filed a memorandum in opposition to these motions. JA5.

On January 13, 2011, following the government's receipt of a laboratory report regarding the cocaine base seized on August 18, 2010, the grand jury returned a Superseding Indictment charging Pressley in Count One with unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and in Count Two with possession with intent to distribute 28 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). JA5, 9-10.

On February 3, 2011, the district court (Ellen Bree Burns, J.) held a suppression hearing. JA6. Post-hearing motion practice followed in February and March 2011. JA6. On May 20, 2011, the district court granted Pressley's motions to suppress the evidence and dismiss the Superseding Indictment. JA7, 182-203.

On May 23, 2011, the government moved for reconsideration of that portion of the district court's decision which dismissed the Superseding Indictment. JA7. The district court vacated the dismissal of the Superseding Indictment that same day. JA7, 204. Also on May 23, 2011, the government filed a notice of appeal. JA7, 205. On May 24, 2011, the government filed the Certification of the United States Attorney as required by 18 U.S.C. § 3731. JA7.

Pressley remains in custody pending the outcome of this appeal. JA7-8.

**Statement of Facts and Proceedings
Relevant to this Appeal**

In this appeal, the government challenges the district court's order suppressing the evidence seized from Pressley's car on August 18, 2010. For purposes of this appeal, with one exception noted below, the government does not challenge the factual findings of the district court as set forth in its May 20, 2011 ruling. *See* JA182-89.

A. The search

At approximately 7:30 p.m. on August 18, 2010, Norwalk Police Officer Mark Suda, who was assigned to the Norwalk Police Department's Special Services Unit and the Bureau of Alcohol, Tobacco, Firearms and Explosives Task Force, was driving in an unmarked police vehicle on routine patrol of "various known hot spots for drug activity in the area around the Roodner Court Housing Complex" in South Norwalk, Connecticut. JA183. Officer Suda was with four other police officers, all of whom were dressed in police raid gear and were members of the Special Services Unit. JA183.

The Roodner Court Housing Complex is "know[n] to be a high crime, open-air drug market for walk-up and drive-up narcotics sales" and had "recently been the site of numerous drug arrests, weapons arrests and violent altercations involving weapons." JA183. The police had

received numerous complaints from residents about drug dealing, loitering and trespassing in the complex, and “NO TRESPASSING” signs are posted throughout the complex. JA183. The Norwalk Housing Authority owns the complex and has a “no trespass policy that restricts access to residents and persons visiting or accompanying residents.” JA183.

While on patrol in the complex, Officer Suda saw a black Acura with tinted windows and black rims parked in a legal parking space between Building 21 and a playground. JA183. Officer Suda saw a man whom he knew as Calixto Figueroa working on the car’s front headlight, and saw Pressley sitting in the car’s driver’s seat. JA183. The car was running, “the driver’s side window was rolled down,” and “the hood of the car was open.” JA183-84 & n.2. Pressley was alone in the car. JA184.

When he saw Pressley, Officer Suda “immediately turned to the other officers” and said “that’s [Pressley] in the vehicle[;] [h]e’s not supposed to be here.” JA184 (quoting testimony). Officer Suda testified that Pressley had “been arrested prior, for criminal trespass in the complex, and he was also warned a few months prior, by me and fellow special services officers not to be in the complex, and he was issued a verbal warning, and he said he fully understood.” JA184 (quoting testimony). Officer Suda also noticed that Pressley’s car, which had been painted gray in the past, now was painted black. JA184.

When Pressley saw the police, he turned off the engine, got out of the car, and stood next to it. JA184. Officer Suda stopped his police vehicle, and all five officers walked up to Pressley's car. JA184-85. Officer Suda walked up to Pressley and started talking with him. JA185. He asked Pressley why he was in the complex, and Pressley replied that he was there visiting his cousin, Tanya Smeriglio, who was the owner of the Acura. JA185. Officer Suda asked Pressley where Smeriglio was, and Pressley said that she had gone to her house and pointed to the area of Building 19 or 20. JA185. None of the officers approached Figueroa, and he walked away. JA185.

At that point, Officer Suda conducted a patdown search of Pressley, which was "negative for weapons." JA185. Officer Suda asked for Pressley's consent to search the car, but Pressley refused, telling the officers that the car belonged to his cousin and that they should ask her for consent. JA185. "This led Officer Suda to call for a narcotic[s] detection canine unit to respond to the scene 'to perform a narcotics detection search of the vehicle.'"¹ JA185. Officer Suda also asked for additional marked units to be sent because "a crowd was beginning to gather around them." JA185.

¹ Officer Suda suspected that Pressley was engaged in drug dealing, but the district court found that the officers lacked reasonable suspicion to detain him on those grounds. JA194-202. Because the government does not challenge that portion of the district court's decision, the facts supporting Officer Suda's suspicions are omitted here.

The canine unit took about ten minutes to arrive. JA185. During this time, the crowd grew larger and became more agitated. JA185. Pressley also became agitated, cursed at Officer Suda, and asked him why he was “doing this.” JA185-86. Officer Suda responded by advising ““Pressley of the information they had received and . . . that he was trespassing.”” JA186. Also, during the ten minutes, Smeriglio and Tammy Morales (another cousin of Pressley), arrived at the scene and were interviewed by the officers. JA186. Smeriglio told the officers that she did not live in the complex, but Morales said that she lived in Building 21. JA186. “The women said Pressley was there to visit them.”² JA186.

When the canine unit arrived, comprised of Officer David Peterson and Rainor, his “trained, certified and accredited police service dog,” Officer Peterson asked Pressley for consent to search the car. JA186. When Pressley refused, Officer Peterson led Rainor around the outside of the car. JA186. Rainor alerted to the odor of narcotics at the front passenger door area and the front license plate. JA186. Officer Peterson then led Rainor inside the car, but Rainor did not make any additional positive alerts for narcotics. JA186.

Based on Rainor’s positive alerts for narcotics, Officer Suda entered the car and located a large sum of cash, in small denominations, in the center console. JA186. He then opened the glove compartment and found a loaded

² As explained below, this factual finding is clearly erroneous.

Smith and Wesson .38 caliber revolver. JA186. After this seizure, Officer Suda ordered other officers to arrest Pressley, at which time Pressley was handcuffed and placed into a marked police car. JA186.

At that point, because the crowd was becoming loud and “agitated” and “because there had been several arrests at the Complex in the prior weeks during which the crowd almost ‘turned on’ the police,” Officer Suda decided to have the Acura driven to the police station to conduct a full search. JA187. He also had the vehicle seized “for asset forfeiture reasons.” JA187. During a full inventory search conducted at the police station in accordance with written department policy, the police found approximately 31.08 grams of crack cocaine, packaging material, and nine envelopes of heroin in the trunk of the car. JA187.

B. The indictment and motion to suppress

On September 14, 2010, a federal grand jury indicted Pressley for (1) unlawful possession of a firearm by a convicted felon and (2) possession with intent to distribute cocaine base. JA3. The grand jury returned a Superseding Indictment on January 13, 2011. JA5, 9-10.

On October 11, 2010, Pressley moved to suppress the gun and drugs found in his car, and to dismiss the Indictment, arguing that the contraband was discovered during a warrantless search which was not supported by probable cause. JA4.

C. The district court's May 20, 2011 ruling

On May 20, 2011, the district court issued a written ruling which granted Pressley's motion to suppress the evidence found in his car. JA7, 182-203. The court concluded that although the law enforcement officers had a reasonable suspicion that Pressley was trespassing in the complex, they lacked a reasonable suspicion to believe that he was engaged in narcotics trafficking and therefore the dog sniff, which extended the scope of the investigative seizure for suspected trespassing, violated Pressley's Fourth Amendment rights. JA195.

In its ruling, the court characterized the key issue as "whether the officers had reasonable suspicion to warrant the scope and duration of the detention and investigation on suspicion of drug trafficking." JA191. The court held that the initial consensual encounter between Pressley and the police became a *Terry* stop³ when the officers frisked the defendant for weapons. JA192. It then analyzed whether there was "[r]easonable [s]uspicion [s]upporting the [c]anine [s]niff." JA194.

In answering this question, the court first held that "[c]onsidering the circumstances of the encounter as a

³ "Under *Terry*[v. *Ohio*, 392 U.S. 1 (1968)], a police officer may briefly detain an individual for questioning if the officer has a reasonable suspicion that the individual is, has been, or is about to be engaged in criminal activity." *United States v. Padilla*, 548 F.3d 179, 186 (2d Cir. 2008) (quotations omitted).

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 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.” JA195 (footnote omitted).

The court next concluded, however, that the officers lacked reasonable suspicion to expand the lawful detention to an investigation of the defendant for drug dealing:

The officers have simply not provided specific, articulable and objective facts to justify their detention and investigation of Pressley for narcotics. And because the scope of that 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 detained him and conducted that investigation. Moreover, there is nothing in the record showing that, during the initial questioning of Pressley regarding his suspected trespass, the officers developed a reasonable, articulable suspicion that he was involved in drug trafficking that would have warranted expanding the scope and duration of the stop.

JA196 (internal citations omitted). The remaining portion of the court’s ruling was dedicated to a discussion of why

the evidence offered at the suppression hearing was insufficient to establish a reasonable suspicion that Pressley was dealing drugs prior to the canine sniff which led to the search of his car. JA196-202.

The district court's May 20, 2011 ruling not only suppressed the evidence which formed the basis for the charges against Pressley, but also dismissed the Superseding Indictment. JA7, 203. On May 23, 2011, the government moved for reconsideration of the dismissal of the Superseding Indictment. JA7. On the same day, the district court entered an order vacating that portion of its May 20, 2011 ruling which dismissed the Superseding Indictment. JA7, 204. Pressley, who had been released from custody after dismissal of the Superseding Indictment, was promptly returned to custody where he remains today. JA7-8.

Summary of Argument

The district court erred in granting Pressley's motion to suppress the firearm, cocaine base and other evidence seized from his car on August 18, 2010 because it failed to apply – or even cite – the Supreme Court's decision in *Illinois v. Caballes*, 543 U.S. 405 (2005). In that case, the Supreme Court held that the use of a drug detection canine does not require separate, articulable reasonable suspicion that a defendant is engaged in drug dealing and does not violate a defendant's Fourth Amendment rights provided that the police's use of the canine does not measurably extend the duration of an otherwise lawful investigative detention.

Here, the initial seizure of Pressley was lawful because the police had at least reasonable suspicion, if not also probable cause, to detain him on suspicion that he was trespassing. Moreover, the dog sniff did not measurably extend the lawful seizure. Accordingly, the dog sniff was a non-event under the Fourth Amendment and the Court should reverse the district court's suppression of the firearm and cocaine base seized on August 18, 2010.

Argument

I. The district court erred in suppressing the evidence recovered from Pressley's car on August 18, 2010.

The district court did not discuss – or even cite – the controlling Supreme Court precedent on the question of dog sniffs: *Illinois v. Caballes*, 543 U.S. 405 (2005). See JA161-62 (Government's Post-Hearing Memorandum in Opposition); JA176-77 (Government's Post-Hearing Sur-Reply in Opposition). Accordingly, the district court failed to apply the governing standard for dog sniffs and erred as a matter of law in suppressing the firearm and cocaine base recovered from Pressley's car on August 18, 2010.

A. Standard of review

“When evaluating a district court's grant of a motion to suppress evidence,” this Court reviews the district court's “findings of fact for clear error, considering them in the light most favorable to the government,” *United*

States v. Julius, 610 F.3d 60, 64 (2d Cir. 2010), and reviews questions of law and mixed questions of law and fact *de novo*, *id.*; *United States v. Lucky*, 569 F.3d 101, 105-106 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1878 (2010). “A finding is clearly erroneous when ‘although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.’” *United States v. Bailey*, — F.3d —, 2011 WL 2623442, at *4 (2d Cir. July 6, 2011) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)).

B. The law governing dog sniffs as set forth in *Illinois v. Caballes*.

In *Caballes*, the Supreme Court considered a “narrow” question: “Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.” 543 U.S. at 407 (quoting cert. petition). The Court assumed “that the officer conducting the dog sniff had no information about respondent except that he had been stopped for speeding” and therefore “omitted any reference to facts about respondent that might have triggered a modicum of suspicion.” *Id.* With this caveat, the Court summarized the relevant facts as follows:

Illinois State Trooper Daniel Gillette stopped respondent for speeding on an interstate highway. When Gillette radioed the police dispatcher to report the stop, a second trooper, Craig Graham, a member of the Illinois State Police Drug

Interdiction Team, overheard the transmission and immediately headed for the scene with his narcotics-detection dog. When they arrived, respondent's car was on the shoulder of the road and respondent was in Gillette's vehicle. While Gillette was in the process of writing a warning ticket, Graham walked his dog around respondent's car. The dog alerted at the trunk. Based on that alert, the officers searched the trunk, found marijuana, and arrested respondent. The entire incident lasted less than 10 minutes.

Id. at 406.

On these facts, the Illinois Supreme Court concluded that “the use of the dog converted the citizen-police encounter from a lawful traffic stop into a drug investigation, and because the shift in purpose was not supported by any reasonable suspicion that respondent possessed narcotics, it was unlawful.” *Id.* at 408 (describing lower court opinion).

The Supreme Court disagreed, holding that “conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not.” *Id.* A dog sniff “reveals no information other than the location of a substance that no individual has any right to possess,” *id.* at 410, and therefore “is not a search subject to the Fourth Amendment,” *id.* at 408; *see also United States v. Place*,

462 U.S. 696, 707 (1983) (holding that a canine sniff of luggage in a public place is not a search under the Fourth Amendment). In short, a dog sniff conducted during a lawful stop that reveals nothing more than the location of contraband does not violate the Fourth Amendment.

The Supreme Court cautioned, however, that “a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution.” *Caballes*, 543 U.S. at 407. Put another way, “[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” *Id.*; see also *Arizona v. Johnson*, 129 S. Ct. 781, 788 (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.”); cf. *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”). But where “the duration of the stop . . . [is] entirely justified by the traffic offense and the ordinary inquiries incident to such a stop,” *Caballes*, 543 U.S. at 408, a dog sniff performed during that stop “does not violate the Fourth Amendment,” *id.* at 410. Accordingly, a dog sniff is a non-event under the Fourth Amendment and may be performed

during the course of any lawful seizure so long as the seizure is not unreasonably prolonged.

The Circuit Courts of Appeals to have considered this issue have all followed the holding of *Caballes* and *Place* that a dog sniff itself does not implicate the Fourth Amendment. *See, e.g., United States v. Hayes*, 551 F.3d 138, 143-45 (2d Cir. 2008) (reasoning that a dog sniff is not a Fourth Amendment search unless it violates “the strong expectation of privacy in the sanctity of one’s home,” such as a sniff “at the door of an apartment”); *United States v. Pierce*, 622 F.3d 209, 213 (3d Cir. 2010) (“Consistently the Supreme Court has held that an *exterior* canine sniff of a car during a lawful traffic stop does *not* amount to a ‘search’ under the Fourth Amendment. The federal courts have followed suit.”) (emphasis in original and citations omitted); *United States v. Branch*, 537 F.3d 328, 335-36 (4th Cir. 2008) (“[A] dog sniff is not a search within the meaning of the Fourth Amendment, and it therefore requires no additional justification.”); *United States v. Rodriguez-Flores*, 249 Fed. App’x 317, 323 (5th Cir. Sept. 11, 2007) (per curiam) (“The dog sniff is itself not a search within the meaning of the Fourth Amendment. Thus the sniff performed on [the defendant’s] vehicle while he was lawfully detained did not implicate the Fourth Amendment.”) (citation omitted); *United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir. 1993) (holding in the pre-*Caballes* context that “[a] dog ‘sniff’ is not a search. Furthermore, the officers did not need reasonable suspicion as a prerequisite to the dog sniff.”) (citations omitted); *United States v. Bell*, 555 F.3d 535, 539 (6th Cir. 2009) (“The Fourth Amendment does not require

reasonable suspicion to justify using a drug-detection dog as long as the traffic stop and detention are not unlawful or improperly extended.”); *United States v. Taylor*, 596 F.3d 373, 376-77 (7th Cir.) (“It is well-established, however, that the use of a drug-sniffing canine in the course of a traffic stop does not constitute a search, and therefore does not in itself violate the Fourth Amendment, although it may impact the determination of a whether a seizure is reasonable if the use of the dog causes a delay.”), *cert. denied*, 130 S. Ct. 3485 (2010); *United States v. Suitt*, 569 F.3d 867, 870 (8th Cir.) (“Dog sniffs of the exterior of a vehicle are not searches under the Fourth Amendment.”), *cert. denied*, 130 S. Ct. 521 (2009); *United States v. Jensen*, 425 F.3d 698, 706 n.2 (9th Cir. 2005) (noting that the “use of a narcotics-detection dog does not itself constitute a search so as to implicate Fourth Amendment concerns”); *United States v. Ludwig*, 641 F.3d 1243, 1250 (10th Cir. 2011) (“It is well settled that a drug dog’s sniff of the outside of a car is not itself a search for Fourth Amendment purposes and so doesn’t require a showing of probable cause to justify it.”), *pet’n for cert. filed*, No. 11-5399 (July 18, 2011); *United States v. Steed*, 548 F.3d 961, 974 n.10 (11th Cir. 2008) (“As long as [a law enforcement officer] was authorized to conduct the administrative inspection, no level of suspicion was required for him to request the canine unit during the course of that inspection.”).

C. The district court failed to apply *Caballes*.

Here, rather than following *Caballes*, the district court found that the dog sniff violated the Fourth Amendment because the dog sniff exceeded the “scope” of the trespassing investigation. JA195-96. Specifically, the district court relied on the principle that in the context of a stop under *Terry v. Ohio*, 392 U.S. 1 (1968), “the stop must be reasonably related to the circumstances that justified the detention in the first place.” JA193. The district court reasoned that the canine sniff was aimed at the detection of narcotics and therefore “exceeded the bounds of reasonableness demanded by the Fourth Amendment” where the officers only had reasonable suspicion of trespassing. JA195.

But the Supreme Court rejected this “scope” limitation for dog sniffs in *Caballes*. Although Justices Ginsburg and Souter would have held that the expansion of a traffic stop into a drug investigation through the use of a drug dog impermissibly expanded the scope of the investigation, *Caballes*, 543 U.S. at 420-21 (Ginsburg, J., dissenting); *id.* at 411 n.1 (Souter, J., dissenting), that view failed to persuade a majority of the Justices. Accordingly, the Supreme Court rejected the rationale relied on by the district court. Indeed, the majority reasoned that a dog sniff is “not a search subject to the Fourth Amendment,” *Caballes*, 543 U.S. at 408, and therefore does not unconstitutionally alter the scope of a lawful investigatory seizure for suspected criminal activity unrelated to narcotics. In other words, in the context of dog sniffs, the

scope limitation espoused by the district court did not survive *Caballes*.

D. The dog sniff in this case did not violate the Fourth Amendment.

As set forth above, under *Caballes*, a dog sniff is not a search under the Fourth Amendment. Accordingly, the Fourth Amendment analysis of a dog sniff conducted during a seizure focuses on only two inquiries: (1) whether the initial seizure was lawful and (2) whether the dog sniff unreasonably prolonged that seizure.

1. The initial seizure of Pressley was lawful because the police had at least reasonable suspicion that Pressley was trespassing.

In this case, although the district court did not rule on the government’s argument that the police had probable cause to believe that Pressley was trespassing,⁴ the court found that the police officers had reasonable suspicion to detain him on suspicion of trespassing. Specifically, the district court concluded that “[c]onsidering the circumstances of the encounter as a whole and viewing the

⁴ One footnote in the district court’s ruling suggests that it misunderstood the government’s argument to be that the police had authority to search Pressley’s car as a search incident to a lawful arrest. *See* JA190-91 n.5. The government never made this argument and, in fact, explicitly renounced any argument based on a search-incident-to-arrest theory. *See* JA172-73 n.1.

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 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.” JA195 (footnote omitted).

The district court’s conclusion that the officers had reasonable suspicion was well-founded. Indeed, the evidence cited by the district court established not only reasonable suspicion, but also probable cause:

There are “No Trespassing” signs posted throughout the complex and an individual is considered to be trespassing in Roodner Court if he is present in the complex without the permission and presence of a resident. JA28, 183. Moreover, as set forth in Officer Suda’s testimony and his August 18, 2010 incident report, admitted as a full exhibit at the suppression hearing, Pressley had been convicted of First Degree Criminal Trespass in Roodner Court in February 2009 and had been issued a verbal warning for trespass in Roodner Court in May 2010. JA28, 134, 184, 195.

When the police first saw Pressley in Roodner Court on August 18, 2010, he was not accompanied by any resident. *See, e.g.*, JA185. Officer Suda asked Pressley about his presence in the complex, and he said that he was visiting Tanya Smeriglio, his cousin. JA30, 185. Officer Suda asked Pressley where Smeriglio lived, and Pressley pointed to the area of Building 19 or 20. JA30, 185. But

Smeriglio was not with Pressley, and as Officer Suda's testimony and the police reports made clear, Smeriglio was not even a resident of Roodner Court. JA35, 135, 156, 186.

To be sure, Morales – another cousin of Pressley who arrived on the scene – claimed to be a resident of Roodner Court. JA156, 186. Her arrival, however, did not undermine the officers' reasonable suspicion that Pressley was trespassing for three reasons. First, Pressley himself never mentioned Morales to the officers in justifying his presence in the complex.⁵ JA56, 185. Second, even

⁵ The district court found that “[t]he women said Pressley was there to visit them[,]” JA186, but this finding was clearly erroneous, at least with respect to Morales. There was *no* evidence in the record that Morales told law enforcement officers that Pressley was visiting her. Officer Suda testified that Smeriglio arrived at the scene and told officers that she did not live in the complex. JA35. Officer Suda later described Smeriglio as “[s]upposedly . . . the person that Mr. Pressley was visiting, or the supposed resident of the complex that he was visiting.” JA49. Although there was evidence that *Smeriglio* told Officer Jean Maxime Sixto that Pressley was there to visit her, she did not live in the complex. JA156. With respect to Morales, a resident of the complex, there was no evidence that she told the officers that Pressley was there to visit her. Defense counsel attempted to elicit testimony about Morales from Officer Collins, but Officer Collins indicated, unequivocally, that his only role was to obtain the identification and address information from Smeriglio and Morales and that it was Officer Sixto who had interviewed them. JA114-15; *see also* JA145.

(continued...)

assuming that Pressley was visiting Morales with her knowledge and permission, she was not present with him at the time of his seizure. JA183-86. Third, the police were still interviewing Morales to learn more about the situation when the firearm was recovered and Pressley was arrested. JA156 (police report noting that interview of Smeriglio and Morales was ongoing when Officer Suda found weapon in the car).

Accordingly, the facts in the record support the district court's conclusion that the police had at least reasonable suspicion to believe that Pressley was committing the crime of First Degree Criminal Trespass, in violation of Connecticut General Statutes § 53a-107. The initial seizure of Pressley, therefore, was lawful.

2. The dog sniff did not unreasonably extend the lawful seizure of Pressley.

Pressley never argued below – and the district court never found – that the duration of the seizure was unreasonably extended by the dog sniff. There was neither a finding by the district court nor even an allegation by

⁵ (...continued)

Officer Collins was insistent that he was not present for the interview, that he had not spoken to the women, and that he did not know what they had told Officer Sixto. Officer Sixto's report confirmed that Morales approached the officers, but said absolutely nothing about any information provided by her other than her address and her status as Pressley's cousin. JA156.

Pressley that law enforcement officers delayed or extended the trespassing investigation to accommodate the drug dog's arrival and the dog sniff. On this record, then, any challenge to the duration of the seizure in this Court was arguably waived. *See United States v. Hester*, 589 F.3d 86, 94 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2137 (2010). But even if the argument was not waived, the seizure here was not unreasonably extended by the dog sniff.

“[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. But as the Supreme Court has recently explained, an officer's inquiries into matters unrelated to the stop do not make it unlawful “so long as those inquiries do not measurably extend the duration of the stop.” *Johnson*, 129 S. Ct. 788; *see also Harrison*, 606 F.3d at 45.

In this context, the Constitution merely requires that the entire process be “reasonable.” *Harrison*, 606 F.3d at 45. Thus, in *Harrison*, this Court held that five to six minutes of additional questioning regarding drug trafficking during a lawful traffic stop did not “measurably extend” the duration of the stop.⁶ *Id.* In reaching this

⁶ *See also United States v. Derverger*, 337 Fed. App'x 34, 36 (2d Cir. 2009) (summary order) (concluding that “five minutes of questioning did not significantly extend the time [the defendant] was detained” for a seat-belt infraction); *United States v. Figueroa*, Nos. 10-2050-cr and 10-2051-cr, 2011 WL (continued...)

holding, the Court cited with approval opinions tolerating fourteen and seventeen minutes of questioning unrelated to the purpose of the lawful stops. *See id.* (citing *United States v. Turvin*, 517 F.3d 1097, 1103-1104 (9th Cir. 2008) (fourteen minutes) and *United States v. Hernandez*, 418 F.3d 1206, 1212 n.7 (11th Cir. 2005) (seventeen minutes)); *see also 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”).

Put another way, the mere extension of a lawful seizure for questioning or investigation unrelated to the purpose of the seizure does not invalidate the seizure; it is only when that questioning or investigation “measurably extends” the

⁶ (...continued)
2040518, at *2 (2d Cir. May 26, 2011) (summary order) (considering the overall length of the detention – similar to the length in this case – and finding that “the duration of the stop did not give rise to a constitutional violation” where the stop for speeding “took less than ten minutes” in which the law enforcement officers “took no action improperly to extend the length of the stop”).

original seizure that the Fourth Amendment is violated. *Harrison*, 606 F.3d at 45. Here, the facts as found by the district court and as revealed in the undisputed record below show that the dog sniff did not unreasonably extend the lawful seizure.

The record shows, to the contrary, that the dog sniff occurred during the police investigation of Pressley for trespassing. Although the entire duration of Pressley's detention is unclear, JA186, Officer Suda called for the canine unit shortly after encountering Pressley outside his car and failing to obtain his consent to search the car, JA185; *see also* JA33-34, 135. Moreover, the officers waited only "approximately ten minutes" for the canine unit to arrive, JA34, 185, and the dog began its exterior check of the car immediately after the officers confirmed again that Pressley did not consent to an interior check of the car, JA34-36, 135, 186.

The undisputed record further shows that during this short interval of time, the police were still investigating Pressley for trespassing. Indeed, for at least part of this time, the police were questioning Pressley's cousins (Smeriglio and Morales) to confirm the reason Pressley gave for being in the complex. The record shows that Smeriglio and Morales arrived on the scene and were interviewed by Officer Sixto *after* Officer Suda called for the canine unit. JA185-86, 190 n.5. And Officer Sixto's interview of the two women was ongoing when the firearm was recovered and therefore when the canine alerted to the presence of drugs, *see* JA156 ("As I was interviewing Smeriglio and Morales, Off. Suda informed

me that a gun was found in the vehicle.”). Finally, Officer Suda testified without contradiction at the suppression hearing that he had not completed his field interview of Pressley at the time Pressley was arrested. JA57 (“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.”). In other words, the police called for and completed the dog sniff of the car *before* they finished their inquiry into the trespassing charge.

But even if there were some argument that the police completed their trespassing investigation before the drug dog arrived,⁷ any delay in awaiting the dog did not measurably extend Pressley’s seizure. The court found that the canine arrived within ten minutes of Officer Suda’s request, and that the dog alerted on the car soon after his arrival. Accordingly, any delay attributable solely to waiting for the drug dog could have been only a matter of minutes. This type of delay – if it even existed – is

⁷ One could argue, for example, that if Pressley’s cousins told the officers that Pressley was there to see them, *see* JA186, those statements would have dispelled the officers’ reasonable suspicion that Pressley was trespassing. As explained above, *see supra* at 21-22 n.5, this factual finding was clearly erroneous. But even taking this fact as given, it does not help Pressley. Even if both women told the police that Pressley was there to visit them, they were in the process of making these statements when the drug dog alerted on the car. And in any event, even if Pressley was there to meet the women, he was still trespassing because he was not with them at the time of his seizure.

comparable to delays approved as reasonable in other cases.

In *Harrison*, for example, a police officer stopped a car because “a license plate light was out.” 606 F.3d at 44. The officer testified that he had all the information he needed to issue a traffic ticket before he approached the car and engaged the passengers in approximately five to six minutes of conversation about their “comings and goings.” *Id.* at 45. During this conversation, the police saw a marijuana cigarette inside the car, and after ordering all passengers out of the car, found a gun in the car as well. *Id.* at 44. One of the passengers, Harrison, argued that the five to six minute delay after the police gathered the information necessary to issue the traffic ticket unreasonably delayed the seizure, but this Court disagreed, holding that in this context, a delay of five to six minutes was reasonable. *Id.* (“Longer intervals than five to six minutes have been deemed tolerable.”).

Here, as in *Harrison*, any delay between the completion of the trespassing investigation and the completion of the dog sniff – if any such delay existed – could not have been more than a few minutes. And, thus, just as in *Harrison*, to the extent Pressley was detained beyond the time necessary to complete the trespassing investigation, that delay can hardly be classified as unreasonable.

In sum, there is no basis for concluding that the dog sniff “measurably extended” the trespassing investigation.

Conclusion

For the foregoing reasons, the district court's decision granting Pressley's motion to suppress the evidence seized from his car on August 18, 2010 should be reversed.

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Respectfully submitted,

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