IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 9/10/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

STATE OF ARIZONA,	)	No. 1 CA-CR 12-0632
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ZAID ABDUL WAKIL,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Coconino County

Cause No. S0300CR201100530

The Honorable Dan R. Slayton, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
and Alice Jones, Assistant Attorney General
Attorneys for Appellee

Law Offices of Lee Phillips, P.C.
By Lee Phillips — Flagstaff
Attorneys for Appellant

K E S S L E R, Presiding Judge

¶1 Zaid Abdul Wakil was convicted of count 1, transportation of narcotic drugs for sale, and count 2, possession of the same. Wakil argues that the superior court

erred by denying his motions to suppress because his detention and the search of his vehicle were unlawful. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 McMains is a canine unit officer with the Arizona Department of Public Safety ("DPS"). In July 2009, McMains was on patrol when Wakil drove by in a white BMW. McMains stopped him because the BMW did not have a license plate and it had an object hanging from the front windshield.[1] McMains's patrol car was equipped with a video camera that recorded video and audio of the entire stop.

I. The stop

¶3 McMains told Wakil he was being stopped for a license plate violation and asked for Wakil's license, registration, and proof of insurance.[2] As a part of his normal routine, McMains asked Wakil to meet him at his patrol car.

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[1] McMains had information that a man named Wakil was believed to be in a car headed eastbound on the I-40 near Flagstaff and that recently Wakil had been arrested for cocaine by another officer in the area. McMains was also informed that the car police believed Wakil had contact with was a white BMW that did not have a license plate. Before stopping Wakil, however, McMains was told that police lost track of the cars and he could disregard the information and go home.

[2] The documentation that Wakil provided ultimately identified him as the driver, and showed that the BMW had been purchased the previous day.

¶4 McMains confirmed that Wakil bought the car in California the previous day. McMains explained that in Arizona and other states, a new car usually comes with a temporary license plate. He also informed Wakil that in Arizona, a car cannot have anything attached to the windshield that blocks the view of the road. McMains told Wakil that he was going to issue a warning and asked Wakil to take down the radar detector attached to the windshield.

¶5 While McMains was completing the warning document he began conversing with Wakil about Wakil's North Carolina driver's license and California car registration for the new BMW. The two men discussed where Wakil bought the car in California the previous day, what he was doing in California, how he got to California, and whether it was cheaper to buy vehicles in California. The two men also discussed Wakil's occupation, whether he ever lived in California, where he currently lived, how long he stayed in California, and they joked about the BMW and how Wakil named his company. They also discussed the designations on Wakil's license. The above conversations lasted approximately seven minutes.

¶6 Officer McFarland then arrived. The three men discussed other aspects about the BMW, the purchase of the BMW, Wakil's business, and the "plate" number McMains should use to complete the warning and repair order. These conversations

lasted about four more minutes. While McMains was communicating with dispatch and completing the warning Officer McFarland talked to Wakil for a few more minutes. The dispatcher warned that Wakil was believed to be armed and dangerous.

¶7 McMains then handed Wakil his documents and the warning and told Wakil it is "just a warning." He asked Wakil to sign the warning, which Wakil did, and then McMains again stated it was "just a warning, no court, no fine, nothing like that."

II. The completion of the stop and continued encounter

¶8 McMains did not say anything for approximately a second and Wakil did not move away from the patrol car when McMains said, "Let me ask you another question," and then proceeded to make a statement that there are problems with people transporting drugs and weapons across the country using the I-40. McMains asked Wakil if he was doing anything like that. Wakil responded, "no." McMains then asked Wakil if he had marijuana, cocaine, methamphetamine, heroin, or large bills over $10,000. Wakil told him no and that he had $3,300 in cash. McMains then asked and Wakil agreed that McMains could search the car.

¶9 In response to further questions, Wakil told the officers that he had a backpack and boxes in the trunk and that if the officers used drug detection dogs, there was nothing in

the car which would cause them to alert. Wakil also told the officers there were safes in the boxes, but he was not sure what was in the safes except that they were personal items that came in the mail to his California office. When McFarland said they would like him to show them the boxes, Wakil began to approach the vehicle but the officers then presented him with a consent to search form. The form stated that consent is given "to search my vehicle and any of its contents under my control." It also stated: "I can refuse to allow my vehicle to be searched," "I can withdraw my consent to search at any time," and "[a]ny evidence found during this search can be used against me in court." Wakil signed the form.

¶10 Sergeant Hutton then arrived. McFarland asked Wakil what he thought was in the boxes and Wakil responded "personal stuff." Instead of having Wakil go near the car, McFarland told Wakil that for safety, he would take the boxes out and asked Wakil if that was okay. Wakil responded, "yes."

III. The first dog sniff

¶11 McMains's drug detection dog, Pete, who began working with McMains earlier that year, was selected to sniff the car for drugs. Pete alerted at the driver's side door handle, but not to any other area of the car. McMains interpreted this as a valid alert of the presence of a drug odor that Pete is trained

to detect.[3] McMains was concerned that Pete might damage the brand new BMW, so he quickly pulled Pete off of the door and told him, "good boy," multiple times.

¶12 McMains and Pete went around the car again counter clockwise. Pete did not show interest or alert to the trunk area. McMains concluded that Pete's valid alert to the driver's door on the first trip around the car gave him probable cause to search the entire car including the locked boxes in the trunk.

IV. The second dog sniff

¶13 McMains told McFarland that Pete alerted and that they could search the car. McFarland suggested that Pete run around the boxes in the trunk, and he removed the boxes from the trunk and set them between the BMW and McMains's patrol car, but did not let the boxes sit outside for at least twenty minutes, as they practice in training, so any odors could permeate the air around the boxes. Pete sniffed the inside of the trunk and the boxes. He did not alert. Pete was rewarded for his search with a toy and placed in the backseat of the patrol car.[4]

¶14 McFarland examined the boxes and in response to a question, Wakil said he would not consent to opening the boxes. The officers then informed Wakil that because Pete alerted, they

[3] Pete is trained to detect four odors: marijuana, cocaine, heroin, and methamphetamine.

[4] Pete is trained to get a toy after a search whether he alerts or not.

had probable cause to search the car. Wakil stated that he did not have a key or a way to open the safes. The officers then requested that Wakil give back the documents in his hand, and place his hands behind his back and handcuffed him.

V. The warrant

¶15 Detective Ernst, Detective Perkins, and Sergeant Livingston arrived at the scene after hearing from dispatch that McMains reported a positive canine alert. McMains told them about the stop, Wakil's nervousness, the consent to search, and Pete's alert. McMains did not tell them that there was a second deployment during which Pete failed to alert on the trunk and boxes.

¶16 Ernst, the lead detective on the case, testified that because they had probable cause to search the entire car based on Pete's alert, a search warrant was not needed. However, Ernst decided to get a warrant because of the potential danger involved in opening the boxes, and because he was being especially cautious to ensure the search was lawful. Ernst drafted the warrant affidavit and Perkins presented it to the judge.[5] However, because Ernst and Perkins were not informed about Pete's search of the boxes and his failure to alert, those facts were not included in the affidavit.

[5] Judge Slayton signed the warrant and later presided over the suppression hearings. This fact did not escape the attention of the parties, but neither party objected.

¶17 The affidavit stated that McMains observed several indicators consistent with criminal activity, Pete alerted to the car door, he found boxes in the trunk and opened one that had a safe inside, Wakil said each box had a safe inside filled with "commodities," Wakil refused permission to open the safes, said he did not have the keys, and requested that the boxes be placed back in the trunk.[6]

¶18 Once the bomb squad confirmed the boxes could be safely opened and the locksmith drilled holes to open them, bags containing what was later determined to be 44 pounds of cocaine were found. One usable print was located on one of the bags of cocaine that matched Wakil's right thumbprint.

VI. Motions to suppress

¶19 Wakil filed pretrial motions to suppress arguing that the stop, detention, and search violated his rights under the

[6] According to McMains, when asked about contraband, Wakil appeared nervous, was breathing heavy, leaning against the car, and looked downward or hesitated while responding to questions. McMains interpreted these as signs of nervousness. At the evidentiary hearing McMains testified that he thought it was suspicious "that [Wakil] flew across the country, and [was] driving back," and that he was driving a "newly-registered car." In addition, McMains thought that Wakil gave vague responses to questions and that the things he said about his company with an office in California, but registered in North Carolina, did not make sense.

Fourth Amendment to the United States Constitution and Article 2, Section 8, of the Arizona Constitution.[7]

¶20 The superior court denied Wakil's motions to suppress. The court did "not find that the questioning from the time [Wakil] was stopped until his paperwork was returned exceeded the scope of, or prolonged the traffic stop; and that there was no coerciveness or show of force." The court found that Wakil was not handcuffed, was standing outside of the patrol car, and the conversation seemed "very affable." The court also found that up to the point where McMains asked Wakil if he could ask another question there was no show of force or coerciveness.

¶21 The court then concluded that the nature of the encounter did not become a seizure once Wakil's papers were returned to him and McMains began to ask him other questions, although it thought this was "an incredibly close call."

¶22 The court also concluded that Wakil's consent to search was valid. The court noted that right after responding to McMains's questions, Wakil consented to a search. The court found that Wakil signed the consent to search form and there was no indication of coercion or that Wakil did not understand the form.

[7] Although Wakil filed a motion to suppress arguing that the initial traffic stop was illegal, after the evidentiary hearing he conceded that police "had reasonable suspicion to conduct the initial traffic stop" and withdrew his motion.

¶23 Finally, the court found there was adequate probable cause to search and that there were no material omissions in the search warrant affidavit. The court found that "there was probable cause to search the entire car and its contents" and "the fact that the dog did not alert to the trunk or its contents does not mean that contraband was not there." Additionally, contrary to Wakil's argument, the court determined that "it would not have been relevant to [the court] that [Pete] did not alert on the safes." In reaching its conclusion that the omitted facts were not material, the court determined that Wakil

> refused to allow the officers to go into the safes in his trunk for which he had no keys but knew their contents; and for which search warrants were subsequently obtained. [Wakil] had been stopped previously, at which time he was found to be in possession of cocaine in a locked tool box. The Court does not believe that anything was left out; that there was enough probable cause to grant a search warrant for the safes.[8]

[8] Although the State did not argue that McMains developed reasonable suspicion of criminal activity during the consensual encounter to justify a search, the court determined that officers wanted a warrant despite the dog alert because Wakil refused permission to open the safes. The court explained: "[Wakil] doesn't have the keys . . . but yet, he knows what the safes contained, and I remember finding that somewhat odd as well." The court further stated that Wakil wanted the officers to put the safes back in the package and in the trunk, "which I also found to be supporting reasonable suspicion and probable cause to search."

VII. Additional motion to suppress

¶24 Wakil filed another motion to suppress arguing: (1) expert evidence would prove that Pete did not "alert," and if he did, the alert was unreliable; (2) Pete's failure to alert on the boxes or trunk was "material to the determination of [Pete's] reliability"; and (3) that because Pete did not alert to the boxes or trunk and such fact was not included in the search warrant affidavit, there was a material omission in the affidavit, the inclusion of which would have resulted in the court's decision to deny the warrant for lack of probable cause.

¶25 Wakil also filed a motion for a *Daubert* hearing and to preclude or limit the State's expert testimony regarding a "drug detection canine's ability to recognize and/or detect the residual odor of cocaine on the exterior door handle of an automobile where the canine has never been formally trained, tested or certified to detect cocaine residue."

¶26 After a four-day evidentiary hearing, the court denied Wakil's motions concluding,

> Pete was a properly trained and certified dog, who has undergone and passed annual training and re-certifications. . . . Pete alerted to the driver's side door. Based upon the probable cause of Pete's alert, officers secured a search warrant . . . . The fact that Pete didn't alert to the safes does not in any way detract from the alert Pete exhibited on [Wakil's] door. . . . It reasonably raises the inference that the drugs were packaged in such a way as to mask their odor . . . . This possibility was never even considered by Mr. Nicely [Wakil's expert

> witness]. . . [and the] failure to consider other reasonable inferences from the evidence and address them is not scientific reasoning but simply biased advocacy.[9]

VIII. Bench trial on a stipulated record

¶27 The parties stipulated to submit the case on the evidence adduced at the evidentiary hearings and supporting documentation. Wakil waived his right to a jury trial, and the court found him guilty of transportation of a narcotic drug for sale pursuant to Arizona Revised Statutes ("A.R.S.") section 13-3408(A)(7) (2010), and possession of a narcotic drug for sale pursuant to A.R.S. § 13-3408(A)(2), both class two felonies, A.R.S. § 13-3408(B)(2), (7). The court sentenced Wakil to concurrent, presumptive, flat-time terms of five years' incarceration for each count. Wakil timely appealed.

¶28 We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033(A)(1) (2010).

STANDARD OF REVIEW

¶29 Wakil challenges the superior court's denial of his suppression motions. In reviewing the superior court's ruling on a motion to suppress, "we view the facts in the light most

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[9] The court explained that the issue was not the applicability of *Daubert* because *Daubert* was the evidentiary standard, but rather "[i]t is the facts associated with this case as applied under the evidentiary standard of *Daubert* that is the issue for this Court."

favorable to upholding" the ruling "and consider only the evidence presented at the suppression hearing." *State v. Teagle*, 217 Ariz. 17, 20, ¶ 2, 170 P.3d 266, 269 (App. 2007); *see State v. Weinstein*, 190 Ariz. 306, 308, 947 P.2d 880, 882 (App. 1997) ("We review the trial court's ruling on a motion to suppress evidence for clear and manifest error.").[10] While this Court defers to the superior court's factual determinations and credibility findings, "we review de novo mixed questions of fact and law including whether . . . the duration of [an investigative] detention was reasonable," *State v. Sweeney*, 224 Ariz. 107, 111, ¶ 12, 227 P.3d 868, 872 (App. 2010), and whether consent was voluntarily given, *State v. Flores*, 195 Ariz. 199, 203, ¶ 11, 986 P.2d 232, 236 (App. 1999). Because the video of the traffic stop was recorded and admitted into evidence at the suppression hearing, we independently review the video evidence. *See Sweeney*, 224 Ariz. at 111, ¶ 12, 227 P.3d at 872 ("[T]he trial court is in no better position to evaluate the video than the appellate court . . . ."). We will affirm the superior court if it reached the correct conclusion even if for the wrong

[10] In *Teagle* we explained that except in a circumstance not present here, the right of privacy afforded by Article 2, Section 8, of the Arizona Constitution "has not been expanded beyond that provided by the Fourth Amendment. Therefore, we rely on Fourth Amendment jurisprudence in determining the propriety of the trial court's suppression order." 217 Ariz. at 22 n.3, ¶ 19, 170 P.3d at 271 n.3 (internal citation omitted).

reason. *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

DISCUSSION

I. Wakil's lawful detention lasted only long enough to effectuate the purpose of the stop, and once concluded, the encounter became consensual.

A. Duration and scope

¶30 Wakil first argues that his lawful detention was unlawfully extended because it was not supported by reasonable suspicion of criminal activity and the continued detention was not a consensual encounter.[11] We disagree.

¶31 "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983); *see Sweeney*, 224 Ariz. at 112, ¶ 17, 227 P.3d at 873 ("[D]uration is an essential element in determining whether the initially lawful intrusion takes on the characteristics of an unlawful detention." (citation omitted)). Such a temporary seizure "ordinarily continues, and remains reasonable, for the duration of the stop," *Arizona v. Johnson*, 555 U.S. 323, 333 (2009), and generally concludes its purpose when an officer returns the

[11] Wakil also argues that his consent to search during the continued encounter was not valid because of the allegedly coercive atmosphere. Because the search of the boxes was pursuant to a search warrant based on facts which occurred during the continued encounter, we address the consent issue only as it affects whether the continued encounter remained consensual.

driver's documents and issues a written warning, *see Teagle*, 217 Ariz. at 23, ¶ 23, 170 P.3d at 272. After effectuating the purpose of the stop, an officer must allow a driver to leave unless "the encounter between the driver and the officer becomes consensual," or "during the [initial lawful stop], the officer develops a reasonable and articulable suspicion that criminal activity is afoot." *Sweeney*, 224 Ariz. at 112, ¶ 17, 227 P.3d at 873; *see also Teagle*, 217 Ariz. at 23, ¶ 22, 170 P.3d at 272.[12]

¶32 Here, it is undisputed that the initial traffic stop was lawful. *See supra* footnote 7. Wakil argues, however, that because he was asked questions unrelated to the purpose of the stop, his detention was unlawfully prolonged and extended. Based on a review of the record, we disagree.

¶33 McMains admitted that while he was checking Wakil's documentation with dispatch and writing the warning and repair order, he asked Wakil some questions that were not necessary to issue the warning. However, "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 the inquiries do not measurably extend the duration of

[12] Here, the State has not asserted, nor do the facts support a theory that McMains developed reasonable suspicion during the initial traffic stop to justify a continued detention or search. McMains believed that the police would not have had search authority to inspect the boxes without Pete's alert.

the stop." *Sweeney*, 224 Ariz. at 112, ¶ 19, 227 P.3d at 873 (quoting *Johnson*, 555 U.S. at 333). In determining "the reasonableness of the length of a detention, [this Court] must consider the degree of intrusion on an individual's privacy and weigh that against the purpose of the stop and the diligence with which the officer pursued that purpose." *Id.* at ¶ 18.

¶34 As described at ¶¶ 4 through 6, at points during the stop, McMains and Wakil discussed among other things, Wakil's trucking company and travels, car-buying, and California registration requirements. These topics came up throughout Wakil's detention and were interspersed with discussions directly related to the purpose of the stop, namely verifying Wakil's documentation, completing the warning and repair order, and explaining the violation and consequences to Wakil. The questions and discussion about Wakil's travels and his company were not unacceptably intrusive in light of the purpose of the stop. Indeed, most questions about Wakil's travels and his company were prompted by the out-of-state driver's license and new car registration that Wakil provided. Other questions involved the name and nature of Wakil's company and its location.

¶35 Moreover, McMains did not idly converse with Wakil, but rather actively verified his information and completed the warning document while engaging Wakil in conversation that aided

the purpose of the stop. Although the conversation was not strictly tailored to obtain no more information than necessary to issue the warning, only about sixteen minutes elapsed from the time McMains activated his patrol car lights until Wakil's documents were returned, the warning was issued, and he was free to leave. This duration is typical for McMains. McMains also confirmed that the stop was not prolonged because he realized, after stopping Wakil, that he was the person police were referencing earlier. *See supra* footnote 1.

¶36 In *Sweeney*, this Court determined that an officer's questions about the driver's travels and reasons for his visit while completing a warning during an eight-minute detention, did not unreasonably extend the detention. 224 Ariz. at 112, ¶ 19, 227 P.3d at 873. In *State v. Box*, after returning the driver's documents and handing him a written warning, the officer asked where the driver was coming from. 205 Ariz. 492, 494, ¶ 4, 73 P.3d 623, 625 (App. 2003). The officer also asked about where the driver had stayed, about the duffel bags in his car, and whether he had weapons, large amounts of money, or drugs. *Id.* We determined that this "ensuing brief interaction . . . was within the scope of a consensual encounter," *id.* at 498, ¶ 21, 73 P.3d at 629, and "within the ambit of a voluntary exchange permitted under [*Florida v. Bostick*, 501 U.S. 429 (1991)] and

[*State v. Richcreek*, 187 Ariz. 501, 505, 930 P.2d 1304, 1308 (1997)]," *id.* at ¶ 22.

¶37 Here, Wakil's detention for approximately sixteen minutes during which Officer McMains asked him questions about his travels while completing the warning was not impermissibly intrusive in light of the purpose of the stop and the less relevant discussion did not measurably extend Wakil's detention. *See Sweeney*, 224 Ariz. at 112, ¶ 19, 227 P.3d at 873. Therefore, we find no error in the superior court's decision to deny Wakil's motion to suppress on the basis that the stop was unlawfully extended due to the duration and scope of questions.

B. Continued consensual encounter

¶38 We also determine that the encounter after the completion of the stop was consensual. A continued encounter becomes consensual when the driver's documents have been returned and the driver reasonably believes he is free to leave. *Box*, 205 Ariz. at 498-99, 73 P.3d at 629-30. As he handed Wakil's documents back to him, McMains stated more than once that he was just giving Wakil a warning and Wakil would not have to go to court or pay fines. McMains was not required to explicitly tell Wakil that he was free to leave. *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996). McMains then briefly paused before saying, "Let me ask you another question." *See Teagle*, 217 Ariz. at 23, ¶ 23, 170 P.3d at 272 (explaining that

at the conclusion of a stop, after returning documents and telling the driver to leave, an officer is also equally free to ask the driver additional questions unrelated to the stop). Wakil did not attempt to leave, but rather stayed and answered questions about contraband.

¶39 Wakil argues that he only agreed to answer questions because he acquiesced to police officer authority and that the presence of another officer created a coercive environment. However, there is no indication in the video recording or evidentiary record of physical or verbal coercion or force during the continued encounter. Thus, Wakil's argument is not supported by the record evidence and he makes no further argument to substantiate his claim of coercion, or that the superior court erred.

¶40 Based the totality of the circumstances, a reasonable person in Wakil's position would have felt free to leave. Wakil was standing outside the patrol car, unrestrained, and there were no officers standing close enough to him such that they can be seen in the video. The officers did not verbally or physically display force and Wakil had all of his documents in his hand such that he could leave if he wanted. Moreover, it is clear that Wakil knew that he was only receiving a warning for the violations for which he was stopped. Wakil never indicated that he could not stay or asked if he could leave, but instead

continued to voluntarily offer information in response to the questions.

¶41 While we do not discount the possibility that additional questions in the presence of an additional officer may be coercive under different circumstances, here the totality of the circumstances establishes that a reasonable person in Wakil's place would have felt free to decline to answer the questions and leave.

¶42 Our conclusion is further supported by Wakil's consent to the police searching most of the car. While Wakil argues that his consent was coerced because he was in a coercive environment due to the presence of another officer, he does not explain how the presence of another officer coerced him into consenting to a search. As discussed above, the recording of the stop does not show evidence of force or coercion or that Wakil's will was overborne by the officers.

¶43 Moreover, after his initial verbal consent to the search, he also signed the consent to search form which expressly informed Wakil he was free to refuse or revoke his consent. *See United States v. Mendenhall*, 446 U.S. 544, 558-59 (1980) (stating proof of knowledge of right to refuse search not constitutionally required but "highly relevant to the determination that there had been consent"). While Wakil later revoked his consent once the police sought to search the boxes

where the drugs were located, revocation is not material to the suppression issues because by that time Pete had already alerted to the presence of drug odor and the police searched the boxes not based on Wakil's earlier consent, but the search warrant. *See Box*, 205 Ariz. at 496, ¶ 14, 73 P.3d at 627 (finding probable cause for search of car after dog alerted on trunk); *Weinstein*, 190 Ariz. at 310-11, 947 P.2d at 884-85 ("[O]nce the dog alerted outside the vehicle, the police had probable cause to search the entire car." (footnote omitted)).

¶44 Based on the above, the superior court did not err in concluding that Wakil and McMains were engaged in a consensual encounter following the completion of the lawful traffic stop.

II. The search warrant did not violate *Franks v. Delaware* despite the omission in the supporting affidavit.

¶45 Wakil next argues that the search warrant was invalid because of the omission of evidence that Pete did not alert to the boxes in the trunk. We find no error.

¶46 A defendant is entitled to a hearing to challenge a search warrant affidavit when it is shown that: (1) "the affiant knowingly, intentionally, or with reckless disregard for the truth included a false statement in the affidavit, and (2) the false statement was necessary to the finding of probable cause." *State v. Buccini*, 167 Ariz. 550, 554, 810 P.2d 178, 182 (1991) (citing *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)); *see*

United States v. Kyllo, 37 F.3d 526, 529 (9th Cir. 1994) (stating defendant must show a misleading omission resulted from deliberate or reckless disregard of the truth and that had there been no omission the affidavit would have been insufficient). It is the defendant's burden to "establish the first prong of the test by a preponderance of the evidence before the court may [proceed to the second prong and] set the false material aside and view the affidavit's remaining content to see whether it is sufficient to establish probable cause." *Buccini*, 167 Ariz. at 554, 810 P.2d at 182.

¶47 On appeal, we defer to a superior court's finding whether an affiant deliberately included misstatements of law or excluded material facts unless such findings are clearly erroneous. *Id*. However, our review of the court's ultimate determination that the redrafted search warrant affidavit is sufficient to establish probable cause is de novo. *Id.* at 555, 810 P.2d at 183.

¶48 The superior court determined that just because Pete did not alert the second time did not mean that there was not contraband in the car, and that "it would not have been relevant to [the court] that [Pete] did not alert on the safes." In addition, the court thought that Pete's alert in conjunction

with other indicia of potential criminal activity supported probable cause for the warrant.[13] *See* ¶ 23 & footnote 8 *supra.*

¶49 Even assuming that Wakil met his burden to show that the omission of Pete's second deployment was deliberate or even reckless, the omission is immaterial to the probable cause determination because of Pete's earlier valid alert, which, as we explain in the next section, based on the totality of the circumstances, was sufficiently reliable to justify probable cause for the warrant. *See Box*, 205 Ariz. at 496, ¶ 14, 73 P.3d at 627 (citing *Weinstein*, 190 Ariz. at 310-11, 947 P.2d at 884-85). Thus, we find no error in the denial of Wakil's motion to suppress based on *Franks*.

III. The superior court did not commit error by finding that Pete reliably alerted; there was probable cause to search the car and its contents.[14]

A. Pete alerted

¶50 Wakil argues that Pete did not alert to the car door handle, and if he did, it was unreliable because the video recording does not show him "demonstrating the objectively

[13] That there were ultimately drugs found in the boxes is not relevant to the probable cause determination because courts "do not evaluate probable cause in hindsight, based on what a search does or does not turn up." *Florida v. Harris*, 133 S. Ct. 1050, 1059 (2013).

[14] Given that the search finding the drugs was made pursuant to a warrant, we address Wakil's arguments about Pete solely to the extent that such arguments might have affected the issuance of the search warrant.

observable trained response of scratching." Wakil maintains that because Pete alerts by repeatedly scratching and the video does not depict repeated scratching, Pete did not alert and there was no probable cause to search.

¶51 McMains testified Pete is an "active alert" dog which means he alerts by scratching at the source of the odor. McMains observed that when Pete is sourcing an odor and detects something, he quickly turns his head and focuses on that area. On Pete's first trip around Wakil's car, when heading from the rear toward the driver's door, Pete jumped up and scratched the door handle. McMains explained that when Pete's nose passed by the door he observed Pete turn, jump, and scratch, and that this sequence of behaviors is a valid alert of the presence of a drug odor that Pete is trained to detect. In addition, Sergeant Lepird, who helped train and has personally observed Pete, testified that after watching the video of the Pete's sniff he determined that Pete alerted to the door by giving a "two-paw scratch."

¶52 McMains testified that he would have normally allowed Pete to continue scratching at the site, but he did not because he did not want Pete to damage the brand new BMW. Contrary to Wakil's assertion, the evidence did not establish that a valid alert can only occur after allowing Pete to repeatedly scratch at a site for a given period of time, but only that in training

Pete is allowed to repeatedly scratch before being rewarded for his search.[15]

¶53 Wakil's expert, Steven Nicely, a private dog handling consultant opined that McMains may have unconsciously interpreted Pete's non-alert as an alert because he knew Wakil had previously been arrested for transporting cocaine. However, the superior court thought this was "rank speculation." The court's conclusion is supported by the video and testimonial evidence and we defer to its factual and credibility findings. *See Sweeney*, 224 Ariz. at 111, ¶ 12, 227 P.3d at 872 (explaining that appellate court defers to superior court's fact and credibility findings).

B. Pete's qualifications and reliability

¶54 Wakil also challenges the certification of "Pete and McMains as a canine team," and argues that if Pete's training "records are correct, Pete can detect the target odor 100% of the time . . . [which] raises serious questions about the

[15] On appeal, Wakil maintains that "McMains admitted that Pete alerts by scratching repeatedly," however, Wakil's citation to the transcript is to an unrelated portion of Sergeant Lepird's testimony.

validity of Pete's training . . . ."[16] Wakil's argument appears to be based on two portions of the record: videos of Pete's alerts in real-world circumstances that took place after the alert in this case, and Pete's training records prior to this incident. Wakil's arguments are not persuasive.

¶55 In *Florida v. Harris*, the Supreme Court squarely addressed the issue of "how a court should determine if the 'alert' of a drug-detection dog . . . provides probable cause to search a vehicle." 133 S. Ct. 1050, 1053 (2013). The court summarized and instructed:

> If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence.

Id. at 1058. As the Court stated, the test in dog alert cases is "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." *Id.*

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[16] We understand Wakil's argument to be that Pete's training records must be inaccurate because in training Pete was 100 percent accurate, yet he failed to alert to the boxes here. This is highly speculative because among other things, it is not known whether Pete's testing conditions involved drugs packaged in the same manner as the cocaine found in the boxes in Wakil's trunk.

¶56 To this end, the Court cautioned against treating a dog's field performance data as the gold standard in evidence because such data "may not capture a dog's false negatives," or if the dog alerts and no substances are found it may be that the dog "detected substances that were too well hidden or present in quantities too small for the officer to locate." *Id.* at 1056. Rather, "[t]he better measure of a dog's reliability [is] . . . in controlled testing environments." *Id.* at 1057. The court determined that

> evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs.

Id.

¶57 Nicely opined that based on video evidence of eleven other traffic stops where Pete sniffed for drugs, Pete has a pattern of going directly to the doors and standing up against the doors momentarily, which is evidence that Pete has been trained to behave in such a way in hopes of being rewarded. However, this conclusion is belied by the fact that Pete is trained to get a toy as a reward after a search whether he alerts or not. Moreover, the evidence established that Pete is

certified according to DPS standards and regularly engages in continuing drug detection training, performance testing, and recertification.

¶58 Wakil also argues that pursuant to certification standards established by the Scientific Working Group on Dog and Orthogonal Detector Guidelines ("SWGDOG"), a dog should not be certified if he fails in more than ten percent of his tests. Wakil contends that Pete's 2009 training records show a twenty-five percent failure rate. The State argues that Pete met the SWGDOG hourly training recommendations and that from 2009 through 2011, Pete did 1,064 blind searches and was 98.2 percent reliable.

¶59 There is no *per se* rule on what statistical level is deemed to make a dog reliable in this context. As DPS stated, it ensures that the dogs are at least seventy percent reliable and that a dog is not certified if it has two improper alerts which is consistent with industry and DPS standards.[17] At the end of his training, Pete was certified in 2009 despite the fact that he had one improper alert to a milk bone. Pete had no

[17] Lepird explained that there are no national or state standards for certifying and training canines, but DPS has created its own standards based upon SWGDOG. The certification process involves blind testing where a dog's handler does not know where the hidden drugs are located and the dog searches blank vehicles as well as those containing narcotics. The dogs are also tested with "distracters" such as dog treats and money to ensure they do not alert on odors that are not one of the four narcotics.

problems during his re-certifications in 2010 and 2011 and based on over 1000 tests during this period, was more than ninety-eight percent accurate in his alerts.[18]

¶60 Moreover, during the hearing McMains testified regarding his experience as a canine handler for more than five years and described the training that he and the dogs complete to be in the canine unit. This includes 160-hour patrol school to learn to find suspects and articles of evidence, 200-hour narcotics training in the field, and weekly maintenance training for a total of sixteen hours a month. McMains and Pete also go through annual certification, and training and daily activity logs are maintained for Pete.

¶61 The superior court found the evidence was sufficient to establish that Pete has met DPS standards for certification for the last three years, he undergoes "continuous training," he is routinely trained by McMains between certifications, and his

[18] While Wakil states that in 2009, Pete was only accurate seventy five percent of the time he searched vehicles, and that he falsely alerted twenty-five percent of the time, this does not require a court to say he is unreliable. *See Harris*, 133 S. Ct. at 1058 (stating that if defendant has challenged the reliability of the dog or of a particular alert, the court should weigh the competing evidence). As previously noted, there is no *per se* standard for reliability and the lower accuracy percentage for 2009 could be a result of other factors such as a small number of tests from which data was collected and analyzed. *See generally id.* at 1056 (rejecting Florida's "strict evidentiary checklist" to assess the reliability of a drug dog as the "antithesis of a totality-of-the-circumstances analysis," and noting that "[o]ne wonders how the court would apply its test to a rookie dog").

training records are reviewed by Sergeant Lepird. The court did not find the testimony provided by Wakil to be credible, and it thought the expert's "opinions were more along the lines of a private consultant giving suggestions, rather than a credible scientific expert."[19] In addition, the court found that Nicely's statistical analysis of Pete's training and certification was not persuasive because it "was either based upon simple statistical math without support as to its validity or reliability or simply without context as to the bases of his opinions."

¶62 Here, Wakil had "an opportunity to challenge" the evidence of Pete's reliability "by cross-examining the testifying officer[s] [and] by introducing his own fact or expert witness," during a four-day evidentiary hearing. *Harris*, 133 S. Ct. at 1057. The record is clear——the superior court reviewed a substantial amount of training and performance data, made fact-findings and credibility determinations, and weighed the competing evidence as required by *Harris*. There is sufficient evidence in the record to support the court's findings and determination, and to establish that Pete is generally reliable and his alert can be trusted, and thus, we find no error in the issuance of the search warrant.

[19] Wakil does not specifically challenge the court's credibility finding.

C. Pete’s alert to Wakil’s car

¶63 “[E]ven assuming a dog is generally reliable, circumstances surrounding a particular alert may undermine the case.” *Id.* at 1057. In *Harris*, the Supreme Court framed the inquiry as “whether all the facts surrounding a dog’s alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.” *Id*. at 1058. We conclude that there were no other circumstances surrounding Pete’s alert that undermined the probable cause determination, but rather that the facts surrounding the alert reasonably indicated that a search would reveal contraband.

¶64 In the superior court, Wakil argued that Pete’s alert to the door but not the boxes “could have been due to the actions of a DPS officer who had just come from a training session where he touched drugs . . . and then touched the door handle of [Wakil’s] car.” The evidence established that Officer McFarland had been at a drug detection training earlier and he can be seen in the video touching Wakil’s driver-side door before Pete’s sniff. However, the evidence also established and the superior court found that McFarland used gloves when handling the drugs at the earlier training and that Wakil’s “thumbprint was located on a bag of cocaine indicating a

reasonable inference that [Wakil] touched the drugs and then touched the driver's door."

¶65 Wakil also argues that Pete was not trained to detect residual odors and "the State failed to offer any evidence to substantiate its theory" that "Pete responded to residual odor of cocaine possibly left on the door by Wakil." McMains testified that an alert itself does not indicate which drug is detected or whether the location of the odor originates from inside or outside of the car. Sergeant Lepird testified that DPS does not typically train for residual odor, and that currently there is no way to quantify odor that a canine detects. We fail to see how Pete's lack of training to detect residual odor supports Wakil's claim. If Pete is only trained to detect the odor of drugs that are actually present, then his alert here would reasonably indicate the presence of drugs as opposed to merely residual odor from drugs no longer present. While Pete alerted at the door handle but not the boxes, it is possible that the alert was the result of Pete smelling the drug odors if the drugs had at one time been in the car before being boxed up.

¶66 As discussed above, after weighing the competing evidence, the superior court accepted that Pete was properly trained and certified, a fact that the Supreme Court has determined establishes probable cause in the absence of

extenuating circumstances that undermine a particular alert. *See Harris*, 133 S. Ct. at 1057 ("[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert."). Moreover, that Pete was not allowed to repeatedly scratch at the door or rewarded after the sniff as he would have been in training, are not circumstances that undermine the alert based on the facts here. McMains observed the full sequence of behaviors that Pete normally exhibits when making an alert and Wakil's evidence failed to establish the existence of other circumstances that undermined the reliability of Pete's alert in this case. Thus, we conclude the superior court did not err in finding Pete's alert was reliable and the officers had probable cause to search the boxes based upon the totality of the circumstances including the alert and other indicia of potential criminal activity and contraband. *See* ¶¶ 23, 49 *supra*.

CONCLUSION

¶67 The superior court did not abuse its discretion by

denying Wakil's motions to suppress. Accordingly, we affirm Wakil's convictions and sentences.

/S/
DONN KESSLER, Presiding Judge

CONCURRING:

/S/
MAURICE PORTLEY, Judge

/S/
PETER B. SWANN, Judge