FILED
United States Court of Appeals
Tenth Circuit

July 10, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NATHAN RUSSELL CATES,

Defendant - Appellant.

No. 22-8038

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 1:21-CR-00101-NDF-1)

Amy Senia, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with her on the brief), Office of the Federal Public Defender, Denver, Colorado, appearing for the Appellant.

Timothy J. Forwood, Assistant United States Attorney (Nicholas Vassallo, United States Attorney, with him on the brief), Office of the United States Attorney for the District of Wyoming, Cheyenne, Wyoming, appearing for the Appellee.

Before **BACHARACH**, **KELLY**, and **BRISCOE**, Circuit Judges.

BRISCOE, Circuit Judge.

Defendant Nathan Russell Cates appeals the denial of his motion to suppress evidence following his entry of a conditional guilty plea. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

Cates was initially indicted on one count of possession with intent to distribute methamphetamine (Count 1), and one count of possession with intent to distribute tetrahydrocannabinol (Count 2). These charges arose from a traffic stop by a Wyoming Highway Patrol (WHP) Trooper, which was followed by a drug-detection dog alerting to the presence of drugs in Cates's rental vehicle.

Cates moved to suppress the evidence that was seized during the search of his vehicle. Additionally, Cates raised several motions seeking access to documents related to his suppression motion—namely, records bearing on the certification, training, and performance of the drug-detection dog in this case. After the district court denied these motions, Cates pleaded guilty to Count 1 of the indictment. Under the terms of his conditional plea agreement, Cates reserved the right to appeal the district court's denial of his motion to suppress.

On appeal, Cates contends that (1) the district court erred in holding that the duration of the traffic stop was reasonable under the Fourth Amendment because law enforcement unreasonably prolonged the stop to arrange for a dog sniff of the vehicle, and (2) the district court erred in denying his motion to compel discovery regarding the drug-detection dog's reliability. We reject Cates's arguments and affirm the district court's denial of Cates's motion to suppress.

I

A. Factual Background

On May 11, 2021, WHP Troopers Scott Neilson and Andrew Jackson were conducting a drug interdiction detail in Laramie County, Wyoming. Both troopers, in

separate vehicles, were parked in the median of Interstate 80 when they observed a black Ford Expedition SUV with New York license plates drive past them. Trooper Neilson believed the SUV was a rental vehicle. The SUV passed the troopers slightly under the speed limit, and Trooper Neilson observed that the driver appeared to be "very rigid." ROA, Vol. III at 21.

Trooper Neilson pulled out from the median and attempted to catch up to the SUV to see if he could run the license plate and observe any traffic violations. When Trooper Neilson caught up to the SUV, the driver turned off at an exit ramp. At the bottom of the exit ramp, the SUV turned onto a street with a speed limit of 45 mph. Trooper Neilson believed the SUV was speeding and activated his radar, which confirmed that the vehicle's speed was 50 mph. Trooper Neilson activated his lights, and the driver pulled over into a parking lot. The stop occurred at 6:39:32 p.m.

Trooper Neilson approached the SUV's front passenger window, where he observed Cates in the driver's seat. Trooper Neilson informed Cates that he had stopped him for speeding, and he asked for Cates's driver's license, registration, and proof of insurance. Cates provided his driver's license and stated that the SUV was a rental vehicle. After Trooper Neilson asked for the rental information, Cates said that the rental contract might be on his phone. From prior experience, Trooper Neilson knew that locating rental agreements on a phone was often time consuming, so he asked Cates to join him in his patrol car while Cates searched for the rental agreement. Trooper Neilson also told Cates that he would just issue him a warning

for speeding and that Cates could look for the rental agreement while Neilson completed the paperwork.

During this conversation, Trooper Neilson noticed a refueling canister for butane lighters on the passenger seat of the vehicle. Trooper Neilson knew that such cannisters were used to heat methamphetamine into vapors to smoke. Trooper Neilson also noticed that the back seats of the SUV were folded down and that several duffel bags were in the cargo area of the vehicle. Additionally, Trooper Neilson observed that Cates's hand was trembling while he tried to operate his phone and that Cates failed to make "decent eye contact." *Id.* at 29–30.

As Trooper Neilson walked back to his patrol car, he radioed Trooper Jackson and requested that Trooper Jackson respond to his location. Trooper Neilson waited by the driver's side of his patrol car for Cates to exit the SUV and walk to the patrol car. When Cates arrived at the patrol car, Trooper Neilson asked him to sit in the passenger seat. Both men entered the car at 6:40:45 p.m.

In the patrol car, Trooper Neilson sent a text message to Trooper Jackson, asking him to run his canine around the exterior of Cates's SUV. Trooper Neilson then began to run Cates's driver's license on the computer in his patrol car. Trooper Neilson simultaneously conversed with Cates about his travel plans. Cates stated that he had been at his mother's house in California for approximately four days and that he was on his way home to Iowa.

Trooper Neilson informed Cates that he was running his driver's license, and he asked if Cates's license was clear and valid. Cates's license check indicated that

his license was valid, but the records check initially returned a warrant associated with Cates's information. After learning about the warrant, Trooper Neilson asked Cates if he went by the name "Manuel Fortuna," the name associated with the warrant and Cates's information. *Id.* at 36–37. Trooper Neilson ultimately determined that the name "Manuel Fortuna" had no relation to Cates. While speaking with Cates about his criminal history, however, Trooper Neilson learned that Cates had previously been arrested. When Trooper Neilson asked Cates about his previous arrest, Cates's demeanor changed. He began looking out the side window away from Trooper Neilson, and he appeared to become more nervous. Trooper Neilson then asked dispatch to check Cates's criminal history.

Just prior to Trooper Neilson requesting a check of Cates's criminal history, Trooper Jackson arrived with his canine partner, May, at 6:42:30 p.m. When Trooper Jackson arrived, he and May walked past Trooper Neilson's patrol car and went directly to Cates's SUV. Trooper Neilson continued completing his paperwork, and Cates continued searching for his rental agreement. When Trooper Jackson walked up to Cates's SUV, he immediately deployed May around its exterior to conduct an open-air sniff for narcotics. May alerted twice to the presence of controlled substances—first, at the driver's side door (6:43:25 p.m.), and second, at the passenger's side door (6:44:14 p.m.).

At 6:44:50 p.m., Trooper Jackson walked to Trooper Neilson's patrol vehicle and informed Trooper Neilson that May had alerted to both sides of Cates's SUV. At that point, Trooper Neilson had not yet completed the warning for Cates, and he had

not yet received the results of Cates's criminal history check. Additionally, Cates had still not provided a rental agreement or proof of insurance.

Shortly after May alerted, Cates showed Trooper Neilson an email on his phone indicating that he had reserved a vehicle from Budget Car Rental. The email did not contain the rental agreement, however, and it did not confirm any details regarding the rental vehicle—such as the authorized renter, where the vehicle was rented from, the date when the vehicle was rented, or when the vehicle was due to be returned.

Thereafter, Trooper Neilson searched the SUV. He found forty-eight pounds of methamphetamine and thirty pounds of marijuana. Trooper Neilson then placed Cates under arrest.

B. Procedural History

On September 22, 2021, a federal grand jury returned an indictment charging Cates with (1) one count of possession with intent to distribute 500 grams or more of a mixture or substance containing a detectible amount of methamphetamine (Count 1), and (2) one count of possession with intent to distribute tetrahydrocannabinol (Count 2).

1. The Motion to Suppress and Rule 17(c) Motion for a Subpoena

Cates filed a motion to suppress the evidence discovered from the search and seizure of his person and his rental vehicle. In his motion to suppress, and as relevant here, Cates argued that (1) Trooper Neilson impermissibly extended the duration of the traffic stop by messaging Trooper Jackson to arrange the dog sniff

and by conducting unrelated inquiries into Cates's criminal history, and (2) May's canine alert did not provide probable cause to search the SUV because the government had failed to produce evidence of her training and reliability.

In his suppression motion, Cates noted that the defense had twice requested that the government disclose WHP's Standard Operating Procedures and May's training and deployment records in discovery. Cates asserted that, in response, the government produced a one-page canine narcotics certification bearing the same date as Cates's arrest, without any information about whether the certification was issued before or after the open-air sniff search of Cates's vehicle.

Proceeding under Federal Rule of Criminal Procedure 17(c), Cates filed an ex parte motion to subpoena records relating to the certification, training, and performance history of May and Trooper Jackson. In his motion, Cates acknowledged that the government had provided some discovery on November 2 and 3, 2021. However, Cates asserted that the government had not provided the following documents:

a. Trooper Jackson's application to apply as a canine handler (WHP Policy and Procedure 09-08, #2.1).

b. Narcotic Detection Canine May's monthly "Canine Deployment Record (P-57)" for the months spanning May 2020 to June 2021 (WHP Policy and Procedure 09-08, #3.3.1).

c. Narcotic Detection Canine May's monthly "Canine Proficiency Training Record (P-58)" for the months spanning May 2020 to June 2021 (WHP Policy and Procedure 09-08, #3.3.2).

d. Narcotic Detection Canine May's monthly training record for the months spanning May 2020 to June 2021 (WHP Policy and Procedure

09-08, #8.1).

e. Narcotic Detection Canine May's annual "Internal or External Certification" for each year in which WHP has employed May. (WHP Policy and Procedure 09-08, #8.2).

f. Any WHP discipline records for May or any discipline records maintained by WHP for May.

Supp. ROA at 5–7.

The district court denied Cates's motion to subpoena the records. As an initial matter, the district court stated that the subpoena was improperly filed ex parte, as Cates's suppression motion already put the government on notice that Cates was challenging the reliability of May's alert. Next, the district court turned to the issue of document production, and it noted that Cates's motion did not establish whether any of the documents sought existed. Additionally, the district court stated:

> It is impermissible at this time – both as a matter of procedure and the substantive law regarding reliability of canine drug detections – to request prehearing production of these documents. "Rule 17(c) is 'not intended to provide an additional means of discovery,' but 'to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials.'" *United States v. Bartkowicz*, No. 10-CR-118- PAB, 2010 WL 3733552, at *1 (D. Colo. Sept. 17, 2010) (quoting *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951)).

Id. at 17.

The district court also determined that Cates could not show that the requested materials were "relevant and necessary until the government puts on its evidence at the suppression hearing." *Id.* at 18. Specifically, the district court cited *Florida v. Harris*, 568 U.S. 237 (2013), for the proposition that, although "criminal defendants

have a right to challenge the reliability of the drug-detecting canine in their case through cross-examination or presentation of their own witnesses," defendants are not entitled to "prehearing production of documents regarding the canine or handler beyond their certification." Supp. ROA at 18. According to the district court, Cates would need to make "a threshold showing before the government will be compelled to produce such additional documents." *Id.* The court ultimately denied the motion for subpoena without prejudice to permit Cates's renewal of the motion, if necessary, "at the end of the government's presentation of evidence at the suppression hearing." *Id.* at 20.

2. The Suppression Hearing and Ruling

At the subsequent hearing on Cates's suppression motion, Troopers Neilson and Jackson testified to the facts as described above. The government also introduced dashcam videos of the traffic stop and the open-air canine sniff into evidence.

The government reviewed the training that both Trooper Jackson and May completed prior to May's certification. May was purchased in 2015 from a company that provided May's initial instruction, which included training her to detect marijuana, cocaine, methamphetamine, and heroin. After May's initial training, Trooper Jackson and May completed approximately two and a half weeks of further training together.

Trooper Jackson testified that he and May have to be certified every year. He noted that they had been recertified by the California Narcotics Canine Association

(CNCA) on the morning of May 11, 2021—just hours before the traffic stop in this case. This was the fifth time that Trooper Jackson and May had been certified by CNCA. During these certification tests, Trooper Jackson and May are required to examine rooms and vehicles that contain zero to four "finds" (hidden drugs) in each room or vehicle. ROA, Vol. III at 96–98. Trooper Jackson and May proceed to each room or vehicle, and they are tasked with determining if there are drugs in any of these locations.

Trooper Jackson provided an overview of his certification test with May on the morning of May 11, 2021. In the first test, they had seven minutes to search three vehicles to find the drugs. May found the substances in each vehicle (marijuana and heroin) and passed. In the second test, they entered a building with four rooms. Three of those rooms contained drugs or drug odors (methamphetamine, cocaine, and heroin), with the remaining room containing no drugs or drug odors. Trooper Jackson and May passed without any false alerts.

Trooper Jackson also testified that WHP conducts an internal assessment each year, the most recent of which occurred in the fall of 2020. Trooper Jackson and May passed that assessment as well, and they were compliant with WHP's internal requirements.

On cross examination, defense counsel inquired further into Trooper Jackson and May's training and certification. Trooper Jackson stated that as part of WHP's requirements, he and May are required to complete sixteen hours of proficiency training each month. This proficiency training includes interior and open-air

training. Trooper Jackson explained that he prepares monthly training logs, in which he documents his training activities with May. These logs include the location and duration of the training, the illegal substances that were used, and any other notes of relevance, such as distractions and aids. Additionally, Trooper Jackson maintains monthly field-performance logs, or "deployment" logs, that track how many times May was used in the field that month. *Id.* at 105–06. These logs include the date, time, and location of each event; whether it was a positive alert or no alert; and what, if anything, was found.

During this cross examination, defense counsel attempted to obtain Trooper Jackson's reports as Jencks statements under Federal Rule of Criminal Procedure 26.2. Alternatively, defense counsel made an oral motion to compel production of these documents pursuant to Federal Rule of Criminal Procedure 16. The district court denied both motions, on similar grounds as its prior denial of Cates's motion for a subpoena:

> [T]he bigger issue is whether defense counsel has made the threshold showing that -- through witness testimony or tendered evidence or certification or lack of certification or lack of training that there's a question about the validity or the reliability of certification.
>
> And it is my conclusion that threshold showing has not been established to warrant producing additional supporting documentation. And so I'll deny the motion under 26.2, which was previously denied, and the alternative request for a motion to compel.

Id. at 115–16. At the conclusion of the evidence, the district court stated that it was inclined to deny the suppression motion.

In its written order denying the motion to suppress, the district court first determined that Trooper Neilson did not prolong the traffic stop in violation of the Fourth Amendment. The district court explained its reasoning as follows:

> While Trooper Neilson could have just issued a warning for speeding, no law requires him to do so without running routine inquiries. The Court finds nothing unreasonable in Trooper Neilson's ordinary actions and questions, especially those related to determining whether Mr. Cates had the legal right to operate the vehicle and had the required insurance documentation. During the full extent of the stop, Mr. Cates was unable to produce any rental agreement or insurance documentation – thus Mr. Cates prolonged the stop, not Trooper Neilson. Because of this, the mission of the traffic stop did not finish prior to the canine alert, and Trooper Neilson was reasonably diligent in his pursuit of ordinary tasks related to the traffic stop.

ROA, Vol. I at 60 (citation omitted).

Next, the district court turned its attention to the issue of the drug-detection dog's reliability. The district court determined that the dog's alert provided the troopers with probable cause to search Cates's SUV because the dog was trained and certified to identify the odor of narcotics. Additionally, the district court addressed Cates's mid-hearing request for May's training and certification records. The district court concluded that production of May's training and performance records was not warranted because Cates failed to cast doubt on her reliability, generally, or her alert to Cates's vehicle, specifically.

> On cross-examination, Defendant did not elicit any testimony that would cast doubt on the reliability of the CNCA training and certification for May and Trooper Jackson. Defendant questioned Trooper Jackson regarding the internal training that WHP requires of canine handlers with their dogs, and Trooper Jackson testified that he does conduct the required training with May. He confirmed that if a

> dog alerts to blanks[1] during such training, it would be documented in training logs. But Trooper Jackson did not testify that May had alerted to blanks in training. Accordingly, the Court again concludes that Defendant did not raise any doubt regarding the reliability of May's training or her alerts in this instance to warrant production of further documentation regarding May's training or performance.

Id. at 61–62.

3. The Plea Agreement and Sentencing

On February 14, 2022, the parties filed a conditional plea agreement pursuant to Federal Rule of Criminal Procedure 11(a)(2) in which Cates agreed to plead guilty to Count 1 (possession with intent to distribute methamphetamine). The conditional plea agreement reserved Cates's right to appeal the district court's denial of his suppression motion.

Cates was sentenced to 180 months' imprisonment, to be followed by five years of supervised release. Cates timely filed his notice of appeal.

II

A. Trooper Neilson Did Not Prolong the Traffic Stop in Violation of the Fourth Amendment

In his first issue on appeal, Cates argues that law enforcement prolonged the traffic stop in violation of the Fourth Amendment by conducting an unrelated criminal inquiry. For the reasons outlined below, we disagree.

[1] Trooper Jackson testified that the term "blank" refers to a room, vehicle, or other area that does not contain any narcotics or narcotic odors.

1. Standard of Review

When reviewing a district court's denial of a motion to suppress, "we view the evidence in the light most favorable to the government and accept the [district] court's factual findings unless clearly erroneous." *United States v. Smith*, 531 F.3d 1261, 1265 (10th Cir. 2008). Further, "[w]e defer to all reasonable inferences made by law enforcement officers in light of their knowledge and professional experience distinguishing between innocent and suspicious actions." *United States v. Pettit*, 785 F.3d 1374, 1379 (10th Cir. 2015). "Ultimate determinations of reasonableness concerning Fourth Amendment issues and other questions of law, however, are reviewed de novo." *Smith*, 531 F.3d at 1265 (citation omitted).

2. Legal Background

The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S. Const. amend. IV. "A traffic stop, even if brief and for a limited purpose, constitutes a 'seizure' under the Fourth Amendment and is subject to review for reasonableness." *United States v. Mayville*, 955 F.3d 825, 829 (10th Cir. 2020) (citing *Whren v. United States*, 517 U.S. 806, 809–10 (1996)). "A traffic stop must be justified at its inception and, in general, the officer's actions during the stop must be reasonably related in scope to 'the mission of the stop itself.'" *United States v. Cone*, 868 F.3d 1150, 1152 (10th Cir. 2017) (quoting *Rodriguez v. United States*, 575 U.S. 348, 356 (2015)).

Actions related to a traffic stop's "mission" include those steps necessary to issue a ticket or warning, and "ordinary inquiries incident to the traffic stop," such as

"checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Rodriguez*, 575 U.S. at 355 (brackets and citation omitted). However, an officer's authority to seize a driver "ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id.* at 354. Officers may not stop vehicles for any "longer than is necessary" to resolve the traffic violation and handle "related safety concerns." *Id.* (citation omitted). Further, officers may not "divert from the mission of the stop in order to conduct general criminal interdiction or investigate other crimes." *United States v. Cortez*, 965 F.3d 827, 838 (10th Cir. 2020).

A traffic stop becomes unlawful, therefore, "when an officer (1) diverts from the traffic-based mission of the stop to investigate ordinary criminal conduct, (2) in a way that 'prolongs' (i.e., adds time to) the stop, and (3) the investigative detour is unsupported by any independent reasonable suspicion." *United States v. Frazier*, 30 F.4th 1165, 1173 (10th Cir. 2022). "Even *de minimis* delays caused by unrelated inquiries violate the Fourth Amendment." *Mayville*, 955 F.3d at 830 (citing *Rodriguez*, 575 U.S. at 355–57).

3. Analysis

Cates does not contend that he was illegally stopped, but rather that Trooper Neilson impermissibly prolonged the traffic stop in violation of the Fourth Amendment. Cates argues that Trooper Neilson "diverted from the traffic-based mission of the stop, and thereby extended its duration, in his efforts to arrange for a

dog sniff." Aplt. Br. at 14. According to Cates, when Trooper Neilson returned to the patrol car with Cates, "he paused all work on the traffic stop to contact Trooper Jackson by instant message and request that Trooper Jackson respond to his location to run his drug dog around the exterior of [Cates's] car." *Id.* We conclude that contrary to Cates's arguments, Trooper Neilson's request for support from Trooper Jackson did not prolong the traffic stop in violation of the Fourth Amendment.

Trooper Neilson's actions leading up to his sending the text message were within the confines of the Fourth Amendment. He was entitled to (1) check Cates's driver's license, registration, and proof of insurance (or, in this case, the rental agreement), *see Rodriguez*, 575 U.S. at 355 ("[A]n officer's mission" during a traffic stop includes "checking the driver's license . . . and inspecting the automobile's registration and proof of insurance."); and (2) ask Cates identifying questions and inquire about his travel plans, *see Cortez*, 965 F.3d at 838 ("An officer may also inquire about the driver's travel plans and the identity of the individuals in the vehicle."). Then, because Trooper Neilson knew from prior experience that it might take a while for Cates to locate the rental agreement on his phone, he asked Cates to come to his patrol car to continue searching while Trooper Neilson completed the warning paperwork. As Trooper Neilson walked back to his patrol car, and before Cates joined him there, he radioed for Trooper Jackson to respond to his location. The parties do not challenge the legality of the events up to this point.

Right after Trooper Neilson and Cates entered the patrol car, Trooper Neilson sent a text message to Trooper Jackson requesting that he deploy his canine around

Cates's vehicle. Trooper Neilson testified that this text message was brief: he typed "run it" and pressed "enter" to send the message. ROA, Vol. III at 83. The parties agree that this action took approximately ten seconds.[2] Trooper Neilson then began conversing with Cates about his travel plans and performing a check of Cates's driver's license.[3] We conclude that Trooper Neilson's text message to Trooper Jackson did not illegally prolong the stop.[4]

---

[2] The district court did not make any findings regarding the precise amount of time that it took for Trooper Neilson to send his text message to Trooper Jackson. At oral argument, however, both parties agreed that this task took approximately ten seconds. The video footage from Trooper Neilson's patrol car confirms this. Specifically, the video reflects several seconds of silence between the time when Cates closed his door in Trooper Neilson's patrol car and when Trooper Neilson began questioning Cates about his travel plans.

[3] At this point in the traffic stop, Trooper Neilson also inquired about Cates's criminal history and requested that dispatch run Cates's criminal history. Cates does not challenge Trooper Neilson's actions in doing so, and we agree that these actions were within the confines of the Fourth Amendment. *See Mayville*, 955 F.3d at 830 ("This court has routinely permitted officers to conduct criminal-history checks during traffic stops in the interest of officer safety.").

[4] In *United States v. Malone*, 10 F.4th 1120, 1124 (10th Cir. 2021), we observed that the "issue . . . [of] whether the alleged detour prolonged the traffic stop . . . . is factual, not legal." *See also United States v. Goodwill*, 24 F.4th 612, 616 (7th Cir. 2022) (citing *Malone* approvingly). In *Malone*, we were reviewing the district court's factual finding "that the officers' actions had not prolonged the stop." *Malone*, 10 F.4th at 1124. Here, however, the government does not argue that a clear error standard of review applies. Rather, the government characterizes our inquiry as a legal one, i.e., whether the stop was unreasonably prolonged in violation of the Fourth Amendment. Regardless of whether we apply a clear error or de novo standard of review, however, we arrive at the same outcome. Under either standard of review, we conclude that Trooper Neilson's text message did not prolong the stop in violation of the Fourth Amendment.

Notably, Cates was never able to provide Trooper Neilson with a rental agreement or proof of insurance during the traffic stop. Although a driver's inability to produce a rental agreement "cannot justify continued detention for the purpose of investigating drug trafficking," we have observed that "[a] driver's inability to produce a rental agreement may justify continued detention for the purpose of investigating his authority to drive the vehicle." *Frazier*, 30 F.4th at 1177. Here, Cates was able to locate only a general email indicating that he had reserved a vehicle through a rental car company. By this time, Trooper Jackson and May had already arrived on the scene, and May had alerted to the presence of narcotics in Cates's rental vehicle. Accordingly, the mission of the traffic stop was still ongoing when Trooper Neilson requested support from Trooper Jackson, and it remained uncompleted when the drug-detection dog alerted several minutes later.

As we held in *Mayville*, "[b]ecause the dog sniff and alert were contemporaneous with the troopers' reasonably diligent pursuit of the stop's mission, the subsequent search of [the d]efendant's vehicle and discovery of evidence did not violate his Fourth Amendment rights." 955 F.3d at 833. Although we can imagine other situations in which an officer's decision to arrange for an open-air dog sniff would unreasonably prolong a traffic stop, this case is not one of them. All in all, it took approximately three minutes from the start of the traffic stop until Trooper Jackson arrived onsite with May. And, critically, during this time, Trooper Neilson continued executing the tasks incident to a traffic stop, such as running Cates's license and checking for any outstanding warrants. We conclude Trooper Neilson

was diligent in executing tasks incident to a traffic stop, and his actions did not unlawfully extend the duration of the stop.

Cates's arguments to the contrary are unconvincing. First, Cates attempts to analogize his case to our recent decision in *Frazier*, in which we held that an officer conducted an investigative detour that prolonged the traffic stop in violation of the Fourth Amendment. 30 F.4th at 1173. *Frazier* is distinguishable. There, the driver was unable to produce a rental agreement for his rental vehicle, but he promptly provided the rental vehicle's registration information and a phone number for the rental company. *Id.* at 1170–71. Once the trooper returned to his patrol vehicle with this information, however, he did not proceed to issue a citation or attempt to contact the car rental company. *Id.* Instead, the trooper spent three minutes attempting to arrange for an open-air sniff of the defendant's rental vehicle. *Id.* at 1171. During this time, the trooper unsuccessfully tried to contact a canine handler through multiple instant messages and a radio call; when the canine handler failed to respond, the trooper finally requested that a dispatcher locate the canine handler and send him to the scene. *Id.* We observed that "each minute that the trooper spent arranging the dog sniff was time the citation-related tasks went unaddressed," and the trooper's "actions necessarily prolonged the stop." *Id.* at 1173. Accordingly, we concluded that "the trooper's efforts to arrange for a dog sniff diverted from the traffic-based mission of the stop and thereby extended its duration." *Id.*

Here, by contrast, Trooper Neilson contacted Trooper Jackson first by radio while he was walking to his patrol vehicle and was still waiting for Cates to join him.

The second time Trooper Neilson contacted Trooper Jackson, he sent a two-word text message immediately after he and Cates entered the patrol vehicle. Several seconds later, Trooper Neilson began to run Cates's driver's license. Trooper Neilson's decision to send Trooper Jackson a single text message as he got in the patrol car is not analogous to the trooper's decision in *Frazier* to spend three full minutes attempting to contact a canine handler through a variety of different means.[5] Further, Cates had not provided his rental vehicle's registration, a phone number for the rental car company, or any other rental documentation to Trooper Neilson when Trooper Neilson requested the canine assist. While Trooper Neilson continued waiting for Cates to locate the rental information, Trooper Neilson diligently carried out the routine tasks incident to the traffic stop. *See id.* at 1177 ("A driver's inability to produce a rental agreement may justify continued detention for the purpose of investigating his authority to drive the vehicle."). Accordingly, we conclude that *Frazier* is distinguishable from the case at hand.

Second, Cates argues that the district court misapplied *Rodriguez* when it "blessed" Trooper Neilson's "diversion" from the mission of the stop "because [Cates] was unable to find his rental paperwork at any point during the stop, including prior to and during the dog sniff." Aplt. Br. at 15. According to Cates, "[t]he fact that [Cates] was unable to find his rental paperwork did not relieve

[5] We do not suggest that a ten-second delay is necessarily too brief to trigger a *Rodriguez* moment. *See Mayville*, 955 F.3d at 830. Here, Trooper Neilson did not delay the stop at all because he requested the canine search while waiting on Cates to find the rental agreement.

Trooper Neilson of his independent duty to stay on task and take affirmative steps to complete the traffic-based mission of the stop." *Id.* at 17.

Contrary to Cates's arguments, the district court properly applied *Rodriguez* and concluded that Trooper Neilson stayed on task by diligently pursuing the mission of the traffic stop. Trooper Neilson's actions were unlike those of the officer in *Rodriguez*, who conducted an open-air dog sniff search *after* he had fully completed a traffic stop and issued the driver a written warning for the traffic offense. 575 U.S. at 352. There, seven or eight minutes had elapsed from the time the officer issued the warning until the canine alerted. *Id.* The Supreme Court held that law enforcement cannot "routinely . . . extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff." *Id.* at 353. The Court observed that "[i]f an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably required to complete the stop's mission," and "a traffic stop prolonged beyond that point is unlawful." *Id.* at 357 (internal quotation marks, citation, and brackets omitted). Here, by contrast, in the three minutes that elapsed from the start of the traffic stop to Trooper Jackson's arrival with May, Trooper Neilson was diligently engaged in routine tasks incident to the traffic stop. *See id.* at 355 (noting that inquiries such as "inspecting the automobile's registration and proof of insurance" are "ordinary inquiries incident to the traffic stop." (internal quotation marks, citations, and brackets omitted)).

We conclude that Trooper Neilson's text message did not illegally extend the duration of the traffic stop.

B. Cates Neither Forfeited nor Waived the Discovery Issue

In his second issue on appeal, Cates argues that the district court erroneously denied his motion to compel discovery of May's training, certification, and field-performance records. In response, the government asserts this issue is not properly before this court because Cates has both forfeited and waived this argument. The government argues that Cates forfeited this issue because he failed to preserve any alleged discovery violation before the district court. Additionally, the government asserts that, even if Cates did not forfeit the issue, he waived it by pleading guilty pursuant to a conditional plea agreement that limits any appeal to the denial of his motion to suppress. The government further contends that if the issue is addressed, the district court did not abuse its discretion in denying production of May's historical canine records. We agree with Cates that he neither forfeited nor waived this issue

1. Forfeiture: Cates Preserved the Discovery Issue by Bringing It to the Court's Attention at the Suppression Hearing

To preserve an issue for appeal, a party must "alert the district court to the issue and seek a ruling." *GeoMetWatch Corp. v. Behunin*, 38 F.4th 1183, 1206 (10th Cir. 2022) (citation and brackets omitted). "[A] party does not preserve an issue merely by . . . presenting it to the district court in a vague and ambiguous manner, or by making a fleeting contention before the district court." *Id.* (internal quotation marks, citation, and brackets omitted). However, a party need not "use any particular language or even . . . wait until the court issues its ruling" to properly preserve an

issue for appeal. *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020). Instead, "[t]he question is simply whether the claimed [issue] was brought to the court's attention." *Id.* (internal quotation marks and citation omitted).

Here, Cates preserved the discovery issue by bringing it to the district court's attention at the suppression hearing. Cates sought production of May's records on two separate and independent grounds: (1) as a testifying witness's prior statements under Rule 26.2, and (2) as a motion to compel discovery. At the suppression hearing, defense counsel stated as follows:

> [A]s the trooper testified, these were electronically signed records and statements he made regarding the performance of May. They do fall under Rule 26.2.
>
> And in the alternative, if the Court determines they are not, we ask that they be produced under a motion to compel the [g]overnment, as they are subject to discovery, and discovery denial in pursuit of a motion to suppress is not harmless error, Your Honor. And that was established in a different circuit in *United States v. Thomas*, 726 F.3d 1086, at page 1096. And that's a Ninth Circuit case from 2013.
>
> So I stand on initially our motion under Rule 26.2, but we also believe it is a motion -- an alternative motion to compel at this point, as we have established these records do exist and they are relevant.

ROA, Vol. III at 115. Moreover, the district court explicitly denied Cates's oral motion to compel discovery, both at the suppression hearing and in its written order on the motion to suppress. *Id.* at 116 ("I'll deny the motion under 26.2, which was previously denied, *and the alternative request for a motion to compel*." (emphasis added)); ROA, Vol. I at 62 ("Accordingly, the Court again concludes that Defendant did not raise any doubt regarding the reliability of May's training or her alerts in this

instance to warrant production of further documentation regarding May's training or performance."). Thus, contrary to the government's argument, the record clearly reflects that Cates brought the discovery issue to the district court's attention. We conclude that Cates preserved his discovery claim "[b]y 'informing the court' of the 'action' he 'wishe[d] the court to take.'" *Holguin-Hernandez*, 140 S. Ct. at 766 (quoting Fed. R. Crim. P. 51(b)).

The government also argues that Cates's request for discovery that he raised at the suppression hearing was not "sufficiently definite, specific, detailed and nonconjectural." Aple. Br. at 25 (quoting *United States v. White*, 584 F.3d 935, 949 (10th Cir. 2009)). We disagree. At the suppression hearing, defense counsel argued that these records were relevant and subject to discovery. Additionally, defense counsel noted that he had established that these records exist, as the district court had previously denied Cates's Rule 17(c) motion for a subpoena, in part, on this basis. Defense counsel also cited a Ninth Circuit case, *United States v. Thomas*, to argue that a defendant is entitled to discover a drug dog's training records under Rule 16 because these records are material to challenging the dog's reliability. 726 F.3d 1086, 1096–97 (9th Cir. 2013). We conclude that Cates preserved the discovery issue by bringing it to the district court's attention.

2. Waiver: The Plea Agreement Reserved Cates's Right to Appeal the Discovery Issue

The government also contends that Cates waived his right to appeal the discovery issue in his plea agreement. This argument also fails.

In determining whether to enforce an appeal waiver, this court considers: "(1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice." *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (per curiam).

Here, only the scope of the waiver is at issue. We "strictly construe" the waiver and read any ambiguities "against the [g]overnment and in favor of a defendant's appellate rights." *Id.* (citation and brackets omitted). "In determining a waiver's scope, . . . the text of the plea agreement is our guide." *United States v. Anderson*, 374 F.3d 955, 957 (10th Cir. 2004) (citation omitted).

Cates entered a conditional plea reserving his right to appeal the district court's order denying his motion to suppress. Specifically, the appeal waiver includes the following exception in subsection (a): "The Defendant may raise a claim as expressly provided for in paragraph 8 above." ROA, Vol. II at 15. Paragraph 8, entitled "Conditional Plea," provides, in relevant part, that "[t]he Defendant reserves the right to appeal the adverse determination of his motion to suppress. (Docs. 23 (motion) & Doc. 34 (order))," and that "[i]f the Defendant prevails on the specific issues raised in his motion to suppress (Doc. 23), the Defendant will be allowed to withdraw his plea of guilty under this agreement." *Id.* at 13.

In his motion to suppress, Cates argued that the "canine 'alert' did not provide probable cause to search the vehicle" because the limited discovery provided by the government failed to establish that May was properly certified and well trained at the

time of the search, thus rendering her alert unreliable. ROA, Vol. I at 21–22. The district court disagreed. In its order denying the motion to suppress, the district court concluded that May's alert gave the troopers probable cause to search the rental car because evidence at the hearing established that May was trained and certified at the time, and Cates "did not raise any doubt regarding the reliability of May's training or her alerts in this instance to warrant production of further documentation regarding May's training or performance." *Id.* at 62 (citing *Harris*, 568 U.S. at 247–48).

The district court's order denying the motion to suppress, therefore, explicitly addressed the discovery argument that Cates now advances on appeal—namely, that the district court erred by requiring Cates to first cast "doubt" on May's reliability before compelling the government to produce her records, which Cates contends were material to his defense under Rule 16. The plea agreement's plain language reserves Cates's right to appeal the district court's suppression order, and this order directly addressed the discovery argument that Cates raises. We conclude that Cates's conditional plea reserved his right to appeal the discovery issue.

C. The District Court Did Not Err by Denying Cates's Motion to Compel Discovery of the Historical Canine Records

Cates argues that he was entitled to May's historical canine records under Federal Rule of Criminal Procedure 16,[6] as this evidence was material to litigating

[6] Although Cates did not explicitly invoke Rule 16 before the district court, this issue is clearly before us under Rule 16. On November 2 and 3, 2021, the government provided discovery to Cates, which included "camera footage, photographs and various law enforcement reports," and a "Narcotic Certification" issued by the CNCA to the drug-detection dog in this case, May, on the morning of

his suppression motion and meaningfully challenging May's reliability. Specifically, Cates challenges the district court's decision to require that he make a "threshold showing" before the district court would compel the government to produce May's historical records. According to Cates, the district court's denial of his motion to compel constitutes an abuse of discretion because it was based on an erroneous view of the law. We disagree.

1. Standard of Review

"We generally review for an abuse of discretion the district court's denial of a discovery request for documentary evidence." *United States v. Moya*, 5 F.4th 1168, 1193 (10th Cir. 2021); *see United States v. Bowers*, 847 F.3d 1280, 1291 (10th Cir. 2017) (noting that the abuse-of-discretion standard applies to the denial of a motion for discovery under Rule 16 in a criminal case). Under this standard of review, "we defer to the trial court's judgment because of its first-hand ability to view the witness or evidence and assess credibility and probative value." *United States v. Gonzalez-Acosta*, 989 F.2d 384, 388 (10th Cir. 1993) (citation omitted). Additionally, "we will not disturb the district court's ruling unless we have a definite and firm conviction that the court made a clear error of judgment or exceeded the

---

the traffic stop. Supp. ROA at 5. Cates deemed this production insufficient and filed an ex parte motion to subpoena May's historical canine records under Rule 17(c). The district court denied Cates's motion. At the suppression hearing, Cates again sought the historical canine records. This time, Cates attempted to obtain the records as Jencks statements under Rule 26.2 and, in the alternative, through a motion to compel. Although Cates did not cite the rule under which he brought this motion to compel, he now argues that it was properly brought under Rule 16.

bounds of permissible choice in the circumstances." *Id.* at 389 (internal quotation marks and citation omitted). However, "[a] district court necessarily abuses its discretion when it makes an error of law." *United States v. LeCompte*, 800 F.3d 1209, 1215 (10th Cir. 2015) (citation omitted).

2. Analysis

Under Rule 16, "a criminal defendant enjoys a right to discovery of information that is 'material to preparing the defense.'" *United States v. Simpson*, 845 F.3d 1039, 1056 (10th Cir. 2017) (quoting Fed. R. Crim. P. 16(a)(1)(E)(i)). Generally speaking, "[e]vidence is 'material' if it would be helpful to the defense." 2 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 254 n.13 (4th ed. 2022) (citation omitted); *see Simpson*, 845 F.3d at 1056–57. In other words, there must be "a strong indication that [the evidence] will play an important role in uncovering admissible evidence, aiding witness preparation, . . . or assisting impeachment or rebuttal." *United States v. Graham*, 83 F.3d 1466, 1474 (D.C. Cir. 1996) (internal quotation marks and citation omitted). "Although the materiality standard is not a heavy burden, the [g]overnment need disclose Rule 16 material only if it enables the defendant significantly to alter the quantum of proof in his favor." *Id.* (internal quotation marks, citations, and brackets omitted).

Cates seeks May's historical canine records in an attempt to prove that she was unqualified, and, therefore, that her alert failed to provide the officers with probable cause to search Cates's vehicle. The district court denied all of Cates's requests for the historical canine records. Specifically, the district court concluded that Cates was

not automatically entitled to such records under *Florida v. Harris*, 568 U.S. 237 (2013), and that Cates failed to make a "threshold showing" to cast doubt on the validity or reliability of May's certification, which was required before the government could be compelled to produce these additional documents. ROA, Vol. III at 115–16; *see also* ROA, Vol. I at 62.

We agree with the district court that Cates is not entitled, as a matter of course, to historical dog records. Thus, the central issue before us is whether a defendant is required to make a prima facie showing of materiality before the government may be compelled to turn over historical canine records. Our settled law counsels in the affirmative: "The defendant bears the burden to make a prima facie showing of materiality" in order to be successful under Rule 16. *Simpson*, 845 F.3d at 1056. We begin with a brief overview of *Harris* and end with a discussion of Rule 16's threshold-showing requirement.

a. *Harris* does not alter our Rule 16 analysis.

We provide only a brief review of *Harris*. There, the Florida Supreme Court had adopted a rule that a drug-detection dog's alert could *never* establish probable cause if the government failed to produce "evidence of the dog's performance history," including records showing "how often the dog has alerted in the field without illegal contraband having been found." *Harris*, 568 U.S. at 243 (quoting *Harris v. State*, 71 So. 3d 756, 769 (Fla. 2011)). The Supreme Court reversed and rejected Florida's "inflexible checklist" of "evidentiary requirements," which, the Court noted, was at odds with the totality-of-the-circumstances analysis that governs

probable-cause determinations. *Id.* at 245. The Supreme Court criticized the effect of Florida's evidentiary requirements, which, if applied, would mean "[n]o matter how much other proof the State offers of the dog's reliability, the absent field performance records will preclude a finding of probable cause." *Id.* The Supreme Court concluded that such an inflexible approach was "the antithesis of a totality-of-the-circumstances analysis" when assessing probable cause. *Id.*

Although the district court cited *Harris* when denying Cates further discovery of May's training and performance records, we must not lose sight of the fact that *Harris* is a probable-cause case, not a Rule 16 or requirements-of-discovery case. While *Harris* arose in the context of an inflexible state-court discovery rule and may speak to the *relevance* of historical canine documents, *see id.* at 247 ("Indeed, evidence of the dog's (or handler's) history in the field . . . may sometimes be relevant [in assessing probable cause]."), it does not discuss the case-by-case *materiality* of such records under Rule 16. In fact, *Harris* explains that when a state or federal court is tasked with evaluating a defendant's challenge to the reliability of a dog's alert, "[t]he court should allow the parties to make their best case, *consistent with the usual rules of criminal procedure*." *Id.* (emphasis added). In our case, our focus is upon Rule 16.

Certainly, a defendant "must have an opportunity to challenge such evidence of a dog's reliability, whether by cross examining the testifying officer or by introducing his own fact or expert witnesses." *Id.* at 247. But, as will be discussed in the following section, this requirement adds nothing new to the materiality

requirement of Rule 16 or our case law. *Harris* does not impute special status to historical canine records, and neither will we. At most, *Harris* counsels that a criminal defendant does not have an automatic right to historical canine records.

Cates would have us rely on his reading of post-*Harris* cases to import some special rule for the discovery of dog records. In particular, Cates points to decisions from the Second and Ninth Circuits, which have cited to *Harris* when discussing whether the government was required to produce a dog's field-performance, training, and certification records. *See United States v. Foreste*, 780 F.3d 518, 527–29 (2d Cir. 2015); *United States v. Thomas*, 726 F.3d 1086, 1096–97 (9th Cir. 2013). We are unpersuaded by Cates's arguments.

In *Foreste*, the district court denied a defendant's request for a drug-detection dog's field-performance records based on the court's view that such records were "not controlled instances" and therefore did not "tell you anything," i.e., that the records were irrelevant. 780 F.3d at 529 (citation omitted). On appeal, the Second Circuit held that the district court's denial of the defendant's request for field-performance records was based on an "erroneous view of the law," and thus constituted an abuse of discretion. *Id.* The Second Circuit reasoned that *Harris* "counsels caution, but it does not dictate an about-face from [the Second Circuit's] long-standing position that a canine's field performance is relevant to the probable cause inquiry." *Id.*

Unlike the district court in *Foreste*, here the district court did not make sweeping generalizations regarding whether May's field-performance records were

relevant to her reliability. *Id.* Rather, the district court concluded that Cates was not automatically entitled to field-performance records, absent a threshold showing that cast doubt on May's reliability. This is in line with *Harris*. Although *Harris* acknowledged that a dog's field-performance "may sometimes be relevant," *Harris* did not speak to whether and when such records are material. The Court instructed only that production of the records cannot be inextricably intertwined with a Fourth-Amendment probable-cause determination. 568 U.S. at 247.

Similarly, in *Thomas*, the district court denied the defendant's motion to suppress, based, in part, on the court's conclusion that the government had satisfied its discovery obligation under Rule 16 and had established that a drug-dog's alert provided probable cause. 726 F.3d at 1088–89. On appeal, however, the defendant challenged the government's production of "heavily redacted training- and performance-evaluation records." *Id.* at 1088; *see id.* at 1096. These records included the dog's "performance during eight-hour-controlled evaluations," and, at least one of these records "revealed marginal performance in 'search skills.'" *Id.* at 1096 (noting that the team was "one-tenth of a point" away from receiving "a failing score").

The Ninth Circuit agreed, and it concluded that the defendant's legal position "was hamstrung by the fact that the certification records had been so redacted." *Id.* The Ninth Circuit explained that, pursuant to prior precedent in that circuit, the government must provide the following information when a defendant "requests dog-history discovery to pursue a motion to suppress": the handler's log, training

records and score sheets, certification records, and training standards and manuals pertaining to the dog in question. *Id.* According to the Ninth Circuit, *Harris* "echoed" Ninth Circuit precedent requiring disclosure of these materials under Rule 16, as these records are "crucial to the defendant's ability to assess the dog's reliability" and "conduct an effective cross-examination of the dog's handler at the suppression hearing." *Id.* (internal quotation marks, citation, and brackets omitted).

By contrast, here the government has provided May's most recent CNCA certification in full, without any redactions. May's certification indicates that she satisfactorily completed her assessment—unlike the dog in *Thomas*, there is no indication that May's performance was "marginal" in any manner. *Id.* Moreover, whereas Ninth Circuit precedent requires disclosure of a specific set of historical canine records, we have not implemented any predetermined requirements in our circuit. Further, it would be questionable if such requirements would pass muster after the Supreme Court's ruling in *Harris*, which eschews rigid disclosure requirements. Here, the government demonstrated that May was properly certified on the day of the open-air sniff and that she had performed satisfactorily in her certification assessment. Because Cates failed to place in question the government's showing, the district court did not err in rejecting Cates's request for additional training records.

b. The district court properly applied a "threshold showing" requirement before granting Cates access to the historical canine records.

In order to successfully compel discovery under Rule 16, we require a criminal defendant "to make a prima facie showing of materiality." *Simpson*, 845 F.3d at 1056; *see also United States v. Muhtorov*, 20 F.4th 558, 632 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 246 (2022) (requiring a defendant to "carry his burden to make a prima facie showing of materiality under [Rule 16]." (internal quotation marks and citation omitted)). Other district courts in our circuit have properly required threshold showings of materiality for defendants wishing to access canine records, *see, e.g.*, *United States v. Mercado-Gracia*, No. CR 16-1701 JCH, 2017 WL 4480114, at *3 (D.N.M. Oct. 5, 2017); *United States v. Morales*, 489 F. Supp. 2d 1250, 1261–62 (D.N.M. 2007), and the district court in the present case properly required such a showing from Cates.

Turning to the substance of Cates's attempted showing of materiality, the district court did not abuse its discretion in determining that Cates failed to meet his burden. The government provided "evidence of [May's] satisfactory performance in a certification or training program," which, in turn, "provide[d] sufficient reason to trust h[er] alert." *Harris*, 568 U.S. at 246. In particular, the government provided both testimony and documentary evidence that May, and her trainer, Trooper Jackson, were properly certified at the time of Cates's traffic stop.

Trooper Jackson testified that May successfully completed her certification test without any false alerts and was issued a "Narcotic Certification" by the CNCA

on the morning of May 11, 2021, prior to Cates's traffic stop later that evening. The CNCA certification reflects that May successfully located various narcotics in vehicles and rooms within a fixed time period. This document also reflects that May successfully located, among other narcotics, methamphetamine and marijuana—the same narcotics that were found in Cates's vehicle. Moreover, there is no indication from the evidence presented that May was unreliable—either on the date of the traffic stop or in general. Accordingly, we cannot conclude that the district court abused its discretion when it determined that Cates failed to make a "threshold showing" that there is "a question about the validity or the reliability of certification," which would "warrant producing additional supporting documentation." ROA, Vol. III at 115–16.

III

For the foregoing reasons, we AFFIRM the district court's denial of Cates's motion to suppress.