STATE OF MAINE
CUMBERLAND, SS.

UNIFIED CRIMINAL DOCKET
LOCATION: PORTLAND
DOCKET NO. CUMCD-CR-18-4821

STATE OF MAINE, Plaintiff	)	
v.	)	MR. STANLEY'S MOTION TO SUPPRESS
JOHNATHAN STANLEY, Defendant	)	

NOW COMES the Defendant, by and through his attorney, David J. Bobrow, with this Motion to Suppress particularly stated as follows:

(1) This matter is currently before the Court on the State's charges of Unlawful Trafficking in Scheduled Drugs x4.

(2) Mr. Stanley is a 32 year-old male with no criminal history.

(3) On or about August 30, 2018, SA Stearns received information from a cooperating informant that the Defendant was in the State of Maine with cocaine. The CI allegedly told SA Stearns that Mr. Stanley was leaving an address on Woodfords Street. Agents made contact with the vehicle and followed it, stopping it when it entered Walgreens on Forest Avenue. The occupants were removed from the vehicle and a canine search was conducted. Zak, the canine, allegedly indicated on a purse on the passenger side floorboard and a bag of cocaine under the driver's seat. Zak allegedly indicated on Mr. Stanley.

(4) For an officer to make a constitutionally sound investigatory traffic stop, there

must be an “articulable suspicion that criminal conduct has taken place, is occurring, or imminently will occur, and the officer’s assessment of the existence of specific and articulable facts sufficient to warrant the stop is objectively reasonable in the totality of the circumstances.” *State v, Tarvers,* 709 A.2d 726, 727 (Me.1998).

(5) The Fourth Amendment of the United State Constitution protects the "right of the people to be secure . . . against unreasonable searches and seizures." *U.S. Const. Amend. IV*. Evidence that is obtained through an unreasonable stop is subject to suppression; that is, it cannot be used against a defendant in a criminal trial. See *Schmerber v. California*, 384 U.S. 757, 766, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); see *also Reynoso-Hernandez,* 2003 ME 19, ¶ 6, 816 A.2d at 829.

(6) Evidence obtained during a search may be tainted by the illegality of an earlier Fourth Amendment violation, rendering it as “fruit of the poisonous tree.” *United States v. D’Andrea*, 648 F.3d 1,6 (1st Cir. 2011). The proper remedy for the illegality is the exclusion of any evidence obtained as a direct result or found to be derivative of the illegal stop, search, or seizure. *Segura v. United States*, 468 U.S. 796, 804 (1984).

(7) The stop of the vehicle was impermissible because it lacked the necessary reasonable suspicion and therefore, violated Mr. Stanley’s Fourth Amendment rights. Accordingly, all evidence obtained after the stop should be suppressed.

STATEMENT OF UNCONTESTED FACTS

1) According to State, on August 30, 2018, a cooperating individual (CI) made contact with the MDEA stating that "Johnathan Stanley had recently arrived in Maine and was in possession of suspected cocaine." According to the MDEA, the CI had physically observed Stanley with cocaine.

2) According to the Government, the CI stated Stanley was leaving an address on Woodfords Street in a dark colored Nissan Altima. The CI did not mention any other individuals.

3) There was never any discussion about how the CI knew this information.

4) The CI signed up in hopes of consideration on a theft charge where she was scheduled to serve five days jail.(1)

5) No information was provided indicating the CI ever provided information in the past.

6) No information was provided that the CI had ever made previously corroborated statements.

7) There was never information provided that the CI had described Johnathan Stanley.

8) The agents went to the address on Woodfords and observed three individuals, two males and a female enter a Nissan Altima and drive away.

9) The agents followed the vehicle to Walgreens on Forest Avenue. The female entered the store. Upon her return, the agents approached the vehicle.

10) The occupants were removed from the vehicle. Another officer arrived with a Zak, a canine who allegedly made a positive sniff.

11) There is no suggestion prior to the canine sniff, that the agents observed any illegal activities by the occupants or any illegal substances.

12) The agents and officers searched the vehicle finding illegal narcotics.

1 This information was provided directed from the AAG. It does not appear in discovery.

13) There are no recordings of the conversations with the CI, of the stop of the vehicle, nor of the dog sniff.

MEMORANDUM OF LAW

I. THE GOVERNMENT CAN PRODUCE NO EVIDENCE TO SUPPORT THE BASIS FOR THE STOP, THEREFORE ALL EVIDENCE OBTAINED AFTER THE STOP SHOULD BE SUPPRESSED

Temporary traffic stops are analogous to so-called *Terry stops* and therefore, all protections under *Terry* apply to traffic stops. *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Stopping a vehicle and temporarily detaining its occupants constitutes a seizure for Fourth Amendment purposes. *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) (collecting cases); *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

Because Mr. Stanley, as a passenger in the stopped automobile, was seized within the meaning of the Fourth Amendment, he may contest whether the stop of the vehicle meets Fourth Amendment standards. *Brendlin v. California*, 551 U.S. 249, 251, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007); see also *United States v. Symonevich*, 688 F.3d 12, 19 (1st Cir.2012).

Several agents and officers stopped that the vehicle containing Mr. Stanley. It is not alleged that the vehicle engaged in a specific traffic offense. The entirety of the stop was based on statements of the CI. Despite the existence of cruiser cameras, communication recording devices, and body cameras, the Government cannot produce one iota of extrinsic evidence supporting their allegations that the CI made statements or that the canine made a positive indication as to the presence

of narcotics. All such evidence has been requested and is solely within the control of the Government. The missing evidence rule provides that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Int'l Union, United Auto., Aerospace & Agricultural Implement Workers of America (UAW) v. NLRB ("Int'l Union"),* 459 F.2d 1329, 1336 (D.C.Cir.1972). The idea is that "all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case." *Id.* at 1338. Thus, "[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Silence then becomes evidence of the most convincing character." *Interstate Circuit v. United States,* 306 U.S. 208, 226, 59 S.Ct. 467, 83 L.Ed. 610 (1939)(internal citations omitted).

A negative inference in this case would be that the statements alleged by the CI, which formed the entire basis for the stop of the motor vehicle, were not made. With that inference, the stop was clearly impermissible and all evidence obtained subsequent should be suppressed. Additionally, without any video evidence as to the positive indication by the canine, a negative inference would that there was no indication, and thus, any subsequent search would be impermissible.

II. THE POLICE LACKED REASONABLE SUSPICION TO STOP THE MOTOR VEHICLE AND DETAIN THE OCCUPANTS BASED SOLELY ON THE STATEMENTS OF THE INFORMANT

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *U.S. Const. Amend. IV.* An exception to this is often referred to as a '*Terry Stop*,' which is derivative from Supreme Court caselaw. Under *Terry v.*

Ohio, an officer may briefly invade that right and detain a suspect for questioning if the officer has reasonable suspicion to believe criminal activity occurred or may occur. 392 U.S. 1 (1968). It is well established that "an officer cannot conduct a *Terry* stop simply because criminal activity is afoot." *United States v. Brown*, 159 F.3d 147, 149 (3rd Cir. 1998). "Instead, the officer must have a particularized and objective basis (reasonable suspicion) for believing that *the particular person* is suspected of criminal activity." *Id.* (citing *Cortez*, 449 U.S. at 417-18, 101 S.Ct. 690 (*emphasis added*). "Reasonable suspicion requires more than mere hunch, but less than probable cause." *United States v. Ruidiaz*, 529 F.3d 25, 29 (1st Cir.2008). Reasonable suspicion requires a "particularized and objective basis for suspecting the person stopped of criminal activity. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). The particularized requirement means, in effect, that such a finding must be grounded in specific and articulable facts." *United States v. Espinoza*, 490 F.3d 41, 47 (1st Cir.2007).

The Fourth Amendment of the United States Constitution and Article 1, Section 5 of our Maine Constitution do require that the officer's objective observations, coupled with any relevant information he may have, together with the rational inferences and deductions he may draw and make from the totality of the circumstances, be sufficient to "reasonably warrant suspicion of criminal conduct" on the part of the party or parties subjected to the investigatory stop or detention, criminal conduct which has taken place, is occurring, or imminently will occur. *State v. Griffin*, 459 A.2d 1086, 1089 (Me.1983).

For an officer to make a constitutionally sound investigatory traffic stop, there must be an "articulable suspicion that criminal conduct has taken place, is occurring, or imminently will occur, and the officer's assessment of the existence of specific and articulable facts sufficient to warrant the stop is objectively reasonable in the totality of the circumstances. *State v, Tarvers*, 709 A.2d 726, 727 (Me.1998). Evidence obtained after an impermissible stop may be tainted by the

illegality of an earlier Fourth Amendment violation, rendering it as "fruit of the poisonous tree." *United States v. D'Andrea*, 648 F.3d 1, 6 (1st Cir. 2011). The proper remedy for the illegality is the exclusion of any evidence obtained as a direct result or found to be derivative of the illegal stop, search, or seizure. *Segura v. United States*, 468 U.S. 796, 804 (1984).

In this matter, the actions by the actors for the Government did not just require reasonable suspicion of criminal activities to conduct a *Terry* Stop, but further evidence of suspicion of criminal activity in order to justify the continued seizure of the occupants to allow for a dog sniff. See *United States v. Cook*, 277 F.3d 82, 85 (1st Cir.2002) (quoting *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); see also *United States v. Chhien*, 266 F.3d 1, 6 (1st Cir.2001)). Since the entirety of the stop and detention was based upon the information supplied by the CI, there is no corroboration by the agents that can be used in the analysis. The barebones information provided by the informant as well as the lack of information the agents knew about the information cannot sustain the Government's burden in this matter as it runs contrary to established caselaw on the requirements for information solely relied upon by an informant. Nowhere is it explained how the informant know Stanley was engaged in drug trafficking. See *State v. Crowley*, 1998 ME 187, pp 6-7, 714 A.2d 834, 837. There is no statement or information to the effect that the informant has been found or is otherwise believed by the MDEA agent or other law enforcement officials to be a reliable reporter of information. *Id*. ¶ 6, 714 A.2d at 837. When the State fails to supply information about an informant's reliability or basis of knowledge, it reduces the veracity of information provided in the analysis. *Id.*

In *State v. Rabon*, the confidential informant claimed that Charles Rabon drove to Florida several times during the year to pick up large amounts of cocaine, brought the cocaine back to the apartment that he shared with his wife in Rumford, and then distributed most of his cocaine to local dealers for sale at local bars

where he operated a karaoke business. He specifically told the agent the following information which was incorporated into the affidavit:

> "a. That a white male known as "CHUCK" resides in a blue apartment building on Plymouth Avenue in Rumford with his wife SHARON;
> b. That CHUCK drives to Florida three or four times per year to pick up a large amount (approximately 2 kilograms) of cocaine and brings it back to his home in Rumford for distribution;
> c. When CHUCK returns to Rumford with the cocaine, CHUCK distributes most of his cocaine to local dealers so they can sell for him;
> d. That CHUCK owns and operates a karaoke music business at local bars including Jack's Place in Rumford and Tommy Guns' in Mexico. It is at these bars that most of CHUCK'S cocaine is distributed." 2007 ME 113, 930 A.2d 268, (2007).

Despite this detailed information, the Law Court reversed a denial of a motion to suppress in large part because:

> "{t}he warrant affidavit reveals very little about the informant's background. It reports that the confidential informant contacted the police wishing to share information about drug trafficking occurring in Rumford in order to receive "prosecutorial consideration if any information provided is helpful in a drug trafficking case." The informant is described as not being on probation, but as being on bail for non-drug related offenses; as not receiving any remuneration in exchange for information; and as having provided additional information other drug trafficking in the area. The affidavit does not provide any details regarding this additional information, or whether it had been found to be accurate." *Id*. at 278.

Finally, the informant is not a disinterested "citizen informant," but is instead a "confidential informant" who "disclose[d] information to the authorities in hopes of lessening his or her own exposure to criminal sanctions." *State v. Perrigo*, 640 A.2d 1074, 1076 (Me. 1994). "Courts are much more concerned with veracity when the source of the information is an informant from the criminal milieu rather

than an average citizen who has found himself in the position of a crime victim or witness." 2 Wayne R. LaFave, Search and Seizure § 3.4 at 219 (4th ed. 2004).

III. THE NARCOTIC DETECTION CANINE WAS NOT PROPERLY TRAINED AND THERE WERE NOT PROPER DETECTION METHODS IN THIS MATTER.

Florida v. Harris offers some instruction on the proper procedures that need to be employed in dog sniff cases. 568 U.S. 237, 133 S.Ct. 1050 (2013). In *Harris*, a canine officer was on patrol with his drug dog, Aldo. Harris' truck was pulled over with an expired license plate. *Id*. at 1053. The canine handler walked Aldo around the exterior of the car, where he alerted on the driver's side door. *Id*. at 1054. The subsequent search did not find drugs, but revealed items related to the cooking of methamphetamine. *Id.*

Harris moved to suppress the dog sniff as insufficient probable cause. He prevailed at the State Court level, and Florida found that "[T]he State must present … the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability." *Id.* at 1055.

The United States Supreme Court reversed. It did not believe in such a rigid reading of probable cause, or the imposition of "a strict evidentiary checklist, whose every item the State must tick off." *Id*. at 1056. The Court found that a dog's satisfactory certification may "provide sufficient reason to trust his alert." *Id*. at 1057. This has never been interpreted to mean any 'certified' drug dog

presents automatic probable cause; rather quite the opposite. The Supreme Court went on to say:

> "A defendant, however, 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. The defendant, for example, may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty. So too, the defendant may examine how the dog (or handler) performed in the assessments made in those settings. Indeed, evidence of the dog's (or handler's) history in the field, although susceptible to the kind of misinterpretation we have discussed, may sometimes be relevant, as the Solicitor General acknowledged at oral argument. See Tr. of Oral Arg. 23-24 ("[T]he defendant can ask the handler, if the handler is on the stand, about field performance, and then the court can give that answer whatever weight is appropriate"). And even assuming a dog is generally reliable, circumstances surrounding a particular alert may undermine the case for probable cause-if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions."
> *Id*. at 1057-1058.

Such a directive demanded by the Supreme Court is consistent with the approach espoused by district and circuit courts related to their probable cause findings:

> "Under the correct approach, a probable-cause hearing focusing on a dog's alert should proceed much like any other, with the court allowing the parties to make their best case and evaluating the totality of the

> circumstances. 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, the court should find probable cause. But 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. The defendant may contest training or testing standards as flawed or too lax or raise an issue regarding the particular alert. The court should then consider all the evidence and apply the usual test for probable cause-whether all the facts surrounding the 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 1052-1053.

There are a significant number of problems in the canine sniff search. Mr. Stanley believes there was cuing of the dog by his handler. Since it is unclear on what passes Zak alerted, it is possible he was continuously reintroduced to the same area, cueing him to alert. Finally, the training records received and the real-world performance by Zak indicate that the canine's training was insufficient.[2] The training documentation is inadequate, as are the training procedures and record-keeping procedures. Therefore, any search that occurred based on the alleged dog 'hit' establishing probable cause was insufficient and should be suppressed.

WHEREFORE Mr. Stanley respectfully requests that this Honorable Court suppress everything that occurred after the unconstitutional stop and seizure of him on August 30, 2018 together with any and all other relief that this Honorable Court deems fit

2 For example, there has been no training documentation provided for 2018. See *United States v. Almeida*, III, et al

and just.

RESPECTFULLY SUBMITTED:
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Date:_____ _____
David J. Bobrow, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this date I emailed and will hand deliver pursuant to the UCD Rules, a copy of this Motion to the Assistant Attorney General, Portland, Maine.

Date:_____ _____
David J. Bobrow

No. 2:11-cr-127-DBH ("as of 2011, K-9s must be recertified once per year.")