No. 13-9972

IN THE SUPREME COURT OF THE UNITED STATES

DENNYS RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LESLIE R. CALDWELL
Assistant Attorney General

SANGITA K. RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the police may initiate a dog sniff following a de minimis delay motivated by officer-safety concerns, where the stopped motorist has declined consent, but the police have a reasonable suspicion that the stopped motorist is engaging in illegal conduct.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-3A) is reported at 741 F.3d 905. The opinion of the district court (Pet. App. 4A-8A) is not published in the Federal Reporter but is available at 2012 WL 5458427.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2014. The petition for a writ of certiorari was filed on May 1, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Nebraska, petitioner was convicted on one count of possessing with intent to distribute 50 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1). He was sentenced to 60 months of imprisonment, to be followed by four years of supervised release. The court of appeals affirmed. Pet. App. 1A-3A; Gov't C.A. Br. 1-2.

1. On March 27, 2012, just after midnight, Morgan Struble, a canine officer with the Valley Police Department in Nebraska, was in his patrol car with his drug dog when he observed the vehicle petitioner was driving veer slowly onto the shoulder of the highway and then jerk back onto the road. Pet. App. 2A; 7/10/12 Hrg. Tr. (Tr.) 3-6, 29. Officer Struble initiated a traffic stop of the vehicle at 12:06 a.m. Passenger Scott Pollman was seated in the front seat beside petitioner. See Pet. App. 2A.

As Officer Struble approached the vehicle, he noticed an "overwhelming" odor of air freshener. Tr. 6-7, 32-33; see Pet. App. 5A. According to Struble, the use of "overwhelming" air freshener is a "common tactic" for covering up the scent of contraband such as illegal drugs. Tr. 35-36. Struble also observed that Pollman had his hat pulled down over his eyes, was

looking straight ahead, and would not make eye contact, as if he did not want to be seen. Pet. App. 2A; Tr. 7, 32. Struble explained at the suppression hearing that Pollman appeared unusually nervous for a mere passenger in a stopped vehicle. Pet. App. 2A, 5A; Tr. 7, 18-19.

After Officer Struble collected petitioner's license, registration, and proof of insurance, he asked petitioner to sit in the patrol vehicle while a records check was completed. Petitioner asked if he was required to do so, and Struble responded that he was not. Petitioner thus declined to accompany Struble and instead waited in his own vehicle. Pet. App. 2A. Struble testified that, in his time as a police officer, he had never encountered anyone else who was "so adamant against" sitting in the patrol vehicle. Tr. 34. Struble believed that petitioner's behavior indicated that he did not want to be far from his vehicle or its contents. At the suppression hearing, Struble explained that, in his experience, "people concealing contraband" tend not to "want to distance themselves too much from their contraband." Tr. 35.

Struble ran a records check on petitioner and returned to the vehicle. He asked Pollman for identification and inquired into where the two men were coming from. Pollman stated that they had traveled to Omaha, Nebraska, to look at a car that was for sale and that they were returning to Norfolk, Nebraska.

Pet. App. 2A; Tr. 10. Pollman stated that he had not seen any pictures of the vehicle before making the trip. Officer Struble found it "suspicious" and "abnormal" that the men would drive four hours to Omaha and back "that late at night to see a vehicle sight unseen to possibly buy it." Tr. 11, 41, 45. Pollman also stated that he had not bought the vehicle because the seller did not have the title to it. Struble found it similarly unlikely that the two men would have driven that distance to look at a car without obtaining any title information in advance. Ibid.

Struble returned to his patrol car to run a records check on Pollman. At that point, he also called for a second officer because he was concerned about his safety. Struble issued a written warning to petitioner at 12:27 or 12:28 a.m. Pet. App. 2A; Tr. 47-48, 51. Struble then asked permission to walk his dog around petitioner's vehicle. When petitioner refused consent, Struble directed petitioner to step out of the vehicle. Petitioner rolled up the windows of his car and then stood in front of the patrol car with Struble while Struble waited for the second officer. Pet. App. 2A-3A; Tr. 14-15. After the second officer arrived, Struble led his drug dog around petitioner's car, and, within 20 to 30 seconds, the dog alerted to the presence of drugs. "All told, seven or eight minutes had passed from the time Struble had issued the written warning

until the dog indicated the presence of drugs." Pet. App. 3A; see also id. at 7A. A search of the vehicle uncovered a large bag of methamphetamine. Id. at 3A.

2. Petitioner was indicted in the United States District Court for the District of Nebraska on one count of possessing with intent to distribute 50 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1). Petitioner moved to suppress the drugs seized from his car, arguing that the dog sniff occurred during an unlawful detention that was not supported by reasonable suspicion of criminal activity. After an evidentiary hearing, a magistrate judge issued oral findings and a recommendation to deny the motion to suppress. Pet. App. 9A-19A. At the outset, the magistrate judge found Officer Struble, the only witness who testified at the suppression hearing, to be credible. Id. at 9A. The magistrate judge declined to find that reasonable suspicion had supported the detention after Struble issued the written warning, id. at 18A, but, citing Eighth Circuit precedent, concluded that the extension of the stop by "seven to eight minutes" for the dog sniff was only a de minimis intrusion on petitioner's Fourth Amendment rights. Id. at 14A-16A.

The district court agreed with the magistrate judge. Pet. App. 6A-7A. Emphasizing that Officer Struble "requested backup for officer safety," that the backup officer "responded in a

short period of time," and that the drug dog was already in Struble's car and was deployed "immediately" after the backup officer arrived, the district court concluded that conducting the dog sniff after Struble had already issued a written warning was a constitutional, de minimis intrusion into petitioner's privacy rights. Id. at 7A. The district court did not address whether reasonable suspicion supported extending petitioner's detention, beyond generally stating that it was adopting the magistrate judge's findings. Id. at 8A.

In light of the denial of the motion to suppress, petitioner entered a conditional guilty plea, reserving his right to appeal the court's Fourth Amendment ruling. He was sentenced to 60 months of imprisonment, to be followed by four years of supervised release. Gov't C.A. Br. 1-2.

3. The court of appeals affirmed the denial of the motion to suppress. Pet. App. 1A-3A. In accordance with Illinois v. Caballes, 543 U.S. 405 (2005), the court pointed out that "[a] dog sniff conducted during a traffic stop that is 'lawful at its inception and otherwise executed in a reasonable manner' does not infringe upon a constitutionally protected interest in privacy." Pet. App. 3A (quoting United States v. Martin, 411 F.3d 998, 1002 (8th Cir. 2005) (quoting Caballes, 543 U.S. at 408)). The court rejected petitioner's argument that the stop was "unreasonably prolonged" by the "brief delay" in deploying

the dog. Ibid. Like the district court, the court of appeals highlighted the fact that the dog sniff had been delayed only because Struble was waiting for a second officer to arrive out of concern "for his safety because there were two persons in [petitioner's] vehicle." Ibid. Noting that it had "repeatedly upheld dog sniffs that were conducted minutes after the traffic stop concluded," the court concluded that the "seven- or eight-minute delay" in this case was -- like the brief delays in those cases -- only a "de minimis intrusion on [petitioner's] personal liberty." Ibid.; see also ibid. (citing United States v. Alexander, 448 F.3d 1014, 1017 (8th Cir. 2006), cert. denied, 549 U.S. 1118 (2007); United States v. Morgan, 270 F.3d 625, 632 (8th Cir. 2001), cert. denied, 537 U.S. 849 (2002); United States v. $404,905.00 in U.S. Currency, 182 F.3d 643, 649 (8th Cir. 1999), cert. denied, 528 U.S. 1161 (2000)). The court thus held that no Fourth Amendment violation had occurred. Id. at 1A-3A.

The court of appeals did not address the government's argument that the police had a reasonable suspicion that petitioner was engaged in criminal activity, independently justifying further detention. Pet. App. 1A-3A.

ARGUMENT

Petitioner argues (Pet. 7-18) that, although the dog sniff in this case may have been permissible if it had been conducted

during the concededly lawful traffic stop, it violated the Fourth Amendment because it was delayed seven to eight minutes while the canine officer awaited the arrival of a backup officer for safety. The court of appeals correctly rejected that argument, and, contrary to petitioner's contention (Pet. 8-13), its decision does not conflict with any decision of this Court or of any other court of appeals or state court of last resort. This Court has recently denied review in cases raising the same claim and arising from the same court of appeals. See, e.g., Norwood v. United States, 131 S. Ct. 996 (2011) (No. 10-6178); Alexander v. United States, 549 U.S. 1118 (2007) (No. 06-5881). The same outcome is warranted here.

1. a. In Illinois v. Caballes, 543 U.S. 405, 407 (2005), this Court addressed the question "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." In that case, one officer walked his dog around the defendant's car while another officer "was in the process of writing a warning ticket." Id. at 406. In concluding that the dog sniff was permissible without any level of suspicion, the Court explained that the use of a well-trained narcotics-detection dog -- one that "does not expose noncontraband items that otherwise would remain hidden from public view" -- during a lawful traffic stop generally does not

implicate legitimate privacy interests. Id. at 409. In this case, the dog sniff was performed on the exterior of petitioner's car after he had been lawfully seized for a traffic violation. The sniff itself did not intrude on petitioner's legitimate privacy expectations. See ibid. (quoting United States v. Place, 462 U.S. 696, 707 (1983)).

Petitioner does not dispute that his vehicle "was lawfully seized for a traffic violation." Caballes, 543 U.S. at 409. Nor does he dispute that the drug-detection dog used by the officers was "well-trained" enough that the "sniff * * * performed on the exterior of [petitioner's] car" did "not expose noncontraband items that otherwise would remain hidden from public view." Ibid. Rather, petitioner's sole ground for distinction from Caballes is that the sniff in Caballes occurred "while [an officer] was in the process of writing a warning ticket," id. at 406, whereas the sniff here occurred several minutes after Officer Struble had finished writing a ticket, once a backup officer had arrived to help ensure Struble's safety. He contends that Struble's deploying the dog shortly after writing the warning ticket and immediately after satisfying his safety concerns -- thereby extending the 21-minute stop by seven to eight minutes -- amounted to a significantly greater "intrusion on * * * privacy

expectations," id. at 409, than the intrusion at issue in Caballes.

The court of appeals correctly concluded that the "de minimis" seven- to eight-minute delay of petitioner's departure to safeguard Office Struble did not itself render unreasonable the otherwise-permissible dog sniff. Pet. App. 3A; see also Pet. 10-11 (explaining that "[o]ther jurisdictions have joined the Eighth Circuit in holding that a brief extension of a traffic stop for a dog sniff is not constitutionally unreasonable" and citing cases). That conclusion is consistent with common sense -- the fact that the sniff was conducted shortly after, instead of during, the issuance of the warning did not change what the sniff itself would or would not reveal, nor did it subject petitioner's vehicle or personal effects to any greater intrusion. Struble had the drug dog on site with him and delayed the sniff for several minutes solely because he was concerned about the threat that two men on a deserted rural highway in the middle of the night might pose to his safety. Gov't C.A. Br. 4. If two officers had conducted the stop rather than one, the dog sniff would have occurred several minutes earlier, but the additional time was de minimis. And had the dog not alerted, petitioner would have been free to go, with no exposure of his personal effects and only a brief, de minimis interference with his travel plans. The "intrusion on * * *

privacy expectations" in this case accordingly had no greater constitutional significance than the minimal intrusion in Caballes. 543 U.S. at 409.

This Court has recently denied review in similar cases, including one on which the district court (Pet. App. 7A) and the court of appeals (Pet. App. 3A) relied. See United States v. Alexander, 448 F.3d 1014, 1016-1017 (8th Cir. 2006) (upholding a suspicionless dog sniff completed four minutes after the officer told defendant he would be receiving a warning ticket for a traffic violation), cert. denied, 549 U.S. 1118 (2007); see also United States v. Norwood, 377 Fed. Appx. 580, 582-583 (8th Cir. 2010) (finding no Fourth Amendment violation when dog sniff was completed one minute and a half after the officer issued a verbal warning and the defendant's voluntary participation in further questioning had ceased), cert. denied, 131 S. Ct. 996 (2011). There is no reason for a different result here.

b. The dog sniff in this case was independently justified by Officer Struble's reasonable suspicion -- unrelated to petitioner's traffic offense -- that unlawful activity was taking place. The scope of a valid investigatory detention may be expanded if an officer can identify "specific and articulable facts" that make him suspicious that "criminal activity may be afoot." Terry v. Ohio, 392 U.S. 1, 21-22, 30 (1968); see, e.g., United States v. Chavez Loya, 528 F.3d 546, 553 (8th Cir. 2008)

("An officer may expand the scope of a traffic stop beyond the initial reason for the stop and prolong the detention if the driver's responses and the circumstances give rise to a reasonable suspicion that criminal activity unrelated to the stop is afoot."). In petitioner's case, Officer Struble had ample reasonable suspicion to initiate the dog sniff after the conclusion of the traffic stop. Although the court of appeals did not rule on those grounds, a prevailing party is "of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979); see Gov't C.A. Br. 15-19.[1]

Officer Struble reasonably suspected that petitioner's car contained illicit drugs. That reasonable suspicion was based on numerous factors including the overwhelming odor of air freshener emanating from petitioner's car, passenger Pollman's nervous behavior and attempts to avoid being looked at closely, and Officer Struble's belief that Pollman's story about the reason for making the long trip to Omaha in the middle of the

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[1] Although the magistrate judge made an oral finding that reasonable suspicion did not justify extending the detention after the written warning was issued, the magistrate judge did not engage in an extended analysis, see Pet. App. 18A, and neither the district court nor the court of appeals addressed the issue.

night was not credible. See, e.g., Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion."); United States v. Branch, 537 F.3d 328, 338 (4th Cir. 2008) (explaining that nervousness of driver, passenger's refusal to make eye contact, and "presence of several air fresheners" in car contributed to reasonable suspicion of illicit drug activity), cert. denied, 555 U.S. 1118 (2009); United States v. Fuse, 391 F.3d 924, 929-930 (8th Cir. 2004) (holding that "a strong odor of air freshener" helped "demonstrate reasonable suspicion justifying continued detention of [defendant] to conduct a dog sniff"), cert. denied, 544 U.S. 990 (2005); see also United States v. Riley, 684 F.3d 758, 764 (8th Cir.) ("[R]easonable suspicion could derive from 'unusual or suspicious travel plans.'" (quoting United States v. Beck, 140 F.3d 1129, 1139 (8th Cir. 1998))), cert. denied, 133 S. Ct. 800 (2012). Moreover, immediately after petitioner declined to consent to a dog sniff of his car and Officer Struble asked him to step out of his vehicle to await the arrival of the backup officer, petitioner rolled up the windows of his car, further contributing to Struble's reasonable suspicion that the air fresheners were being used to mask the scent of odors detectable to a drug dog.

Officer Struble took reasonable, minimally intrusive steps to investigate his reasonable suspicion of illicit activity. As soon as the backup officer he had called for protection arrived, Struble deployed the drug dog that had been on the scene with him since the beginning of the stop, and the dog alerted to the presence of drugs within 20 to 30 seconds. Because the dog sniff was based on Struble's reasonable suspicion that additional criminal activity was afoot and was "reasonably related in scope to the circumstances which justified [it]," Terry, 392 U.S. at 20, it was lawful regardless of whether Struble could otherwise have detained petitioner for an additional seven to eight minutes after issuing the written warning. Resolution of the issue on which petitioner seeks further review would therefore have no effect on the outcome of his case.

2. Petitioner is incorrect (Pet. 11-13) that further review is warranted based on an asserted conflict between the outcome in this case and a decision of this Court, another federal court of appeals, or any state court of last resort.

a. Petitioner's contention (Pet. 14-15) that the court of appeals' decision conflicts with Caballes is incorrect. Petitioner argues that, "[w]hile the Court in Caballes held that a dog sniff during a reasonably-executed stop will not violate the Fourth Amendment, it was quick to point out that reasonable

suspicion would be required for any sniff occurring 'during an unreasonably prolonged traffic stop.'" Pet. 15 (emphases omitted) (quoting Caballes, 543 U.S. at 407). But petitioner's traffic stop was not "unreasonably prolonged." The Court in Caballes cited People v. Cox, 782 N.E.2d 275 (Ill. 2002), cert. denied, 539 U.S. 937 (2003), as an example of a case in which a traffic stop was unreasonably prolonged. 543 U.S. at 407-408. The officer who initiated the traffic stop at issue in Cox called in a canine unit that did not arrive at the scene until "approximately 15 minutes after the initial traffic stop." 782 N.E.2d at 277, 280. In the instant case, by contrast, Officer Struble had a drug-detection dog in his patrol car from the outset and extended the stop by at most eight minutes, primarily to await the arrival of a backup officer who could help ensure his safety. Also, whereas the court in Cox expressed its view that the officer who had initiated the traffic stop had unreasonably extended the duration of the stop to allow the dog to arrive on the scene before the stop had concluded, id. at 280, petitioner makes no such allegation. Moreover, the court in Cox determined that the officer in that case did not have a reasonable, articulable suspicion that the defendant was engaged in illegal activity. Id. at 280-281. The court of appeals did not reach that issue in this case. As discussed previously, see pp. 11-14, supra, Officer Struble was justified in extending his

stop of petitioner in order to conduct the dog sniff, based on his reasonable suspicion that petitioner was engaged in illegal activity. Because the stop of petitioner was not "unreasonably prolonged" by waiting to conduct or by conducting the dog sniff, the court of appeals' decision is fully consistent with Caballes.[2]

b. Nor is there merit to petitioner's argument (Pet. 11-12) that the outcome of his case would have been different if his case had been litigated in a Nebraska state court rather than a Nebraska federal court. Petitioner relies on State v. Louthan, 744 N.W.2d 454 (Neb. 2008), in which the Nebraska Supreme Court interpreted this Court's decision in Caballes as "indicat[ing] that there is a constitutionally significant line of demarcation between a routine traffic stop and one in which a dog sniff is conducted after the investigative procedures incident to the traffic stop have been completed." Id. at 462 (emphasis

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[2] The other case on which petitioner primarily relies (Pet. 15), Muehler v. Mena, 544 U.S. 93 (2005), also does not support his point that "any investigation that prolongs a traffic stop beyond its natural conclusion must be supported by individualized suspicion." Pet. App. 14. In Muehler, the Court merely held that officers did not violate the defendant's Fourth Amendment rights by questioning her about her immigration status while she was validly detained on other grounds because the questioning did not prolong her detention. 544 U.S. at 101. The case did not address whether a de minimis extension of a traffic stop, as here, must be supported by reasonable suspicion.

omitted). It is true that the Louthan court declined (as petitioner notes, Pet. 12) to adopt the Eighth Circuit's "de minimis rule" (which was applied in this case), instead concluding that law enforcement officers may not initiate a dog sniff after the conclusion of a lawful traffic stop unless they have a reasonable suspicion. 744 N.W.2d at 461-462. Where such a suspicion exists, the state court stated that a court must determine whether the extended detention was reasonable. Id. at 462.

But any divergence in approach between the Nebraska Supreme Court and the Eighth Circuit does not merit further review of petitioner's case because petitioner would not have prevailed under the standard articulated in Louthan either. Officer Struble's reasonable, articulable suspicion that petitioner was engaged in illegal activity independently justified the additional seven- to eight-minute detention of petitioner for the purpose of conducting the dog sniff. The court in Louthan upheld a delay of seven minutes based on a similarly reasonable suspicion that illegal activity was afoot. 744 N.W.2d at 464. Thus, petitioner's suppression argument would not have fared any better in the Nebraska state courts than it did in federal court.

c. For the same reason, further review is not warranted to settle any conflict between the court of appeals' decision and

any of the remaining cases cited by petitioner. See Pet. 12-13 (citing United States v. Stepp, 680 F.3d 651, 661-662 (6th Cir. 2012); United States v. Urrieta, 520 F.3d 569, 578 (6th Cir. 2008); United States v. Wood, 106 F.3d 942, 946 (10th Cir. 1997); State v. Baker, 229 P.3d 650 (Utah 2010); D.K. v. State, 736 N.E.2d 758 (Ind. Ct. App. 2000), abrogation recognized by McLain v. State, 963 N.E.2d 662 (Ind. Ct. App. 2012)). Although petitioner is correct that none of those cases applied the "de minimis rule" that the court of appeals applied in this case, each case did conclude that a law enforcement officer may detain an individual beyond the duration of a lawful traffic stop if the officer has a reasonable, articulable suspicion that the individual is engaged in unlawful activity. See Stepp, 680 F.3d at 661; Urrieta, 520 F.3d at 574; Baker, 229 P.3d at 659; D.K., 736 N.E.2d at 762; cf. Wood, 106 F.3d at 948. In this case, as discussed above, the dog sniff of petitioner's car was independently justified under that standard as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LESLIE R. CALDWELL
Assistant Attorney General

SANGITA K. RAO
Attorney

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