

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2908-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NESTOR BALBI, a/k/a
BALBI-CIRIACO, and
NESTOR BALBI CIRIACO,

Defendant-Appellant.

Argued February 8, 2023 – Decided March 14, 2023

Before Judges Currier, Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law
Division, Bergen County, Indictment No. 17-06-0767.

Alyssa Aiello, Assistant Deputy Public Defender,
argued the cause for appellant (Joseph E. Krakora,
Public Defender, attorney; Alyssa Aiello, of counsel
and on the brief).

Deepa Jacobs, Assistant Prosecutor, argued the cause
for respondent (Mark Musella, Bergen County
Prosecutor, attorney; William P. Miller, Assistant

Prosecutor, of counsel and on the brief; Catherine A. Foddai, Legal Assistant, on the brief).

PER CURIAM

Defendant Nestor Balbi appeals from an October 9, 2020 order denying his motion to suppress evidence after a remand. We affirm.

In our prior decision, we remanded for the trial judge to make specific factual findings about the movements of the K-9 dog as part of a canine sniff of defendant's car to establish probable cause for a search warrant. We asked the remand judge to "address whether the canine sniff was lawful and what effect, if any, an illegal breach of the vehicle's exterior had on the search and the validity of the search warrant." See State v. Balbi, No. A-0682-18 (App. Div. June 2, 2020) (slip op. at 14-15).

The facts leading to defendant's guilty plea and judgment of conviction are set forth in our June 2, 2020 opinion and we need not repeat them here. We recite only the additional facts adduced during the August 25, 2020 evidentiary hearing after our remand.

Consistent with our remand instructions, the judge heard the testimony of Officer Robert Marini of the Bergen County Sheriff's Office,¹ the canine handler who, with his dog, conducted a canine sniff of defendant's car after officers assigned to the Bergen County Prosecutor's Office Narcotics Task Force (NTF) lawfully stopped the vehicle. A video of the canine sniff from the officers' motor vehicle recording was introduced during the evidentiary hearing.

Officer Marini testified he was called to the upper level of the George Washington Bridge at approximately 7:15 p.m. on February 17, 2017 to conduct a narcotics sniff. After speaking with the lead officer at the scene, Detective Timothy Cullen from the NTF, Officer Marini deployed his dog to conduct a canine sniff of defendant's car. Marini explained that from the moment his dog exited the patrol car, the dog "[was] ready to work." Marini stated the "[d]river's side window was down all the way" and the rear driver's side window "was down half-way" prior to starting the sniff.² Marini testified his dog alerts, or indicates, in response to the odor of narcotics by "[b]iting, scratching, barking."

¹ In our June 2, 2020 opinion, we noted "the canine handler could have shed some light on what transpired [during the canine sniff], but [Officer Marini] was not subpoenaed by the defense or called by the State." Balbi, slip op. at 14.

² While watching the video, the judge noted "for the record that the video . . . even prior to the dog going to the other side of the car[,] you can see . . . what appears to be an air freshener hanging from the . . . car. It's already moving and swaying back and forth even before any intrusion [in]to the vehicle."

Marini narrated the dog's movements in the video while it played during the evidentiary hearing. He explained the dome light from the car's interior came on because the dog "bit the door handle" on the front passenger door and the officer "immediately closed the door, continu[ing] on."

Officer Marini explained that he conducted two passes around defendant's car with his dog. On the first pass, he went "higher on the car by the door handle, windows. . . . On the second pass[, he] went lower to see if [there was] anything under the car . . . [such as] narcotics under the seats under the vehicle."

Marini confirmed that his dog alerted on the front passenger door by biting the door handle, which informed Marini that the dog detected the odor of drugs. The officer explained his dog then scratched at the front passenger door, pointing "to the source" of the odor. Marini stated his dog "never entered the vehicle." When the dog opened the car door, Marini "shut the door immediately." He further explained he had his left hand on the dog's leash and used his right hand to close the car door.

On cross-examination, Officer Marini reviewed thirty-two individual screen shots from the motor vehicle recording of the canine sniff. He explained that his dog previously opened car door handles "possibly" five times prior to this sniff, and the pair had conducted "over a thousand K-9 jobs." Marini

testified that biting, scratching, jumping, and barking were his dog's alert signals and any one of the four actions by his dog could indicate the odor of narcotics. Marini also acknowledged that his written report never mentioned his dog biting and physically opening the car door.

On redirect, Officer Marini explained the air freshener inside defendant's car began moving when the dog put his "body weight on the vehicle, shak[ing] the car" on the passenger side door.³ The officer reiterated that he looked for his dog to scratch the car "to pinpoint" the odor of narcotics. Marini confirmed that his dog biting on the car door handle was "one of his indication[s]" for detecting the odor of drugs. He further testified his dog was "[n]ot agitated" during the sniff and simply displayed excitement to be working.

At the end of the evidentiary hearing, the attorneys and the judge discussed the events depicted on the video recording. The judge stated, "if you look carefully at the video, . . . it appears to me to be clear that the officer's . . . hands are on the leash and his arms are never extended to [] a point where [the officer] could have opened up the door." The judge then referred to our remand decision, where we cautioned "[a]ny attempts by counsel to try to fill the void

³ Officer Marini's canine partner is a German Shepherd and weighed about eighty-five pounds.

by representing what appeared in the [motor vehicle recording] footage cannot substitute for . . . competent evidence [by the canine handler]." Balbi, slip op. at 14. During the colloquy with counsel, the judge also commented "there's no evidence before me that the dog has been specifically trained to open up car doors." The judge stated he would rely on Officer Marini's testimony and the motor vehicle recording in rendering his decision on remand.

About a month after the evidentiary hearing, the judge issued a sixteen-page written decision, supplementing his earlier written decision denying defendant's motion to suppress evidence. The judge found "Officer Marini's testimony to be credible and consistent with the video of the motor vehicle stop" In accordance with our remand instructions, the judge concluded "Officer Marini's testimony clarifie[d] and shed[] light on the specific facts and circumstances of the canine sniff and how the vehicle's front driver and front passenger side doors were opened."

Relying on the officer's credible testimony, the judge found the dog's "biting, scratching, and barking [were] indicators of the presence of narcotics." After describing his observations from the motor vehicle recording, the judge found "Officer Marini's testimony as to the sequence of the deployment of [the dog] [was] consistent with what is observed on the video." The judge further

determined Marini plausibly testified the dog opened the car door by biting the handle because the officer's arms were "not extended in a position where Officer Marini himself could have opened the front driver side door." After reviewing the video, the judge found the dog never entered defendant's car.

In his remand decision, the judge concluded:

based on the credible testimony of Officer Marini, consistent with the video . . . , that [the dog] was not specifically prompted by Officer Marini to open either of the doors and that [the dog's] biting and scratching at the exterior of the vehicle, including the door handles, occurred just prior to the opening of the doors, and was a positive alert for the presence of narcotics consistent with the dog's training. Therefore, based on a totality of the evidence before it, this court finds that the canine sniff was lawful and the opening of the car doors was not an illegal breach of the vehicle's exterior as the positive indications for narcotics occurred before the doors opened. This court finds that the brief opening of the car doors had no effect on the search and validity of the warrant.

The judge reaffirmed his denial of defendant's motion to suppress after the remand hearing. On appeal, defendant raises the following arguments:

POINT I

THE REMAND JUDGE'S DECISION DENYING SUPPRESSION MUST BE REVERSED BECAUSE THE OPENING OF THE CAR DOORS DURING THE DOG SNIFF CONSTITUTED AN UNLAWFUL SEARCH.

A. No Deference Is Owed To The Trial Judge's Findings That The Dog Opened The Car Doors Or That The Dog Gave A Positive Alert Before The Doors Were Open.

i. The video does not support the judge's finding that the officer could not have opened the driver's door.

ii. The evidence unequivocally established that the "biting and scratching of the exterior of the vehicle," which constituted the positive alert, occurred only on the passenger side and only after the driver's door had been opened.

iii. There was no sufficient, credible evidence in the record to support a finding that the dog was capable of pulling open the driver's door.

B. Assuming Arguendo The Dog Opened The Doors, There Was No Basis For The Judge To Conclude That The Dog Was "Following Its Instincts."

C. Assuming Arguendo The Dog In This Case Had Somehow Developed The Ability To Open a Car Door, The Handler's Failure To Control The Dog From Doing So Rendered The Dog Sniff Invalid.

We reject these arguments as the judge's findings are supported by sufficient credible evidence in the remand record.

In reviewing a motion to suppress evidence, we afford considerable deference to the judge's role as a factfinder. Our review of a judge's factual findings is "exceedingly narrow." State v. Locurto, 157 N.J. 463, 470 (1999).

We must defer to those factual findings "so long as those findings are supported

by sufficient evidence in the record." State v. Hubbard, 222 N.J. 249, 262 (2015) (internal citations omitted). As part of that deference, we must respect the trial judge's assessment of credibility, given the judge's ability to make "observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." Locurto, 157 N.J. at 474. "A trial court's findings should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)).

Additionally, "[v]ideo-recorded evidence is reviewed under the same standard." State v. Hagans, 233 N.J. 30, 38 (2018). Even where a trial judge's fact-finding is based solely on a video recording, we will disturb the determination only "when factual findings are so clearly mistaken—so wide of the mark—that the interests of justice demand intervention." State v. S.S., 229 N.J. 360, 381 (2017). However, we review a trial judge's legal determinations de novo. Hagans, 233 N.J. at 38.

We first consider defendant's argument that the judge erred in determining Officer Marini's dog alerted for the odor of drugs prior to opening the car doors. In United States v. Place, 462 U.S. 696, 707 (1983), the Supreme Court held that an exterior sniff of luggage in a public place by a trained canine "did not

constitute a 'search' within the meaning of the Fourth Amendment." In City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000), the Supreme Court extended this reasoning to an exterior sniff of an automobile, holding that such actions did not constitute a search because it "does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics." "[T]he use of a well-trained narcotics-detection dog . . . during a lawful traffic stop, generally does not implicate legitimate privacy interests." Illinois v. Caballes, 543 U.S. 405, 409 (2005). The New Jersey Supreme Court has adopted this same approach "for determining the manner in which an officer may conduct a canine sniff during an otherwise lawful traffic stop." State v. Dunbar, 229 N.J. 521, 538-39 (2007).

Here, the judge found Officer Marini's dog alerted prior to opening any of the car doors. A narcotics dog's positive alert while searching the exterior of a vehicle can give rise to probable cause. See Florida v. Harris, 568 U.S. 237, 246-47 (2013) (holding that a trained or certified drug detection canine's sniff of a vehicle's exterior and subsequent alert provides probable cause to believe it contained illegal drugs); United States v. Pulido-Ayala, 892 F.3d 315, 319 (8th Cir. 2018) (holding that a dog's alert while outside the car's door, along with defendant's "suspicious reaction to the drug checkpoint," meant "police had

probable cause to believe that the vehicle contained contraband in the moment before [the dog] actually crossed the threshold into the interior of the [vehicle]").

Here, the judge found the dog bit the car door handle, constituting an alert for the odor of drugs, prior to the dog opening the car door. Officer Marini described how his dog bit the car door handle, causing the door to open, and that the act of biting the door handle constituted an alert. The officer's testimony was consistent with the judge's review of the motor vehicle recording.

Moreover, there is no evidence in the record to support defendant's argument that Officer Marini opened the car door. As the judge noted, the officer's arms were not extended in a position that would have allowed him to open the door. Rather, the judge concluded the officer's body position was consistent with his holding onto the dog's leash with both hands, arms bent at his elbows, and close to his body.

Based on our review of Officer Marini's testimony and the motor vehicle recording of the canine sniff, there was sufficient credible evidence in the record to support the judge's determination that the dog, not the officer, opened the door. Nor did the judge abuse his discretion in concluding the dog had previously bitten car door handles during canine sniffs, resulting in the opening

of a car door, and that biting was but one of this dog's alerts when detecting the odor of drugs.

There is no evidence in this record to support defendant's contention that the dog was trained to open doors during a canine sniff. Despite having ample opportunity to explore this theory during the cross-examination of Officer Marini, defense counsel did not do so. Even if the dog was trained to open car doors, a contention that is unsupported by this record and purely speculative, such a theory is irrelevant to the judge's finding that the dog alerted prior to opening the car door.

We also reject defendant's contention that the dog's biting of the car door handle did not constitute an alert. Officer Marini explained that a narcotics dog is trained to detect the odor of drugs and then signal an alert. Several times during his testimony, the officer explained his dog alerts, or indicates, by biting, scratching, or barking, and then "pinpoint[s]" the location of the odor by scratching. In narrating the video during the remand hearing, Officer Marini noted four occasions when his dog's actions constituted an alert or indication. According to the officer, the four separate alerts were: biting the front driver's side door handle; barking at the rear driver's side door; barking on the passenger's side of the vehicle; and ultimately biting and scratching the front

passenger's side door. Officer Marini testified his dog pinpointed only to the front passenger side door because that was the single time the dog scratched at the car. It was this testimony, coupled with the video evidence, that led the judge to conclude the dog alerted when he bit the front passenger side car door handle before that door opened.

Nothing in the record supports defendant's contention that the dog must perform all three actions—bark, bite, and scratch—to constitute an alert sufficient for establishing probable cause to obtain a warrant to search. A dog's alert may support probable cause even if the dog has not given a final indication, or pinpoint, as to the specific location of the drugs. See United States v. Moore, 795 F.3d 1224, 1232 (10th Cir. 2015) ("[A]n alert, or a change in a dog's behavior in reaction to the odor of drugs, is sufficient to establish probable cause to search a vehicle, and that a final indication is not necessary."); United States v. Parada, 577 F.3d 1275, 1283 (10th Cir. 2009) ("We hold that probable cause was satisfied by [the dog's] alert to the odor of an illegal substance in the vehicle and that it was not necessary for the dog to indicate the exact source of that odor."); People v. Bailey, 427 P.3d 821, 823 (Colo. 2018) (finding the dog's "alert to the odor of narcotics while sniffing the exterior of [defendant]'s car, provided state troopers with probable cause to search the car. The fact that [the

dog]'s alert was not a final indication did not render it irrelevant to the trooper's probable cause determination.").

Having reviewed the remand record, we are satisfied the judge did not abuse his discretion in denying defendant's motion to suppress the drug evidence. After considering Officer Marini's testimony and the motor vehicle recording of the canine sniff, the judge concluded the dog alerted to the odor of drugs when he bit the handle on defendant's front passenger car door, and that the car door only opened after the dog alerted. Thus, the judge properly concluded the canine sniff was lawful and the dog's alert gave rise to probable cause for a warrant to search defendant's car.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION