

Cite as 2023 Ark. App. 439  
**ARKANSAS COURT OF APPEALS**  
DIVISION II  
No. CR-22-784

JOSHUA STEVEN FLEMING  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

Opinion Delivered October 4, 2023

APPEAL FROM THE DREW  
COUNTY CIRCUIT COURT  
[NO. 22CR-21-75]

HONORABLE CREWS PURYEAR,  
JUDGE

AFFIRMED

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**CINDY GRACE THYER, Judge**

A Drew County jury convicted appellant Joshua Fleming of one count of possession of marijuana, one count of possession of methamphetamine, one count of possession of amphetamine, and one count of simultaneous possession of drugs and a firearm. Fleming's sole argument on appeal following his convictions is that the circuit court erred in denying his motion to suppress the physical evidence seized from his vehicle during a traffic stop. We find no error and affirm.

*I. Factual and Procedural History*

Our summary of the facts in this case is gleaned both from testimony at the suppression hearing and from our viewing of the police body-camera videos that were introduced at that hearing.

On February 12, 2021, Sergeant Ben Michel with the Monticello Police Department initiated a traffic stop of Fleming's vehicle because its license-plate lights were not functioning. Michel also noticed, as Fleming pulled into a car-wash parking lot, that the vehicle lacked brake lights. Michel approached the vehicle and asked Fleming for his driver's license and other information, and Fleming complied. Michel returned to his patrol vehicle and ran Fleming's information. Dispatch informed Michel that Fleming had a suspended license and a failure-to-appear warrant out of Cabot. Michel returned to Fleming's vehicle and asked him to step out so Michel could "advise [him] of a couple of things."

Fleming stepped out of his vehicle and asked Michel if he should turn the car off; Michel replied that he could if he wanted to or could leave it running. Michel then asked if Fleming had any weapons on him. Fleming replied that he did not, and Michel asked Fleming to turn around so Michel could pat him down. After doing so, Michel asked Fleming if he knew why his driver's license was suspended. Fleming answered that he knew it was restricted, but he was unaware that it was suspended. The two stepped slightly away from Fleming's vehicle and continued to have a conversation about the state of Fleming's driver's license and his warrant out of Cabot.

By this time, Officer David Menotti had arrived in his patrol unit with his canine officer, Cezar. Michel inquired whether Fleming had "anything in the vehicle I need to know about? Any illegal guns, drugs, knives . . . under the seat, hanging out?" The following exchange then took place.

FLEMING: Man, I got tools and all kinds of stuff in there. We was coming down here to work construction, like I said.

MICHEL: Okay. Would you mind if we take a quick look in there?

FLEMING: You want to search my vehicle?

MICHEL: Yes, sir.

FLEMING: For what?

MICHEL: Just doing our job. Trying to warm up, stay warm.

FLEMING: I mean, don't you need a warrant to do that?

MICHEL: No, sir, we don't.

FLEMING: You don't?

MICHEL: No, sir.

FLEMING: You--

MICHEL: I need your consent--I need your consent, but--

FLEMING: I don't really want to let you search my vehicle. I've got all my stuff in there.

MICHEL: Okay, well, that's fine.

FLEMING: If you get a warrant, you can do it.

MICHEL: Well, that's okay. If you'll step back here with this officer right here, my other officer is going to run his drug dog around your car.

FLEMING: All right.

MICHEL: And as soon as he gets done with that, we'll take care of some paperwork and we'll try to get you lined out. Okay?

FLEMING: You going to leave my dog--or my door open?

MENOTTI: You left it open, sir. I didn't.

Officer Menotti and Cezar then proceeded to walk around Flemings's vehicle to perform a "free air sniff" of the air around and outside of the vehicle. Cezar's sniff was captured on Michel's body camera, which showed that the dog, once the sniff began, almost immediately sat and alerted at the right rear corner of the vehicle. Cezar proceeded counterclockwise around the car, and he alerted again at the right front corner, at the left front corner, and at the open driver's-side door. Cezar was then led again to the back of the vehicle, where he alerted once more at the tailgate. Cezar then returned to the driver's door, where he stuck his nose inside the door frame of the vehicle and froze until Menotti bounced a tennis ball at him to tell him the sniff was over. At the suppression hearing, Menotti described Cezar's actions as alerting at "the back tailgate area and . . . multiple alerts on that driver door," including a "hard alert on both sides of the door before we get this final alert."

On the basis of Cezar's alerts, Menotti informed Fleming that the dog "hit three different places on your vehicle" and suggested that if "any weed's been in there at any time, he's going to pick it up." Fleming denied that anyone had smoked marijuana in the car, to which Michel responded, "Well, what he's trying to tell you, Mr. Fleming, is that [the three separate hits] gave us [probable cause] to search your ride." A subsequent search of the vehicle revealed a green leafy substance in a prescription bottle in the center console of the vehicle, a white crystal substance in another bottle, and a Kel-Tec 9mm handgun in a backpack in

the front seat. Fleming was arrested and charged with multiple counts of drug possession and simultaneous possession of drugs and a firearm.

Fleming subsequently filed a motion to suppress the evidence that had been seized from his vehicle following Cezar's sniff. At the hearing on Fleming's motion, Michel testified about the circumstances surrounding his encounter with Fleming and explained what was depicted on the video taken by his body camera. On cross-examination, Michel said that Fleming got out of the car "because I asked him to, but he didn't have to get out." He added that he determined a dog sniff might be warranted "just from years of being on patrol. I noticed how nervous he was . . . [S]omething didn't sit right with me in my gut and I can't explain it."

Menotti testified at the suppression hearing regarding the relevance of Cezar's actions. He explained that Cezar "consistently showed body language which would indicate that he was in the odor of narcotics. That was in the rear of the vehicle all the way around to the driver's door. He did multiple head checks around that driver's door, and gave full alerts on multiple occasions right there at the door." Menotti described Cezar as demonstrating "multiple head checks [and] multiple check backs where he would pass an area and then kind of turn around to it and then keep going. . . . He sat multiple times. He had that clear stare that he was in the presence of odor multiple times."

At the conclusion of the hearing, Fleming argued that, while a dog sniff of the exterior of a vehicle is not a search within the meaning of the Fourth Amendment, "once a dog enters into a protected space, which would be the interior of the car, there are Fourth Amendment

ramifications.” He asserted that the officers commanded Fleming to leave his vehicle, that he did not voluntarily leave his car door open, and that the dog was allowed “to sniff on the inside of his car without any reason of suspicion at that point.” The State denied that the dog had jumped into the car, as Fleming appeared to argue, pointing out that Cezar “merely sat there at the open door area.”

The court ruled that the dog’s “positive indication alone was enough to establish probable cause for the presence of controlled substance if the dog is reliable.” The court also noted that while the dog sat down “inside” the open door, it disagreed that the dog had been “inside the vehicle” for purposes of Fleming’s argument. Accordingly, the court denied Fleming’s motion to suppress the physical evidence seized from his vehicle.

## II. *Standard of Review*

When reviewing a circuit court’s denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to the inferences drawn by the circuit court. *Cagle v. State*, 2019 Ark. App. 69, at 2, 571 S.W.3d 47, 50. A finding is clearly erroneous when, even if there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been made. *Id.* We defer to the circuit court’s superior position in determining the credibility of the witnesses and resolving any conflicts in the testimony. *Lauck v. State*, 2020 Ark. App. 145, at 4, 596 S.W.3d 71, 73.

## III. *Analysis*

The Supreme Court has held that the use of a well-trained dog during a lawful traffic stop does not implicate legitimate privacy interests. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).<sup>1</sup> Our appellate courts have adopted this holding in multiple cases. See *State v. Harris*, 372 Ark. 492, 500, 277 S.W.3d 568, 575 (2008) (“The use of a drug dog during a traffic stop does not constitute an illegal search under the federal constitution.”); *Mickens v. State*, 2020 Ark. App. 280, at 8, 599 S.W.3d 392, 397 (“Where there is no search within the meaning of the Fourth Amendment, no reasonable suspicion is necessary to justify having a dog smell an individual’s vehicle.”).

Moreover, when a reliable canine gives a positive alert on a vehicle, that positive alert alone is enough to establish probable cause for the presence of a controlled substance. See *Jackson v. State*, 2013 Ark. 201, at 9, 427 S.W.3d 607, 613; *State v. Thompson*, 2010 Ark. 294,

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<sup>1</sup>The Supreme Court explained its rationale in *Caballes* as follows:

Official conduct that does not “compromise any legitimate interest in privacy” is not a search subject to the Fourth Amendment. [*United States v. Jacobsen*, 466 U.S. [109,] 123, 104 S. Ct. 1652. We have held that any interest in possessing contraband cannot be deemed “legitimate,” and thus, governmental conduct that only reveals the possession of contraband “compromises no legitimate privacy interest.” *Ibid.* This is because the expectation “that certain facts will not come to the attention of the authorities” is not the same as an interest in “privacy that society is prepared to consider reasonable.” *Id.*, at 122 (punctuation omitted). In *United States v. Place*, 462 U.S. 696 (1983), we treated a canine sniff by a well-trained narcotics-detection dog as “*sui generis*” because it “discloses only the presence or absence of narcotics, a contraband item.” *Id.*, at 707; see also *Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000).

*Caballes*, 543 U.S. at 408–09.

at 5, 377 S.W.3d 207, 211; *Miller v. State*, 81 Ark. App. 401, 412, 102 S.W.3d 896, 902 (2003) (“Once a canine dog alerts, an officer has probable cause to suspect the presence of illegal contraband.”).

On appeal, Fleming acknowledges that a dog sniff of the exterior of a vehicle during a lawful traffic stop is not a search within the meaning of the Fourth Amendment. He likewise concedes that when a dog alerts to the presence of narcotics while sniffing the exterior of a vehicle, officers have probable cause to search the interior. He maintains, however, that the officers here “facilitated” Cezar’s sniff of the interior of his vehicle at the open driver’s-side door when they ordered him out of his vehicle without allowing him to close the door behind him.

Fleming’s argument is without merit because it fails to take into account the fact—plainly apparent from viewing the body-camera videos that were introduced at the suppression hearing—that Cezar alerted at multiple points on Fleming’s vehicle *before* he ever approached the open driver’s-side door. He alerted first at the rear of the vehicle and then alerted again at two different points at the front of the vehicle before coming around to the open door. At the moment Cezar first alerted at the rear of Fleming’s vehicle, the officers present at the scene had probable cause to search the vehicle. *See Thompson*, 2020 Ark. 294, at 6, 377 S.W.3d at 211 (“[O]nce Nero gave a positive alert on Thompson’s vehicle, there was probable cause for the officers to conduct a search, and there was no violation of the Fourth Amendment.”); *Jackson v. State*, 2013 Ark. 201, at 10, 427 S.W.3d 607, 614 (“A dog’s positive indication alone is enough to establish probable cause for the presence of a

controlled substance if the dog is reliable.”); *Mickens*, 2020 Ark. App. 280, at 8, 599 S.W.3d at 396–37 (“[O]nce Zeke alerted on the vehicle, there was no additional suspicion needed for the vehicle to be searched.”).

Thus, regardless of whether Cezar’s sniff at the open door of the vehicle was “facilitated” by the officers, as Fleming claims,<sup>2</sup> the dog’s alert at multiple other points on the vehicle had already given the officers probable cause to search the car. We therefore cannot say that the circuit court erred in denying Fleming’s motion to suppress the physical evidence seized from the vehicle. See *Jackson*, *supra*.

Affirmed.

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<sup>2</sup>Were we to reach the issue, we would disagree with Fleming’s assessment that the officers’ conduct “facilitated” Cezar’s sniff of the inside of the vehicle. The gist of his claim is that “[w]hen Sergeant Michel ordered Fleming out of the vehicle without allowing him to close the door behind him, he created the opportunity for Cezar to sniff the interior of Fleming’s car.”

Once again, however, the video belies Fleming’s claims (and he concedes that Michel did not “explicitly order [him] to leave the door open”). When Michel received the information from dispatch and asked Fleming to step out of the car, Fleming asked Michel to “hang on” while he put his insurance and registration away. He then asked if Michel wanted him to turn off the car; Michel said he could if he wanted to or he could leave it running if he wanted to. Fleming stepped out of the car and made no effort to close the door; moreover, nothing indicates that Michel prevented him from doing so. He got out of the car, turned around, and was frisked by Michel. Fleming and Michel then stood by the vehicle talking until Michel leaned in, at Fleming’s request, to grab a piece of paper showing Fleming had just had an ignition-interlock device removed from the car. Although Michel did not close the car door behind him when he retrieved the paper, Fleming did not ask him to. Nothing about the encounter, as viewed on the body-camera video, gives support to Fleming’s claim on appeal that he was “prevented” from closing the door behind him. Accordingly, although addressing this argument is unnecessary to reach our conclusion herein, Fleming’s claims are unsupported by the record.

BARRETT and WOOD, JJ., agree.

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