STATE OF MAINE
PENOBSCOT, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO: PEN-21-256

STATE OF MAINE,
Appellee

v.

DERRIC MCLAIN,
Appellant

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

I. Whether the trial court erred in finding McLain made a selective waiver of his rights to answer questions.

II. Whether McLain has standing to contest his detention or search.

III. Whether the trial court erred in finding reasonable suspicion to stop the vehicle.

IV. Whether the trial court erred in finding reasonable articulable suspicion existed to detain McLain for an additional six minutes pending SA McLaughlin's arrival.

SUMMARY OF ARGUMENT

1. The trial court did not err in concluding that Derric McLain (McLain) made a selective waiver of his rights to answer questions. When asked whether he wanted to answer questions, McClain answered that it depends on what the questions are. Asking whether a lawyer was present was not an invocation of his right to counsel, and his responding again with "it depends" to an attempt to clarify if he wanted to talk indicated he was aware he could choose to answer some questions and not others. He also initiated further questioning by asking the agents questions and asking what they wanted to know, supporting the trial court's conclusion.

2. To raise a fourth amendment challenge to the stop, length of detention, or search, McLain is required to demonstrate standing, in the form of a reasonable expectation of privacy in Calvin Vandine's vehicle. No facts have ever been presented to establish any such expectation.

3. Reasonable articulable suspicion of drug activity existed to support an investigative detention of the vehicle McLain occupied, separate and apart from the traffic stop justification. The collective knowledge of Maine Drug Enforcement Agents was imputed to Corporal Fiske when Special Agent (SA) McLaughlin asked him to locate and pull over the Pontiac Calvin Vandine was driving. The approximately six (6) additional minutes the vehicle was

detained prior to SA McLaughlin arriving were reasonable in light of that existing articulable suspicion. Additionally, SA McLaughlin's knowledge of McLain's identity and warrants should likewise be imputed to Cpl. Fiske.

4. McLain, who was subject to multiple felony arrest warrants, had no reasonable expectation of privacy in his person that should allow him to contest his detention. His detention is questioned solely because McLain lied to Cpl. Fiske about his identity. To hold otherwise would create an unreasonable result whereby McLain would be allowed to profit by lying to law enforcement.

PROCEDURAL HISTORY

On August 27, 2020, the Penobscot County Grand Jury returned an indictment charging McLain with one count of Aggravated Trafficking in Scheduled Drugs, Class A[1], and one count of Violation of Conditions of Release (VCR), Class E. (*State of Maine v. Derric McLain,* PENCDCR-2020-01748, Appendix, 20, hereinafter cited as "A. ___"). On December 16, 2020, McLain filed a Motion to Suppress. (A. 21-24). On February 19, 2021, a hearing was held on the Motion to Suppress, which was denied in a written Order dated April 1, 2021. (*Anderson, J.*). (A. 10-19).

A jury was selected and a two day trial began on June 2, 2021. (*Murray, J.*). (A. 6). On June 3, 2021, the jury returned a verdict of guilty on Aggravated Trafficking. (A. 7). The Court entered the verdict and, based on McLain's stipulation, entered a verdict of guilty on the Count 2 VCR. (A. 7).

A sentencing hearing was held July 28, 2021 (*Murray, J.*). (A. 7). The Court sentenced McLain to 15 years, all but 8 years suspended, with 4 years probation and a $400 fine on Count 1, and 30 days concurrent on Count 2. (A. 7-8). McLain then timely appealed. (A. 9).

[1] 17-A M.R.S. §§ 1105-A(1)(M) (2017).

STATEMENT OF FACTS

On or about June 11, 2020, Special Agent (SA) Marc Egan of the Maine Drug Enforcement Agency (MDEA) received a tip from a confidential source at Rent-a-Wreck in Hampden, indicating that Calvin Vandine had been repeatedly renting vehicles for 24-hour periods and putting several hundred miles on them during those brief rentals. (Motion Transcript, 11, February 19, 2021, hereinafter cited as "Mot. Tr. ___."). The most recent rental was of a Ford F-150 within the last 24 hours. *Id*. This source had called MDEA in the past and provided credible information about people using vehicles for illegal drug activity. *Id.* at *32.*

SA Patricia McLaughlin learned of this information from SA Egan.[2] *Id.* at 11. SA McLaughlin knew Vandine personally from living in the same area (East Millinocket), and had researched his drug involvement. *Id.* at 12. She was aware he had several police interactions involving drugs, had been out on bail, had tested positive for drugs in urine screens on more than one occasion, had previously overdosed on heroin in 2018, and also knew him to be directly associated with known drug traffickers. *Id.* at 12, 23. Rent-a-Wreck is 68 miles away from East Millinocket, where Vandine resided.

[2] SA McLaughlin has been a law enforcement officer for twelve (12) years, and was a special agent with MDEA for five (5) years (Mot. Tr. 11.).

SA McLaughlin contacted Chief McDunnah of the East Millinocket Police Department, as she knew him to be familiar with Vandine. *Id.* at 13. She learned from Chief McDunnah that Vandine had been seen driving a gray Pontiac G6. He provided a plate number for that Pontiac. *Id.* East Millinocket officers checked for the vehicle at Vandine's home at SA McLaughlin's request, and did not locate it. *Id*. SA McLaughlin then drove to the Rent-a-Wreck and observed the Pontiac G6 in the parking lot there. *Id.* at 14.

The following morning, on June 12, 2020, SA Paul Gauvin checked the Rent-a-Wreck parking lot at SA McLaughlin's request, and found the Pontiac was no longer there. *Id.* at 63. The confidential source indicated to SA Gauvin that Vandine had left in the vehicle about five minutes before Gauvin's arrival, with a passenger named Kris. *Id*. SA Gauvin relayed this information to SA McLaughlin. The confidential source also provided a physical description of the passenger to SA Gauvin, that appeared to match Kristopher Hersey, a suspected trafficker that SA McLaughlin was familiar with from multiple intelligence reports. *Id.* at 15; 24. The source also indicated the same individual had gone with Vandine in past trips. *Id.* at 24-25. Based on her training and experience, this information led SA McLaughlin to suspect Vandine was renting vehicles to drive out of state to pick up drugs and return them to Maine. *Id.* at 15.

The agents believed Vandine would be heading northbound back towards East Millinocket, so SA Gauvin got on the interstate to attempt to locate the Pontiac. *Id.* at 64. SA McLaughlin contacted Maine State Police (MSP) Corporal Thomas Fiske and asked him to also watch for the vehicle and stop it for MDEA to come investigate. *Id.* at 16.

Cpl. Fiske observed the Pontiac in question pass him on Interstate 95, and noted that it had a loud exhaust. *Id.* at 37. Cpl. Fiske pulled over the vehicle, for the primary basis of detaining it for MDEA's investigation and for the secondary basis related to the loud exhaust. He found it to be occupied by the driver Calvin Vandine, and a passenger who identified himself as Kyle Bouchard. *Id.* at 37-38. SA McLaughlin immediately began driving towards the location of the stop, and called for a Maine State Police canine while en-route. *Id.* at 17. SA Gauvin arrived on scene shortly after the stop but waited for SA McLaughlin to approach the vehicle, as MDEA agents operate in pairs and she was the one most familiar with the suspects and investigation. *Id.* at 65-66. Cpl. Fiske testified he did not know the details of SA McLaughlin's investigation and would not ordinarily inject himself into an investigation that he was unfamiliar with. *Id.* at 36.

While awaiting the arrival of SA McLaughlin, Fiske discussed the exhaust issue with Vandine and conducted a roadside inspection of the car,

then pointed out several other defects that the trooper observed. *Id.* at 37. Cpl. Fiske concluded business related to the exhaust approximately fifteen (15) minutes into the stop, then continued to detain the vehicle for a further approximately six (6) minutes for SA McLaughlin to arrive. *Id.* at 56; 59.

Upon arrival, SA McLaughlin approached the vehicle and recognized the passenger to actually be Derric McLain, who she knew to have five open arrest warrants, including one for Aggravated Trafficking based on a controlled purchase of drugs from him that she had conducted. *Id.* at 18. She also knew him to be presently on bail with search conditions. *Id.* at 19. McLain was removed from the vehicle and arrested, during which SA Gauvin discovered a syringe between the center console and passenger seat. . (Trial Transcript, 97, June 2, 2021, hereinafter cited as "Trial Tr. __.") . Cpl. Fiske searched McLain's person and discovered a screw-top container disguised as a battery. *Id.* at 50. The "battery" had powder that was later analyzed and determined to have a net weight of 1.94 grams and contained fentanyl. *Id.* at 157.

Trooper Taylor Dube, a canine handler, then arrived on the scene and conducted a sniff on the vehicle. *Id.* at 60. Dube's canine showed interest in the open driver's side window and the passenger side of the window, and then

attempted a final alert.[3] *Id.* at 60-61. Notwithstanding, SA McLaughlin already had cause to search the vehicle before Trooper Dube arrived.

SA McLaughlin and SA Gauvin then searched the vehicle and located a shopping bag in the back seat, which contained a personal size Cheerios container with the lid peeled back. *Id.* at 79. Inside the Cheerios container was a bag of tan powder that the agents believed to be heroin or fentanyl. *Id*. This powder was later analyzed and determined to have a net weight of 92.6 grams and contained fentanyl. *Id.* at 157.

McLain was taken to the Penobscot County Jail, and SAs Gauvin and Knappe spoke with him. (Mot. Tr. 70). SA Gauvin *Mirandized* McLain and asked if he wanted to speak with agents. *Id*. McLain responded that it depended on what the questions were, paused, then asked if there was a lawyer there. *Id.* SA Gauvin responded that there was not. *Id.* McLain then engaged SA Gauvin in conversation and began asking questions, including what Gauvin wanted to know and about his charges. *Id.* at 71. SA Gauvin again asked McLain if he wanted to talk to them, and McLain responded that, "it depends." *Id.* at 78. Subsequent to that, McLain answered questioning and admitted making a trip to New Hampshire to pick up heroin that day, that he

[3] The trooper explained the canine's final alert was to come to a sitting position, but that it was a hot day and that the dog dropped into a near-sitting position without directly touching the hot pavement. (Trial Tr. 61).

had been doing that once every couple of weeks at a minimum, and that it was for someone else. (Trial Tr. 105-106). McLain also said he was going to take responsibility, that he thought somebody must have told on him, that he didn't ask questions when he was told when and where to get the stuff, and that he could end up dead if he told the agents where it came from. *Id.* at 113-114.

ARGUMENT

I. The trial court did not err in finding McLain made a selective waiver of his rights to answer questions.

McLain argues that prior to answering questions he invoked his right to counsel, however, his questions did not amount to even an ambiguous invocation of his right to counsel; instead, they indicated a knowing and selective waiver of his rights, as found by the motion court. (Appellant's Brief, pages 9-11, hereinafter cited as "Blue Br. ___."); Order on Motion to Suppress, page 9, hereinafter cited as "MTS Order __."). The motion court's findings of facts are reviewed for clear error, however the issue of whether rights under *Miranda* have been knowingly and intelligently waived is reviewed de novo. *State v. Lockhart,* 2003 ME 108, ¶ 21, 830 A.2d 433.

In order to invoke one's Fifth Amendment right to counsel, one must do so unambiguously. *Davis v. United States*, 512 U.S. 452, 459 (1994). The statement at issue in this case was the question, "Is there a lawyer here?" It is well settled that a defendant does not invoke the right to counsel simply by using the word attorney. *State v. Curtis*, 552 A.2d 530, 532 (Me. 1988). Courts, including this one, have addressed similar situations where defendants have used language such as "maybe I should talk to an attorney," "I've already spoken to my attorney," that it was "not a bad idea" to wait for counsel, and

"I've talked too much the way it is anyway, without a lawyer." *Davis v. U.S.*, 512 U.S. 452, 462 (1994); *Curtis*, 552 A.2d at 532; *State v. Nielsen,* 2008 ME 77, ¶ 20, 946 A.2d 382; *State v. McCluskie*, 611 A.2d 975, 977 (Me. 1992). In each of these cases, the court found the language insufficient to qualify as an unambiguous invocation of the right to counsel. Even in the *Lockhart* case, cited by McLain, the Court found a question of, "should I talk to a lawyer," did not serve to invoke the defendant's right to an attorney. *Lockhart,* 2003 ME 108, ¶ 28, 830 A.2d 433.

Even had McLain invoked his right to an attorney, as McLain points out, such an invocation would not prohibit further discussion, so long as he was the party to initiate that discussion. Blue Br. 10; *Edwards v. Arizona,* 451 U.S. 477, 484-485 (1981). After asking if an attorney was present, McLain asked what SA Gauvin wanted to know. SA Gauvin indicated that he wanted to talk about the Aggravated Trafficking, and again asked if McLain wanted to answer questions. (Mot. Tr. 71). McLain once again responded, "it depends." *Id.* at 78. It is clear from the record that following his question regarding an attorney, no interrogation took place until after McLain engaged SA Gauvin with inquiries of his own. Even then, SA Gauvin continued questioning only after attempting to reconfirm whether McLain wanted to answer questions.

The State bears the burden of establishing by a preponderance of the evidence that the suspect has been advised of his *Miranda* warnings and knowingly and intelligently waived them. *Curtis*, 552 A.2d at 531. However, an express written or oral waiver is not required. *Id.* at 531-532. Without an explicit waiver, the defendant's overall conduct, viewed in context, can be adequate to evidence a waiver. *Id.* The law also permits a selective waiver, choosing to answer based on the specific questions asked. *United States v. Eaton*, 890 F.2d 511, 514 (1st Cir. 1989). As the trial court found, by indicating it depends on the questions, and then choosing to answer some (but not all) questions, McLain made a selective waiver analogous to the facts of *Eaton.* MTS Order, 9; *Eaton*, 890 F.2d at 513.

II. McLain had no reasonable expectation of privacy in Calvin Vandine's vehicle.

McLain contests the detention and eventual search of Calvin Vandine's Pontiac on Fourth Amendment grounds, however, "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman v. United States,* 394 U.S. 165, 174 (1969). If a motion to suppress claims a violation of the Fourth Amendment, the defendant must demonstrate that his own reasonable expectation of privacy was violated by the State to establish standing. *State v. Maloney*, 1998 ME 56,

¶ 6, 708 A.2d 277. If the State disputes the defendant's standing, the defendant bears the burden of persuasion to establish it. *Id.* The State raised this issue at the motion to suppress, however it was not addressed in the trial court's order. (Mot. Tr. 86).

In *State v. Lovett*, 2015 ME 7, ¶ 7, 109 A.3d 1135, *as corrected* (Feb. 24, 2015), the State argued at a suppression hearing regarding a vehicle search that the defendant lacked standing to challenge the search. On appeal, this Court chose to address and decide that issue of standing despite neither party briefing the issue. *Id.* The Court found that there was no evidence in the record tending to show that the defendant had a reasonable expectation of privacy in the vehicle he was riding in and concluded that he did not have standing. *Id.* ¶ 8. The Court went on to state that litigants and judges at suppression hearings must address the issue of standing, as inquiry into whether the defendant's Fourth Amendment rights were violated requires a determination that their reasonable expectation of privacy was violated. *Id.* ¶ 9.

As in that case, there is no evidence in the record tending to show that McLain had a reasonable expectation of privacy in the vehicle he was riding in. *Id.* ¶ 8. No evidence exists in the record to show an ownership interest in the vehicle, longstanding ties to the vehicle, a key to the vehicle, or an agreement

to continue using the vehicle. In the absence of any such showing, the only individual with standing to challenge the legality of the stop duration and ultimate search is the driver, Calvin Vandine.

III. The collective knowledge of law enforcement established a reasonable articulable suspicion of drug activity.

McLain argues that the only reason for the stop was the loud exhaust, however, the collective knowledge of law enforcement supported reasonable articulable suspicion of illegal drug activity.

An investigatory stop must be based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *State v. Eastman*, 1997 ME 39, ¶ 6, 691 A.2d 179. The stop may be made if there is an articulable suspicion that the object of the search has committed or is about to commit a crime, and that suspicion is objectively reasonable in light of all the circumstances. *Id.* The Court stated that, "for the stop to be reasonable, the court must find that the officer actually entertained a concern and that the concern was reasonable under the circumstances." *Id. (internal quotations omitted).*

Cpl. Fiske had independent reasonable suspicion to conduct a traffic stop and investigation for an equipment violation related to the loud exhaust on Calvin Vandine's vehicle. (Mot. Tr. 37). He spoke with Vandine about the

violation and conducted a roadside safety inspection of equipment on the vehicle to ensure it was being otherwise operated safely, during which he discovered and pointed out various other equipment defects. *Id.* This business was, admittedly, concluded approximately fifteen (15) minutes into the stop, whereupon Cpl. Fiske then detained the vehicle for a further approximate six (6) minutes for SA McLaughlin to arrive. *Id.* at 59; 59. If there had been no other reason for the stop other than the exhaust violation, Cpl. Fiske would have impermissibly extended detention as in *Rodriguez v. United States*, 575 U.S. 348 (2015); however, reasonable suspicion of separate criminal activity existed from the outset of the stop.

Reasonable and articulable suspicion to conduct an investigatory stop can rest on the collective knowledge of police, and that can be so even if the content of the knowledge is not communicated to the officer making the stop. *State v. Carr*, 1997 ME 221, ¶ 7, 704 A.2d 353. Cpl. Fiske is imputed with the knowledge of SA McLaughlin, who already had information to support the vehicle's detention when she asked Cpl. Fiske to locate and stop it. At the time of the stop, SA McLaughlin knew that 1) Calvin Vandine was repeatedly renting vehicles from a location over an hour's drive distance from his residence, 2) these vehicles were being kept only for 24-hour periods, 3) several hundred miles were being logged on the vehicles during each short

rental, 4) that all of the above came from a source that had provided credible information in the past about renters using vehicles for drug activity, 5) Vandine had a history of drug involvements and tested positive for drugs while on bail, 6) Vandine had previously overdosed on heroin within the past two years, 7) Vandine was directly associated with known drug traffickers, 8) Vandine was traveling that day with someone who fit the description of another suspected drug trafficker, and 9) Vandine had traveled with the same individual on past trips from the rental lot. Mot. Tr. at 11; 12; 23; 24-25; 32.

McLain argues that this information cannot amount to a reasonable suspicion because of the possible innocent explanation for any of these factors. Blue Br., 20. However, innocent behavior can provide the basis for a showing of probable cause based on the degree of suspicion that attaches to particular noncriminal acts. *United States v. Sokolow*, 490 U.S. 1, 10 (1989). That principle also applies to the reasonable suspicion inquiry. *Id.* As in *Sokolow* and the seminal *Terry* decision itself, a series of circumstances that may appear innocent if viewed separately, when taken together may warrant further investigation. *Id*. at 9-10; *Terry v. Ohio*, 392 U.S. 1, 22 (1968). As the motion court correctly concluded, when taken collectively, information known to SA McLaughlin supported an objectively reasonable suspicion that the

occupants of the vehicle were returning from a trip in which they purchased drugs. MTS Order, 5.

The acceptable reasonable duration of a traffic stop is determined by the stop's "mission" or purpose. *United States v. Dion*, 859 F.3d 114, 123 (1st Cir. 2017); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). A distinction under these facts is that Cpl. Fiske had two separate missions: first, to find and detain the vehicle for SA McLaughlin's drug investigation (the specifics of which he was not privy to), and second, to address the vehicle safety violations he observed himself. Cpl. Fiske knew SA McLaughlin had a distance to travel, so acting reasonably, he chose to first fully address his independent mission related to the vehicle. Although Cpl. Fiske might not have stopped the vehicle for this traffic violation without SA McLaughlin's request, the United States Supreme Court has flatly rejected the suggestion that an officer's ulterior motives can somehow invalidate officer conduct justified on a separate objectively reasonable basis. *Whren v. United States,* 517 U.S. 806, 812-813 (1996). As noted, Cpl. Fiske took a reasonable 15 minutes to fully address the safety violation, leaving an additional 6 minutes of detention based solely on the drug investigation mission.

Cpl. Fiske did not know the details behind SA McLaughlin's suspicion, nor was he a drug specialist, and he testified he would not ordinarily inject

himself into a MDEA investigation where he had incomplete information. (Mot. Tr. 36). The stop happened in a relatively remote location, some distance from where the investigating agent (SA McLaughlin) would be able to respond from, but she dispatched immediately and arrived approximately 21 minutes after the initial stop, and only 6 minutes after the traffic-related investigation was concluded. *Id.* at 17; 59 Given the independent suspicion of drug related crimes, the minimal extension of the traffic stop and roadside detention by 6 minutes to allow SA McLaughlin (who was familiar with the drug investigation) to arrive and investigate further is reasonable on these facts.

Furthermore, when imputing the facts known to SA McLaughlin to Cpl. Fiske, it is rational to take into account that she recognized McLain immediately, despite his prior deception of Cpl. Fiske. If the collective knowledge of law enforcement, including her knowledge of McLain's appearance, is fully imputed to Cpl. Fiske, the issue of detention length need never be reached. It is undisputed that McLain had multiple felony warrants, and they provided an independent basis for his arrest and detention from the point of identification.

IV. McLain had no reasonable expectation of privacy in his person to assert against roadside detention due to his felony warrants.

The Fourth Amendment provides the right of people to be secure against unreasonable searches and seizures. U.S. Const. amend. IV. The Fourth Amendment is violated when a search or seizure violates a subjective expectation of privacy that society recognizes as reasonable. *State v. Akers*, 2021 ME 43, ¶ 25, 259 A.3d 127. The exclusionary rule excludes evidence seized in violation of an individual's Fourth Amendment rights, though its purpose is to deter future Fourth Amendment violations and is applied in situations where that purpose is best served. *Id.* at 139. However, the touchstone of the Fourth Amendment is reasonableness, and it only proscribes searches and seizures that are unreasonable. *Id*. at 136. The substantial costs of exclusion on the judicial system and society at large must be weighed, and for exclusion to be appropriate, the deterrence benefit of suppression must outweigh its heavy costs. *Id.* at 139.

It is unquestioned in the record that McLain had multiple valid felony warrants, including for Aggravated Trafficking, at the point of his detention, and that McLain lied about his identity to Cpl. Fiske. The warrants exist based on prior independent judicial determinations that there was adequate probable cause to arrest and detain McLain for various criminal offenses. A person already subject to an independent basis for arrest and detention no longer has a reasonable expectation of privacy in his person. Similarly, such a

person has no legitimate basis to object to roadside detention that is prolonged by six minutes. But for McLain being untruthful about his own identity, Cpl. Fiske would have quickly determined that McLain had multiple open arrest warrants. To rule otherwise would lead to an unreasonable result of McLain profiting from his deception to the police about his identity, successfully allowing him to escape what would have otherwise been an unquestionably valid detention and arrest of himself based on the previously issued warrants.

CONCLUSION

For the foregoing reasons, the State respectfully asks that the denial of the motion to suppress and the conviction be affirmed.

Respectfully submitted

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Dated: January 27, 2022

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CERTIFICATE OF SERVICE

I, Jason Horn, Assistant Attorney General, certify that I have sent a native PDF and mailed two copies of the foregoing "BRIEF OF APPELLEE" to McLain's attorney of record, Hunter Tzovarras, Esq.

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