

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

DIVISION ONE  
COURT OF APPEALS  
STATE OF ARIZONA

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

FILED AUG 06 2009

PHILIP G. WERRY CLERK  
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STATE OF ARIZONA, ) 1 CA-CR 08-0984  
)  
Appellant, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
JACQUELYN MARCY WRIGHT, ) Rule 111, Rules of the Arizona  
) Supreme Court)  
Appellee. )  
)

Appeal from the Superior Court in Yavapai County

Cause No. V-1300-CR-0820070878

The Honorable Warren R. Darrow, Judge

**AFFIRMED**

Sheila Sullivan Polk, Yavapai County Attorney  
by David B. Loder, Deputy County Attorney  
Attorneys for Appellant

Prescott

David G. Bednar  
Attorney for Appellee

Flagstaff

**W I N T H R O P**, Judge

¶1 The State appeals from the trial court's order granting Jacquelyn Wright's ("Appellee") motion to suppress the evidence found during a search of her vehicle. For the reasons set forth below, we affirm.

## I. FACTS AND PROCEDURAL HISTORY

¶2 In reviewing a trial court's decision on a motion to suppress, we view the facts in the light most favorable to upholding the trial court's ruling and consider only the evidence presented at the suppression hearing. *State v. Wyman*, 197 Ariz. 10, 12, ¶ 2, 3 P.3d 392, 394 (App. 2000).

¶3 On November 30, 2007, after receiving information from a confidential informant that Appellee would be driving to the Phoenix area to purchase illegal drugs, the Special Crimes Unit of the Yavapai County Sheriff's Office ("YCSO") assembled a surveillance team consisting of multiple narcotics detectives to monitor Appellee. Several detectives in unmarked cars followed Appellee as she traveled southbound on I-17. At one point the detectives lost sight of Appellee but located her again as she traveled northbound on I-17. As a result of Appellee's alleged erratic driving,<sup>1</sup> Detective Dartt radioed Deputy Shrum, a canine unit deputy positioned on the shoulder of northbound I-17, to conduct a traffic stop.

¶4 Deputy Shrum initiated a traffic stop for Appellee's reported traffic violations. While talking to Appellee, Deputy

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<sup>1</sup> According to Detectives Rumpf, Long, Dartt, and Sergeant Roussellee, Appellee's erratic driving was evidenced by her significant change of speeds, abrupt lane changes, and failure to signal. Appellee disputed this testimony and testified that she was not speeding because of the wet roads and that her erratic driving was the result of being scared due to the detectives' aggressive driving.

Shrum noticed that Appellee's pupils were dilated, that she spoke rapidly, and appeared nervous and agitated. Deputy Shrum asked Appellee to follow him to the front of his police vehicle where he issued her a warning for an unsafe lane change and having no proof of insurance. As Appellee walked back to her vehicle, Deputy Shrum asked for her consent to search her vehicle and Appellee refused. Deputy Shrum then retrieved his drug detection dog ("Aros") to conduct an exterior sniff of the vehicle. Deputy Shrum testified that Aros had an immediate change in behavior as it approached the car, and ultimately "alerted" to a scent at the driver's door. Thereafter, Deputy Shrum and Detective Darff, who was also present at the traffic stop, searched Appellee's car and found approximately twenty five grams of methamphetamine in a bag on the backseat.

¶5 Appellee was placed under arrest and ultimately indicted for one count of transportation of dangerous drugs for sale and one count of possession of drug paraphernalia. Before trial, Appellee filed a motion to suppress the evidence seized from her vehicle on the basis that it was obtained in violation of the Fourth Amendment to the United States Constitution and Article 2, Sections 3, 4, and 8, of the Arizona Constitution. Specifically, Appellee argued that Deputy Shrum lacked reasonable suspicion to conduct a stop, and that the

handler/canine team was not sufficiently reliable to provide probable cause to search Appellee's vehicle.<sup>2</sup>

¶16 Following an evidentiary hearing, the trial court granted Appellee's motion to suppress on the grounds that the State did not show that the drug detection dog was sufficiently reliable at the time of the search of Appellee's vehicle. The court then granted the State's motion to dismiss without prejudice.

¶17 The State timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 13-4032(6) (Supp. 2008).<sup>3</sup>

## II. ANALYSIS

¶18 We review the granting of a motion to suppress evidence for an abuse of discretion. See *State v. Schinzel*, 202 Ariz. 375, 378, ¶ 12, 45 P.3d 1224, 1227 (App. 2002); see also *State v. Rosengren*, 199 Ariz. 112, 115-16, ¶ 9, 14 P.3d 303, 306-07 (App. 2000). As stated above, we review only the evidence presented at the suppression hearing, *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996), and view it in the light most favorable to upholding the trial

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<sup>2</sup> The trial court found that the detectives possessed reasonable suspicion to conduct a traffic stop based on Appellee's unsafe lane change. Appellee does not appeal this finding.

<sup>3</sup> We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

court's factual findings. *State v. Gerlaugh*, 134 Ariz. 164, 167, 654 P.2d 800, 803 (1982). We review the court's decision "for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues *de novo*." *State v. Booker*, 212 Ariz. 502, 504, ¶ 10, 135 P.3d 57, 59 (App. 2006).

### **Expert Witnesses**

¶9 An alert by a properly trained and reliable drug detection dog can provide probable cause for a warrantless search. See *State v. Teagle*, 217 Ariz. 17, 27 n.7, ¶ 36, 170 P.3d 266, 276 n.7 (App. 2007); see also *State v. Box*, 205 Ariz. 492, 496, ¶ 14, 73 P.3d 623, 627 (App. 2003). A central issue in this appeal involves the reliability of the dog involved in this search.

¶10 At the evidentiary hearing, the State and Appellee each presented their own experts on this issue - Sergeant Martin Lepird testified for the State and Steven Nicely testified for Appellee. Sgt. Lepird, the canine training supervisor for the Arizona Department of Public Safety ("DPS"), testified that he was not concerned with Aros' reliability despite acknowledging that the Yavapai County training logs did not include important details surrounding the training exercises, such as the quantity of drugs used, the specific location of where the drugs were hidden, the weather conditions, and the time it took Aros to

alert. Sgt. Lepird explained that DPS's training logs document this information because it helps identify deficiencies and to determine the dog's reliability.

¶11 The State contends that the "trial court erroneously relied on insufficient and unproven facts provided by Appellee's expert witness, finding him more 'credible.'" Mr. Nicely, a professional dog trainer for approximately thirty-five years, testified for Appellee. Mr. Nicely described the inadequacies of Aros' training and training logs, the shortfalls in the policies and other administrative support of the YCSO's canine unit, and ultimately opined that he could not confirm or otherwise support Aros' reliability.

¶12 In its ruling, the court stated:

On one level the Court could determine the question of the reliability of the drug-detection dog, Aros, by evaluating the weight to be assigned to the testimony of the two experts appearing at the evidentiary hearing - Sergeant Martin Lepird of DPS for the State and Steven Nicely for [Appellee]. In determining that Mr. Nicely was the more "credible" expert witness, this Court is in no manner suggesting or insinuating that the testimony of Sergeant Lepird was in any manner untruthful. This Court notes the following factors as supporting its determination that Mr. Nicely's testimony and opinion are highly credible: the comprehensiveness of Mr. Nicely's reports, which reflect his knowledge, experience and his thorough analysis of this case; his extensive background in training dogs; and the logic of his testimony setting forth his reasons and explanations for his opinion that Aros was not shown to be sufficiently reliable . . . .

¶13 The trial court determines the weight to be given to evidence presented at a suppression hearing. *State v. Estrada*, 209 Ariz. 287, 292, ¶ 22, 100 P.3d 452, 457 (App. 2004). "Because the trial court [is] in the best position to observe the demeanor of the witnesses and determine their possible biases, we [] defer to its assessment of their credibility . . . ." *Id.* Inevitably, when two expert witnesses disagree, the trial court must determine which opinion is more accurate. During the State's cross-examination of Mr. Nicely, the State agreed with Mr. Nicely that administrative support for Deputy Shrum was lacking and admitted to "receive[ing] an education" about proper dog training from Mr. Nicely's testimony. Even the State's opening brief concedes that "both expert witnesses were very articulate as to their own opinions." In light of the discretion we afford to the trial court, we will not second guess the trial court's determination as to which witness was more credible.

#### **Drug Detection Dog's "Real-World" Record**

¶14 The State next contends that the trial court's ruling was erroneous because it considered the "real-world" records of the handler/canine team.<sup>4</sup> Specifically, the State argues that

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<sup>4</sup> "Real world" records are the documentation of all of a drug detection dog's field activities, including every instance where a detection dog alerts to the scent of an illegal substance and whether the dog's handler physically locates the substance.

the trial court should have instead found that Aros' training and certification was *prima facie* evidence of a drug detection dog's reliability.

¶15 Appellee contends this argument was not preserved below because it was not raised in any pre-hearing memoranda and the State failed to make any objection at the time the information or data was offered into evidence at the hearing. Because the State presents this argument for the first time on appeal, the State has waived any objection to the trial court's admission of such evidence, absent fundamental error. See *State v. Jones*, 185 Ariz. 471, 480-82, 917 P.2d 200, 209-11 (1996) ("Because defendant did not make this argument in his motion to suppress, our inquiry is limited to fundamental error analysis."); *State v. Freeland*, 176 Ariz. 544, 549, 863 P.2d 263, 268 (App. 1993) ("Because defendant did not make this argument in the trial court, it is waived, absent fundamental error.").

¶16 In any event, the State fails to cite any cases and we are not aware of any that provide a trial court is *precluded* from considering real-world records as part of a totality of the circumstances when determining the reliability of a drug detection dog. The State only argues that a dog's training and certification is *prima facie* evidence of a drug detection dog's reliability, citing *United States v. Wood*, 915 F.Supp. 1126,

1134-35 (D.Kan. 1996), *rev'd on other grounds* by 106 F.3d 942 (10th Cir. 1997); *State v. Laveroni*, 910 So.2d 333, 334 (Fla. Ct. App. 2005); *Dawson v. State*, 518 S.E.2d 477, 479-80 (Ga. Ct. App. 1999). However, as Appellee notes, these cases only provide that a showing of proper training and certification can provide *prima facie* evidence. A closer reading of these cases also dictates that a court examine the totality of the circumstances in analyzing the reliability of a canine. Because the State did not directly raise this argument below, and in fact later urged the trial court to consider a variety of elements in determining Aros' reliability, including "success and failure in the field," we find no error, let alone fundamental error, in either the admission of this evidence, or in considering these records as part of the totality of the circumstances surrounding the search.

#### **Residual Odor**

¶17 In a related argument, the State also contends that the trial court's ruling erroneously addressed the issue of "residual odor."<sup>5</sup> The State contends that a drug detection dog's false-positive alerts do not automatically negate reliability, see *U.S. v. Diaz*, 25 F.3d 392, 393-96 (6th Cir. 1994), and that a finding of probable cause is not precluded based on the fact

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<sup>5</sup> Residual odor is the scent of an illegal substance that remains in a defined space after the substance has been removed.

that a detection dog could alert to residual odors. See also \$217,590.00 in *United States Currency v. Texas*, 54 S.W.3d 918, 922 (Tex. Ct. App. 2001). The State similarly notes that many courts have held the alert of a trained drug dog furnishes probable cause regardless of whether the dog is able to differentiate between residual odors and the odor of drugs currently in a vehicle. See *State v. Cabral*, 859 A.2d 285, 300 (Md. Ct. Spec. App. 2004); see also *United States v. Johnson*, 660 F.2d 21 (2d Cir. 1981); see also *State v. Carlson*, 657 N.E.2d 591 (Ohio Ct. App. 1995).

**¶18** In *Cabral*, a case in which the court analyzed and applied *Johnson* and *Carlson*, the defendant filed a motion to suppress the evidence seized from his vehicle after a drug detection dog alerted to the presence of drugs. 859 A.2d at 287. On appeal, the defendant attacked the existence of probable cause when there was a possibility that the dog might have alerted to a stale odor of contraband. *Id.* at 297. In reversing the trial court's granting of the motion to dismiss, the appellate court stated that the concept of staleness depends on the particular circumstances of the case. *Id.* at 297. The court further stated that the existence of residual odor does not compel a finding that there is no probable cause and that "[t]he issue of a possible alert to a residual odor is a factor to be considered by the trial court but it is not dispositive."

*Id.* at 300. The court ultimately held that the trial court "erred in finding that there was no probable cause because [the dog] might have alerted to the presence of an illegal drug that was in the vehicle as much as 72 hours before the alert." *Id.*

¶19 Here, the trial court's ruling provided in relevant part:

Deputy Shrum's and the State's explanation for the fact that the dog alerts nearly 100% of the time a sniff is conducted is the presence of residual odor. If in fact virtually all of the vehicles searched either actually contained drugs or emitted residual odor, which would be detected by and alerted to by a narcotics dog, it is hard to see why a dog would be necessary unless it would be to narrow the focus for locating the drugs. As noted by Mr. Nicely, for the time frame examined, once the deputy decided to conduct a dog sniff there was a 98% chance that the dog would alert. Without strong statistical or other evidence suggesting that it is typical for trained drug-detection dogs to alert on virtually all vehicles under sufficiently similar conditions, this Court is hesitant to accept residual odor as a nearly universal explanation for this behavior. Furthermore, neither the certification record nor the training records indicate any testing or training of this dog with regard to residual odor or "dead scents." According to the information provided, the deputy apparently theorized the presence of residual odor on an ad hoc basis when a post-sniff search did not result in the locating of drugs. If residual odor is such an important factor in understanding why a dog alerts on ostensibly clean locations, it would seem that tests would be done in a controlled setting. A number of questions appear appropriate, for example: are some dogs capable of distinguishing, at least to some degree, between "active" and residual odors; does the type and quantity of a drug have any effect on whether a dog will "hit" on a residual odor; how long after a particular quantity of drug is removed from a location will a drug alert to that area? Arranging tests and training relating to residual odor would seem to be

both an appropriate component of assessing the reliability of a narcotics dog and one aspect of analyzing possible reasons for apparent false alerts.

The significance of residual odor to the question of reliability of narcotics dogs has not been fully explored in this hearing. There is a fundamental legal issue presented here that has not been addressed by Arizona appellate courts. The issue is whether a dog detecting residual odors of drugs that have been removed from a vehicle hours, days or weeks before the dog sniff is conducted is a reliable tool for providing probable cause to search that vehicle, a vehicle which no longer contains contraband. As mentioned above, some courts take the view that because of the problem of residual odor, real world records are not material and therefore not even discoverable in a typical case. Such courts obviously take the view that an alert to residual odor is an acceptable basis for probable cause. The present case illustrates that, regardless of the ultimate determination of this issue, in some cases discovery and examination of the real world records are appropriate. The certification records of this dog suggest a possible problem - the dog was being cued or had a tendency to alert on blank vehicles. The real world records substantiate this concern unless it is accepted that actual drugs or residual odor was present in virtually all of the vehicles searched. Even if residual odor accounted for almost all of the false alerts in the field, however, what caused the false alert during the certification process if not cueing or some improper procedure that had to be corrected?

¶20

Although the cases cited by the State did not involve any dispute as to whether the detection dog was properly trained, they do remain instructive in that the issue of a stale or residual odor may be considered as a factor in the trial court's determination of reliability. Here, even though the trial court did comment on the issue of a dog alerting to

residual odor, the court also stated that its primary reason for concluding that the dog was not sufficiently reliable was based on concerns regarding the training and certification process. Further, as the court noted, the issue and impact of residual odor was raised by both the State and Appellee during the evidentiary hearing. Accordingly, it was appropriate for the trial court to question how the issue of residual odor impacted Aros' certification, training, and reliability.<sup>6</sup> Ultimately, the court did not rely entirely on the issue of residual odor in suppressing the State's evidence; instead, it was only one factor the court considered, as utilized or interpreted by both Appellee's expert and the State's expert.

#### **Totality of the Circumstances**

¶21 The State further argues that the trial court erred in not applying the law properly. The State contends that the court erred when it relied solely on *State v. Nguyen*, 811 N.E.2d 1180 (Ohio Ct. App. 2004).

¶22 We disagree with the State that the trial court relied solely on *State v. Nguyen*. In *Nguyen*, a canine officer initiated a traffic stop after observing a marked lane change

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<sup>6</sup> Deputy Shrum assumed that Aros' false alerts during training and certification were caused by the presence of residual odor and opined that the alerts were not false alerts at all. However, Deputy Shrum also testified that the testing and certification procedures are usually conducted in a controlled setting so that the presence of residual odors may be eliminated.

violation. 811 N.E.2d at 1181, ¶ 3. During the traffic stop, the officer decided to use her drug detection dog to ascertain whether any drugs were present in the vehicle. *Id.* at ¶ 6. The dog immediately alerted to an area of the car and, pursuant to a warrantless search, the officer seized more than 100 pounds of marijuana. *Id.* at 1182, ¶ 7. At trial the defendants filed a motion to suppress, alleging that the drug detection dog was unreliable, and also filed a motion asking the trial court to compel the production of the drug detection dog's real-world records that were not disclosed by the State. *Id.* at 1182, ¶¶ 9-11. The trial court concluded that all of the dog's real-world reports were material and therefore discoverable. *Id.* at 1182, ¶ 11. The Ohio Court of Appeals disagreed, concluding that the real-world reports were immaterial to the defendants' defense.<sup>7</sup> *Id.* at 1184-95, ¶¶ 19-64. The court further stated that "[p]roof that a drug dog is properly trained and certified may be established by means of testimony or through documentary proof." *Id.* at 1194, ¶ 55.

¶23 Here, the trial court's order noted that *Nguyen* conflicts with *Matheson v. State*, 870 So.2d 8, 14-15 (Fla. Dist.

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<sup>7</sup> The court stated that "to be material for the purposes of the rule, the requested information must have 'more than \* \* \* some abstract logical relationship to the issues in the case.' The 'touchstone of materiality is a reasonable probability of a different result.'" *Id.* at 1193, ¶ 52 (citations omitted).

Ct. App. 2003), and Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (3d ed. 1996).<sup>8</sup> The trial court acknowledged *Nguyen* as authority for the State's proposition that a drug dog's real-world reports are immaterial and quoted *Nguyen's* language from its holding: "[P]roof of the fact that a drug dog is properly trained and certified is the only evidence material to a determination that a particular dog is reliable. Proof that a drug dog is properly trained and certified may be established by means of testimony or through documentary proof." *Nguyen*, 811 N.E.2d at 1194. However, the trial court here concluded that Aros' real-world record was in fact material to the question of reliability - a position contrary to the Ohio Court of Appeals' view. Therefore the trial court did not improperly rely on *Nguyen* as suggested by the State.

**¶24** The State also contends that the trial court should have adopted the view discussed by the South Dakota Supreme Court in *State v. Nguyen*, 726 N.W.2d 871 (S.D. 2007). In *Nguyen* (South Dakota), after a police officer issued the defendant a warning for a traffic violation, the officer asked the defendant

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<sup>8</sup> The court further noted that "[Appellee] relies heavily on the case of *Matheson v. State* and the highly-regarded LaFave treatise as authority for the arguments that (1) 'the fact that a dog has been trained and certified, standing alone, is insufficient to give officers probable cause to search based on the dog's alert' and (2) the 'track record' of the dog up until the search[] is a critical factor in the determination of reliability."

to sit in the passenger seat in his police car. *Id.* at 873, ¶ 3. During their discussion in the police car, the drug detection dog located in the back seat alerted to the odor of illegal drugs. *Id.* at ¶ 5. The officer then led the detection dog in an exterior sniff of the defendant's vehicle where the dog again alerted to the odor of illegal drugs. *Id.* at 873-74, ¶¶ 7-8. The officer discovered approximately fifty-four pounds of marijuana in the vehicle's trunk. *Id.* at 874, ¶ 9. At trial, the defendant moved to suppress the evidence on multiple grounds, including that the officer lacked probable cause to search his vehicle. *Id.* at 874, ¶ 9. The trial court denied the motion and found that the officer had probable cause based upon the objectively observable indication of a properly trained and certified drug detection dog. *Id.* at ¶ 10.

¶25 On appeal, the defendant argued that the drug detection dog was not reliable<sup>9</sup> and that the drug detection dog's behavior did not give the officer probable cause to search her trunk. *Id.* at ¶ 11. In analyzing the dog's reliability, the court summarized the three different views that have emerged to determine what is required to prove a drug detection dog's reliability:

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<sup>9</sup> The defendant only argued that the dog's field activity reports reflected its unreliability - the defendant did not dispute that the dog was properly certified and trained.

First, there are a host of courts that deem a dog reliable solely because the evidence shows that the dog was trained and certified to detect controlled substances. Second, some jurisdictions consider a dog's training and certification to be *prima facie* evidence that the dog is reliable. The burden then shifts to the defense to produce evidence to challenge the dog's reliability. Third, a minority of jurisdictions either require or allow a dog's field activity reports, along with evidence that the dog is trained and certified, to be considered as factors in determining reliability. Nonetheless, the prevailing view with respect to reliability is that the decision ultimately rests in the trial court's sound discretion.

*Id.* at 876, ¶ 16 (citations omitted). The court concluded that the drug detection dog was reliable and stated that "trial courts making drug dog reliability determinations may consider a variety of elements, including such matters as the dog's training and certification, its successes and failures in the field, and the experience and training of the officer handling the dog." *Id.* at 877, ¶ 20. "Under the totality of the circumstances, the court can then weigh each of these factors." *Id.*

¶26 Here, while not expressly citing *Nguyen* (South Dakota), the trial court applied a similar "totality of the circumstances" analysis in making its reliability determination. As mentioned above, the trial court's order first described the expert testimony presented at the evidentiary hearing and concluded that Appellee's expert was more credible due to the comprehensiveness of his reports and the logic of his testimony.

The court then stated that its primary reason for concluding that the dog was not sufficiently reliable was based on its concerns regarding the certification process. The court also stated that "[t]he certification and training records, as corroborated by the 'real world' records as summarized to the Court, do not substantiate that this dog possessed [the ability to discriminate between vehicles that contain illegal drugs and those that do not] to a sufficient degree at the time of the search of the Wright vehicle." Further, the court noted that the certification process did not eliminate inadvertent or unconscious "cueing" by the dog's handler. The trial court also considered Aros' field records; specifically, Aros' performance records show that illegal drugs were only found in 42% of the instances where Aros positively alerted to the odor of illegal drugs. Lastly, the court noted that Aros' "training procedure was apparently not designed in the manner best suited to detect and, if necessary, correct any cueing problem." In fact, Deputy Shrum testified that he placed the drugs in the training vehicle himself. Further, Mr. Nicely testified about the possibility of a cueing problem and the training that may be done to correct this problem, but had not been done here. Both the State's and Appellee's expert witnesses testified about the absence of important details in Aros' training records, including the quantity of drugs used, the height and location of where the

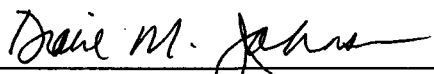
drugs were hidden, and the weather conditions. Deputy Shrum even testified that there was essentially no training program in place in Yavapai County.<sup>10</sup> In consideration of this substantial evidence, we find no abuse of discretion or other error.

### III. CONCLUSION

¶27 For the foregoing reasons, we affirm the trial court's granting of Appellee's motion to suppress.

  
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LAWRENCE F. WINTHROP, Judge

CONCURRING:

  
\_\_\_\_\_  
DIANE M. JOHNSEN, Presiding Judge

  
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DONN KESSLER, Judge

<sup>10</sup> However, Deputy Shrum and Mr. Nicely testified that Yavapai County now has an official training program that is far superior to the one in place at the time of the subject events.