

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 8, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 25-8055

GEORGE OSTERTAG,

Defendant - Appellant.

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 2:24-CR-00084-ABJ-1)

Perrin Tourangeau, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with her on the briefs), Office of the Federal Public Defender, Denver, Colorado, for Defendant-Appellant.

Christyne Marie Martens, Assistant United States Attorney (Darin D. Smith, United States Attorney; and Paige N. Hammer, Assistant United States Attorney, on the brief), District of Wyoming, Cheyenne, Wyoming, for Plaintiff-Appellee.

Before **TYMKOVICH**, **MURPHY**, and **CARSON**, Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

The defendant-appellant, George Ostertag, was convicted of unlawfully possessing a firearm as a convicted felon. *See* 18 U.S.C. §§ 922(g)(1), 924(a)(8). The

firearm at issue was found inside his vehicle, the search of which began after Becky, a narcotics-detection dog, was deployed during a traffic stop.

Ostertag raises three issues on appeal. He first argues Becky's sniff on the exterior of his vehicle from the side of a public highway amounts to an unconstitutional search. Second, he claims he was again subjected to an unlawful search when, later during her deployment, Becky made physical contact with his vehicle while sniffing the same. Third, he brings a facial and an as-applied challenge to § 922(g)(1).

Ostertag fails to establish Becky's initial sniff compromised any legitimate expectation of privacy. Although Becky's subsequent sniff, when combined with her physical contact with the vehicle, may have constituted a search, there was probable cause to support it. Finally, binding precedent forecloses Ostertag's challenges to § 922(g)(1). Thus, exercising jurisdiction pursuant to 28 U.S.C. § 1291, the court **affirms** the judgment of the district court.

II. BACKGROUND

A. Factual Background

Ostertag was pulled over by Wyoming Highway Patrol Sergeant Chad Bracken on Highway I-80 for failing to signal a turn. Trooper Andres Martinez, a K-9 officer with the Wyoming Highway Patrol, along with his dog, Becky, were called to the scene. While Bracken ran a record check on Ostertag, Martinez deployed Becky to perform an initial sniff on the exterior of Ostertag's vehicle from the side of the road ("open-air sniff"). Becky was then brought closer to the vehicle. She ran back and

forth along the passenger side before repeatedly jumping and placing her front paws on the vehicle. She stopped jumping shortly thereafter and, while sitting still, remained focused on the vehicle.

Martinez reported to Bracken that Becky exhibited a positive alert behavior. Bracken removed Ostertag from his vehicle and both Martinez and Bracken proceeded to search inside. A 9mm pistol with an obliterated serial number was discovered between the driver's seat and the center console.

B. Procedural Background

Ostertag, who had a prior felony conviction, was indicted on two counts: 1) possessing a firearm as a felon in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(8) (setting forth the penalties for a knowing violation of § 922(g)(1)); and 2) possessing a firearm with an obliterated serial number in violation of 18 U.S.C. §§ 922(k); 924(a)(1)(B) (setting forth the penalties for a knowing violation of § 922(k)).

Ostertag moved to suppress the evidence found from the search of his vehicle, asserting the evidence was the result of an unconstitutional search. He argued Becky's deployment and open-air sniff constituted a search. Separately, and alternatively, Ostertag contended he was subject to a search when Becky placed her paws on his vehicle as she continued to sniff his vehicle. In neither instance, he maintained, did the officers have probable cause to justify the search. He also disputed Becky's reliability as a narcotics-detection dog, scrutinizing her certification, training, and performance, as well as her behavior on the day she was deployed to sniff his vehicle.

The district court held a suppression hearing which spanned five days of testimony. Based on the evidence submitted, the district court found: 1) Becky was sufficiently reliable for her alert behavior to create probable cause, and 2) Becky exhibited a positive alert behavior following her open-air sniff but before she made physical contact with Ostertag's vehicle. The district court further concluded a search occurred when Becky sniffed the vehicle while maintaining contact with it. Nevertheless, it reasoned, Becky's positive alert behavior shortly before the search was sufficient to establish probable cause. The district court then rejected Ostertag's contention that Becky's open-air sniff amounted to a search. Consequently, Ostertag's motion to suppress was denied.

Through separate filings, Ostertag also moved to dismiss his indictment. In one motion, he raised both facial and as-applied challenges to § 922(g)(1), arguing the statute violated the Second Amendment. In another, he raised a facial challenge, again based on the Second Amendment, to § 922(k). Both motions were denied. The district court ruled Ostertag's challenges to § 922(g)(1) were foreclosed by the then-current law of the Tenth Circuit. It then concluded § 922(k) did not implicate the Second Amendment.

Ostertag subsequently entered a guilty plea pursuant to a conditional plea agreement which preserved his right to appeal the district court's rulings on his motion to suppress and on his motions to dismiss the indictment. *See Fed. R. Crim. P. 11(a)(2)*. Upon the government's motion, the district court dismissed the charge of possessing a firearm with an obliterated serial number. Convicted on the remaining

count of being a felon in possession of a firearm, Ostertag was sentenced to eighteen months' imprisonment, followed by three years of supervised release. He timely appealed.

III. DISCUSSION

Ostertag challenges both the denial of his motion to suppress and the denial of his motion to dismiss the indictment as to the § 922(g)(1) charge.

A. Motion to Suppress

“In reviewing a district court’s denial of a motion to suppress, this court considers the totality of the circumstances and views the evidence in the light most favorable to the government.” *United States v. Little*, 119 F.4th 750, 766 (10th Cir. 2024). The district court’s factual findings are reviewed for clear error, while legal issues are reviewed de novo. *United States v. Tew*, 171 F.4th 1210, 1225 (10th Cir. 2026).

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV; *see Mapp v. Ohio*, 367 U.S. 643, 650-51 (1961) (extending the protection of the Fourth Amendment against state action through the Fourteenth Amendment). Generally, evidence obtained in violation of the Fourth Amendment cannot be used at trial. *See Herring v. United States*, 555 U.S. 135, 139-40 (2009) (summarizing the exclusionary rule).

On appeal, Ostertag claims he was twice subjected to searches in violation of the Fourth Amendment: 1) when Becky was first deployed and performed an open-air

sniff, and 2) when, shortly thereafter, Becky placed her front paws on his vehicle as she continued to sniff. Whether a Fourth Amendment search has occurred is a legal issue. *United States v. Nicholson*, 144 F.3d 632, 636 (10th Cir. 1998).

1. Open-Air Sniff

“[A] vehicle is an ‘effect’ protected by the Fourth Amendment.” *United States v. Canada*, 76 F.4th 1304, 1307 (10th Cir. 2023). Subject to certain exceptions inapplicable here, “[a] search of a vehicle without probable cause violates the Fourth Amendment.” *Felders v. Malcom*, 755 F.3d 870, 879 (10th Cir. 2014); *see Whren v. United States*, 517 U.S. 806, 811-12 (1996) (discussing the validity of certain searches conducted without probable cause).

Pursuant to *Katz v. United States*, 389 U.S. 347 (1967), and its progeny, a search occurs when the government intrudes into a “private sphere” over which an individual exhibits an expectation of privacy, if that expectation is one that society is prepared to recognize as reasonable. *Carpenter v. United States*, 585 U.S. 296, 304 (2018) (“In *Katz* . . . we established that ‘the Fourth Amendment protects people, not places,’ and expanded our conception of the Amendment to protect certain expectations of privacy as well.”); *see Smith v. Maryland*, 442 U.S. 735, 740-41 (1979). “Official conduct that does not compromise any legitimate interest in privacy,” on the other hand, “is not a search subject to the Fourth Amendment.”¹ *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (quotation omitted).

¹ The Supreme Court uses the terms “‘reasonable’ and ‘legitimate’ interchangeably to describe a privacy interest entitled to Fourth Amendment

In *Caballes*, the Supreme Court held a sniff performed by a well-trained narcotics-detection dog on the exterior of a vehicle during a lawful traffic stop on a public road was, categorically, not a search. *Id.* at 409. Underlying this determination were two main premises. First, “any interest in possessing contraband [was not] deemed ‘legitimate.’” *Id.* at 408. Second, a sniff by a well-trained narcotics-detection dog was “‘sui generis’ because ‘it disclose[d] only the presence or absence of narcotics, a contraband item.’” *Id.* at 409 (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)). The deployment of a narcotics-detection dog was therefore considered government conduct which did not compromise any “legitimate privacy interest.” *Id.* at 408.

Urging the court to deviate from this well-established precedent, Ostertag advances two related positions. He first seeks to rebut the premises upon which *Caballes* relies. Becky is trained to detect the scent of certain controlled substances, including marijuana, methamphetamine, and fentanyl. Ostertag claims the scent of these substances does not always reveal unlawful activity. For example, as the district court found, unlawful marijuana smells “identical” to certain kinds of hemp, which Congress legalized in 2018. ROA Vol. I at 336; *see* 21 U.S.C. § 802(16)(B)(i)

protection.” *Dow Chem. Co. v. United States*, 476 U.S. 227, 248 n.9 (1986) (Powell, J., concurring in part and dissenting in part); *see Smith v. Maryland*, 442 U.S. 735, 741 (1979) (“Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government action.”).

(excluding “hemp, as defined in [7 U.S.C. § 1639o]” from the definition of marijuana). Ostertag also theorizes the scent of methamphetamine and fentanyl may be traced back to legally prescribed medication, the possession of which may reveal medical or mental health information. The protections of the Fourth Amendment, he continues, extends to privacy interests over this type of medical information. According to Ostertag, Becky’s sniff is not only capable of detecting lawful activity but, as a result, also intrudes upon reasonable expectations of privacy.

As his second argument, Ostertag looks to extend the holding of *Kyllo v. United States*, 533 U.S. 27 (2001), to this case. *Kyllo* held the use of a “thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a ‘search’ within the meaning of the Fourth Amendment.” *Id.* at 29, 41. The Court explained the “surveillance of the home is a search where ‘the Government uses a device that is not in general public use’ to ‘explore details of the home that would previously have been unknowable *without physical intrusion.*’” *Florida v. Jardines*, 569 U.S. 1, 11 (2013) (quoting *Kyllo*, 533 U.S. at 40). “Critical to [the holding of *Kyllo*] was the fact that the device was capable of detecting lawful activity,” including “intimate details in a home.” *Caballes*, 543 U.S. at 409-10. Ostertag analogizes a sniff of a narcotics-detection dog to the thermal-imaging device at issue in *Kyllo* and asserts Becky is capable of detecting lawful activity.

Because Ostertag seeks “[t]o establish a protectable Fourth Amendment interest,” the burden falls on him to “demonstrate a legitimate expectation of

privacy.” *United States v. Lowe*, 117 F.4th 1253, 1260 (10th Cir. 2024) (quotation omitted); see *United States v. Jacobsen*, 466 U.S. 109, 122 (1984) (“The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities.”).

As an initial matter, Ostertag’s attempt to extend *Kyllo* is unpersuasive. When analyzing police surveillance technology, courts must “assure[] preservation of [the] degree of privacy against government that existed when the Fourth Amendment was adopted.” *Kyllo*, 533 U.S. at 34. For this reason, *Kyllo* cautioned against a “mechanical interpretation” of the Fourth Amendment. *Id.* at 35, 36 (“While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.”).

“[F]or the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.” *Chambers v. Maroney*, 399 U.S. 42, 52 (1970). “One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects.” *United States v. Knotts*, 460 U.S. 276, 281 (1983) (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion)). To be sure, a “diminished privacy interest[] does not mean that the Fourth Amendment falls out of the picture entirely.” *Riley v. California*, 573 U.S. 373, 392 (2014). Given the “reduced expectation of privacy” in vehicles, however, it falls on Ostertag to examine “the nature of the particular [information]” at issue and establish that the privacy

expectation he seeks to assert is legitimate. *See Carpenter*, 585 U.S. at 314. Ostertag fails to do so, instead arguing the “reduced expectation of privacy with respect to one’s vehicle . . . has no bearing whether an action constitutes a *search* within the meaning of the Fourth Amendment.” Appellant’s Opening Br. at 16. By “mechanically applying” *Kyllo* to the instant case, Ostertag disregards the caution set out in the very case he seeks to extend. *Carpenter*, 585 U.S. at 314.

“Whether an expectation of privacy counts as legitimate is less the result of any fixed set of rules than of ‘guideposts’ stretching back to the Fourth Amendment’s beginnings.” *Chatrie v. United States*, 146 S. Ct. 2193, 2205 (2026). In this regard, the Supreme Court recognized two core principles. *See id.*; *Carpenter*, 585 U.S. at 305.

First, “the Fourth Amendment [seeks] to secure the ‘privacies of life’ against the exercise of arbitrary power.” *Chatrie*, 146 S. Ct. at 2205 (quotation omitted); *see Carpenter*, 585 U.S. at 311 (holding time-stamped location data may expose one’s “privacies of life” because a person’s movement may reveal their “familial, political, professional, religious, and sexual associations”). Far from providing “an intimate window into a person’s life,” *Carpenter*, 585 U.S. at 311, the information obtained from a sniff is limited in nature, *see Place*, 462 U.S. at 707. A canine sniff reveals the presence of an odor.² *Florida v. Harris*, 568 U.S. 237, 246 n.2 (2013). The presence

² Following oral argument on appeal, Ostertag filed a notice of supplemental authority pursuant to Fed. R. App. P. 28(j). In it, he cited *Chatrie v. United States* for the proposition that whether government conduct constitutes a search does not hinge on “the fruits of a given search.” *See* 146 S. Ct. 2193, 2212 (2026) (holding the

of the odor does not necessarily indicate the presence of the substance associated with the odor. *See id.* (recognizing the odor may linger even if the substance itself is not present). By Ostertag’s own admission, the presence of a particular substance does not necessarily disclose its purpose either. *See, e.g.,* Appellant’s Opening Br. at 12 (identifying different uses of methamphetamine and fentanyl); ROA Vol. I at 336 (recognizing that hemp and marijuana smell “identical”). The asserted privacy interest in medical and mental health information, as well as lawful activity more broadly, is therefore several inferential leaps removed from the information a sniff might uncover. *See Caballes*, 543 U.S. at 413 (Souter, J., dissenting) (“[T]he sniff is *the first step* in a process that may disclose ‘intimate details’ without revealing contraband” (emphasis added)); *see also United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) (suggesting privacy expectation over GPS data ought to be considered reasonable because the data discloses “trips the indisputably private nature of which takes little imagination to conjure” (quotation

legality of a search is determined when it starts because “[a]n officer . . . cannot know the fruits of a given surveillance in advance”). According to Ostertag, this supports his position that Becky’s open-air sniff amounts to a search because there is the possibility that she may reveal lawful conduct or sensitive and personal information.

Ostertag erroneously conflates what Becky’s sniff may reveal with what may be discovered through subsequent action by law enforcement. Becky’s sniff reveals the presence or absence of an odor. *See Florida v. Harris*, 568 U.S. 237, 246 n.2 (2013). The source of the odor and the purpose behind its presence would be discovered only if law enforcement officers took additional steps (e.g., visually inspecting the interior of the vehicle or engaging in a search therein).

omitted)). Thus, “[t]he invasion of privacy, if it can be said to exist, is abstract and theoretical” in the context of an open-air sniff by a narcotics-detection dog.

Cardwell, 417 U.S. at 592 (quotation omitted).

Second, the Fourth Amendment was intended to be an “obstacle[] in the way of a too permeating police surveillance.” *Carpenter*, 585 U.S. at 305 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)); see *Chatrpie*, 146 S. Ct. at 2210 (holding the government’s “intrusive powers” must be subject to limitations). A canine sniff is limited by several obvious constraints. An open-air sniff performed on the exterior of the vehicle is less intrusive than a physical search conducted in its interior. See *Place*, 462 U.S. at 707. Because the interaction with the vehicle is limited to its exterior, officers would not be able to disturb the internal layout of the vehicle, keeping hidden odorless items that are not initially in plain view. See *Horton v. California*, 496 U.S. 128, 133-36 (1990) (explaining the scope of the plain view doctrine).

There are also temporal limitations. An open-air sniff reveals only scents sufficiently intense to be detected at the time of the dog’s deployment. Because scents are, by nature, fleeting, see *Harris*, 568 U.S. at 246 n.2, a sniff will not produce an “all-encompassing record” of what might have been present in the vehicle at any given time, *Carpenter*, 585 U.S. at 311. Moreover, in the context of a traffic stop such as the one Ostertag was subjected to, the deployment of a narcotics-detection dog cannot prolong a traffic stop beyond the time required to complete the “tasks tied to the traffic infraction.” *Rodriguez v. United States*, 575 U.S. 348, 354

(2015). The temporal scope of the information that could be collected and the window of time to collect such information are subject to cognizable limitations.

A canine sniff, though sufficiently reliable, is by no means a “perfect [form of] surveillance” either. *Chatrue*, 146 S. Ct. at 2208. There is the possibility of false negatives. *See Harris*, 568 U.S. at 245-46 (acknowledging the risk of error in the use of narcotic-detection dogs); *Caballes*, 543 U.S. at 410-14 (Souter, J., dissenting) (discussing the fallibility of drug-detection dogs); *cf. United States v. Scott*, 610 F.3d 1009, 1014 (8th Cir. 2010) (“Naton is a very energetic dog and most of his failures are false negatives, resulting from his moving too quickly and failing to discover where drugs are hidden.”). Officers may fail to find narcotics even when a dog accurately alerts because “[t]he dog may have detected substances that were too well hidden or present in quantities too small for the officer to locate.” *Harris*, 568 U.S. at 245. These limitations suggest the canine sniff is more accurately categorized as “rudimentary” police technology than overly “sweeping modes of surveillance.” *Carpenter*, 585 U.S. at 306 (affirming the principle set out in *Knotts*, 460 U.S. at 284, that “different constitutional principles may be applicable” based on the sophistication of the technology used).

In all, neither principle supports recognizing the asserted privacy interest as reasonable. Ostertag fails to establish a protectable Fourth Amendment interest under the circumstances of this case. *Lowe*, 117 F.4th at 1260. Becky’s open-air sniff therefore did not constitute a search under the Fourth Amendment.

2. Physical Contact with the Vehicle

Ostertag next contends a search occurred when Becky, following her open-air sniff, placed her paws on his vehicle's doors as she continued to sniff. Relying on *Jones*, 565 U.S. at 402-04,³ he characterizes Becky's behavior as a physical intrusion onto a constitutionally protected effect for the purpose of gathering information.

Even assuming, solely for the sake of argument, that Becky's physical contact with the vehicle, combined with her sniff, initiated a search, the government established probable cause. *See United States v. Ludwig*, 10 F.3d 1523, 1528 (10th Cir. 1993) ("A warrantless search of an automobile is reasonable if there is probable cause to believe it contains contraband.").

"Probable cause means that 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Id.* at 1527 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). "A trained narcotic dog's detection of the odor of an illegal substance emanating from a vehicle creates a fair probability that there is contraband in that vehicle." *United States v. Parada*, 577 F.3d 1275, 1282 (10th Cir. 2009) (quotation omitted); *see Ludwig*, 10 F.3d at 1527 ("[A] dog alert usually is at least as reliable as many other sources of probable cause and is certainly reliable

³ In *United States v. Jones*, the Supreme Court held "the attachment of a [GPS] tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search . . . within the meaning of the Fourth Amendment." 565 U.S. 400, 402 (2012). In arriving at this conclusion, the Court explained the government conducts a search when it "physically occupie[s] private property for the purpose of obtaining information." *Id.* at 404.

enough to create a ‘fair probability’ that there is contraband.”). The district court found Becky positively alerted after performing an open-air sniff but before placing her paws on the vehicle. ROA Vol. I at 303, 306-10, 335. Her alert was sufficient to satisfy the probable cause requirement.

Ostertag challenges the district court’s determination that Becky alerted.⁴ This factual finding is reviewed for clear error. *Parada*, 577 F.3d at 1281. “A finding of fact is clearly erroneous if it is without factual support in the record or if, after reviewing all of the evidence, [the court is] left with the definite and firm conviction that a mistake has been made.” *United States v. Pena*, 115 F.4th 1254, 1259 (10th Cir. 2024).

Based on the evidence submitted during the suppression hearing, the district court identified several ways by which Becky could be expected to exhibit alert behavior. This included “a head snap, closed-mouth breathing, bracketing . . . , and changes in posture or ear position.”⁵ ROA Vol. I at 306 (quotations omitted). The district court then recognized the “unique familiarity that handlers have with their

⁴ On appeal, Ostertag does not dispute Becky’s reliability as a narcotics-detection dog. *See Harris*, 568 U.S. at 247 (“A defendant . . . must have an opportunity to challenge [the] evidence of a dog’s reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses.”).

⁵ During the suppression hearing, Marc Russell, captain and K-9 team commander with the Wyoming Highway Patrol, testified that “bracketing” is the process by which narcotics-detection dogs, upon detecting a particular scent, move back and forth along the target object to narrow its focus and determine more precisely the location of the source of the scent. *See* ROA Vol. II at 115:14-23.

dogs,” before assessing Martinez’s testimony in particular. *Id.* at 307 (relying on, among other cases, *United States v. Goldberg*, 850 F. App’x 610, 613 (10th Cir. 2021)). The district court acknowledged Martinez’s testimony that jumping may be yet another example of Becky’s alert behavior. It, however, refused to credit this testimony, in light of Martinez’s own conflicting statement that Becky’s jumping could be interpreted as either her alert behavior or basic exploratory behavior. Upon its own objective review of the relevant footage, the district court concluded Becky exhibited alert-specific behaviors “near the start of her sniff,” including head snaps, bracketing, and a “focused stare.” *Id.* at 309-10, 335 (“Becky’s bracketing and head-snap constituted alert behavior which was expressed before any trespassory contact with the car began.”); *see United States v. Ross*, 456 U.S. 798, 808 (1982) (“[T]he probable-cause determination must be based on objective facts . . .”).

The district court’s careful assessment is more than plausible in light of the record viewed in its entirety. *See United States v. Cortez*, 139 F.4th 1146, 1151 (10th Cir. 2025). Ostertag offers contrary interpretations of the evidence. For example, he disputes the significance of certain expert testimony, the relevance of Martinez’s testimony about Becky’s off-duty behavior, and the contents of the relevant bodycam footage. These contentions, however, are directed at the weight of the evidence, which this court may not reconsider on appeal. *See United States v. Craine*, 995 F.3d 1139, 1158 (10th Cir. 2021) (explaining this court may not reverse the district court’s findings “regardless of how we might have weighed the evidence in the first instance”); *see also Parada*, 577 F.3d at 1281 (“Although the quality of the videotape

is poor, making it difficult to see the dog's response, [the K-9 officer] testified to that fact at the evidentiary hearing and the district court was able to judge his credibility.”).

The district court did not clearly err in finding Becky exhibited a positive alert behavior following her open-air sniff. To the extent Becky's physical contact with the vehicle amounted to a search, there was probable cause to justify it. Neither Becky's open-air sniff nor her physical contact with the vehicle constitutes an unconstitutional search in violation of the Fourth Amendment.

B. Motion to Dismiss the Indictment

Ostertag also appeals the district court's denial of his motion to dismiss the indictment. He raises both a facial and an as-applied challenge to § 922(g)(1), arguing the statute violates the Second Amendment. A preserved challenge to the constitutionality of a statute is reviewed de novo. *See United States v. Harjo*, 122 F.4th 1240, 1245 (10th Cir. 2024).

Ostertag concedes from the outset that binding precedent compels an affirmance of the district court's ruling. In *Vincent v. Bondi*, this court held § 922(g)(1) may be applied against those without violent felony convictions. 127 F.4th 1263, 1266 (10th Cir. 2025) (“[T]he Second Amendment doesn't prevent application of § 922(g)(1) to nonviolent offenders”). His facial challenge fails by extension. *See United States v. Rahimi*, 602 U.S. 680, 693 (2024) (holding a statute survives a facial challenge if it is “constitutional in some of its applications”).

IV. CONCLUSION

The judgment of the district court is **AFFIRMED**.