69799-4 69799-4

NO. 69799-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

AMY C. TAYLOR,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

(1) A police officer approached a pickup truck on foot. When he asked the driver if she was "clear," she handed him her driver's license. The officer stood next to the driver and used his radio to conduct a warrants check. Did these actions constitute a "seizure" of the driver?

(2) After arresting the driver, police used a dog to sniff the outside of the truck. Did this action constitute a "search"?

(3) A search warrant affidavit showed that the dog was trained and certified as a drug detection dog. It also showed that the suspect had tried to conceal something in her truck, and that she had been previously found in possession of a large quantity of methamphetamine. Did this affidavit establish probable cause that methamphetamine would be found in the truck?

(4) Can a defendant be convicted on multiple counts for possessing drugs at different locations?

II. STATEMENT OF THE CASE

On September 3, 2010, a Marysville Police officer conducted a traffic stop on a warrant subject. When he did so, a pick-up truck stopped nearby. Snohomish County Deputy Sheriff Dan Dusevoir heard a radio report of these events. He was concerned that the

occupants of the pick-up truck might be friends of the arrestee who would outnumber the arresting officer. Dep. Dusevoir went to the scene to back up the Marysville officer. Supp. hg. RP 4-5.

When he arrived, Dep. Dusevoir saw that the truck had pulled into "a gravel driveway roadway area." He pulled in behind the truck. His car did not block the truck. For safety reasons, he turned on his rear strobe lights. Supp. hg. RP 5-6.

On approaching the truck, Dep. Dusevoir saw that the driver was the defendant (appellant), Amy Taylor. Erin Graafstra was in the truck with her. Less than a year before, Dep. Dusevoir had contacted the defendant and Graafstra. That contact had led to recovery of a large amount of methamphetamine. Supp. hg. RP 6, 9.

Dep. Dusevoir asked the defendant if she was "clear" (meaning "valid to drive a vehicle"). She said she was and handed him her driver's license. He had not asked to see her license. While holding the license, he used his radio to conduct a warrant check. He was informed that there was an outstanding arrest warrant. Supp. hg. RP 6-7.

Dep. Dusevoir attempted to detain the defendant. He took hold of her hand. She had something in her hands that she was

holding tightly. She "kind of ditched down into the area in the vehicle between the driver's seat and the passenger seat." When the defendant was removed from the car she appeared "to drop something and crush it on the ground and kick it away." Supp. RP 8-9; CP 98.

After the defendant was removed from the scene, a K-9 handler arrived. Supp. hg. RP 9. The dog sniffed the outside of the car. When he reached the passenger side door, he "demonstrated a change of behavior consisting of mouth closure and intense sniffing followed by a specific alert consisting of aggressive scratching on the passenger side door seem." This behavior was consistent with past alerts where narcotic odors were present and narcotics had been located. CP 102.

Based on this information, police obtained a search warrant. CP 96-102. (A copy of the search warrant affidavit is attached to the appellant's brief.) Under the seat, police found a plastic box holding 3.38 grams of methamphetamine. Behind the seats, there was a bag with the defendant's initials. Inside the bag was a plastic container holding 27.78 grams of methamphetamine. Trial RP 88.

The defendant was charged with two counts of possession of a controlled substance, based on the drugs found in the two

separate containers. CP 71. She moved to suppress the evidence. CP 103-34. At a suppression hearing, Deputy Dusevoir testified to the facts summarized above. Supp. hg. 4-10. The defendant did not testify concerning that stop or offer any other conflicting evidence.[1]

The court determined that Deputy Desevoir's actions did not constitute a seizure. The court also determined that the use of the drug dog to sniff the outside of the vehicle was not a search. The search warrant affidavit sufficiently established the dog's reliability. The court therefore denied the motion to suppress. CP 1-3 (attached to this brief). A jury found the defendant guilty as charged. CP 35-36.

At sentencing, no one raised any double jeopardy issue. The defendant had no prior convictions. The court computed an offender score of 1. The standard sentencing range of 0-6 months is the same for any offender score between 0 and 2. The court sentenced the defendant to 45 days' confinement on each count, to be served concurrently. Sent. RP 5; CP 17-27.

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[1] The defendant testified concerning a different stop that occurred on a later date. Supp. hg. RP 23-24. The court granted the suppression motion was regard to this later stop. Id. at 41-43.

III. ARGUMENT

A. A PERSON IN A VEHICLE IS NOT "SEIZED" WHEN AN OFFICER APPROACHES ON FOOT TO ASK QUESTIONS.

The defendant claims that she was "seized" when an officer approached her on foot and asked her questions.

> Under article I, section 7, a person is seized only when, by means of physical force or a show of authority his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter. The standard is a purely objective one, looking to the actions of the law enforcement officer.

State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (citations omitted). Under this standard, no "seizure" occurs when a police officer approaches a parked vehicle on foot to contact the occupant. Id. at 578-79. Nor does a "seizure" occur when the officer asks the occupant for identification. Id. at 581.

A situation very similar to that in the present case arose in State v. Mote, 129 Wn. App. 276, 120 P.3d 276 (2005). There, an officer in a patrol car drove by a legally parked car. The officer turned around and parked behind the car. He approached on foot and asked for identification. The occupant handed the officer his license. The officer wrote down information from the license and returned to his vehicle for a warrant check. Id. at 279 ¶¶ 4-8. This

court held that the officer's actions did not constitute a "seizure." Id. at 292 ¶ 13.

The defendant argues that a seizure occurred when the officer "activated lights on his patrol car." Brief of Appellant at 10. All of the cases that he cites involved activation of *emergency* lights. State v. Gantt, 163 Wn. App. 133, 141 ¶ 25, 257 P.3d 682 (2011), review denied, 173 Wn.2d 1011 (2012); State v. DeArman, 54 Wn. App. 621, 624, 774 P.2d 1247 (2008); State v. Larson, 93 Wn.2d 638, 640, 611 P.2d 771 (1980). The use of an emergency light is a command to stop. State v. Stroud, 30 Wn. App. 392, 396, 634 P.3d 316 (1981), review denied, 96 Wn.2d 1025 (1982); see RCW 46.61.210 (driver must pull over and stop on approach of vehicle displaying emergency signal). The same requirement does not apply to use of other types of lighting. In Mote, for example, the use of a spotlight did not transform the encounter into a "seizure." Mote, 129 Wn. App. at 292 ¶ 13. Police officers who wish to contact someone should not be required to endanger motorists by leaving their patrol cars unilluminated.

The defendant also argues that the officer's request for identification constituted a "seizure" under State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004). Mote specifically rejected an

identical argument. Rankin governs situations when *moving* cars are *stopped* by police. Mote, 129 Wn. App. at 290 ¶ 27. "The reasoning of Rankin ... is centered on the fact that a driver's traffic infraction gives an officer cause to pull a vehicle over and get the driver's, but not the passenger's, identification." Mote, 129 Wn. App. at 290 ¶ 28. Rankin is therefore inapplicable when officers contact occupants of cars parked in public places. Id. ¶ 29.

Finally, the defendant argues that the officer "seized" her by holding her driver's license in his hand. Court's have found a "seizure" when "an officer retains a suspect's identification or driver's license and takes it with him to conduct a warrants check." State v. Coyne, 99 Wn. App. 566, 572, 995 P.2d 78 (2000). In contrast, no "seizure" occurs if the officer does not remove the identification from the person's presence. State v. Smith, 154 Wn. App. 695, 700 ¶ 10, 226 P.3d 195, review denied, 169 Wn.2d 1013 (2010). Here, the officer testified that he was "standing right next to" the defendant while he was holding her license. Supp. RP 7; see CP 3, conclusion no. 3 ("Deputy Dusevoir did not leave with [the license]"). Because the license was not removed from the defendant's presence, there was no seizure.

In short, nothing that the officer did conveyed to any reasonable person that she was not free to leave or to terminate the encounter. Until the officer learned of the outstanding arrest warrant, the defendant was not "seized." The officer's actions were therefore proper.

B. THE USE OF A DRUG DETECTION DOG TO SNIFF A LAWFULLY-STOPPED VEHICLE IS NOT A "SEARCH" UNDER EITHER THE STATE OR FEDERAL CONSTITUTION.

The defendant next claims that the use of a drug dog constituted a "search" under the Washington constitution. No issue has been raised under the federal constitution. The U.S. Supreme Court has held that legitimate privacy interests are not implicated by use of a well-trained drug detection dog during a lawful traffic stop. Illinois v. Cabales, 543 U.S. 405, 128 S. Ct. 834, 160 L. Ed. 2d 842 (2005). More recently, however, the court held that a search occurred when a drug dog was used to investigate a home and its immediate surroundings. Florida v. Jardines, ___ U.S. ___, 133 S. Ct. 1409, 185 l. Ed. 2d 495 (2013).

Prior to Jardines, Washington cases had applied a similar analysis. The Washington Supreme Court had believed that the U.S. Supreme Court had adopted a "blanket rule that drug sniffs are not searches." The Washington Supreme Court rejected such a

rule. Rather, "our courts have employed a more conservative approach to dog sniffs and require an examination of the circumstances of the sniff." State v. Young, 123 Wn.2d 173, 187-88, 867 P.2d 593 (1994).

This court had reached a result similar to Jardines in State v. Dearman, 92 Wn. App. 630, 962 P.2d 850 (1998), review denied, 137 Wn.2d 1032 (1999). There, police brought a drug detection dog into the driveway of a house and had the dog sniff along the door seams of the garage. This court held that this conduct constituted a search under the State constitution.

In contrast, when drug dogs did not intrude into the area near a residence, the use of such dogs did not constitute a "search." "As long as the canine sniffs the object from an area where the defendant does not have a reasonable expectation of privacy, and the canine sniff itself is minimally intrusive, then no search has occurred." State v. Boyce, 44 Wn. App. 724, 730, 723 P.2d 28 (1986) (sniff of safe deposit box not search); see State v. Stanphill, 53 Wn. App. 623, 631, 769 P.2d 861 (1989) (sniff of package at post office not search); State v. Wolohan, 23 Wn. App. 813, 598 P.2d 421 (1979) (sniff of parcel at bus station not search). Applying this standard, this court held that use of a dog to sniff a

vehicle does not constitute a search. State v. Hartzell, 156 Wn. App. 918, 237 P.3d 928 (2010).

The defendant claims that Hartzell involved "the use of a tracking dog to track from the car to a gun located outside the automobile." Brief of Appellant at 22. The court, however, characterized the case as involving a "dog sniffing through the open window" of the vehicle. Hartzell, 156 Wn. App. at 928 ¶ 9. The court held that such conduct did not violate any reasonable expectation of privacy. Id. at 929-30. The same reasoning applies to the present case.

The drug dog here was in a location where the defendant had no expectation of privacy – outside a vehicle on a public street. Using a dog to search a vehicle has been recognized as "minimally intrusive." Consequently, as in Hartzell, the use of a dog to sniff the defendant's vehicle during a lawful investigatory detention did not constitute a "search" in violation of the Washington constitution.

C. THE SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE.

"Generally, an 'alert' by a trained drug dog is sufficient to establish probable cause for the presence of a controlled substance" State v. Jackson, 82 Wn. App. 594, 606, 918 P.2d 945

(1996), review denied, 131 Wn.2d 1006 (1997). Here, the affidavit explained that the dog had "successfully completed a 14 week course of training for the detection of odors emanating from Marijuana, Cocaine, Heroin and Methamphetamine." The dog and his handler had also "successfully completed a 4 week Detection Drug Handler course." The dog and her handler had "performed over 800 applications where controlled substances were discovered and/or the odor of controlled substances were present." The dog was "certified yearly by the Pacific Northwest Police Detection Dog Association." The last certification was less than four months before the dog's use in this case. CP 101.

Comparable information has been held sufficient to establish a dog's qualifications. In one case, an affidavit stated that the dog "had received 525 hours of training, had been certified by the Washington State Police Canine Association as a Certified Narcotics Detection Canine, and had participated in 97 searches in which narcotics were found." The court held that this information was sufficient to establish probable cause for issuance of a search warrant. State v. Flores-Moreno, 72 Wn. App. 733, 741, 868 P.2d 648, review denied, 124 Wn.2d 1009 (1994).

The defendant argues that the affidavit must specifically set out the dog's false positive and false negative rate. No such requirement has been imposed by prior cases. It should not be imposed now.

"Affidavits for search warrants must be tested in a commonsense manner rather than hypertechnically so long as the basic ... requirements are met." State v. Fisher, 96 Wn.2d 962, 965, 639 P.2d 743 (1982). "Probable cause is established when an affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in the criminal activity." State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58, 67 (2002). In the present case, the affidavit shows that the dog had "successfully" completed two training course and been "certified" less than five months before. It is hard to imagine how a dog's training could be considered "successful" if drugs are usually not found when the dog alerts. It is equally hard to imagine why a dog would be "certified" under such circumstances. Moreover, the dog had successfully located drugs over 800 times – suggesting that the dog's alerts are usually correct.

Moreover, this warrant was not based *solely* on the dog's alert. The affidavit also showed that the officer's last stop of the

defendant and her passenger had resulted in the recovery of a large amount of methamphetamine and cash. When arrested on this occasion, the defendant lunged towards the right in an apparent attempt to dispose of something or retrieve something between the seats. CP 96.

Although a history of similar crimes does not establish probable cause by itself, it is helpful in determining probable cause. State v. Neth, 165 Wn.2d 177, 185-86 ¶ 18, 196 P.3d 658 (2008). Furtive movements are likewise supportive of probable cause. State v. Huff, 64 Wn. App. 641, 647, 826 P.2d 698, review denied, 119 Wn.2d 1007 (1992). Here, these facts corroborate the other evidence of the dog's reliability.

The defendant relies on Neth. There, however, the State had not challenged the trial court's ruling that the dog was unreliable. The Supreme Court therefore assumed "that the trial court was correct both in finding the affidavit insufficient to establish the dog's reliability and in excluding that information from its subsequent probable cause analysis." Neth, 165 Wn.2d at 181 n. 2. The court held that probable cause was not established by the suspect's criminal history, nervousness, inconsistent statement, and

possession of a large sum of cash and a few unused plastic baggies. Id. at 185 ¶ 16.

In analyzing search warrants, there is no "all or nothing" rule. Information that is less than totally reliable is not excised from the affidavit. Rather, it is considered in conjunction with other information. For example, two informants who are not separately shown to be reliable may nonetheless corroborate each other. State v. Lair, 95 Wn.2d 706, 711-12, 630 P.2d 427 (1981).

Here, even if the dog is not considered totally reliable, there is substantial information concerning his reliability. The court can look to other information in the affidavit to see if it cumulatively establishes probable cause. Criminal history and furtive movements do not establish probable cause by themselves, but they are corroborative of other indications of criminal activity. Even if the dog's alert did not establish probable cause by itself, it did establish probable cause when corroborated by this other information. The search warrant was properly issued.

D. THE STATE CONCEDES THAT A DEFENDANT CANNOT BE CONVICTED OF MULTIPLE COUNTS OF POSSESSION FOR DRUGS IN DIFFERENT PLACES.

Finally, the defendant claims that she was improperly convicted on two counts of possession of a controlled substance.

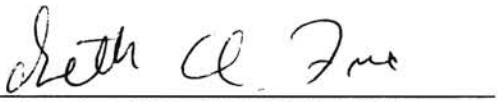
The State concedes that the possession of drugs in multiple places at the same time constitutes only a single unit of prosecution. State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998); State v. Chenoweth, 127 Wn. App. 444, 462-63 ¶ 31, 111 P.3d 1217 (2005). The case should therefore be remanded for re-sentencing on a single count.

IV. CONCLUSION

The defendant's conviction for one count of possessing methamphetamine should be affirmed. The conviction on a second count should be reversed and the case remanded for re-sentencing.

Respectfully submitted on November 6, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON, **Plaintiff,** **vs.** **Amy C. Taylor** **Defendant.**	**Case No.: 11-1-00807-4** **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A hearing pursuant to CrR 3.6 was conducted before the Honorable Thomas Wynne on September 27, 2012. The State was represented by Deputy Prosecuting Attorney Bob Langbehn, and the defendant was represented by Attorney Jeff Steinborn. Testifying on behalf of the State was Deputy Dan Dusevoir. The defendant did not testify.

FINDINGS OF THE FACTS

1) On 9-3-2010. Deputy Dusevoir of the Snohomish County Sheriff's Office was on patrol
2) Deputy Dusevoir was dispatched to a traffic stop in which Office Shove of the Marysville was present
3) Office Shove radioed that a 2nd vehicle had pulled over on the traffic stop and he had concerns
4) Deputy Dusevoir was on scene for officer safety reasons

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5) Deputy Dusevoir made contact with the driver of the second vehicle, who was later identified as the defendant, Amy Taylor. There was also a passenger, Erin Graafstra, in the passenger seat whom Deputy Dusevoir also recognized.

6) Deputy Dusevoir immediately recognized the defendant from prior police contacts which involved controlled substances

7) Deputy Dusevoir was not aware of whether or not Officer Shove had any intention of speaking with the defendant

8) Deputy Dusevoir asked the defendant if she was "legal"

9) The defendant voluntarily handed over her driver's license to the officer

10) Deputy Dusevoir ran a check of the license through dispatch to see if the defendant's license was suspended or if there were any outstanding warrants pending

11) Dispatch informed Deputy Dusevoir that the defendant had a warrant out for her arrest

12) Deputy Dusevoir opened the defendant's car door and took hold of her left wrist. In the defendant's left hand was a wallet and small sized folder.

13) The defendant began to tense up and turn away from the officer

14) The defendant appeared to have ditched something between the seats

15) The defendant was forcibly escorted from the vehicle

16) Once out of the vehicle, the defendant appeared to drop something, ground it into the pavement with her foot, and kick it away

17) The defendant was placed in the patrol car

18) Deputy Dusevoir requested a second officer arrive with a K9 drug detection dog in order to sniff the outside of the vehicle

19) The K9 alerted on the vehicle

20) The vehicle was impounded a search warrant was authorized 5 days later

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21) As part of the search warrant, an affidavit was included which had the K9's training and certifications to be a drug detection dog

22) A controlled substance, methamphetamine, was located in the vehicle

CONCLUSIONS OF LAW

1) The Court finds that the facts in this case should be properly analyzed under a Terry analysis

2) No seizure occurred at the time the license was handed to Deputy Dusevoir as there was no demand for it, Deputy Dusevoir did not leave with it, and the defendant voluntarily handed it over

3) There was a valid arrest of the defendant as she had a warrant out for her arrest

4) The combination of the defendant appearing to ditch something between the seats, grinding something into the ground and kicking it away, and the prior police contacts justified Deputy Dusevoir in requesting a drug detection dog to arrive on scene

5) The sniff of the outside of the vehicle was not a search and it was not a seizure

6) The K9's affidavit was sufficient to properly establish the reliability of his skills in detecting controlled substances and his alerting on the vehicle.

DONE IN OPEN COURT this 14 day of January, 2012

JUDGE THOMAS WYNNE

Presented By:

Bob Langbehn, #37508
Deputy Prosecuting Attorney

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