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SUPREME COURT
STATE OF WASHINGTON
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NO. 97190-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

SHAWN FITZPATRICK,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

RYAN JURVAKAINEN
Prosecuting Attorney

AILA R. WALLACE/WSBA 46898
Deputy Prosecuting Attorney
Representing Respondent

HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080

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I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the April 9, 2019, unpublished opinion of the Court of Appeals in *State v. Fitzpatrick*, COA No. 50864-8-II. This decision upheld the petitioner's conviction for one count of possession of methamphetamine.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

The Court of Appeals properly held that a sniff by a trained narcotic-detecting dog of the air outside a vehicle is not search subject to constitutional protections. Additionally, the Court of Appeals properly held that the State established K9 Kelo's reliability such that the search warrant was supported by probable cause.

III. STATEMENT OF THE CASE

On June 27, 2017, at around 4 a.m., Trooper Kyle Lindemann stopped Shawn Fitzpatrick for speeding on I-5. RP 178. Fitzpatrick informed Trooper Lindemann that his driver's license was suspended, and Lindemann ultimately placed him under arrest for driving with a suspended license. RP 179. While the trooper was speaking with Fitzpatrick, he also noticed that both the front seat passenger and backseat passenger appeared nervous. RP 184, CP 10. They were looking around

repeatedly and were unable to sit still. CP 10. Fitzpatrick informed the trooper that they were going to Vancouver to see his mother and to drop off the car they were driving and pick up a different car. *Id.* Fitzpatrick stated the car was not his and gave Trooper Lindemann the name and phone number of the owner. RP 186. Officers attempted to contact that person but were unable to reach him. RP 187. Lindemann thought Fitzpatrick's responses were vague and suspicious, and he also knew that Fitzpatrick had a DOC warrant on an original charge of unlawful possession of a controlled substance, so he called for back-up. RP 179, CP 11. Officer Kelley of the Woodland Police Department arrived a short time later. RP 179. Officer Kelley is a Drug Recognition Expert, or DRE. CP 11, RP 193.

Officer Kelley spoke to Dustin German, the front seat passenger, when he arrived. German gave Officer Kelley a number of different explanations of where they were going; he initially stated they were going to Vancouver but later stated they were going to Newport, Oregon. CP 11. During their conversation, Officer Kelley noticed that German was unable to stand still and his eyes were very droopy. *Id.* This was consistent with a person who is coming down from a stimulant drug. A short time later, Officer Kelley was informed that German had a DOC warrant on an original charge of unlawful possession of a controlled substance, and he

was arrested. *Id.* The backseat passenger was allowed to walk away from the scene. CP 11, RP 179.

Officer Kelley also spoke to Fitzpatrick who stated that the vehicle belonged to a friend. RP 196. This was later discovered to be untrue; the Department of Licensing records indicated a record of sale on June 24, 2017, which transferred ownership of the vehicle to Fitzpatrick. RP 159–60. Trooper Lindemann then transported Fitzpatrick to jail and Officer Kelley requested a K9 unit come to the scene. RP 197, CP 12.

Deputy Ness Aguilar arrived with his canine, Kelo. His affidavit, which was included in Officer Kelley’s affidavit in support of the search warrant, states that he and Kelo are certified in both Washington and Oregon in accordance with WAC 139-05-915 and Oregon Revised Statute 167.310(7). CP 12. Deputy Aguilar explained the 200 hours of training that he and Kelo went through to obtain certification, which includes detection of controlled substances, vehicle searching, and testing aptitude. *Id.* Kelo is trained to detect the odor of controlled substances, specifically cocaine, heroin, and methamphetamine. *Id.* at 13. Deputy Aguilar’s affidavit also states that he and Kelo continue to train for at least four hours per week; this training includes controlled negatives, varied quantities and types of narcotics, and novel odors. *Id.* Finally, Deputy

Aguilar's affidavit explains Kelo's response when the odor of controlled substances is detected.

When Deputy Aguilar and Kelo arrived at the scene on June 27, they began their investigation of the car at the front, near the license plate. CP 13. Kelo started sniffing the vehicle in a counter-clockwise direction, and showed an extreme change in behavior near the open driver's side window. He indicated the odor of controlled substances by sitting. *Id.* at 14. He continued around the vehicle, showing a change in behavior at the rear, trunk area of the car by sniffing intently. Kelo ultimately sniffed around the vehicle three times, indicating the odor of controlled substances by sitting near the driver's side window each time. *Id.*

Officer Kelley utilized this information, as well as the group's differing responses about their travel plans and Fitzpatrick's history of drug crimes, to request and ultimately receive a signed search warrant for the vehicle. Upon searching it, he found a black box that contained a substantial amount of methamphetamine, a scale, and two used methamphetamine pipes. RP 204–5. Fitzpatrick was charged with one count of possession with intent to deliver. CP 3.

Prior to trial, Fitzpatrick moved to suppress the evidence stemming from the search warrant, arguing that the search exceeded the scope of the warrant. CP 19. He argued that Kelo detected the odor of controlled

substances near the driver's door, not the trunk area, so the search of the trunk was outside the scope of the warrant. *Id.* The trial court disagreed, holding that the passenger compartment of a vehicle and the trunk are connected, separated only by seats, so the search warrant to search the entire vehicle was not overbroad. RP 15.

After trial, Fitzpatrick was acquitted of possession with intent to deliver but convicted of simple possession. CP 53-4. He appealed his conviction and the Court of Appeals upheld. He now petitions this Court for review.

IV. ARGUMENT

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme Court if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four

conditions as outlined by RAP 13.4(b). The Division II Court of Appeals holding in this case is not in conflict with any decisions either the Washington Supreme Court or another division of the Court Appeals. The holding also does not raise a significant question of law or involve an issue of substantial public interest.

A. The decision of the Court of Appeals does not raise a significant constitutional question that the Court should resolve because a canine sniff of the air outside a vehicle is not a search subject to constitutional protection.

Both the United States Constitution and the Washington Constitution protect against unreasonable searches and seizures. Article I, section 7 of the Washington Constitution states that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. A search under the Washington Constitution occurs “when the government disturbs those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespasses absent a warrant.” *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). If no search occurs, Article I, Section 7 is not implicated. *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994).

A search does not occur when a law enforcement officer detects something using his senses from a nonintrusive vantage point. *State v. Hartzell*, 156 Wn. App. 918, 929, 237 P.3d 928 (2010), citing *State v.*

Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). When a canine sniffs an object from an area where the suspect does not have a reasonable expectation of privacy, and the sniff itself is minimally intrusive, no search has occurred. *State v. Boyce*, 44 Wn. App. 724, 730, 723 P.2d 28 (1986) (K9 sniff of the defendant's safety deposit box was not a search because the sniff occurred from an area where the defendant does not have a reasonable expectation of privacy and was minimally intrusive); *Hartzell*, 156 Wn. App. at 929-30 (dog sniff from a lawful vantage point outside of the defendant's vehicle that was minimally intrusive is not a search); *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 838 (2005) (no legitimate privacy interest is implicated by allowing a drug detection dog to sniff the exterior of a vehicle during a lawful traffic stop). The decision of the Court of Appeals in this case follows *Hartzell*, *Boyce*, and *Caballes*, and is therefore not in conflict with decisions from other divisions of the Court of Appeals or the Supreme Court.

Additionally, there is no significant constitutional question here. Fitzpatrick argues that the Court of Appeals engaged in an improper Fourth Amendment analysis when deciding *Hartzell*, instead of an Article I, Section 7 analysis. This is simply incorrect. In both *Boyce* and *Hartzell*, the Courts examined the nature of the intrusion into each defendant's private affairs that was occasioned by the canine sniff. *Boyce*,

44 Wn. App. at 729; *Hartzell*, 156 Wn. App. at 930. When Division I discussed a “reasonable expectation of privacy,” it was specifically determining whether a search had occurred pursuant to Article I, Section 7’s prohibition against unreasonable intrusions into a person’s private affairs. *See Young*, 123 Wn.2d at 181. There was no unreasonable intrusion into Fitzpatrick’s private affairs when Kelo walked around his car and sniffed for controlled substances. Therefore, the canine sniff of Fitzpatrick’s vehicle did not constitute a search subject to constitutional protection. This case raises no constitutional question that has not been settled by current case law.

B. The Court of Appeals decision that the canine’s reliability was shown is not in conflict with any other decisions and it does not raise a significant constitutional question.

Fitzpatrick argues that the affidavit in support of the search warrant did not establish probable cause because the affidavit did not supply sufficient information for the reviewing magistrate to determine if Kelo was reliable. This argument fails. The issuance of a search warrant is reviewed only for abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Generally, “an alert from 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); *State v. Stanphill*, 53 Wn. App. 623, 632, 769 P.2d 861 (1989) (a canine

can be found reliable based on a statement that the dog is trained and certified; a showing of the dog's track record is not required); *see also United States v Klein*, 626 F.2d 22, 27 (7th Cir. 1980); *United States v. Venema*, 563 F.2d 1003, 1007 (10th Cir. 1976) (holding that a statement that the drug dog in question was a "trained, certified marijuana sniffing dog" was sufficient to establish reliability); *United States v. Meyer*, 536 F.2d 963, 965 (1st Cir. 1976) (holding that a statement that the dog was "trained" was sufficient to establish reliability).

In *State v. Gross*, the affidavit in support of the search warrant stated that the dog was "trained for the detection of marijuana, hashish, cocaine, and heroin," was "certified by the Washington State Police Canine Association and the Washington State Criminal Justice Training Commission," and was qualified in both local courts and in federal courts." *State v. Gross*, 57 Wn. App. 549, 551, 789 P.2d 317 (1990), *overruled on other grounds by State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999).

In this case, the affidavit in support of the search warrant established that K9 Kelo and his handler are certified through the Washington Criminal Justice Training Commission and the Oregon Police Canine Association in accordance with WAC 139-05-915 and ORS 167.310(7), respectively. CP 12. The affidavit also described the

minimum 200 hours of training canine teams are required to have and explained that K9 Kelo and Deputy Aguilar completed that training in 2016 and were recertified in 2017. CP 12–13, 34. This information was similar to the information provided in *Stanphill* and *Gross* and is therefore not in conflict with decisions from other divisions of the Court of Appeals or the Supreme Court.

Similarly, this case raises no constitutional question that has not been settled by current case law. The reliability of a narcotic dog must be shown in the warrant affidavit; Kelo’s reliability was shown here.

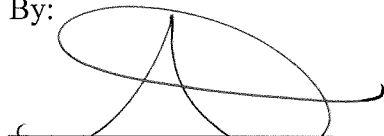
V. CONCLUSION

For the reasons stated above, the State respectfully requests this Court deny Fitzpatrick’s petition for review.

Respectfully submitted this 20th day of May, 2018.

RYAN JURVAKAINEN
Prosecuting Attorney

By:



AILA R. WALLACE/WSBA #46898
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Julie Dalton certifies the State's Response to Petition for Review was served electronically via the Supreme Court Portal to the following:

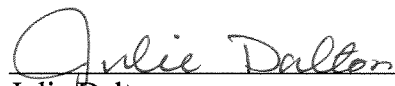
Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504

and,

Tiffinie Ma
Washington Appellate Project
1151 Third Ave., Ste 610
Seattle, WA 98101
tiffinie@washapp.org
wapofficemail@washapp.org

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 21, 2019.



Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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