Supreme Court No. 90526-6
COA No. 69799-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

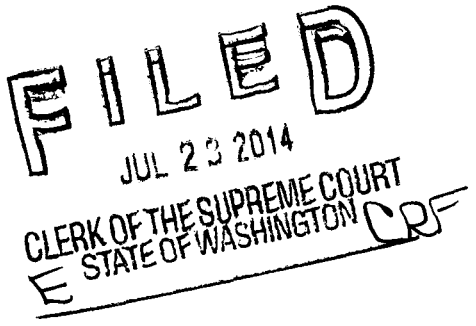
AMY CAROL TAYLOR,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable Thomas J. Wynne

PETITION FOR REVIEW



OLIVER R. DAVIS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED IN COA ON JULY 15, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

UNITED STATES SUPREME COURT CASES

CONSTITUTIONAL PROVISIONS

A. IDENTITY OF PETITIONER

Amy Taylor was the defendant in Snohomish County No. 11-1-00807-4, and the appellant in Court of Appeals No. 69799-4-I.

B. COURT OF APPEALS DECISION

Ms. Taylor seeks review of the decision issued June 23, 2014 by the Court of Appeals (Div. 1), affirming the trial court's ruling that *inter alia* her investigative detention was a mere social contact (leading to discovery of an arrest warrant), and ruling that her car was not searched incident to that arrest when a K-9 dog team was then called to the scene to sniff outside the car, which lead to a formal search warrant for the vehicle. Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review to clarify that a person such as Ms. Taylor is seized in the constitutional sense when a deputy pulled up behind her stopped truck at night, approached the vehicle, asked her to show whether she was "clear," meaning legal to drive, and then held the identification card that she gave him in response while running the information on it for arrest warrants?

2. Incident to her arrest on a warrant, the deputy desired to learn what might be inside Ms. Taylor's car. A K-9 dog team was therefore called to the scene and alerted on the passenger door

seam, which lead to a search warrant for the vehicle, resulting in discovery of drugs. Should this Court grant review where the K-9 dog sniff incident to arrest was a "search," under the state constitution?

3. Should this Court accept review to make clear that a search warrant affidavit is inadequate where it fails to show a K-9 dog's *rate* of success and failure at alerting or not alerting to drugs?

D. STATEMENT OF THE CASE

1. Vehicle stop and Motion to Suppress.[1] Amy Taylor was charged with possession of methamphetamine, based on the presence of the substance in the passenger cab of the truck she was driving. CP 1-3; CP 80-81. The drugs were located by means of a search warrant obtained and executed five days after the vehicle was subjected to a dog sniff incident to Taylor's arrest on a warrant, by Deputy Dusevoir of the Snohomish County Sheriff's Office. At the CrR 3.6 hearing, Dusevoir stated that on the night of

[1] As Ms. Taylor argued, the search warrant was required to have been issued based only upon probable cause. U.S. Const. amend. 4; Wash. Const. art. 1, § 7; Coolidge v. New Hampshire, 403 U.S. 443, 454–55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); State v. Vickers, 148 Wn.2d 91, 108, 112, 59 P.3d 58 (2002). The inclusion of illegally obtained information in a warrant affidavit will render the warrant invalid where the affidavit does not contain independent facts giving rise to probable cause. State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005); Franks v. Delaware, 438 U.S. 154, 171–72, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

September 3, 2012 at 1:12 a.m., he heard a Marysville police officer advise over the radio that he was conducting a traffic stop, and state that a *second* vehicle, a truck, had turned into a gravel area in the vicinity of the stop. CP 1; 9/28/12RP at 4-5.

Arriving on the scene, Deputy Dusevoir pulled his patrol car up behind the truck, which was in a large gravel driveway area, about 75 feet away from the location of the Marysville officer's stop. The Deputy activated his rear strobe lights, exited, and approached the truck at the driver's side door. CP 1-2; 9/28/12RP at 4-5. He testified that he believed he recognized the driver as someone who had prior law enforcement contacts, including one in which a large amount of methamphetamine was recovered. CP 1; 9/28/12RP at 15-16. Ms. Taylor told Deputy Dusevoir that she thought the Marysville police car had wanted her to pull over as well. 9/28/12RP at 16.

Deputy Dusevoir then questioned Ms. Taylor to determine if she was "clear" or legal, meaning whether she was legal to drive. CP 1; 9/28/12RP at 4-5, 17. The trial court found that Ms. Taylor responded by "hand[ing] over her driver's license to the [Deputy]." CP 2 (CrR 3.6 finding 9); CP 3 (CrR 3.6 conclusion of law 2)

9/28/12RP at 7-8. The passenger seat was occupied by another woman, Ms. G., who the Deputy allowed to leave the scene. CP 1.

After learning the driver's name was Amy Carol Taylor, and running her license card's information over his radio, Deputy Dusevoir was informed by dispatch that Ms. Taylor had an outstanding arrest warrant. CP 1; 9/28/12RP at 7. When Dusevoir took Ms. Taylor by the arm to escort her from the truck, she resisted, and then seemed to be secreting or putting something in between the driver's seat and the front passenger seat. 9/28/12RP at 8-9. Once taken out of the truck, Ms. Taylor continued to resist, and appeared to drop something from her hand, grind it into the gravel with her foot, and then kick it away (nothing was located in a later search). CP 1; 9/28/12RP at 9-10.

Deputy Dusevoir took Ms. Taylor into custody pursuant to the warrant, and placed her in his patrol car; he then requested a canine unit. CP 2 (CrR 3.6 findings 15, 17, 18). The Marysville K-9 officer, Johnson, and dog Brody arrived, and the dog "alerted on the vehicle," according to the Deputy. CP 2. The trial court found that the truck was then "impounded." CP 2 (CrR 3.6 finding 20). Deputy Dusevoir sought a search warrant, which was granted and then executed five days later; methamphetamine powder was

located. CP 97-100 (affidavit for search warrant); CP 101-02 (affidavit attachments of K-9 officer); see CP 73-102 (State's response to motion to suppress); CP 94 (search warrant).

The trial court rejected Ms. Taylor's arguments of illegal seizure, and illegal search, and denied her motion to suppress the fruits of the search warrant, concluding that she was not seized, that the later drug dog sniff was justified but was not a search, and that the supporting affidavit of the K-9 officer showed the dog to be reliable. CP 2-3; CP 73-102.

2. Appeal. Ms. Taylor appealed. CP 5-16. The Court of Appeals affirmed the rejection of the challenge to the search warrant, holding that Ms. Taylor was not detained because she was free to leave when the Deputy challenged whether she was legal to drive and then held her identification to run it for warrants, that the K-9 sniff search incident to Taylor's arrest was not a "search" of the car under the state constitution because it is identical to a dog sniff of the outside of a safe deposit box, found to be a non-"search" in State v. Boyce, 44 Wn. App. 724, 723 P.2d 28 (1986), and that the affidavit stating that the K-9 dog was generally reliable was adequate for probable cause under State v. Flores-Moreno, 72 Wn. App. 733, 868 P.2d 648, review denied, 124 Wn.2d 1009 (1994).

E. ARGUMENT

1. THIS COURT SHOULD ACCEPT REVIEW TO CLARIFY THAT A PERSON IS SEIZED WHEN AN OFFICER BOTH CHALLENGES THEM TO PROVE THEIR CONDUCT IS LEGAL AND ALSO RETAINS THEIR DRIVERS LICENSE CARD FOR A WARRANTS CHECK.

a. Review is warranted under RAP 13.4(b)(1), (2) and (3) because the decision conflicts with Supreme Court and appellate court decisions, and the question is a significant constitutional issue. This Court should grant review to clarify that a person is not reasonably free to leave a scene where law enforcement challenges whether the person is obeying the law, and where law enforcement then takes possession of the person's license card to also run a warrants check. Review is warranted under RAP 13.4(b)(1), (2) and (3).

b. Ms. Taylor was seized when Deputy Dusevoir challenged whether she was legal to drive and used her card to run her license information. Applicable throughout the issues raised in this petition, the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution prohibit unreasonable searches and seizures. Terry v. Ohio, 392

U.S. 1, 16-19, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Parker, 139 Wn.2d 486, 527, 987 P.2d 73 (1999).

A seizure of a person occurs if, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." State v. Aranguren, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985) (citing United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980)).

Ms. Taylor was subjected to a seizure of her person when Deputy Dusevoir pulled up behind her in the middle of the night, approached her and asked her whether she was clear, or legal to be driving, and used the license card she handed him to also check her warrant status. A reasonable person in her position, as a result of the deputy's conduct and language, would not feel free to drive her truck away, during this juncture in the encounter, because the officer in the circumstances created an atmosphere of intrusion into private affairs that would make a reasonable person feel she was not free to simply drive away. State v. Harrington, 167 Wn.2d 656, 668-69, 222 P.3d 92 (2009); State v. Soto–Garcia, 68 Wn. App. 20, 22, 25, 841 P.2d 1271 (1992); State v. Dearman, 54 Wn. App. 621,

620-26, 774 P.2d 1247 (1989); State v. Larson, 93 Wn.2d 638, 645, 611 P.2d 771 (1980).

When the deputy challenged Ms. Taylor as to whether she was driving 'legally' with a valid license, and then used the drivers license card she gave him to check her legality -- and also to run her information for warrants – a reasonable person would not feel free to leave. This Court has already ruled that checking a name and drivers license of a person in an officer-stopped car to see if the license is valid is an investigative detention. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). Importantly, a detention in the circumstances here arises not by the physical handing-over of the license card to the officer; rather, it was the law enforcement officer's request that the person identify themselves as a legal driver, and the officer's running of that person's information through a dispatch check, that created a seizure. See State v. Brown, 154 Wn.2d 787, 788-89, 796-98 and n. 7, 117 P.3d 336 (2005). However, in this case certainly, the retention of a drivers license card as part of running the person's information was further or additional conduct also establishing a seizure. See State v. Coyne, 99 Wn. App. 566, 572, 995 P.2d 78 (2000) (seizure occurred when officer retained license card to run driver information including for

warrants check); see also State v. Ellwood, 52 Wn. App. 70, 73, 757 P.2d 547 (1988) (telling citizen to wait is a seizure).

Regardless of whether she had been stopped, or was detained when the Deputy approached her and asked her if she was driving legally, Ms. Taylor would not feel free to leave after being issued that challenge, much less to do so while the Deputy held her license card in his hand. Amy Taylor reasonably would not feel free to drive away while the Deputy was holding her license card and conducting the check, irregardless of whether he spoke on the radio while standing right there at her car, or whether he had walked a distance away. This was not a social contact, and the fact set is not comparable to cases where an officer ambles up to a pedestrian in a public square and asks in a casual manner to see identification so he can know who the person is. Cf. State v. Harrington, 167 Wn.2d at 664-65, (officer's act of conversing with pedestrian did not ripen into detention); State v. Belanger, 36 Wn. App. 818, 820, 677 P.2d 781 (1984) (approaching pedestrian and conversing in the public square was not detention). The case of State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003), involves such a social contact; but the fact that the social contact in that case occurred between an officer and a person in a stopped car does

not mean that all such encounters are *necessarily* social contacts – yet the Court of Appeals seemed to rely on erroneous reasoning to that effect. Decision, at pp. 4-7.

Here, it was the Deputy's challenging question, combined with his retention of Ms. Taylor's ID card, which were the two very significant facts that contributed to creating a "seizure" to a reasonable person, for constitutional purposes.

The crucial fact is that the Deputy effectively inquired whether Ms. Taylor was *breaking the law.* State v. Soto–Garcia, 68 Wn. App. at 22, 25 (officer's inquiry about identification and question if defendant had cocaine contributed to seizure occurring *at that juncture*); see also State v. Smith, 154 Wn. App. 695, 701-02, 226 P.3d 195 (2010) (noting the Court's emphasis in Soto–Garcia that the officer asked a direct question about whether the person was engaged in legal or illegal conduct - drug possession). This is in accord with a central determining issue in whether there has been a seizure -- the use of language by the officer that creates an atmosphere of intrusion into private affairs that would make a reasonable person feel she was not free to simply leave and walk (or here, drive) away. State v. Harrington, 167 Wn.2d at 668-69.

The Court of Appeals cited State v. Mote, 129 Wn. App. 276, 279, 292, 120 P.3d 596 (2005), for the reasoning that that case involved an officer approaching a parked car and asking the occupant for identification, writing the person's information down, and returning to his vehicle to run it, which the Court found to not be a seizure. BOR, at pp. 5-6. But the circumstances in Mote did not involve a direct challenge inquiring if the car occupant was following or breaking the law, as here, and the circumstances of that case caused the appellate court to conclude that the contact was merely a social one, as part of community caretaking. Mote, 129 Wn. App. at 280-81. Thus, the Mote case was distinguished in State v. Dorey, 145 Wn. App. 423, 186 P.3d 363 (2008), in which the Court of Appeals noted that Mote involved an approach to a citizen and an inquiry whether the officer could ask questions of them. State v. Dorey, 145 Wn. App. at 428 (also noting that tone of voice can indicate that submitting to the inquiry is compelled) (citing cases). This case is unlike not just O'Neill, but it is also unlike Mote. This Court should accept review.

2. THIS COURT SHOULD ACCEPT REVIEW TO MAKE CLEAR THAT A DOG SNIFF INCIDENT TO ARREST IS A "SEARCH."

a. Review is warranted under RAP 13.4(b)(3) because the question whether an exterior dog sniff is a search of a vehicle presents significant a constitutional issue. Incident to Ms. Taylor's arrest on a warrant, Deputy Dusevoir desired to learn what might be inside her truck. This Court should grant review where the K-9 dog sniff procedure was indeed a search incident to arrest, under the state constitution, Article 1, section 7.

b. The dog sniff of the truck incident to Ms. Taylor's arrest on a warrant was a "search" under the state constitution.[2] While the United States Supreme Court has ruled that a dog sniff of the exterior of a car does not violate the Fourth Amendment, Illinois v. Caballes, 543 U.S. 405, 409, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), this Court has not addressed whether a dog sniff of a car constitutes a search under article I, section 7 of

[2] As Ms. Taylor argued, the search warrant executed five days after the dog sniff incident to arrest of Ms. Taylor was required to have been issued based only upon a showing of probable cause. U.S. Const. amend. 4; Wash. Const. art. 1, § 7; Coolidge v. New Hampshire, 403 U.S. at 454–55; State v. Vickers, 148 Wn.2d at 108, 112. The inclusion of illegally obtained information in a warrant affidavit will render the warrant invalid absent independent facts giving rise to probable cause. State v. Gaines, 154 Wn.2d at 718; Franks v. Delaware, 438 U.S. at 171–72.

the Washington Constitution. See State v. Neth, 165 Wn.2d 177, 181, 196 P.3d 658 (2008) (granting review on question but deciding case on alternate grounds).

However, this Supreme Court's decisions and decisions of the Court of Appeals have effectively indicated that a dog sniff of the sort conducted in this case will violate article I, section 7, and the fact that the area in question is not physically invaded into does not mitigate the intrusion into privacy. See State v. Young, 123 Wn.2d 173, 188, 867 P.2d 593 (1994) (whether a "search" has been conducted by use of a means that does not physically intrude into the subject property requires an examination of all of the circumstances) (thermal detection device outside a home constituted a search in violation of art. I, § 7). Relying on Young, the Court of Appeals in State v. DeArman, determined that a dog sniff of the outside of a house's garage constituted a search which violated art. I, § 7, because the dog exposes information that could not have been sensed by an officer and obtained without the K-9. State v. DeArman, 92 Wn. App. 630, 635, 962 P.2d 850 (1998), review denied, 137 Wn.2d 1032 (1999).

Of course, the interior of a car is not like the interior of a safety deposit box, in terms of being accorded privacy protection.

State v. Boyce, 44 Wn. App. 724, 730, 723 P.2d 28 (1986). The Boyce decision is also flawed in itself as state constitutional precedent to the extent it focused on a "reasonable expectation of privacy." This Court has held that article I, section 7 has broader application than does the Fourth Amendment as it "clearly recognizes an individual's right to privacy with no express limitations." State v. Simpson, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980); see also State v. Ferrier, 136 Wn.2d 103, 110, 960 P.2d 927 (1998) (Article I, section 7 clearly recognizes an individual's right to privacy with no express limitations).

Importantly, the Court of Appeal's decision in State v. Hartzell, finding no intrusion into private affairs in a case involving a dog sniff of a car, involved a fundamentally different police procedure than the present case. State v. Hartzell, 153 Wn. App. 137, 221 P.3d 928 (2009), review granted, cause remanded for reconsideration in light of State v. Williams–Walker, 167 Wn.2d 889, 225 P.3d 913 (2010), 168 Wn.2d 1027, 230 P.3d 1054 (2010). There, the defendant was arrested outside his vehicle following an earlier shooting from a car occupied by two persons, and statements to police by a witness the defendant was visiting; the defendant's car clearly had a bullet hole shot into it. Hartzell, 153

Wn. App. at 146. In a search incident to arrest of Hartzell, the police located ammunition in the car, and in an attempt to locate the gun that shot at the car, a dog sniff tracking team led to the discovery of the gun some yards away on the ground. The Court ruled that the dog sniff was not an intrusion into Mr. Hartzell's private affairs. Hartzell, 153 Wn. App. at 146-48. The present case involves a warrant arrest and therefore does not involve an arrest "plus" additional circumstances giving rise to authority to search for evidence of the crime of arrest. See State v. Valdez, 167 Wn.2d 761, 768, 777, 224 P.3d 751 (2009). Further, the present case involves an intrusion into the private affairs Ms. Taylor was entitled to hold dear in the vehicle, not the use of a tracking dog to track *from* the car to a gun located outside the automobile.

Although the car in question, Ms. Taylor's truck, was not the home garage at issue in DeArman, this Court has long held that the right to be free from unreasonable governmental intrusion into one's "private affairs" encompasses automobiles and the contents of those automobiles. See, e.g., State v. Parker, 139 Wn.2d 486, 494, 987 P.2d 73 (1999); State v. Mendez, 137 Wn.2d 208, 219, 970 P.2d 722 (1999); State v. Valdez, 167 Wn.2d at 768; Wash. Const. art. 1, § 7. Indeed, although it has already been determined

that questions arising under Article 1 section 7 are always accorded separate state constitutional analysis, the foregoing cases indicate that this State's protection of the private affairs of automobiles has a specific history in our constitutional law. See also Boyce, 44 Wn. App. at 728-29; State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

The question is, in this case, what was the dog sniff, if it was *not* a search incident to arrest? The State never responded below to Ms. Taylor's argument that the Trooper did not lawfully impound her vehicle, and that this was therefore not a lawful inventory search. See AOB, at pp. 27-28. Ms. Taylor had been arrested, the State failed to argue that there could be any lawful inventory search, and yet the Trooper had a canine unit sniff the vehicle incident to Taylor's arrest, to see what was inside it, causing an alert which was the material basis for the later warrant. The use of the K-9 in this case was a search incident to arrest, in violation of State v. Valdez, 167 Wn.2d at 768, 777, and the state constitution, as argued.

3. THIS COURT SHOULD ACCEPT REVIEW TO CLARIFY THAT AN AFFIDAVIT MUST INDICATE THE K-9'S RATE OF SUCCESS AND FAILURE.

a. Review is warranted under RAP 13.4(b)(3) because the question presents a significant constitutional issue. This Court should also grant review where the affidavit regarding the K-9 dog's capability was not sufficient to establish the probable cause required under the Fourth Amendment or the state constitution, absent a showing of a rate of success and failure. U.S. Const. amend. 4; Wash. Const. art. 1, § 7.

b. Even if the dog sniff was not an illegal search, the search warrant affidavit failed to establish probable cause based on the inadequacy of the reliability of the K-9's sniff. The trial court ruled that this dog team had a history of "800 prior incidents in which the dog has made hits in which drugs have been present." 9/28/12RP at 39, see CP 3 (CrR 3.6 Conclusion of Law 6, finding that affidavit established the dog's reliability); cf. WAC 139-05-915. However, probable cause was not established where the affidavit did not show Brody could reliably detect drugs when present, and refuse to alert when they are absent. Without this information, the animal's raw number of successful alerts

cannot support probable cause to justify a search. The affidavit fails to distinguish between (a) Brody's ability to alert when drugs are present, and (b) Brody's ability to refuse to alert when drugs are absent. See United States v. Trayer, 898 F.2d 805, 809 (D.C. Cir. 1990); see also Caballes, supra, 543 U.S. at 411-412 (Souter, J., dissenting) (noting that "[t]he infallible dog . . . is a creature of legal fiction").

The case of State v. Flores-Moreno, 72 Wn. App. 733, 866 P.2d 648 (1994), upon which the Court of Appeals relied, fails to consider any of the foregoing arguments. Absent a complete affidavit from the K-9 handler that established Brody's actual reliability, Deputy Dusevoir's report that the dog "alerted" at the passenger door seam of Ms. Taylor's truck was an inadequate basis for finding probable cause to support a search warrant.

F. CONCLUSION

Amy Carol Taylor requests that this Court accept review, and reverse her convictions.

Respectfully submitted this 15 day of July, 2014.

Oliver R. Davis /WSBA no. 24560
Washington Appellate Project - 91052
Attorneys for Petitioner

Appendix A - Decision

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. AMY CAROL TAYLOR, Appellant.	)	No. 69799-4-I DIVISION ONE UNPUBLISHED OPINION FILED: June 23, 2014

BECKER, J. — In this drug possession case, an officer pulled in behind a parked vehicle, activated his rear strobe lights for illumination, contacted the driver, asked her if she had a valid driver's license, examined the license when she handed it to him, ran a warrants check, discovered an outstanding warrant, and arrested her on the warrant. We conclude there was no seizure until the driver was arrested.

The encounter occurred at 1:12 a.m. on September 3, 2012. A Marysville police officer signaled over the radio that he was conducting a traffic stop and that another vehicle, a small truck, had turned into a gravel driveway area off the road nearby. Snohomish County Deputy Sheriff Dan Dusevoir responded. When he arrived, he stopped his vehicle behind the truck, activated his rear strobe lights, and approached on foot. Deputy Dusevoir testified that when he

saw the truck's occupants, he recognized them from earlier contacts, including one involving the recovery of a significant amount of methamphetamine.

Deputy Dusevoir asked appellant Amy Taylor, the driver of the vehicle, if she was "clear." The parties agree that Taylor correctly understood he was asking if she had a valid driver's license. Taylor handed him her license. While standing by the driver's side window, Deputy Dusevoir performed a warrants check using his radio and discovered that there was an outstanding warrant for Taylor's arrest. He moved to take Taylor into custody by opening the car door and taking hold of Taylor's left wrist.

Taylor resisted and appeared to be clutching something tightly in her hand. Deputy Dusevoir suspected that Taylor had attempted to dispose of something between the passenger seat and the driver's seat. Once out of the vehicle, Taylor appeared to drop something, grind it into the gravel with her foot, and kick it away. Deputy Dusevoir suspected that she was trying to dispose of narcotics. He called for a K-9 officer.

The K-9 officer brought a narcotics detection dog to the scene. The dog sniffed the outside of the vehicle and alerted to the presence of drugs. The car was impounded. Five days later, a search warrant was authorized, based on affidavits documenting Deputy Dusevoir's observations and the training and history of the drug dog and her handler.

When the car was searched pursuant to the warrant, methamphetamine was found in two separate containers in the vehicle. One plastic container containing 3.38 grams of methamphetamine was located between the front seats

of the vehicle. Another containing 27.78 grams of methamphetamine was found behind the seats. Taylor was charged with two counts of possession of methamphetamine. Taylor moved to suppress the methamphetamine. The court denied the motion. Taylor was tried by a jury and convicted as charged.

Taylor contends Deputy Dusevoir's actions before he learned of the outstanding warrant constituted a seizure. If his actions did constitute a seizure, the seizure was unlawful. Detentions must be supported by reasonable suspicion. State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). Under the Fourth Amendment and article I, section 7, the facts relied on by the detaining officer must be specific and articulable, rather than premised on a hunch. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Armenta, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). All the deputy knew when he arrived at the scene was that Taylor had pulled over when the Marysville police officer pulled another car over and she had parked on the side of the road. He had no specific or articulable suspicion of criminal activity until he discovered Taylor's outstanding warrant. We conclude, however, that nothing the deputy did up to that point amounted to a seizure.

A seizure of a person occurs if, in full view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); State v. Young, 135 Wn.2d 498, 501, 957 P.2d 681 (1998). "A police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter

to an investigative detention." Armenta, 134 Wn.2d at 11. The fact that the person approached is in a parked vehicle does not by itself convert the encounter into a seizure. The focus of the inquiry is not on whether the defendant's movements are confined due to circumstances independent of police action, but on whether the police conduct was coercive. State v. Thorn, 129 Wn.2d 347, 353, 917 P.2d 108 (1996), overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 570, 62 P.3d 489 (2003). Thus the question is not merely whether the defendant felt free to leave, but "whether he felt free to terminate the encounter, refuse to answer the officer's question, or otherwise go about his business." Thorn, 129 Wn.2d at 353.

In O'Neill, the court held no seizure occurred when an officer approached a car that was parked in a public space, shined his spotlight on it, knocked on the window, shined his flashlight in the face of the occupant, and asked for identification. O'Neill, 148 Wn.2d at 572-73, 581.

The fact that Deputy Dusevoir activated his rear strobe lights for safety instead of using a flashlight does not distinguish this case from O'Neill. It would be a different question if he had activated his emergency lights because that is more clearly a display of authority signaling that the driver of the vehicle is not free to leave. State v. Gantt, 163 Wn. App. 133, 141-42, 257 P.3d 682 (2011), review denied, 173 Wn.2d 1011 (2012). But as the State argues, an officer is not expected to engage in nighttime roadside contacts in the dark. Doing so would pose a hazard both to the officer and to passing motorists. The use of the strobe light here was no more intimidating than the officer's use of the flashlight in

O'Neill to shine a light on the face of the occupant or the use of a spotlight in State v. Mote, 129 Wn. App. 276, 120 P.3d 596 (2005).

In Taylor's view, the part of the encounter that most clearly manifested a show of authority such that a reasonable person would not feel free to leave was the deputy's question to Taylor about whether she had a valid driver's license.

An officer may request the name and date of birth of the occupant of a parked vehicle and use that information to conduct a warrants check without a seizure occurring. Mote, 129 Wn. App. at 292. Taylor contends that asking whether she had a valid driver's license was more coercive than merely asking for identification because it indicated the officer's suspicion that she was driving illegally and implicitly commanded her to prove that she was not.

At oral argument before this court, Taylor asserted that a factually comparable case showing that the officer's question was coercive is State v. Soto-Garcia, 68 Wn. App. 20, 841 P.2d 1271 (1992), abrogated on other grounds by Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996). In that case, an officer who was patrolling a street in Kelso at night saw the defendant walking out of an alley and asked him where he was going and what he was doing. The defendant answered these questions appropriately. The officer next asked the defendant for his name. The defendant offered his driver's license. The officer asked him if he had any cocaine on his person. The defendant responded that he did not. The officer asked for permission to search the defendant. The defendant gave permission. The officer reached into the defendant's shirt pocket and found cocaine. This led to a charge of cocaine possession. The trial court granted the

defendant's motion to suppress. The State appealed. The trial court ruling was affirmed on the ground that the discovery of the cocaine was the result of coercive questioning that occurred before the officer had a reasonable suspicion of criminal activity:

> Considering all of the circumstances surrounding the encounter between Tate and Soto-Garcia, the evidence was sufficient for the trial court to conclude that a reasonable person would not have felt free to decline the police officer's requests that he provide information regarding his activities and submit to a search. The atmosphere created by Tate's progressive intrusion into Soto-Garcia's privacy was of such a nature that a reasonable person would not believe that he or she was free to end the encounter.
>
> The trial court's findings, as well as the record, reveal that Soto-Garcia had done nothing before being confronted by Tate which would suggest that he had committed any criminal act. Soto-Garcia was merely walking on the streets of Kelso in the late evening, albeit in an area apparently known for cocaine trafficking, when Tate observed him. For reasons known only to the officer, Tate confronted Soto-Garcia and began questioning him. After Soto-Garcia answered Tate's questions "appropriately", Tate decided to run an "identification check". While Soto-Garcia apparently produced his identification voluntarily in response to Tate asking him his name, there is no evidence that suggests that he consented to the identification check. Although the check revealed no outstanding warrants for Soto-Garcia, Tate apparently remained curious, and he asked Soto-Garcia if he had any cocaine on his person. We agree with the trial judge that at this point, Soto-Garcia was seized.

Soto-Garcia, 68 Wn. App. at 25.

Unlike in Soto-Garcia, here there was no "progressive intrusion" into Taylor's privacy. The officer asked her only one question. In view of the totality of the circumstances, nothing suggests that the question was more coercive than asking to see her license or asking for her name and date of birth. We conclude

the question asked here was not an appreciably greater show of authority than the request for identification in O'Neill.

In response to the question, Taylor handed over her driver's license. She contends that a seizure occurred when Deputy Dusevoir held onto the license while using his radio to check for warrants. But the deputy did not leave with the license. He testified that he was standing right next to Taylor while he was holding her license. If the license is not removed from the defendant's presence, there is no seizure. State v. Smith, 154 Wn. App. 695, 700, 226 P.3d 195, review denied, 169 Wn.2d 1013 (2010).

Taylor argues that use of the identifying information found on her license to run a warrants check was an investigatory detention like in State v. Rankin, 151 Wn.2d 689, 695-97, 92 P.3d 202 (2004) (seizure of passenger occurred when officer, in the course of a lawful traffic stop, requested passenger's personal information and ran a warrants check). But the Rankin court was "focused on the different circumstances encountered by pedestrians and passengers in *moving* cars that were *stopped* by police." Mote, 129 Wn. App. at 290.

Following O'Neill and Mote, we conclude Taylor was not seized until she was arrested on the warrant.

The other disputed issues in the case involve the dog sniff. Taylor contends the dog sniff was a search and the results must be suppressed because it was conducted without a warrant.

A dog sniff of a place where the defendant does not have a reasonable expectation of privacy does not constitute a search. State v. Boyce, 44 Wn. App. 724, 723 P.2d 28 (1986). In Boyce, the dog sniffed a bank safe deposit box. The dog handler had permission to be in the area, the defendant could not control who was there, and there was no seizure of the safety deposit box. Boyce, 44 Wn. App. at 730. The court found it was not 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.

Boyce, 44 Wn. App. at 730. Cf. State v. Dearman, 92 Wn. App. 630, 635, 962 P.2d 850 (1998) (under article I, section 7, a dog sniff is a search when it is directed at the outside of a home), review denied, 137 Wn.2d 1032 (1999).

No material distinction exists between a dog sniff directed at the exterior of a vehicle and a dog sniff directed at a safety deposit box. This court has already held, on slightly different facts, that a dog sniff of a vehicle is not a search. State v. Hartzell, 156 Wn. App. 918, 237 P.3d 928 (2010). In Hartzell, the dog sniffed the air coming from an open window of a car and then led police to a firearm 100 yards away. We concluded that the defendant did not have a reasonable expectation of privacy in the air coming from the open window of the vehicle. Hartzell, 156 Wn. App. at 929-30.

Boyce and Hartzell establish that when the officer and dog are lawfully situated outside the place or object being sniffed, then no privacy interest is implicated as long as the place is not a home. Here, the K-9 handler and dog were lawfully present outside Taylor's car. Following Boyce and Hartzell, we

conclude the dog sniff did not constitute a search. Accord, Illinois v. Caballes, 543 U.S. 405, 409, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005).

The dog alerted after sniffing Taylor's car, signaling the presence of drugs. This information was included in the affidavit in support of a warrant to search the car. Taylor challenges the adequacy of the affidavit.

The affidavit described the dog team's training. The training included a 4-week course for the officer and dog together and a 14-week course for the dog alone. According to the affidavit, the officer and dog had a history of "800 applications where controlled substances were discovered and / or the odor of controlled substances was present." However, the affidavit contained no information about the frequency of false alerts, and Taylor argues that the number of correct alerts by the dog is meaningless unless accompanied by a track record of false positive and false negatives.

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). This court has determined that an affidavit similar to the one in this case was sufficient to establish probable cause. State v. Flores-Moreno, 72 Wn. App. 733, 741, 868 P.2d 648, review denied, 124 Wn.2d 1009 (1994). The affidavit stated that the drug dog had received 525 hours of training, had been certified by the Washington State Police Canine Association for narcotics detection, and had participated in 97 searches where narcotics were found. Flores-Moreno, 72 Wn. App. at 741. Following Flores-Moreno, we conclude the information about the

track record of the dog and her handler was sufficient even though it did not quantify the number of inaccurate alerts.

And even if the dog sniff did not conclusively establish probable cause, the warrant was also supported by Deputy Dusevoir's observation that Taylor appeared to hide something between the seats of the vehicle and then grind something into the ground when she was arrested.

We conclude the information offered in support of the warrant was enough to establish probable cause to search the vehicle.

Taylor was convicted of two counts of possession of methamphetamine based on the two containers found in different places inside the car. She contends the two convictions violate double jeopardy because both containers of methamphetamine were found in the same search. The State concedes this point. We accept the concession. State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998).

Taylor filed a statement of additional grounds in which she challenges the credibility of the deputy who arrested her. She suggests that the other occupant of the vehicle was the owner of the drugs, and she points out alleged inconsistencies in the evidence and testimony. Because this court does not resolve disputed facts or issues of credibility, the statement of additional grounds does not present issues warranting further scrutiny.

Affirmed in part. We reverse and remand with instructions to vacate the second conviction for possession of methamphetamine.

Becker, J.

Dwyer, J.

Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69799-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Seth Fine, DPA [sfine@snoco.org]
Snohomish County Prosecutor's Office

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 15, 2014