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No. 95881-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MEGAN LARES-STORMS,

Petitioner.

MEMORANDUM OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Rules

Constitutional Provisions

Other Authorities

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 80,000 members and supporters, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting unreasonable interference in private affairs. It has participated in numerous privacy-related cases as *amicus curiae* or as counsel to parties.

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether a warrantless dog sniff of a person's vehicle, allowing police to go beyond human senses to detect the contents of the car, disturbs "private affairs" and constitutes a "search" under ample Article 1, Section 7 authority, satisfying all the RAP 13.4(b) grounds for review.

STATEMENT OF THE CASE

Megan Lares-Storms was driving a car known to have been used during a sale of drugs a few weeks earlier. When she parked her car, officers approached her and arrested her on an outstanding warrant. After she had been transported to jail, officers used a dog placed outside her car to sniff for drugs inside the car. After the dog "alerted," officers impounded the vehicle and obtained a warrant, using the dog's alert as support for probable cause. The subsequent search revealed drugs. Lares-

Storms moved to suppress the evidence as the result of an unconstitutional search, both because the dog sniff was a warrantless search and because the sniff failed to establish probable cause. The trial court denied her motion, and the Court of Appeals affirmed, holding that dog sniffs of a vehicle are not a search, and that questions of dog sniff reliability are "best reserved for our Supreme Court or the state legislature." Slip. Op. at 15.

This case asks whether Article 1, Section 7 of the Washington State Constitution allows for such warrantless dog sniffs of a vehicle.

ARGUMENT

Over a decade ago, this Court granted review in two cases "because the question of whether a dog sniff amounts to a search under article I, section 7 of the Washington Constitution has not yet been answered." *State v. Neth*, 165 Wn.2d 177, 181, 196 P.3d 658 (2008). Both of those cases ultimately were resolved without reference to the dog sniff, so the question remains unanswered today. The reasons for this Court to grant review and consider the question remain as compelling today as they were a decade ago. The use of detection dogs by law enforcement remains widespread, impacting many members of the public, despite this Court's explicit recognition that their constitutionality is an open question. Rather than re-examining the question in light of developments in both Article 1, Section 7 jurisprudence and research on the accuracy of dog sniffs, the

lower courts have often (as in the present case) instead simply looked to old, questionable authority such as *State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986). This case presents an opportunity to provide clear guidance to both law enforcement and the lower courts—not just on the use of dog sniffs, but also on the use of other developing technologies.

A. The Decision Below Is Incompatible with This Court's Article 1, Section 7 Jurisprudence and Threatens To Eviscerate Privacy Protection for Uses of New Technologies

Although it recognized that a dog sniff could violate Article 1, Section 7, the Court of Appeals decided this case was controlled by *State v. Hartzell*, 156 Wn. App. 918, 237 P.3d 928 (2010). Slip Op. at 12. As here, *Hartzell* involved a dog sniff of a car,[1] but engaged in limited examination of its constitutionality. Instead, it simply quoted *Boyce's* rule that "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.'" *Hartzell*, 156 Wn. App. at 929 (quoting *Boyce*, 44 Wn. App. at 730). It then summarily held that there was no "reasonable expectation of privacy in the air coming from the open window of the vehicle," and "[t]he sniff

[1] It should be noted that *Hartzell* was not precisely on point, as it involved a dog using scents to track an object—a time-honored use of dogs—as opposed to detection of contraband, which began only in the latter half of the 20th century. *See* Mark Derr, *A Dog's History of America: How Our Best Friend Explored, Conquered, and Settled a Continent* 343-47 (2013).

was only minimally intrusive." *Id*. at 929-30.

The Court of Appeal's reliance upon *Hartzell* (and *Boyce*) is misplaced. *Boyce* was decided before the development of modern Article 1, Section 7 jurisprudence, only two months after this Court first established the framework for independent state constitutional analysis in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Thus, although it was decided under Article 1, Section 7, *Boyce* largely relied on a reasonableness standard. Since then, this Court has explained that this is not the correct approach to Article 1, Section 7 analysis.

"The private affairs inquiry is broader than the Fourth Amendment's reasonable expectation of privacy inquiry." *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). "[T]he word 'reasonable' does not appear in any form in the text of article I, section 7." *State v. Morse*, 156 Wn.2d 1, 9, 123 P.3d 832 (2005). "[O]ur constitution focuses on the rights of the individual, rather than on the reasonableness of the government action," *id.* at 12, protecting "private affairs" even against searches that would be deemed reasonable under the Fourth Amendment. *See, e.g., State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009).

Using this approach, this Court has held that warrantless thermal imaging violates Article 1, Section 7. *See Young*. Although the *Young* officers used the thermal imager from "a lawful, nonintrusive vantage

point," 123 Wn.2d at 183, the "device discloses information about activities occurring within the confines of the home, and which a person is entitled to keep from disclosure absent a warrant," *id.* at 184. Two decades ago, the Court of Appeals saw that exactly the same logic applies to dogs:

> Like an infrared thermal detection device, using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to see through the walls of the home. … [T]he dog does expose information that could not have been obtained without the 'device' and which officers were unable to detect by using one or more of their senses while lawfully present at the vantage point where those senses are used. … [U]sing a trained narcotics dog constituted a search for purposes of article 1, section 7 of the Washington Constitution and a search warrant was required.

State v. Dearman, 92 Wn. App. 630, 635, 962 P.2d 850 (1998) (quotations, citations, and footnotes omitted).

Inexplicably, *Hartzell* failed to even mention *Dearman* or *Neth*, and did not discuss any of *Young's* reasoning about thermal imaging; in effect, it nullified twenty years of the development of Article 1, Section 7 doctrine by relying on *Boyce* as its only meaningful precedent. In the present case, the Court of Appeals dismissed *Dearman* and *Young* as applying only to homes—ignoring the fact that *Young* was explicitly decided first on the "private affairs" prong of Article 1, Section 7 (and secondarily on the "home" prong). The lower courts here likewise ignored the ample authority from this Court recognizing the inside of a person's

car is part of their "private affairs" protected from police warrantless searches, *see* Pet. for Rev. at 9-11, and failed to explain why a home's constitutional protection extends to the air molecules *outside* it, but a car's constitutional protection does not.

In fact, the core of the State's argument is that there is no privacy interest in "air molecules outside of the car." State's Answer at 8. This argument not only flies in the face of this Court's precedent, *see Young*, 123 Wn.2d at 185-86, it also ignores the facts of physics. *All* information we obtain about objects, other than that obtained through direct touch, is actually information obtained from the environment outside the object. Visually, we only look at photons outside the object; sound is carried by the movement of particles outside the object; and other properties are conveyed by various electromagnetic waves. Accepting the State's argument would leave Washingtonians' privacy at ever-greater risk as more and more technologies are developed that analyze increasingly subtle effects an object or person creates on the surrounding environment.

Most obviously, technologies such as high-resolution telescopes (with capabilities far beyond ordinary binoculars) and sensitive microphones now enable surveillance from great distances by detecting and amplifying small effects. But those are just the tip of the iceberg. A high-tech method of eavesdropping on sound inside a building involves

looking at the minute vibrations in the building's windows, and researchers have now extended this to capture conversations by using a simple high-speed camera to look at vibrations in ordinary objects such as potted plants and bags of potato chips. *See* Abe Davis, et. al., *The Visual Microphone: Passive Recovery of Sound from Video,* ACM Transactions on Graphics 33 (2014). Walls are no longer effective at hiding movements. *See* Scott Eisen, *Invisibility cloak won't shield user from this X-ray vision device*, Seattle Times, Dec. 25, 2015. Nor is an envelope or book cover sufficient to hide the text within. *See* Charles Q. Choi, *New Tech Could Read Books Without Opening Them,* Live Science, Sep. 9, 2016, <http://www.livescience.com/56054-new-tech-could-read-closed-books.html>.

Perhaps most pertinent to the current case is the development of "electronic noses" which can be tuned to detect any number of different smells. *See, e.g., Cyranose Electronic Nose* (visited Jun. 27, 2018) <http://sensigent.com/products/cyranose.html> ("The Cyranose® 320 is a fully-integrated handheld chemical vapor sensing instrument designed specifically to detect and identify complex chemical mixtures that constitute aromas, odors, fragrances, formulations, spills and leaks.") The State's claim that there is no privacy in air molecules, and thus no "search" here, would allow the unlimited use of these devices to detect

any number of scents originating from a person or object, revealing not just the presence of contraband, but also a person's preferences in scents, food, hygiene products, and even medical conditions. *See* Sensigent, *Cyranose 320*, <http://sensigent.com/products/Cyranose 320 brochure.pdf> at 8 (discussing use of electronic nose for detecting lung cancer, chronic obstructive pulmonary disease, and Alzheimer's disease).

In an age when walls and closed doors no longer enable ordinary people to protect their own privacy, our constitutional protections are more important than ever. Article 1, Section 7 protects the "privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). Washingtonians' privacy rights do not diminish when new technologies are developed that facilitate intrusions into their private affairs. Just as warrantless thermal imaging is not allowed by Article 1, Section 7, *see Young*, neither is the warrantless use of other technologies that intrude into private affairs from a distance, or collect and analyze subtle perturbances in the environments surrounding one's private affairs. This is a matter of substantial public interest, as new technologies are continually developed. Unless the existence of a search is recognized here, the "right to privacy may be eroded without our awareness, much less our consent." *Young*, 123 Wn.2d

at 184. This Court should grant review to reaffirm the *Young* principles, and protect Washingtonians from privacy-invasive technologies, both electronic and biological in nature. Review is necessary to resolve the significant question of constitutional law, of great public interest, posed by the conflict between *Boyce*, *Hartzell*, *Dearman*, and *Young*. RAP 13.4(b).

B. No Washington Court Has Considered the Constitutional Implications of Research Demonstrating the Inherent Unreliability of Dog Sniffs

When *Boyce* was decided, it was widely believed that a detection dog has an "unerring nose," *State v. Wolohan*, 23 Wn. App. 813, 815, 598 P.2d 421 (1979), and "reveals only whether or not there is contraband present," *Boyce*, 44 Wn. App. at 729. Those assumptions underlie its conclusion that a dog sniff is generally "minimally intrusive." *Id*. at 730. The experience of decades of use of detection dogs has undercut that assumption, so by the mid-2000's, it was recognized that "[t]he infallible dog, however, is a creature of legal fiction." *Illinois v. Caballes*, 543 U.S. 405, 411, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) (Souter, J., dissenting). More recent research confirms that unreliability, especially with regard to improperly alerting when no contraband is present (a "false positive"). *See, e.g.*, Lisa Lit, Julie B. Schweitzer, & Anita M. Oberbauer, *Handler Beliefs Affect Scent Detection Dog Outcomes*, 14 Animal Cognition 387 (2011) (17 out of 18 trained and certified dogs improperly alerted during

searches of totally clean rooms, with a total of 225 false alerts in searches of just 144 rooms).

This massive rate of false alerts is compounded by the fact that dogs are able to react "to residual scents lingering for up to four to six weeks." *Jennings v. Joshua Indep. School Dist.*, 877 F.2d 313, 317 (5th Cir. 1989). This undermines the dog's reliability in detecting currently present contraband, as illustrated by the present case. Lares-Storms' car was known to have contained drugs a few weeks earlier, so the dog alert provided *no* new information; even if the dog was 100% accurate, there was no way to know whether it alerted to a residual odor from the prior drugs or instead indicated the presence of current drugs.

The inherent unreliability of a dog alert as an indicator of whether contraband is currently present demonstrates that their use is an unconstitutionally intrusive invasion of Washingtonians' private affairs. If the State's position is accepted, people, vehicles, and other property will be subject to unlimited suspicionless sniffs by dogs, and the unreliable results will be used to justify manual searches. This Court should grant review to ensure that such fishing expeditions do not occur.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests the Court to accept Lares-Storms' Petition for Review.

Respectfully submitted this 11th day of July 2018.

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