FILED
SUPREME COURT
STATE OF WASHINGTON
6/12/2018 11:25 AM
BY SUSAN L. CARLSON
CLERK

COA NO. 34765-6-III

NO. 95881-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MEGAN LARES-STORM,

Petitioner.

PETITION FOR REVIEW

STATE'S ANSWER

Respectfully submitted:

by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 4242
Pasco, Washington 99302
(509) 545-3543

TABLE OF CONTENTS

Page No.

I. **IDENTITY OF RESPONDENT** 1

II. **RELIEF REQUESTED** 1

III. **ISSUES** 1

IV. **STATEMENT OF THE CASE** 2

V. **ARGUMENT** 6

A. The Unpreserved Challenge To The Canine Sniff Of The Exterior Of A Car Parked In A Public Lot Does Not Present A Significant Constitutional Question Or Involve A Substantial Public Interest 6

B. The Science Behind So-Called "False Negatives" And "False Positives" Has Not Been Litigated So As To Provide A Record For Review 12

VI. **CONCLUSION** 18

TABLE OF AUTHORITIES

State Cases

Page No.

City of Seattle v. Mesiani,
110 Wn.2d 454, 755 P.2d 775 (1988) 8
State v. Boyce,
44 Wn.App. 724, 723 P.2d 28 (1986) 7
State v. Dearman,
92 Wn. App. 630, 962 P.2d 850 (1998) 8, 10
State v. Fisher,
96 Wn.2d 962, 639 P.2d 743 (1982) 17
State v. Gaddy,
114 Wn. App. 702, 60 P.3d 116 (2002) 12
State v. Hartzell,
156 Wn. App. 918, 237 P.3d 928 (2010) 5
State v. Ladson,
138 Wn.2d 343, 979 P.2d 833 (1999) 8
State v. Lee,
162 Wn.App. 852, 259 P.3d 294 (2011) 12
State v. Mecham,
186 Wn.2d 128, 380 P.3d 414 (2016) 7
State v. Neth,
165 Wn.2d 177, 196 P.3d 658 (2008) 4, 5, 6
State v. Partin,
88 Wn.2d 899, 567 P.2d 1136 (1977) 17
State v. Payne,
45 Wn. App. 528, 726 P.2d 997 (1986) 11
State v. Robinson,
171 Wn.2d 292, 253 P.3d 84 (2011) 12
State v. Rose,
128 Wn.2d 388, 909 P.2d 280 (1996) 9

Page No.

State v. Snapp,
174 Wn.2d 177, 275 P.3d 289 (2012) 8, 11
State v. Stanphill,
53 Wn. App. 623, 769 P.2d 861 (1989) 7
State v. Swan,
114 Wn.2d 613, 790 P.2d 610 (1990) 14
State v. Tarica,
59 Wn.App. 368, 798 P.2d 296 (1990) 12
State v. Tibbles,
169 Wn.2d 364, 236 P.3d 885 (2010) 8
State v. Wolohan,
23 Wn. App. 813, 598 P.2d 421 (1979) 7, 10
State v. Young,
123 Wn.2d 173, 867 P.2d 593 (1994) 10

Other State Cases

Dawson v. State,
518 S.E.2d 477 (Ga. App. 1999) 14
Harris v. State,
71 So. 3d 756 (Fla. 2011) 15, 16
Matheson v. State,
870 So. 2d 8 (Fla. Dist. Ct. App. 2003) 15
People v. Campbell,
367 N.E.2d 949 (Ill. 2d 1977) 10
State v. England,
19 S.W.3d 762 (Tenn. 2000) 16
State v. Hall,
4 Ohio Dec. 147 (Com. Pleas 1896) 9
Warren v. State,
561 S.E.2d 190 (Ga. App. 2002) 14

United States Supreme Court Cases

Page No.

United States v. Place,
462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983) 10

Federal Circuit Court Cases

United States v. Diaz,
25 F.3d 392 (6th Cir.1994) 13
United States v. Hill,
195 F.3d 258 (6th Cir.1999) 13

Constitution and Court Rules

RAP 13.4 6
WASH. CONST. art. I, § 7 8

Secondary Authorities

1 W. LaFave, Search and Seizure, § 3.3 9 (1978) 17

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Does the canine sniff of the exterior of a car parked in a public lot, not challenged below, present a significant constitutional question or involve a substantial public interest requiring reversal of established law?
2. Where the matter was not litigated below, where no record or case law establishes the scientific premise as being generally accepted or valid theory, is there a significant constitutional question or substantial public interest which would require a recitation of the drug dog's history of so-called "false positives" and "false negatives" in an application for search warrant?

IV. STATEMENT OF THE CASE

The Defendant Megan Lares-Storm has been convicted at a stipulated facts trial of possession of methamphetamine with intent to deliver and use of drug paraphernalia. CP 6-7, 54-57.

In the spring of 2016, Walla Walla police had been trying to arrest the Defendant on a DOC warrant. CP 36-37. In mid-March, the Defendant crossed into Oregon before law enforcement could detain her. CP 36-37. On March 30, 2016, Walla Walla police detective Harris observed the Defendant park her car in a public lot at the Taj gas station and convenience store. CP 51-52. She was the only occupant of the vehicle. CP 52.

The Defendant was arrested on the warrant and transported to the county jail. CP 51-52. Immediately before her arrival in the parking lot, Det. Harris had observed the Defendant stop at a residence to retrieve a bag and backpack. CP 51. When she expressed concern for personal items in the car, the detective told her the items would stay in her car which would be locked. CP 51.

The City Drug Unit was aware that the Defendant had been residing with a known drug dealer and selling methamphetamine from her car. CP 36. Walla Walla police officer Fulmer applied his K-9

partner, Pick, to the exterior of the parked car. CP 27, 33, 52-53. The K-9 is trained to alert to the odor of cocaine, methamphetamine, and heroin and has been certified for this detection in conjunction with her handler Ofc. Fulmer. CP 33, 52. The K-9 sniffed the exterior of the car and alerted on the driver door handle and door seam, detecting the scent of a controlled substance coming from within the Defendant's car. CP 27, 52-53.

On May 31, Walla Walla police detective Harris applied for a search warrant for the Defendant's car. CP 28-38, 42, 52. In the application, he described the canine sniff, the Defendant's known prior drug criminal history, and the detective's observations during a controlled drug buy on February 25. CP 28-38, 52. During the controlled buy operation, the detective observed the Defendant's car arrive at a pre-arranged location in Walla Walla. CP 36, 50. Someone exited the car and delivered methamphetamine to the informant. *Id.* The informant was shown a photo of the Defendant later that day. *Id.* The informant "could not say for sure the driver was Ms. Lares-Storms but said he/she felt that was the female driving the vehicle that day." CP 50-51.

A district court judge signed the warrant. CP 39-40. Police

searched the Defendant's car and located 30 grams of very good quality methamphetamine in five plastic seals, numerous empty seals, $700, and a small electronic scale with methamphetamine residue. CP 41-42.

In pretrial motion, the Defendant challenged whether there was probable cause for the issuance of the search warrant.

> So, here is the heart of the issue. Did Detective Harris establish probable cause to obtain the search warrant in this case?

CP 12.

> In the instant case, the arrest was for a DOC warrant, showing that she did have criminal history as in the *Neth* case. However, nothing was seen in the car that could have been associated with drugs. It was brought up that the vehicle, not registered to Ms. Lares-Storm[,] was observed at a drug buy, but Ms. Lares-Storm was not identified as being in the car. Given the circumstances in *Neth*, this case simply lacks even the facts found to be insufficient in *Neth*. The State cannot establish that the warrant allowing the search of the vehicle in this case contained probable cause for the seizure and search.

CP 13 (referencing *State v. Neth*, 165 Wn.2d 177, 196 P.3d 658 (2008)). The matter was decided on the motion alone; no testimony was taken. RP 4-7. The facts are not in dispute. CP 50-52; RP 4, 6-7, 11.

The superior court concluded that there was probable cause for the search warrant "based on the information he had about Ms. Lares-Storms' prior drug history and the use of her vehicle during a controlled buy on February 25, 2016, coupled with the K-9 sniff of that same vehicle on March 30, 2016." CP 53. The court held the methamphetamine and drug paraphernalia were admissible. *Id.*

In the appeal, the Defendant raised claims that had not been made to the lower court. She argued that the canine sniff was an unconstitutional search. And she argued that a court could not rely upon a canine alert where the affidavit in support of the warrant did not detail the canine's history of so-called "false positives" and "false negatives."

In an unpublished opinion, the court of appeals affirmed. Finding *State v. Hartzell*, 156 Wn. App. 918, 237 P.3d 928 (2010) to be controlling, the court held the canine sniff of the exterior of a vehicle parked in a public lot "did not unreasonably intrude on Megan Lares-Storms' private affairs." Unpublished Opinion at 12-13. The court declined the Defendant's invitation to create a new rule regarding a canine's reliability, where the matter had not been raised below and the record had not been developed. Unpub. Op. at 14-15.

V. ARGUMENT

The Defendant's argument to the trial court relied upon *State v. Neth*, 165 Wn.2d 177, 196 P.3d 658 (2008). This is a case which explicitly declined to discuss the canine sniff. *State v. Neth*, 165 Wn.2d at 181 ("we conclude that the dog sniff is not before us"). The Defendant did not challenge the canine sniff at the trial level.

Having made no record for an appeal, the Defendant asks this Court to accept discretionary review by taking judicial notice of facts which the State strenuously rejects. Without a full hearing, the testimony of witnesses, opportunity for cross-examination, and findings of fact by the trial court, there is no record before this Court on which review may be taken.

A. THE UNPRESERVED CHALLENGE TO THE CANINE SNIFF OF THE EXTERIOR OF A CAR PARKED IN A PUBLIC LOT DOES NOT PRESENT A SIGNIFICANT CONSTITUTIONAL QUESTION OR INVOLVE A SUBSTANTIAL PUBLIC INTEREST.

To merit discretionary review, a party must demonstrate a consideration under RAP 13.4(b). The Defendant cannot demonstrate that the court of appeals' decision conflicted with established law. The unpublished opinion follows published case law.

See State v. Mecham, 186 Wn.2d 128, 147, 380 P.3d 414 (2016) (favorably referencing *Hartzell* for the proposition that a "canine sniff outside of car window is not a search because suspects have no reasonable expectation of privacy in air outside a car window"); *State v. Stanphill,* 53 Wn. App. 623, 769 P.2d 861 (1989) (no warrant required for a canine to smell a package at post office); *State v. Boyce,* 44 Wn.App. 724, 729-30, 723 P.2d 28 (1986) (a canine sniff from an area where the defendant does not have a reasonable expectation of privacy and which is itself minimally intrusive is not a search); *State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986) (no warrant required for a canine to smell a safety deposit box at bank); *State v. Wolohan*, 23 Wn. App. 813, 598 P.2d 421 (1979), *review denied*, 93 Wn.2d 1008 (1980) (no warrant required for a canine to smell a parcel in bus terminal).

This significant body of case law demonstrates the matter has already been well and adequately considered. A canine sniff from a lawful vantage point is not intrusive. Unpub. Op. at 12-13. It is not an "invasion of privacy" involving a significant constitutional question of substantial public interest.

The Defendant's attempts to compare her case with other automobile cases fail. Unlike in *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012) and *State v. Tibbles*, 169 Wn.2d 364, 369, 236 P.3d 885 (2010), here the search was authorized by a warrant. Unlike in *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988), police did not stop the Defendant in traffic. She parked, exited, was arrested, and was incarcerated. A warrant was obtained, and then a search was conducted of the car parked in a public lot. Unlike in *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999), there no stop and no pretext.

The Defendant claims that this matter involves a significant question under WASH. CONST. art. I, § 7, because "a dog detects more than what a driver leaves exposed to public view." Petition for Review at 8-9. The argument does not make sense. The dog did not look into the car window. "Any search by K9 Pick did not entail sight. Pick searched by her sense of smell." Unpub. Op. at 11. Nor did she did smell the interior of the locked car. Petition at 8 (quoting *State v. Dearman*, 92 Wn. App. 630, 635, 962 P.2d 850 (1998) (misstating that a dog's nose allows officers to see through walls)). She smelled the air molecules <u>outside</u> of the car and exposed to the public. The

air outside of a car parked in a public lot is available for any being to smell.

The suggestion that a dog's nose is some new technology not previously considered by the courts or Legislature is false. First, dogs have long been a routine and legitimate tool of law enforcement. They have been used to track fugitives throughout recorded history. *See State v. Hall*, 4 Ohio Dec. 147 (Com. Pleas 1896) (discussing history of tracking by bloodhounds). Had the drafters of the Washington Constitution considered this to be a threat to privacy or liberty, they would have taken steps to protect against it. The Washington Legislature has enacted almost 200 laws related to dogs, but none to protect people from a canine sniff.

Second, a dog's nose is a simple tool. It is not a modern technology which evolves rapidly and provides a broad range of information so as to be comparable to a thermal imager. It is a common tool like a flashlight, which enhances a person's ability to sense from a lawful vantage point. *Cf. State v. Rose*, 128 Wn.2d 388, 909 P.2d 280 (1996) (flashlight view through a window into a mobile home is not an unconstitutional search). The dog smells particles (the odor) in the public domain which *emanate from* the car.

> The use of trained dogs to detect the odor of marijuana poses no threat of harassment, intimidation, or even inconvenience to the innocent citizen. Nothing of an innocent but private nature and nothing of in incriminating nature other than the narcotics being sought can be discovered through the dog's reaction to the odor of the narcotics.

State v. Wolohan, 23 Wn. App. at 820, *quoting People v. Campbell*, 367 N.E.2d 949, 953-54 (Ill. 2d 1977), *cert. denied*, 435 U.S. 942 (1978).

K-9 Pick's sniff was not offensive to the right of privacy, because a sniff of a vehicle in a public place is not intrusive. *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644, 77 L. Ed. 2d 110 (1983) (A "canine sniff" is much less intrusive than a typical search; it does not require opening luggage or exposing noncontraband items that otherwise would remain hidden from public view; and it only discloses the presence or absence of contraband); *State v. Young*, 123 Wn.2d 173, 188, 867 P.2d 593, 600 (1994) ("a dog sniff might constitute a search if the object of the search or the location[1] of the search were subject to heightened constitutional protection").

---

[1] It is the heightened constitutional protection of a home which justifies the holding in *State v. Dearman*, 92 Wn. App. 630, 635, 962 P.2d 850 (1998). Insofar as the opinion suggests that a dog's nose pierces the solid walls of a home like an infrared

Insofar as the Defendant attempts to inject race into this discussion (Petition at 11), the argument has no relevance here. Neither the Defendant's race nor the canine handler's awareness or perception of her race is a part of the record. In fact, the canine handler appears to have arrived after the Defendant was transported to jail. CP 2, 4. A court may not take judicial notice of someone's appearance where a fact may reasonably in dispute. *State v. Payne*, 45 Wn. App. 528, 531, 726 P.2d 997 (1986) (reversing finding that victim was particularly vulnerable due to her size where her size was unsupported by any record).

The Defendant argues that by relying on the precedent of *Boyce* and *Hartzell*, the court of appeals necessarily "ignored" the precedent of *Snapp*. Petition at 12. This is not apparent. *State v. Snapp* did not even mention the earlier cases, much less overrule them. The court of appeals correctly identified the issue under the Washington Constitution as whether the canine sniff unreasonably disturbs a citizen's private affairs. Unpub. Op. at 10. No bright line rule suppresses that which can be sensed from a lawful vantage point.

---

device, this is not the science.

The Defendant's unpreserved claim to privacy in the air around her property parked in a public lot is not a significant constitutional question or an issue of public interest.

B. THE SCIENCE BEHIND SO-CALLED "FALSE NEGATIVES" AND "FALSE POSITIVES" HAS NOT BEEN LITIGATED SO AS TO PROVIDE A RECORD FOR REVIEW.

The Defendant did not challenge K-9 Pick's reliability below. CP 9-15. The matter is waived on appeal. *State v. Lee,* 162 Wn.App. 852, 856-57, 259 P.3d 294 (2011), *review denied,* 173 Wn.2d 1017 (2012); *see also State v. Tarica,* 59 Wn.App. 368, 372, 798 P.2d 296 (1990), *overruled on other grounds by State v. McFarland,* 127 Wn.2d 322, 899 P.2d 1251 (1995). No exception to the rule is asserted or present. *State v. Robinson*, 171 Wn.2d 292, 305, 253 P.3d 84, 89 (2011) (listing the exceptions).

The Defendant compares a dog to a criminal informant subject to *Aguilar-Spinelli.* Petition at 14-15. A dog is not a witness, who can be sworn or cross-examined. However, if a dog were a witness, K-9 Pick is not a criminal informant. She is a police officer and therefore presumptively reliable. *State v. Gaddy*, 114 Wn. App. 702, 707, 60 P.3d 116, 120 (2002), *aff'd*, 152 Wn.2d 64, 93 P.3d 872 (2004).

If she is a tool, then the canine's performance history in the application for the warrant satisfied the judge that the dog was functioning as expected. Drug sniffing dogs are trained young and retired after a handful of years or so. CP 31. At the time of the warrant, Pick was a 2 year old female black lab who had completed a 16 week course of training and then 200 hours with handler Ofc. Fulmer before certification. CP 31-34. Her annual certification was attached to the warrant application. CP 33, 35. The application detailed the handler's experience in locating and identifying drugs and drug paraphernalia. CP 32-33. K-9 Pick together with her handler are employed by the state patrols of Washington and Oregon, two county sheriff's offices, two city police departments, the state penitentiary, the DEA, and the FBI in executing search warrants and finding both drugs and drug paraphernalia. CP 32, 34. They had performed over 400 applications where controlled substances were discovered or the odors of controlled substances were present. CP 33.

Several courts have held that certification that a dog has been trained is prima facie proof of the dog's reliability which may be rebutted by the presentation of the dog's performance or training. *United States v. Hill,* 195 F.3d 258, 273 (6th Cir.1999); *United States*

v. Diaz, 25 F.3d 392, 395 (6th Cir.1994); *Warren v. State,* 561 S.E.2d 190, 194-95 (Ga. App. 2002); *Dawson v. State,* 518 S.E.2d 477, 481 (Ga. App. 1999). K-9 Pick's reliability has not been rebutted.

For the first time on appeal, the Defendant claimed that the affidavit in support of the search warrant should have included information about the canine's so-called "false positive" and "false negative" history. The Defendant claims that preservation of error is not necessary, because "the record contained all of the information relied on by the magistrate." Petition at 7. This is disingenuous. There is no definition of "false positive" or "false negative" in the record. The State does not recognize this terminology as having any scientific validity. The Defendant cannot offer this argument without offering an expert witness and laying a proper foundation subject to cross-examination. *State v. Swan*, 114 Wn.2d 613, 655, 790 P.2d 610 (1990) (under ER 702, the testimony of an expert is only admissible if the witness can be shown to qualify as an expert, to rely upon an explanatory theory generally accepted in the scientific community, and if the testimony is helpful to the trier of fact).

If an attorney references a "fact" that he or she knows is not the proper subject of judicial notice, then that attorney deprives an

opponent of a meaningful opportunity to be heard on the question of whether or not that "fact" is true. This is unfair to the opposing party and violates a rule of the appellate tribunal. RPC 3.4(c).

The Defendant would define a "false positive" as an alert where no drugs are recovered. This misapprehends at its most basic level what a canine does and is trained to do. A canine alerts to a scent, not a substance. *Matheson v. State*, 870 So. 2d 8, 12 (Fla. Dist. Ct. App. 2003). The absence of contraband does not indicate the absence of the scent. A cigarette may be long gone, but you can still smell cigarette smoke in the car or in your hair.

A dog's nose is more sensitive than scientific equipment. It may detect what we cannot. *Harris v. State*, 71 So. 3d 756, 763, 769 (Fla. 2011) ("The presence of a drug's odor at an intensity detectable by the dog, but not by the officer, does not mean that the drug itself is not present.") ("an alert to a residual odor is different from a false alert"). When a dog alerts and no substance is found, police almost always find burnt tissue (used for holding heated glass pipes) and blackened cotton swabs (used for cleaning glass pipes). This is not canine error.

The Defendant would define a "false negative" as the failure to alert when a substance is present. This regards the sensitivity of the dog's nose, not its reliability. A canine that fails to detect 35 pounds of marijuana submerged in gasoline within a gas tank[2] is not a concern for a magistrate or a defendant.

The Defendant persists in her claim that she has found authority, albeit in other jurisdictions, in support of her claim. Petition at 7. Not so. The Florida case has been withdrawn. *Harris v. State*, 71 So. 3d at 767 (Fla. 2011), *as revised on denial of reh'g* (Sept. 22, 2011), *rev'd*, 568 U.S. 237, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013), and *opinion withdrawn*, 123 So. 3d 1144 (Fla. 2013). The Defendant is forced to acknowledge as much. Petition at 18. The Tennessee opinion only states that a magistrate "may" consider the dog's track record of false alerts in making a reliability determination. *State v. England*, 19 S.W.3d 762, 768 (Tenn. 2000). There is no authority for her demand that every drug dog certification include "false positive" and "false negative" history.

---

[2] Peter Tyson, Dog's Dazzling Sense of Smell, NOVA Science Now (October 4, 2012) (providing anecdote of such a detection). http://www.pbs.org/wgbh/nova/nature/dogs-sense-of-smell.html .

The existing law is simply that an affidavit should provide information of the underlying circumstances by which the affiant concluded that the informant was credible and that the information was reliable. *State v. Partin*, 88 Wn.2d 899, 567 P.2d 1136 (1977). There is no single way by which reliability may be shown. While it is not enough to provide the affiant's conclusion that the informant was credible, it is almost universally held to be sufficient if information has been given which has led to arrests and convictions. *State v. Fisher*, 96 Wn.2d 962, 965, 639 P.2d 743, 745-46 (1982) (citing 1 W. LaFave, Search and Seizure, § 3.3, at 509 (1978)).

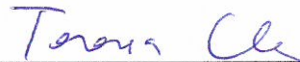
The Defendant is arguing for a change in law premised on a withdrawn Florida opinion and where the scientific premise is not generally accepted and has not been litigated. Review is not appropriate.

VI. CONCLUSION

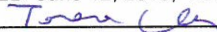
Based upon the forgoing, the State respectfully requests this Court deny the Petition for Review.

DATED: June 12, 2018.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

Lila J. Silverstein lila@washapp.org	A copy of this brief was sent via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 12, 2018, Pasco, WA  **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

June 12, 2018 - 11:25 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95881-5
Appellate Court Case Title:	State of Washington v. Megan Cherisse Lares-Storms
Superior Court Case Number:	16-1-00145-6

The following documents have been uploaded:

- 958815_Answer_Reply_20180612112334SC798708_5504.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 958815 States Answer.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- jnagle@co.walla-walla.wa.us
- lila@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Teresa Chen - Email: tchen@co.franklin.wa.us
Address:
PO BOX 4242
PASCO, WA, 99302-4242
Phone: 509-545-3543

Note: The Filing Id is 20180612112334SC798708