

70841-4

70841-4

NO. 70841-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

PORT OF SEATTLE POLICE DEPARTMENT,

Respondent, et ano.

v.

QUANG D. NGUYEN,

Petitioner.

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COURT OF APPEALS
DIVISION I
JAN 11 2011

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

MAFÉ RAJUL
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES PRESENTED

1. Where officers have an articulable suspicion that an object contains narcotics, a canine sniff by a well-trained narcotics detection dog is not a search within the meaning of the Fourth Amendment. Here, Nguyen was carrying \$80,000.00 in U.S. Currency in bundles at the airport; concealed the money in different places on his person and his luggage; was traveling on a one-way ticket to San Diego after having spent only six hours in Seattle upon his arrival from Alaska; provided inconsistent and unreasonable statements about the source of the currency; and had a prior conviction for a drug-related crime. Did the officers act within the parameters allowed by the Fourth Amendment when they conducted a canine sniff with a well-trained narcotics dog without a warrant?

2. When a canine sniffs an object from an area where a person does not have a reasonable expectation of privacy, and the canine sniff is minimally intrusive, no search has occurred. Here, Nguyen was at the airport, where a person has a lower expectation of privacy, and the canine sniff took place in the public lobby of the police department. Did the canine sniff fall within the parameters of

Article I, Section 7 of the Washington State Constitution not constituting a search?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On August 3, 2011, pursuant to RCW 69.50.505 the defendant in rem, \$80,000.00 U.S. Currency, was seized by the Port of Seattle Police (POSP). A claim was received by Quang D. Nguyen on August 10, 2011. RP 4.¹ An adjudicative hearing was heard before Hearing Examiner, Marilyn Brenneman. CP 32-164; RP 1-125. Nguyen filed a motion to suppress the canine sniff arguing that it was a warrantless search in violation of his rights under the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Washington State Constitution. RP 5. At the commencement of the hearing, Ms. Brenneman denied Nguyen's motion to suppress the narcotics canine alert on the \$80,000.00 currency and admitted the alert into evidence during the POSP's case in chief. RP 6-7.

At the conclusion of the forfeiture hearing, Ms. Brenneman found in favor of POSP, and entered findings of fact and

¹ The verbatim proceedings from the forfeiture administrative hearing, which took place on Wednesday, November 2, 2011, will be referred to in this brief as RP.

conclusions of law. CP 12-27. On December 8, 2011, Nguyen filed an appeal with Thurston County Superior Court, and after an agreed change of venue to King County Superior Court and other delays, the appeal was heard on August 16, 2013. CP 1-4.

The Honorable Judge Catherine Shaffer affirmed the Hearing Examiner's ruling holding that Ms. Brenneman did not commit an error of law when she properly denied Nguyen's motion to suppress the narcotics detection canine sniff and alert to the \$80,000.00 U.S. Currency. CP 165-66. This Court granted Nguyen's petition for discretionary review.

2. SUBSTANTIVE FACTS

On August 2, 2011, at approximately 11:00 pm, Nguyen arrived in Seattle from Dutch Harbor, Alaska. CP 14, FF 6; RP 16, 20-21, 35, 76. Just six hours later, at approximately 5:00 am on August 3rd, Nguyen was at SeaTac Airport passing through the security checkpoint when Transportation Security Administration (TSA) stopped him to investigate suspicious bulges on his person. CP 14, FF 7; RP 11-12, 31-32. Those bulges contained numerous bundles of U.S. Currency. CP 14, FF 8; RP 38. TSA agents called POSP to investigate the suspicious concealment of the money.

CP 14, FF 8; RP 38. POSP officers arrived and spoke with Nguyen regarding the currency, and throughout that conversation they repeatedly told him he was not under arrest and was free to leave.

CP 14, 16, FF 9, 10, and 18; RP 13.

Nguyen acknowledged that numerous officers advised him that he was not under arrest and free to leave. CP 16, FF 18. In addition to voluntarily engaging in the interview, Nguyen also gave POSP consent to search his belongings. CP 18, FF 25; RP 24.

Throughout their contact with Nguyen, officers learned that:

- 1) the money was hidden in numerous locations on Nguyen's person and in his bag;
- 2) Nguyen said the money was concealed that way because he did not want to get beat up and have it taken away from him;
- 3) Nguyen said he had \$60,000, but in reality he had \$80,000;
- 4) Nguyen said he and a partner were going to purchase a business in Alaska for \$340,000 and that the \$80,000 was the 20% down payment;²
- 5) Nguyen claimed he was going to San Diego to visit his girlfriend and was going to deposit the money in his bank in California;
- 6) Nguyen claimed he was not going to deposit the money in an Alaska bank, even though the business was going to be purchased in Alaska, because the people at the

² 20% of \$340,000.00 is \$68,000.00.

only bank in Alaska were very rude; 7) Nguyen stated he made \$90,000 annually; 8) Nguyen changed his story and said that the money was going to be used as a down payment for a residence in Alaska, but was unable to provide the address; 9) Nguyen then indicated that half of the money belonged to a friend who owned a restaurant in Dutch Harbor, and the other half was his, which he picked up from a water jug he kept at his uncle's residence while he was in Seattle; 10) Nguyen admitted he paid cash for a one way ticket from Seattle to San Diego. CP 14-17, FF 11, 12, 13, 14, 15, 19, 20, and 22; RP 14-16, 18, 23, 34-36, 38, 41, 50-51, 61-62, 69, and 73.

Detective Bruch arrived on scene with his narcotics detection canine, Lilly. CP 16, FF 17 and 18; RP 23. Detective Bruch is an experienced narcotics interdiction detective and knows that California is a source location of narcotics destined for consumption / distribution in Alaska, and that it is common for large sums of cash to be transported from Alaska to California as either proceeds of narcotics purchases or as money used for the purchase of narcotics. CP 16, FF 17; RP 30 and 43. Detective Bruch entered Nguyen's name into various police databases and learned that Nguyen had a prior conviction for Violation of the Uniformed

Controlled Substances Act from 1996. CP 15, FF 16; RP 42.

Nguyen gave Detective Bruch permission to search his bag.

CP 18, FF 25; RP 42 and 67.

Detective Bruch found several "pay and owe" sheets, which in his experience, are common for drug dealers to carry; five separate Western Union transaction receipts for \$5,000 each showing wire transfers to Vietnam, believed to be structured transactions which took place close in time; and a receipt showing a \$4,000 cash payment on a Key Bank credit card completed the day before. CP 18, FF 27; RP 43, 48, 68, 74-75. Nguyen was unable to explain why he was able to send \$25,000 to Vietnam, pay \$4,000 on his credit card, and still have \$80,000 on his person when his entire annual salary was \$90,000. CP 19, FF 30; RP 46.

After speaking with Nguyen, Detective Bruch decided to deploy Lilly to determine whether Nguyen's currency was associated with narcotics. Lilly and Detective Bruch have met the requirements for canine narcotics specific training as outlined by WAC 139-05-915. CP 19, FF 32; RP 51-52. Lilly regularly trains with circulated U.S. Currency and she does not alert to regular U.S. Currency unless it has been in recent proximate contact with narcotics. CP 20, FF 37; RP 55-56. Nguyen's currency was placed

into a plastic bag in the public lobby out of view from Detective Bruch and Lilly. CP 20, FF 36; RP 51-52, 56-57. Lilly alerted to the bag indicating to Detective Bruch that the money had been in recent close contact with narcotics. CP 20, FF 38; RP 57.

Based on the totality of the circumstances known to Detective Bruch at the time, to wit: one way cash purchase ticket to San Diego, which is a source of narcotics travelling to Alaska; Nguyen's very short stay in Seattle; the bundling of the money; the concealment of the money in multiple locations on Nguyen's person and his bag; Nguyen's inconsistent statements regarding his intent to purchase a business in Alaska and his intent to purchase a residence in Alaska; the pay and owe sheets located in Nguyen's luggage; the \$25,000 worth of Western Union receipts; the \$4,000 cash payment on Nguyen's credit card; Nguyen's admission that he makes \$90,000 annually; and the positive narcotics detection canine alert on the cash, the \$80,000.00 was seized under RCW 69.50.505. CP 20-21, FF 39 and 40; RP 58. Nguyen did not appear upset or shocked that the money was being seized. CP 21, FF 40; RP 58. Nguyen signed the Notice of Seizure form, but asked that Detective Bruch write on the back of the form that Nguyen did not witness the dog alert on the money. CP 21, FF 42;

RP 59. Nguyen then proceeded to travel as planned to San Diego.

CP 21, FF 42; RP 59.

C. ARGUMENT

THE TRIAL COURT CORRECTLY AFFIRMED THE HEARING EXAMINER'S RULING THAT THE CANINE SNIFF WAS NOT A SEARCH.

Nguyen argues that a canine sniff at the airport, which he did not consent to, was a warrantless search in violation of his rights under the Fourth Amendment of the U.S. Constitution and under Article I, Section 7 of the Washington State Constitution. Nguyen's argument should be rejected because the Federal case law provides that a sophisticated dog sniff in these precise circumstances does not constitute a "search." Similarly, the Washington case law provides that a canine sniff of the air where a person does not have a reasonable expectation of privacy does not constitute a search. Thus, the Hearing Examiner properly denied Nguyen's motion to suppress the canine sniff and alert, and the Superior Court was correct in affirming the Hearing Examiner's ruling.

1. Standard Of Review.

When reviewing an administrative agency decision, the Court reviews issues of law de novo. Ames v. Washington State Dept. of Medical Quality Health Assurance Com'n, 166 Wn.2d 255, 260, 208 P.3d 549 (2009). The reviewing court applies the “error of law” standard of RCW 34.04.130(6)(d) when reviewing an administrative agency’s conclusions of law. Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 728, 818 P.2d 1062, 1067 (1991). Under this standard, the reviewing court accords substantial weight to the agency’s interpretation of the law, although this Court may substitute its judgment for that of the agency. Id.

“Unchallenged findings of fact become verities on appeal.” Davis v. Dep’t of Labor & Indus., 94 Wn.2d 119, 123, 615 P.2d 1279, 1282 (1980); Dep’t of Labor & Indus. of State of Wash. v. Allen, 100 Wn. App. 526, 530, 997 P.2d 977, 979 (2000). Nguyen does not assign error to any of the findings of fact.

2. The Canine Sniff Did Not Violate Nguyen’s Rights Under The Fourth Amendment Of The U.S. Constitution.

Nguyen’s characterization of a canine sniff as a “search” is erroneous. A canine sniff by a well-trained narcotics detection dog

is not a search within the meaning of the Fourth Amendment. United States v. Place, 462 U.S. 696, 707, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983). See also Illinois v. Caballes, 543 U.S. 405, 409, 125 S. Ct. 834, 838, 160 L. Ed. 2d 842 (2005) (holding that a dog sniff performed on the exterior of a suspect's car while he was lawfully seized for a traffic violation does not implicate legitimate privacy interests rising to the level of a constitutionally cognizable infringement).

Place, supra, is instructive. Place's behavior aroused the suspicions of law enforcement officers as he waited in line at the Miami International Airport to purchase a ticket to New York's La Guardia Airport. 462 U.S. at 698. As Place proceeded to the gate for his flight, the agents approached him and requested his airline ticket and some identification. Place complied with the request and consented to a search of the two suitcases he had checked. Id. Because his flight was about to depart, however, the agents decided not to search the luggage. Prompted by Place's parting remark that he had recognized that they were police, the agents inspected the address tags on the checked luggage and noted discrepancies in the two street addresses. Id. Further investigation revealed that neither address existed and that the

telephone number Place had given the airline belonged to a third address on the same street. Id.

On the basis of the officers' encounter with Place and this information, the Miami agents called Drug Enforcement Administration (DEA) authorities in New York to relay their information about Place. Place, 462 U.S. at 698. Two DEA agents waited for Place at the arrival gate at La Guardia Airport in New York. Id. at 699. The agents identified themselves as federal narcotics agents. One of the agents informed Place that, based on their own observations and information obtained from the Miami authorities, they believed that he might be carrying narcotics. Place identified the bags that belonged to him. Id. When Place refused to consent to a search of his luggage, the agents took the bags to the Kennedy Airport, where they subjected the bags to a "sniff test" by a trained narcotics detection dog. Id.

One of the issues on appeal was whether the Fourth Amendment prohibits law enforcement authorities from temporarily detaining personal luggage for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics. Place, 462 U.S. at 697-98. In ruling that a traveler's luggage could be detained on the basis of reasonable,

articulable suspicion that the luggage contains contraband or evidence of a crime, the United States Supreme Court specifically held that exposing the detained luggage to a narcotics detection dog was not a search. Id. at 707. The Court reasoned that a “canine sniff” by a well-trained narcotics detection dog does not require opening the luggage. Id. The Court further articulated that:

[A canine sniff] does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer’s rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods. Id.

Similar to Place, the officers here had reasonable articulable suspicion that the currency might contain contraband based on Nguyen’s numerous conflicting stories about the source of the money and its intended purpose, the suspicious travel, Nguyen’s criminal history of narcotics, and the way the money was packaged and concealed. RP 58. Nonetheless, Nguyen argues that the officers were required to obtain a warrant before conducting the

canine sniff because although he consented to the bags being searched, he never consented to the sniff. This argument is meritless because a dog sniff under these circumstances is not a search, thus consent is not required. It should be noted that here Nguyen consented to the search of his belongings, whereas in Place he did not. 462 U.S. at 699. In its holding, the United States Supreme Court held that the canine sniff was not a search because this “investigative procedure is limited” in the manner in which the information is obtained as well as how it is revealed. Id. at 707. Thus, even if Nguyen had not consented to the search of his bags, the officers were permitted to detain the currency and conduct the sniff in order to confirm or dispel their suspicions.

Nguyen further argues, that the canine sniff was not minimally intrusive because the money was removed from Nguyen and his luggage, and placed in a secondary location. His argument is not persuasive. Nguyen's argument that the sniff was not minimally intrusive is based solely on the fact that the currency was moved for the canine sniff within the office. However, the facts here are more compelling than those in Place. In Place, the agents transported his bag from La Guardia airport to the Kennedy airport. 462 U.S. at 699. Even so, the United States Supreme Court held

that the dog sniff was minimally intrusive.³ Id. at 707. Nothing in Place nor in any other authority supports the argument that because the currency, or the object to be sniffed, is moved from one location to another, the sniff itself somehow ceases to be minimally intrusive.

In sum, the canine sniff of Nguyen's \$80,000.00 U.S. Currency was not a "search" and Nguyen's rights under the Fourth Amendment were not violated.

3. The Canine Sniff Did Not Violate Nguyen's Rights Under Article I, Section 7 Of The Washington State Constitution.

Article I, Section 7 protects a person's home and his private affairs from warrantless searches: "No person shall be disturbed in his private affairs, or his home invaded, without the authority of law." However, Article I, Section 7 is not implicated if no search occurs. State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994).

As a general rule, warrantless searches and seizures are per se unreasonable. Jacobsen v. City of Seattle, 98 Wn.2d 668, 672, 658 P.2d 653, 655 (1983). Nonetheless, there are a few

³ The Supreme Court found that the 90-minute detention of Place's luggage was unreasonable. Place, 462 at 710. However, Nguyen did not argue below, nor does he argue on appeal, that the length of time for the detention of his currency was unreasonable.

“jealously and carefully drawn’ exceptions” to the warrant requirement. Id. Airport and courthouse searches fall within one of those narrow exceptions to the warrant requirement. Id. at 672 (citing United States v. Skipwith, 482 F.2d 1272 (5th Cir.1973); Downing v. Kunzig, 454 F.2d 1230 (6th Cir.1972)). See Gaioni v. Folmar, 460 F.Supp. 10, 13 n.10 (M.D.Ala.1978).

Nguyen argues that his rights under the Washington Constitution were violated for the same reason that he claims his rights under the United States Constitution were violated. Nguyen’s argument as it pertains to Article I, Section 7 of the Washington State Constitution should also be rejected. This Court has held that whether a canine sniff is a search under Article I, Section 7 depends on the circumstances of the canine sniff. State v. Boyce, 44 Wn. App. 724, 725, 723 P.2d 28 (1986). Specifically, where a 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.” Id. at 730.

In Boyce, an informant advised detectives that Boyce was selling heroin and that she kept her supply in a safety deposit box. A week later, after conducting some unspecified surveillance, a detective called banks in the area and located the bank where

Boyce had a safety deposit box. 44 Wn. App. at 725. That same day, an officer and his narcotics detection dog entered the bank vault and the dog alerted on Boyce's safety deposit box. Id. at 726. Based on the surveillance, the informant's tip, and the canine sniff, a warrant was obtained and heroin was found in the box. Id. In holding that the canine sniff under these circumstances was not a search, this Court reasoned that a person who has a safety deposit box in a bank does not have complete control over the vault area, and that a canine sniff of the air outside the safety box is minimally intrusive. Id. at 730.

Likewise, this Court held that a canine sniff of air outside the window of a defendant's vehicle was not a "search," within the meaning of the Washington constitution. State v. Hartzell, 156 Wn. App. 918, 237 P.3d 928 (2010).

In Hartzell, a deputy went to a house in a rural area in "response to a call of a man with a gun." 156 Wn. App. at 927. While the deputy was waiting for backup, a vehicle pulled into the driveway and Hartzell got out. Id. Hartzell claimed to be looking for his girlfriend. Id. The girlfriend was located inside the residence, and after the deputy interviewed her, Hartzell was taken into custody. Deputies then discovered a bullet hole through the

passenger door of the vehicle and a cartridge and several boxes of ammunition in the vehicle, as well as a cartridge in Hartzell's jacket. Id. A K-9 officer was called to the scene. The canine jumped up on the door, sniffed through the open window, then went south on the road locating a semiautomatic handgun. Id.

This Court concluded, "that Hartzell 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. The Court noted that Hartzell was not in the SUV when the dog sniffed from a lawful vantage point outside the vehicle, and emphasized that the sniff was "only minimally intrusive." Id.

In the present case, before the currency was subject to a canine sniff, Nguyen voluntarily submitted himself and his possessions to a search at a TSA checkpoint at SeaTac airport. RP 66. Such checkpoints require passengers to expose themselves to heightened screening measures to detect suspicious activity. Nonetheless, Nguyen now claims that because he did not consent to the canine sniff, POSP officers were required to obtain a warrant. However, Nguyen does not argue, nor can he, that he had a reasonable expectation of privacy in the air that surrounded him and his luggage at the public airport.

This Court in Boyce stated that “we can envision *few situations* where a canine sniff of an object would unreasonably intrude into the defendant’s private affairs.” 44 Wn. App. at 730 (emphasis added). A canine sniff at a public airport is not one of those situations. Rather, the facts here are analogous to Boyce and Hartzell. Just as a person does not have a reasonable expectation of privacy in the air around a safety deposit box in a vault area of a bank, or in air coming directly from the inside of the car through an open window, a person does not have a reasonable expectation of privacy in the air at the airport.

Nguyen chose to carry his money through the airport where a person has a lower expectation of privacy. See United States v. Mines, 883 F.2d 801, C.A.9 (Cal. 1989) (the search of Mines’ machine gun occurred not in a private apartment but in a public place- an airport- where expectations of privacy are sharply reduced by ubiquitous searches of persons and luggage to detect potential hijackers. See generally 4 LaFare, Search and Seizure: A Treatise on the Fourth Amendment, § 10.6 (2d ed.1987); see also United States v. Henry, 615 F.2d 1223, 1228-29 (3rd Cir.1980) (public is aware that security measures used in airports include inspections). Nguyen cannot claim that he had an expectation of

privacy in his currency where the sniff was conducted from a lawful vantage point in the public lobby of the police department inside the airport.

Lastly, Nguyen's reliance on State v. Neth, 165 Wn.2d 177, 196 P.3d 658 (2008) is misplaced. Neth stands for the proposition that under the circumstances of that case – inconsistent statements, suspicious empty bags in the car, large amount of cash, and prior criminal history – without a canine alert, the officers did not have probable cause to issue a warrant to search Neth's car. Id. at 185-86. In fact, a close read of Neth supports a conclusion that a canine sniff is not a search, and more importantly, that it can be the basis to support a finding of probable cause for the issuance of a search warrant.⁴

In conclusion, the canine sniff of Nguyen's currency was not a "search" and his rights under Article I, Section 7 of the Washington constitution were not violated.

⁴ The court noted: "Absent the dog's alert, the only facts that can be said to show a nexus connecting Neth's car to criminal activity are the plastic baggies, a relatively large sum of money in the car, and his criminal history. Neth, 165 Wn.2d at 184.

D. CONCLUSION

For all the foregoing reasons, the POSP respectfully asks this Court to affirm the Superior Court's ruling and hold that the canine sniff under these circumstances is not a search.

DATED this 15th day of October, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By. 

MAFÉ RAJUL, WSBA #37877
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Joseph Patrick Devlin, II, the attorney for the petitioner Quang Nguyen, at Law Office of Joseph P. Devlin II, PLLC, P.O. Box 11266, Tacoma, WA 98411-1266 containing a copy of the BRIEF OF RESPONDENT, in QUANG D. NGUYEN V. PORT OF SEATTLE POLICE DEPARTMENT, Cause No. 70841-4, in the Court of Appeals, Division 1, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 15 day of October, 2014



Bora Ly
Done in Seattle, Washington

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DIVISION 1