

No. 42259-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

HARRY LEE THOMAS III,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen M. Warning
The Honorable James J. Stonier

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

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

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

C. STATEMENT OF THE CASE 3

 1. The October 29, 2008, arrest of Mr. Thomas and seizure of residue. 3

 2. The April 15, 2008, stop and search of Mr. Thomas' car..... 4

D. ARGUMENT 5

 1. THE POLICE LACKED REASONABLE SUSPICION TO STOP AND DETAIN MR. THOMAS AND THE SUBSEQUENT ARREST AND SEIZURE WERE ILLEGAL 5

 a. A warrantless detention must be supported by articulable suspicion. 5

 b. The police officers lacked articulable suspicion to stop and detain Mr. Thomas. 8

 c. The pipe and the residue inside must be suppressed as the result of an unlawful detention and arrest. 11

 2. THE SEARCH WARRANT LACKED PROBABLE CAUSE BECAUSE IT WAS BASED UPON AN UNLAWFUL K-9 SNIFF OF THE EXTERIOR OF MR. THOMAS' VEHICLE AFTER HIS ARREST WHICH VIOLATED ART. I, SEC. 7 11

 a. A search warrant must be supported by probable cause..... 11

b. The warrant lacked probable cause because it was based solely on the illegal dog sniff of Mr. Thomas' car..... 13

c. Since the warrant lacked probable cause, the methamphetamine must be suppressed..... 17

E. CONCLUSION..... 18

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IVpassim

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 7.....passim

FEDERAL CASES

Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1719, 173 L.Ed.2d 485
(2009) 3

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29
L.Ed.2d 564 (1971)..... 12

Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842
(2005) 13

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889
(1968) 6, 7

United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d
621 (1981) 7

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d
441 (1963) 11, 18

WASHINGTON CASES

City of Seattle v. McCreedy, 123 Wn.2d 260, 868 P.2d 134
(1994) 15

City of Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775
(1988) 16

State v. Bailey, 154 Wn.App. 295, 224 P.3d 852, *review denied*,
169 Wn.2d 1004 (2010)..... 7

State v. Boyce, 44 Wn.App. 724, 723 P.2d 28 (1986)..... 14

State v. Chamberlin, 161 Wn.2d 30, 162 P.3d 389 (2007)..... 12

<i>State v. Dearman</i> , 92 Wn.App. 630, 962 P.2d 850 (1998), (internal citations omitted), <i>review denied</i> , 137 Wn.2d 1032 (1999).....	14
<i>State v. Diluzio</i> , 162 Wn.App. 585, 254 P.3d 218 (2011)	9, 10
<i>State v. Doughty</i> , 170 Wn.2d 57, 239 P.3d 573 (2010).....	passim
<i>State v. Duncan</i> , 146 Wn.2d 166, 43 P.3d 513 (2002).....	11
<i>State v. Ferrier</i> , 136 Wn.2d 103, 960 P.2d 927 (1998).....	15
<i>State v. Gaines</i> , 154 Wn.2d 711, 116 P.3d 993 (2005).....	17
<i>State v. Garvin</i> , 166 Wn.2d 242, 207 P.3d 1266 (2009).....	6, 7
<i>State v. Gatewood</i> , 163 Wn.2d 534, 182 P.3d 426 (2008).....	7
<i>State v. Gibbons</i> , 118 Wn. 171, 203 P. 390 (1922).....	16
<i>State v. Gleason</i> , 70 Wn.App. 13, 851 P.2d 731 (1993)	9
<i>State v. Glover</i> , 116 Wn.2d 509, 806 P.2d 760 (1991).....	6
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996)	16
<i>State v. Huft</i> , 106 Wn.2d 206, 720 P.2d 838 (1986).....	12
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	6, 7, 16
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999)	6
<i>State v. McKinnon</i> , 88 Wn.2d 75, 558 P.2d 781 (1977)	12
<i>State v. Mendez</i> , 137 Wn.2d 208, 970 P.2d 722 (1999)	16
<i>State v. Neth</i> , 165 Wn.2d 177, 196 P.3d 658 (2008).....	12, 13
<i>State v. Olson</i> , 73 Wn.App. 348, 869 P.2d 110 (1994)	13
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	16

<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	12
<i>State v. Patton</i> , 167 Wn.2d 379, 219 P.3d 651 (2009).....	17
<i>State v. Schlieker</i> , 115 Wn.App. 264, 62 P.3d 520 (2003).....	17
<i>State v. Simpson</i> , 95 Wn.2d 170, 622 P.2d 1199 (1980)	15
<i>State v. Spotted Elk</i> , 109 Wn.App. 253, 34 P.3d 906 (2001)	18
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <i>cert.</i> <i>denied</i> , 523 U.S. 1008 (1998).....	12
<i>State v. Valdez</i> , 167 Wn.2d 761, 224 P.3d 751 (2009)	16, 17
<i>State v. Vickers</i> , 148 Wn.2d 91, 112, 59 P.3d 58 (2002)	12
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984).....	6
<i>State v. Young</i> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	13, 14

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Thomas' motion to suppress the pipe seized from him by police on October 29, 2008.¹

2. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering

Conclusion of Law 2, which stated:

The caller's information that an individual was standing over another individual and yelling and the description of the vehicle and events was sufficient to justify a limited contact of the 1995 Toyota Forerunner SUV that pulled out of the alley between 19th and 20th in Longview, pursuant to *Terry v. Ohio*.

3. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering

Conclusion of Law 3, which stated:

Evidence obtained from the search of the vehicle is properly suppressed under *Arizona v. Gant*, but the drugs found on defendant's person in the search incident to arrest are admissible.

4. The trial court erred in denying Mr. Thomas' motion to suppress the baggie of methamphetamine seized by police on

¹ This consolidated appeal stems from two cases. Cowlitz No. 08-1-01230-9 involved the stop and arrest of Mr. Thomas on October 29, 2008, and the warrantless seizure of a pipe from his person. Cowlitz No. 08-1-01209-I involved the arrest of Mr. Thomas on April 15, 2008, and seizure pursuant to a search warrant of a plastic baggie from a locked box located in his car.

October 15, 2008, from the locked box tucked under the wheel well of his car.²

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourth Amendment and article I, section 7 authorize the police to briefly detain an individual to investigate potential criminal activity where the police have reasonable suspicion that criminal activity is or has occurred. Here, the police stopped Mr. Thomas' car based upon a citizen informant's tip that one man was seen standing over another yelling and then left in Mr. Thomas' car. Did this information fail to rise to the level of reasonable suspicion, mandating suppression of the items seized from Mr. Thomas as a result of the stop and search?

2. Article I, section 7 bars police disturbances of a person's private affairs without authority of law. A dog sniff of the exterior of a car is a disturbance of a person's private affair which this state has carefully guarded. The search was without a warrant, thus without the authority of law. Did the dog sniff of the exterior of Mr. Thomas' car violate his article I, section 7 right to privacy requiring suppression of the fruits of that search?

² The trial court did not enter findings of fact and conclusions of law following the CrR 3.6 hearing as required by CrR 3.6(b).

C. STATEMENT OF THE CASE

1. The October 29, 2008, arrest of Mr. Thomas and seizure of residue. Geoffrey Aguirre called the Longview Police Department to report a man standing over another man shouting in the alley between 19th and 20th. CP 21. Mr. Aguirre told the 911 operator the man doing the yelling was associated with a gray SUV, which was parked in the middle of the alley. CP 22. Mr. Aguirre related to the police that the SUV began pulling out of the alley. CP 22.

Longview police saw a gray Toyota Forerunner pull out of the alley between 19th and 20th and stopped the SUV. CP 22. The officers discovered the driver, Harry Thomas III, was driving with a license that had been suspended in the third degree. CP 22. The officers arrested Mr. Thomas, searched him incident to the arrest, and seized a pipe with methamphetamine residue inside. CP 22.³

Mr. Thomas was charged with possession of methamphetamine and moved to suppress the pipe as the result of an unlawful detention and arrest. The trial court denied the motion, finding the stop and detention of Mr. Thomas to be supported by

³ The police also seized additional contraband inside the SUV in a search incident to arrest, which was suppressed pursuant to *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1719, 173 L.Ed.2d 485 (2009).

reasonable suspicion. CP 22-23. Mr. Thomas was found guilty as charged following a stipulated facts bench trial. CP 24-26.

2. The April 15, 2008, stop and search of Mr. Thomas' car.

On April 15, 2008, Washington State Patrol (WSP) Trooper Kenny Lutz stopped Mr. Thomas' car for speeding. CP 84. The trooper discovered Mr. Thomas was driving while his license was suspended in the third degree, arrested him, and placed him in the rear of the police car. CP 84.

Cowlitz County Sheriff's Deputy Jennifer Prusa provided assistance to Lutz. CP 85. Prusa was a K-9 handler whose dog was trained as a narcotics detection dog. CP 85. Prusa ran her dog around Mr. Thomas' car and the dog alerted on the driver's side front wheel well. CP 85. Lutz impounded Mr. Thomas' car while Prusa sought a search warrant. CP 85 (A copy of the search warrant and Prusa's affidavit are attached as Appendix A).⁴

The search of Mr. Thomas' car revealed a black box nestled in between the battery and fuse box. CP 85. Inside the box, the police discovered a plastic bag with a quantity of

⁴ The search warrant affidavit was referred to by the parties and considered by the trial court during the hearing on Mr. Thomas' CrR 3.6 motion. It was marked as an exhibit but not admitted.

methamphetamine. CP 85. Mr. Thomas was charged with possession of methamphetamine with intent to deliver. CP 87-88.⁵

Mr. Thomas moved to suppress the contraband seized pursuant to the search warrant on the grounds, among others, that the dog search of the exterior of his car which served as the basis for probable cause to support the warrant violated his right to privacy under Article I, section 7 of the Washington Constitution. CP 74-80. The trial court denied the motion. RP 119-20.

Following a jury trial, Mr. Thomas was convicted of the lesser included offense of possession of methamphetamine. CP 17.

D. ARGUMENT

1. THE POLICE LACKED REASONABLE SUSPICION TO STOP AND DETAIN MR. THOMAS AND THE SUBSEQUENT ARREST AND SEIZURE WERE ILLEGAL

a. A warrantless detention must be supported by articulable suspicion. The Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington Constitution protect against unlawful searches and seizures. Warrantless seizures are per se unreasonable, and the State bears the burden

⁵ Mr. Thomas was also charged with driving while license suspended in the third degree and possession of marijuana. CP 87-88. Prior to trial, Mr. Thomas pleaded guilty to those offenses. CP 36-44.

of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Doughty*, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010); *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). A brief investigatory seizure is an exception to the warrant requirement. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Doughty*, 170 Wn.2d at 61-62. A *Terry* stop requires a well-founded suspicion that the defendant engaged in criminal conduct. *Id.* at 21; *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). “[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21. A traffic stop is a seizure for purposes of constitutional analysis. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

A *Terry* stop must be reasonable. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). When reviewing the merits of an investigatory stop, the trial court must evaluate the totality of circumstances presented to the investigating officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991), *citing United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621

(1981). The State must show by clear and convincing evidence that the *Terry* stop was justified. *Garvin*, 166 Wn.2d at 250.

A *Terry* stop must be supported by articulable suspicion, which arises when “there is a substantial possibility that criminal activity has occurred or is about to occur.” *Kennedy*, 107 Wn.2d at 6. The officer's suspicion must be well-founded (i.e., based on specific and articulable facts that the individual has committed a crime) and reasonable. *Terry*, 392 U.S. at 21; *Kennedy*, 107 Wn.2d at 4-5. The *Terry* stop must be justified at its inception. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

The *Terry* stop threshold was created to stop police from interfering with people's everyday lives and to stop police from acting on mere hunches. “Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.” *Terry*, 392 U.S. at 22.

The question of whether an investigatory stop is constitutional is a question of law reviewed *de novo*. *State v. Bailey*, 154 Wn.App. 295, 299, 224 P.3d 852, *review denied*, 169 Wn.2d 1004 (2010).

b. The police officers lacked articulable suspicion to stop and detain Mr. Thomas. The sole basis for the stop and detention of Mr. Thomas was Mr. Aquirre's observation that one man was standing over another in an alley, yelling, and drove away in a car similar to Mr. Thomas'. Mr. Thomas submits this information alone was insufficient to support a reasonable suspicion to stop him.

Instructive on this issue are two recent decisions. In *State v. Doughty, supra*, the Supreme Court ruled the police lacked a reasonable suspicion for a *Terry* stop where the defendant approached a suspected drug house, stayed for two minutes, and then drove away. *Doughty*, 170 Wn.2d at 59. The defendant was subsequently stopped on suspicion of drug activity and found to be driving while his license was suspended in the third degree. A search of the car incident to arrest revealed methamphetamine. *Id.* The Supreme Court ruled the police lacked reasonable suspicion to stop Mr. Doughty's car:

Here, police never saw any of Doughty's interactions at the house. He may not have even interacted with anybody there. As far as Officer Bishop knew, maybe Doughty knocked and nobody answered. Maybe Doughty even had the wrong house. The two-minute length of time Doughty spent at the house - albeit a

suspected drug house - and the time of day do not justify the police's intrusion into his private affairs.

A more apt analogy rests with *State v. Gleason*, 70 Wn.App. 13, 851 P.2d 731 (1993). Based on the totality of the circumstances, the *Gleason* court held it improper to seize a person merely for exiting an apartment complex that had a history of drug sales. *Id.* at 18, 851 P.2d 731. The court reasoned that "this was the first time the defendant had been seen in the area, the officers did not know what occurred inside the apartment and neither officer saw him involved in the purchase of drugs. Further, there was no evidence Mr. Gleason was acting suspiciously, he was not carrying any unusual objects." *Id.* (citation omitted). That statement describes the events in Doughty's chronology almost exactly.

Doughty, 170 Wn.2d at 64-65.

Similarly, in *State v. Diluzio*, police watched as the driver of a car stopped and talked to a female pedestrian through the passenger window. 162 Wn.App. 585, 589, 254 P.3d 218 (2011). The officer stopped in the lane of traffic behind the car and watched as the woman got into the front passenger seat. There were no bus stops at the location, and the area was known for high levels of prostitution activity. The officer stopped the car suspecting that solicitation of prostitution was occurring. The driver was arrested on a warrant and the search of his car revealed methamphetamine. *Id.* Relying on the decision in *Doughty*, *supra*, the Court of Appeals ruled the officer lacked reasonable suspicion for the traffic stop:

The facts in Mr. Diluzio's case are similar to those in *Doughty* and provide even less justification for a stop. Here, as in *Doughty*, the investigatory stop was based on the officer's observation. The officer saw Mr. Diluzio having a conversation with a woman who got into the passenger side of his vehicle. There was no police informant and the police officer did not see any money change hands and did not overhear any conversations between the two individuals. Neither individual was known to have been involved in prostitution or solicitation activities. These incomplete observations do not provide the basis for a *Terry* stop.

Diluzio, 162 Wn.App. at 593.

Here the police had as little information as the police had in *Doughty* and *Diluzio* when they stopped Mr. Thomas. The sole basis for the stop was a citizen informant's tip that one man was standing over the other in an alley yelling, without more. The officers did not know what was being said and lacked any knowledge of how the men came to be in the alley. There was no indication of any criminal activity at all. At least in *Doughty* and *Diluzio*, the police were in an area of prior criminal activity, which still did not provide support for the stop. Here, there was no information that the area where the two men were seen was an area of criminal activity. Following *Doughty* and *Diluzio*, the officers lacked reasonable suspicion to stop Mr. Thomas.

c. The pipe and the residue inside must be suppressed as the result of an unlawful detention and arrest. If a *Terry* stop is unlawful, the fruits obtained as a result must be suppressed. *Doughty*, 170 Wn.2d at 63-65. "The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002).

The Longview Police officers lacked reasonable suspicion to stop Mr. Thomas. As a result, the fruits of the stop, primarily the residue in the pipe, must be suppressed.

2. THE SEARCH WARRANT LACKED PROBABLE CAUSE BECAUSE IT WAS BASED UPON AN UNLAWFUL K-9 SNIFF OF THE EXTERIOR OF MR. THOMAS' VEHICLE AFTER HIS ARREST WHICH VIOLATED ART. I, SEC. 7

a. A search warrant must be supported by probable cause. The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution protect individuals from unreasonable searches and seizures. Government agents must therefore have a search warrant issued upon probable cause unless some other condition justifies a warrantless search.

Coolidge v. New Hampshire, 403 U.S. 443, 454–55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *State v. McKinnon*, 88 Wn.2d 75, 79, 558 P.2d 781 (1977).

The warrant clause of the Fourth Amendment to the United States Constitution and article I, section 7 of our state constitution require that a trial court issue a search warrant only upon a determination of probable cause. *State v. Vickers*, 148 Wn.2d 91, 108, 112, 59 P.3d 58 (2002). Probable cause to issue a warrant is established if the supporting affidavit sets forth facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity. *State v. Huft*, 106 Wn.2d 206, 209, 720 P.2d 838 (1986). The affidavit must be tested in a commonsense fashion rather than hypertechnically. *State v. Stenson*, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998); *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977). The existence of probable cause is a legal question which a reviewing court considers *de novo*. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007). Review is limited to the four corners of the affidavit, however. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). “[T]he information [the court] may consider is the information that was available to the issuing

magistrate.” *State v. Olson*, 73 Wn.App. 348, 354, 869 P.2d 110 (1994).

b. The warrant lacked probable cause because it was based solely on the illegal dog sniff of Mr. Thomas’ car. 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), the Washington Supreme Court has not addressed whether a dog sniff constitutes a search under article I, section 7 of the Washington Constitution. See *Neth*, 165 Wn.2d at 181 (the Court originally granted review to determine the issue of whether a dog sniff is a search but since the trial court ruled that the magistrate should not have issued the warrant based on the dog sniff because of inadequate foundation that the dog was reliable, the Court decided the search aspect of the dog sniff was not properly before it).

However, the Supreme Court has indicated a dog sniff may violate article I, section 7. See *State v. Young*, 123 Wn.2d 173, 188, 867 P.2d 593 (1994) (ruling that the use of a thermal detection device outside a home constituted a search in violation of art. I, sec. 7 while rejecting State’s argument that a thermal imaging

detection device is similar to dog sniff). Subsequently, in *State v. Dearman*, relying on *Young*, Division One of this Court determined that a dog sniff of the outside of a house constituted a search which violated art. I, sec. 7:

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.’”

The record is clear that officers could not detect the smell of marijuana using only their own sense of smell even when they attempted to do so from the vantage pointed as Corky. As in *Young*, police could not have obtained the same information without going inside the garage. It is true that a trained narcotics dog is less intrusive than an infrared thermal detection Device. But the 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.”

92 Wn.App. 630, 635, 962 P.2d 850 (1998), (internal citations omitted), *review denied*, 137 Wn.2d 1032 (1999).

Division One of this Court in a decision preceding *Dearman*, held that a canine sniff of the outside of a safety deposit box was not a search and did not violate art. I sec. 7 because the defendant did not have an expectation of privacy in the safety deposit box. *State v. Boyce*, 44 Wn.App. 724, 730, 723 P.2d 28 (1986). But that

decision is flawed to the extent it focuses on a “reasonable expectation of privacy.”

The Washington Supreme 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). The issue is not one of whether the person has a reasonable expectation of privacy but whether the privacy is one the person is entitled to hold. *See City of Seattle v. McCreedy*, 123 Wn.2d 260, 270, 868 P.2d 134 (1994) (“The assessment of whether a cognizable privacy interest exists under Const. art. I, § 7 is thus not merely an inquiry into a person's subjective expectation of privacy but is rather an examination of whether the expectation is one which a citizen of this state should be entitled to hold.”).

The question then in *Boyce* was not as framed by this Court, but whether privacy in a safety deposit box was one the defendant was entitled to hold. Framing the issue thusly, it can be persuasively argued that privacy in a safety deposit box is one a

person should be allowed to hold. The issue was not about the air outside the box that the dog sniffed no more than it was about the air outside the house the dog sniffed in *Dearman*.

As a consequence, the question is not whether Mr. Thomas had a reasonable expectation of privacy in the wheel well of his car, but whether his privacy in his car is one in which he is entitled to hold, especially in light of the fact he was handcuffed and seated in the rear of the police car. The Supreme Court has long held that the right to be free from unreasonable governmental intrusion into one's "private affairs" encompasses automobiles and their contents. See, e.g., *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009); *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. Hendrickson*, 129 Wn.2d 61, 69 n. 1, 917 P.2d 563 (1996) (citing cases); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456–57, 755 P.2d 775 (1988) (citing cases); *Kennedy*, 107 Wn.2d at 4-5; *State v. Gibbons*, 118 Wn. 171, 187-88, 203 P. 390 (1922).

Further, the Supreme Court has held that a person's private affairs are disturbed without authority of law when the police conduct a warrantless search of a car where the defendant has been arrested, handcuffed, and placed in the police car so that he

is no longer a danger to the police. *Valdez*, 167 Wn.2d at 778; *State v. Patton*, 167 Wn.2d 379, 395-96, 219 P.3d 651 (2009). In light of these decisions, Mr. Thomas' private affairs in his car were disturbed. Since the police did not have a search warrant prior to the dog sniff, the police lacked lawful authority to conduct the search. *Valdez*, 167 Wn.2d at 778. Further, since a person's private affairs include one's car, the dog sniff of the exterior of Mr. Thomas' car intruded on his private affairs, and was without authority of law since Mr. Thomas was handcuffed and in the rear of the police car, no longer posing a danger to the police.

c. Since the warrant lacked probable cause, the methamphetamine must be suppressed. Where the probable cause supporting the warrant used relied on tainted evidence, the search is illegal. *State v. Schlieker*, 115 Wn.App. 264, 266-67, 62 P.3d 520 (2003). Evidence that is obtained from an illegal search and seizure is subject to suppression under the exclusionary rule. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005). Under the exclusionary rule, evidence must be suppressed unless the relationship between the illegal search and seizure and the evidence obtained is sufficiently attenuated so as to dissipate the

taint. *Wong Sun*, 371 U.S. at 491; *State v. Spotted Elk*, 109 Wn.App. 253, 262, 34 P.3d 906 (2001).

The sole basis for the probable cause to support the warrant was the result of the dog search. Since that search violated article I, section 7, the warrant is without probable cause and the contraband seized pursuant to it must be suppressed.

E. CONCLUSION

For the reasons stated, Mr. Thomas requests this Court reverse the denial of his motions to suppress and reverse his convictions.

DATED 10th day of November 2011.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Tom Kummerow', is written over a horizontal line.

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 42259-0-II
v.)	
)	
HARRY THOMAS III,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF NOVEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

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Case Name: STATE V. HARRY THOMAS III

Court of Appeals Case Number: 42259-0

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

 Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

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