

No. 42259-0-II
Cowlitz Co. Cause Nos. 08-1-00-1230-9, 08-1-01209-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

HARRY LEE THOMAS III,

Appellant.

BRIEF OF RESPONDENT

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I. ANSWERS TO ASSIGNMENT OF ERROR

1. The trial court properly denied the defense motion to exclude the pipe found on the appellant's person during a lawful search incident to arrest on October 29th, 2008.
2. The trial court properly found that based on the facts before it there was sufficient evidence to support a limited investigative detention pursuant to *Terry v. Ohio* on October 29th, 2008.
3. The trial court properly found that the drugs found on the appellant's person during a search incident to arrest were admissible
4. The trial court properly denied the defense motion to suppress the drugs found in a locked storage box tucked under the wheel well of a vehicle during the execution of a lawful search warrant.

II. STATEMENT OF THE CASE

The Respondent generally accepts the appellant's recitation of the facts.

III. ARGUMENT

A. THERE WAS A REASONABLE ARTICULABLE SUSPICION TO JUSTIFY THE BRIEF INVESTIGATIVE DETENTION OF THE APPELLANT ON 10/29/2008

The stop was a valid under *Terry v. Ohio* and the evidence found pursuant to the stop should not be suppressed. In Washington "if a seizure is a *Terry* stop, it need not be supported by probable cause to believe that a crime has been committed, but it must be supported by 'specific and articulable facts which taken together with

rational inferences from those facts, reasonably warrant that intrusion.” *State v. Lund*, 70 Wn. App. 437, 445, 853 P. 2d 1379 (1993), citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (other citations omitted). The level of articulable suspicion necessary to justify a *Terry* stop is “a substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). There were sufficient specific and articulable facts to justify the stop in this case.

The named informant saw a man standing over another man yelling, associated that man with a gray SUV, and then told police that the SUV was leaving and that they could no longer see the man on the ground. The police saw evidence that corroborated the named informant’s statements when they saw a grey SUV emerge from the alley where the informant said the altercation took place. Based on the statements by the informant, police would rightly be concerned about the safety of the individual on the ground with another man standing over him yelling in an alley. This behavior was apparently raucous enough to warrant a bystander calling 911 to report it. Based on these facts, there was a reasonable and articulable suspicion that a kidnapping, assault, harassment, or other crime had been committed.

The facts of this case stand in stark contrast to the two principle cases cited by the appellant, *Diluzio* and *Doughty*. Both of those cases involve simple police observation of activity by

individuals, without seeing any specific facts that indicated a crime was afoot. In the case of *Doughty*, officers watched the suspect go to the suspected drug house for a few minutes, then leave. *State v. Doughty*, 170 Wn.2d 57, 59, 239 P.3d 573 (2010). There was nothing in the record to show the individual had any interaction with anyone at the house. *Id.*, 239 P.3d 573. In fact, the court contemplates the possibility that the suspect simply stood at the door and that nobody even answered. *Id.* at 64-65, 239 P.3d 573. Similarly, in *Diluzio*, police simply observed a woman talk to a man in a car, then get into the car. 162 Wn.App. 585, 593, 254 P.3d 218 (2011). These facts stand in stark contrast to the possible emergent situation the officers responded to in this case.

Officers responded to a named citizen informant who called 911 because of one man standing over another while yelling in an alleyway. This apparently caused the 911 caller concern and the State contends that most reasonable people would hope that police would investigate such a situation. The officer's brief investigative detention based on this information was justified. Because the detention was justified, the subsequent arrest and search incident to arrest of the appellant was lawful and the trial court's denial of the appellant's suppression motion should be affirmed.

B. THE SEARCH WARRANT WAS BASED ON A VALID CANINE SNIFF OF THE EXTERIOR OF A VEHICLE PARKED IN A PUBLIC LOCATION

The search warrant in this case was lawful and based in probable cause. The search warrant relied on a canine sniff of the appellant's vehicle. The canine sniff at issue in this case was not a search. Washington caselaw is clear on this question. "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." *State v. Boyce*, 44 Wn.App. 724, 730, 723 P.2d 28 (1986). This remains the rule today, specifically as applied to vehicles. The sniff was conducted in an area where officers were lawfully present, outside the vehicle where there would be no expectation of privacy, and the search was minimally intrusive. No search occurred in this case.

A vehicle is not like a private residence for the purpose of Article I, Section 7 of the Washington Constitution. The appellant relies on *State v. Dearman* and *State v. Young* to suggest that because a dog was like a sense-enhancing device when used to sniff a private residence, any canine sniff of a vehicle is also a search because a vehicle receives the same constitutional protection as a private residence. This is simply not the case, as vehicles historically have not received the same level of protection as a private residence.

In both *Young* and *Dearman*, the court focused on the fact that the thermal imager observation/canine sniff involved a private residence. As the *Dearman* court noted, "the home receives

heightened constitutional protection and is treated as a highly private place which can be 'invaded' even though there is no physical entrance to the house. 92 Wn. App. 630, 635, 962 P.2d 850 (1998) citing *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). They continue by quoting the *Young* court which noted that "the closer officers come to intrusion into a dwelling, the greater the constitutional protection." *Id.*, citing *Young*, quoting *State v. Chrisman*, 100 Wn.2d 814, 820, 676 P.2d 419 (1984). Most importantly, the *Dearman* court recognized that "the result in this case might be different had the garage been at some distance from the house...here we afford it to the same level of protection because it was right next to the home." *Id.* The *Dearman* court also recognized other cases where canine sniffs were not considered searches and did not involve private residences. *Id.* at 637, 723 P.2d 28.

A vehicle does not enjoy the same constitutional protections as a residence. This has been recognized over and over in Washington State jurisprudence. The Supreme Court found as much when it noted that "vehicles traveling on public highways are subject to broad regulations not applicable to fixed residences." *State v. Johnson*, 128 Wn.2d 431, 449, 909 P.2d 293 (1996). Indeed, the vehicle in *Johnson* was a tractor trailer and court found that the defendant did not have the "same heightened privacy protection in the sleeper that he would have in a fixed residence or home." *Id.* A few years later, the

Supreme Court again recognized that a vehicle does not have the same heightened privacy protection as a private residence in *State v. Vrieling*, where it explicitly extended *Johnson* to cover motor homes and “all vehicles” and reiterated that because such vehicles travel highways and are heavily regulated “privacy interests are thus not as great as in a fixed residence.” 144 Wn.2d 489, 495, 28 P.3d 762 (2001).

No Washington case has ever extended the heightened constitutional protections of a private residence to a vehicle. Indeed, even when the vehicle acts as a pseudo-residence like a tractor trailer with a sleeper compartment, or an actual residence like a motorhome, they are not given the heightened privacy protections extended to private residences. Looking specifically at the appellant’s principle case, *Dearman*, the court in that case recognized that the only reason the location sniffed (a garage) was subject to heightened protections was because it was next to the house and that if the garage were detached, the outcome could have been different.

The canine sniff was not a search and thus was not subject to the warrant requirement. Appellant’s reliance on broad invocations of protections under Article I, Section 7 of the Washington Constitution and caselaw established under *Valdez* does not answer the fundamental question of whether or not a canine sniff is a search. It is not. Because the canine sniff was lawful and established probable

cause for the search of the vehicle, as determined by the magistrate that reviewed the search warrant, the search of the vehicle was lawfully authorized by warrant and the trial court's ruling should be affirmed.

IV. CONCLUSION

The trial court appropriately denied the appellant's motion to suppress. The appellant was seen standing and shouting over another man, who was on the ground in an alley. An identified concerned citizen called in the activity, described the conduct, and the police responded and conducted a limited detention. This detention was a lawful and appropriate detention under *Terry v. Ohio* and the trial court's decision should be affirmed.

The canine sniff was not a search and thus was not subject to the warrant requirement. Because the canine sniff was lawful, the search warrant issued based on that dog sniff was also lawfully issued and this court should not invalidate that warrant.

Respectfully submitted this February 5th, 2012.

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APPENDIX

WASHINGTON STATE CONSTITUTION ARTICLE I, SECTION 7

INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

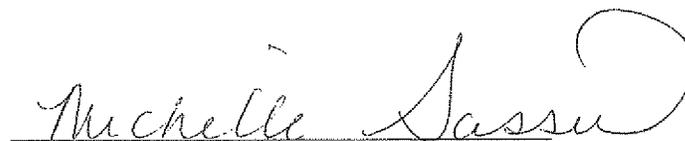
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on February 16th, 2012.


Michelle Sasser

COWLITZ COUNTY PROSECUTOR

February 06, 2012 - 1:36 PM

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