FILED
Court of Appeals
Division II
State of Washington
7/13/2018 4:05 PM

No. 50864-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHAWN FITZPATRICK,

Appellant.

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

REPLY BRIEF OF APPELLANT

TIFFINIE B. MA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 4

1. The warrantless search of Mr. Fitzpatrick's car by a drug-detection canine violated his right to privacy under article I, section 7, and the State's position is contrary to Supreme Court case law. 4

   a. *The State improperly relies on a Fourth Amendment "reasonableness" analysis, which is inapplicable under article I, section 7.* 4

   b. *Absent the dog's alert, the State lacked probable cause to support the warrant, and this Court should reverse and remand with instructions to suppress the evidence and dismiss the charge.* 6

2. The State failed to prove the canine could reliably detect the odor of controlled substances. 7

   a. *The State does not dispute that article I, section 7 is more protective in the context of canine "informants."* 7

3. The court's finding that airflow could occur between the passenger compartment and the trunk is not supported by substantial evidence; the error is not harmless. 10

F. CONCLUSION 11

TABLE OF AUTHORITIES

UNITED STATE SUPREME COURT CASES

Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) 7

Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969) 7

WASHINGTON SUPREME COURT CASES

State v. Gatewood, 163 Wn.2d 534, 182 P.3d 426 (2008) 7

State v. Jackson, 102 Wn.2d 432, 435, 688 P.2d 136 (1984) 7, 9

State v. Neth, 165 Wn.2d 177, 196 P.3d 658 (2008) 6

State v. Surge, 160 Wn.2d 65, 156 P.3d 208 (2007) 5

State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994) 5

WASHINGTON COURT OF APPEALS CASES

State v. Boyce, 44 Wn. App. 724, 723 P.2d 28 (1986) 5

State v. Dearman, 92 Wn. App. 630, 962 P.2d 850 (1998) 4

State v. Flores-Moreno, 72 Wn. App. 733, 866 P.2d 648 (1994) 9

State v. Gross, 57 Wn. App. 549, 789 P.2d 582 (1990) 8, 9

State v. Hartzell, 156 Wn. App. 918, 237 P.3d 928 (2010) 4, 6

State v. Jackson, 82 Wn. App. 594, 606, 918 P.2d 945 (1996) 9

State v. Stanphill, 53 Wn. App. 623, 769 P.2d 861 (1989) 8

DECISIONS OF OTHER JURISDICTIONS

United States v. Caceres-Olla, 738 F.3d 1051 (9th Cir. 2013) 7

CONSTITUTIONAL PROVISIONS

Const. Art. I, § 7 ..... passim

A. <u>ARGUMENT IN REPLY</u>

1. The warrantless search of Mr. Fitzpatrick's car by a drug-detection canine violated his right to privacy under article I, section 7, and the State's position is contrary to Supreme Court case law.

a. The State improperly relies on a Fourth Amendment "reasonableness" analysis, which is inapplicable under article I, section 7.

In the opening brief, Mr. Fitzpatrick implored this Court to part ways with Division One's decision in *State v. Hartzell* in light of numerous Supreme Court cases, as well as the holding in *Dearman* prohibiting the warrantless application of a canine to a person's home. Br. of Appellant at 15-18 (discussing *State v. Hartzell*, 156 Wn. App. 918, 928-30, 237 P.3d 928 (2010); *State v. Dearman*, 92 Wn. App. 630, 631, 962 P.2d 850 (1998)).

The State fails to acknowledge *Dearman*, nor does it recognize the greater protections afforded by article I, section 7 to the vehicle context. Instead, the State cites cases upholding warrantless canine sniffs where courts engaged in a Fourth Amendment "reasonableness" analysis instead of an article I, section 7 "private affairs" analysis. Br. of Respondent at 5-7. As discussed in appellant's brief, article I, section 7 does not depend on a "reasonable expectation of privacy" rationale.

Br. of Appellant at 15-17. Accordingly, the State's reliance on this analysis is unpersuasive.

The State cites *State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986), for the proposition that "[w]hen a canine sniffs an object from an area where the suspect does not have a reasonable expectation of privacy, and the sniff itself is minimally intrusive, no search has occurred." Br. of Respondent at 6. The State's own wording reveals the problem with the Court's reasoning in *Boyce*. Despite holding the sniff of a safety deposit box did not violate article I, section 7, the Court in *Boyce* justified its holding using a "reasonable expectation of privacy" analysis. *Boyce*, 44 Wn. App. at 730. Later cases have clearly established "private affairs are not determined according to a person's subjective expectation of privacy." *State v. Surge*, 160 Wn.2d 65, 72, 156 P.3d 208 (2007); *see also State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). Even if *Boyce's* rationale applied, it is distinguishable. The *Boyce* court explicitly found no search occurred in part because *no seizure* of the safety deposit box occurred, whereas Mr. Fitzpatrick's car was clearly seized upon being pulled over. *Boyce*, 44 Wn. App. at 730.

The State also relies on *State v. Hartzell*, 156 Wn. App. 918, 237 P.3d 928 (2010), arguing "When Division I discussed a 'reasonable expectation of privacy,' it was specifically determining whether a search had occurred pursuant to Article I, section 7's prohibition against unreasonable intrusions into a person's private affairs." Br. of Respondent at 7. Essentially, the State's argument is that *Hartzell* was properly decided because Division One asserted it was conducting an article I, section 7 analysis, even though the court clearly engaged in a Fourth Amendment analysis using a Fourth Amendment standard. Merely calling a Fourth Amendment analysis an article I, section 7 analysis does not make it so, and this Court should reject this argument.

Mr. Fitzpatrick asks this Court to hold that under article I, section 7, a drug-detection canine's sniff of a car requires a warrant.

b. Absent the dog's alert, the State lacked probable cause to support the warrant, and this Court should reverse and remand with instructions to suppress the evidence and dismiss the charge.

As explained in the opening brief, after excising the unconstitutional dog alert from the warrant application, the remaining information is insufficient to support the search warrant. Br. of Appellant at 18-20 (citing *State v. Neth*, 165 Wn.2d 177, 179, 196 P.3d 658 (2008)). The State does not respond to this argument. The omission

should be considered a concession that the remaining evidence does not rise to the level of probable cause. *See United States v. Caceres-Olla*, 738 F.3d 1051, 1054 n. 1 (9th Cir. 2013). Accordingly, this Court should reverse the convictions and remand with instructions to suppress the evidence and dismiss the charges with prejudice. *See State v. Gatewood*, 163 Wn.2d 534, 542, 182 P.3d 426 (2008).

2. The State failed to prove the canine could reliably detect the odor of controlled substances.

Even if this Court determines a dog sniff is not a search within the meaning of article I, sections 7, it should nonetheless reverse because the State provided no measure of the canine's reliability.

a. The State does not dispute that article I, section 7 is more protective in the context of canine "informants."

As discussed in the opening brief, our Supreme Court adheres to the two-pronged "*Aguilar-Spinelli*"[1] test to determine whether an informant's tip can support probable cause. *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984). The State does not dispute this point; rather, it argues that it did, in fact, prove that its dog could

[1] See *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

reliably detect controlled substances. Br. of Respondent at 8-9. The State is wrong.

Here, the State presented evidence in its search warrant application that the canine was trained and certified in 2016 and 2017. No additional information about the dog's performance, in training or in the field, was provided to the magistrate. The affidavit fails to explain what is required for certification and does not include the dog's track record in training or in the field. In fact, the affidavit fails to indicate whether this particular dog has *ever* been used in the field to detect narcotics. Without this information, the evidence included in the affidavit was insufficient to show the canine's reliability.

The State relies on *State v. Stanphill*, 53 Wn. App. 623, 632, 769 P.2d 861 (1989) and *State v. Gross*, 57 Wn. App. 549, 551-52, 789 P.2d 582 (1990) to argue that proof of a canine's training and certification is sufficient to prove its reliability. The State neglects to mention the courts in both *Stanphill* and *Gross* considered the canines' *actual* experience in the field in determining their reliability. *Stanphill*, 53 Wn. App. at 632 (canine's reliability "established by its extensive training, certification, and *past experience*") (emphasis added); *Gross*,

57 Wn. App. at 552 (canine "utilized in cases to detect narcotics *on other occasions*") (internal quotations omitted) (emphasis added).

An informant's track record is important for determining whether the informant is reliable or credible. *Jackson*, 102 Wn.2d at 437. In Washington, a dog sniff has been sufficient to establish probable cause where the dog's track record was specifically included in the affidavit submitted to obtain a search warrant. *See, e.g., State v. Jackson*, 82 Wn. App. 594, 606, 918 P.2d 945 (1996) ("dog's training and track record . . . were subsequently shown in the affidavit" (emphasis added)); *State v. Flores-Moreno*, 72 Wn. App. 733, 741, 866 P.2d 648 (1994) (affidavit stated canine had participated in 97 searches in which narcotics were found).

Here, the government presented no information about the canine's track record of false positives or false negatives. More concerning still, the affidavit failed to even state whether this particular animal had ever performed in the field at all. Without this information, there is insufficient evidence the canine is reliable, and its alert should not have been considered for the probable cause determination. This failure provides independent grounds for reversal and remand for suppression of the evidence and dismissal of the charges.

3. The court's finding that airflow could occur between the passenger compartment and the trunk is not supported by substantial evidence; the error is not harmless.

As discussed in the opening brief, no evidence in the record supports the court's finding that "There can be air transfer between the trunk of a car and the passenger compartment; something that is odiferous in the trunk could cause the passenger compartment to smell badly as well." Findings of Fact 9; CP 80; Br. of Appellant at 24-25. The State does not dispute this. Instead, it argues any resulting error is harmless because the remaining findings establish probable cause for the search warrant. Br. of Respondent at 10. The State is wrong.

In this case, the canine investigated the trunk of Mr. Fitzpatrick's car three times *without* signaling the presence of drugs. Instead, the canine alerted at the driver's side window for the passenger compartment, where no drugs were found. Without a finding that air carrying the odor of drugs from the trunk to the passenger compartment, the dog alert alone was only sufficient to establish probable cause to search the passenger compartment. The State claims once there is probable cause to believe a car contains contraband, a search of any part of the vehicle, including the trunk and locked containers, is appropriate. Br. of Respondent at 10-11. However, the

State only cites cases employing a Fourth Amendment analysis and offers no Washington case law supporting this proposition.

Here, Mr. Fitzpatrick asserts both that the canine was not proven reliable and the court erroneously found air could move between the trunk and the passenger compartment. Thus, when the dog's alert is excised from the search warrant affidavit, in conjunction with the erroneous finding of fact regarding airflow, the search warrant affidavit is insufficient to establish probable cause to search Mr. Fitzpatrick's car. Therefore, the error in the court's Findings of Fact is not harmless, and this Court should find the remaining information in the affidavit is insufficient to support probable cause.

F. CONCLUSION

For the foregoing reasons, this Court should reverse Mr. Fitzpatrick's conviction and remand with instructions to suppress the evidence and dismiss the charge.

DATED this 13th day of July 2018.

Respectfully submitted,

/s Tiffinie B. Ma

Tiffinie B. Ma – WSBA #51420
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 50864-8-II
v.	)	
	)	
SHAWN FITZPATRICK,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF JULY, 2018, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] RYAN JURVAKAINEN [appeals@co.cowlitz.wa.us] COWLITZ COUNTY PROSECUTING ATTORNEY 312 SW 1ST AVE KELSO, WA 98626-1739	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X] SHAWN FITZPATRICK (NO CURRENT ADDRESS ON FILE) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	( ) ( ) (X)	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF JULY, 2018.

X_____

Washington Appellate Project
1511 Third Avenue
Suite 610
Seattle, Washington 98101
Phone (206) 587-2711

WASHINGTON APPELLATE PROJECT

July 13, 2018 - 4:05 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50864-8
Appellate Court Case Title:	State of Washington, Respondent v. Shawn J. Fitzpatrick, Appellant
Superior Court Case Number:	17-1-00816-5

The following documents have been uploaded:

- 508648_Briefs_20180713160453D2448883_9509.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was washapp.071318-02.pdf

A copy of the uploaded files will be sent to:

- Jurvakainen.ryan@co.cowlitz.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Tiffinie Bie Ha Ma - Email: tiffinie@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180713160453D2448883