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NO. 50864-8-II

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

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SHAWN FITZPATRICK,

Appellant.

RESPONDENT'S BRIEF

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not err in denying Fitzpatrick's motion to suppress because the canine sniff of his vehicle was not a search subject to constitutional protection, and the canine in question was reliable.
2. Any error in the trial court's findings of fact is harmless.

II. STATEMENT OF FACTS

On June 27, 2017, at around 4 a.m., Trooper Kyle Lindemann stopped Shawn Fitzpatrick for speeding on Interstate Five. RP 178. Fitzpatrick informed Trooper Lindemann that his driver's license was suspended, and Lindemann ultimately placed him under arrest for driving with a suspended license. RP 179. While the trooper was speaking with Fitzpatrick, he also noticed that both the front seat passenger and backseat passenger appeared nervous. RP 184, CP 10. They were looking around repeatedly and were unable to sit still. CP 10. Fitzpatrick informed the trooper that they were going to Vancouver to see his mother and to drop off the car they were driving and pick up a different car. *Id.* Fitzpatrick stated the car was not his and gave Trooper Lindemann the name and phone number of the owner. RP 186. Officers attempted to contact that person but were unable to reach him. RP 187. Lindemann thought

Fitzpatrick's responses were vague and suspicious, and he also knew that Fitzpatrick had a DOC warrant on an original charge of unlawful possession of a controlled substance, so he called for back-up. RP 179, CP 11. Officer Kelley of the Woodland Police Department arrived a short time later. RP 179. Officer Kelley is a Drug Recognition Expert, or DRE. CP 11, RP 193.

Officer Kelley spoke to Dustin German, the front seat passenger, when he arrived. German gave Officer Kelley a number of different explanations of where they were going; he initially stated they were going to Vancouver but later stated they were going to Newport, Oregon. CP 11. During their conversation, Officer Kelley noticed that German was unable to stand still and his eyes were very droopy. *Id.* This was consistent with a person who is coming down from a stimulant drug. A short time later, Officer Kelley was informed that German had a DOC warrant on an original charge of unlawful possession of a controlled substance, and he was arrested. *Id.* The backseat passenger was allowed to walk away from the scene. CP 11, RP 179.

Officer Kelley also spoke to Fitzpatrick; Fitzpatrick told him that the vehicle belonged to a friend. RP 196. This was later discovered to be untrue; the Department of Licensing records indicated a record of sale on June 24, 2017, which transferred ownership of the vehicle to Fitzpatrick.

RP 159–60. Trooper Lindemann then transported Fitzpatrick to jail and Officer Kelley requested a K9 unit come to the scene. RP 197, CP 12.

Deputy Ness Aguilar arrived with his canine, Kelo. His affidavit, which was included in Officer Kelley’s affidavit in support of the search warrant, states that he and K9 Kelo are certified in both Washington and Oregon in accordance with WAC 139-05-915 and Oregon Revised Statute 167.310(7). CP 12. Deputy Aguilar explained the 200 hours of training that he and K9 Kelo went through to obtain certification, which includes detection of controlled substances, vehicle searching, and testing aptitude. *Id.* K9 Kelo is trained to detect the odor of controlled substances, specifically cocaine, heroin, and methamphetamine. *Id.* at 13. Deputy Aguilar’s affidavit also states that he and K9 Kelo continue to train for at least four hours per week; this training includes controlled negatives, varied quantities and types of narcotics, and novel odors. *Id.* Finally, Deputy Aguilar’s affidavit explains K9 Kelo’s response when the odor of controlled substances is detected.

When Deputy Aguilar and K9 Kelo arrived at the scene on June 27, they began their investigation of the car at the front, near the license plate. CP 13. K9 Kelo started sniffing the vehicle in a counter-clockwise direction, and showed an extreme change in behavior near the open driver’s side window. He indicated the odor of controlled substances by

sitting. *Id.* at 14. He continued around the vehicle, showing a change in behavior at the rear, trunk area of the car by sniffing intently. K9 Kelo ultimately sniffed around the vehicle three times, indicating the odor of controlled substances was present by sitting near the driver's side window each time. *Id.*

Officer Kelley utilized this information, as well as the group's differing responses about their travel plans and Fitzpatrick's history of drug crimes, to request and ultimately receive a signed search warrant for the vehicle. Upon searching it, he found a black box that contained a substantial amount of methamphetamine, a scale, and two used methamphetamine pipes. RP 204–5. Fitzpatrick was charged with one count of possession with intent to deliver. CP 3.

Prior to trial, Fitzpatrick moved to suppress the evidence stemming from the search warrant, arguing that the search exceeded the scope of the warrant. CP 19. He argued that K9 Kelo detected the odor of controlled substances near the driver's door, not the trunk area, so the search of the trunk was outside the scope of the warrant. *Id.* The trial court disagreed, holding that the passenger compartment of a vehicle and the trunk are connected, separated only by seats, so the search warrant to search the entire vehicle was not overbroad. RP 15.

After trial, Fitzpatrick was acquitted of possession with intent to deliver but convicted of simple possession. CP 53–4. He now timely appeals his conviction.

III. ARGUMENT

A. The use of K9 Kelo on Fitzpatrick’s car was not a search subject to constitutional protection.

Both the United States Constitution and the Washington Constitution protect against unreasonable searches and seizures. Article I, section 7 of the Washington Constitution states that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. A search under the Washington Constitution occurs “when the government disturbs those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespasses absent a warrant.” *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). If no search occurs, Article I, Section Seven is not implicated. *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994).

A search does not occur when a law enforcement officer detects something using his senses from a nonintrusive vantage point. *State v. Hartzell*, 156 Wn. App. 918, 929, 237 P.3d 928 (2010), citing *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). A particularly intrusive

method of observing might constitute a search under Washington law. *State v. Myers*, 117 Wn.2d 332, 345, 815 P.2d 761 (1991). When 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. *State v. Boyce*, 44 Wn. App. 724, 730, 723 P.2d 28 (1986) (K9 sniff of the defendant's safety deposit box was not a search because the sniff occurred from an area where the defendant does not have a reasonable expectation of privacy and was minimally intrusive); *Hartzell*, 156 Wn. App. at 929-30 (dog sniff from a lawful vantage point outside of the defendant's vehicle that was minimally intrusive is not a search); *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 838 (2005) (no legitimate privacy interest is implicated by allowing a drug detection dog to sniff the exterior of a vehicle during a lawful traffic stop). Therefore, this Court must determine whether there is a reasonable expectation of privacy in the air outside a car window, and whether Kelo's sniff of Fitzpatrick's vehicle was minimally intrusive.

First, case law is clear that there is no reasonable expectation of privacy in the air outside a car window. *Hartzell*, 156 Wn. App. at 929–30. Second, the canine sniff in this case was minimally intrusive. Fitzpatrick's vehicle was stopped on a public roadway in Woodland, Washington. CP 13. Fitzpatrick had already been placed under arrest and

was not in his vehicle when Kelo sniffed it. RP 195. When Kelo and Deputy Aguilar walked around the vehicle, they were in a nonintrusive vantage point because they were outside the vehicle. Additionally, there is no indication that Kelo touched the vehicle, and the sniff was minimally intrusive because it was done only on the exterior of the vehicle and could only reveal the presence or absence of controlled substances. The sniff revealed nothing of Fitzpatrick's private affairs. *See State v. Dearman*, 92 Wn. App. 630, 634, 962 P.2d 850 (1998).

Fitzpatrick argues that Division I engaged in an improper Fourth Amendment analysis when deciding *Hartzell*, instead of an Article I, Section 7 analysis. This is simply incorrect. In both *Boyce* and *Hartzell*, the Courts examined the nature of the intrusion into each defendant's private affairs that was occasioned by the canine sniff. *Boyce*, 44 Wn. App. at 729; *Hartzell*, 156 Wn. App. at 930. 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. *See Young*, 123 Wn.2d at 181. There was no unreasonable intrusion into Fitzpatrick's private affairs when Kelo walked around his car and sniffed for controlled substances. Therefore, the canine sniff of Fitzpatrick's vehicle did not constitute a search subject to constitutional protection.

B. The trial court did not abuse its discretion when it found that K9 Kelo was reliable and that there was probable cause for the search warrant to issue.

Fitzpatrick argues that the affidavit in support of the search warrant did not establish probable cause because the affidavit did not detail K9 Kelo's record of false positives. This argument fails. The issuance of a search warrant is reviewed only for abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Generally, "an alert from a trained drug dog is sufficient to establish probable cause for the presence of a controlled substance." *State v. Jackson*, 82 Wn. App. 594, 606, 918 P.2d 945 (1996); *State v. Stanphill*, 53 Wn. App. 623, 632, 769 P.2d 861 (1989) (a canine can be found reliable based on a statement that the dog is trained and certified; a showing of the dog's track record is not required); *see also United States v Klein*, 626 F.2d 22, 27 (7th Cir. 1980); *United States v. Venema*, 563 F.2d 1003, 1007 (10th Cir. 1976) (holding that a statement that the drug dog in question was a "trained, certified marijuana sniffing dog" was sufficient to establish reliability); *United States v. Meyer*, 536 F.2d 963, 965 (1st Cir. 1976) (holding that a statement that the dog was "trained" was sufficient to establish reliability).

In *State v. Gross*, the affidavit in support of the search warrant stated that the dog was "trained for the detection of marijuana, hashish, cocaine, and heroin," was "certified by the Washington State Police

Canine Association and the Washington State Criminal Justice Training Commission,” and was qualified in both local courts and in federal courts.” 57 Wn. App. 549, 551, 789 P.2d 317 (1990), *overruled on other grounds by State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999).

In this case, the affidavit in support of the search warrant established that K9 Kelo and his handler are certified through the Washington Criminal Justice Training Commission and the Oregon Police Canine Association in accordance with WAC 139-05-915 and ORS 167.310(7), respectively. CP 12. The affidavit also described the minimum 200 hours of training canine teams are required to have and explained that K9 Kelo and Deputy Aguilar completed that training in 2016 and were recertified in 2017. CP 12–13, 34. This information was sufficient to establish that K9 Kelo is able to detect controlled substances and to establish probable cause for the search warrant to issue.

C. Any error in the court’s finding of fact is harmless.

The Court of Appeals reviews a trial court’s findings of fact by determining whether they are supported by substantial evidence, and, if so, whether the findings support the conclusions of law. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). Erroneous findings of fact are subject to harmless error analysis. *State v. Banks*, 149 Wn.2d 38, 43–46, 65 P.3d 1198 (2003). An error is harmless if it appears beyond a

reasonable doubt that the finding does not materially affect the conclusions of law. *State v. Caldera*, 66 Wn. App. 548, 551, 832 P.2d 139 (1992). In other words, an error is harmless if it would not have changed the result. *Banks*, 149 Wn.2d at 44.

In this case, if the trial court's finding that that there can be airflow between the trunk and passenger compartment of a car is erroneous, it is harmless because the remainder of the findings of fact support the conclusions of law. Unchallenged findings of fact are considered verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). Fitzpatrick challenges three of the trial court's findings, but only supplies argument for one of them, number nine. When the challenged finding of fact is excised from the trial court's findings, the remaining findings establish Deputy Aguilar and K9 Kelo's training, that they circled Fitzpatrick's vehicle three times, that K9 Kelo sniffed intently at the trunk area, and that he sat (indicating an alert to controlled substances) near the open driver's side window. CP 79–80. These findings support the conclusion that the search warrant allowed for the search of the entire vehicle, including the trunk.

It is well settled that once there is probable cause to believe that a motor vehicle may contain specific contraband, a search of any part of the vehicle in which the suspected contraband might be found, including any

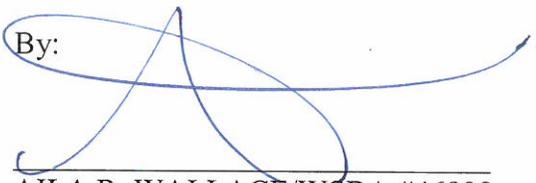
closed containers, is permissible. *See U.S. v. Ross*, 456 U.S. 798, 809, 102 S. Ct. 2157 (1982); *California v. Carney*, 471 U.S. 386, 390-91, 105 S. Ct. 2066 (1985). Therefore, K9 Kelo's alert that he detected the odor of controlled substances in the vehicle authorized a search warrant for the entire vehicle, including the trunk and any closed containers therein. Even if this court disregards the trial court's finding regarding airflow, the remaining findings support the conclusions of law.

IV. CONCLUSION

For the reasons stated above, the State respectfully requests this Court affirm Fitzpatrick's conviction.

Respectfully submitted this 13th day of June, 2018.

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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 June 13th, 2018.



Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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