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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32706-0-III

STATE OF WASHINGTON, Respondent,

v.

JUSTIN D. TONIES, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Justin Tonies was charged with possessing a controlled substance when the vehicle in which he had left his backpack was impounded without a warrant for investigatory purposes. The vehicle, and Tonies' backpack in particular, were subjected to a K9 sniff without a warrant, which led to a search warrant being issued and contraband being seized from Tonies' backpack. Tonies challenges the denial of his motion to suppress evidence, arguing that police lacked probable cause to impound the vehicle, that the K9 sniff constitutes a search under Article 1, Section 7 of the Washington State Constitution that requires a search warrant, and that the K9 sniff could not support probable cause to search because it could not reliably and accurately identify the presence of illegal drugs.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in denying Tonies' motion to suppress evidence.

ASSIGNMENT OF ERROR 2: The trial court erred in entering Finding No. 4, that there was probable cause to impound the vehicle for investigation.

ASSIGNMENT OF ERROR 3: The trial court erred in entering Finding No. 5, that the K9 sniff did not constitute a search.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Is a K9 sniff a search under Article 1, Section 7 of the Washington State Constitution requiring issuance of a warrant?

ISSUE 2: Did police have probable cause to believe the vehicle was being used in the commission of a felony to justify its impoundment when the grounds alleged were limited to innocuous facts consistent with innocence and the prior drug history of one of the individuals associated with it?

ISSUE 3: Can a positive alert by a drug detection dog establish probable cause to search when the dog cannot reliably identify only illegal substances and admittedly alerts to legal amounts of marijuana?

IV. STATEMENT OF THE CASE

Deputy Sheriff Ian Edwards contacted Justin Tonies on November 13, 2013, at about 1:30 a.m. next to the pool house in Prescott. RP 2-3. A white SUV was parked in the parking lot and Edwards wanted to see who was in it. RP 4-5. As he approached the vehicle, he saw Tonies approaching with a person Edwards knew from prior contacts named

Walter Walker. RP 5. Edwards knew Mr. Walker to have an extensive criminal background including drug trafficking related offenses. RP 5.

Upon questioning, Walker stated that they were waiting for a person named Donovan. RP 7. Walker then advised that they had just bought a drum set, which was in the back of the SUV, and they were there to pay for it. RP 8. Edwards could see the drum set in the back of the vehicle. RP 10. Neither Tonies nor Walker answered Edwards' question who drove the vehicle there. RP 8-9.

A short time later, another car pulled up driven by an elderly woman named Nada Bray. RP 9. Determining that he did not have cause to detain Tonies or Walker, Edwards allowed them to leave in Bray's vehicle. RP 10-11. Edwards contacted dispatch to run the registration for the white SUV and it came back registered to a woman in Oroville for whom there was no contact information. RP 11-12. The vehicle was not registered as stolen. RP 26. Edwards then looked through the vehicle windows and saw a glass pipe and a jar of marijuana, which he acknowledged to be legal under state law. RP 13, 27. He also saw a Mentos container sitting on the dashboard and a black plastic case sitting on top of a backpack as well as a piece of a plastic baggie protruding from the center console. RP 13, 15-16.

As Edwards was looking in the vehicle, Tonies returned and asked to get his backpack out of the car. RP 17. The car was locked, and Tonies did not have the keys. RP 17. Edwards asked if he could call Walker, but Tonies stated he did not have the phone number. RP 18. Tonies showed Edwards where his backpack was through the passenger window and Edwards asked him about a black plastic case sitting on it. RP 18-19. Tonies told him it was a camcorder case. RP 19.

Shortly before Tonies returned, Edwards telephoned K9 officer Gunner Fulmer to advise what he had found and to ask Fulmer what he should do. RP 20. Fulmer advised Edwards to impound the vehicle and he would apply his dog to it the next day. RP 20. Edwards then advised Tonies that he was impounding the vehicle at the K9 officer's request and advised that he could retrieve his items from the police department the following morning. RP 21, 22.

The following afternoon around 3:00 p.m., Officer Fulmer conducted a K9 sniff on the vehicle. RP 37, 41. The K9 alerted to the vehicle and Fulmer applied for a search warrant based upon the sniff. RP 42, 43. He executed the search warrant later that day and the K9 alerted to other containers in the vehicle, including the Mentos container and the backpack. RP 43-44. Fulmer obtained a second search warrant for the

backpack based upon the K9 sniff and subsequently located suspected drugs and paraphernalia inside it. RP 45-46.

Tonies was charged with possessing controlled substances and drug paraphernalia. CP 1. He moved to suppress evidence obtained from Fulmer's search on multiple grounds, including that the officers lacked probable cause to impound the vehicle, that the seizure exceeded the scope of an investigative detention under *Terry v. Ohio*, and that the K9 sniff was insufficient to generate probable cause to search. CP 4-17. At the 3.6 hearing, Fulmer conceded that his K9 had originally been certified to detect the presence of marijuana, had not been "untrained" from marijuana and continued to alert to legal amounts of marijuana in the field. RP 48-49.

The trial court found that there was probable cause to seize the vehicle. RP 59. It entered findings of fact and conclusions of law in which it found that Edwards had probable cause to impound the SUV

... based upon his observations of the SUV parked unattended at a closed park/pool, the time of day, the explanations of Mr. Walters and Mr. Tonies about why there were at the scene there in Prescott at 1:30 a.m., his personal knowledge of Mr. Walters' criminal history to include drug offenses, and his observations of their nervousness during their contact with him.

CP 69. The trial court also found, although the parties had not briefed the issue, that the K9 sniff did not constitute a search. CP 69. As a result, the trial court concluded that the evidence found in Tonies' backpack was admissible. CP 70. Tonies moved for discretionary review, which was granted by the Commissioner's Ruling entered December 8, 2014.

V. ARGUMENT

A. The K9 sniff of the vehicle and Tonies' backpack constitutes an unlawful warrantless search under Article 1, Section 7 of the Washington State Constitution

A K9 sniff permits law enforcement to intrude into a person's private affairs by detecting otherwise unavailable information about areas closed to public view. Accordingly, under current precedent, the K9 sniff is a search within the meaning of Article 1, Section 7 of the Washington Constitution and requires police to first obtain a warrant. Because the sniff in this case was performed without a warrant, the evidence was unlawfully obtained and should have been suppressed.

1. **The Court of Appeals should review whether the K9 sniff constituted a search under RAP 2.5(a)**

Although Tonies did not raise the issue whether the K9 sniff constitutes a search under Article 1, Section 7 of the Washington

Constitution below, the trial court entered a finding that the sniff did not constitute a search. CP 69. Because the trial court addressed the issue, because judicial economy favors evaluating the issue in the present appeal, and because the issue constitutes a manifest error affecting a constitutional right under RAP 2.5(a)(3), review of the issue should be granted.

RAP 2.5(a) permits, but does not require, the Court of Appeals to decline to consider for the first time on review an issue not raised in the trial court. Whether to accept review is a matter of discretion with the reviewing court. *State v. Blazina*, __ Wn.2d __, __ P.3d __, *slip op. no.* 89028-5 (March 12, 2015), at p. 3 (*citing State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 304 (2011)). Here, the Court of Appeals should exercise its discretion to review the issue because the trial court issued a ruling that the sniff was not a search. CP 69. To the extent the trial court raised the issue *sua sponte*, it is properly before the Court of Appeals for review. Moreover, economy favors review in these circumstances. Because of the posture of this case, in the event Tonies does not prevail on any of the remaining assignments of error, on remand he would unquestionably raise the same arguments that the K9 sniff constitutes an unlawful warrantless search now presented to this court. Because appellate review of the question is inevitable, this court should simply consider the issue now as

furthering “the efficient use of judicial resources.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

To the extent RAP 2.5(a) permits discretionary review of matters not argued below, it establishes review as a matter of right for manifest errors affecting a constitutional right. *See Blazina*, at p. 3. To warrant review under this section, the error must be both manifest – meaning that the error actually affects the Appellant’s rights – and of constitutional magnitude. *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). The court considers whether the alleged error implicates a constitutional interest and is not merely another form of trial error. *Id.* If the error is of constitutional magnitude, the court then evaluated whether the asserted error had practical and identifiable consequences in the case. *Id.* at 99. The factual record must be sufficient to permit appellate review or the error is not manifest. *State v. Fenwick*, 164 Wn. App. 392, 400, 264 P.3d 284 (2011). Appellants have established manifest errors affecting constitutional rights when they show the illegality of the search, and the lack of an exception to the warrant requirement. *See, e.g., State v. Swetz*, 160 Wn. App. 122, 127-28, 247 P.3d 802 (2011); *State v. Littlefair*, 129 Wn. App. 330, 338, 119 P.3d 359 (2005).

Here, Tonies alleges that the K9 sniff infringes upon his “private affairs” contrary to Article 1, Section 7 of the Washington State

Constitution. The error is, therefore, of constitutional magnitude because it concerns the exploitation of an illegal search to prosecute Tonies for a crime. Moreover, the error is manifest because the only evidence of criminal activity obtained against Tonies is the product of the unlawful search, and the prosecution could not be sustained without use of the illegally-obtained evidence. Accordingly, the error meets the requirements of RAP 2.5(a)(3) and should be reviewed by this court.

2. The K9 sniff is a search under the Washington Constitution because it does more than enhance normal human senses, permitting entry into areas closed to the police and entitled to constitutional protection.

Whether a K9 sniff constitutes a search under Article 1, Section 7 of the Washington Constitution remains an open question. *State v. Neth*, 165 Wn.2d 177, 181, 196 P.3d 658 (2008). In several older cases, some appellate courts ruled, without substantial analysis, that a K9 sniff does not constitute a search. *See, e.g., State v. Wolohan*, 23 Wn. App. 813, 598 P.2d 431 (1979); *State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986); *State v. Stanphill*, 53 Wn. App. 623, 769 P.2d 861 (1989). In 1994, however, the Washington Supreme Court decided *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994), in which it held that a similar form of

surveillance, thermal imaging, was a search under Article 1, Section 7, and required a warrant. The *Young* Court recognized the analogy to the K9 sniff and discussed the sniff in its opinion, noting that while the appellate courts upheld warrantless sniffs, those same opinions also “acknowledged a dog sniff might constitute a search if the object of the search or the location of the search were subject to heightened constitutional protection. 123 Wn.2d at 188.

In *Young*, the Court rejected the argument that the use of thermal imaging technology was minimally intrusive, observing:

The infrared device invaded the home in the sense the device was able to gather information about the interior of the defendant’s home that could not be obtained by naked eye observations. Without the infrared device, the only way the police could have acquired the same information was to go inside the home. Just because technology now allows the information to be gained without stepping inside the physical structure, it does not mean the home has not been invaded for the purposes of Const. art. 1, § 7.

123 Wn.2d at 186. Unlike cases where police officers were able to view evidence from a lawful vantage point using only their own senses, the infrared device constituted an intrusive means of observation that went “well beyond an enhancement of natural senses.” *Id.* at 183. Noting that the technology permitted the State “to, in effect, ‘see through the walls,’”

the *Young* Court held that its use intruded into an individual's private affairs and therefore required a warrant. *Id.*

Subsequently, relying on *Young* and applying the same reasoning, Division II of the Court of Appeals ruled that a K9 sniff is a search under Article 1, Section 7. *State v. Dearman*, 92 Wn. App. 630, 962 P.2d 850 (1998). The divisions have since remained split on the issue. Although the Washington Supreme Court accepted review in *Neth*, 165 Wn.2d at 181, to address this question, it resolved the case on other grounds.

It is time for this court to follow the rationale of *Dearman* and hold that under the reasoning of *Young*, a K9 sniff intrudes into constitutionally protected personal affairs and requires a search warrant. There is no legal or practical difference between the use of an electronic surveillance device that exposes otherwise unavailable information from inside a protected area and the use of a biological surveillance device that does the same thing. The drug detecting dog serves exactly the same function as the thermal imaging device – it provides information that is hidden from view and from the ordinary detection capabilities of the human officer. It does so in the same manner, by identifying emanations from the closed area that cannot be detected by human senses – heat waves in the case of the thermal device, scents in the case of the drug detecting dog.

Young distinguished *Wolohan*, *Stanphill* and *Boyce* on the grounds that the areas subjected to the sniff in those cases were not entitled to heightened protection, whereas the thermal imaging device was applied to a residence. 123 Wn.2d at 188. Both sniffs in this case were conducted upon areas that courts have recognized are entitled to protection – a vehicle and a repository of personal belongings. See *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999) (recognizing constitutionally protected privacy interest in automobiles and the contents therein); *State v. Kealey*, 80 Wn. App. 162, 170, 907 P.2d 319 (1995) (“Purses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment.”). The sniff exposed the contents of these protected areas to the police. Thus, the areas subject to the K9 sniff in this case are equally as deserving of protection as the home that was unlawfully searched in *Young*.

Simply stated, a K9 sniff is an unreasonably intrusive means of surveillance because it eliminates one’s privacy in even the most protected areas. Since *Young*, the prior authorities permitting warrantless K9 sniffs are no longer viable and should be expressly repudiated. The trial court’s ruling that the K9 sniff in this case was not a search should be reversed.

In this case, absent the K9 sniff, grounds to search the vehicle and the backpack would not have existed. Because the sole evidence used to prosecute Tonies resulted from the search conducted in reliance upon the sniff, it should be excluded from trial.

B. The vehicle impoundment was unlawful because police lacked probable cause to believe it was involved in the commission of a felony

In the present case, even if the K9 sniff were not *per se* a search requiring a warrant, the sniff nevertheless depended upon an unlawful detention of the vehicle in which Tonies was riding for that purpose. Because the trial court's conclusion (erroneously designated as a "finding") that there was probable cause to impound the vehicle was incorrect, the evidence that flowed from that impoundment must be suppressed.

Impoundment of a vehicle is a seizure that must be supported by reasonable cause. *State v. Houser*, 95 Wn.2d 143, 148, 622 P.2d 1218 (1980). An impoundment is considered reasonable if an officer has probable cause to believe it was stolen, or that it was being used in the

commission of a felony. *Id.* at 149. Here, the State argued,¹ and the trial court agreed, that there was probable cause to believe the vehicle was being used in the commission of a felony, notwithstanding the plain contradiction that Edwards acknowledged not having even sufficient reasonable suspicion of criminal activity to detain Tonies and Walker at the scene for investigation and there were no other known persons associated with the vehicle who might be using it to commit felonies. RP 11, 59. The logical contortion of this position belies deeper defects in the trial court's reasoning.

First, no evidence existed that the vehicle was stolen. RP 26. Impoundment cannot, therefore, be justified on the first ground established in *Houser*.

Second, the facts asserted by the State as supporting probable cause to impound the vehicle are nearly identical to the facts present in *Neth*, which the Washington Supreme Court held inadequate to support a determination of probable cause to support a warrant. Specifically, the trial court here found the following facts supported a finding of probable cause to impound the vehicle:

¹ Following the evidentiary portion of the 3.5 hearing, the State apparently abandoned its prior argument that the impoundment was authorized as a community caretaking action.

- It was parked unattended at a closed park/pool;
- Edwards' observation inside the vehicle of a legal amount of marijuana and a smoking device, a glass container with unknown contents, a small Mentos container on the dashboard, a portion of a plastic baggie protruding from the center console, and a plastic bag lying underneath the backpack on the passenger side;
- The time of day (approximately 1:30 a.m.)
- The explanations Walker and Tonies gave for their presence
- Walker's criminal history including drug offenses
- Tonies' and Walkers' nervousness

CP 57-58, 60.

The use of strikingly similar circumstances as supportive of probable cause to search were analyzed and rejected by the *Neth* Court.

Each is considered in turn as follows:

- a. Vehicle parked unattended in a closed pool/park. Edwards acknowledged the parking lot was not gated, there was no notice that the lot was closed or that parking in the lot while the park was closed could lead to impoundment, and that there was no ordinance being violated by parking in the lot. RP 28-30. In and of itself, the vehicle being parked is not felonious conduct and, while possibly

suspicious, is consistent with lawful behavior. Moreover, the *Houser* court declined to extend the community caretaking exception to permit impoundment of vehicles that were not impeding traffic or posing any threat to public safety or convenience. 95 Wn.2d at 152. Because, as in *Houser*, the impoundment here plainly occurred to investigate criminal activity, the probable cause standard must be met. *Id.* Tonies and Walker were not violating any law by parking the vehicle in the lot.

- b. Items observed inside the vehicle. “Innocuous objects that are equally consistent with lawful and unlawful conduct do not constitute probable cause to search.” *Neth*, 165 Wn.2d at 185. The *Neth* Court particularly rejected the reliance upon the presence of plastic baggies, noting that they are capable of lawful as well as unlawful purposes. *Id.* The same, presumably, can be said of the Mentos container and the other innocuous objects observed by Edwards inside the vehicle, including the marijuana that Edwards acknowledged was well within the limits that can be legally possessed under Washington law. RP 27. Simply put, it is not illegal to possess legal amounts of marijuana, baggies, or other containers that can hold a variety of legal as well as illegal items,

and possession of such containers cannot generate probable cause to believe a felony has been committed.

- c. Time of day. Nothing in the evidence or the State's arguments demonstrates that being out in public at 1:30 a.m. means that a felony is probably being committed.
- d. Explanations of Tonies and Walker. Tonies and Walker explained that they were waiting for a person named Donovan, and that they had purchased a drum set (which Edwards saw inside the vehicle) and were there to pay for it. Edwards, apparently, considered these explanations to be inconsistent and suspicious. Even if Edwards' suspicions are warranted, suspicious statements do not even justify investigative detentions, let alone establish probable criminal activity. *Neth*, 165 Wn.2d at 184 (citing *State v. Coyne*, 99 Wn. App. 566, 574, 995 P.2d 78 (2000)).
- e. Walker's prior drug history. While criminal history may support probable cause, it is insufficient standing alone; otherwise, "anyone convicted of a crime would constantly be subject to harassing and embarrassing police searches." *Neth*, 165 Wn.2d at 185-86 (citing *State v. Clark*, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001), *State v. Hobart*, 94 Wn.2d 437, 446-47, 617 P.2d 429 (1980)). It is tautological that history is not destiny, and that while

one's past may warrant closer scrutiny of one's present conduct, in the absence of other incriminating evidence it does not make one more or less likely to be engaging in criminal activity at any given time.

- f. Nervousness. *Neth* specifically rejected reliance upon nervousness or failure to produce proper identification or documentation as grounds to search, citing cases acknowledging that most people are nervous during police encounters even when innocent. 165 Wn.2d at 184.

As in *Neth*, “[t]hese facts are unusual, and taken together, they seem odd and perhaps suspicious. However, all of these facts are consistent with legal activity, and very few have any reasonable connection to criminal activity.” 165 Wn.2d at 184. None of the circumstances relied upon by the trial court support an inference of probable criminal activity, but at best mere suspicion that something was amiss. As *Houser* makes clear, impounding a vehicle for investigative purposes requires far more than mere suspicion – probable cause that the vehicle is involved in the commission of a felony is required. Because the circumstances present here, as in *Neth*, fall far short of this standard, the trial court erred in determining that probable cause supported the

impoundment and the evidence obtained from the impoundment should be suppressed.

C. The K9 sniff cannot generate probable cause supporting issuance of a search warrant when the dog will alert indiscriminately to lawful substances known to be present in the area to be searched

The reliability of a trained dog to alert its handler to the presence of an illegal substance is a prerequisite to considering the dog's positive alert in a probable cause determination. *See State v. Flores-Moreno*, 72 Wn. App. 733, 741, 866 P.2d 648 (1994); *U.S. v. Meyer*, 536 F.2d 963, 966 (1st Cir. 1976) (evaluating whether sniff of trained drug detection dog meets reliability prong of the *Aguilar-Spinelli* test); *U.S. v. Lingenfelter*, 997 F.2d 632, 639 (9th Cir. 1993) ("A canine sniff alone can supply the probable cause necessary for issuing a search warrant if the application for the warrant establishes the dog's reliability."); *U.S. v. Diaz*, 25 F.3d 392, 394 (6th Cir. 1994) (same); *see also U.S. v. Florez*, 871 F. Supp. 1411 (Dist. N.M. 1994) (evaluating problem of false alerts and determining search pursuant to sniff by unreliable dog was unlawful). Indeed, the reliability of the K9 sniff is what makes it probable that evidence of a crime can be found at the place to be searched. *Flores-Moreno*, 72 Wn. App. at 741. Without such reliability, a positive alert by the dog does

nothing to establish the likelihood of illegal behavior or the presence of contraband, and therefore cannot be of assistance in determining whether probable cause exists to search.

In the present case, the K9 sniff was conducted by an animal who was known to provide positive alerts to the presence of legal amounts of marijuana in the field, upon a vehicle that was already known to contain a legal amount of marijuana. RP 27, 49. The dog had been previously trained to alert to marijuana and had not been “untrained” from it. RP 48. The trial court further found that the K9 cannot communicate to its handler whether marijuana or an illicit substance is present. CP 59.

Under the circumstances present in this case, the positive K9 alert cannot establish a probability of criminal activity supporting a search because there is no way for the handler to know whether the dog was simply confirming the presence of a lawful substance already known to be present or identifying illegal contraband. The dog cannot be relied upon to alert only to illegal substances, but is known to falsely alert to legal marijuana. As the Washington Supreme Court has held, “Innocuous objects that are equally consistent with lawful and unlawful conduct do not constitute probable cause to search.” *Neth*, 165 Wn.2d at 185. Here, the K9 alert was equally consistent with the known presence of legal

marijuana as illegal conduct and was not reliable evidence of criminal behavior. It cannot, accordingly, supply probable cause sufficient to justify searching either the vehicle or Tonies' backpack without corroborating circumstances that are not present here.

VI. CONCLUSION

For the foregoing reasons, the trial court's ruling that the evidence obtained from Tonies' backpack is admissible in his trial should be reversed and the case remanded for dismissal.

RESPECTFULLY SUBMITTED this 23rd day of March, 2015.



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