

32706-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

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May 22, 2015
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN D. TONIES,

Petitioner.

DISCRETIONARY REVIEW
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the superior court's denial of the Petitioner's/Defendant's suppression motion.

III. ISSUES

1. Whether this Court should review a claim raised for the first time only after discretionary review was accepted?
2. Whether this Court should overrule *State v. Hartzell* to hold that a K-9 sniff of a vehicle is a search requiring a warrant?
3. Whether there was probable cause to impound the SUV based on Mr. Walker's history for dealing methamphetamine, the presence of the men and vehicle in a closed park at 1:30 in the morning, the observation of drugs and drug paraphernalia in the SUV, the men's nervous behavior, and their illogical stories?
4. Whether there was probable cause for the issuance of the search warrants for the SUV and backpack?

IV. STATEMENT OF THE CASE

The Petitioner/Defendant Justin Tonies is charged with possessing methamphetamine with intent to deliver, use of drug paraphernalia, and possessing amphetamine. CP 1-3.

On November 13, 2013, Walla Walla Deputy Sheriff Ian Edwards observed a white Nissan Pathfinder in the parking lot at Prescott Park in Prescott. RP 3-4, 37. The pool was closed. RP 3. A sign indicates that the public park is closed between the hours of 10 p.m. and 5 or 6 a.m.. RP 3-4. It was 1:30 in the morning. RP 3. The deputy stopped behind the SUV to see who was in the park after hours. RP 4-5. He intended to determine if there was a community caretaking concern and to ask any occupant to move along. RP 6-7. There had been problems in recent years with thefts and burglaries in the pool area and with the vending machines. RP 6. The SUV was unoccupied. RP 5-6.

Walter "Moses" Walker (56 years of age) and the Defendant Justin Tonies (23 years of age) were next to the pool house in the park, behind the enclosed fence by the pool area. CP 56-57, 75, 79; RP 3-5, 7. The two men approached the deputy and spoke with him. RP 4-6. The deputy was very familiar with Mr. Walker who has a fairly extensive criminal background, including thefts, burglaries, and dealing methamphetamine.

RP 5. The Deputy did not know the Defendant Tonies. CP 57.

Mr. Walker said they were waiting for “Donovan” who was going to drive them to Walla Walla. CP 93; RP 7. Mr. Tonies had a different and conflicting story: he said Mr. Walker had driven him to the park to buy and pay for a drum set. CP 93; RP 8. Mr. Walker then adopted this story and said Mr. Tonies had just bought the drums and the two of them were in the park to pay for it. CP 94-95. But the deputy could see the pair were already in possession of the drum set, because it was visible in their SUV. RP 10.

Deputy Edwards asked who drove the SUV. RP 8. Mr. Walker responded with a blank stare. RP 8. The deputy then posed the same question to Mr. Tonies who looked to Mr. Walker and then also did not respond. RP 8-9. Both were very nervous. CP 95. When the deputy asked who owned the SUV, the Defendant Tonies said it belonged to a woman, but he did not know her name. RP 19. Mr. Walker said the SUV belonged to “Amber.” RP 19.

At this point, another car arrived, driven by 85 year old Nada Bray who was accompanied by her 23 year old granddaughter Sarah Bray. CP 58 (¶ 4); RP 9. The deputy knew both women and neither was known as “Donovan.” RP 9. Sarah Bray told the deputy that she had a warrant for

her arrest, a fact the deputy recalled from reviewing the warrants board. RP 9-10. He arrested her, but released her almost immediately after learning through dispatch that the warrant had been quashed. RP 10.

The deputy determined that neither Mr. Walker nor Mr. Tonies had any active warrants. RP 11. Mr. Walker had keys to the SUV. CP 58 (§ 4). He locked the SUV, and then he and the Defendant left “rather abruptly,” piling into Mrs. Bray’s very small car. CP 57, 94-95; RP 9, 10.

Alone with the SUV, the deputy ran its plate and learned it was registered neither to a Donovan nor an Amber, but to Natasha Allison from Oroville. RP 11-13. He was not able to find any contact information for her. RP 12. Looking into the SUV, the deputy observed in the middle of the passenger compartment that there was a glass smoking device, marijuana in a small glass jar, a small plastic baggie sticking out of the locked portion of the center console, and the top of a glass jar wedged between the seats. RP 13, 15, 16. He also observed a closed Mentos container on the driver’s side dash, which the deputy knew from both training and experience was a container commonly repurposed to hold illegal drugs. RP 13-14. Deputy Edwards called K-9 officer Gunner Fulmer to consult. RP 19-20. Officer Fulmer advised the deputy to seize the unclaimed SUV and bring it to the police lot. RP 20.

Mrs. Bray and Mr. Tonies returned to the park in Mrs. Bray's car, and the Defendant approached the deputy again. RP 17. He asked if he could retrieve his backpack and the drum set from the SUV. RP 17, 18. On the front passenger floorboard, the deputy observed a black plastic case sitting on or in the backpack. RP 15, 18-19. The Defendant identified the plastic case as a camcorder case. RP 19. The deputy asked if there were any illegal substances in the backpack, and the Defendant said no. RP 21. He explicitly denied ownership of the car. CP 96.

The car was locked, and Mr. Tonies did not have the keys. RP 17. The deputy suggested Mr. Tonies call Mr. Walker, but the Defendant said he did not have Mr. Walker's phone number or any way to gain access to his property in the SUV. RP 18. The deputy advised that the SUV would be seized and Mr. Tonies could pick up his property at the police department the following morning. RP 21. The Defendant left with Mrs. Bray. RP 22-23. He did not come to the police department for another eight days, and then only on an unrelated matter. CP 24.

Nobody named Donovan ever appeared at the Prescott parking lot. CP 95. The SUV was locked and had evidence tape on all doors, windows, trunk, and hood. RP 43. The SUV was towed to a secure impound lot. RP 22.

Officer Fulmer learned that Nicole Oliveira (not Donovan, Amber, or Natasha) owned the SUV and had loaned it to Mr. Walker at ten the night before. CP 99-100.

Officer Fulmer's K-9, Rev, has been certified annually since July of 2009 for detection of cocaine, heroin, and methamphetamine. RP 38, 42. Rev was applied first to the corner of the vehicle and then along the door seams. RP 41-42. Rev is trained to alert at the location that is closest to the source of the odor. RP 42. Rev alerted at the front passenger door seam. RP 42-43. The object closest to the canine alert was the Defendant's backpack on the front passenger's floorboard. RP 44.

Officer Fulmer requested a warrant "based on the suspicious activity of Walker and Tonies, [their] stories not matching up, Walker's narcotics history which includes possession with intent to deliver methamphetamine, and the K-9 alert to the vehicle." CP 45, 100. After the warrant was granted, Rev entered the SUV and alerted on the backpack and on the Mentos container which was on the dashboard directly in front of the steering wheel. CP 100; RP 13, 43-44. Officer Fulmer located 3.4 grams of crystal methamphetamine and 18 hydrocodone pills in the Mentos container. CP 76, 100; RP 44.

Officer Fulmer removed the backpack and placed it 50 feet from

the SUV to allow any odor that might have come from the SUV to dissipate for at least an hour before applying the K-9 to the backpack. RP 44-45. Rev alerted to the backpack again. RP 44.

The next day, a separate search warrant was obtained for the Defendant's backpack. CP 100; RP 43-45. The backpack held a grower's journal, a contact list suspected to relate to drug transactions, and significant evidence of the Defendant's dominion and control over the backpack. CP 77. A black camera case inside the backpack held 1.81 grams of methamphetamine crystals, a glass pipe, a digital scale, empty ziplock baggies, and three prescription drugs. CP 76; RP 46.

The Defendant made a motion to suppress the evidence. CP 4-54. At the hearing, Officer Fulmer testified that the K-9, Rev, was certified in marijuana detection from 2009 through 2012, but not in January 2013 after the passage of Initiative 502. RP 48-49. Rev has not been "untrained" to alert on marijuana. RP 48. He has alerted to marijuana in the field since its November 2012 legalization in Washington, but Rev has not "been around marijuana since about January 2013." RP 49. Officer Fulmer does not deploy Rev unless the officer is satisfied that a substance other than marijuana is involved. CP 60 (¶ 12). None of the items which Rev alerted to in this case tested positive for marijuana. *Id.* The affidavit in support

of the search warrant informed the issuing magistrate that the Rev had been trained to detect marijuana, cocaine, heroin, and methamphetamine.

CP 44, 52. The superior court denied the Defendant's motion to suppress.

4. The Court finds that based on [the deputy's] observations of the SUV parked unattended at a closed park/pool, the time of day, the explanations of Mr. Walker and Mr. Tonies about why they were at the scene there in Prescott at 1:30 a.m., his personal knowledge of Mr. Walker's criminal history to include drug offenses, and his observations of their nervousness during their contact with him, that Dep. Edwards had sufficient probable cause to impound the SUV for further investigation.

5. The Court finds that Off. Fulmer's application of his K-9 partner to the exterior of the SUV, and later to the exterior of the backpack after the execution of the first search warrant, did not constitute searches.

6. The Court finds that Off. Fulmer had probable cause to apply for a search warrant for the SUV based on the information he had acquired from Dep. Edwards, coupled with the K -9 sniff.

7. The Court finds that Off. Fulmer had probable cause to apply for a search warrant for the contents of the backpack from the SUV based on the information he had acquired from Dep. Edwards, coupled with the K-9 sniff.

CP 60.

The Defendant seeks discretionary review of the denial of the suppression motion. The parties stipulated to discretionary review and have stayed trial pending the outcome of this review. CP 61, 70, 108-09.

V. ARGUMENT

- A. THE PETITIONER MAY NOT RAISE A NEW CLAIM FOR THE FIRST TIME IN THE BRIEF OF APPELLANT WHEN DISCRETIONARY REVIEW WAS GRANTED ONLY AS TO A DIFFERENT ISSUE.

The Defendant is asking this Court consider whether the K-9 sniff was a warrantless search – a claim the Defendant readily admits was not raised before the lower court. Brief of Appellant (BOA) at 6. To raise this question for the first time only after discretionary review was accepted on a separate issue is an abuse of the process. Where there is no appeal as a matter of right, the court may (but is never required to) accept discretionary review in expressly limited circumstances. RAP 2.3. Such review requires notice and a motion. RAP 5.1. In this case, the Defendant did not provide notice that he was seeking review, nor was review granted, *as to this issue*. The issue was not raised to any court until the Brief of Appellant. The Court should refuse to entertain the claim.

This issue was not raised in the Motion to Suppress. CP 6 (challenging (1) probable cause for the impoundment of the vehicle and (2) its contents, (3) the reasonableness of the delay between the impoundment and the K-9 sniff, and (4) the value of the K-9 sniff after the passage of I-502). The issue was not raised in the Motion for

Discretionary Review. Motion for Discretionary Review at 2 (repeating the identical issues raised in the Motion to Suppress).

The State did not stipulate to review based on an unknown challenge. The State stipulated to review of the matters that were raised to the lower court. CP 61; State's Answer to Motion for Discretionary Review at 9. This Court's Commissioner accepted discretionary review based on that stipulation and for the question of "whether a secondary search of a backpack in an impounded vehicle constitutes a search."¹ Commissioner's Ruling.

Because this Court accepted discretionary review based on that stipulation and issue only, the issue is not properly before this Court and must be rejected out of hand.

The United States Supreme Court recently addressed the impropriety of what it characterized as a "bait-and-switch" tactic.

Having persuaded us to grant certiorari, [petitioner] chose to rely on a different argument than what it had pressed below.

.....

Because certiorari jurisdiction exists to clarify the law, its exercise "is not a matter of right, but of judicial discretion." Supreme Court Rule 10. Exercising that discretion, we

¹ The Brief of Appellant has abandoned the issue of the secondary search that had been raised in the Motion for Discretionary Review and for which review was explicitly granted.

dismiss the first question presented as improvidently granted.

City & Cnty. of San Francisco, Cal. v. Sheehan, No. 13-1412, 2015 WL 2340839, at *6 (U.S. May 18, 2015).

Why, one might ask, would a petitioner take a position [] that it had no intention of arguing, or at least was so little keen to argue that it cast the argument aside uninvited? The answer is simple. Petitioners included that issue to induce us to grant certiorari.

....

I would not reward such bait-and-switch tactics.

City & Cnty. of San Francisco, Cal. v. Sheehan, 2015 WL 2340839, at *11-12 (Scalia, J., concurring/dissenting). This Court should similarly disfavor the tactic as fraudulent.

B. THE TRIAL COURT DID NOT ERR IN FOLLOWING *STATE V. HARTZELL* WHICH HOLDS THAT A K-9 SNIFF OF A VEHICLE IS NOT A SEARCH.

The Defendant challenges the superior court's conclusion that "the K-9 sniffs did not constitute a search." BOA at 6; CP 61. The Defendant argues that there is a split among divisions. BOA at 11. This is not a correct review of the case law. There is no such split.

The Defendant discusses *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994). BOA at 9. This case does not decide a K-9 sniff question. *State v. Young* is also not a decision of the Court of Appeals. Therefore it

does not support the Defendant's argument that there is a split among the divisions of the Court of Appeals as to whether a K-9 sniff constitutes a search.

The Court of Appeals has held that the warrantless use of a trained dog in certain public places does not constitute a search. *State v. Stanphill*, 53 Wn. App. 623, 769 P.2d 861 (1989) (package at post office); *State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986) (safety deposit box at bank); *State v. Wolohan*, 23 Wn. App. 813, 598 P.2d 421 (1979), *review denied*, 93 Wn.2d 1008 (1980) (parcel in bus terminal).

Protections are greater however for a K-9 sniff of a home. In this specific circumstance, where the sniff is of *a locked dwelling* or associated structure and where the police officers are unable to detect the controlled substance using their own senses from a lawful vantage point, the use of a trained narcotics dog to detect the presence of a controlled substance will be a search for purposes of Const. art. I, § 7. *State v. Dearman*, 92 Wn. App. 630, 962 P.2d 850, *review denied*, 137 Wn.2d 1032 (1999). The *Dearman* opinion did not overrule *Stanphill*, *Boyce*, or *Wolohan*. Rather, it distinguished those cases as not involving a private residence.

Our case does not involve a private residence. Therefore, *Dearman* does not apply here. Our case involves a K-9 sniff of a vehicle.

After *Dearman*, the Court of Appeals has addressed the K-9 sniff of a *vehicle* parked on the shoulder of a road in *State v. Hartzell*, 156 Wn. App. 918, 927, 237 P.3d 928 (2010). Police were searching for a gun which had fired a bullet through the passenger door of the vehicle. *Id.* The dog sniffed the car door and then led police to the handgun less than a hundred yards away. *Id.* The defendant challenged the admission of the gun as the fruit of a warrantless search, i.e. the K-9 sniff. *State v. Hartzell*, 156 Wn. App. at 928.

The court held that the sniff of the vehicle on the side of the road was not a search of a person's home or private affairs which requires a search warrant. *State v. Hartzell*, 156 Wn. App. at 929, (citing *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994)). This opinion controls. It is not in conflict with any other.

The Defendant is not asking this Court to resolve a split among divisions, because there is no conflict. Rather, the Defendant is asking this Court to overrule *Hartzell* in order to extend the protections in *Dearman* related to a private residence to a very different circumstance, that of a vehicle driven on the public roadway and illegally parked in a public park after hours.

This Court has only recently declined a similar invitation. In *State*

v. Witherrite, 184 Wn. App. 859, 339 P.3d 992 (2014), *review denied*, -- P.3d -- (Apr. 29, 2015), the defendant asked the court to extend *Ferrier* warnings, required to obtain consent for a home search, to vehicle searches. The *Witherrite* court made a thorough analysis, concluding: “The Washington Supreme Court has long distinguished houses from vehicles in the search and seizure context.” *State v. Witherrite*, 184 Wn. App. at 863. “The cited history of *Ferrier* and our court’s treatment of the home as most deserving of heightened protection under our constitution leads us to conclude that *Ferrier* warnings need not be given prior to obtaining consent to search a vehicle.” *State v. Witherrite*, 184 Wn. App. at 864. The concurrence also urged caution: “As an intermediary appellate court, we should be cautious not to grant new rights where our state Supreme Court has not indicated a willingness to expand existing rights.” *Id.* (Lawrence-Berrey, J., concurring). And the supreme court denied review.

This Court should decline the Defendant’s request to overrule *Hartzell*, especially where review was not accepted on this issue.

C. STANDARDS OF REVIEW.

The Defendant challenges whether there was probable cause for impoundment or a search warrant. BOA at 13, 19. The issuance of a search warrant is reviewed for abuse of discretion with great deference accorded to the issuing judge or magistrate. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004); *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

A search warrant is entitled to a presumption of validity. The decision to issue a search warrant is highly discretionary. We generally give great deference to the magistrate's determination of probable cause and view the supporting affidavit for a search warrant in a commonsensical manner rather than hypertechnically. Accordingly, we generally resolve doubts concerning the existence of probable cause in favor of the validity of the search warrant.

State v. Chenoweth, 160 Wn.2d 454, 477-78, 158 P.3d 595 (2007) (citations omitted).

Although, the trial court's assessment of probable cause is reviewed de novo (*State v. Chamberlin*, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007)), the measure of probable cause is a very low bar for the State to overcome. "Probable cause exists where there are facts and circumstances sufficient to establish a reasonable *inference* that the defendant is involved in criminal activity and that evidence of the criminal

activity can be found at the place to be searched.” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (emphasis added). The state’s burden does not even rise to the level of a prima facie showing.

[W]e do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause; that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial; that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense; and that their determination of probable cause should be paid great deference by reviewing courts.

Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637 (1969) (citations omitted). Circumstantial evidence is sufficient to establish probable cause. *Escamilla v. Tri-City Metro Drug Task Force*, 100 Wn.App. 742, 751, 999 P.2d 625, 631 (2000).

Probable cause only requires “a fair probability that contraband or evidence of a crime will be found,” not certainty or even a preponderance of the evidence. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). “A tolerance for factual inaccuracy is inherent to the concept to probable cause.” *State v. Chenoweth*, 160 Wn.2d at 475.

[P]robable cause doesn’t require an officer’s suspicion about the presence of contraband to be “more likely true

than false.” *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983); *United States v. Padilla*, 819 F.2d 952, 962 (10th Cir. 1987); *see also United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999) (“[T]he requisite ‘fair probability’ is something more than a bare suspicion, but need not reach the fifty percent mark.”); *United States v. Linares*, 269 F.3d 794, 798 (7th Cir. 2001) (“ ‘[P]robable cause’ is something less than a preponderance.”); *United States v. Donnelly*, 475 F.3d 946, 954 (8th Cir. 2007) (“Probable cause ... does not require ... evidence demonstrating that it is more likely than not that the suspect committed a crime.”) (quotations omitted).

United States v. Ludwig, 641 F.3d 1243, 1252 (10th Cir.), *cert. denied*, 132 S. Ct. 306 (2011).

D. THE SUPERIOR COURT DID NOT ERR IN FINDING PROBABLE CAUSE FOR IMPOUNDMENT OF THE VEHICLE.

The Defendant challenges the impoundment of the vehicle. BOA at 13.

Warrantless impoundments are lawful when the officer has probable cause to believe that it was used in the commission of a felony. *State v. Simpson*, 95 Wn.2d 170, 189, 622 P.2d 1199 (1980). The superior court found “sufficient probable cause to impound the SUV for further investigation” on these facts:

- The SUV parked unattended at a closed park/pool,
- The time of day,

- The bizarre stories of Mr. Walker and Mr. Tonies,
- Mr. Walker's criminal history which included drug offenses, and
- The men's nervousness.

CP 60 (¶ 4). Because this Court's review is *de novo*, it may uphold the lower court's decision on this basis or any other.

The Defendant argues that if the deputy did not feel there was probable cause *to detain a person*, then there could not have been probable cause *to seize and search an object*. BOA at 14. This is incorrect.

While it is true that probable cause is required for both a search and an arrest, the required probable causes for both [are] not entirely identical. For a search there must be reasons to believe that certain items of property will timely be found in a particular place, which conclusions need not be concerned with a particular person's guilt. In the case of an arrest, there must be reasons to believe that the particular person to be arrested has committed a crime. The power to arrest is not so limited by time and place as with searches.

12 Wash. Prac., Criminal Practice & Procedure § 2501 (3d ed.). Here there was reason to suspect that there were illegal drugs in the vehicle, but the officer did not yet know if they were the property of Mr. Walker or Mr. Tonies.

The superior court's findings are more than enough to meet the low standard of an "inference" of involvement in illegal drugs to permit an impoundment.

In deciding this question, the superior court took testimony and reviewed the briefs which provided detailed police reports and affidavits for warrants. The conflicting statements were cause for serious concern. Mr. Walker claimed he was waiting for a ride from Donovan, suggesting the SUV was not his ride. And yet Mr. Tonies said that Mr. Walker had driven Mr. Tonies to Prescott in the SUV, and the deputy observed that Mr. Walker had the key to the SUV.

The story about the drum set also made no sense. Why would they have taken possession of the goods before they had made a payment? And nobody showed up to receive the payment while the deputy waited, although it was already very late. It was 1:30 in the morning when the deputy first arrived, and the park had closed at 10 p.m..

The Defendant asks what evidence suggests the vehicle was stolen. BOA at 14. Both men admitted they did not own the SUV. Mr. Walker apparently had been driving it and had possession of the key, but he did not seem to know who owned the SUV. He said it belonged to Amber, but it was registered to Natasha Allison from Oroville. Oroville is at the

far north of the state, a good five hour drive from Prescott at the far south of the state. Ms. Allison could not be reached, so police could not tell if she had sold the SUV to Amber or if it had been stolen.

Mr. Walker refused to admit that he had driven the SUV to Prescott, as Mr. Tonies informed, yet Mr. Walker was in possession of the car keys. He left without the SUV and then separated from Mr. Tonies even though Mr. Tonies had no way to reach Mr. Walker and, therefore, no way to retrieve his possessions from the SUV which Mr. Walker had locked.

Mr. Walker's attempts to distance himself from the vehicle suggest that either the vehicle was stolen or held evidence of a crime.

The probable crime was drug sales. This is because Mr. Walker is a known methamphetamine dealer who had drug paraphernalia in the car he was driving. The Mentos container, commonly repurposed to hold illegal narcotics, was directly above the steering wheel. The place and time were consistent with or convenient for a drug deal. It was late at night when there would be few witnesses. And they were in a closed park where they were unlikely to be seen and on public property which could not be tied to either seller or buyer. The two had walked behind the fence of the closed pool so as to be even further out of view. Mr. Walker

invented names like Amber and Donovan and failed to provide real and relevant names like Nicole Oliveira and Nada and Sarah Bray, possibly in order to protect other complicit parties. And, of course, neither man could provide a plausible reason for their presence. All of these facts provide probable cause to believe that there were controlled substances in the SUV.

The Defendant has cited *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980) in support of this argument. BOA at 13. In that case, the court found the detention of the vehicle was unreasonable. However, the case is not on point. Houser's car was only impounded after his arrest because it was "off the roadway" and without a driver. *State v. Houser*, 95 Wn.2d at 146. There was no suggestion that the purpose of the impoundment was to investigate a crime. The search in that case was a warrantless inventory search of the locked trunk area, which resulted in evidence of a previously unsuspected crime.

Here, however, the SUV was impounded in anticipation of a search warrant. Police suspected the presence of illegal drugs and intended to and did seek a search warrant. The eventual search was under the authority of a warrant after a finding of probable cause. The Defendant has acknowledged that the purpose of the seizure here was the

investigation of criminal activity, and not the removal of the vehicle from a roadway. CP 10. The *Houser* case is not germane.

The Defendant claims the facts of our case are “nearly identical” or “strikingly similar” to those in *State v. Neth*, 165 Wn.2d 177, 196 P.3d 658 (2008). BOA at 14, 15. This is inaccurate. The only facts the two cases have in common are that both Neth and Walker had convictions for drug dealing and were nervous. *State v. Neth*, 165 Wn.2d at 183.

Mr. Neth was stopped by a trooper for speeding and arrested on a warrant. *State v. Neth*, 165 Wn.2d at 179-80. Here Mr. Tonies and Mr. Walker were not traveling in the SUV and were not arrested. They were walking around a park, and they left in a different vehicle. Police did not impede their movement.

Mr. Neth associated himself with the car, claiming to have purchased it, although a registration check did not confirm this. *State v. Neth*, 165 Wn.2d at 180. Mr. Walker denied owning the SUV and, in the face of Mr. Tonies’ statement and while in possession of the car keys, refused to confirm that he had even driven the car to Prescott. He was attempting to distance himself from the vehicle in words and space.

The trooper seized Neth’s hatchback after a K-9 unit alerted for drugs. *State v. Neth*, 165 Wn.2d at 179. The trial court found the

particular K-9 to be unreliable. *Id.* Therefore, the only remaining evidence supporting seizure was a large amount of cash (which Neth explained was to rent a house from his father) and some unused plastic bags in his pocket. *Id.*

In our case, the seizure occurred before the application of a K-9 unit, such that impoundment never relied upon this information. Nor did impoundment have anything to do with the presence of cash. Instead, the evidence was that a known drug dealer was meeting someone clandestinely behind a fence in a closed park in the middle of the night, unable to provide a satisfactory explanation for his presence, and trying to distance himself from the vehicle which he had driven to the park. In plain view, the deputy could see the SUV held marijuana, a glass smoking device, and other drug paraphernalia (jars, a plastic baggie, and the Mentos container).

Probable cause can depend on the expertise of the officer. For example, a trooper knows from experience that the overpowering smell of cologne on a driver may suggest alcohol or drugs, because it is commonly used to mask such odors. *United States v. Ludwig*, 641 F.3d at 1248.

An officer of a narcotics detail may find probable cause in activities of a suspect and in the appearance of paraphernalia or physical characteristics which to the eye of

a layman could be without significance. His action should not, therefore, be measured by what might or might not be probable cause to an untrained civilian passerby, but by a standard appropriate for a reasonable, cautious, and prudent narcotics officer under the circumstances of the moment. *Bell v. United States*, 102 U.S.App.D.C. 383, 254 F.2d 82 (1958).

State v. Poe, 74 Wn.2d 425, 429, 445 P.2d 196 (1968).

Here, the Mentos container on the dashboard, which is innocuous to a layman, was a significant indicator to the deputy who knows it to be a container of choice for illegally possessed controlled substances. RP 13-14 (“In my training and experience I have seen drugs of all types, methamphetamine, marijuana, stored inside Mentos containers.”). And, in fact, it contained hydrocodone and methamphetamine.

This evidence meets the low standard for probable cause.

The Defendant would like to defend each fact separately. BOA at 15-18 (presence in a closed park “in and of itself”) (Walker’s criminal history “standing alone”). But this is not the standard. The courts look at the totality of the evidence. The totality of the evidence here supports the trial court’s finding that there was probable cause for impoundment.

E. THERE WAS PROBABLE CAUSE FOR THE SEARCH WARRANTS.

The Defendant challenges whether there was probable cause for the issuance of a search warrant. BOA at 19. The Defendant argues that the K-9 sniff was unreliable, because the K-9 Rev had been trained in the past to alert to marijuana and there was marijuana in the SUV. BOA at 20. However, (1) the record does not show and the court did not find that Rev was unreliable and (2) there was probable cause independent of the K-9 alert.

It remains illegal to possess marijuana in excessive amounts. RCW 69.50.360, .4013. If Rev alerted to marijuana, this alert could provide “probable cause that there was perhaps a felony amount of drugs in there, whether it be marijuana or something else like methamphetamine.” RP 57-58. Therefore, regardless of I-502, a canine alert provides useful information in a determination of probable cause.

The Defendant’s argument is not supported by the court ruling. There was no showing and the court did not find that Rev was unreliable. In making its determination of probable cause, the court was aware of the dog’s training and certification. There was no allegation by the State that Rev would not alert to marijuana. The court found that Rev had been

trained to alert for the presence of heroin, cocaine, methamphetamine, and marijuana, but was only certified at the time as to the first three substances. CP 59. *See also* RP 38-40. Officer Fulmer had quit training Rev around marijuana for a year before this application. RP 48.

Officer Fulmer does not deploy Rev unless the officer is satisfied that a substance other than marijuana is involved. CP 60 (§ 12). And none of the items which Rev alerted to in this case tested positive for marijuana. *Id.*

So informed, the superior court found that there was probable cause to support the warrants based on all the information that supported impoundment coupled with the K-9 sniff. CP 59.

The Defendant's argument is also not supported in the case law. No authority says that after the passage of I-502, all previously certified drug dogs are unreliable and must be retired.

Although Rev made no error, a drug dog can err and still be reliable. Probable cause for arrest and search warrants have routinely been sustained despite significant canine error rates. *United States v. Ludwig*, 641 F.3d at 1252 (an accuracy rate of 55 to 60 per cent is more than reliable enough to establish probable cause); *United States v. Ohoro*, 724 F. Supp. 2d 1191, 1203-04 (M.D. Ala. 2010) (a dog with "a 55%

accuracy rate in finding measurable amounts of drugs” was sufficiently reliable to establish probable cause). Probable cause to search or arrest may be found even when a canine does not alert on a package or container. *United States v. Lakoskey*, 462 F.3d 965, 976-77 (8th Cir. 2006); *United States v. Ramirez*, 342 F.3d 1210, 1212-13 (10th Cir. 2003) (“an investigator need not honor a dog’s judgment in every case, because even highly trained dogs remain fallible”).

In this case, the court found probable cause for impoundment *before* the K-9 sniff. If this Court agrees that there was probable cause for impoundment, then it must also necessarily find that the magistrates did not abuse their discretion in determining probable cause for the warrants which were premised on the information known before impoundment plus some additional information.

Besides the information which supports impoundment, the magistrate on the first warrant also knew about the phone call from Nicole Oliveira and the canine alert to the passenger door. CP 41-46. The magistrate on the second warrant also knew about Ms. Oliveira and the canine alert to the backpack. CP 49-54. Ms. Oliveira told police that she owned the SUV and gave Mr. Walker permission to drive it. That being the case, Mr. Walker’s nervousness could not have been related to his

possession of the car itself. He had Ms. Olivera's permission to use the car. Therefore, his concern had to do with what was *contained* in the car.

The superior court upheld the two different magistrates' determinations of probable cause on both warrants based on all the information Officer Fulmer received from Deputy Edwards and supplemented by the canine sniff. CP 60. There was no abuse of discretion on the part of either issuing magistrate. Both warrants are supported by probable cause.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the suppression ruling.

DATED: May 21, 2015.

Respectfully submitted:

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<p>Andrea Burkhart <Andrea@BurkhartandBurkhart.com></p> <p>Justin Tonies 934 Edith Street Walla Walla, WA 99362</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 21, 2015, Pasco, WA</p> <p><u>Teresa Chen</u> Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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