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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 34154-2

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

STATE OF WASHINGTON,

RESPONDENT,

V.

JON SOUZA

APPELLANT.

BRIEF OF RESPONDENT

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COURT RULES

CrR 2.3

CONSTITUTIONAL PROVISIONS

Washington State Constitutional Article 1, § 7

I. APPELLANT'S ASSIGNMENTS OF ERROR

- A. The trial court erred when it entered Finding of Fact 1.4 (*Findings of Fact, Conclusions of Law and Verdict after Non-Jury Trial, 2/26/16*).
- B. The trial court erred when it concluded that because the dog sniff was in a public area, it was not intrusive and provided adequate probable cause for the issuance of a search warrant. (*Conclusion of Law 2.3, Findings of Fact, Conclusions of Law and Order on CrR 3.6 Motion, 10/23/15*).
- C. The trial court erred when it concluded that the positive sit response by the K-9 was adequate probable cause for the issuance of a search warrant. (*Conclusion of Law 2.3, Findings of Fact, Conclusions of Law and Order on CrR 3.6 Motion, 10/23/15*).
- D. The trial court erred when it concluded that the likelihood that the canine alert was to an illegal drug was supported by other relevant facts in the affidavit for the search warrant. (*Conclusion of Law A, CrR 3.6 Hearing, Conclusions of Law and Ruling, 12/14/15*).
- E. The trial court erred when it denied the defendant's motion to suppress items recovered from the glove box of the vehicle.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Is a trained K-9 officer's use of a trained K-9 to sniff for controlled substances in a public place a violation of Washington State Constitutional Article 1, § 7?
- B. Were the facts as stated in the affidavit for the search warrant sufficient to establish probable cause to issue a warrant to search the vehicle?

- C. Did the trial court err when it denied the motion to suppress the items removed from the defendant's vehicle?

III. STATEMENT OF THE CASE

A. Facts

Sergeant Loren Culp is a certified canine handler and works with his K-9 partner, Isko. RP 82-3. On August 8, 2015, Sgt. Culp was on duty as an officer for the Republic Police Department. RP 50, 83. On that day, Sgt. Culp was parked in a pull-off area alongside the road on South Clark Street near the Beaver Trap (a local store) and was performing routine traffic enforcement with his radar unit. RP 50, 84. Sgt. Culp noticed a vehicle traveling northward on Clark Street, past his location, which vehicle appeared to be exceeding the posted speed limit of 25 miles per hour. RP 50, 84. Sgt. Culp's radar unit confirmed that the vehicle, a gray pickup with a toolbox along the bed rail, was traveling at 35 miles per hour, well above the posted speed limit. RP 50, 84. As the driver passed Sgt. Culp, he looked right at Sgt. Culp and continued going. RP 84-85. Sgt. Culp was able to see the driver as the vehicle passed and later confirmed the driver's identity as the Defendant, Jon Souza. RP 84.

Sgt. Culp began to pull onto Clark Street behind the Defendant, but yielded to another vehicle that was traveling a few car

lengths behind the Defendant. RP 51, 85. Sgt. Culp expected to effectuate a traffic stop in the first appropriate place to pull over on Clark Street (the Napa parking lot). RP 51, 85. However, when Sgt. Culp crested the small hill between the Beaver Trap and Napa, the Defendant was nowhere in sight. RP 51, 85. This surprised Sgt. Culp because if the Defendant had been going the speed limit, he still would have been in view of the officer. RP 51. Sgt. Culp sped up and saw the Defendant, now several blocks away, on Keller Street. RP 51, 85. Sgt. Culp believed the Defendant was trying to get away from him based on the rapid increase in the distance between their vehicles and the Defendant's high rate of speed. RP 86. Sgt. Culp then activated his emergency lights, which is standard procedure for a routine traffic stop. RP 51-52. Sgt. Culp followed the Defendant as he turned from Keller Street to Klondike Street and then onto Thornton Drive and then into the hospital parking lot, where the Defendant finally stopped. RP 51-52, 85-86. At that time, Sgt. Culp conducted a traffic stop for speeding. RP 86.

The Defendant's perceived elusive behavior concerned Sgt. Culp, and so, upon initiating the stop, Sgt. Culp asked the Defendant to see his hands and then secured the Defendant in cuffs for his own safety. RP 52, 86-87. This is standard procedure for an officer who

has safety concerns. RP 52, 87. When the Defendant exited the vehicle, Sgt. Culp was able to see that there were no other occupants in the vehicle. RP 87.

At this time, Sgt. Culp was investigating a speeding infraction. RP 52-53. Per his standard protocol, Sgt. Culp requested the Defendant's license, registration, and proof of insurance. RP 88. Upon Sgt. Culp's request for a license, Defendant informed him that it was in his [Defendant's] backpack, which was located in the front of the truck. RP 88. Defendant gave Sgt. Culp permission to retrieve the license from the backpack and directed Sgt. Culp to the specific pocket where the license was located. RP 88. Defendant volunteered information to Sgt. Culp that his license was suspended, that he did not have a registration or insurance, and that he had purchased the vehicle earlier in the spring. RP 88. Sgt. Culp asked the Defendant if there were any drugs in the vehicle, RP 54, 61, to which Defendant replied that there were not. CP 124.

After running the Defendant's license through dispatch, Sgt. Culp informed the Defendant that he was under arrest for driving with his license suspended in the third degree and for failure to transfer his title. RP 89.

As the Defendant was being secured by another officer, Sgt.

Culp walked around the Defendant's vehicle with his K-9 partner Isko. RP 90. Isko gave a sit response at the driver's side door of the Defendant's vehicle, after which Defendant applied for and received a search warrant for the Defendant's vehicle. RP 90.

Upon searching the Defendant's vehicle, Sgt. Culp located a box in the glove compartment. RP 91. That box contained three pipes which Sgt. Culp knew from experience were commonly used to smoke methamphetamine. RP 91, 96-97. Also in the box, Sgt. Culp located a small plastic baggie, commonly referred to as a "bindle", which contained what appeared to be methamphetamine. RP 91, 93. That bindle and its contents were sent to the Washington State Patrol Crime Laboratory for testing. RP 100. The contents of the bindle were tested by forensic scientist Steven Reid, who determined that the contents of the bindle contained methamphetamine. RP 122, 127.

B. Procedure

On August 14, 2015, Defendant/Appellant Jon Souza was charged in Ferry County Superior Court by an information alleging one count of Possession of a Controlled Substance (Methamphetamine), contrary to RCW 69.50.4013, one count of Use of Drug Paraphernalia, contrary to RCW 69.50.412(1), one count of

Driving While License Suspended or Revoked in the Third Degree, contrary to RCW 46.20.342(1)(c), and one count of Failure to Transfer Title within 45 Days After Date of Delivery, contrary to RCW 46.12.650(7). CP 15-17. Prior to trial, Defendant moved on two occasions to suppress the evidence of the controlled substance and paraphernalia that was obtained from the Defendant's vehicle. CP 24, 65. Both motions were denied. CP 55-64, 112-115. Defendant also moved to suppress the Defendant's statements made to law enforcement. CP 103. This motion was denied, except with regard to the answer to the question "do you have any drugs in the car." CP 123-126.

Defendant's case was tried to the Bench, the Honorable Patrick Monasmith, on January 20, 2016. RP 80-191. Witnesses called by the State were Republic Police Sergeant Loren Culp (RP 82-120), Washington State Patrol Forensic Scientist Steven Reid (RP 120-138), and Washington Department of Licensing Records Custodian Richard Letteer (RP 138-154). Defense presented no witnesses.

After the State rested, Defendant moved to dismiss the charges of Use of Drug Paraphernalia and Failure to Transfer Title, claiming that the State had failed to establish a prima facie case. RP

155. These motions were denied. RP 160-161. After the parties presented closing arguments to the Bench, the Judge found the Defendant guilty of the charges of Possession of a Controlled Substance, Use of Drug Paraphernalia, and Driving While License Suspended in the Third Degree. RP 178-84. The Judge found the Defendant not guilty of the charge of Failure to Transfer Title within 45 Days of Delivery. RP 178-84.

The Judge issued oral findings in court and followed up with written findings of fact and conclusions of law on February 26, 2016. CP 127-32. A sentencing hearing was held on February 26, 2016, at which Defendant was sentenced to 45 days on the Possession of Methamphetamine charge and 90 days each on the DWLS 3 and Paraphernalia charges, with 90 days suspended on conditions of probation. RP 203. Defendant was given credit for any time that he had already served on the sentence while awaiting trial. CP 133-142.

IV. ARGUMENT

A. A TRAINED CANINE'S "SNIFF" IN A PUBLIC PLACE DOES NOT CONSTITUTE AN UNCONSTITUTIONAL WARRANTLESS SEARCH

1. Standard of Review

An appellate court reviews constitutional issues de novo.

State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). When

a trial court denies a motion to suppress, an appellate court reviews that court's conclusions of law de novo. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

2. Case Law and Analysis

Under the Fourth Amendment, a search occurs when the state intrudes upon an area where a person has a reasonable expectation of privacy. *United States v. Jones*, 565 U.S. 400, 132 S. Ct. 945, 950, 181 L. Ed. 2d 911 (2012). A reasonable expectation of privacy is measured by a two-fold analysis. *United States v. Katz*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 576 (1967). First, a person must have "exhibited an actual (subjective) expectation of privacy." *Id.* Second, the individual's expectation must be "one that society is prepared to recognize as "reasonable." *Id.*

The U.S. Supreme Court has held that under the Fourth Amendment, a sniff by a drug-scenting dog is not a search. *Illinois v. Caballes*, 543 U.S. 405, 409, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005); *United States v. Place*, 462 U.S. 696 (1983). The Ninth Circuit and other federal courts have also repeatedly held that use of a narcotics-detection dog in a public place does not itself constitute a search so as to implicate Fourth Amendment concerns. *United*

States v. Jensen, 425 F.3d 698, 708 (9th Cir. 2005) (citing *Illinois v. Caballes*, *supra*), *United States v. Lustig*, 830 F.3d 1075, 1081 (9th Cir. 2016), *United States v. Matson*, 2008 U.S. Dist. LEXIS 77630 (E.D. Wash. 2008).

No Washington court has yet held that a trained dog's sniff around the exterior of a vehicle necessarily constitutes a search under article I, section 7 of the Washington State Constitution. See *State v. Neth*, 165 Wn.2d 177, 181, 196 P.3d 658 (2008) (finding the issue was not before the Court despite accepting the case for review on that assumption). In contrast to the U.S. Supreme Court's blanket ruling that dog sniffs never constitute a search under the Fourth Amendment, Washington courts have adopted a situational approach, holding that the question of whether a canine sniff constitutes a search is fact-specific and dependent on the object sniffed as well as on the circumstances surrounding the sniff. *State v. Hartzell*, 156 Wn.App. 918, 929, 237 P.3d 928 (2010) (citing *State v. Boyce*, 44 Wn. App. 724, 729, 723 P.2d 28 (1986)). "[A]s long as the dog "sniffs the object from an area where the defendant does not have a reasonable expectation of privacy, and the canine itself is minimally intrusive, then no search has occurred." *State v. Boyce*, 44 Wn. App. at 730. Other state appellate court decisions

have likewise held that a dog sniff does not constitute a search under Article I, § 7 if the defendant has no reasonable expectation of privacy in the object being sniffed and the sniff is minimally intrusive. *State v. Dearman*, 92 Wn. App. 630, 635-37, 962 P.2d 850 (1998), citing *State v. Boyce*.

In *Boyce*, the court ruled that a dog sniff around the defendant's safety deposit box was not a search under Article I, § 7, reasoning that the defendant had no expectation of privacy in the bank vault and that it was only minimally intrusive for an officer invited into the bank to use the dog in this manner. *State v. Boyce*, 44 Wn.App. at 730. Washington courts consistently followed the rule articulated in *Boyce* and *Dearman* in other cases. See, e.g., *State v. Stanphill*, 53 Wn. App. 623, 769 P.2d 861 (1989) (dog sniff of package at post office not a search); *State v. Wollohan*, 23 Wn. App. 813, 598 P.2d 421 (1979), *review denied*, 93 Wn.2d 1008 (1980) (dog sniff of parcel at bus terminal not a search).

Specifically in the context of automobiles, in *State v. Hartzell*, Division One reiterated the rule as stated in *Boyce* and held that a drug dog sniffing through an open window of an S.U.V., when the dog sniffed from a lawful vantage point and the defendant was not in the vehicle, was not a search. 156 Wn. App. 918, 237 P.3d 928

(2010). The *Hartzell* court held that the trial court correctly concluded that Hartzell did not have a reasonable expectation of privacy in the air coming from the open window of the vehicle—especially given that Hartzell was not inside the vehicle when the dog sniffed from a lawful vantage point outside the vehicle—and that the sniff was only minimally intrusive. *Id.* at 929.

When the Court of Appeals has departed from this view, it has only been in the strict context of the home. In *State v. Dearman*, the court held that a dog standing in a driveway, sniffing at the crack of an attached garage door, was a search because of the direct connection to the home. 92 Wn. App. 630, 633 n.4, 932 P.2d 950 (1998). But the court also noted that its decision might be different if the garage were detached from the home. *Id.* And the court specifically did not overrule previous rulings, such as *Boyce*, holding that canine sniffs are *not* searches when the dog is sniffing other locations and objects from a public vantage point. *Id.* at 637, n.20.

Here, Appellant attempts to analogize the use of a canine sniff to the use of thermal infrared devices that was held to be an unconstitutional search in *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). However, the Washington State Supreme Court

recently addressed this specific issue and distinguished between technology that enhances an officer's sensory perceptions (such as infrared imaging or vehicle tracking devices) and other investigatory techniques which reveal only limited information:

[N]ot all technology or techniques used to augment an officer's unaided observation of a suspect transforms that observation into a search. Officers may use flashlights or binoculars, and may even conduct aerial flyovers of a suspect's property to aid their observation without infringing on a suspect's article I, section 7 rights....In determining what constitutes a search, we consider whether the technology is generally available to the public as well as *the amount of information revealed by the use of that technology.*

State v. Mecham, 186 Wn.2d 128, 147, 380 P.3d 414 (2016), emphasis added. The Court in *Mecham* goes on to say that investigative devices such as FSTs (field sobriety tests) and canine sniffs for contraband qualify as such non-search limited investigative techniques because they reveal only a limited amount of information. *Id.* at 147-48. Like an FST, a canine sniff does not reveal information which has traditionally been afforded protection under Article I, § 7: a canine sniff is not a physical search, nor is it analogous to a search of a tangible object such as a person's garbage. *Id.* The information revealed and the level of intrusion are distinct from taking bodily fluids, and the sniff will not reveal

information analogous to private electronic information such as cell phone records or pen registers. *Id.* Instead, a canine sniff is a limited investigative technique which will reveal only the presence of an item which may constitute contraband. *Id.*

Appellant is correct that there is a constitutional right to be free from *unreasonable* governmental intrusion into his automobile and its contents. However, the canine sniff by Isko was not unreasonable, nor was it an intrusion. The sniff was a limited investigative technique that merely gave the Officer probable cause to believe that a crime was being committed and which prompted him to seek a warrant to allow for further investigation as approved by the issuing magistrate. Therefore, the trial court did not err when it held that the sniff by Isko was not an impermissible warrantless search.

B. THE WARRANT AFFIDAVIT SET FORTH SUFFICIENT FACTS TO ESTABLISH PROBABLE CAUSE FOR THE SEARCH WARRANT

1. Standard of Review

It is well-settled that a search warrant affidavit must set forth sufficient facts and circumstances to establish a reasonable probability that evidence of criminal activity would be found in the location to be searched. CrR 2.3; *State v. Petty*, 48 Wn. App. 615,

621, 740 P.2d 879 (1987); *State v. Higby*, 26 Wn. App. 457, 460, 613 P.2d 1192 (1980). It should set forth sufficient facts to lead a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity. *State v. Cord*, 103 Wn. 2d 361, 365, 693 P.2d 81 (1985). The likelihood of criminal activity, rather than a prima facie showing of it, determines whether a warrant should issue. *State v. Hansen*, 42 Wn. App. 755, 714 P.2d 309, *aff'd*, 107 Wn.2d 331, 728 P.2d 593 (1986).

The issuing magistrate may draw common sense inferences from the facts and circumstances contained in the affidavit. *State v. Hansen, supra*. Great deference must be given to the magistrate's determination of probable cause and *all doubts are to be resolved in favor of the warrant*. *United States v. Ventresca*, 380 U.S. 102, 109, 134 L. Ed. 2d 684, 85 S. Ct. 741 (1965), emphasis added; *State v. Smith*, 110 Wn.2d 658, 756 P.2d 772 (1988); *State v. O'Connor*, 39 Wn. App. 113, 692 P.2d 208 (1984).

The issuance of a search warrant is a matter of judicial discretion and is reviewed only for an abuse of that discretion. *State v. Smith*, 93 Wn.2d 329, 610 P.2d 869 (1980); *State v. Dobyms*, 55 Wn. App. 609, 620, 779 P.2d 746 (1989). Such "abuse" may be found *only* where it is exercised on untenable grounds or for

untenable reasons. *State ex. rel. Carrol v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

2. The canine alert, along with the officer's observations, was sufficient to establish probable cause for the search warrant.

Washington courts have consistently concluded that "an 'alert' by 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) (finding a search warrant for a FedEx package was validly issued) (emphasis added); see also *Valdez*, 137 Wn. App. at 289; *State v. Flores-Moreno*, 72 Wn. App. 733, 866 P.2d 648 (1994) (when a dog's training and certification is established on the record, probable cause can be established by a positive reaction by the dog); *State v. Wollohan*, 23 Wn. App. 813, 598 P.2d 421 (1979) (alert by dog with reliable record was sufficient to establish probable cause).

Appellant argues that, because marijuana is now legal in the State of Washington, the dog sniff is an invalid basis for probable cause because Isko is trained to alert to marijuana as well as other controlled substances and the officer had no way of knowing if the drugs Isko detected were illegal or not. However, the limitations of a canine are *not* fatal to a determination of probable cause.

Probable cause only requires “a fair *probability* that contraband or evidence of a crime will be found,”¹ not certainty or even a preponderance of the evidence.² Appellant is correct that a narcotics canine trained to “hit” on marijuana could lead to problematic search warrants when the warrant is based on the canine alert alone. However, because marijuana is not legal for everyone and under all circumstances, there are some circumstances where a mere alert would give rise to probable cause of criminal activity. For instance, if the driver is under 21 then the alert by the dog in and of itself is sufficient for probable cause. Likewise, if the narcotics canine alerts but the officer has ruled out that the alert is to a legal substance, it could be assumed that any such alerts would be for illegal controlled substances, and the sniff/alert alone could give rise to probable cause for a search warrant. Thus, it is clear that a narcotics canine can still be a useful investigative tool for law enforcement, even if it is trained to alert on both legal and illegal controlled substances.

In the present case, the officer relied upon several

¹ Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L.Ed. 2d 527 (1987).

² Id. Accord State v. Hatchie, 161 Wn.2d 390, 404, 166 P.3d 698 (2007) (“Probable cause requires more than suspicion or conjecture, but it does not require absolute certainty.”) State v. Chenoweth, 160 Wn2d 454, 475, 158 P.3d 595 (2007) (“A tolerance for factual inaccuracy is inherent to the concept of probable cause.”).

independent factors in addition to Isko's alert. First, the officer believed that the Defendant was trying to elude him. In his affidavit, Sgt. Culp describes how the Defendant looked at him [Culp] as he drove past and sped up after Sgt. Culp pulled towards Clark Avenue. He goes on to state that "the distance the truck had gained on me made me believe that the driver was trying to elude me and it was clear that the vehicle had been traveling at extreme speeds." Sgt. Culp followed the Defendant with his emergency lights activated from before the Sheriff's Office all the way to the hospital parking lot before the Defendant finally pulled over and stopped. This trial court found that the Defendant's actions qualified as potentially evasive or guilty knowledge on the part of the Defendant which, in addition to the canine alert, gave rise to probable cause of illegal activity. That is to say, if the Defendant had nothing to hide from the officer, there was no reason to try to elude or outrun the officer. This was one independent factor that Sgt. Culp described in his affidavit for the search warrant.

Secondly, Sgt. Culp relied upon statements made by the Defendant. As stated in his affidavit, Sergeant Culp asked the Defendant if he had any drugs in the vehicle, to which the Defendant replied "no." If the Defendant had a legal amount of

marijuana, he had no reason to lie to the officer. Subsequently, K9 Isko alerted to the presence of drugs in the vehicle. At that time, Sgt. Culp had reason to believe that there might be drugs in the vehicle, yet the Defendant—whom he believed had just tried to elude him—told him that there were not. At this point, it was reasonable for Sergeant Culp to surmise that not only was it probable that there were drugs in the vehicle (based on Isko's sniff), but that the drugs present were probably illegal in nature, based on the Defendant's statement that there were no drugs in the vehicle. Again, if the Defendant had answered the question saying that he had perhaps a small amount of marijuana, and Isko had alerted after that, Sergeant Culp may not have had reason to search the vehicle – after all, there would have been a *legal* explanation for why Isko alerted. However, the Defendant's reaction of eluding, and his statement that there were *no* drugs in the vehicle, coupled with Isko's subsequent alert, were enough to raise a reasonable suspicion that there was contraband in the vehicle.

3. Sgt. Culp's affidavit provided sufficient evidence about Isko's qualifications to establish his reliability and support issuance of the warrant.

Appellant claims that the canine alert should have been

stricken from the probable cause determination because the search warrant affidavit was insufficient to establish K9 Isko's reliability. However, Washington courts have held that canine reliability may be premised on a statement that the dog is trained and certified, without a showing of the dog's track record. *State v. Gross*, 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). See also *United States v. Klein*, 626 F.2d 22, 25-27 (7th Cir. 1980), *United States v. Venema*, 563 F.2d 1003, 1007 (10th Cir. 1977), *United States v. Meyer*, 536 F.2d 963, 965-66 (1st Cir. 1976).

While canine-conducted narcotics searches may have encountered some judicial skepticism in the past, the technique is now sufficiently well-established to make a formal recitation of a police dog's *curriculum vitae* unnecessary in the context of ordinary warrant applications.

State v. Gross, 57 Wn.App. at 551, citing *United States v. Trayer*, 701 F. Supp. 250, 256 (D.D.C. 1988). See also *United States v. Sentovich*, 677 F.2d 834, 838 N.8 (11th Cir. 1982) ("training of a dog alone sufficient proof of reliability").

Appellant cites *State v. Neth*, 165 Wn.2d 177, 196 P.3d 658 (2008) in support of its argument that Sgt. Culp's affidavit here was insufficient. However, this case is easily distinguishable from *Neth*.

First, in *Neth*, the warrant affidavit merely stated that the dog was “trained to recognize the odor of illegal narcotics.” *Id* at 181. Here, the affidavit gave much more information, including that Isko and his handler were certified as a Narcotics K9 team with the State of Washington and had completed 240 hours of training. The affidavit also set forth all the substances that Isko was trained to detect, as well as Isko’s limitations (inability to communicate which substance has been detected or what amounts are detected). Unlike *Neth* where the affidavit did not discuss the dog’s certification, here, Sgt. Culp clearly communicated both Isko’s qualifications and limitations to the magistrate reviewing the warrant affidavit.

It is important to note that in *Neth*, the issue of whether the warrant affidavit adequately established the dog’s reliability was not before the Appellate Court. That determination had been made by the trial court and was not reviewed on appeal. The issue the *Neth* court addressed was whether there was sufficient evidence in the warrant affidavit, *other than the dog alert*, to justify issuance of the warrant, which there was not. *Neth* never addressed the issue of whether the trial court’s ruling on the dog’s reliability was proper, and therefore *Neth* is of limited application to the case at hand.

Here, the affidavit set forth that Isko's training and certification, which, per *State v. Gross* is sufficient to establish the canine's reliability. Furthermore, the issue of Isko's reliability was not raised in the trial court and cannot be raised for the first time on appeal.

4. Under the Totality of the Circumstances, there were sufficient facts to support a finding of probable cause.

Affidavits of probable cause need not meet the standards governing the admissibility of evidence at trial. *State v. Grenning*, 142 Wn.App. 518, 534, 174 P.3d 706 (2008). "We give great deference to the trial court's probable cause determination." *Id.* Even if all the information relied upon in the affidavit would not have been admissible at trial, it was sufficient for the issuing magistrate's finding of probable cause. The totality of the circumstances leading up to Sgt. Culp seeking a search warrant - including the dog's alert, the Defendant's acts prior to and leading up to the stop, and his statements to Sergeant Culp - gave Sergeant Culp a sufficient independent basis for his belief that there were illegal controlled substances in the Defendant's vehicle, contrary to RCW 69.50.4013. These facts were communicated in the warrant affidavit which was reviewed by the issuing magistrate. Based on

the affidavit, the reviewing magistrate issued the search warrant through which Sgt. Culp did, indeed, find controlled substances in the Defendant's vehicle. Based on the information in the affidavit, there was probable cause for the issuance of the warrant and Appellant has not shown that the issuing magistrate abused his discretion in doing so, or issued the warrant for on "untenable grounds" or for "untenable reasons".

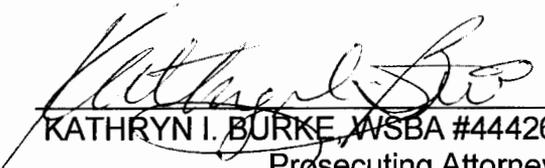
E. CONCLUSION

Under the precedent of State and Federal law, it is clear that K9 Isko's "sniff" of the air outside Appellant's vehicle, which was located in a hospital parking lot, does not constitute an impermissible warrantless search. It is also clear that the search warrant affidavit prepared by Sgt. Culp contained sufficient information about Isko's training and certification from which a reviewing magistrate could find that Isko's alert was reliable. The evidence in the affidavit, which included information about Isko's alert, along with Sgt. Culp's own observations about Appellant's statements and actions, were sufficient to establish a reasonable probability that evidence of criminal activity would be found in the Appellant's vehicle. Therefore, the trial court did not err by denying Appellant's motion to suppress the evidence obtained from Appellant's vehicle.

For the reasons stated above, the State respectfully requests that the Court deny Appellant's motion to reverse and remand back to the trial court and to suppress the evidence obtained through the search warrant.

Dated this 22 day of December, 2016

Respectfully Submitted by:


KATHRYN I. BURKE, WSBA #44426
Prosecuting Attorney

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COURT OF APPEALS, DIVISION III
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JON SOUZA
Appellant.

No. 34154-2 III
Ferry County #15-1-00053-5

PROOF OF SERVICE

I, Terri Bell, do hereby certify under penalty of perjury that on December 22, 2016, I mailed to the following by U.S. Postal Service first class mail, postage repaid, or provided email service by prior agreement (as indicated), a true and correct copy of:

BRIEF OF RESPONDENT

Marie J. Trombley
WSBA 41410
P.O. Box 829
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I certify/declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 22nd day of December, 2016.



TERRI BELL
Legal Assistant

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COURT OF APPEALS, DIVISION III
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JON SOUZA
Appellant.

No. 341542 III
Ferry County #15-1-00062-4

PROOF OF SERVICE

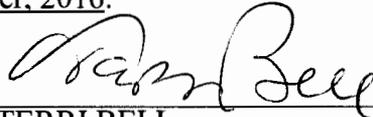
I, Terri Bell, do hereby certify under penalty of perjury that on December 22, 2016, I mailed to the following by U.S. Postal Service first class mail, postage repaid, or provided email service by prior agreement (as indicated), a true and correct copy of:

RESPONDENT'S BRIEF

Renee S. Townsley, Clerk
Court of Appeals, Div III
500 N. Cedar St.
Spokane, WA 99201-1905

I certify/declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 22nd day of December, 2016.



TERRI BELL
Legal Assistant