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

DIVISION III

No. 35619-1-III

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STATE OF WASHINGTON, Respondent,

v.

TERESA JEAN ALATORRE, Appellant.

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**APPELLANT'S BRIEF**

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## **I. INTRODUCTION**

Teresa Alatorre was sitting in a passenger seat in a car stopped in a public alley when police approached it and detained the occupants, despite them being involved in no criminal activity. Police arrested the driver for driving with a suspended license and subjected the car to a warrantless dog sniff. Informing the driver that the dog alerted, police obtained consent to search the car. During the search, police opened a closed bag located in the passenger area where Alatorre had been sitting and found several baggies containing small amounts of methamphetamine.

The State charged Alatorre with possessing methamphetamine with intent to deliver and tried the case to a jury. Its evidence at trial that Alatorre intended to deliver the methamphetamine consisted of the quantity and the individual packaging, together with generalized testimony from a drug unit detective about the kinds of things drug dealers generally do and the kinds of things that are indicative of dealing rather than possessing drugs for personal use. The jury convicted Alatorre, and the trial court sentenced her to 16 months in prison. On appeal, she contends that (1) the initial stop of the vehicle was unauthorized by law; (2) Tyrell had no authority to consent to a warrantless search of her bag; (3) the dog sniff constituted an unlawful warrantless search; (4) the drug detective's testimony constituted an improper opinion on guilt; and (5) the evidence

was insufficient to establish intent to deliver. In the event she does not prevail on these issues, she requests that the court waive appellate costs due to her continuing indigency.

## **II. STATE'S ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR NO. 1:** The seizure of the vehicle was unjustified when it was stopped in a public alley where the driver had a right to be present and police had no reasonable suspicion of criminal activity.

**ASSIGNMENT OF ERROR NO. 2:** Police lacked consent from a person with actual authority when they opened and searched the lunch bag found in the car without a warrant.

**ASSIGNMENT OF ERROR NO. 3:** The dog sniff constituted a search under article I, section 7 of the Washington Constitution that required a warrant.

**ASSIGNMENT OF ERROR NO. 4:** Testimony of Detective Steve Harris about how people handle their drugs and finding multiple baggies of drugs indicates the person is selling improperly opined on Alatorre's guilt.

**ASSIGNMENT OF ERROR NO. 5:** Because the only evidence that Alatorre intended to deliver drugs was the quantity and the individual

packaging, the State failed to meet its evidentiary burden to prove intent to deliver as a matter of law.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE NO. 1:** Is the lawfulness of the stop a manifest error affecting a constitutional right that can be raised for the first time on review?

**ISSUE NO. 2:** In the absence of a protective order or other legal prohibition preventing a male driver from being within a specified distance of a women's shelter, may police detain the driver for parking in a public alley behind it?

**ISSUE NO. 3:** When police obtain consent to search a vehicle from the vehicle's driver, does that consent extend to opening and searching a passenger's bag found inside the car?

**ISSUE NO. 4:** Is the lawfulness of a warrantless K9 dog sniff a manifest error affecting a constitutional right that can be raised for the first time on review?

**ISSUE NO. 5:** Is a K9 sniff a search within the meaning of article I, section 7 of the Washington Constitution?

ISSUE NO. 6: Does Alatorre have automatic standing to challenge the stop and the K9 dog sniff of a vehicle in which she was a passenger when she was charged with possessing contraband found inside the vehicle?

ISSUE NO. 7: Did it invade the province of the jury for Detective Harris to testify that drug users usually keep their drugs close by, that finding 11 bags with meth in them says that person is selling, and if drugs are found without paraphernalia, the person isn't using but selling?

ISSUE NO. 8: When police retrieved no ledgers, cash, messages pertaining to drug transactions, scales, or packaging materials, or any other corroborating evidence of intent to deliver drugs, was mere evidence of the quantity of drugs retrieved in individual packages sufficient to prove intent to deliver?

#### **IV. STATEMENT OF THE CASE**

On the morning of April 12, 2017, employees of the YWCA women's shelter were in a staff meeting when they saw a car pull up and stop in the alley behind the shelter. RP 83-84, 125-27, 146, 149-51. They recognized the driver as a man who had been seen there on several occasions. RP 84. The alley was not owned by YWCA, and the car simply sat there while some of the residents approached it. RP 85, 128, 131-32, 150-51. Based on their view that men were not supposed to be

hanging around near the shelter and the man parked in the alley was too close, the shelter director called the police to report he was trespassing. RP 84, 130, 151.

At least three uniformed officers responded to the call in marked patrol cars and contacted the vehicle. RP 34, 36, 161-63. Believing the driver might have been up to something inappropriate, they spoke with him for several minutes about why he was there. RP 38. Other than the driver, the only other person in the car was Teresa Alatorre, who was sitting in the rear passenger seat. RP 39. Eventually, police identified the driver as Raymond Tyrell, determined his driver's license was suspended, and decided to arrest him. RP 38, 39.

Before the stop was concluded, Alatorre asked to get out of the car and was permitted to exit. When she attempted to remove a bag from the car, police asked her for permission to search it for weapons, which she granted. Nothing was found in the bag. RP 40. Police continued to question Tyrell and Alatorre about their activities and believed their stories were somewhat inconsistent because Tyrell reported they were going to Wildhorse Casino while Alatorre was vague about where they were going and did not mention the casino. RP 40-42. Eventually, when Tyrell was arrested, Alatorre was allowed to leave. RP 43.

Based upon information from YWCA staff, police decided to run a K9 drug-sniffing dog around the car “to make sure there wasn’t some drug activity going on.” RP 43. The dog alerted to the front passenger door to indicate she detected an odor of narcotics inside. RP 43. The officer informed Tyrell that the dog had alerted and Tyrell said they could search the vehicle because there was nothing illegal inside. RP 44. Police found a small black lunch-type bag on the seat<sup>1</sup> next to where Alatorre had been sitting when they contacted her. RP 44. Without a warrant, they opened the bag and, inside, found several small bags that contained suspected methamphetamine. RP 44, 54. The officer observed that the bags were consistent in weight, indicating to him that they were what a dealer would deal out on the street. RP 45. The bag also contained an EBT card and some paperwork with Alatorre’s name on them. RP 50.

Police arrested Alatorre for possession of methamphetamine with intent to deliver it and transported her to the police station to be interviewed by a fourth officer. RP 59. The interview was not recorded, but the detective reported that she mentioned having a lunch bag and accurately described it as having a rip in it that needed to be sewn. RP 171-72, 177, 181-82. After mentioning the bag, the detective said that she

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<sup>1</sup> The officer also testified that the bag was on the floorboard at her feet, so its exact location in the car is unclear from the record. RP 54, 79.

appeared to physically jump in her seat and then tried to change the subject and distance herself from the bag. RP 181-82. He showed her a photo of the bag and she identified it as hers, stating that she had not seen the bag for some time and did not know how it would be in the car. RP 182. When he told her what had been found in the bag, he said she smiled and said she did not know what would be in the bag or why. RP 183.

The State charged Alatorre with possessing a controlled substance with intent to deliver, and the case proceeded to a jury trial. CP 3. A crime lab analyst testified that she measured and tested four baggies out of 13 total that were submitted to her. RP 24-26, 27-29. Two smaller baggies that she analyzed from a group of 11 contained less than .1 gram of methamphetamine, and two larger baggies contained .2 grams and .8 grams. RP 29-30, 32. The State also proffered testimony from a drug detective, Steve Harris, over a defense objection. In a discussion outside of the presence of the jury, the court expressed concerns that Harris not offer any opinions about guilt, and the State described his anticipated testimony as consisting of the value of the drugs involved and the significance of not recovering a ledger. RP 206-08. Based on those representations, the court overruled the defense objection and permitted Harris to testify. RP 208.

Subsequently, Harris testified and offered several opinions elicited by the State that the evidence was indicative of drug sales rather than possession for personal use. RP 215. First, in response to a question from the State about how drug users handle their drugs, he stated,

Well, their drugs are their money. It would be like you having a \$100 bill and setting it someplace and walking away. They are going to keep them concealed, hid, and they are going to keep them close by where they know where they can get them.

RP 216. The State then asked if subjects kept their drugs not on their person but in some other container associated with them, and Harris stated,

It is very common in vehicles. They have the opportunity to stash the drugs before we are able to make contact. So in a vehicle once, it's not rare, but not totally unheard of, to pull somebody out and they still have the drugs on them.

RP 219-20. The State asked a person would walk away from the drugs if the police showed up and Harris answered yes, because the person doesn't want to get caught with them. RP 220.

Following a discussion about amounts typical for personal use and typical packaging of methamphetamine, as well as the value of typical amounts, the State asked Harris about the significance of having two baggies with larger quantities and 11 smaller baggies. I RP 220-21, II RP 223-25, 227. Harris responded,

Based on my training and experience you have people that may want more than just a 20 sack. So you bag these all up in a safe place and if you're out making your deliveries, and you [sic] they want a 40 or they want a gram, which is going to be 60, you have it on hand, you don't have to find someplace to try to break this down and put it in little bags.

II RP 228. After eliciting information about the current prevalence of written drug ledgers, the following exchange occurred:

Q. Okay. Is there any significance to one being found where there is drugs in a larger quantity versus just one or two baggies? Is there any significance to a ledger being there or not being there in the vicinity?

A. A ledger just helps us determine whether, you know, these people, if we find one bag of Meth with a drug ledger and empty baggies, you know, you put those three things together and more likely than not they are distributing. If you find a drug ledger with no drugs then obviously they've sold what they had, and they have to keep the drug ledger for payment. Yeah, it does make a difference if we look for stuff **if we find 11 bags with Methamphetamine in it, okay, that's says people are selling.** If we find one bag with Meth in it say there is a half-ounce in there but we find no other packaging, no scales, no drug ledger, I mean, more likely than not they would probably be using that amount for distribution, but it's very hard to prove. So we look for ledgers, packaging material, larger quantities, and scales.

RP 229-30 (emphasis added). Finally, the State asked if there was any significance to the absence of paraphernalia found near the drugs. Harris replied,

That if there is no pipe with those drugs then they are obviously not using or smoking it. If there is no tooter, which is a straw that has been cut down to snort it, if that's

not they're likely, that they're not using what they have there, it's for sale.

RP 232.

On her own behalf, Alatorre testified she had been living at the YWCA shelter and the black lunch bag had gone missing a couple of days before. II RP 276-77, 280. She denied owning the drugs that were found in the bag or knowing they were there. II RP 291. The jury convicted her as charged with possessing the drugs with intent to deliver them, and the trial court imposed a sentence of 16 months' incarceration, 12 months of community custody, and \$800 in mandatory legal financial obligations. CP 54, 59, 60; II RP 354, 361, 362. Alatorre now appeals, and has been found indigent for that purpose. CP 71, 82.

## **V. ARGUMENT**

On appeal, Alatorre argues three errors allowed the introduction of evidence used to convict her that should have been suppressed, one error permitted testimony that invaded the province of the jury and deprived her of a fair trial, and one error resulted in her conviction for a charge for which the evidence was insufficient as a matter of law. These errors require reversal and remand for further proceedings.

As to the first three assignments of error, these errors are raised for the first time on review and are, therefore, subject to RAP 2.5(a)(3), which permits initial appellate review of manifest errors affecting a constitutional right. To establish a manifest error affecting a constitutional right, an appellant must demonstrate that the error is of constitutional magnitude, and actually affected the appellant's rights at trial. *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 evaluates 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), *review denied*, 173 Wn.2d 1021 (2012). Appellants have established manifest errors affecting constitutional rights when they show the illegality of a 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), *review denied*, 174 Wn.2d 1009 (2012); *State v. Littlefair*, 129 Wn. App. 330, 338, 119 P.3d 359 (2005).

Additionally, as to the first and third assignments of error, Alatorre alleges error arising from the unlawful stop and search of a vehicle that

she did not own. A person has automatic standing to challenge an unconstitutional intrusion into an area in which she was lawfully present, when the fruits of the search are proposed to be used against her. *State v. Simpson*, 95 Wn.2d 170, 175, 622 P.2d 1199 (1980); *State v. Michaels*, 60 Wn.2d 638, 646, 374 P.2d 989 (1962). Furthermore, vehicle passengers hold independent privacy interests that are not diminished by entering into another's vehicle. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Here, the record reflects that Alatorre was an invited passenger in Tyrell's vehicle at the time the police detained it and searched it. Accordingly, her lack of a titled interest in the vehicle does not preclude her from challenging unlawful police activity toward the vehicle that resulted in evidence used against her.

1. Because the car in which Alatorre was riding and in which the contraband was found was not violating the law, seizing the vehicle occupants to question them lacked the authority of law required by the Fourth Amendment and article I, section 7 of the Washington Constitution.

Under the Fourth Amendment to the U.S. Constitution, law enforcement officers may not seize an individual unless there is probable cause to believe the person has committed a crime. *Dunaway v. New*

*York*, 442 U.S. 200, 207-08, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). However, under the U.S. Supreme Court's decision in *Terry v. Ohio*, an officer may briefly detain a person whom he reasonably suspects of criminal activity for limited questioning. *State v. White*, 97 Wn.2d 95, 105, 640 P.2d 1061 (1982) (“[T]o justify the initial stop the officer must be able to point to specific and articulable facts that give rise to a reasonable suspicion that there is criminal activity afoot.”); *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429 (1980); *State v. King*, 89 Wn. App. 612, 618, 949 P.2d 856 (1998) (“[I]t is reasonable for an officer to detain a person briefly, for investigation, if the officer harbors a reasonable suspicion, arising from specific and articulable facts, that criminal activity is afoot.”).

While an officer may conduct a *Terry* stop on a vehicle, the stop is proper only if it was justified at its inception. *State v. Ladson*, 138 Wn.2d 343, 351, 979 P.2d 833 (1999). To be valid, the officer must show “a substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). A random stop to check a driver's license and vehicle registration or to investigate criminal activity, without any reasonable suspicion that the law is being violated, is contrary to both the Fourth Amendment to the U.S. Constitution and article I, section 7 of the Washington State Constitution.

*See generally Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988).

When an officer makes a traffic stop on objective facts that fail to constitute a violation, then there is a lack of reasonable suspicion to justify a stop. *U.S. v. Mariscal*, 285 F.3d 1127, 1130 (9th Cir. 2002). “If an officer simply does not know the law, and makes a stop based on objective facts that cannot constitute a violation, his suspicions cannot be reasonable. The chimera created by his imaginings cannot be used against the driver.” *Id.* (citing *U.S. v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000)).

Here, the record reflects no lawful basis to stop Tyrell’s vehicle. Although the YWCA director called the police because she apparently believed Tyrell should not be hanging around the shelter, at no point did Tyrell leave the public alley where he had a lawful right to be. RP 84, 131-32. Nothing in the record indicated that Tyrell was subject to any protective order excluding him from the vicinity of the shelter, or established any other legal right the shelter possessed to exclude unwanted persons from public property near their facility. Lastly, no evidence suggested that police witnessed Tyrell violate any rules of the road before

stopping the vehicle. Consequently, there was no reasonable suspicion of criminal activity that justified the stop.

Here, the record is adequate to evaluate the police conduct in stopping Tyrell's vehicle and the justifications for their intrusion, and demonstrates that the stop was constitutionally defective. Because the stop led directly to the search of the vehicle and the seizure of the contraband used to prosecute Alatorre, the stop also had real and practical consequences in the present case. Accordingly, Alatorre has met her burden to obtain review of the error under RAP 2.5(a)(3) and the court should hold that the drugs recovered from Tyrell's car following the unlawful seizure should not have been admitted against her at trial.

2. Police lacked legal authority to search the bag found within Tyrell's vehicle because he lacked actual authority to consent to its search.

Under article I, section 7 of the Washington State Constitution, police may not disturb an individual's private affairs without authority of law. The protections afforded against police intrusions into personal privacy are broader under the Washington State Constitution than under the Fourth Amendment to the U.S. Constitution. *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). Under article I, section 7, a warrantless search is *per se* unreasonable unless it fits within a "jealously

and carefully drawn exception” to the warrant requirement that is well-rooted in the common law. *York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 310, 178 P.3d 995 (2008). The State bears a heavy burden to establish that the warrantless search falls within an exception to the warrant requirement. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

Consent is an exception to the warrant requirement. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). A warrantless search is unconstitutional if police are not granted valid consent, and if no other exception to the warrant requirement is present. *Washington v. Chrisman*, 455 U.S. 1, 9-10, 102 S. Ct. 812, 70 L.Ed.2d 778 (1982). A valid consent search requires that (1) the consent be “voluntary,” (2) the consent be granted by a party having the authority to consent; and (3) the search be limited to the scope of consent granted. *State v. Hastings*, 119 Wn.2d 229, 234, 830 P.2d 658 (1992).

The State bears the burden of proving that consent to a search was given voluntarily. *Walker*, 136 Wn.2d at 682. A consensual search must be limited to the area covered by the authority given by the consenting party. *State v. Davis*, 86 Wn. App. 414, 423, 937 P.2d 1110, *review denied*, 133 Wn.2d 1028 (1997). A search which exceeds the scope of the

consent given is unlawful. *State v. Bustamante-Davila*, 138 Wn.2d 964, 982, 983 P.2d 590 (1999). A reasonable belief by police that a person had authority to consent to a search is irrelevant because there is no good faith exception to the warrant requirement in Washington. *State v. Eisfeldt*, 163 Wn.2d 628, 639, 185 P.3d 580 (2008).

Here, there is no evidence from which the court could determine that Tyrell had a privacy interest in Alatorre's belongings such that he had authority to consent to their search. *See State v. Morse*, 156 Wn.2d 1, 13, 123 P.3d 832 (2005) ("We have been quite explicit that under our constitution, the burden is on the police to obtain consent from a person whose property they seek to search."). The consent they received from Tyrell to search the vehicle could not extend to articles that were not his. Absent valid consent from the bag's owner or a warrant, police lacked constitutionally required authority of law to open and search the bag. Because Alatorre did not consent and because Tyrell's general consent to search the car could not extend to items over which he lacked authority, the entry into the bag was unlawful and its contents should not have been admitted in Alatorre's trial.

3. Because a police K9 dog sniff intrudes into a vehicle occupant's private affairs, it constitutes a search that requires a warrant under article I, section 7 of the Washington Constitution.

A K9 dog sniff permits law enforcement to intrude into a person's private affairs by detecting otherwise unavailable information about areas closed to public view. Accordingly, the dog sniff is a search within the meaning of article I, 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 found in Tyrell's car and used to prosecute Alatorre was unlawfully obtained and should not have been admitted.

Whether a dog sniff constitutes a search under Article 1, Section 7 of the Washington Constitution remains an open question in the Washington Supreme Court.<sup>2</sup> *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 dog sniff does not constitute a search. *See, e.g., State v. Wolohan*, 23 Wn. App. 813, 598 P.2d 431

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<sup>2</sup> In a recent unpublished opinion, this court recently rejected the argument that a dog sniff constitutes a search requiring a warrant under article I, section 7 of the Washington Constitution. *State v. Lares-Storms*, \_\_ Wn. App. \_\_, slip op. no. 34765-6-III (April 17, 2018). Under GR 14.1(a), the unpublished opinion has no precedential value and is not binding on any court. For the reasons set forth herein, Alatorre contends that *Lares-Storms* is wrongly decided and should not be followed.

(1979), *review denied*, 93 Wn.2d 1008 (1980); *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 I, section 7, and required a warrant. The *Young* Court recognized the analogy to the K9 dog 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 dog sniff is a search under article I, section 7. *State v. Dearman*, 92 Wn. App. 630, 962 P.2d 850 (1998), *review denied*, 137 Wn.2d 1032 (1999). The divisions have since remained split on the issue. *See, e.g., State v. Hartzell*, 156 Wn. App. 918, 237 P.3d 928 (2010). Although the Washington Supreme Court accepted review in *Neth* to address this question, it resolved the case on other grounds. 165 Wn.2d at 181

This court should follow the rationale of *Dearman* and hold that under the reasoning of *Young*, a K9 dog 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. The sniff in this case was conducted upon an area that courts have recognized is entitled to protection – a vehicle. *See generally Parker*, 139 Wn.2d at 496 (recognizing constitutionally protected privacy interest in automobiles and the contents therein). The sniff exposed the contents of this protected area to the police. Thus, the areas subject to the K9 dog sniff in this case are equally as deserving of protection as the home that was unlawfully searched in *Young*.

Simply stated, a K9 dog 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 dog sniffs are no longer viable and should be expressly repudiated. In the present case, the police utilized a K9 dog sniff and exploited the dog's

reaction to obtain the driver's consent to search. Because the consent, the search, and the discovery of the contraband flowed directly from the use of an intrusion that allowed police to heighten their senses to peer into the protected area of the car, the fruits of the search should not have been used to prosecute Alatorre.

4. Detective Harris's generalized testimony about how drug users handle their drugs and how possessing multiple bags and possessing drugs without also possessing paraphernalia indicates the person is selling invaded the province of the jury and unlawfully opined on Alatorre's guilt.

An opinion on guilt, direct or by inference, is improper. *State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.3d 267 (2008). Testimony constitutes an improper opinion on guilt when it goes to the ultimate factual issue in the case. *State v. Quaale*, 82 Wn.2d 191, 200, 340 P.3d 213 (2014). “[I]nferential testimony that leaves no other conclusion but that a defendant is guilty cannot be condoned, no matter how artfully worded.” *State v. Cruz*, 77 Wn. App. 811, 815, 894 P.2d 573 (1995). Introducing such evidence invades the exclusive fact-finding province of the jury and thereby undermines the constitutional right to a jury trial under the U.S. and Washington Constitutions. *Quaale*, 82 Wn.2d at 199; *Montgomery*, 163 Wn.2d at 590. Such evidence is particularly prejudicial

when it is expressed by a government official, including a police officer, because of the opinion's potential to unduly influence the jury. *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985).

Law enforcement agents may be permitted to testify to specialized knowledge obtained through training or experience, when such testimony is helpful to the trier of fact and does not embrace the defendant's guilt, veracity, or intent. *Montgomery*, 163 Wn.2d at 590-91. Thus, for example, the State may appropriately introduce specialized information about drug use and the drug trade, which is likely beyond the ordinary experience of the jury. *U.S. v. Boissoneault*, 926 F.2d 230, 232-33 (2d Cir. 1991). However, conclusory statements as to the legal significance of the evidence, such as whether it suggests "street level distribution" of a controlled substance, are problematic and unhelpful. *Id.* at 233.

The State is not precluded in any way from presenting relevant facts about the drug trade that would likely be outside the jury's ordinary experience, such as dosage and price and how transactions are typically structured. *Cruz*, 77 Wn. App. at 815. But the detective's statements here went beyond these parameters on multiple occasions. First, by describing how drug users typically behave by keeping their drugs near, stashing their drugs in separate containers in vehicles, and leaving the drugs behind

when contacted police, Harris sought to have the jury infer that Alatorre's proximity to the drugs in the car meant the drugs were hers. Similarly, Harris's testimony that the absence of paraphernalia and the fact that the methamphetamine was found in multiple baggies indicated that she was selling amounted to the kind of conclusory opinion about the significance of evidence found problematic in *Montgomery* and *Boissoneault*.

These aspects of Harris's testimony were no more than a bare effort to communicate his opinion about the significance of the evidence as it related to Alatorre's charges. Because the opinions reached the ultimate issues in the case – who possessed the drugs and whether the drugs were intended for personal use or for delivery – they invaded the province of the jury and deprived Alatorre of a fair trial.

5. Insufficient evidence supports the “intent to deliver” element because the State did not present corroborating indicia of intent beyond possession.

In a challenge to the sufficiency of the evidence to support a conviction, the court considers the evidence in the light most favorable to the state and determines whether a rational trier of fact could have found all of the elements of the crime beyond a reasonable doubt. *State v. Spruell*, 57 Wn. App. 383, 385, 788 P.2d 21 (1990). Possession of a controlled substance, without more, is insufficient to establish the element

of intent to deliver. *State v. Hagler*, 74 Wn. App. 232, 235, 872 P.2d 85 (1994). Even when the defendant possesses a large quantity of a controlled substance, some additional factor is required to establish an intent to deliver as a matter of law. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995); *Hagler*, 74 Wn. App. at 236. Such additional indicia of intent may include possession of a large amount of cash, scales, or cutting agents, or an informant's tip. *State v. Davis*, 79 Wn. App. 591, 595 n. 13, 904 P.2d 306 (1995).

Here, the State relied entirely upon the amount of methamphetamine in separate packages in Alatorre's possession to prove she intended to distribute it. But similar cases relying upon the discovery of a quantity of drugs in separate packages have held such evidence insufficient to prove intent to deliver as a matter of law. In *State v. Kovac*, 50 Wn. App. 117, 118, 747 P.2d 484 (1987), the defendant possessed seven baggies of marijuana containing a total of 8 grams. There, the court held the total amount, whether packaged individually or separately, was a reasonable amount for personal consumption and did not support the inference of intent to distribute. *Id.* at 121. In *Davis*, 79 Wn. App. at 595, the defendant possessed six baggies of marijuana, two baggies of seeds, a film canister of marijuana, another baggie with marijuana residue, and a separate box of sandwich bags. In that case, the court held the quantity of

the marijuana and the packaging were not inconsistent with personal use, and remanded for entry of judgment on the lesser charge of simple possession. *Id.* at 595-96. And in *Lopez*, 79 Wn. App. at 769, the defendant's possession of fourteen separate bindles of cocaine in addition to two ounces was insufficient to support the intent to deliver element, but the defendant's possession of a large amount of cash provided the required indicia of intent.

Here, Harris testified that up to an eighth of an ounce, or 3.5 grams, of methamphetamine was a normal amount of methamphetamine for a user to possess. II RP 223-24. The total amount of methamphetamine recovered from the lunch bag was less than 2 grams. I RP 28-30. These facts are squarely with the precedents established in *Kovac*, *Davis*, and *Lopez* and fail to provide the additional indicia needed to establish intent to deliver as a matter of law. Accordingly, as in those cases, this case should be remanded for entry of judgment on the lesser offense of simple possession.

6. Alatorre should not be assessed appellate costs if she does not prevail.

Pursuant to this court's General Court Order dated June 10, 2016 and RAP 14.2, appellate costs should not be imposed herein. Alatorre's report as to continued indigency is filed contemporaneously with this

brief. She was previously found indigent for appeal, and the presumption of indigency continues throughout. RAP 15.2(f). She has fully complied with the General Order and remains unable to pay, having no assets or income and substantial debt. A cost award is, therefore, inappropriate.

#### **VI. CONCLUSION**

For the foregoing reasons, Alatorre respectfully requests that the court REVERSE her conviction for possession with intent to deliver a controlled substance and REMAND the case for further proceedings.

RESPECTFULLY SUBMITTED this 23 day of April, 2018.

A handwritten signature in blue ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

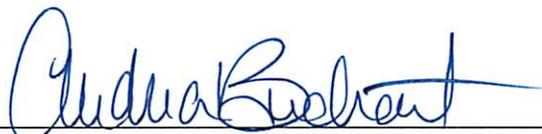
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 23 day of April, 2018 in Walla Walla, Washington.

  
\_\_\_\_\_  
Andrea Burkhardt

**BURKHART & BURKHART, PLLC**

**April 23, 2018 - 7:34 AM**

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