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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Neth's motion to suppress evidence obtained as a result of an unlawful search.
2. The trial court erred in finding/concluding that having the police narcotics dog sniff the car was either not a search or not illegal.
3. The trial court erred in finding/concluding that the trooper had reason to impound the vehicle and apply for a warrant even without the dog sniff.
4. The trial court erred in finding/concluding that there was plenty of other evidence to substantiate the warrant without the dog sniff.

Issues Pertaining to Assignments of Error

1. Did the warrantless search by the trooper pursuant to the traffic stop exceed the legitimate scope of an investigative stop?
2. Did using a trained dog to sniff for narcotics outside the car constitute a search that, absent a warrant, violated both the Fourth Amendment and Article I, section 7 of the Washington Constitution?
3. Was the impoundment of the car an unreasonable seizure that violated both the Fourth Amendment and Article I, section 7 of the Washington State Constitution?

4. Did the search warrant affidavit fail to establish probable cause to issue the search warrant?

STATEMENT OF THE CASE

On January 18, 2006, Trooper Michael Wells stopped a car for speeding on Highway 97 in Klickitat County. Mr. Neth was the driver of the car and Marisa Vachon was the passenger. (RP 4-6) Trooper Wells thought they both appeared nervous. (RP 6) A dog in the backseat was "going crazy." Mr. Neth yelled at the barking dog. (RP 44-45) Mr. Neth did not have a driver's license or any identification, but gave the trooper his name, date of birth and driver's license number. (RP 45, 77) A radio check revealed that Mr. Neth had a warrant for a failure to appear on a charge of driving with a suspended driver's license. The trooper called for backup. Once Officer Smith arrived at the scene, Trooper Wells had Mr. Neth get out of the car for officer safety. Trooper Wells then arrested Mr. Neth on the warrant, handcuffed and searched him. The trooper found several empty baggies in a coat pocket. (RP 46-47, 120)

Trooper Wells placed Mr. Neth in the backseat of the patrol car and told him his car was going to be searched. The trooper asked if there was anything of value in the car. Mr. Neth said there was around \$3500 which was to pay rent on a house in Goldendale he was renting from his

father. (RP 49-50) Trooper Wells then got out of his patrol car and spoke to Ms. Vachon, who was still sitting in the passenger seat of the stopped car. He spoke to her ten to fifteen minutes and then returned to his patrol car. (RP 50-51) He then contacted communications and found out the issuing agency would not confirm the warrant. He then went back and further questioned the passenger about what they were doing there and what was going on. (RP 52)

Trooper Wells testified that his suspicions were aroused because of the baggies, the money, the fact that neither subject had a driver's license or identification, no registration or insurance, the fact that they were coming from Vancouver to Goldendale without any of this stuff, and the fact that Mr. Neth was renting a house. Because of his suspicions, Trooper Wells said he wanted to continue the investigation. (RP 52-53)

Mr. Neth had given the trooper his father's name but the trooper did not follow up on that information. He also informed the trooper that he had recently purchased the car. (RP 78-79) Later on, the trooper conducted a registration check which reported the recent sale of the vehicle and that the last legal owner was someone other than Mr. Neth. (RP 82)

To further investigate his suspicions, Trooper Wells summoned the K9 officer, Sgt. Bartkowski, and his supervisor, Sgt. Retzlaff. (RP 53) Trooper Wells then released Mr. Neth but told him he was going to write infractions for his having no insurance and Ms. Vachon's failure to wear a seatbelt. (RP 54, 79-80) The trooper allowed Mr. Neth to stand outside the car holding his dog while he sat in his patrol car writing the infractions. (RP 120) It took Trooper Wells thirty minutes to write two infractions. The trooper said the delay was because "[t]hey didn't have a name, date of birth or address...I had to gather all this information." (RP 54)

In the meantime, Sgt. Bartkowski arrived with his drug-sniffing dog and walked the dog along the passenger side of the stopped car. The dog "hit" on the passenger door, indicating it detected the odor of drugs. (RP 54-55, 120-22) After consulting with Sgt. Retzlaff, who had also arrived at the scene, Trooper Wells decided to impound the car and get a search warrant. The car was towed to the state patrol garage at around 6:30 p.m. No one was arrested. Trooper Wells did not obtain the search warrant until 4:00 p.m. the next day, almost 24 hours later.¹ Officers searched the car later that evening and discovered \$4,790,

¹ The record does not indicate what happened to Mr. Neth and Ms. Vachon during this time, but it seems apparent they were detained at some unknown location.

methamphetamine powder and residue, scales and drug paraphernalia.

(RP 57-61, 88, 92, 94-95)

Mr. Neth and Ms. Vachon moved to suppress all the evidence seized from the car as fruits of an illegal search. (RP 3-23, CP 44-60) The Court denied the motion finding (1) that the K9 hitting on the car was either not a search or not illegal²; (2) the trooper had reason to impound the vehicle and apply for a warrant even without the dog sniff; (3) the dog sniff cannot be used as a basis for the warrant because the statement in the affidavit stating “the K9 [is] trained to recognize the odor of illegal narcotics” does not establish the reliability of the animal; (4) there was plenty of other evidence to substantiate the warrant without the dog sniff; (5) the 24-hour delay in obtaining the search warrant was not unreasonable, since there was no emergency (RP 23-26)

Mr. Neth was subsequently found guilty by a jury of possession of methamphetamine with intent to deliver. (RP 157) This appeal followed. (CP 43)

C. ARGUMENT

Standard of Review. Findings of fact on a motion to suppress are reviewed under the substantial evidence standard. Substantial evidence is

² The Court did not enter any written findings. Some of the Court’s oral findings are unclear and thus subject to interpretation.

evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Conclusions of law in an order pertaining to suppression of evidence are reviewed *de novo*. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

1. The warrantless search by the trooper pursuant to a traffic stop exceeded the legitimate scope of an investigative stop.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. Mapp v. Ohio, 367 U.S. 643, 647, 81 S.Ct. 1684, 1687, 6 L.Ed.2d 1081, 84 A.L.R.2d 933 (1961). Searches and seizures must be supported by probable cause whether or not formal arrest or search by way of warrant has been made. Dunaway v. New York, 442 U.S. 200, 208, 99 S.Ct. 2248, 2254, 60 L.Ed.2d 824 (1979). Although there are exceptions that authorize seizure on lesser cause, these are narrowly drawn and carefully circumscribed. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982).

A stop of a person in an automobile implicates both the Fourth Amendment and Washington State Constitution article 1 section 7. State v. Kennedy, 107 Wn.2d 1, 5, 776 P.2d 445 (1986). Warrantless searches

and seizures are *per se* unreasonable unless they fall into a jealously guarded exception. State v. Simpson, 95 Wn.2d 170, 188, 622 P.2d 1199 (1980). The burden is on the State to show the search and seizure falls into one of those exceptions.

RCW 46.61.021(2) authorizes officers to detain persons for traffic infractions "for a reasonable period of time necessary to identify the person, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction." RCW 46.61.021(1) requires a person to stop if he is signaled to stop by a law enforcement officer for a traffic infraction. That person is further required to identify himself to the officer, give his current address, and sign an acknowledgement of receipt of the notice of infraction. RCW 46.61.021(3).

Mr. Neth challenges the length of the detention and warrantless search of his vehicle by the drug dog³ as beyond the scope of a Terry stop (an investigatory stop). Under the Washington Constitution, a valid Terry stop may include a search of the suspect's vehicle when the search is necessary to assure officer safety. State v. Kennedy, 107 Wn.2d at 12, 726 P.2d 445; State v. Larson, 88 Wn.App. 849, 853, 946 P.2d 1212 (1997);

³ The issue of whether the dog sniffing constituted a search will be discussed below as a separate issue.

Justice Charles W. Johnson, *Survey of Washington Search and Seizure Law: 1998 Update*, 22 Seattle U.L.Rev. 337, 397 (1998). A search for weapons may extend only to areas within the investigatee's immediate control. Kennedy, 107 Wn.2d at 12, 726 P.2d 445. The scope of the search may expand to areas of the vehicle's interior where another person remains seated inside the car or where the investigatee has made a furtive gesture as if to hide a weapon. Larson, 88 Wn.App. at 855-57, 946 P.2d 1212.

In Larson, when a police officer maneuvered his police car directly behind Larson's speeding truck, the officer observed Larson lean forward and make movements toward the floorboard of his truck. Larson, 88 Wn.App. at 851, 946 P.2d 1212. The officer directed Larson out of the truck, patted him down and then stuck his head in the cab of the truck through the open door to inspect the area around the driver's seat. Larson, 88 Wn.App. at 851, 946 P.2d 1212. Based on his observation of Larson's furtive movement and anticipation that Larson would have to return to the vehicle to obtain his vehicle registration, the Court held that the officer's concern for his safety was objectively reasonable and the search for weapons was proper in scope. Larson, 88 Wn.App. at 857, 946 P.2d 1212.

In Kennedy, when an officer stopped a vehicle after observing and receiving tips about drug-related activities, the officer saw the driver lean forward in a way that looked like he was secreting something in the front seat of the car. Kennedy, 107 Wn.2d at 11, 726 P.2d 445. The Washington Supreme Court held that the officer could lawfully search for weapons in areas within the immediate control of both the driver and his companion. Kennedy, 107 Wn.2d at 12, 726 P.2d 445. In another traffic stop case, an officer observed a passenger lean forward as if to place something under the seat. State v. Watkins, 76 Wn.App. 726, 728, 887 P.2d 492 (1995). This Court held that the police had the authority to ask the passenger to exit the car and to search for weapons in the area within his immediate control based on his furtive movements alone. Watkins, 76 Wn.App. at 730, 887 P.2d 492; cf State v. Bradley, 105 Wn.App. 30, 18 P.3d 602.(2001).

Here, there were no furtive movements as in Kennedy and Watkins. Thus, there was no basis to expand the scope of the search to areas of the vehicle's interior. The detention and subsequent search by the drug dog went beyond the point where the trooper had any concern for weapons or officer safety. Trooper Wells arrested and previously searched Mr. Neth for weapons, handcuffed him and placed him in the backseat of

his patrol car. After he found out the warrant could not be confirmed Trooper Wells released Mr. Neth and allowed him to stand outside the car with his dog while Trooper Wells wrote tickets for the infractions inside his patrol car. Officer Smith was present to watch both Mr. Neth and Ms. Vachon. It is clear from the officers' actions that at this point in time they no longer had any concerns about officer safety or weapons.

Taking an additional 30 minutes to write the tickets for the infractions exceeded the "reasonable period of time necessary" to qualify as merely an investigative stop. The trooper said the delay was because "[t]hey didn't have a name, date of birth or address...I had to gather all this information." (RP 54) However, the trooper's earlier testimony contradicts this explanation.

Trooper Wells testified that his suspicions were aroused because of the baggies, the money, the fact that neither subject had a driver's license or identification, no registration or insurance, the fact that they were coming from Vancouver to Goldendale without any of this stuff, and the fact that he was renting a house. Because of his suspicions, Trooper Wells said he wanted to continue the investigation. (RP 52-53) He then summoned the K9 officer, Sgt. Bartkowski. (RP 53) Trooper Wells then

released Mr. Neth but told him he was going to write infractions for no insurance and failure to wear a seatbelt on Ms. Vachon. (RP 54, 79-80)

It is clear from this testimony that Trooper Wells deliberately took a ridiculous amount of time in writing two tickets in order to allow Sgt. Bartkowski sufficient time to arrive and conduct a K9 search. Since there was no longer any concern for officer safety or weapons, this thirty minute delay exceeded the scope of a Terry stop. Without sufficient justification, police officers may not use routine traffic stops as a basis for generalized, investigative detentions or searches. State v. Henry, 80 Wn.App. 544, 553, 910 P.2d 1290 (1995).

In summation, because there was no evidence that the trooper's safety was in danger or that he had any suspicion of weapons being present, the further detention and search of Mr. Neth's car went beyond the scope of an investigatory stop. Therefore, the subsequent search after the search warrant was obtained, and the fruits of that search are inadmissible as fruits of the poisonous tree. State v. Larson, 93 Wn.2d 638, 645-46, 611 P.2d 771 (1980); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

2. Using a trained dog to sniff for narcotics outside the car constituted a search that, absent a warrant, violated both the Fourth Amendment and Article I, section 7 of the Washington Constitution.

Article I, section 7 of the Washington Constitution declares: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This section of our constitution provides greater protection to an individual's right of privacy than the Fourth Amendment. State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Our courts have held that using a trained dog to sniff for narcotics outside a dwelling constitutes a search that, absent a warrant, violates both the Fourth Amendment and Article I, section 7 of the Washington Constitution. State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). The Young court observed:

With a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument. Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be "sensed" from outside his door.... Because of [the] defendant['s] heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search....

Young, 123 Wn.2d at 194, 867 P.2d 593 (*quoting United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir.), *cert. denied*, 474 U.S. 819, 106 S.Ct. 66, 67, 88 L.Ed.2d 54 (1985)).

The Young court also noted Washington appellate court cases where warrantless dog sniffs were approved. Id. at 188, 867 P.2d 593 (citing State v. Stanphill, 53 Wn.App. 623, 769 P.2d 861 (1989) (dog sniff of package at post office); State v. Boyce, 44 Wn.App. 724, 723 P.2d 28 (1986) (dog sniff of safety deposit box at bank); State v. Wolohan, 23 Wn.App. 813, 598 P.2d 421 (1979) (dog sniff of parcel in bus terminal not a search), *rev. denied*, 93 Wn.2d 1008 (1980)). In each of these cases, the courts acknowledged a dog sniff might constitute a search if the object or location of the search were subject to heightened constitutional protection. Id. at 188, 867 P.2d 593.

Washington courts have long held that freedom from governmental intrusion into one's "private affairs" includes automobiles and their contents. Parker, 139 Wn.2d at 494, 987 P.2d 73. Accordingly, our state has greater privacy rights in automobiles than guaranteed by the Fourth Amendment. Parker, 139 Wn.2d at 495, 987 P.2d 73. To date, it appears our appellate courts have not ruled on whether a dog sniff of a vehicle under circumstances similar to the present case would constitute a search.

However, since our state has greater privacy rights in automobiles than guaranteed by the Fourth Amendment, and since our Supreme Court has indicated that a dog sniff might constitute a search if the object or location of the search were subject to heightened constitutional protection, it follows that the dog sniff of Mr. Neth's car was in fact a search. Young, 123 Wn.2d at 188, 867 P.2d 593.

Warrantless searches, even of automobiles, are unreasonable *per se*. Parker, 139 Wn.2d at 496, 987 P.2d 73. Because courts consider this a strict rule, they limit and narrowly construe exceptions to the warrant requirement. Parker, 139 Wn.2d at 496, 987 P.2d 73. When challenged, the State bears the heavy burden to prove that a warrantless search falls within an exception. Parker, 139 Wn.2d at 496, 987 P.2d 73. The exceptions to the requirement of a warrant have fallen into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry investigative stops. See generally Robert F. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U. PUGET SOUND L.REV. 411, 528-80 (1988).

As stated previously, the dog sniff far exceeded the scope of a Terry stop. Moreover, the facts of this case do not fall under any of the

other categories of warrant exceptions. Therefore, since the dog sniff was a search, and was conducted without a warrant, it was unlawful.

3. The impoundment of the car was an unreasonable seizure that violated both the Fourth Amendment and Article I, section 7 of the Washington State Constitution.

Under the Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington State Constitution, all seizures must be reasonable. State v. White, 97 Wn.2d at 109-10, 640 P.2d 1061. Impoundment is a seizure because it involves the governmental taking of a vehicle into its exclusive custody. State v. Reynoso, 41 Wn.App. 113, 116, 702 P.2d 1222 (1985). The reasonableness of a particular impoundment must be determined from the facts of each case. State v. Greenway, 15 Wn.App. 216, 219, 547 P.2d 1231, *rev. denied*, 87 Wn.2d 1009 (1976). Three circumstances justify impounding a vehicle: (1) as evidence of a crime; (2) as part of the police "community caretaking function," if removal of the vehicle is necessary; and (3) as part of the police function of enforcing traffic regulations, if the driver has committed a traffic offense for which the Legislature has authorized impoundment. Simpson, 95 Wn.2d at 189, 622 P.2d 1199.

Here, the trial court concluded that the trooper had a reason to impound the vehicle and apply for a warrant even without the dog sniff. However, the impoundment does not fall under any of the justifications listed above. Therefore, the impoundment was an unreasonable seizure and the trial court erred in its conclusion otherwise.

4. The search warrant affidavit failed to establish probable cause to issue the search warrant.

A search warrant affidavit must demonstrate reasonable inferences that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. State v. Cole, 128 Wn.2d 262, 287, 906 P.2d 925 (1995). "Issuance of a search warrant is a matter of judicial discretion and is reviewed only for abuse of that discretion." State v. Dobyms, 55 Wn.App. 609, 620, 779 P.2d 746 (1989). "The affidavit must be accepted on its face and any doubts should be resolved in favor of the warrant." Dobyms, 55 Wn.App. at 620, 779 P.2d 746. But the affidavit in support of the search warrant must be based on more than suspicion or mere personal belief that evidence of the crime will be found on the premises searched. State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981).

Here, the affidavit was based entirely on the suspicion and personal belief of Trooper Wells and little more. Trooper Wells testified that his suspicions were aroused because of the baggies, the money, the fact that neither subject had a driver's license or identification, no registration or insurance, the fact that they were coming from Vancouver to Goldendale without any of this stuff, and the fact that he was renting a house but didn't know its exact location. (RP 52-53) This information, plus the dog sniff and the fact that Mr. Neth was a convicted felon, was the basis for the warrant as stated in the affidavit. (CP 56-57)

As argued above, the dog sniff was an illegal search. The trial court found the dog sniff could not be used as a basis for the warrant because the statement in the affidavit stating "the K9 [is] trained to recognize the odor of illegal narcotics" did not establish the reliability of the animal. However, the Court found there was plenty of other evidence to substantiate the warrant without the dog sniff. The Court's finding is incorrect.

There was no evidence of any drugs or other contraband in the car to support the issuance of the warrant. Trooper Wells mentioned Mr. Neth yelling, but considering the dog in the backseat "going crazy," Mr. Neth's yelling at the barking dog to be quiet seems like a normal reasonable

reaction. The trooper noted that Mr. Neth did not have a driver's license or any identification. But Mr. Neth gave the trooper his correct name, date of birth and driver's license number.

The trooper found several empty baggies in a coat pocket, but there was no trace of any drug in the baggies. Regarding the money, Mr. Neth voluntarily told the trooper about the money in the car. He also told the trooper what the money was for, to rent a house from his father. He also gave the trooper his father's name. The trooper did not follow up on any of this information, although it would have taken little effort on his part to do so.

Regarding the lack of car registration, Mr. Neth informed the trooper that he had recently purchased the car. (RP 78-79) The trooper later confirmed this fact when he conducted a registration check that reported the recent sale of the vehicle and that the last legal owner was someone other than Mr. Neth. (RP 82) Beyond mere suspicion, there was simply no evidence that either Mr. Neth or Ms. Vachon was engaged in any criminal activity.

In summation, the search warrant affidavit failed to demonstrate reasonable inferences that either Mr. Neth or Ms. Vachon was involved in criminal activity and that evidence of the criminal activity would be found

in the car. Instead, the affidavit was based almost entirely on the suspicion and personal belief of Trooper Wells. Therefore, the issuing magistrate abused his or her discretion in signing the warrant.

D. CONCLUSION

For the reasons stated the conviction should be reversed and the case dismissed.

Respectfully submitted April 11, 2007.



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