

70841-4

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Case # 70841-4

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

QUANG D. NGUYEN, *Appellant*,

v.

PORT OF SEATTLE POLICE DEPARTMENT, *Respondents*,

BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON


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A. Assignment of Error

1. The trial court erred in affirming the decision by the administrative law judge in denying Mr. Nguyen's motion to suppress the canine sniff.

Issues Pertaining to Assignments of Error

1. Mr. Nguyen was stopped at the security checkpoint, after the money was found on his person during the scan. The police took Mr. Nguyen to a separate room and searched his bag. More money was found in his bag, in addition to what was found on his person. The police then took the money from the room and a canine unit was brought into to conduct a warrantless search on the money. Mr. Nguyen had given permission to search his bag, but did not consent to the search by the canine unit.. Did the search and seizure violate Mr. Nguyen's rights under the fourth to the Constitution of the United States and under article I, section 7 Washington State Constitution?

B. Statement of the Case

- a. Procedural History

On August 16, 2013, an administrative law review hearing was held in King County Superior Court regarding a final order that was entered by the Hearing Officer Marilyn Brenneman on November 15, 2011. (Clerks Papers 165-166). Judge Shaffer affirmed the ruling of Hearing Officer Marilyn Brenneman. (C.P. 165-166)

Notice of Discretionary Appeal was filed in King County Superior Court. (C.P. 167-169) Review was granted by the Court of Appeals Division I on August 2, 2014.

b. Factual History

This case arises out of the seizure of \$80,000.00 in U.S Currency that from Quang Nguyen on or about August 3, 2011, under R.C.W. 69.50.505 at the Sea Tac International Airport. (C.P. 24, Lines 19-24) Mr. Nguyen was passing through SeaTac International Airport security when TSA agents stopped him to investigate numerous bulges seen on him via the magnometer machine. (C.P. 14, lines 5-7) Those bulges turned out to contain numerous bundles of U.S. Currency. TSA agents then called the Port of Seattle Police to investigate.(C.P. 14, lines 8-9) Officers advised Mr. Nguyen that he was not under arrest and was to free to leave. They asked if he would voluntarily follow them to the Port

of Seattle Police public lobby, and he agreed. (C.P. 14, lines 10-12). Mr. Nguyen was questioned by the Port of Seattle Police Department about the money. (C.P. 14, lines 17-20). Mr. Nguyen was advised by Officer McCarthy when he arrived in the lobby that he was not under arrest and that he was free to leave. (C.P. 14, lines 13-16) Office McCarthy questioned Mr. Nguyen about the large amount of cash found hidden in various locations on his person. (C.P. 16, lines 16-20) Mr. Nguyen informed the officer that he was going to San Diego to visit his girlfriend, and that the money was concealed as it was because Mr. Nguyen did not want to be beaten up and have the money taken from him. (C.P. 15, lines 1-3) Mr. Nguyen first told officers that he had \$60,000 with him and later stated that he had \$80,000. (C.P. 15, lines 4-5) When asked by officers why he was carrying so much money on him, Mr. Nguyen indicated that he and a partner were going to purchase a business called Dutch Harbor Fast Food for \$340,000 and the cash was the 20% down payment for the purchase. (C.P. 15, lines 2-5) Mr. Nguyen indicated that he was taking the money to San Diego to deposit it into his Wells Fargo account. (C.P. 15, lines 9-10) Mr. Nguyen informed the officers that the reason that he couldn't deposit the money into his bank account in Alaska, was that the

only bank there was Key Bank and the people were very rude. (C.P. 15, lines 9-12). Officers ran Mr. Nguyen's name in various police databases and found that Mr. Nguyen had a prior conviction for Violation of the Uniformed Controlled Substances Act Distribution of Narcotics from 1996, Mr. Nguyen admitted to the conviction. (C.P. 15-16, lines 20-22 and lines 1-3) Detective Bruch was contacted to assist with the investigation. (C.P. 16, lines 4-12). Detective Bruch arrived and informed Mr. Nguyen that he was not under arrest and he was free to leave. (C.P. 16, lines 13-15) Detective Bruch was given permission by Mr. Nguyen to search his bag. (C.P. 18, line 9)

Detective Bruch and his canine partner searched the public lobby and the canine did not alert to any area. (C.P. 20, lines 6-7) Mr. Nguyen's money was then removed from his presence and placed in a plastic bag. The bag was then placed outside of Detective Bruch's sight in the public lobby. (C.P. 20, lines 8-14) The canine alerted to the garbage can with the bag containing Mr. Nguyen's money in it. (C.P. 20, Lines 10-14) Detective Bruch testified that the positive alert indicated to him that the money had been in recent, close contact with narcotics. (C.P. 20, lines 18-19). The total amount of the money seized was \$80,000, consisting of

\$100 bills rubber banded into \$5,000 bundles. The seizure was based on the one way cash purchase ticket to San Diego which is a source location of narcotics traveling to Alaska, Mr. Nguyen's very short stay in Seattle, the bundling of the money, the concealment of the money in multiple locations on Mr. Nguyen's person and in his bag, Mr. Nguyen's inconsistent statements regarding his intent to purchase a business in Alaska and his intent to purchase a residence in Alaska, the pay and owe sheets located in Nguyen's luggage, the \$25,000 worth of Western Union receipts, the \$4,000 cash payment on Nguyen's credit card, Nguyen's admission that he makes \$90,000 annually, and the positive narcotics detection canine alert on the cash. (C.P. 20 & 21, lines 20-21, and lines 1-9)

Mr. Nguyen was given the Notice of Seizure Form after the canine alert to the currency

and after officers were finished questioning him about the currency. (C.P. 14-16)

C. Argument

Mr. Nguyen's motion to suppress the search conducted by the canine and her handler was in error. Mr. Nguyen has a right to

be free from warrantless searches and seizures. Mr. Nguyen was constructively seized by the Port of Seattle Police Department in this case, when the Port of Seattle Police Department first interacted with the Mr. Nguyen. Finding of Fact #10, states that “Officers advised Nguyen that he was not under arrest and was free to leave. (C.P. 14, line 10) The officers asked Mr. Nguyen if he would voluntarily follow them to the Port of Seattle Police public lobby, and he agreed.” (C.P. 14, lines 10-12 There is no indication given in this finding of fact that Mr. Nguyen was free to leave with his money. Finding of Fact #10 states that “Off. McCarthy arrived at the lobby and saw that Nguyen was seated in an office in a chair closest to the open door. (C.P. 14, lines 13-14) Officer McCarthy again advised Nguyen that he was free to leave and was not under arrest. (C.P. 14, lines 14-16) Mr. Nguyen indicated that he understood.” (C.P. 14, lines 15-16) Again there is no indication given that Mr. Nguyen was free to leave with his money, nor was a receipt provided for the currency that had been seized by the Port of Seattle Police Department. Finding of Fact #18 states that “Upon his arrival, Det. Bruch again informed Nguyen that he was free to leave and not under arrest. Nguyen acknowledged that the officers had already told him that.” (C.P.

16, lines 13-15) However, there is no indication that Mr. Nguyen was free to leave with his money or nor was he provided a receipt for the money that had been seized.

Under Article I, Section 7 of the Washington State Constitution and the Fourth Amendment to the United States Constitution, a warrantless search is impermissible absent an exception to the warrantless requirement. In this situation, Mr. Nguyen was subject to a warrantless search and no exception to a warrantless search was provided. Mr. Nguyen had been constructively seized and had volunteered to a search of his person and belongings. The search by the canine was conducted after the Petitioner had been questioned and his previous conviction for a narcotics crime had been brought up to the attention of the investigators. The investigators in this case did not provide notice of the seizure, until after the time that they had finished questioning Mr. Nguyen and the canine sniff had been conducted, Finding of Fact #41. (C.P 21, lines 14-16) The search by the canine was a warrantless search, because the investigators had already made the determination to seize the money from Mr. Nguyen and could have attempted to acquire a search warrant prior to having conducted the canine sniff.

The canine search was a second and distinct search that was conducted after the Port of Seattle Police had detained Mr. Nguyen without providing a receipt for the money that they had taken from him, nor is there anything in the record that reflects Mr. Nguyen was free to leave with the money. The canine search that took place in this case was not minimally intrusive, but was used as a backstop to justify the detention and subsequent seizure of the money from Mr. Nguyen. The canine sniff was not minimally intrusive in this case because the money was removed from Mr. Nguyen and his luggage, and placed in a secondary location for the canine drug sniffing to take place. In *State v. Hartzell*, the Court determined “as long as the canine ‘sniffs the object from any area where the defendant does not have a reasonable expectation of privacy, and the canine sniff itself is minimally intrusive, then no search has occurred. 156 Wn. App. 918, 237, P.3rd 928, (July, 2010) quoting from *State v. Boyce*, 44 Wn.App. 724, 723 P.2d 28(1986) The fact in this case differ from the facts in *State v. Hartzell*, 156 Wn. App. 918, 237 that Mr. Nguyen was detained and the money had already been found via a search by TSA security and the Port of Seattle Police Department, Finding of Fact #7 and 8. (C.P. 14, lines 5-9) The money was then subjected to a

second and separate search after Mr. Nguyen had been questioned by the Port of Seattle Police Department, Finding of Fact # 11. (C.P. 15, lines 17-20) The money was taken to a secondary location and placed in another bag other than the Petitioners luggage for the canine to conduct the search. This is not minimally intrusive as illustrated by the great lengths that were taken by the investigators in this case to first question Mr. Nguyen and then to conduct the search on the money a second time with the use of the canine.

In *United States v. Place*, 103 S.Ct. 2637, 462 U.S. 696, 103 S. Ct. 2637, 77L.ed.2d 110 (1983), the United States Supreme Court stated that a canine sniff is not a search within the meaning of the Fourth Amendment. After holding that the traveler's luggage could be detained on a reasonable, articulable suspicion that the luggage contains contraband or evidence of a crime, the Court stated that exposing the detained luggage to a narcotics detection dog was not a search. *Id.* at 696. The present case deviates substantially from the facts of the case in *Place*. In this case Mr. Nguyen had gone through airport security with his carrying on bag and the money had already been located during the screening and subsequent search of Mr. Nguyen's carryon bag.

The canine search was conducted on the money after it had been removed from Mr. Nguyen's person and luggage and placed into a separate plastic bag, Finding of Fact #36. (C.P. 20, lines 8-9). The money was then removed from the room in which Mr. Nguyen was being detained taken to another location for the canine to sniff test the currency alone, Finding of Fact #36. (C.P. 9-10) The Place Court also determined that:

“[A canine sniff] does not expose noncontraband items that otherwise would remain hidden from public view, as does, for an example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search.” *Id.* at 696

In this case the canine sniff took place after the more intrusive search was conducted by the detective. This canine sniff was not minimally intrusive as outlined by the Court. This was a warrantless search that was intrusive and conducted after the money had already been located. The canine search was used after Mr. Nguyen was questioned by the Port of Seattle Police Department. The canine search did not take place while Mr. Nguyen was passing through the airport, it took place after the money had already been found by the TSA agents and after Mr. Nguyen had been questioned. Detective Bruch seized the money based on the totality of the circumstances known to Detective Bruch regarding the

investigation, Finding of Fact #40. (C.P. 21, lines 10-12) Mr. Nguyen had inconsistent statements when questioned by the Port of Seattle Police Department, Finding of Fact #39. (C.P. 21, lines 4-9) However, inconsistent statements to a law enforcement officer are not sufficient to establish probable cause to conduct a warrantless search.

In *State v. Neth*, the case involved an individual that was stopped for speeding. *Id.* Neither the defendant nor the passenger had any identification and some of the information that they provided the state patrol trooper was inconsistent. 165 Wn.2d 177, 196 P.3d 658(2008) The defendant also had some plastic baggies and several thousand dollars in cash in the car, and acted in ways that the investigating trooper considered suspicious, the trooper called for a K-9 unit and the dog alerted for drugs. The Court held that the absent the evidence from the dog, there was not probable cause to issue a search warrant and the case was remanded for further proceedings. *Id.* at 663 The Court stated that “We do not permit searches merely because people do not have proper identification or documentation, are nervous, or tell inconsistent version of events. *Id.* at 662 Mr. Nguyen’s case is similar to that of *State v. Neth*, in that Mr. Nguyen was unable to accurately tell the investigating officers the amount of cash he had on his person. Mr. Nguyen told the investigating officers that he was purchasing a business with a partner and that he did not like

the bank employees in Alaska because they were rude, Finding of Fact #14. (C.P. 15, lines 9-12) Mr, Nguyen was also traveling with a large amount of cash on his person, Finding of Fact #19. (C.P. 19, line 19) These facts are unusual as were the facts in *State v. Neth*, but as the Court held the facts in that case when taken together seemed odd and perhaps suspicious, however all the facts were consistent with legal activity. *Id.* at 662 The Court held that absent the dog's alert, the only facts that can be said to show a nexus connecting Neth's car to criminal activity are the plastic baggies, a relatively large sum of money in the car , and his criminal history;" *Id.* At 663 The facts are similar in Mr. Nguyen's case. Mr. Nguyen was traveling to California with a large sum of money on his person. Mr. Nguyen has a criminal record for drug related charges, Finding of Fact #16. (C.P. 15-16, lines 20-21 and 1-3) However, without the separate canine sniff that was conducted on the money, there is no nexus connecting Mr. Nguyen to criminal activity.

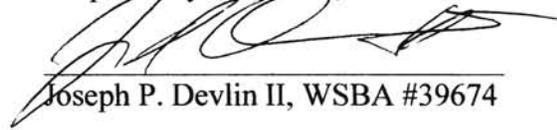
Thereby, the canine search in the present case was in fact a warrantless search, and therefore impermissible under Article I, Section 7 of the Washington State Constitution and the Fourth Amendment to the United States Constitution.

D. Conclusion

The motion to suppress the canine sniff should be granted and the case should be remanded for further proceedings.

September 10, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Devlin II", written over a horizontal line.

Joseph P. Devlin II, WSBA #39674

Attorney for Appellant