91705-1

Court of Appeal Cause No. 70841-4-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Port of Seattle Police Department, Respondent

v.

Quang D. Nguyen, Petitioner/Appellant

PETITION FOR REVIEW

Joseph P. Devlin II, WSBA #39674
P.O. Box 11266, Tacoma, WA 98411-1266
253-297-1957

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Cases

A. Identity of Petitioner

Quang Nguyen asks this court to accept review of the decision designated in Part B of this petition.

B. Court of Appeals Decision

Quang Nguyen, Petitioner, seeks review by the Supreme Court of Washington, of the Court of Appeals Division I Order entered on April 20, 2015, Case # 70841-4-1, affirming the decision by the Hearing Examiner Marilyn Brenneman for Cause Number C2011-1794 to deny the Petitioner's Motion to Suppress the Canine Sniff in this case.

A copy of the decision is in the Appendix at pages A-1 through A-4.

C. Issues Presented for Review

1. The Petitioner was detained and questioned by the Port of Seattle Police Department prior to having the canine sniff search conducted by the K-9 unit. Did the search and seizure violate Petitioner's rights under the fourth and fourteenth amendments to the Constitution of the United States and under article I, section 7 of the Constitution of the United State of Washington?

D. Statement of the Case

On April 20, 2015, the Court of Appeals Division I issued an order Affirming the ruling of the Hearing Officer Marilyn Brenneman to deny the Petitioner's Motion to Suppress the Canine Search. This matter was appealed to the Court of Appeals Division I, after the King County Superior Court affirmed the ruling of the Hearing Officer on August 16, 2013.

On or about August 3, 2011, Quang Nguyen, Petitioner was at Sea Tac International Airport. The Petitioner was traveling on a one way ticket to California. At approximately 5:00 a.m., the Petitioner was passing through the security screening section of Sea Tac International Airport, where he was stopped by employees of the Transportation Administration Security Department (TSA). The Petitioner was stopped for investigation of bulges on his person during the screening process. These bulges were determined to be several bundles of U.S. Currency that the Petitioner had on his person. The TSA employees called the Port of Seattle Police Department to investigate. The Petitioner was subsequently taken to an interview area at the Port of Seattle Police Department. The Petitioner was questioned by the Port of Seattle Police Department and a canine search was conducted on the currency that the Mr. Nguyen had on his person. Mr. Nguyen was given a Notice of Seizure form after the canine alerted on the currency and after the Port of Seattle Police Department had finished questioning Mr. Nguyen.

E. Argument Why Review Should Be Accepted

The Court of Appeals Division I made an error when it affirmed the decision of the Hearing Examiner to deny the Petitioner's motion to suppress the canine search. The Petitioner has a right to be free from warrantless searches and seizures. In this case the Petitioner had been constructively seized by the Port of Seattle Police Department. The Port of Seattle Police Department reported and testified that the Petitioner was free to leave at any time. However, the record is silent on the fact of whether or not the Petitioner was in fact free to leave at any time with his money. The record shows that the Petitioner was only provided a receipt for his money after the Port of Seattle Police Department had questioned him and conducted a canine search after the questioning was completed.

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 search requirement. In this case, the Petitioner was subject to a warrantless search and seizure and no exception to a warrantless search and seizure was provided. The Petitioner had voluntarily submitted to a search of his person and belongings. The search by the canine unit was conducted after the Port of Seattle Police Department was finished questioning the Petitioner. The Notice of Seizure was only provided to the Petitioner after the questioning had been completed and the search was conducted by the canine. The canine sniff in this incident was a second and distinct search that was conducted by the Port of Seattle Police Department. This canine sniff was not minimally intrusive, in that the Petitioner was taken to an interview room and the money was subsequently removed from his control and taken into a public area to have the search conducted.

In *State v. Hartzell*, the Court determined "as long as the canine sniffs the object from an 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 facts in this case differ from the facts in *State v. Hartzell*, because in this case the money had already been found by the TSA employees and the Port of Seattle Police Department, prior to the canine search. *Id.* The Petitioner's money was then subjected to a second separate distinct search after the Port of Seattle Police had questioned the Petitioner about his travel plans and the money. The money was removed from the interview area where the Petitioner was located and taken to a secondary location that was open to the public and placed in a separate bag that did not belong to the Petitioner. The canine then was brought to the location of the money and alerted to the money. After the canine alert, the Petitioner was then provided the Notice of Seizure and receipt for the money. This was not a minimally intrusive search as outlined by the Court in *Hartzell*, but rather this was a warrantless search that did not fall under one of the stringent exceptions to a warrantless search. *Id.* The money had already been located by a search of the Petitioner during the screening process and the search of his belongings that he consented. The canine sniff was a second and distinct search that required the Port of Seattle Police Department to seek a warrant to conduct this second search.

In *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. 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 United States v. Place. *Id.* In this case Mr. Nguyen had gone through airport security with his carryon bag and the money had already been located during the screening and subsequent search of Mr. Nguyen's carry on 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 bag. The money and bag were then removed from the room in which Mr. Nguyen was being detained and taken to another location for the canine sniff of the money and bag. This was not a minimally intrusive search as outlined by Court in *United States v. Place. Id.*

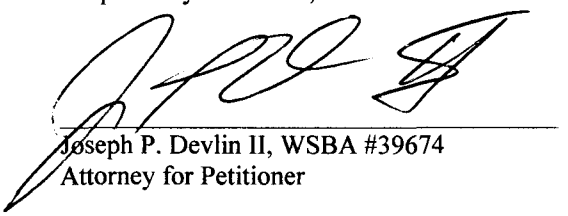
In *State v. Neth*, the court stated that "We do not permit searches merely because people do not have proper identification or documentation, are nervous, or tell inconsistent version of events. 165 Wn.2d 177, 196 P.3d 648 (2008). The facts in this case are similar to the fact pattern in State v. Neth. Id. Mr. Nguyen was unable to accurately tell the investigating officers the exact amount of cash he had on his person. It was established that Mr. Nguyen was traveling to the State of California with a large amount of cash on his person. Mr. Nguyen has a previous criminal history involving drugs. However, without the canine sniff there was no nexus to connect Mr. Nguyen to criminal activity. The facts were odd pertaining to Mr. Nguyen and his traveling idiosyncrasies, the facts could be considered suspicious as the investigating officers testified, but without any additional evidence at the time Mr. Nguyen was detained, then the canine sniff was a second and separate warrantless search.

F. Conclusion

This court should accept review for the reasons indicated in Part E and find that the motion to suppress the canine sniff should have been granted and remand the case for further proceedings consistent with this ruling.

May 15, 2015

Respectfully submitted,



Joseph P. Devlin II, WSBA #39674
Attorney for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

QUANG NGUYEN, Petitioner, v. PORT OF SEATTLE POLICE DEPARTMENT, Respondent.	DIVISION ONE No. 70841-4-I UNPUBLISHED OPINION FILED: April 20, 2015

DWYER, J. — Quang Nguyen appeals the civil forfeiture of $80,000 under the Uniform Controlled Substances Act, chapter 69.50 RCW, to the Port of Seattle Police Department. Nguyen contends that the hearing examiner erred by denying his motion to suppress evidence of a dog sniff that violated his constitutional rights against warrantless searches. We affirm.

I

Around 5:00 a.m. on August 3, 2011, SeaTac airport security agents stopped Quang Nguyen to investigate numerous bulges in his clothing. Upon determining that the bulges were bundles of money, the agents referred the matter to the Port of Seattle Police. After repeatedly advising Nguyen that he was not under arrest and was free to leave, officers asked him whether he would

answer their questions and consent to a search of his carry-on bag. Nguyen spoke with the officers and allowed them to search his bag. The officers determined that Nguyen had a total of $80,000 concealed on his person and in his bag. They also discovered "pay and owe sheets," receipts for wire transfers to Vietnam totaling $25,000, and a receipt indicating that Nguyen had paid $4,000 cash on his credit card in Dutch Harbor, Alaska the previous day. Nguyen admitted that he had been convicted of distributing narcotics in 1996.

Officers put the bundles of cash in a plastic bag and then placed the bag in a public lobby area. Detective Matthew Bruch and his narcotics detection dog, Lilly, then entered the lobby. Lilly indicated to Detective Bruch that she had detected the odor of narcotics near a garbage can, where the Detective found the bag of money. The officers then seized the money and provided Nguyen with a written notice of seizure pursuant to RCW 69.50.505.

Nguyen filed a timely claim for the money. Prior to the administrative hearing, Nguyen filed a motion to suppress evidence of the dog sniff, arguing that it was a "second and distinct search," after the money was seized, and therefore "not allowed under article 1, section 7 of the Washington State Constitution and the Fourth Amendment." The hearing examiner denied the motion to suppress evidence of the dog sniff. After the hearing, the hearing examiner entered written findings of fact and conclusions of law forfeiting Nguyen's interest in the $80,000 to the Port of Seattle Police Department. Nguyen appealed to King County Superior Court, which affirmed the hearing examiner's decision.

Nguyen again appeals.

II

We apply the standards of the Washington Administrative Procedure Act (APA), chapter 34.05 RCW, directly to the agency record in reviewing agency adjudicative proceedings. William Dickson Co. v. Puget Sound Air Pollution Control Agency, 81 Wn. App. 403, 407, 914 P.2d 750 (1996). Nguyen has not assigned error to any findings of fact, so they are verities on appeal. Tapper v. Emp't Sec. Dep't, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). On questions of law, our review is de novo. Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 325, 646 P.2d 113 (1982).

As below, Nguyen argues on appeal that after the police found the money during a consensual search of his person and bag, the Fourth Amendment and Washington's constitution required them to obtain a search warrant or request his specific or additional consent before taking the money into another room to perform a "second and separate search" with the dog. Contrary to Nguyen's assertions, however, the dog sniff did not constitute an unlawful search under either the Fourth Amendment or Washington's constitution. "A 'canine sniff' by a well-trained narcotics detection dog" "in a public place," does "not constitute a 'search' within the meaning of the Fourth Amendment." United States v. Place, 462 U.S. 696, 706-07, 103 S. Ct. 2637, 77 L. Ed.2d 110 (1983); see also, Illinois v. Caballes, 543 U.S. 405, 410, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) ("A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.").

Under Washington's constitution, whether a "canine sniff is a search depends on the circumstances of the sniff itself." 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 canine 'sniffs the object from an 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.'" Hartzell, 156 Wn. App. at 929 (quoting Boyce, 44 Wn. App. at 730). As the dog herein sniffed the plastic bag containing the money in a public lobby area, the sniffing did not intrude into an area where Nguyen had a reasonable expectation of privacy. No violation of article I, section 7 occurred during the dog sniff. Thus, the hearing examiner properly denied Nguyen's motion to suppress.

Affirmed.

We concur: