Supreme Court No. 97190-1
(COA No. 50864-8-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHAWN FITZPATRICK,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Shawn Fitzpatrick asks this Court to review the opinion of the Court of Appeals in *State v. Fitzpatrick*, No. 50864-8-II (issued on April 9, 2019). A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. The warrantless use of a narcotics-detection dog around the exterior of a home disturbs a private affair within the meaning of article I, section 7. This Court has also repeatedly held article I, section 7 provides greater privacy protections for vehicles than the Fourth Amendment. Moreover, unlike the Fourth Amendment, our constitution does not depend on "reasonable expectations of privacy." Does the application of a narcotics detection dog to the exterior of a person's car disturb a private affair such that article I, section 7 requires a warrant prior to the intrusion? RAP 13.4(b)(3), (4).

2. Washington courts adhere to the *Aguilar-Spinelli* test for determining the reliability of an informant's tip. Dog alerts are treated like informant tips for purposes of evaluating reliability. Did the State fail to establish the reliability of the dog alert in this case, where the affidavit in support of the search warrant contained no information

about the animal's track record or whether it had ever been used to detect the odor of controlled substances in the field?

C. STATEMENT OF THE CASE

Shawn Fitzpatrick was pulled over for speeding. RP 178. He had two passengers with him. *Id*. When Trooper Kyle Lindemann came to his window, Mr. Fitzpatrick readily admitted he did not have a valid license. RP 179. The trooper arrested Mr. Fitzpatrick and placed him in his patrol vehicle. RP 110, 179. Trooper Lindemann testified that Mr. Fitzpatrick told him he was going to "Portland or Vancouver." RP 110. Trooper Lindemann requested assistance with the traffic stop, and Woodland Police Officer Derek Kelley responded. CP 10; RP 179.

Once at the scene, Trooper Lindemann told Officer Kelley that Mr. Fitzpatrick was driving to Vancouver to visit his sick mother and pick up a different car. CP 10. Officer Kelley spoke to the front passenger, Dustin German. CP 11; RP 221. Upon learning Mr. German had a Department of Corrections warrant, Officer Kelley arrested him. CP 11. Mr. German appeared nervous and unable to sit still, and his eyes were droopy. CP 10-11; RP 221. Mr. German told the officer they were traveling to Vancouver to see his mother, but later stated they were going to Newport, Oregon to pick up his girlfriend. CP 11. Based

on his training as a drug recognition expert, Officer Kelley believed Mr. German was under the influence of methamphetamine, and Mr. German admitted he had "been on a weeklong methamphetamine bender" and had not slept during that time. CP 11; RP 221. In a search incident to his arrest, Officer Kelley found Mr. German's wallet which contained a notebook with names, nicknames, and phone numbers. CP 11. He also located a bag of syringes. *Id*.

The rear passenger, Valerie Ray, told the officer they were going to Kelso and then to Portland. CP 11. She also told the officer she did not know anything. *Id*.

Officer Kelley spoke with Mr. Fitzpatrick, who clarified they were driving to Vancouver to visit Mr. German's ill mother. CP 11. Mr. Fitzpatrick also told both officers he had borrowed the car from a friend and provided the friend's name and phone number, but the officers could not make contact with that friend. RP 196-97. Officer Kelley later discovered the car had been transferred to Mr. Fitzpatrick's name only three days prior, and the record of the sale did not process until June 27, 2017, the same day as the incident in question. RP 159-60.

Without obtaining a warrant, Officer Kelley requested a K-9 unit to the scene. CP 12. Deputy Ness Aguilar responded with his K-9 unit

and applied the dog to the car. CP 13-14. The dog circled the vehicle three times and sat, indicating it detected the odor of drugs. *Id*.

Based on the above, Officer Kelley applied for a search warrant for the car. CP 9-16. The officer asserted there was probable cause to search the car based on the differing reasons for the group's drive, the items located on Mr. German's person, both Mr. German and Mr. Fitzpatrick's histories of drug-related crime, and the dog search. CP 14.

Officer Kelley's affidavit in support of the warrant application incorporated Deputy Aguilar's affidavit. CP 12-14. The deputy claimed he and his K-9 were certified, but included no other information about the dog's training and performance. CP 12-13. In particular, the affidavit failed to state the canine's rates of false positives (alerts where no drugs were found) or false negatives (no alerts where drugs were present) either in training or in the field. Moreover, the affidavit did not include how many times the canine has performed in the field and did not indicate whether the animal had ever been used in the field at all.

Although the dog search of the car occurred without a warrant, and the search warrant affidavit provided no information about the dog's reliability, a judge signed a warrant permitting officers to search Mr. Fitzpatrick's car. CP 16. The subsequent search revealed

methamphetamine in a container in the trunk of the car. RP 204. The State charged Mr. Fitzpatrick with one count of possession of a controlled substance with intent to deliver. CP 3-4.

Mr. Fitzpatrick moved to suppress the evidence, alleging the search exceeded the scope of the warrant because the canine did not alert at the trunk of the car. CP 17-20. The trial court denied the motion, finding the canine exhibited a change of behavior because it "sniffed intently" at the trunk area and sat by the driver's window. CP 79-80. The court also found "There can be air transfer between the trunk of a car and the passenger compartment; something that is odiferous in the trunk could cause the passenger compartment to smell badly as well." CP 80. Notably, the warrant affidavit does not include any information about the car's internal airflow, and no testimony was taken during the motion to suppress. The court concluded the search warrant permitted a search of the entire vehicle, including the trunk, because they are connected. CP 80.

After trial, Mr. Fitzpatrick was acquitted of possession with intent to deliver, but was convicted of simple possession. CP 53-54.

On appeal, Mr. Fitzpatrick argued the application of a canine unit to a person's car disturbs a "private affair under article I, section 7, thus

requiring a warrant or an exception before the intrusion. Br. of Appellant at 12-20. He acknowledged a dog sniff on a car is not a search within the meaning of the Fourth Amendment, but noted that this Court has repeatedly held article I, section 7 is more protective than the Fourth Amendment in the vehicle context. Br. of Appellant at 12-15. Mr. Fitzpatrick also noted a Division One case rejecting this argument was incorrect because the Court of Appeals improperly relied on a "reasonable expectations of privacy" analysis, which is a Fourth Amendment standard inconsistent with article I, section 7. Br. of Appellant at 15-17.

Alternatively, Mr. Fitzpatrick argued the evidence should have been suppressed because the State failed to prove the reliability of the canine whose alert supported the search warrant that was later issued. Again, Mr. Fitzpatrick noted the greater protections afforded citizens by article I, section 7 in this context in comparison with the Fourth Amendment. Br. of Appellant at 20-24.

The Court of Appeals rejected both arguments. The court acknowledged article I, section 7's greater privacy protections, but found the dog sniff in this case did not amount to a "search" implicating our constitution. Slip Op. at 4. The Court relied on *State v.*

Hartzell, 156 Wn. App. 918, 929, 237 P.3d 928 (2010), to hold that no search occurred because Mr. Fitzpatrick "did not have a reasonable expectation of privacy in the air outside his car." Slip Op. at 1, 5.

As to the second issue, the court found a drug-detection dog's reliability could be established solely by a statement that the dog is trained or certified. Slip Op. at 10. The court further found the *Aguilar-Spinelli* test for reliability of an informant's tip does not apply to drug-detection dogs. *Id*. at 10. The court found no error in the trial court's ruling that probable cause supported the search warrant, and affirmed Mr. Fitzpatrick's conviction. *Id*. at 10.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The question of whether a drug dog's inspection of a car disturbs a private affair is a significant constitutional question this Court should resolve.

a. Drug dogs disturb private affairs because they reveal information people do not expose to public view.

Under both the Fourth Amendment and article I, section 7, the warrantless use of a drug-detection dog on a person's home is impermissible. *See Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 1417-18, 185 L. Ed. 2d 495 (2013); *State v. Dearman*, 92 Wn. App. 630, 636, 962 P.2d 850 (1998). This is because "using a narcotics dog goes beyond merely enhancing natural human senses and, in effect,

allows officers to 'see through the walls' of the home.'" *Dearman*, 92 Wn. App. at 635 (citing *State v. Young*, 123 Wn.2d 173, 183, 867 P.2d 593 (1994)). The court relied on *Young*, in which this Court held the use of an infrared radiation detector outside a home disturbs a private affair. 123 Wn.2d at 183. This is because even though the device was applied to the exterior of the home, it "allowed the officers to see more than what Mr. Young left exposed to public view." *Id.*

The U.S. Supreme Court has declined to extend this rationale in the vehicle context, finding application of a narcotics-detection dog is not a search because it does not implicate an "interest in privacy that society is prepared to consider reasonable." *Illinois v. Caballes*, 543 U.S. 405, 408-09, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) (citing *U.S. v. Jacobsen*, 466 U.S. 109, 122, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984)) (internal quotation marks omitted). Article I, section 7, however, is not "grounded in notions of reasonableness. Rather, it prohibits any disturbance of an individual's private affairs without authority of law." Const. art. I, § 7; *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012). Accordingly, article I, section 7 affords greater privacy protection in the vehicle context than the Fourth Amendment. Because a drug detection dog detects more than what a driver leaves

exposed to public view, it disturbs a private affair under the state constitution, and a warrant or exception is required.

b. Article I, section 7 provides stronger privacy protection in the vehicle context than the Fourth Amendment and stronger protection against pretextual intrusions.

The Court of Appeals dismissed *Dearman* because that case involved a home, which the court acknowledged "receive[s] more protection under article I, section 7 than vehicles." Slip Op. at 7. But as Mr. Fitzpatrick noted, this Court has repeatedly held that Washington's citizens indeed have a privacy interest in their cars which they are entitled to hold safe from governmental intrusion absent a warrant. Br. of Appellant at 14-15.

"From the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles." *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988); see also *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999). Accordingly, while the Fourth Amendment permits an "automobile exception" to the warrant requirement, no such exception exists under article I, section 7. *See Snapp*, 174 Wn.2d at 192.

Additionally, Washington Courts have refused to permit invasions of the right to privacy in cars in other contexts. For example,

article I, section 7 prohibits sobriety checkpoints even though they are permissible under the Fourth Amendment. *Mesiani*, 110 Wn.2d at 457-58; *contrast Michigan Department of State Police v. Sitz*, 496 U.S. 444, 455, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990). And, while police may make pretextual stops under the Fourth Amendment, such stops offend article I, section 7. *Compare Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); *State v. Chacon Arreola*, 176 Wn.2d 284, 294, 290 P.3d 983 (2012). Furthermore, Washington requires a warrant to search a vehicle incident to arrest regardless of whether it contains evidence of the crime of arrest, while the Fourth Amendment would permit a warrantless search in such circumstances. *Snapp*, 174 Wn.2d at 197.

The pretext cases not only provide further evidence of Washington's strong privacy protection in cars, but also indicate this Court should be concerned about the specific issue presented here. Scholars have warned that the absence of constitutional protection against warrantless canine inspections "allow[s] law enforcement to conduct searches when they see fit and for reasons that do not establish probable cause, such as race." Taylor Phipps, *Probable Cause on A Leash*, 23 B.U. Pub. Int. L.J. 57, 73 (2014). Indeed, an

attorney for the Mexican American Legal Defense and Education Fund suggests, "police are using dogs to target the Hispanic community." *Id.* Such practices are inconsistent with the Washington Constitution's guarantees of privacy and equality, and this Court should grant review. RAP 13.4(b)(3), (4).

c. Article I, section 7 does not depend on notions of "reasonableness."

Article I, section 7 not only provides more protection than the Fourth Amendment, but its protections and its relevant analysis are qualitatively different. *See Snapp*, 174 Wn.2d at 187. Article I, section 7 analysis does not rely on the "reasonable expectation of privacy" rationale. "Private affairs are not determined according to a person's subjective expectation of privacy." *State v. Surge*, 160 Wn.2d 65, 72, 156 P.3d 208 (2007). Instead, the private affairs inquiry focuses on "'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" *Id.* at 71 (quoting *Young*, 123 Wn.2d at 181).

The Court of Appeals rejected this Court's admonition that article I, section 7 is "not grounded in notions of reasonableness." *Snapp*, 174 Wn.2d at 194. It relied on Division One's opinion in *Hartzell*, which held the use of a drug detection dog to the exterior of a

car did not constitute a "search" because there was no "reasonable expectation of privacy." *Hartzell*, 156 Wn. App. at 929; Slip Op. at 7. This analysis is inappropriate under article I, section 7, which "prohibits any disturbance of an individual's private affairs without authority of law." *Snapp*, 174 Wn.2d at 194.

d. Other states have held that canine sniffs outside cars are "searches" under their state constitutions.

Although *Caballes* held the application of a drug-detection canine to the exterior of a car is not a "search" under the Fourth Amendment, some courts have reached the opposite conclusion under their state constitutions. For example, "[a] canine sniff is a search pursuant to Article I, Section 8 of the Pennsylvania Constitution." *Commonwealth v. Green*, 2017 PA Super 244, 168 A.3d 180, 185 (2017) (citing *Commonwealth v. Rogers*, 578 Pa. 127, 849 A.2d 1185, 1190 (2004)); *see also id.* at n.8 (contrasting *Caballes*, 543 U.S. at 409). Similarly, "[e]mploying a trained canine to sniff a person's private vehicle in order to determine whether controlled substances are concealed inside is certainly a search" under the New Hampshire Constitution. *State v. Pellicci*, 133 N.H. 523, 533, 580 A.2d 710, 716 (1990); *see also id.* at 531 (rejecting U.S. Supreme Court's analysis in *United States v. Place*, 462 U.S. 696, 707, 103

S.Ct. 2637, 77 L.Ed.2d 110 (1983)). Given our state constitution's exceptional protection of privacy, the same should be true under article I, section 7.

Indeed, this Court should grant review to address the question of whether the use of a narcotics-detection dog to the outside of a person's car disturbs a private affair and thus requires a warrant or exception prior to the intrusion. Other states have addressed the issue and held their constitutions provide greater protection in this context than the Fourth Amendment. This Court has consistently held not only that article I, section 7 provides more protection than the Fourth Amendment, but also that analysis under this provision does not depend on reasonable expectations of privacy. It is important for this Court to address the issue of drug-detection dogs and condemn their warrantless use to invade a person's privacy and detect what an individual has not exposed to the public.

2. This Court should accept review to determine whether the State must prove the reliability of a dog's alert in order to support probable cause for the issuance of a warrant.

This Court should also accept review of the second issue in this case and hold that article I, section 7 provides greater protection against unreliable dog alerts than the Fourth Amendment.

A dog's alert is treated like an informant's tip in the context of detecting narcotics. *See Florida v. Harris*, 568 U.S. 237, 133 S. Ct. 1050, 1056, 185 L. Ed. 2d 61 (2013). Washington adheres to the two-pronged "*Aguilar-Spinelli*"[1] test to determine whether an informant's tip can support probable cause. *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984). For an informant's tip to create probable cause, the State must show: (1) "the reliability of the manner in which the informant acquired his information," and (2) "the informant was credible or his information reliable." *Id*. The *Jackson* court made clear that for article I, section 7 purposes, "unless it can be shown that the tip came from an honest or reliable person who acquired the information in the particular case in a reliable way, an arrest or search should not be permitted on the basis of the tip." *Id*. at 442.

Here, the Court of Appeals mischaracterized Mr. Fitzpatrick's reliance on *Harris*, noting that nothing in *Harris* "suggests that courts must apply the *Aguilar-Spinelli* test to a controlled substance detection dog alert." Slip Op. at 10. Rather, Mr. Fitzpatrick relied on *Harris* simply to demonstrate that in the context of detecting narcotics, dog

[1] See *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

alerts are treated like informants' tips. Thus, because our courts continue to apply the *Aguilar-Spinelli* test to determine the reliability of an informant's tip, so must they analyze the reliability of a dog alert pursuant to the same test.

The Court of Appeals also noted *Harris* "stated that evidence of a dog's satisfactory completion of a certification or training program can presumptively establish the dog's reliability." Slip Op. at 10; *Harris*, 568 U.S. at 246-47. Therefore, the court concluded, because the State established the dog in this case was trained and certified, the State satisfied its burden to prove the animal's reliability. Slip Op. at 10.

The reasoning in *Harris* does not apply here. *Harris* is a Fourth Amendment case involving a dog alert which the Florida Supreme Court found unreliable due the State's failure to present evidence of the animal's performance history. 568 U.S. at 242. The U.S. Supreme Court reversed. *Id*. at 250. It ruled the Florida court's "strict" reliability requirement was inconsistent with the holding in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), in which the Supreme Court abandoned the *Aguilar-Spinelli* test and held the reliability of an informant's tip must be evaluated under the totality of the circumstances. *Harris*, 568 U.S. at 244-45.

However, under Washington law, strict reliability requirements remain. *See Jackson*, 102 Wn.2d at 441 (rejecting *Gates*). Thus, this Court should accept review to address the issue of how *Jackson* applies to the reliability of canine alerts. It should hold that the evidence presented in this case was insufficient to demonstrate reliability and establish probable cause.

Here, the State presented evidence in its search warrant application that the canine was trained and certified in 2016 and 2017. No additional information about the dog's performance, in training or in the field, was provided to the magistrate. The affidavit does not explain what is required for certification and does not include the animal's track record in training or in the field. In fact, the affidavit fails to indicate whether this particular dog has ever been used in the field to detect narcotics. Without this information, the evidence included in the affidavit was insufficient to show the canine's reliability.

An informant's track record is important for determining whether the informant is reliable or credible. *Jackson*, 102 Wn.2d at 437. In Washington, a dog sniff has been sufficient to establish probable cause where the dog's track record was specifically included

in the affidavit submitted to obtain a search warrant. *See, e.g.*, *State v. Jackson*, 82 Wn. App. 594, 606, 918 P.2d 945 (1996) ("dog's training and track record . . . were subsequently shown in the affidavit" (emphasis added)); *State v. Flores-Moreno*, 72 Wn. App. 733, 741, 866 P.2d 648 (1994) (affidavit stated canine had participated in 97 searches in which narcotics were found).

Courts must not accept training and certification of a canine as a sufficient proxy for true evidence of the animal's reliability. This is because canines, like the one here, are "trained to detect the odor of controlled substance," not the actual *presence* of such substances. CP 13 (emphasis added). Thus, "the dog that alerts hundreds of times will be wrong dozens of times." *Caballes*, 543 U.S. at 412 (Souter, J., dissenting). Indeed, the "infallible dog" is "creature of legal fiction," "belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine." *Id*. at 411-12 (collecting cases and studies). A person's private affairs should not be disturbed simply because an animal apparently detects the *odor* of a substance.

Here, the government presented no information about the canine's track record of false positives or false negatives. More concerning still, the affidavit failed to even state whether this particular animal had ever performed in the field at all. Without this information, there is insufficient evidence the canine is reliable, and its alert should not have been considered for the probable cause determination. This Court should accept review to address this important issue. RAP 13.4(b)(3), (4).

E. CONCLUSION

Based on the foregoing, Mr. Fitzpatrick respectfully requests that review be granted. RAP 13.4(b).

DATED this 9th day of May 2019.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SHAWN JAMES FITZPATRICK, Appellant.	No. 50864-8-II UNPUBLISHED OPINION

MAXA, C.J. – Shawn Fitzpatrick appeals his conviction of possession of a controlled substance – methamphetamine, which arose out of a traffic stop and subsequent search of the car he was driving. A law enforcement officer pulled over Fitzpatrick for speeding on Interstate 5. After a controlled substance detection dog alerted to the odor of controlled substances, an officer obtained a search warrant for the car. During the search the officers discovered methamphetamine.

We hold that the trial court did not err in denying Fitzpatrick's motion to suppress evidence obtained during the search because (1) the controlled substance detection dog's sniff around the car for controlled substance odors was not a "search" because Fitzpatrick did not have a reasonable expectation of privacy in the air outside the car; (2) the search warrant was supported by probable cause because the statements in the search warrant affidavit that the officer/handler and the controlled substance detection dog had extensive training and were

certified as a canine team established the reliability of the dog's alert to the odor of controlled substances; and (3) even assuming that substantial evidence does not support the trial court's finding of fact that there can be air flow between the trunk and passenger compartments of a car, such an error was harmless because the search warrant authorized a search of the entire vehicle including the trunk.

Accordingly, we affirm Fitzpatrick's conviction.

FACTS

Trooper Kyle Lindemann pulled over Fitzpatrick for speeding as he was traveling on Interstate 5 in Cowlitz County. There were two passengers in the car. Fitzpatrick admitted that he was driving without a license and Lindemann placed Fitzpatrick under arrest.

Woodland police officer Derek Kelley arrived and spoke with one of the passengers, Dustin German. Both Fitzpatrick and German had warrants based on previous convictions of possession of controlled substances. Kelley arrested German and found drug paraphernalia, including a large packet of unused syringes and a possible drug ledger.

Kelley called Deputy Ness Aguilar to bring his controlled substance detection dog, Kelo, to perform an exterior sniff check of the car. Aguilar and Kelo began at the front of the car and proceeded down the driver's side. Kelo immediately showed an extreme change of behavior and indicated the detection of controlled substance odor by sitting at the driver's side open window. Aguilar and Kelo continued around the vehicle and Kelo sniffed intently at the trunk of the car. Kelo returned to the driver's door and window and again sat to indicate the detection of controlled substance odors. Aguilar and Kelo did a third loop around the car and Kelo again sat at the driver's side open window.

Law enforcement impounded the car Fitzpatrick was driving and Kelley applied for a search warrant to search the car, including any compartments or containers inside the vehicle. Kelley included in his affidavit Aguilar's statement of his investigation of the exterior of the car as well as Aguilar and Kelo's credentials as a canine team.

In his statement, Aguilar said that he and Kelo had been certified as a canine team in Washington. Aguilar had completed over 200 hours of classroom and practical training. Aguilar and Kelo trained about four hours every week. Kelo was trained to detect cocaine, crack cocaine, heroin, and methamphetamine. When Kelo detected the odor of one of those substances, his body posture and respirations changed and he stared intently at the source of the odor. Kelo was trained to sit as close to the source of the odor as possible, and Aguilar was trained to watch for the changes in Kelo's behavior.

A judge approved the search warrant, and Kelley and another officer searched the car. Kelley found a substantial amount of methamphetamine, a digital scale, and two used glass pipes in a black box in the trunk of the car.

The State charged Fitzpatrick with possession of a controlled substance with intent to deliver – methamphetamine. Before trial, Fitzpatrick filed a motion to suppress the evidence recovered pursuant to the search.

Fitzpatrick argued that Kelley did not have probable cause to search the trunk and that the search of the trunk exceeded the proper scope of the search warrant. The trial court denied the suppression motion and entered written findings of fact and conclusions of law. The court made a finding that "[t]here can be air transfer between the trunk of a car and the passenger

compartment; something that is odiferous in the trunk could cause the passenger compartment to smell badly as well." Clerk's Papers at 80.

A jury acquitted Fitzpatrick of possession with intent to distribute but convicted him of the lesser included charge of possession of a controlled substance – methamphetamine. Fitzpatrick appeals the trial court's order denying his motion to suppress the evidence seized pursuant to the search warrant.

ANALYSIS

A. CONTROLLED SUBSTANCE DETECTION DOG SNIFF AS A SEARCH

Fitzpatrick argues that the use of a controlled substance detection dog to sniff around his car without a search warrant constituted an unlawful warrantless search. And he claims that without the dog's alert to the presence of controlled substance odors, the State did not have probable cause to obtain a search warrant for the car. We disagree.

1. Legal Principles

Article I, section 7 of the Washington Constitution states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The protected privacy interest extends to vehicles and their contents. *State v. Patton*, 167 Wn.2d 379, 385, 219 P.3d 651 (2009). Article I, section 7 prohibits warrantless searches of vehicles unless an exception to the warrant requirement applies. *State v. Froehlich*, 197 Wn. App. 831, 837, 391 P.3d 559 (2017). However, conduct that does not rise to the level of a "search" does not implicate article I, section 7. *See State v. Jones*, 163 Wn. App. 354, 361, 266 P.3d 886 (2011) (addressing open view doctrine).

In general, "a search does not occur if a law enforcement officer is able to detect something using one or more of his senses from a nonintrusive vantage point." *State v. Hartzell*, 156 Wn. App. 918, 929, 237 P.3d 928 (2010). This type of observation does not violate article I, section 7 because "something voluntarily exposed to the general public and observable without an enhancement device from a lawful vantage point is not considered part of a person's private affairs." *Id.*

A dog sniff technically is a type of investigative device. *See State v. Mecham*, 186 Wn.2d 128, 147, 380 P.3d 414 (2016). Therefore, whether using a controlled substance detection dog sniff to detect the odor of controlled substances constitutes a search depends on the specific circumstances of the case. *Hartzell*, 156 Wn. App. at 929.[1] The court in *Hartzell* stated the general rule: "[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.' " *Id.* (quoting *State v. Boyce*, 44 Wn. App. 724, 730, 723 P.2d 28 (1986)).

2. Analysis

Here, Fitzpatrick's car was parked on the side of a public road when Kelo conducted a sniff around the car. Fitzpatrick was no longer in the car. Both Aguilar and Kelo stayed outside the vehicle throughout the entire sniff procedure.

[1] The United States Supreme Court has held that a dog sniff is not a search under the Fourth Amendment to the United States Constitution. *E.g.*, *Illinois v. Caballes*, 543 U.S. 405, 409, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005). However, article I, section 7 provides broader protection in this context. *State v. Boyce*, 44 Wn. App. 724, 728-30, 723 P.2d 28 (1986).

In *Hartzell*, the court addressed whether a dog sniff of the air by an open car window was a search. 156 Wn. App. at 928-30. In that case, a dog sniffed a bullet hole in a car parked in a driveway and then located the gun that caused the hole nearby. *Id.* at 927-28. The court held that the dog sniff was not a search because the defendant "did not have a reasonable expectation of privacy in the air coming from the open window of the vehicle." *Id.* at 929-30. In addition, the defendant no longer was in the car, the dog was sniffing from a lawful vantage point outside the car, and "[t]he sniff was only minimally intrusive." *Id.* at 930.

The Supreme Court in *Mecham* cited *Hartzell* with approval, in a parenthetical characterizing *Hartzell*'s holding as "canine sniff outside of car window is not a search because suspects have no reasonable expectation of privacy in air outside a car window." *Mecham*, 186 Wn.2d at 147.

The analysis in *Hartzell*, confirmed in *Mecham*, compels the conclusion here that the dog sniff of the air around Fitzpatrick's car was not a search. If anything, the dog sniff in this case was less intrusive than the dog sniff in *Hartzell*. There, the dog sniffed the exterior of a car that was parked in a private driveway. *Hartzell*, 156 Wn. App. at 927. Here, Kelo sniffed Fitzpatrick's vehicle when it was parked on the side of a public road.

Fitzpatrick argues that we should follow *State v. Dearman*, 92 Wn. App. 630, 633-37, 962 P.2d 850 (1998). In *Dearman*, the court considered whether a dog sniff of the seams along a garage door to detect the odor of marijuana was a warrantless search under article I, section 7. *Id.* at 632-34. The court stated that the use of a trained controlled substance detection dog is an intrusive means of observation because it exposes private information that the police could not have obtained using only one or more of their senses from a lawful vantage point. *Id.* at 635.

The court also stated that using a significantly enhanced sensory instrument, such as a dog sniff, constituted a search because the defendant had a heightened expectation of privacy inside his private dwelling. *Id.* at 636-37.

However, *Dearman* involved a dog sniff of a garage and implicated the privacy interests associated with private dwellings. *Id.* at 632, 636. Dwellings receive more protection under article I, section 7 than vehicles. *See State v. Vrieling*, 144 Wn.2d 489, 494-95, 28 P.3d 762 (2001) (noting that motor vehicles do not receive the same heightened privacy protection as private homes). This case, like *Hartzell*, involves a dog sniff around a vehicle and the privacy interests are distinguishable. In fact, the court in *Hartzell* did not even mention *Dearman* in its analysis.

Fitzpatrick also claims that *Hartzell* is inapplicable because the court "engaged in a Fourth Amendment analysis that was inapplicable to the article I, section 7 issue before it." He claims that *Hartzell* and other cases upholding dog sniffs were wrongly decided because the privacy protections under article I, section 7 do not depend on a person's subjective expectation of privacy. However, the court in *Hartzell* grounded its decision on the general rule that something observable by the general public "is not considered part of a person's private affairs." 156 Wn. App. at 929. That general rule tracks the language of article I, section 7.

We hold that the dog sniff of the air around Fitzpatrick's vehicle was not a search and therefore was not unlawful under article I, section 7.

B. SEARCH WARRANT VALIDITY

Fitzpatrick argues that there was insufficient probable cause to support the search warrant because the search warrant affidavit did not include information demonstrating that Aguilar and Kelo could reliably detect controlled substance odors. We disagree.

1. Probable Cause

Both the Fourth Amendment to the United States Constitution and article I, section 7 require probable cause to support the issuance of a search warrant. *See State v. Figeroa Martines*, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015) (Fourth Amendment); *State v. Ollivier*, 178 Wn.2d 813, 846, 312 P.3d 1 (2013) (article I, section 7). "Probable cause exists when the affidavit in support of the search warrant 'sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.' " *Ollivier*, 178 Wn.2d at 846-47 (quoting *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003)).

There must be "a nexus between criminal activity and the item to be seized and between that item and the place to be searched." *State v. Neth*, 165 Wn.2d 177, 183, 196 P.3d 658 (2008). A search warrant affidavit must identify specific facts and circumstances from which the magistrate can infer that evidence of the crime will be found at the place to be searched. *State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999).

We review de novo a trial court's assessment of probable cause at a suppression hearing, giving deference to the magistrate's determination. *Neth*, 165 Wn.2d at 182; *see also State v. Dunn*, 186 Wn. App. 889, 896, 348 P.3d 791 (2015). We consider only the information contained in the affidavit supporting probable cause. *Neth*, 165 Wn.2d at 182.

"Generally, an 'alert' by a trained drug dog is sufficient to establish probable cause for the presence of a controlled substance." *State v. Jackson*, 82 Wn. App. 594, 606, 918 P.2d 945 (1996). However, for an alert by a controlled substance detection dog to contribute to probable cause, the State must establish the dog's reliability. *State v. Flores-Moreno*, 72 Wn. App. 733, 741, 866 P.2d 648 (1994). The dog's training and past experience may establish its reliability. *Id.*

2. Analysis

Fitzpatrick argues that the State did not establish Kelo's reliability because the search warrant affidavit contains no information about the dog's track record. He cites two cases in which the court mentioned the detection dog's track record in determining that the dog was reliable: *Flores-Moreno*, 72 Wn. App. at 741; *Jackson*, 82 Wn. App. at 606.

However, no court has held that the State must demonstrate a controlled substance detection dog's successful track record to show that the dog is reliable for purposes of supporting probable cause. The only court to expressly address this issue held that the State could establish a controlled substance detection dog's reliability based on "a statement that the dog is trained or certified, without a showing of the dog's track record." *State v. Gross*, 57 Wn. App. 549, 551, 789 P.2d 317 (1990), *overruled on other grounds by Thein*, 138 Wn.2d 133. The court also cited federal cases stating that a dog's reliability could be established based on training alone. *Gross*, 57 Wn. App. at 551. The court held that the dog was reliable for purposes of supporting probable cause because the search warrant affidavit had stated that the dog was trained to detect drugs. *Id.* at 551-52.

Here, the search warrant affidavit included a statement by Aguilar establishing that he had completed over 200 hours of training as a canine handler for the detection of controlled substances and he and Kelo were certified as a canine team. Aguilar stated that one of the specific areas of training was vehicle searching. This information was sufficient to show that Kelo could reliably detect controlled substance odors.

Fitzpatrick argues that we must determine whether Kelo was reliable under the *Aguilar-Spinelli*[2] test, which is used in the context of probable cause based on an informant's tip. He cites *Florida v. Harris*, 568 U.S. 237, 244-46, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013), for the proposition that we treat a detection dog alert like an informant's tip in determining if the information is reliable enough to support probable cause.

However, nothing in the Court's holding in *Harris* suggests that courts must apply the *Aguilar-Spinelli* test to a controlled substance detection dog alert. In fact, the Court stated that evidence of a dog's satisfactory completion of a certification or training program can presumptively establish the dog's reliability. *Id.* at 246-47.

We conclude that the State adequately demonstrated Kelo's reliability in the search warrant affidavit by stating that he had completed an extensive training program and was up-to-date on his certification as a controlled substance detection dog. Therefore, we hold that the trial court did not err in ruling that there was probable cause to obtain a search warrant of the car based on Kelo's alert to the presence of controlled substance odors.

[2] *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed 2d 723 (1964); *Spinelli v. U.S.*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed 2d 637 (1969).

C. CHALLENGED FINDING OF FACT

Fitzpatrick argues that the trial court erred in making a finding of fact that there could be air flow between the trunk and passenger compartments of a car.[3] He claims that this finding is not supported by the evidence and therefore that the search warrant should have been limited to the passenger compartment of the car. We hold that any such error was harmless.

We review a trial court's written findings in a ruling on a motion to suppress to determine whether they are supported by substantial evidence. *Froehlich*, 197 Wn. App. at 837. Evidence is substantial if it is enough to persuade a fair-minded person of the truth of the stated premise. *Id.* Unchallenged findings are treated as verities on appeal. *State v. Betancourth*, 190 Wn.2d 357, 363, 413 P.3d 566 (2018). An error regarding a finding of fact is harmless if it appears beyond a reasonable doubt that the finding does not materially affect the trial court's conclusions of law. *State v. Coleman*, 6 Wn. App. 2d 507, 516, 431 P.3d 514 (2018).

Here, any error in the challenged finding of fact was harmless because this finding was immaterial to the suppression motion. The search warrant affidavit requested permission to search the entire vehicle, including any locked or unlocked compartments or containers. "A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search . . . [and] applies equally to all containers." *U.S. v. Ross*, 456 U.S. 798, 821-22, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982); *see also State v. Witkowski*, 3 Wn. App. 2d 318, 325-26, 415 P.3d 639, *rev. denied* 191 Wn.2d 1016 (2018). Further, the affidavit stated,

[3] Fitzpatrick also assigns error to two other findings of fact. However, he provides no argument stating how the trial court erred in making those findings. This court may decline to address assignments of error that are not supported by argument or authority. RAP 10.3(a)(6); *State v. Cherry*, 191 Wn. App. 456, 464 n.3, 362 P.3d 313 (2015). Accordingly, we decline to address these assigned errors.

and the trial court made an unchallenged finding of fact, that Kelo had sniffed intently at the trunk area of the car during the free air sniff.

The trial court's unchallenged findings and the affidavit's specific description of the areas to be searched support the trial court's conclusion that the search warrant authorized a search of the entire vehicle, including the trunk.

Accordingly, we hold that even if the trial court erred in finding that there could be air flow between the trunk and passenger compartment of a car, the error was harmless because the finding does not affect the validity of the trial court's suppression ruling.

CONCLUSION

We affirm Fitzpatrick's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, C.J.

We concur:

WORSWICK, J.

GLASGOW, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 50864-8-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered by other court-approved means to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 9, 2019
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