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No. 68422-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent

v.

EDWARD IVAN KOHLWES,

Appellant.



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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. INTRODUCTION	1
B. ASSIGNMENTS OF ERROR	2
C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
D. STATEMENT OF THE CASE.....	4
E. ARGUMENT	9
1. Police did not have a reasonable suspicion of drug possession to justify detaining Mr. Kohlwes while they waited for a K-9 unit to arrive.....	9
2. The dog sniff was a search under the Washington Constitution....	12
a. The dog sniff was a search because it invaded Mr. Kohlwes's privacy.	13
b. The dog-sniff search was invalid because it was conducted without authority of law.....	16
3. Police did not have probable cause to support a warrant to search Mr. Kohlwes's car.	20
a. Officer Langdon's affidavit did not establish that he and Buddy were certified as a K-9 team, as required by the WAC regulations.	21
b. The information provided in the warrant application regarding Buddy's training and performance record is insufficient to show that he can reliably alert when, and only when, drugs are present.	23
c. Drug dogs are not inherently reliable.....	26
F. CONCLUSION	28

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<i>State v. Afana</i> , 169 Wn.2d 169, 233 P.3d 879 (2010).....	13, 14, 16
<i>State v. Eserjose</i> , 171 Wn.2d 907, 259 P.3d 172 (2011)	17
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	17
<i>State v. Jackson</i> , 150 Wn.2d 251, 76 P.3d 217 (2003)	12
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999)	9, 16
<i>State v. Lyons</i> , 174 Wn.2d 354, 275 P.3d 314 (2012).....	20, 26
<i>State v. Morse</i> , 156 Wn.2d 1, 123 P.3d 832 (2005).....	12
<i>State v. Myrick</i> , 102 Wn.2d 506, 688 P.2d 151 (1984).....	12
<i>State v. Patton</i> , 167 Wn.2d 379, 219 P.3d 651 (2009)	16
<i>State v. Smith</i> , 165 Wn.2d 511, 199 P.3d 386 (2009).....	18
<i>State v. Snapp</i> , 174 Wn.2d 177, 275 P.3d 289 (2012)	14
<i>State v. Tibbles</i> , 169 Wn.2d 364, 236 P.3d 885 (2010)	18, 19
<i>State v. White</i> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	12
<i>State v. Winterstein</i> , 167 Wn.2d 620, 220 P.3d 1226 (2009).....	12, 13
<i>State v. Young</i> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	14

Washington Court of Appeals Decisions

<i>State v. Boyce</i> , 44 Wn. App. 724, 723 P.2d 28 (1986)	13, 15
<i>State v. Dearman</i> , 92 Wn. App. 630, 962 P.2d 850 (1998).....	13, 14
<i>State v. Hartzell</i> , 153 Wn. App. 137, 221 P.3d 928 (2009).....	15
<i>State v. Higby</i> , 26 Wn. App. 457, 613 P.2d 1192 (1980)	20

State v. Neely, 113 Wn. App. 100, 52 P.3d 539 (2002) 10

State v. Stanphill, 53 Wn. App. 623, 769 P.2d 861 (1989)..... 15

United States Supreme Court Decisions

Illinois v. Caballes, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842
(2005)..... 9, 12, 28

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) ... 9, 16,
17

United States v. Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110
(1983)..... 12

Statutes

RCW 46.12.650(7)..... 5, 10

Regulations

WAC 139-05-915(6)(a) 21

Constitutional Provisions

Const. art. I, § 7..... passim

U.S. Const. amend. IV 9

Decisions of Other Jurisdictions

Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979) 27

Jennings v. Joshua Independent School Dist., 877 F.2d 313 (5th Cir. 1989)
..... 27

United States v. Cruz-Roman, 312 F. Supp. 2d 1355 (W.D. Wash. 2004)22

United States v. Saccoccia, 58 F.3d 754 (1st Cir. 1995) 27

United States v. Trayer, 898 F.2d 805 (D.C. Cir. 1990)..... 26

Other Authorities

- Eliezer S. Yudkowsky, *An Intuitive Explanation of Bayes' Theorem*,
available at <http://yudkowsky.net/rational/bayes>..... 25
- Robert C. Bird, *An Examination of the Training and Reliability of the
Narcotics Detection Dog*, 85 Ky. L.J. 405..... 26

A. INTRODUCTION

Edward Kohlwes was convicted of possession of a controlled substance based on illegally obtained evidence. Sheriff's deputies pulled him over for failing to transfer the title in his new car, and then arguably developed a reasonable suspicion that he was driving under the influence of an intoxicant. But they did not cite him for either of those offenses; instead, they detained him in order to wait for a K-9 unit to indulge their suspicion that he currently possessed a controlled substance. But because that suspicion was not reasonable, the detention was illegal, and all evidence that resulted from it must be suppressed.

Furthermore, the search warrant later obtained for Mr. Kohlwes's car was invalid. The warrant was based on an illegal warrantless search, and the warrant affidavits failed to establish either that the dog-handler team was properly certified or that the dog was reliable. Because the warrant relied on illegally obtained and unreliable information, it was defective. This Court should therefore reverse the trial court, suppress the illegally obtained evidence, and vacate Mr. Kohlwes's conviction.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that Mr. Kohlwes's detention while waiting for a K-9 unit was reasonable based on a suspicion of driving under the influence of a controlled substance. CP 101, Conclusion of Law (d); RP 43.¹

2. The trial court erred in refusing to grant Mr. Kohlwes's CrR 3.6 motion based on the illegal seizure and search of his person and his vehicle. CP 102; RP 43.

3. The search warrant for Mr. Kohlwes's vehicle was invalid, and the fruits of the search must be suppressed, because it was based in part on an illegal search and because the warrant affidavits did not establish probable cause that the car contained contraband. CP 51-52.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An investigative detention that is based on reasonable suspicion of criminal activity must be limited to the time and scope necessary to confirm or dispel that suspicion. The trial court found that police had a reasonable suspicion both that Mr. Kohlwes had failed to transfer the title in his vehicle and that he was driving under the

¹ The Verbatim Report of Proceedings consists of three separately paginated volumes. Except as otherwise noted, all transcript citations in this brief are to the first volume, containing the suppression hearing of June 17, 2011.

influence of an intoxicant, but not that he was currently in possession of a controlled substance. Where Mr. Kohlwes was not cited for the failure to transfer title or driving under the influence, and was detained for 15 minutes waiting for a K-9 unit to arrive solely because of his suspected possession of drugs, was the detention illegal? (Assignments of Error 1, 2.)

2. A police-dog sniff test is a search under the Washington Constitution if it invades the suspect's private affairs. The sniff test here caused Mr. Kohlwes to be detained for 15 minutes and to have to stand in public by the side of the road while his vehicle was being inspected. Did these invasions of Mr. Kohlwes's private affairs cause the sniff to constitute a search? (Assignment of Error 3.)

3. Under the Washington Constitution, a search is illegal and the fruits of the search must be suppressed unless the search is authorized by a warrant or a recognized warrant exception. The Washington Supreme Court recently held that suspicion of possession of drugs in a car does not establish the existence of exigent circumstances to search the car unless the State shows that a warrant could not have been timely obtained. The State here did not establish any reason why police could not have obtained a warrant before having

a K-9 unit investigate Mr. Kohlwes's car. Was the search therefore illegal? (Assignment of Error 3.)

4. The affidavit purporting to establish the reliability of the K-9 team did not show that the dog and its handler were certified as a team, as required by the Washington Administrative Code. Nor did the affidavit establish that the dog itself could reliably distinguish between the presence and absence of the substances that it had been trained to detect. Where the warrant to search Mr. Kohlwes's vehicle relied upon the dog's alert, did the State fail to establish probable cause to justify the warrant? (Assignment of Error 3.)

D. STATEMENT OF THE CASE

Early on the morning of May 31st, 2010, Snohomish County Sheriff's Deputy Ryan Phillips was on patrol in Everett. RP 3-4. As part of his patrol duties, he drove to a known drug house to check for any suspicious activity. RP 5, 8. When he was about a block away from the house, he saw Mr. Kohlwes drive past him in the opposite direction and ran a computer check on Mr. Kohlwes's license plates. RP 5-7. The computer check revealed that Mr. Kohlwes's vehicle had been sold several months prior, but that the title had not yet been transferred to

the new owner. RP 7-8. A new owner's failure to transfer the title within 45 days of the purchase is a misdemeanor. RCW 46.12.650(7).

Deputy Phillips radioed another Sheriff's deputy to stop Mr. Kohlwes for the failure to transfer title. RP 8. After Deputy Phillips had checked on the drug house, he drove to the location where the other deputy had pulled over Mr. Kohlwes. *Id.* The other deputy had not yet exited his car, and Deputy Phillips conducted the entire encounter with Mr. Kohlwes. RP 9-16.

Upon approaching Mr. Kohlwes, Deputy Phillips thought that he appeared to be "under the influence of some sort of intoxicants." RP 10. Deputy Phillips "asked [Mr. Kohlwes] where he was coming from, and he said Sven's house." RP 15. Deputy Phillips interpreted "Sven" as being Sven Vic, the owner of the known drug house he had just checked. RP 15, 17.

Deputy Phillips requested permission to search the vehicle, which Mr. Kohlwes declined. RP 13. Deputy Phillips then "requested a narcotics canine from Lynnwood, who arrived within about 15 minutes." RP 13; CP 100. Deputy Phillips testified that he called for the K-9 unit because he suspected that Mr. Kohlwes was in possession of a controlled substance, and that his purpose in holding Mr. Kohlwes for

the sniff test was "to determine whether or not [he was] going to ask for a warrant for the car." RP 22-24. Deputy Phillips did not ask Mr. Kohlwes to complete a field sobriety test, nor did he contact a drug recognition expert to evaluate whether Mr. Kohlwes was under the influence of a controlled substance. RP 22. He never cited or arrested Mr. Kohlwes either for the failure to transfer title or for driving under the influence. RP 22-23.

After waiting for approximately 15 minutes, Officer Coleman Langdon of the Lynnwood Police Department arrived with Buddy, a police dog. RP 23; CP 57-58, 100. Upon sniffing Mr. Kohlwes's car, "Buddy provided a positive alert at the open driver's window." CP 57. Deputy Phillips then impounded Mr. Kohlwes's vehicle in order to request a search warrant. RP 13. After impounding the car, Deputy Phillips released Mr. Kohlwes. RP 22.

One week later, Deputy Phillips applied for a warrant to search Mr. Kohlwes's car on suspicion of possession of a controlled substance. CP 53-55. Attached to the warrant affidavit were two other affidavits by Officer Langdon. CP 57-58. The first indicated that Buddy had alerted to Mr. Kohlwes's car, and explained that "[w]hen Buddy moves in to an area containing the odor of one or more of the drugs that he

was trained to detect he will display a noticeable change of behavior and then move in to a final response (positive alert) of moving in to a sit position." CP 57.

The second affidavit described the qualifications of Officer Langdon and Buddy. The affidavit claimed that "Buddy is certified by Washington Administrative Code (WAC) standards as both a generalist and [a] narcotics detection dog." CP 58. The affidavit indicated that Buddy completed a 153-hour narcotics-detection program in 2008 "with an overall success rate in the nineties (percentage rate) and has continued at that rate having been involved in over 58 applications." *Id.* The affidavit neither defined what "success rate" meant nor provided any specific error rates or performance records for Buddy. It also indicated that Buddy had undergone his training with a trainer from the Redmond Police Department, not Officer Langdon. *Id.*

The affidavit also described Officer Langdon's credentials as a dog handler and trainer. *Id.* It did not, however, state that Officer Langdon and Buddy had been certified together as a K-9 team under the applicable WAC standards. *Id.*

A Snohomish County District Court Commissioner approved the warrant. CP 51-52. Deputy Phillips searched the car, finding

methamphetamine and a pipe in the center console. CP 48. Mr. Kohlwes was arrested the next day when he came to the police precinct to pick up his car. CP 45. He was charged with possession of a controlled substance, but not with failure to transfer the title or driving under the influence. CP 133.

Before trial, Mr. Kohlwes moved under CrR 3.6 to suppress the evidence seized from his car. CP 127-31. He claimed that the deputies did not have probable cause to pull him over for failure to transfer title, and that the stop was pretextual. *Id.* During the suppression hearing, he additionally argued that he was unlawfully detained while awaiting the K-9 unit, because the delay was based only on his suspected possession of a controlled substance, and was not related either to the failure to transfer title or to his alleged driving under the influence. RP 35.

The court denied his motion to suppress. RP 40-43; CP 98-102. It found that the stop was not pretextual, that Deputy Phillips developed a reasonable suspicion during the stop that Mr. Kohlwes was driving under the influence, and that Mr. Kohlwes was then "detained for a reasonable period of time to allow for additional investigation." RP 43; CP 100-02. The court did not, however, find that the deputies had a

reasonable suspicion of possession of a controlled substance during the time they were waiting for the K-9 unit.

Mr. Kohlwes was convicted of the charge after a bench trial on stipulated facts. RP (1/23/12) 2-11; CP 14-22. He now appeals the denial of his CrR 3.6 motion and his conviction.

E. ARGUMENT

1. Police did not have a reasonable suspicion of drug possession to justify detaining Mr. Kohlwes while they waited for a K-9 unit to arrive.

Police may not detain a person to investigate a possible crime unless they have a reasonable, articulable suspicion that the person is, or is about to be, engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Ladson*, 138 Wn.2d 343, 351, 979 P.2d 833 (1999); *see also* U.S. Const. amend. IV; Const. art. I, § 7. When police conduct an investigative detention, the seizure must not extend beyond the time necessary for police to confirm or deny their reasonable suspicion. *Illinois v. Caballes*, 543 U.S. 405, 407-08, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005). If a detention extends beyond the permissible time and then results in the discovery of incriminating evidence, the evidence is the result of an illegal seizure and must be suppressed. *Id.* Like probable cause

determinations, whether an undisputed set of facts created a reasonable suspicion is a legal conclusion that is reviewed de novo. *See State v. Neely*, 113 Wn. App. 100, 105-06, 52 P.3d 539 (2002).

The police in this case pulled over Mr. Kohlwes for failure to transfer the title of his recently purchased car, which is a misdemeanor. RP 12-13; RCW 46.12.650(7). After stopping him, Deputy Phillips noticed certain characteristics about Mr. Kohlwes that led him to believe that Mr. Kohlwes was under the influence of an illegal substance. RP 10-13.

Deputy Phillips did not conduct a field sobriety test, or any other tests, to attempt to confirm his suspicion that Mr. Kohlwes was on drugs. RP 22. Nor did Deputy Phillips cite Mr. Kohlwes for the failure to transfer title. RP 22-23. Instead, Deputy Phillips detained Mr. Kohlwes for approximately 15 minutes in order to wait for a K-9 unit to arrive and sniff the outside of the car. RP 13, 23, 41; CP 100. This continued detention was solely in order to wait for the K-9 unit, and not related to either the original reason for the stop or to Mr. Kohlwes's suspected driving under the influence. RP 22-23. Deputy Phillips was not investigating either of those alleged crimes, nor was he completing any administrative tasks (e.g., filling out paperwork) related to them.

The continued detention was predicated entirely on Deputy Phillips's suspicion that Mr. Kohlwes possessed contraband. The detention was therefore illegal unless Deputy Phillips's suspicion was reasonable.

The circumstances known to Deputy Phillips do not support a finding that he had a reasonable suspicion to detain Mr. Kohlwes for possession of a controlled substance. Even viewed in the light most favorable to the State, the record shows that Deputy Phillips knew only that Mr. Kohlwes appeared to be under the influence of drugs and that he had recently left a known drug house. RP 15-16; CP 100. While these facts might have supported a detention for further investigation of driving under the influence, they do not indicate that Mr. Kohlwes actually had any drugs with him when he was pulled over. Moreover, the trial court never found that Deputy Phillips had any reasonable suspicion related to possession of an illegal substance, rather than simply for being under the influence. *See* RP 43; CP 101-02.

Because the seizure of Mr. Kohlwes extended beyond the time necessary to investigate the crimes for which reasonable suspicion could have been established, the continued detention was unlawful. Thus, the results of the subsequent dog sniff and warrant search that

followed must be suppressed, and Mr. Kohlwes's conviction must be reversed.

2. The dog sniff was a search under the Washington Constitution.

The United States Supreme Court has held that canine sniff tests conducted outside automobiles are not "searches" within the meaning of the Fourth Amendment. *Caballes*, 543 U.S. at 409 (citing *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983)). But article I, section 7 of the Washington Constitution, which explicitly protects the right to personal privacy, provides broader protections than the Fourth Amendment. Const. art. I, § 7; *State v. Winterstein*, 167 Wn.2d 620, 631-32, 220 P.3d 1226 (2009) (noting that "article I, section 7 'clearly recognizes an individual's right to privacy with no express limitations'" (quoting *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982))); *see also State v. Jackson*, 150 Wn.2d 251, 259-60, 76 P.3d 217 (2003) ("The inquiry under article I, section 7 . . . focuses on 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass.'" (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984))); *State v. Morse*, 156 Wn.2d 1, 9, 123 P.3d 832 (2005) ("Unlike in the

Fourth Amendment, the word 'reasonable' does not appear in any form in the text of article I, section 7 of the Washington Constitution.").

Under article I, section 7, a dog sniff constitutes a search if, on the facts of the case, it "unreasonably intrude[s] into the defendant's private affairs." *State v. Boyce*, 44 Wn. App. 724, 729-30, 723 P.2d 28 (1986); *see also State v. Dearman*, 92 Wn. App. 630, 635-36, 962 P.2d 850 (1998). And if a dog sniff constitutes a search, then, like any other search, it requires a warrant or a recognized warrant exception. *State v. Afana*, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010). Evidence gained as the result of an unlawful search must be suppressed. *Id.* at 180-81 (noting that "[u]nlike its federal counterpart, Washington's exclusionary rule is 'nearly categorical'" (quoting *Winterstein*, 167 Wn.2d at 636).

a. The dog sniff was a search because it invaded Mr. Kohlwes's privacy.

In this case, the dog sniff did invade Mr. Kohlwes's personal privacy, and it was therefore a search. First, Mr. Kohlwes was detained for 15 minutes waiting for the K-9 unit to arrive. This detention would not have occurred but for the involvement of the K-9 unit. Mr. Kohlwes was not arrested or cited for the misdemeanor failure to transfer title for which he was originally pulled over. Thus, Deputy Phillips did not need to complete any paperwork or otherwise delay Mr. Kohlwes in

connection with that offense. Similarly, Mr. Kohlwes was not cited, or even evaluated with a field sobriety test, for driving under the influence of drugs. Like the failure to transfer title, his alleged intoxication did not contribute to the length of the detention. Thus, his additional detention only occurred to facilitate the dog sniff. That continued detention, like any other seizure, certainly intruded on Mr. Kohlwes's private affairs.

Second, the circumstances of the sniff itself invaded Mr. Kohlwes's privacy. This Court has held, and our Supreme Court has strongly suggested, that a dog sniff is a search when directed at a residence, because of the privacy interest that inheres in the home. *Dearman*, 92 Wn. App. at 636-37; *State v. Young*, 123 Wn.2d 173, 188, 867 P.2d 593 (1994) ("[A] dog sniff might constitute a search if the object of the search or the location of the search were subject to heightened constitutional protection."). And while the privacy interest in a vehicle is undoubtedly less than in a home, our Supreme Court has "long recognized a privacy interest in automobiles and their contents." *Afana*, 169 Wn.2d at 176; *see also State v. Snapp*, 174 Wn.2d 177, 187, 275 P.3d 289 (2012). Thus, police practices that infringe on that

privacy interest impact "private affairs" within the meaning of article I, section 7. *Snapp*, 174 Wn.2d at 187.

Moreover, Mr. Kohlwes was required to exit his vehicle and stand on the side of a public road, in cold, rainy weather wearing only a t-shirt, while Buddy was walking around the car. RP 10, 13. Anybody who drove by the scene would have seen Mr. Kohlwes standing there while a police officer walked a dog around his car, instantly identifying Mr. Kohlwes as a suspected criminal.

The sniff in this case is therefore not like the cases where Washington courts have previously held dog sniffs not to be searches under article I, section 7. *See Boyce*, 44 Wn. App. at 725 (sniff of a safety-deposit box in a bank vault); *State v. Stanphill*, 53 Wn. App. 623, 625, 769 P.2d 861 (1989) (sniff of a package while in possession of the U.S. Postal Service); *State v. Hartzell*, 153 Wn. App. 137, 146-47, 221 P.3d 928 (2009) (sniff of vehicle where defendant voluntarily parked in a driveway and exited vehicle prior to police involvement, and was taken into custody before the K-9 unit was called). In *Boyce* and *Stanphill*, the sniffs did not take place while the defendants were present, did not occur in areas where the defendants had any reasonable expectation of privacy, and did not publicly identify the defendants as

the targets of police investigations. And in *Hartzell*, the sniff did not intrude on the defendant's private affairs because police did not detain him to conduct the sniff test and he was already in custody before the sniff took place.

Here, on the other hand, Mr. Kohlwes was detained solely to facilitate the sniff test, the sniff took place while he was present and out of custody, the sniff targeted an object—his vehicle—in which he had a recognized expectation of privacy, and the sniff publicly exposed him as the target of a criminal investigation. The dog sniff therefore invaded Mr. Kohlwes's personal privacy and was a search under article I, section 7.

b. The dog-sniff search was invalid because it was conducted without authority of law.

Under article I, section 7, a search must be conducted with "authority of law." Const. art. I, § 7. As used in article I, section 7, "authority of law" means a valid warrant, or one of a "few jealously guarded exceptions" to the warrant requirement. *Afana*, 169 Wn.2d at 176-77 (citing *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009)). These exceptions include "consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops." *Ladson*, 138 Wn.2d at 349 (citing *State v.*

Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996)). A warrantless search or seizure is presumed to violate article I, section 7, and the burden is always on the State to prove that such a search or seizure is valid under a recognized warrant exception. *Patton*, 167 Wn.2d at 386; *Ladson*, 138 Wn.2d at 350. Whether a set of undisputed facts meets this constitutional standard is a question of law, reviewed de novo. *State v. Eserjose*, 171 Wn.2d 907, 912, 259 P.3d 172 (2011).

Police in this case did not have a warrant prior to conducting the dog-sniff search. Nor do any of the warrant exceptions apply. Mr. Kohlwes did not give his consent for any search of his vehicle. CP 54. He was not arrested and the car was not impounded prior to the dog sniff, so the search was not incident to an arrest or an inventory search. RP 13, 22-23. Neither Deputy Phillips nor Officer Langdon saw any contraband in plain view, and the dog sniff does not fall under the *Terry* search exception because it was not conducted for officer-safety purposes. RP 23; *Terry*, 392 U.S. at 29. Therefore, those exceptions also do not apply.

The final possible warrant exception is exigent circumstances. Exigent circumstances exist where "obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise

officer safety, facilitate escape or permit the destruction of evidence." *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009). But the Washington Supreme Court recently considered a similar case and concluded that, despite the inherent mobility of automobiles, the suspected presence of drugs inside a car does not necessarily justify a warrantless search under the exigent-circumstances exception.

In *State v. Tibbles*, 169 Wn.2d 364, 236 P.3d 885 (2010), a police officer stopped a car late at night for having a defective taillight. *Id.* at 367. Upon approaching the car, the officer smelled marijuana. *Id.* The driver denied having marijuana or using it that day. *Id.* at 367-68. Nevertheless, the officer searched the interior of the car without obtaining a warrant and found marijuana and drug paraphernalia hidden under a seat. *Id.* at 368.

The District Court, Superior Court, and Court of Appeals all upheld the warrantless search under the exigent-circumstances exception. *Id.* But the Supreme Court reversed them, holding that the State "ha[d] not shown any need for particular haste" in searching the vehicle. *Id.* at 371. The Court held that the State had failed to show that the defendant was at risk of fleeing or that "the destruction of evidence was imminent." *Id.* Nor had the State established that any safety

concerns existed or that "obtaining a warrant was otherwise impracticable." *Id.* at 371-72.

The Court emphasized that the State bears the burden of establishing the existence of a warrant exception, including exigent circumstances. *Id.* at 372. Thus, the Court refused to speculate about whether the officer could have obtained a telephonic warrant or otherwise secured the scene while he left to obtain a warrant. *Id.* at 371. Because the State had the burden to produce evidence on the record to establish that exigent circumstances existed, but failed to do so, the Court held that the warrant exception did not apply. *Id.* at 372.

Like *Tibbles*, the deputy in this case encountered a driver who was alone in his car, was not pulled over for impaired driving, and was compliant when approached by the deputy. RP 9-13, 23-24; *Tibbles*, 169 Wn.2d at 372. The record contains no indication that Deputy Phillips could not have obtained a warrant prior to calling for the K-9 search. Thus, like all of the other possible warrant exceptions, the exigent-circumstances exception does not apply.

Using Buddy to sniff Mr. Kohlwes's car invaded his privacy and was therefore a search under article I, section 7. Because the search was conducted without a warrant or a recognized warrant exception,

Buddy's alert should have been suppressed and was not a proper ground on which to base the subsequent search warrant. Buddy's alert, and the fruits of the warrant obtained based on the alert, must therefore be suppressed, and Mr. Kohlwes's conviction reversed.

3. Police did not have probable cause to support a warrant to search Mr. Kohlwes's car.

Even if the dog sniff did not qualify as a search, and thus does not need to be suppressed, it still did not provide probable cause to impound Mr. Kohlwes's car and obtain a warrant to search it. A magistrate's determination as to whether probable cause exists is generally due "great deference." *State v. Lyons*, 174 Wn.2d 354, 362, 275 P.3d 314 (2012). But "that deference is not unlimited." *Id.* A reviewing court "cannot defer to the magistrate where the affidavit does not provide a substantial basis for determining probable cause." *Id.* at 363. Thus, "[a]lthough search warrant affidavits are not read hypertechnically, they must disclose sufficient facts to allow the magistrate to exercise independent judgment on the question of probable cause." *State v. Higby*, 26 Wn. App. 457, 462, 613 P.2d 1192 (1980).

The affidavits in this case were insufficient to establish probable cause for two reasons. First, Officer Langdon's affidavits did not

establish that he and Buddy had been certified together, as required by the Washington Administrative Code (WAC). Second, the affidavits did not establish that Buddy can reliably detect drugs when they are present and refuse to alert when they are absent. Without this information to establish Buddy's reliability, his alert cannot support probable cause to justify a search. And because the remaining allegations in the affidavits were insufficient to establish probable cause, the warrant was issued in error.

- a. Officer Langdon's affidavit did not establish that he and Buddy were certified as a K-9 team, as required by the WAC regulations.**

In Washington, a police dog and its handler must be certified together as a team. WAC 139-05-915(6)(a). Officer Langdon's affidavit stated that Buddy had been trained and was certified as a "generalist" and as a narcotic-detection dog. CP 58. The affidavit also stated that Officer Langdon was trained and certified as a dog handler. *Id.* But it did not state that Officer Langdon and Buddy had been certified together as a team. The affidavit thus does not establish that Buddy and Officer Langdon, acting together, are a reliable drug-detection team.

Establishing that the team is certified is particularly important given the way in which Buddy alerts. The affidavit indicates that when

Buddy alerts, he will "display a noticeable change of behavior" and then sit down. CP 57. This standard is highly subjective, relying on the officer's assessment of whether Buddy's behavior has changed noticeably and in the right way, and whether Buddy is sitting down in connection with an alert or in response to some other stimulus or command. Without even a minimal basis—namely, an affidavit of certification—on which to find that the team can operate reliably, the commissioner could not meaningfully evaluate whether the purported alert established probable cause. *Accord United States v. Cruz-Roman*, 312 F. Supp. 2d 1355, 1363 (W.D. Wash. 2004) (finding compliance with WAC 139-05-915 to be "strongly probative of the issue of reliability" even though not binding in federal court, and finding that a dog alert did not establish probable cause where the handler-canine team was not certified until "a few days" after the alert in question).

Because the warrant affidavits did not establish that Buddy and Officer Langdon were properly certified as a team, as required by WAC 139-05-915, the commissioner erred in relying on Buddy's alert to issue a search warrant. The alert and the fruits of the warrant therefore must be suppressed.

- b. The information provided in the warrant application regarding Buddy's training and performance record is insufficient to show that he can reliably alert when, and only when, drugs are present.**

Even if the affidavits had established that Buddy and Officer Langdon had been certified as a team, they still do not establish Buddy's reliability. And because Buddy's alert is meaningless unless he is shown to be reliable, the alert could not properly contribute to a finding of probable cause. The warrant was therefore defective.

The affidavit that describes Buddy's qualifications states that Buddy "completed the [narcotics detection] course with an overall success rate in the nineties (percentage rate) and has continued at that rate having been involved in over 58 applications." CP 58. But the affidavit does not define how this "success rate" is measured. In particular, it fails to distinguish between (a) Buddy's ability to alert when drugs are present, and (b) Buddy's ability to refuse to alert when drugs are absent. Because false negatives and false positives both affect a dog's overall reliability, it is literally impossible to assess reliability without knowing both error rates. Thus, the affidavit's claims regarding Buddy's reliability, based on a single "success rate," are completely meaningless.

In the general sense, a false negative occurs when a test fails to detect something that is actually present. In Buddy's case, a false negative would occur if he failed to alert after being directed to sniff an object containing drugs that he had been trained to detect. If Buddy's "success rate" is defined in terms of avoiding false negatives, then a 95% success rate² would mean that 95% of the time when drugs are present, Buddy alerts.

A false positive, on the other hand, occurs when a test indicates that something is present when it is not actually there. So if Buddy's "success rate" were defined as avoiding false positives, then the same 95% success rate would indicate that 95% of the time when drugs are not present, Buddy does not alert.

The interplay of these two measures determines Buddy's true reliability. If Buddy has a 95% success rate as to both false positives and false negatives, then he is 19 times as likely to alert when drugs are present as he is when drugs are not present.³ If, on the other hand, Buddy has a 95% success rate in detecting drugs when they are present,

² Officer Langdon's affidavit claimed that Buddy's "overall success rate [is] in the nineties (percentage rate)." CP 58.

³ In this example, Buddy has a 95% chance of alerting if drugs are present (achieving an accurate positive result), and a 5% chance of alerting even if drugs are not there (a false positive). Thus, he is $95/5 = 19$ times as likely to alert when drugs are present than when they are not.

but only a 50% success rate in avoiding false positives, then he is less than two times as likely to alert when drugs are present as he is when they are not present.⁴ In both cases, Buddy will alert 95% of the time when drugs are present. But in the second example, the predictive power of Buddy's alert—the probability that he is alerting because drugs are actually present, instead of for some other reason—is decreased by a factor of 10.⁵

Thus, simply providing a "success rate," without the rates of false positives and false negatives, left the commissioner utterly without the ability to judge Buddy's reliability. Because the warrant affidavits did not establish both error rates, Buddy's alert cannot properly contribute to a finding of probable cause, because it is

⁴ In this example, Buddy has a 95% chance of alerting if drugs are present and a 50% chance of alerting if they are not present. Thus, he is only $95/50 = 1.9$ times as likely to alert in the presence of drugs as he is in their absence.

⁵ Note that neither of these examples gives the ultimate probability that, when Buddy alerts, drugs are actually present. Thus, in the first example, Buddy's alert does not mean that there is a 19/20 chance that the car contains drugs. Calculating the true probability requires further determining a baseline probability that a given car has drugs in it, before considering whether Buddy did or did not alert. For example, if one out of every thousand cars on the road has drugs in it, then even in the first case given above (where Buddy is more accurate), his alert on a randomly chosen car would mean only that instead of a 1/1000 chance that the car contains drugs, there is slightly less than a 19/1000 chance. This is due to a mathematical concept called "conditional probabilities," which is expressed by a formula called Bayes' Theorem. For a long, but lucid, explanation of the concept, see Eliezer S. Yudkowsky, *An Intuitive Explanation of Bayes' Theorem*, available at <http://yudkowsky.net/rational/bayes> (last visited Oct. 9, 2012).

impossible to assess the meaning of that alert. There was, in other words, no "substantial basis for determining probable cause." *Lyons*, 174 Wn.2d at 363.

c. Drug dogs are not inherently reliable.

Other issues arise with the use of dog alerts that also demonstrate the need to require the State to clearly prove the dog's reliability. First, as mentioned above, determining whether or not the dog is in fact giving an alert is subjective and open to interpretation by the handling officer. CP 57; *see also* Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 422 (claiming that "almost all erroneous alerts originate not from the dog, but from the handler's misinterpretation of the dog's signals"). Because the handler's own conscious or unconscious biases could affect both how he interprets the dog's behavior and how the dog behaves, it is critical for the State to show clearly that the dog is capable of refusing to alert when appropriate and in a manner that the handler can understand. *See* Bird, *supra*, at 422-23; *United States v. Trayer*, 898 F.2d 805, 809 (D.C. Cir. 1990) (noting, based on expert testimony of a police-dog trainer, that anything "less than scrupulously

neutral procedures, which create at least the possibility of unconscious 'cuing,' may well jeopardize the reliability of dog sniffs").

Moreover, significant evidence indicates that dogs can detect trace amounts of narcotics that could be present due to a person having recently handled or been around drugs, even if not currently possessing them. *See, e.g., Jennings v. Joshua Independent School Dist.*, 877 F.2d 313, 317 (5th Cir. 1989) (noting that "although King, the dog, was trained to detect various contraband, he also was capable of reacting to some nonprescription drugs and to residual scents lingering for up to four to six weeks"); *United States v. Saccoccia*, 58 F.3d 754, 777 (1st Cir. 1995) (noting estimates and collecting cases holding that widespread contamination of U.S. currency with trace amounts of controlled substances undermines probative value of dog alerts). And other cases have discussed alerts that were triggered by factors apparently completely unrelated to drugs. *See, e.g., Doe v. Renfrow*, 475 F. Supp. 1012, 1017 (N.D. Ind. 1979) (noting that in a school sweep where drug dogs alerted to approximately 50 students, only 17 were found in possession of drugs, and one alert was of a student who "had been playing with one of her dogs that morning of the search and that dog was in heat"), *overruled in part on other grounds*, 631 F.2d 91

(7th Cir. 1980). *See also Caballes*, 543 U.S. at 411-412 (Souter, J., dissenting) (noting that "[t]he infallible dog . . . is a creature of legal fiction" and collecting examples of unreliable dogs).

Thus, unless police adequately establish a dog's reliability—at the very least by tracking and disclosing the relevant error rates—the dog's alert is a woefully inadequate basis for finding probable cause. A human officer could not establish probable cause for possession of drugs merely by stating that the suspect had been in contact with drugs or a dog in heat sometime in the recent past. A dog's alert that cannot be shown to mean anything more should not be treated any differently. Rather, the State must be held to a consistent probable-cause standard, which can be satisfied for dogs only if the State affirmatively establishes the dog's reliability. Because the State did not do so here, the warrant was issued without probable cause.

F. CONCLUSION

The evidence that supported Mr. Kohlwes's conviction was obtained as the result of an illegal detention, a dog sniff that was an illegal warrantless search, and a search warrant that was not supported by probable cause. This Court should therefore reverse the trial court, suppress the evidence, and vacate Mr. Kohlwes's tainted conviction.

DATED this 9th day of October, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Lahiri', written over a horizontal line.

Rabi Lahiri, WSBA No. 44214
Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent/Cross-appellant,)	NO. 68422-1-I
)	
)	
EDWARD KOHLWES,)	
)	
Appellant-Cross-respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF OCTOBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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