

68422-1

68422-1

NO. 68422-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD KOHLWES,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 APR 23 PM 1:15

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

(1) After stopping a driver, the officer observed signs that he was under the influence of drugs. The driver also admitted that he had just visited a nearby drug house. Do these facts provide reasonable suspicion justifying detaining the driver so that his car could be sniffed by a drug detection dog?

(2) Does the use of a drug detection dog to sniff a lawfully-stopped vehicle constitute a “search”?

(3) Police used information from the sniff to obtain a search warrant. At trial, the defendant claimed that this information was unlawfully obtained. He did not claim that the information contained in the affidavits was insufficient to establish probable cause. Can this argument be raised for the first time on appeal?

(4) If the issue can be raised, is probable cause established by evidence that a trained and certified drug detection dog alerted to the defendant’s car?

II. STATEMENT OF THE CASE

At around 2:00 a.m. on May 31, 2010, Deputy Snohomish County Sheriff Ryan Phillips was on patrol. In accordance with his normal practice, he ran the license plate of a car that he saw. He learned that the car had been sold, but the title had not been

transferred. RP 4-7. This is a misdemeanor under RCW 46.12.102(6).

Deputy Phillips requested another officer to stop the car. Deputy Phillips arrived immediately afterwards and conducted the investigation. The car was driven by the defendant (appellant), Edward Kohlwes. As soon as the defendant got out of the car, Deputy Phillips observed signs of intoxication. The defendant seemed unable to focus. His eyes were extremely "twitchy." He appeared to have a dry mouth. Although it was cold and raining and the defendant was dressed in a T-shirt, he was sweating. Based on the officer's training and experience, "it was quite obvious he was under the influence of some sort of intoxicants." RP 10-12.

The defendant told the officer that he was coming from "Sven's house." The officer was aware that Sven was the owner of a nearby drug house. Police had information concerning "lots of drug use" at that house. When the defendant was asked what he was doing at Sven's house, he said that they were talking about woodworking. RP 8, 15.

Deputy Phillips requested a drug dog. The dog and handler arrived about 15 minutes later. The handler applied the dog to the exterior of the vehicle. Almost immediately, the dog alerted to the

vehicle, indicating that there was or recently had been some kind of drugs there. Deputy Phillips therefore impounded the car and sought a search warrant. RP 13. The search disclosed approximately two grams of methamphetamine. CP 40.

The defendant was charged with possession of a controlled substance. CP 133. He moved to suppress the evidence, claiming that the detention was pretextual and unsupported by probable cause. CP 127-31. Following a suppression hearing, the court rejected these claims and denied the motion. CP 98-102; RP 40-43. The defendant was then convicted at a stipulated trial. CP 30-33.

III. ARGUMENT

A. A PERSON WHO APPEARS TO BE DRIVING WHILE UNDER THE INFLUENCE OF DRUGS CAN BE DETAINED TO INVESTIGATE THE POSSIBLE PRESENCE OF DRUGS IN HIS VEHICLE.

The defendant claims that he was unlawfully detained while the officer was awaiting a drug dog.

A valid ... investigative stop is permissible if the officer can point to specific and articulable facts which, taken together with rationale inferences from those facts, reasonably warrants the intrusion. A reasonable, articulable suspicion means that there is a substantial possibility that criminal conduct has occurred or is about to occur.

State v. Snapp, 174 Wn.2d 177, 197-98 ¶ 47, 275 P.3d 289 (2012)

(citations omitted). A lawful stop is "limited in scope and duration to

fulfilling the investigative purposes of the stop.” State v. Acrey, 148 Wn.2d 738, 747, 645 P.3d 594 (2003).

The defendant acknowledges that the facts known to the investigating officer “might have supported a detention for further investigation of driving under the influence.” He claims, however, that these facts were insufficient to justify an investigation of *possession* of controlled substances. Brief of Appellant at 11. This is a false dichotomy.

An investigation into a defendant’s intoxication can include an attempt to determine whether he possesses an intoxicating substance. For example, in a prosecution for driving while under the influence of alcohol, the presence of an open alcohol container is evidence of the defendant’s intoxication. See State v. Morales, 154 Wn. App. 26, 51 ¶ 55, 225 P.3d 211 (2010), rev’d on other grounds, 173 Wn.2d 560, 269 P.3d 263 (2012). Similarly, the defendant’s possession of drugs would have probative value in a prosecution for driving while under the influence of drugs. Consequently, an investigatory detention for that crime can properly encompass efforts to determine whether drugs are present.

In any event, the reasonable suspicion in this case extended to both possession and use of drugs. When stopped, the defendant

exhibited signs of being under the influence of drugs. RP 10-13. He told the officer that he had come from a known drug house, which was less than a tenth of a mile away. RP 15, 19. From these facts, it was reasonable to infer that the defendant may have obtained drugs at the drug house, which would still be in his possession. Even if such a conclusion is not considered *probable*, there was at least a substantial *possibility* that the defendant was in possession of drugs – which is all that is needed to justify an investigatory detention.

Under similar circumstances, the Louisiana Court of Appeal held that there was a sufficient factual basis for an investigatory detention. State v. Barlow, 792 So. 2d 63 (La. App. 2001), review denied, 817 So. 2d 89 (La. 2002). In that case, an officer stopped the defendant for driving while intoxicated. The officer's observations indicated that the suspect was under the influence of some substance other than alcohol. The court held that these facts justified the officer's use of a drug dog to examine the defendant's vehicle. Id. at 65-66.

In the present case, there was even a stronger factual basis than there was in Barlow. In addition to the defendant's intoxication, he had just visited a location where drugs were apparently available

for purchase. The officer could reasonably suspect that the defendant was in possession of drugs that he had purchased there. The detention to allow a dog sniff was proper.

B. THE USE OF A DRUG DETECTION DOG TO SNIFF A LAWFULLY-STOPPED VEHICLE IS NOT A “SEARCH” UNDER EITHER THE STATE OR FEDERAL CONSTITUTION.

The defendant next claims that the use of a drug dog constituted a “search” under the Washington constitution. No issue has been raised under the federal constitution. The U.S. Supreme Court has held that legitimate privacy interests are not implicated by use of a well-trained drug detection dog during a lawful traffic stop. Illinois v. Cabales, 543 U.S. 405, 128 S. Ct. 834, 160 L. Ed. 2d 842 (2005). In a recent case, however, the court held that a search occurred when a drug dog was used to investigate a home and its immediate surroundings. Florida v. Jardines, 133 S. Ct. 1409 (2013).

Prior to Jardines, Washington cases had applied a similar analysis. The Washington Supreme Court had believed that the U.S. Supreme Court had adopted a “blanket rule that drug sniffs are not searches.” The Washington Supreme Court rejected such a rule. Rather, “our courts have employed a more conservative approach to dog sniffs and require an examination of the

circumstances of the sniff.” State v. Young, 123 Wn.2d 173, 187-88, 867 P.2d 593 (1994).

This court had reached a result similar to Jardines in State v. Dearman, 92 Wn. App. 630, 962 P.2d 850 (1998), review denied, 137 Wn.2d 1032 (1999). There, police brought a drug detection dog into the driveway of a house and had the dog sniff along the door seams of the garage. This court held that this conduct constituted a search under the State constitution.

In contrast, when drug dogs did not intrude into the area near a residence, the use of such dogs did not constitute a “search.” “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.” State v. Boyce, 44 Wn. App. 724, 730, 723 P.2d 28 (1986) (sniff of safe deposit box not search); see State v. Stanphill, 53 Wn. App. 623, 631, 769 P.2d 861 (1989) (sniff of package at post office not search); State v. Wolohan, 23 Wn. App. 813, 598 P.2d 421 (1979) (sniff of parcel at bus station not search). Applying this standard, this court held that use of a dog to sniff a vehicle does not constitute a search. State v. Hartzell, 156 Wn. App. 918, 237 P.3d 928 (2010).

The defendant claims that a search existed in his case because (1) he was present at the time of the sniff and (2) he was removed from his vehicle. Neither if these facts should change the analysis. Although the defendant was present, the dog sniffed the vehicle, not the defendant. This court has specifically rejected the claim that lawful detention of an object transforms use of a drug dog into a “search.” Stanphill, 53 Wn. App. at 631. The same should be true of the lawful detention of a person.

As for removing the defendant from his vehicle, the Washington Supreme Court has considered this “a de minimus intrusion upon the driver’s privacy.” State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722 (1999). That factor as well should not change a dog sniff into a “search.”

The drug dog here was in a location where the defendant had no expectation of privacy – outside a vehicle on a public search. Using a dog to search a vehicle has been recognized as “minimally intrusive.” Consequently, as in Hartzell, the use of a dog to sniff the defendant’s vehicle during a lawful investigatory detention did not constitute a “search” in violation of the Washington constitution.

C. THE SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE.

1. The Validity Of The Warrant Cannot Be Challenged For The First Time On Appeal.

Finally, the defendant argues that the search warrant was not supported by probable cause. This argument should not be considered, because it is raised for the first time on appeal.

Under CrR 3.6, a suppression motion must be “supported by an affidavit or documents setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion.” On the basis of these documents, “[t]he court shall determine whether an evidentiary hearing is required.” Since the court looks to the grounds set out in the motion in deciding whether to hold a hearing, it is vital that the defendant be limited to those grounds.

Here, the defendant’s suppression motion asserted that the detention was pretextual. It also claimed that there was no probable cause justifying stopping the vehicle or detaining the defendant. CP 127-31. The motion did not claim that the ensuing search warrant was unsupported by probable cause. Nor did the defendant raise such an argument at the suppression hearing. RP 34-35. The search warrant affidavit was not even made part of the record at the

suppression hearing. (A copy was introduced into evidence at the stipulated trial. The copy quality is poor, with some words illegible. CP 53-58.)

In general, claims of unlawful search and seizure cannot be raised for the first time on appeal. An exception has been recognized when, after the suppression hearing, “a court issues a new controlling constitutional interpretation material to the defendant’s case.” State v. Robinson, 171 Wn.2d 292, 304-06 ¶¶ 20-25, 253 P.3d 84 (2011). No such new interpretation exists in the present case. Rather, the defendant’s argument is based on the long-established concept of probable cause. This argument could and should have been raised in the trial court. Since it was not, it should not be considered on appeal.

2. If The Challenge Can Be Raised, An “Alert” By A Trained Drug Dog Is Sufficient To Establish Probable Cause.

If the issue is nonetheless considered, it should be rejected. “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), review denied, 131 Wn.2d 1006 (1997). Here, the affidavit contained the following information about the dog’s training:

[Police Dog] Buddy completed a one hundred and fifty-three hours narcotics detection program in March of 2008. . . . Buddy completed the course with an overall success rate in the nineties (percentage rate) and has continued at that rate having been involved in over 58 applications.

. . .

Police Dog Buddy is certified by Washington Administrative Code standards as both a generalized and narcotics detection dog. Buddy is also certified as a narcotics detection dog [illegible] Master Generalist Team through the Washington State Police Canine Association (WSPCA).

CP 58.

Comparable information has been held sufficient to establish a dog's qualifications. In one case, an affidavit stated that the dog "had received 525 hours of training, had been certified by the Washington State Police Canine Association as a Certified Narcotics Detection Canine, and had participated in 97 searches in which narcotics were found." The court held that information sufficient to establish probable cause for issuance of a search warrant. State v. Flores-Moreno, 72 Wn. App. 733, 741, 868 P.2d 648, review denied, 124 Wn.2d 1009 (1994).

The defendant argues that the affidavit must specifically set out the dog's false positive and false negative rate. No such

requirement has been imposed by prior cases. It should not be imposed now.

“Affidavits for search warrants must be tested in a commonsense manner rather than hypertechnically so long as the basic ... requirements are met.” State v. Fisher, 96 Wn.2d 962, 965, 639 P.2d 743 (1982). “Probable cause is established when an affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in the criminal activity.” State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58, 67 (2002). The affidavit in this case shows that the presence of drugs was indicated by a trained, certified, and experienced drug detection dog, who was under the control of a trained, certified, and experienced handler. From these facts, a reasonable magistrate could conclude that drugs were probably present. No more is required to establish probable cause.

The defendant also claims that the affidavit must show that the handler and the dog were certified together. Again, no such requirement has been established by prior cases. Furthermore, the affidavit contains this information. It refers to the handler’s “certification with PD Buddy.” CP 58.

Nor was this warrant based on the "alert." The affidavit also stated that the driver of the car appeared to be under the influence of methamphetamine. Additionally, it said that the driver had just come from a nearby house that was known to be the site of illegal drug trafficking. CP 54. Even if the alert by itself were not sufficient to establish probable cause, it was sufficiently corroborated by the other information in the affidavit. The search warrant was properly issued.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on April 22, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Respondent

Cascade
~~SNOH~~ DISTRICT COURT FOR SNOHOMISH COUNTY

STATE OF WASHINGTON)

No. *PFM 5949*

COUNTY OF SNOHOMISH)
WARRANT

AFFIDAVIT FOR SEARCH

I, Ryan Phillips a Deputy Sheriff with the Snohomish County Sheriff's Office, being first duly sworn on oath, complain, depose and say:

That I have probable cause to believe, and in fact do believe, that in violation of the laws of the State of Washington, evidence of the crime(s) of: **POSSESSION OF A CONTROLLED SUBSTANCE [RCW 69.50.401]** and contraband, the fruits of a crime, or things otherwise criminally possessed, as defined by law, are being kept in, about and upon the following described premises or vehicles, designated and described as follows:

THE VEHICLE LOCATED AT:

Snohomish County Sheriff's Office
South Precinct
15928 Mill Creek BLVD
Mill Creek, WA 98012

The vehicle is listed as a gray 1997 Jeep Cherokee, four door. VIN #1J4GZ78YXVC704889. The vehicle is registered to Jay S. Bowley at 6220 Wetmore Ave, Everett, WA 98203. Although the vehicle has a "Vehicle Sold" hit as of 2/28/2010. After running the vehicle sold hit, the DOL says the new registered owner is Edward Kohlwe at 16822 189th PL NW, Stanwood, WA 98292. The vehicle's title has not yet been transferred.

MY BELIEF, IN PART, IS BASED UPON THE FOLLOWING TRAINING, KNOWLEDGE, AND EXPERIENCE:

Your affiant is a fully commissioned, sworn Deputy Sheriff with the Snohomish County Sheriff's Office. I am currently assigned to the patrol division at the South Precinct. I have been employed by the Sheriff's Office since July of 2006 as a deputy. I have completed and graduated from the Washington State Basic Law Enforcement Academy, completing 720 training hours. I have had numerous hours of in service training that includes basic investigation skills that include narcotic identification. I have in excess over a hundred arrests dealing specifically with controlled substances. These arrests include investigations of Possession of Controlled Substances as well as investigations of Possession with Intent to Deliver Controlled Substances and Manufacturing Marijuana. I have received instruction in the use of confidential sources, the identification of narcotics, and how to write and serve search warrants. I have written numerous other search warrants in my career, seizing narcotics, money, stolen property, and the vehicles themselves. I have received training and written search warrants for possession of stolen property and identifying stolen property as well.

1/6 PFM

PFM 5949

Your affiant's formal education consists of a Bachelor's Degree in Criminal Justice and a Bachelor's Degree in Sociology from Washington State University, 2005.

AFFIANT'S BELIEF IS BASED UPON THE FOLLOWING FACTS AND CIRCUMSTANCES:

On 5/31/10 at 0200hours I was on patrol in the Everett area within Snohomish County. I was turning south on 27th DR SE and a gray Jeep drove past me. I ran the license plate WA license 508UCP and saw there was a "vehicle sold" listing on registration as of 2/28/10. The titled had not yet been transferred on the vehicle. I asked Dep. Murphy who was in the area to stop the vehicle for failure to transfer title. I continued south on 27th DR SE to check on a known drug house located at 10104 27th DR SE. The owner of this house goes by "Sven". Other deputies and I have observed numerous occasions of short stay vehicle traffic from this residence, made multiple arrests for both warrants and narcotics, and I frequently receive information regarding illegal drug trafficking taking place at this location by "Sven". I drove past the residence and observed only two vehicles in the driveway, one of which belonging to "Sven".

Dep. Murphy had stopped the gray Jeep at 96th PL SE and 19th Ave SE. The driver of the Jeep was also the new registered owner Kohlwes. When I approached the driver's side window I observed he was wearing a cut-off T-shirt, his eyes were very "jumpy" (constantly bouncing around, unable to focus), and he was sweating. It was fairly cold outside and raining.

Based on my training and experience I know that people who are under the influence of methamphetamines can be "witchy" meaning involuntary muscle twitches and spasm due to the methamphetamine. I knew that their eyes have a hard time concentrating on stationary objects, are dilated, and are frequently bouncing around and restlessness, and dry mouth.

Kohlwes told me he has not had enough money to transfer the title on the vehicle and stated he knew it was a crime to have not done so. I asked Kohlwes where he was coming from and he told me his friend "Sven's" house. He stated he and Sven were talking about "wood working" at 0200hours. Based on my training and experience and Kohlwes body language, not being able to focus his eyes while I spoke with him, his sweating, along with his admission to just leaving a known drug house I requested Ofc. Langdon and his narcotic K9 to assist me. Kohlwes told me there were no illegal drugs in his car, but refused to let me search it.

Ofc. Langdon arrived on scene approximately 15 minutes after the initial traffic stop. Ofc. Langdon arrived on scene and advised me his narcotic K9 had given a positive indication on the vehicle. Ofc. Langdon's report, K9 affidavit, and qualifications are hereby attached and incorporated by reference.

I asked dispatch to have Mary's Towing enroute for the Jeep. I advised Kohlwes that I was impounding his vehicle for a search warrant. Kohlwes refused to give me a current address or an alternate phone number to contact him when I was completed with my search warrant.

I followed Mary's towing to the South Precinct where the vehicle was secured pending a search warrant.

INFORMANT INFORMATION / QUALIFICATIONS:

Based upon the above facts and circumstances:

2/6 PFM

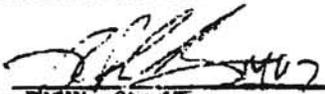
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COPY P.5 P.6/7

PFM 5949

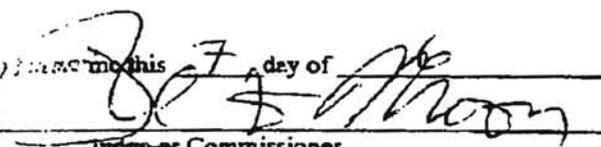
I believe that controlled substances are located within this vehicle and I am requesting a search warrant to search for and seize all controlled substances found together with the vessels in which they are contained and all implements, furniture used or kept for the illegal use, manufacture, sale, barter, exchanging, giving away, furnishing, or otherwise disposing of such illicit drugs and controlled substances, papers showing occupancy or ownership of vehicles, and sales transactions. All packaging supplies, scales, or papers documenting distribution or sale of illicit drugs. All profits and monies from the sale and distribution of controlled substances. Any and all locked and unlocked containers, including the trunk, and those items covered under RCW 69.50.505. In violation of the Laws of the State of Washington, RCW 69.50.401A, 69.50.505, and 9.41.040.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

AFFIANT

Deputy Ryan Phillips 36637
Snohomish County Sheriff's Office

Issuance of Warrant Approved:

Deputy Prosecuting Attorney Valerie Shapiro
WSEBA# 36610

Subscribed and Sworn to before me this 27 day of June, 2010

Judge or Commissioner

Paul F. Moon
Print Name

3/6 (PFM)

PFM
5949

10-04576
AOA/K-9 Assist

On 05-31-10 at approximately 0213 hours Lynnwood Police Dog Buddy and I responded to 1900 block of 96th St SE to assist Snohomish County Sheriff's Deputies with a possible drug sniff.

Upon arrival I contacted Deputy Phillips. Deputy Phillips requested that Lynnwood Police Dog Buddy perform a sniff of the exterior of the listed vehicle, a gray 1997 Jeep Grand Cherokee bearing license 508UCP. The Jeep was stopped facing eastbound on 96th St SW. The driver's door window was rolled down and the vehicle was unoccupied.

During a sniff of the exterior of the vehicle Buddy provided a positive alert at the open driver's window.

A positive alert indicates the presence and or odor of one or more of the drugs that Buddy was trained to detect.

Buddy is a WAC certified and Washington State Police Canine Association Certified Drug Detection Dog. Buddy has been trained to detect methamphetamine, cocaine, crack cocaine, heroin, marijuana and ecstasy.

When 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.

I advised Deputy Phillips of Buddy's alert on the vehicle and then cleared the scene.

See the attached exhibit detailing my and Buddy's qualifications.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. (RCW 9A.72.035)

[Signature]
Deputy

C. Langdon #806

LOCATION 1900 block 96th St SE Lynnwood WA City/County Lynnwood/Snohomish

5/6 (PFM)

21

Lynnwood Police K-9 Narcotic Affidavit

PFM
5949

City of Lynnwood cross-trained narcotics detection police dog Buddy is a four year old German Shepherd. Buddy completed a one hundred and fifty-three hour narcotics detection program in March of 2008. The training was conducted by Trainer Sam Hovenden of the Redmond Police Department. Buddy completed the course with an overall success rate in the nineties (percentage rate) and has continued at that rate having been involved in over 58 applications.

I, Coleman Langdon have been a police officer with the City of Lynnwood for ten years. I have been a K-9 handler with the Lynnwood Police Department since March of 2003. I must/exceed all of the requirements set forth by the State of Washington for both a generalist dog handler and a narcotics dog handler. Police Dog Buddy is certified by Washington Administrative Code (WAC) standards as both a generalist and narcotics detection dog. Buddy is also certified as a narcotics detection dog and a Master Generalist Team through the Washington State Police Canine Assn. (WSPCA).

I have been a fully-commissioned police officer since May of 1998 and am currently employed as a Police Officer with the Lynnwood Police Department assigned to the K-9 Unit. I have received over 400 hours of specialized training in narcotics investigations and detection through my course of certification. Prior to handling and certifying with PD Buddy, I handled and trained another police dog, Tanner. Tanner and I completed a five week (200 hour) course in spring of 2004. Tanner and I had numerous applications and enjoyed a success rate in the nineties in both initial training and in real applications. Tanner and I were involved in numerous drug searches. I am currently a generalist trainer for the WSPCA and have certified two generalist teams.

Through my training, experience and conversations with experienced narcotics detectives, I am familiar with the methods of drug users and drug dealers. I have made numerous narcotics arrests and been involved in numerous controlled substance investigations.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. (RCW 9A.72.085)

Signed [Signature] Date 5-5-10
Location 1400 1st St. Lynnwood, WA 98036 City/County Lynnwood/Snohomish

6/6 (PFM)