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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 25600-6-III

81361-2

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH DOUGLAS NETH

Appellant.

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

1. The Trooper had a valid basis to search the vehicle incident to arrest. Therefore the very limited scope of the search was valid.

2. The use of a canine to walk next to the vehicle during a valid stop, while the vehicle was parked in a public location was valid.

3. The impoundment of Neth's car was legal.

4. The trial court properly found that there was sufficient information placed before the neutral magistrate to establish probable cause.

II. Statement of the Case

As stated in the Motion on the Merits, the State takes issue with some of the facts as set out by appellant; however for purposes of this response the facts are sufficient. Therefore, pursuant to RAP 10.3(b) The state will not submit a separate statement of facts. Where needed the State shall refer to specific additional areas of the record.

III. Argument

It is clear that the action of the trial court clearly fell within the standard set by State v. Stenson, 132 Wn.2d 668, 701-02, 940 P.2d 1239 (1997):

This Court reviews a trial court's decisions as to the admissibility of evidence under an abuse of discretion standard. E.g., State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (this court will not disturb a trial court's rulings on a motion in limine or the admissibility of

evidence absent an abuse of the court's discretion); State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990) (the admission and exclusion of relevant evidence is within the sound discretion of the trial court and the court's decision will not be reversed absent a manifest abuse of discretion). When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. Powell, 126 Wn.2d at 258.

The trial court did not abuse its discretion; the actions of the trial court shall not be overturned without a showing that there was a manifest abuse of discretion.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. State ex rel. Clark v. Hogan, 49 Wn.2d 457, 303 P.2d 290 (1956). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).

Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

The Trooper had probable cause to arrest the driver of the car for driving while suspended as well as for the outstanding warrant and thus had the legal right and ability to search the car, the search would have been legal even if the warrant was not confirmed:

State v. Bradley, 105 Wn. App. 30, 38-39, - P.3d - (2001):

In making an arrest, officers may search the passenger compartment of a vehicle for weapons or destructible evidence if the vehicle was in the immediate control of the suspect at the time of--or just prior to--an arrest. State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986) (defendants were beside vehicle); State v. Lopez, 70 Wn. App. 259, 270, 856 P.2d 390 (1993) (defendant was 50 to 60 feet from vehicle). But c.f. State v. Porter, 102 Wn. App. 327, 334, 6 P.3d 1245 (2000) (defendant was not in immediate control of vehicle after walking 300 feet away). Stroud explicitly allows a search of an automobile incident to arrest after the suspect is handcuffed and in the patrol car. Stroud, 106 Wn.2d at 152; State v. Boursaw, 94 Wn. App. 629, 634, 976 P.2d 130 (1999). There are limitations on such warrantless searches: (1) officers may not open a locked container or locked glove compartment; (2) the search must be contemporaneous with arrest; and (3) the suspect must remain at the scene. Stroud, 106 Wn.2d at 152; Boursaw, 94 Wn. App. at 632-33.

Nonetheless, a search incident to arrest is valid if there is probable cause to arrest a suspect for the relevant offense at the time of the search, even if the officer does not subjectively consider the suspect formally under arrest but merely detained. State v. Harrell, 83 Wn. App. 393, 401, 923 P.2d 698 (1996). Probable cause exists where the facts and circumstances known to the arresting officer are sufficiently trustworthy to cause a reasonable person to believe that an offense has been committed. Harrell, 83 Wn. App. at 399. Because a determination of probable cause is an objective inquiry, we may consider the cumulative information possessed by all officers in a joint investigation. Harrell, 83 Wn. App. at 400.

The Trooper had the legal basis to continue to detain Neth. Neth fails to address the fact that once the Trooper found that there was an outstanding warrant he could have searched the entire vehicle.

It must be stressed that at no time did any officer at the scene search the vehicle prior to the issuance of the search warrant. Neth's statement that the

trooper conducted a search that exceeded the scope of the initial stop is inaccurate. The only "search" was that done when the drug dog walk up and down the passenger side of the vehicle. This alleged search took "a couple of minutes." (RP 55) It is of note that the Trooper testified that he was in the still writing the tickets when the canine sniff took place. He further indicated that after this sniff he finished writing the tickets and then issued them to Neth and his passenger. (RP 54-55) The statement by Neth that the Trooper waited the thirty minutes to write the tickets is incorrect, he stated that the entire process took thirty minutes so clearly from his statements it was less the full thirty minutes that passed while Neth and his passenger waited to be issued their citations. This is yet another indicator that the Trooper did not engage in some delaying tactic just to allow the canine unit to arrive and conduct the walk around. (RP 54-56)

See, United States v. Quinn, 815 F.2d 153, 159 (1st Cir. 1987) (initial 5-minute delay waiting for agent's return from calling to report information to secure warrant was not unreasonable; additional 25-30 minute delay from agent's arrival to probable cause based on canine alert was not unnecessarily long where circumstances occurred increasing the level of justified suspicion); United States v. Hardy, 855 F.2d 753, 761 (11th Cir. 1988) (investigative detention of 50 minutes from initial detention of speeding car to arrival of canine which alerted to presence of narcotics in trunk was reasonable; trooper could not have known in advance where or

when he would encounter highway drivers raising suspicion of narcotics trafficking, requiring narcotics dog).

The Trooper had a legitimate basis to detain Neth for questioning; he had a reasonable suspicion of criminal activity. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Crane, 105 Wn. App. 301, 312, 19 P.3d 1100 (2001). A reasonable suspicion exists if an officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant {the} intrusion." Terry, 392 U.S. at 21. In evaluating the reasonableness of an investigative stop, courts consider the totality of the circumstances: State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The trooper did not need to rule out all innocent explanations to justify a detention. State v. Anderson, 51 Wn. App. 775, 780, 755 P.2d 191 (1988).

The information that was gathered by the Trooper without an actual search of the interior of the vehicle was such that he believed that there was a basis to continue the investigation into the possibility of illegal drugs being present. The actions of Neth, the fact that when pulled over the passenger was in the hatch back area of the car, the considerable amount of money, the fact that one person stated that there was minimal money on hand, the baggies described as being three inches long, the absurdity of the story as well as the inability of the two occupants to come up with one story were such that the officer was justified in his actions as well as the fact that this Trooper stated that he had "roughly one-hundred" prior arrests involving

drugs. The Trooper used this totality of information as the basis for the request for the search warrant from the neutral magistrate.

This vehicle was parked had pulled off the highway and was "just behind the Chevron gas station" when it stopped. (RP 44) This is a very public location and the K-9 did not intrude into the vehicle.

State v. Flores-Moreno, 72 Wn. App. 733, 866 P.2d 648 (1994).

The police had probable cause to search the car after the dog gave a positive reaction for drugs.

...

Flores-Moreno claims that the dog's positive reaction cannot contribute to probable cause because the record inadequately demonstrates the dog's training and certification. Probable cause to search can be established by the positive reaction of a drug sniffing dog whose reliability has been shown. State v. Wolohan, 23 Wn. App. 813, 815, 598 P.2d 421 (1979), review denied, 93 Wn.2d 1008 (1980). Here, the telephonic affidavit supporting the search warrant stated that Keila 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. Exhibit 1, at 4. These qualifications show reliability for purposes of probable cause, and Flores-Moreno's claim is not well taken.

The police did not detain the car for more than a reasonable time. They detained it about 45 minutes after they acquired probable cause to search, and about 50 minutes overall. Both periods were reasonable under the circumstances.

The car was lawfully searched. A search is lawful when conducted pursuant to warrant, and the warrant results from a showing of probable cause. Zurcher v. Stanford Daily, 436 U.S. 547, 549-50, 56 L. Ed. 2d 525, 98 S. Ct. 1970 (1978). Probable cause exists when a reasonable, prudent person would understand that a crime has been committed, and that evidence of the crime can be found at the place to be searched. State v. Garcia, 63 Wn. App. 868, 871, 824 P.2d 1220 (1992) (citing State v. Fisher, 96 Wn.2d 962, 965, 639 P.2d 743, cert. denied, 457 U.S. 1137 (1982)).

For illustrative purposes a recent analysis by a Washington court directly addressed the issue of a canine sniff of a motor vehicle, the analysis, in part, was as follows:

The United States Supreme Court recently held that a canine sniff of the exterior of a defendant's vehicle conducted during a lawful traffic stop that reveals no information other than the location of a substance that no individual has the right to possess does not violate the Fourth Amendment. Illinois v. Caballes, U.S. , 125 S. Ct. 834, 838, 160 L. Ed. 2d 842 (2005).

No published Washington cases have explicitly analyzed whether a canine sniff of the exterior of a car constitutes a search for purposes of article I, section 7.8 See *David J. Perkins, Capsized by the Constitution: Can Washington State Ferries Meet Federal Screening Requirements and Still Pass State Constitutional Muster?*, 79 Wash. L. Rev. 725, 738-39 (2004).

Under article I, section 7 of our state constitution, the court must determine 'whether the State unreasonably intruded into the defendant's 'private affairs.'" Mendez, 137 Wn.2d at 219 (quoting State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984)). 'The analysis . . . focuses, not on a defendant's actual or subjective expectation of privacy but, as . . . previously established, on those privacy interests Washington citizens held in the past and are entitled to hold in the future.' Mendez, 137 Wn.2d at 219 (quoting State v. White, 135 Wn.2d 761, 768, 958 P.2d 982 (1998)). Thus article I, section 7 provides greater protection to the privacy of individuals in automobiles than the Fourth Amendment, and Caballes is not dispositive of the issue. See Mendez, 139 Wn.2d at 220.

Under article I, section 7, Washington courts have found canine sniffs of a defendant's home unduly intrusive. State v. Dearman, 92 Wn. App. 630, 635, 962 P.2d 850 (1998), review denied, 137 Wn.2d 1032 (1999). In State v. Wolohan, 23 Wn. App. 813, 598 P.2d 421 (1979), review denied, 93 Wn.2d 1008 (1980), we held that the canine sniff of a package sent via a common carrier, a Greyhound bus, was not a search under the Fourth Amendment because the intended recipient had no reasonable expectation of privacy in the bus station where the sniff occurred or in the area surrounding the package. Then, in State v. Boyce, 44 Wn. App. 724, 726, 723 P.2d 28 (1986), a defendant contended that the canine sniff of her safety deposit box without a warrant violated article I, section 7.9 Boyce, 44 Wn. App. at 728-30. Engaging in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).analysis and

considering Wolohan, Division One concluded that the canine sniff was not a search under article I, section 7. The court noted that the officer had permission to be in the bank vault area; the defendant lacked control of the bank area where her safety deposit box was; and the intrusion involved in a canine sniff of the air outside a safety deposit box is minimal. Boyce, 44 Wn. App. at 730. Likewise, in State v. Stanphill, 53 Wn. App. 623, 630-31, 769 P.2d 861 (1989), a case involving a dog sniff of a package at the post office, Division Three held that the sniff did not violate article I, section 7. Boyce controls our analysis here. In Boyce, the court stated that '{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.' 44 Wn. App. at 730. The officers had a right to make an investigatory stop of the Taurus based on their reasonable, articulable suspicion that it was part of a drug transportation operation and that it was being used to transport marijuana from a suspected storage site. The occupants' voluntary, yet inconsistent, stories supported the continued investigative detention and use of the canine drug unit. The inherent, minimally intrusive nature of the canine sniff of the outside of the vehicle was not altered by Trooper Sligh having pushed on the trunk to circulate air. The trial court properly concluded that no search occurred until police served the search warrant and seized the marijuana from the Taurus's trunk.

It is the position of the State that the court was incorrect in determining that the information about the K-9's reliability was insufficient; however this matter was not properly challenged at the trial court. State v. Gross, 57 Wn. App. 549, 551, 789 P.2d 317 (1990):

Gross challenges the initial detention of the package and the dog's reliability. We reject both arguments under State v. Stanphill, 53 Wn. App. 623, 769 P.2d 861 (1989), which we read to uphold the brief detention of a package based on reasonable suspicion and to premise canine reliability on a statement that the dog is trained or certified, without a showing of the dog's track record. See United States v. Klein, 626 F.2d 22, 25-27 (7th Cir. 1980); United States v. Venema, 563 F.2d 1003, 1007 (10th Cir. 1977); United States v. Meyer, 536 F.2d 963, 965-66 (1st Cir. 1976).

While canine-conducted narcotics searches may have encountered some judicial skepticism in the past, the technique is now sufficiently well-established to make a formal recitation of a police dog's curriculum vitae unnecessary in the context of ordinary warrant applications.

United States v. Trayer, 701 F. Supp. 250, 256 (D.D.C. 1988) (quoting United States v. Watson, 551 F. Supp. 1123, 1127 (D.D.C. 1982)). See also United States v. Sentovich, 677 F.2d 834, 838 n.8 (11th Cir. 1982) ("training of a dog is alone sufficient proof of reliability").

It should be clearly pointed out that the court did not state at any time that the information about the K-9 was to be redacted or disallowed. The court stated on more than one occasion and that was confirmed by defense counsel that the only thing that the court was stating was that the "dog's reliability was not established in the search warrant affidavit but the other information was enough for the Magistrate to issue the warrant?" (RP 26) The "dog's reliability" not the fact that the dog had made three positive alerts, this taken with the Judge's statement that the "sniff alone" clearly indicates that court was considering whether the mere sniff alone was probable cause and found it not to be but did not remove, redact or disregard the fact that the dog made these alerts, they were merely additional information the issuing magistrate could consider, but the alerts by themselves did not establish probable cause.

The issue raised by Neth was whether the actions of the officers at the scene were such that Neth was subjected to an illegal search, State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994), would appear to support this search. The trial court ruled that the positive alert of the canine was not, standing alone, to be used in the determination of probable cause. The decision of the court was

not based on the canine sniff alone, the totality of the information provided the issuing magistrate was used to establish probable cause.

This "search" was based on information that was later held to be sufficient to allow the search of the vehicle. This information established probable cause and therefore the search by the canine was legal. The search took place in a public place, after a legal stop, arrest and detention.

The fact that the arrest warrant was not "confirmed" does not negate the existence of that warrant or the fact that this was a legal arrest on that warrant. Neth states that the Trooper was delaying the issuance of the tickets in order to allow for the "search" by the canine. The fact that the Trooper took thirty minutes to confirm that the Neth, a person whom he had validly arrested, was who he said he was is a very minimal amount of time. The trooper was in fact issuing tickets to both occupants of the car for more than one violation. The two people in question did not have ID and were telling stories that did not match. Any reasonably prudent officer would take the time needed to insure that the verbal information that had been supplied was accurate.

It also should be noted that Neth had no proof of ownership for the car that he was driving. Neth's statement that the Trooper took "a ridiculous amount of time in writing two tickets" is based on thin air. There was no testimony by Neth that would support this contention. It is clear that these two individuals were not telling the same story about their actions, therefore to state that the Trooper should merely rely on the statement by Neth that this is my name and

date of birth, write my ticket at lightening speed and let me go would have been in and of itself ridiculous. See Flores-Moreno, supra. (45-50 minutes).

State v. Williams, 102 Wn.2d 733, 738, 689 P.2d 1065 (1984):

The Court's third decision was United States v. Place, - U.S. -, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983). The Court first held that Terry permits investigative detentions of luggage as well as of persons. The Court then held, however, that the detention of the luggage in that case-for 90 minutes-exceeded, the permissible limits of a Terry stop. The Court stated that the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. Moreover, . . . we take into account whether the police diligently pursue their investigation.

Place, 103 S. Ct. at 2645. The Court declined to adopt any "outside time limitation for a permissible Terry stop . . .". 103 S. Ct. at 2646. It also specifically questioned the "wisdom" of the ALI Model Code recommendation of 20 minutes as the maximum permissible period. 103 S. Ct. at 2646 n.10. The Court nonetheless concluded that the 90-minute detention "alone precludes the conclusion that the seizure was reasonable in the absence of probable cause," 103 S. Ct. at 2645.

The foregoing cases demonstrate that, in evaluating investigative stops, a court must make several inquiries. First, was the initial interference with the suspect's freedom of movement justified at its inception? Second, was it reasonably related "in scope" to the circumstances which justified the interference in the first place? Terry v. Ohio, supra at 19-20. To justify an intrusion, the police officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, at 21.

The next issue is whether there was sufficient information to allow the issuing magistrate to find probable cause in the warrant after the trial court disallowed the **reliability** of the canine sniff. This issue was raised and briefed at the trial court level and the court found that although the canine sniff alone did not establish probable cause, there was still clearly enough information to

allow for this warrant to stand. State v. Perez, 92 Wn. App. 1, 963 P.2d 881 (1998):

In determining the validity of a search warrant, we consider whether the affidavit on its face contained sufficient facts for a finding of probable cause. An affidavit is sufficient to establish probable cause to support a search if it contains facts from which an ordinary, prudent person would conclude that a crime has occurred and that evidence of the crime could be found at the location to be searched. We examine the warrant de novo and evaluate it in a commonsense, practical manner, rather than hyper-technically. Issuance of a search warrant is a matter of judicial discretion, and great deference is accorded a magistrate's determination of probable cause. That deference, however, is not boundless and we will not defer to a magistrate's decision if the information on which it is based is not sufficient to establish probable cause. We resolve any doubts in favor of the validity of the warrant. (Footnotes Omitted.)

See also, State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003):

A search warrant may be issued only upon a determination of probable cause. State v. Gore, 143 Wn.2d 288, 296, 21 P.3d 262 (2001). Probable cause exists where the affidavit in support of the 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. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002); State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The affidavit must be based upon more than mere suspicion or personal belief that evidence of the crime will be found at the place to be searched. Vickers, 148 Wn.2d at 108. A judge's decision to issue a warrant is reviewed for abuse of discretion, and great deference is accorded that decision. Id. The affidavit is evaluated in a commonsense manner, rather than hypertechnically, and any doubts are resolved in favor of the warrant. Id. at 108-09; State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 115 (1975); State v. Partin, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977).

Quoting at length from the ruling of the trial court Judge:

As far as the K9 search under the circumstances of this case, I don't believe it was. My understanding of Washington law is that you can't just take a dog down the street and sniff every car but, if

you have some reasonable suspicion of illegal contraband in an area in public, we are talking about a public area here, alongside the road, then I believe the State is permitted to have a K9 do a search.

In this case Trooper Wells had stopped the vehicle for a legitimate purpose, that is not contested. The driver stated he had a license but no proof of insurance or registration. Driver is nervous, he is yelling at his dog, got angry as the contact went on. Driver's check showed that he had a warrant out of Clark County, although it could not be confirmed. At that point Mr. Neth was placed under arrest and the officer was going to do a search of the vehicle pursuant to arrest. The officer also found several clear plastic baggies which the officer's experience indicated they could be used for drugs. He asked the defendant, Mr. Neth, why he had the bags. He didn't have a very good answer. Mr. Neth gave some conflicting statements as to what he was doing in the area. He also had a large amount of money \$2,500.00 to \$3,500.00 which is also suspicious.

So, at this point the officer is ready to go ahead and search the vehicle but before he did he could not get confirmation of the warrant from Clark County. At that point he decided he was going to release Mr. Neth from arrest and cite him for the speeding infraction and not having his license on his person. But the officer decided he needed to have a K9 sniff on the vehicle to substantiate what his suspicions were. The dog arrived, did the sniff and alerted three times on the vehicle, the officer did not, upon the K9 sniff, go into the vehicle, so we don't have that situation. The officer did impound the vehicle, held the vehicle until he could get a search warrant.

I find that he officer did have, based on his experience and training, even without the dog sniff, reason to impound the vehicle and apply for a warrant. Again, driver, nervous, yelling, couldn't proof (sic) that he owned or rented the vehicle, had no registration documents, conflict in statements about renting a house in Goldendale between he and Ms. Vachon, a great deal of cash in his vehicle which most people don't carry around. The clear plastic baggies that he had. The officer knew that these kinds of bags were used for drug trafficking. Also it was shown that he had a criminal record, conviction for delivery of illegal drugs including possession of Heroin.

So, even without the dog sniff, I believe the officer had sufficient probable cause to seek a search warrant. As far as the dog is concerned it is a close call whether the dog sniff could be used as a reason to get a warrant. This dog is probably very well trained, but someone not knowing the dog would not know that. The

officer made a statement, "the K9 trained to recognized (sic) the odor of illegal narcotics" is really not sufficient to base a warrant on. Just on that. We need to know the dogs exact training, how many hours of training he had where did he go to school, what degrees did he get what experience he had, how many sniff led to arrests. You must need to be more thorough as just the basis to get a warrant. In this case there is plenty of other evidence that the officer had without the dog sniff to substantiate the warrant. (RP23-26) (Emphasis mine.)

This is clearly a matter of discretion on the part of the trial court. As cited above,

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. State ex rel. Clark v. Hogan, 49 Wn.2d 457, 303 P.2d 290 (1956). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941). (Junker, supra.)

The courts continued use of the information from the canine sniff is analogous to the reasoning set out in State v. Clark, 143 Wn.2d 731, 749-50, 24 P.3d 1006 (2001):

Further, although polygraph results are not admissible at trial unless stringent conditions have been met, see State v. Renfro, 96 Wn.2d 902, 905-08, 639 P.2d 737 (1982), such evidence may be considered in a magistrate's probable cause determination. State v. Cherry, 61 Wn. App. 301, 305, 810 P.2d 940 (1991). Here Clark's polygraph performance was deemed "deceptive" by the administering FBI agent. Clark challenges the conclusion of the FBI agent in that his qualifications and indicia of reliability were not set forth in Detective Herndon's affidavit. However in State v. Lair, 95 Wn.2d 706, 712, 630 P.2d 427 (1981), we noted that

information from a reliable informant has corroborative value even if the informant's basis of knowledge is not specified. Here the FBI agent's basis of knowledge is the administration of the polygraph and his clinical and commonsense observation of Clark's performance. Clark seems to be claiming that no foundation is laid in the supporting affidavit to support the agent's qualifications. But the agent need not submit a curriculum vitae to the affiant for his conclusions developed during the administration of the polygraph to be probative and corroborative as the magistrate makes his probable cause determination.

See also, State v. Young, 123 Wn.2d 173, 187-88, 867 P.2d 593

(1994) as cited by Neth, can be just as easily read to indicate that the type of search that occurred here is allowed:

Finally, the State contends the use of infrared surveillance does not violate the Washington State Constitution because the surveillance is analogous to the warrantless use of police dogs trained to sniff and identify the presence of drugs. To date, dog sniffs have not been classified as searches by our case law. According to the State, just as "odor escapes a compartment or building and is detected by the sense-enhancing instrument of a canine, so also does heat escape a home and is detected by the sense-enhancing infrared camera. Brief of Respondent, at 5. Therefore, the argument is that if a dog sniff is not a search, neither should infrared surveillance constitute a search.

However, the analogy misses the mark. Thus far the Washington courts have refused to adopt the United States Supreme Court's blanket rule that dog sniffs are not searches. State v. Boyce, 44 Wn. App. 724, 729, 723 P.2d 28 (1986). Instead, our courts have employed a more conservative approach to dog sniffs and require an examination of the circumstances of the sniff. Boyce, 44 Wn. App. at 729.

The question whether and under what conditions a warrantless dog sniff might constitute a violation of Const. art. 1, SS 7 is not before the court. For the purpose of the State's argument, however, we note that private residences were not involved in any of the cases decided by the Washington appellate courts where warrantless dog sniffs were approved. See State v. Stanphill, 53 Wn. App. 623, 769 P.2d 861 (1989) (dog sniff of package at post office not a search); State v. Boyce, 44 Wn. App. 724, 723 P.2d 28 (1986) (dog sniff of safety deposit box at a bank not a search); State v. Wolohan, 23 Wn. App. 813, 598 P.2d 421

(1979) (dog sniff of parcel in bus terminal not a search), review denied, 93 Wn.2d 1008 (1980). That the object of the search is a home is critical.

In fact, in each of these cases the courts acknowledged 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. Stanphill, 53 Wn. App. at 630-31; Boyce, 44 Wn. App. at 729; Wolohan, 23 Wn. App. at 820 n.5. Therefore, the State's analogy of infrared sense enhancement to the canine sniff cases is not useful.

Neth states in a footnote at page 5 of his brief “the record does not indicate what happened to Mr. Neth and Ms. Vachon during this time, but it seems apparent they were detained at some unknown location.” This is an attempt to interject hyperbole in a factual situation. The record is very clear, the transcript contains at least five statements from various parties that Neth was “released”, “releasing him”, “given tickets then released”, “he released him from custody”, “he was released, taken out of the patrol car, handcuffs taken off and I advised him that they would not confirm the warrant. But I did inform him that I did have infraction tickets to write for his violations for him and also for the passenger.” (RP 8, 14, 19, 23, 54) It is clear that both occupants were released, there can be no more clear meaning than that; they were released, not detained at some unknown location.

They were present at the scene of the canine “search”. They were cited after they were released, the Trooper had a legal basis to impound and search the vehicle.

The following lengthy quote from State v. Huff, 64 Wn. App. 641, 48-53, 826 P.2d 698 (1992) is clearly on point and addresses the impoundment

issue as well as addressing the claim that the trooper exceeded the legitimate scope of a search based on an investigative stop:

His argument is that Cox unconstitutionally interfered with his possessory rights, as opposed to his privacy rights. See State v. Ng, 104 Wn.2d 763, 770-71, 713 P.2d 63 (1985) (quoting 2 *W. LaFare, Search and Seizure* SS 6.5, at 185 (Supp. 1985)).

Before Cox seized the car, he had probable cause to search it. The odor of methamphetamine, Huff's apparent reluctance to stop, Morley's furtive gestures and Morley's lies were facts and circumstances sufficient to cause a person of reasonable caution to believe that the car contained contraband.

Based on the probable cause that he had, Cox could have immediately searched the Lincoln without a warrant. See e.g., Chambers v. Maroney, 399 U.S. 42, 26 L. Ed. 2d 419, 90 S. Ct. 1975 (1970); State v. Glasser, 84 Wn.2d 17, 523 P.2d 937 (1974); State v. Parker, 79 Wn.2d 326, 485 P.2d 60 (1971). If he had done so, Huff's privacy rights would have been invaded without warrant. Moreover, the occupants of the car would have been dispossessed during the search, which is equivalent to saying that Huff's possessory rights would have been interfered with for the period of time needed to conduct the search.

Instead of searching immediately, Cox chose to seek a warrant, a course of action that the law prefers. United States v. Rubies, 612 F.2d 397, 404 n.7 (9th Cir. 1979), cert. denied, 446 U.S. 940 (1980); United States v. Doty, 714 F.2d 761, 763 (8th Cir. 1983); see also Johnson v. United States, 333 U.S. 10, 14, 92 L. Ed. 436, 68 S. Ct. 367, 369 (1948). So that evidence would not be taken or destroyed, he seized and held the car not only for the time needed to search, but also for the time needed to obtain a warrant. Thus, Huff's privacy rights were not invaded, but his possessory rights were interfered with for a longer period of time than if Cox had searched immediately without a warrant. It is the latter fact that forms the crux of Huff's present complaint.

The United States Supreme Court has upheld the warrantless seizure of various kinds of property for the time reasonably necessary to obtain a warrant, provided that the police have probable cause to search. Arkansas v. Sanders, 422 U.S. 753, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979) (luggage); United States v. Van Leeuwen, 397 U.S. 249, 25 L. Ed. 2d 282, 90 S. Ct. 1029 (1970) (packages in the mail); Segura v. United States, 468 U.S. 796, 82 L. Ed. 2d 599, 104 S. Ct. 3380 (1984) (plurality opinion) (an apartment may be secured from the inside even absent exigent circumstances); Segura v. United States, supra at 824 n.15

(Stevens, J., dissenting) (apartment may be secured from the outside, even absent exigent circumstances). With specific regard to cars, it has held that when an officer develops probable cause to believe that a car which he or she has lawfully stopped contains contraband, it is reasonable under the Fourth Amendment to seize and hold the car for "whatever period is necessary" in order to obtain a search warrant. Chambers v. Maroney, 399 U.S. at 51; Texas v. White, 423 U.S. 67, 46 L. Ed. 2d 209, 96 S. Ct. 304 (1975) (per curiam); Michigan v. Thomas, 458 U.S. 259, 73 L. Ed. 2d 750, 102 S. Ct. 3079 (1982); United States v. Kimberlin, 805 F.2d 210 (7th Cir. 1986), cert. denied, 483 U.S. 1023 (1987); see also Cardwell v. Lewis, 417 U.S. 583, 595, 41 L. Ed. 2d 325, 94 S. Ct. 2464 (1974).

The Washington Supreme Court has held that the police, if they have probable cause to search, may seize a residence for the time reasonably needed to obtain a search warrant. State v. Terrovona, 105 Wn.2d 632, 645, 716 P.2d 295 (1986); State v. Ng, 104 Wn.2d at 770-71. We are unaware of any Washington case that extends this principle to cars, /4 but we now do so. **In our view, the possessory rights to a car are not greater than those to a residence. Thus, if the police are authorized to interfere with possession of a residence for the time reasonably needed to get a warrant, they are also authorized to interfere with possession of a car for the same period of time.**

To hold otherwise would discourage and perhaps eliminate the use of warrants for cars. If an officer wants to obtain a warrant but cannot hold a car for the period of time needed to obtain the warrant, one alternative is to release the car to its occupants or their friends; a second is to lock it up and leave it on the street; and a third is to search it immediately without warrant on the ground that its mobility creates exigent circumstances. Chambers v. Maroney, supra; State v. Glasper, supra; State v. Parker, supra. The first alternative entails a risk that the occupants or their friends will take or destroy the evidence, and the second entails a risk that thieves or vandals will do the same. Thus, even the officer who would prefer to obtain a warrant will invariably adopt the third, and the practice of obtaining a warrant before searching a car, to the extent that it now exists, will be virtually eliminated.

These same concerns can be articulated using the language of constitutional reasonableness. The purpose of the fourth amendment to the United States Constitution and Const. art. 1, SS 7 is to prohibit unreasonable searches and seizures, Cady v. Dombrowski, 413 U.S. 433, 439, 37 L. Ed. 2d 706, 93 S. Ct.

2523 (1973); State v. McKinnon, 88 Wn.2d 75, 78, 558 P.2d 781 (1977), and it is constitutionally reasonable to allow a slightly longer infringement on possessory rights in order to encourage the heightened protection of privacy rights that results from obtaining a warrant before a search is conducted.

...
In light of the foregoing, we hold that when an officer has probable cause to believe that a car contains contraband or evidence of crime, he or she may seize and hold the car for the time reasonably needed to obtain a search warrant and conduct the subsequent search. It makes no constitutional difference whether this is done by placing a guard on the car at the scene or by towing it to the police station or an impound yard. Cf. State v. Terrovona, supra (officers stationed inside residence); State v. Ng, supra (same); Chambers v. Maroney, supra (car towed to police station). Either involves approximately the same degree of interference with possession. Cox's seizure of the Lincoln was valid because he had probable cause to search it, and because he seized it only for the time reasonably needed to obtain a warrant and then search. (Emphasis mine.)

With regard to the length of time the vehicle was in the custody of the police prior to the actual search State v. Jackson, 82 Wn. App. 594, 604-05, 918 P.2d 945 (1996) would appear to further indicate that the time that the Trooper took to prepare and then finally execute the search warrant was not excessive:

The next questions are whether the seizure of the package was justified (1) when it occurred and (2) in duration. Because the seizure was without warrant, the State bore the burden of proof on these questions.

A temporary seizure of mail is initially justified if the authorities have a reasonable and articulable suspicion of criminal activity.«27» Although "temporary," it can last for a number of hours if that length of time is reasonable under the circumstances.«28» Thus, the United States Supreme Court has described its own holdings as follows:

In two instances, the Court has allowed temporary seizures and limited detentions of property based upon less than probable cause.

In United States v. Van Leeuwen, 397 U.S. 249 [90 S. Ct. 1029, 25 L. Ed. 2d 82] (1970), the Court refused to invalidate the seizure and detention-on the basis of only reasonable suspicion-of two packages delivered to a United States Post Office for mailing. One of the packages was detained on mere suspicion for only 1 1/2 hours; by the end of that period enough information had been obtained to establish probable cause that the packages contained stolen coins. But the other package was detained for 29 hours before a search warrant was finally served. Both seizures were held reasonable. In fact, the Court suggested that both seizures and detentions for these "limited times" were "prudent" under the circumstances.[«29»]

Once an investigative detention ripens into probable cause to search, the State can detain the property for the time reasonably needed to prepare and secure a search warrant.«30»

«27» United States v. Van Leeuwen, 397 U.S. 249, 252-53, 90 S. Ct. 1029, 25 L. Ed. 2d 282 (1970); Banks, 3 F.3d 399, 401; United States v. Lux, 905 F.2d 1379, 1381, 115 A.L.R. Fed. 749 (10th Cir. 1990); United States v. Aldaz, 921 F.2d 227, 229 (9th Cir. 1990), cert. denied, 501 U.S. 1207 (1991); United States v. Mayomi, 873 F.2d 1049, 1053 (7th Cir. 1989); see also Segura v. United States, 468 U.S. 796, 806 n.6, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984) (discussing Van Leeuwen).

«28» This assumes that the detention of a person is not involved. See United States v. Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983) (90 minutes too long where detention of person involved).

«29» Segura, 468 U.S. at 806 n.6.

«30» Sanders, 442 U.S. 753 (1979) (luggage); Van Leeuwen, 397 U.S. 249 (1970) (packages in mail); Segura, 468 U.S. 796 (1984) (house); Chambers v. Maroney, 399 U.S. 42, 51, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) (car); Texas v. White, 423 U.S. 67, 96 S. Ct. 304, 46 L. Ed. 2d 209 (1975) (car); Michigan v. Thomas, 458 U.S. 259, 102 S. Ct. 3079, 73 L. Ed. 2d 750 (1982); State v. Terravona, 105 Wn.2d 632, 645, 716 P.2d 295 (1986) (house); State v. Ng, 104 Wn.2d 763, 770-71, 713 P.2d 63 (1985) (house); State v. Huff, 64 Wn. App. 641, 653, 826 P.2d 698 (car), review denied, 119 Wn.2d 1007 (1992).

III. CONCLUSION

The information that was supplied to the magistrate was found by the Superior court to be sufficient to establish probable cause to search the car that was operated by Neth. The court never "threw out" the canine sniff; it only stated that standing on its own it did not establish probable cause to search the vehicle. The initial search that was done by the Trooper was justified based on the facts and circumstance that were present at the time of the stop and detention of Neth. No officer ever entered the vehicle until the search warrant was obtained. There was no unreasonable "search" by the canine of this vehicle that was properly stopped and held. There was not intrusion into the vehicle and the actual length of the search was about two minutes and only involved the canine walking down one side of the vehicle, a vehicle for which Neth could not even show ownership.

The initial length of time that Neth was detained was minimal, less than thirty minutes. The time that it took to obtain the search warrant was not excessive as stated by the trial court. The trial court ruled that because the time that it took for the Trooper to obtain the search warrant was not unreasonable, a factual finding by the court.

The case law is clear that the actions of this Trooper were proper throughout. He did not search the vehicle even after the canine sniff established probable cause. He took the prudent step of presenting his information to an impartial

magistrate who agreed with the Trooper that there was probable cause to search the vehicle, a determination that was later upheld by the trial court.

The actions of the trial court were well within its sound discretion, were of a factual nature, this appeal should be dismissed and the actions of the trial court should be affirmed.

July 16, 2007
Respectfully Submitted,

A handwritten signature in black ink, appearing to read "David B. Trefry", written over a horizontal line.

By: DAVID B. TREFRY WSBA# 16050
Special Deputy Prosecuting Attorney