No. 81361-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH DOUGLAS NETH,

Appellant.

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting unreasonable interference in private affairs. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether a warrantless canine search of a vehicle violates Article 1, Section 7.

STATEMENT OF THE CASE

Appellant has thoroughly described the facts. Appellant's Brief at 2-6. *Amicus* limits its repetition of facts to those relevant to the dog sniff issue:

On January 18, 2006, Joseph Neth was driving from Vancouver to Goldendale when he was stopped for speeding. Neither he nor his passenger had a driver's license or identification with them, nor did they have the vehicle registration. Neth provided the officer correct

information, including the fact he had recently purchased the car. The officer did a records check and discovered an outstanding warrant for driving with a suspended license. The officer arrested and searched Neth, and announced an intention to search Neth's car. Prior to the vehicle search, however, the officer was informed that the outstanding warrant could not be confirmed. The officer was still suspicious, and decided to call for a drug-sniffing dog before releasing Neth. The officer proceeded to write infractions for both Neth and his passenger (for failure to wear a seatbelt); the State and Neth dispute whether the officer took an inordinate length of time—up to 30 minutes.

In the meantime, the drug-sniffing dog arrived, sniffed along the exterior of the car, and "hit" on the passenger door. The officers then impounded the car. They applied for a search warrant the following day, including the dog's alert in the affidavit in support of the warrant. The affidavit stated only that "the K9 [is] trained to recognize the odor of illegal narcotics" as a basis for its reliability.

The trial court denied Neth's motion to suppress evidence discovered during the search, finding that (1) the dog's sniff of the car was constitutional; (2) the dog's reliability had not been established; and (3) there were sufficient facts besides the dog's alert in the affidavit to support

the warrant. Neth was subsequently convicted of possession with intent to deliver, and timely appealed.

ARGUMENT

This Court has briefly touched the subject of warrantless dog sniffs in the past, but it has explicitly reserved judgment as to their validity under Article 1, Section 7 of the Washington Constitution. *See State v. Young*, 123 Wn.2d 173, 188, 867 P.2d 593 (1994). Recent decisions of this Court addressing other types of searches demonstrate that warrantless dog sniffs are inconsistent with the privacy guarantees of Article 1, Section 7, and the Court of Appeals has agreed. *See State v. Dearman*, 92 Wn. App. 630, 962 P.2d 850 (1998). Unfortunately, there are some earlier decisions from the Court of Appeals upholding warrantless use of dogs in some circumstances; they have not been explicitly overruled, and continue to cause confusion. *See State v. Wolohan*, 23 Wn. App. 813, 598 P.2d 421 (1979); *State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986); *State v. Stanphill*, 53 Wn. App. 623, 769 P.2d 861 (1989). This case presents an opportunity to provide clear guidance to both law enforcement and the lower courts.

A. Warrantless Dog Sniffs Are a Search and Unconstitutionally Intrude Into Private Affairs

Article 1, Section 7 prohibits invasion of private affairs without "authority of law," which normally requires a warrant or subpoena issued by a neutral magistrate. *See State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007). The State does not claim there was any authority of law to use a dog to search Neth's car, but instead appears to assert that there was no invasion of Neth's private affairs. Brief of Respondent at 5-8. This assertion is not supported by either common sense or legal authority.

1. Dog Sniffs Are Analogous to Thermal Imaging, Whose Warrantless Use Is Unconstitutional

This Court has previously found an analogous form of surveillance, warrantless thermal imaging, to be an unconstitutional invasion of private affairs. *See State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994). Dog sniffs are dependent on the dog detecting otherwise undetectable trace odors; thermal imaging is dependent on detecting otherwise undetectable infrared radiation. Both methods rely on detection and analysis of hidden information emitted unwittingly and unwillingly by the subject, and allow an officer "to, in effect, 'see through the walls.'" *Id.* at 183.

Just as the State here claims a dog sniff is an unintrusive method of collecting information, Brief of Respondent at 6, the State there claimed that thermal imaging was unintrusive. In both instances, the State misunderstood what constitutes the intrusion into private affairs—it is not the physical intrusion of the detection device, but instead the collection of otherwise private information through advanced technology:

> The infrared device invaded the home in the sense the device was able to gather information about the interior of the defendant's home that could not be obtained by naked eye observations. Without the infrared device, the only way the police could have acquired the same information was to go inside the home. Just because technology now allows this information to be gained without stepping inside the physical structure, it does not mean the home has not been invaded for the purposes of Const. art. 1, § 7.

Id. at 186.

Young's reasoning applies equally well to this case by simply substituting "canine" for "infrared device" and "automobile" for "home." *Young* foreshadowed this case with a brief discussion of dog sniffs, although it explicitly did not decide the question of their constitutionality. *Id*. at 187-88. Instead, it recognized that even those lower Washington courts that had upheld some dog sniffs had also "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." *Id.* at 188. Just a few years later, the Court of Appeals used just that reasoning to hold

unconstitutional a warrantless dog sniff of a home. *See State v. Dearman*, 92 Wn. App. 630, 962 P.2d 850 (1998).

Like homes, vehicles are also a constitutionally protected area. This Court recognized long ago that Washingtonians have a strong privacy interest in their automobiles, and there is no Washington "automobile exception" allowing a search without a warrant. *See State v. Gibbons*, 118 Wash. 171, 203 P. 390 (1922); *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), *overruled in part by State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986). This Court has expressed a "continued recognition of a constitutionally protected privacy interest the citizens of this state have held, and should continue to hold, in their automobiles and the contents therein." *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Motor vehicles are "necessary to the proper functioning of modern society," and Washingtonians are entitled to use them without sacrificing their right to privacy. *State v. Boland*, 115 Wn.2d 571, 581, 800 P.2d 1112 (1990). Neth did not sacrifice his right to privacy by driving, even though he exceeded the speed limit. He had not voluntarily exposed the contents of his car to public view, invited the public to examine his car, or otherwise opened his private affairs to the public—or their dogs.

2. Dog Sniffs Are Invasive Intrusions Into Private Affairs

The use of a dog was a particularly invasive intrusion into Neth's private affairs. "[U]sing a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to 'see through the walls.'" *Dearman*, 92 Wn. App. at 635. The entire reason the officers used the dog was because it could reveal information that would not otherwise be accessible to the officers themselves.

It was not accidental or coincidental that the dog happened upon Neth's car. The original officer had already expressed a desire and intent to search the vehicle. It was only after he was frustrated in this desire—when he learned that he could not arrest Neth on the purported outstanding warrant—that he called for the assistance of a drug-sniffing dog. Rather than complying with the constitutional mandate to not invade Neth's private affairs without authority of law, the officer instead attempted to evade the constitution by using a dog as his agent.

Furthermore, Neth was prevented from taking steps to protect his private affairs. The parties dispute whether or not the officer took an inordinate amount of time to write up infractions for Neth and his passenger, but there is no dispute that Neth was not free to move or secure his car. He was not allowed to prevent or interfere with the dog's sniffing. It cannot reasonably be claimed that the sniff was anything other than a

search and invasion of Neth's private affairs, ordered and conducted by law enforcement without Neth's consent, either express or implied.

3. Warrantless Use of Dog Sniffs Invites Improperly Delayed Detentions and Fishing Expeditions

Amicus does not take a position on the factual question of whether the officer took too much time to write the infractions in this case. Allowing warrantless sniffs certainly raises the risk, however, that an officer will, perhaps unconsciously, extend a traffic stop unduly in order to provide time for a dog to arrive on the scene. It is hard to imagine a situation where an officer is suspicious enough to call for a dog, but then proceeds expeditiously in concluding the stop, with absolutely no regard for when the dog actually arrives. It would be simply human nature for an officer to slow down and stall a little to provide the time necessary for the sniff to be completed, and such a natural move seems inevitable in at least some cases. The only way to prevent such unconstitutionally extended detentions is to remove the incentive for them, by prohibiting dog sniffs except in situations where a full search would be allowed: pursuant to a warrant or one of the recognized exceptions to the warrant requirement.

In contrast, the State's position would not only encourage such pretextual delays, it would also allow dog searches with no suspicion whatever. "[T]his court has consistently expressed displeasure with

random and suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition." *State v. Jorden*, 160 Wn.2d 121, 127, 156 P.3d 893 (2007). But fishing expeditions would be the result of a holding that use of a dog to sniff a vehicle, house, person, or other property is not an intrusion into private affairs. Nothing would prevent the use of dogs on a routine basis to sniff cars in parking lots, or even stopped at traffic lights. Nor would anything prevent routine patrols sniffing homes in apartment complexes or sniffing people standing at bus stops. No Washingtonian could rest assured in their right to remain free from suspicionless dog sniffs.

4. Warrants Are Necessary to Provide Judicial Oversight of Dog Sniffs

The State focuses on the manner in which the dog was used, and views it from the perspective of the police officers. This does not follow the correct interpretive approach this Court has specified to determine the bounds of Article 1, Section 7. "In short, while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article I, section 7 we focus on expectations of the people being searched." *State v. Morse*, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). In this case, the focus must be on the driver's expectation of privacy in his vehicle. Article 1, Section 7 prohibits the invasion of that

privacy without authority of law; invasion cannot be justified in the absence of exigent circumstances simply because officers act "reasonably."

If the officers had reason to believe they were likely to find contraband in Neth's car, Article 1, Section 7 provides clear guidance on the procedure to follow: apply for a warrant. Here, nothing prevented the officers from delaying the search until they had telephonically obtained a search warrant. It is quite possible that a warrant would have been issued; the trial court found there was sufficient information to support a search warrant even when the result of the dog sniff was excluded. Appellant's Brief at 6. But officers are not entitled to simply go ahead and invade private affairs based on their own suspicions without the intervention of a neutral magistrate:

> Warrant application and issuance by a neutral magistrate limit governmental invasion into private affairs. In part, the warrant requirement ensures that some determination has been made which supports the scope of the invasion. The scope of the invasion is, in turn, limited to that authorized by the authority of law. The warrant process, or the opportunity to subject a subpoena to judicial review, also reduces mistaken intrusions.

Miles, 160 Wn.2d at 247 (citations omitted).

The State would eliminate this requirement of intervention of a neutral magistrate and allow canine officers to intrude into private affairs

based solely on the hunch of a law enforcement officer—even in cases such as the present one where no exigencies exist to justify dispensing with the protections provided by a neutral magistrate. *Amicus* urges this Court to instead hold that dog sniffs are an intrusion into private affairs, and violate Article 1, Section 7 unless conducted pursuant to a warrant or a recognized exception to the warrant requirement.

B. The Inherent Unreliability of Dog Sniffs Makes Their Use Unconstitutional

1. Dog Sniffs Are Not Reliable Indicators of Contraband

The foregoing discussion has assumed, for the sake of argument, that a dog has an "unerring nose." *State v. Wolohan*, 23 Wn. App. 813, 815, 598 P.2d 421 (1979). The same assumption has been made by courts throughout the country. *See, e.g., United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983); *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005).

"The infallible dog, however, is a creature of legal fiction." *Caballes*, 543 U.S. at 411 (Souter, J., dissenting). The reality is much different:

> [T]heir supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the

> pervasive contamination of currency by cocaine. *See, e.g., United States v. Kennedy*, 131 F.3d 1371, 1378 (C.A.10 1997) (describing a dog that had a 71% accuracy rate); *United States v. Scarborough*, 128 F.3d 1373, 1378, n. 3 (C.A.10 1997) (describing a dog that erroneously alerted 4 times out of 19 while working for the postal service and 8% of the time over its entire career); *United States v. Limares*, 269 F.3d 794, 797 (C.A.7 2001) (accepting as reliable a dog that gave false positives between 7% and 38% of the time); *Laime v. State*, 347 Ark. 142, 159, 60 S.W.3d 464, 476 (2001) (speaking of a dog that made between 10 and 50 errors); *United States v. $242,484.00*, 351 F.3d 499, 511 (C.A.11 2003) (noting that because as much as 80% of all currency in circulation contains drug residue, a dog alert "is of little value"), vacated on other grounds by rehearing en banc, 357 F.3d 1225 (C.A.11 2004); *United States v. Carr*, 25 F.3d 1194, 1214-1217 (C.A.3 1994) (Becker, J., concurring in part and dissenting in part) ("[A] substantial portion of United States currency ... is tainted with sufficient traces of controlled substances to cause a trained canine to alert to their presence"). Indeed, a study cited by Illinois in this case for the proposition that dog sniffs are "generally reliable" shows that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time, depending on the length of the search. See Reply Brief for Petitioner 13; Federal Aviation Admin., K. Garner et al., Duty Cycle of the Detector Dog: A Baseline Study 12 (Apr.2001) (prepared by Auburn U. Inst. for Biological Detection Systems). In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times.

Id. at 411-12.

As damning as the examples cited by Justice Souter are, they probably nonetheless understate the problem. It is unusual for dog sniffs to come to the attention of the judicial system except in situations where

contraband is actually discovered after a dog alerts.[1] The popular literature, however, is replete with examples of highly fallible dogs. *See, e.g., Drug-Sniffing Dogs Score Low at School*, Seattle Times, Nov. 12, 1989, at B2 ("drug-detection dogs indicated 75 lockers at the school contained drugs, but a search produced no illegal substances"); Mark Derr, *With Dog Detectives, Mistakes Can Happen*, New York Times, Dec. 24, 2002, at F1 ("Dogs want rewards ... and so they will give false alerts to get them. Dogs lie."); John F. Kelly, *The Noses Didn't Notice*, Washington Post, June 9, 2003, at A01 (trained dog went after hot dogs, not explosives); *Police, school district defend drug raid*, CNN, (Nov. 12, 2003) <http://www.cnn.com/2003/US/South/11/07/school.raid/> (dog indicated drugs present in 12 book bags, but none found in subsequent search); *see also* R.C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 431 (1997) (citing instances where 27 alerts resulted in only one discovery of narcotics, and 50 alerts resulted in only 17 instances of narcotics).

Amicus has itself investigated the accuracy of dogs used in a variety of school districts in Washington, sniffing lockers, cars in parking lots, and other school areas. Although both the sampling and

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[1] Some courts even explicitly turn a blind eye to actual reliability facts, including for the dog at question, finding those facts to somehow be irrelevant. *See, e.g., State v. Nguyen*, 157 Ohio App.3d 482, 811 N.E.2d 1180 (2004).

recordkeeping are incomplete, they demonstrate a consistent pattern of unreliable dogs. Contraband was found in less than 15% of the cases where a dog alerted—so over 85% of alerts were "false positives." Yet they were not characterized as such. Instead, roughly half were explained away by the discovery of over-the-counter medications such as pain relievers. And many of the remaining ones were labeled as detection of "residual odors"—including one claim that a dog alerted on a car in a parking lot because the dog detected an odor from a medication taken by a person who had been in the car the previous day!

Perhaps these explanations were accurate. Experts claim that dogs are able to react to both "nonprescription drugs and to residual scents lingering for up to four to six weeks." *Jennings v. Joshua Indep. School Dist.*, 877 F.2d 313, 317 (5th Cir. 1989). In fact, the ability to detect residual odors is often touted as a plus. *See, e.g.,* Sara Bader, *High schools call in dogs to hunt drugs*, Issaquah Press, Mar. 31, 2004 ("if you smoked pot and had it on your hands, then you opened your car door, the dog would pick up that smell on the door handle"); Hope Anderson; *Wag the Debate: District reconsiders contraband-sniffing dogs*, Daily News, Jul. 25, 2004, <http://www.tdn.com/articles/2004/07/25/top_story/news01.txt> ("dog may detect a 'residual odor' hours or even days and weeks later").

As a result, "many trainers and handlers deny that their dogs sound false alarms, and so they do not record them, especially if they occur in the field. They argue instead that the dog is picking up a faint trace of a substance that was once present." Derr, *supra*. Some handlers even *reward* their dogs for false positives. *See, e.g., Leerburg Q&A on Narcotics Dog Training*, <http://www.leerburg.com/qadrug.htm#reward> (Question 9) (last visited May 9, 2008). Although these trainers may be technically correct, and the dog is not at fault, the result nonetheless is inaccurate, claiming that contraband is present when it is not.

In somewhat of a paradox, a dog's super-detection ability actually lessens its value for law enforcement purposes—the dog alerts when no contraband is present. It may have been present at some time in the past, but that need not reflect on the current occupant or owner of the car. In the present case, Neth had recently purchased his car from another person, as was known to the officers. Hence, when the dog alerted, it could as easily have been responding to the previous owner's activities as to Neth's present ones.

That is the most generous view of dog's capabilities. The reality is that we just do not know how accurate dogs are in general, let alone how accurate any individual dog is:

> Certification standards for dogs and handlers vary markedly from state to state and agency to agency. Written training logs, which are used to establish a dog's reliability in court, are themselves often unreliable. "There is a saying in Holland that the training log is a lie," Dr. Schoon said, if only because handlers want their dogs to look good. It is not known how often this problem crops up in the United States. Dr. Myers said: "The standard measure of a dog's accuracy is what it finds. The best programs subtract from that score the number of false alerts, but most do not and so they have no accurate measure of their dogs' reliability."

Derr, *supra*.

Beyond the accuracy of the dog itself, one must look at the dog's handler, and the combination of the two. Some believe that "almost all erroneous alerts originate not from the dog, but from the handler's misinterpretation of the dog's signals... If a handler is not aware of a dog's particular behavior, she may mistake an indication of narcotics for a reaction to food, another animal, or other distraction." Bird, *supra*, at 422-24. Handlers may also either consciously or unconsciously influence their dogs, so an alert is more indicative of the handler's suspicion than it is of any odor actually detected by the dog. "These voice or physical signals can compromise a dog's objectivity and impermissibly lead the dog to alert at the suspected item or person." *Id.* at 424. *Amicus* is aware of at least one situation where a police officer believed drugs were present in a trunk; the officer pushed on the trunk (supposedly to better circulate air) and the dog

then alerted. Such an alert is obviously compromised, but there are many other instances of more subtle cues by handlers as well.

2. Unreliable Dog Sniffs Cannot Provide Probable Cause to Support Further Searches

The trial court was correct, therefore, in excluding the dog alert in this case as a basis for the search warrant. As shown above, a statement that a dog has been trained does not in any way establish that the dog/handler pair reliably reports the presence of contraband only when it is, in fact, present. At a minimum, the past track record of the particular dog/handler pair must also be presented, including both successes and false alerts, before a court can reasonably have any faith whatever in the significance of an alert; "the most telling indicator of what the dog's behavior means is the dog's past performance in the field." *Matheson v. State*, 870 So. 2d 8, 14-15 (Fla. App. 2003) (emphasizing the significance of false alerts). *Amicus* respectfully urges this Court to overrule any holdings to the contrary by lower Washington courts, such as that found in *State v. Gross*, 57 Wn. App. 549, 551, 789 P.2d 317 (1990), *overruled in part by State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999).

More significantly, however, the inherent unreliability of dogs trying to determine whether contraband is currently present demonstrates that their use is an unconstitutionally intrusive invasion of

Washingtonians' private affairs. If the State's position is accepted, people, vehicles, and other property will be subject to unlimited suspicionless sniffs by dogs, and the unreliable results will be used to justify manual searches. This type of unregulated and unreliable fishing expedition is exactly what Article 1, Section 7 is designed to prevent.

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests the Court to hold that Article 1, Section 7 prohibits a canine search of a vehicle absent a warrant or a recognized exception to the warrant requirement.

Respectfully submitted this 12th day of May 2008.

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