No. 13-_____

In The

# Supreme Court of the United States

NICHOLAS STEPOVICH,

*Petitioner,*

v.

STATE OF ALASKA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Court Of Appeals Of Alaska**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is a police officer's "hunch" that criminal activity is afoot sufficient to establish the reasonable suspicion necessary to justify a stop and seizure under the Fourth Amendment?

2. When a narcotics-detection dog is trained to detect both legal and illegal substances, does admission of an unconfirmed dog-alert to prove an element of the offense violate the Sixth and Fourteenth Amendments?

## PARTIES

All parties are named in the case caption.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued



STATUTES



OTHER AUTHORITIES

## OPINIONS AND ORDERS BELOW

Petitioner was tried in the Superior Court for the State of Alaska at Fairbanks. [App. 24]. The criminal judgment was filed on December 29, 2009 and a timely appeal was taken to the Court of Appeals for the State of Alaska. [App. 24-31]. The Alaska Court of Appeals issued its decision on April 26, 2013. [App. 1]. A request for hearing was filed and accepted before the Alaska Supreme Court and hearing was denied on October 7, 2013. [App. 42].

## RELATED OPINIONS

Petitioner is not aware of any related opinions.

## JURISDICTION

The State of Alaska Supreme Court denied hearing on October 7, 2013. [App. 42]. This Court has jurisdiction to review a final decision from a State's highest court where rights protected by the United State's Constitution are at issue under 28 U.S.C. § 1257(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Fourth, Sixth and Section 1 of the Fourteenth Amendments of the U.S. Constitution.

> Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
>
> Fourteenth Amendment: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### A. Relevant Facts.

Petitioner was charged with knowingly possessing cocaine in violation of Alaska Statute, Sec. 11.71.040(a)(3)(A). [App. 24]. He was also charged with a misdemeanor for attempted tampering with physical evidence. [App. 24]. Petitioner filed a pretrial motion to suppress evidence and a motion challenging the admission of the dog-alert. Both motions were denied by the trial court. [App. 35-36, 40-41]. Following a jury trial, at which Petitioner was convicted of both charges, the trial court entered an order suspending imposition of sentence and providing for eighteen months of probation. [App. 24-31]. The charges were based on the following.

At approximately 1:00 a.m., on November 8, 2008, a Fairbanks police officer, was driving a well-marked, patrol vehicle through an alley behind the Big I Bar in Fairbanks, Alaska. [App. 2]. The area was used for parking for the bar and as a smoking area for patrons. The officer was on routine patrol, checking local bars to see how crowded they were. The Big I bar was not known as a problem or high crime area. The officer had decided to drive down the

alley where the rear entrance of the bar was to get to another location where vagrants sometimes slept. [App. 2]. The area was dimly lighted and when the officer drove past a trash dumpster, he saw two men near the back door of the bar, standing close together with their hands cupped in close proximity to each other. [App. 2]. They appeared to be looking at something in their hands. *Id*.. The officer admitted that he could see their hands clearly, but could not see anything in them. [App. 5-7, 43].

Based solely on a hunch, the officer immediately jumped to the conclusion that the men were involved in an illegal drug transaction. [App. 2-4, 42]. The officer testified that he did not have any objective evidence that a drug transaction was taking place – he did not see a bindle or a tooter or a joint or a coke spoon or any type of drug paraphernalia. [App. 41-42]. He admitted that the two men had no obligation to talk to him and they had the right to walk away; however, he decided to stop the two men based solely on his hunch that criminal activity was afoot. [App. 42].

As both men began moving away from each other and moving toward the back door of the bar, the officer repeatedly ordered both men to stop. [App. 3]. Petitioner walked around the dumpster and immediately returned when ordered to do so by the officer. [App. 3]. After the officer had stopped the two men, he called for backup and another officer arrived. [App. 4]. Both men were detained while the officer retrieved a flashlight from his car and checked behind the dumpster. *Id*. He saw a folded piece of paper on the

ground on top of the snow, which he seized and the contents of which tested positive for cocaine. The owner of the Big I testified at trial that it was not uncommon for him to find illegal substances in the area of the dumpster when picking up after closing.

Petitioner was arrested and during a search incident to arrest, the police seized a jar of gold nuggets and some cash from his person. [App. 4]. These two items were later subjected to a dog sniff that resulted in an alert. *Id*. Although the dog used was trained to alert in detecting marijuana, cocaine, heroin, and methamphetamine, the state failed to test the cash or the jar to determine the actual presence of any of the identifiable substances upon which the dog was trained to alert. [App. 13-14].

**B. Relevant Court Proceedings.**

Petitioner filed a pretrial motion to suppress all evidence, arguing the evidence was obtained as a result of an unlawful stop or seizure. [App. 5, 37-41]. Petitioner asserted that the officer did not have reasonable suspicion that a crime was being or was about to be committed at the point that he commanded the men to stop. *Id*. The State agreed that the stop had occurred at the point that the officer ordered the two men to stop, but argued that the stop was based on reasonable suspicion. The trial court denied the motion. [App. 40-41].

In denying the motion to suppress, the trial court stated that "I want our law enforcement officers to

find out what's going on in that type of a situation." [App. 40-41]. The trial court stated that the stop was justified because of the time of day, the location, the position that the men were in when first observed, their initial reaction to seeing the police officer, and Petitioner's change in demeanor after walking behind the dumpster. *Id*. The trial court described the stop as being the type of stop found in *Terry v. Ohio,* 392 U.S. 1 (1968).

When the State filed its pretrial notice of an expert witness concerning the narcotics dog-alert on the cash and jar containing gold, Petitioner filed a motion seeking a hearing relying on *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). [App. 32-36]. Petitioner argued that the reliability of the "dog sniff" evidence was not scientifically supported, being similar to polygraph evidence. *Id*. Petitioner also argued that to allow an expert witness to testify about what an animal had done deprived Petitioner of his right to confront witnesses against him as he was unable to actually question the animal. *Id*. Finally, Petitioner argued that the discovery he had received did not establish the reliability and training of the dog on materials such as currency or a jar of gold nuggets and also that the discovery suggested that the dog had alerted on an item not containing any illegal drugs. *Id*.

The State asserted that the testimony was crucial to the state's obligation to prove that Petitioner had knowingly possessed cocaine. [App. 39]. Petitioner responded by arguing that the testimony was not

sufficiently reliable to establish this element of the offense because the dog was trained to alert to four different controlled substances, one of which was a legally possessed substance. [App. 38].

The trial court decided that the evidence did not fall under *Daubert* and therefore no *Daubert* hearing would be held. [App. 38-39]. During the expert testimony it was clearly established that the drug dog in question was trained to alert if sensing the odor of four different substances including heroin, methamphetamine, cocaine, and marijuana. [App. 36]. Possession of Marijuana in the home has been legal in Alaska since 1975 when the Alaska Supreme Court decided the case of *Ravin v. State*, 537 P.2d 494 (Alaska 1975). The State did not have the currency or the jar of gold nuggets tested to determine the identity of the substance on which the dog alerted so when the evidence of the dog alert was admitted to make the connection between the slip of cocaine found behind the dumpster and the currency and jar of gold found on Petitioner's person, Petitioner was denied his right to cross-examine laboratory technicians and denied the right to contest the evidence.

The trial ended on August 21, 2009 and the jury returned a verdict of guilty as to each count on August 24, 2009. [App. 24]. On December 29, 2009, the trial court entered an order suspending imposition of sentence and placing Petitioner on probation. *Id*.

Petitioner appealed the conviction to the Alaska Court of Appeals. [App. 1]. The Court of Appeals

affirmed the conviction for possession but reversed the conviction for attempted tampering with physical evidence. [App. 23]. The Alaska Supreme Court denied request for hearing on October 7, 2013 [App. 42].



## REASONS FOR GRANTING THE WRIT

Petitioner was stopped and seized by a police officer based solely on an inchoate hunch. After the stop, the police officer found a slip of cocaine behind the trash dumpster located at the back of the bar. To convict Petitioner of possession the officer and the State would require some evidence connecting Petitioner to that folded piece of paper containing cocaine. To make that connection, the State took the cash and a jar of gold nuggets that Petitioner had in his pocket and hid them at their station to see if a narcotics-detection dog could alert on those items. The dog alerted, but the dog was trained to alert to both legal and illegal substances. Normally, the State would perform simple laboratory testing on such items to determine the nature of the substance to which the dog alerted; however, in this case the State was allowed to forego highly probative evidence and allowed to introduce prejudicial evidence consisting solely of the alert itself. Similar factual scenarios, where the State can easily perform forensic analysis and fails to do so, have cause the innocent to be found guilty and suffer both direct and collateral consequences of a conviction. It is within this backdrop

that Petitioner contends that constitutional protections of national importance are at stake in this case.

First, there is the right to be free from unreasonable search or seizure under the Fourth Amendment which includes the right to be free from a stop and seizure based solely on a hunch. A subjective hunch or ill-formed suspicion is not enough to justify a stop. "[T]he police can stop and briefly detain a person for investigative purposes if they have a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,'" *United States v. Sokolow*, 490 U.S. 1, 2 (1989) (*citing Terry v. Ohio*, 392 U.S. 1 (1968)). In order to conduct an investigatory, warrantless stop and detention of an individual, a police officer must have reasonable suspicion, grounded in articulable and objective facts, that the individual is engaged in criminal activity. The reasonable suspicion must arise from the officer's knowledge when he decided to initiate the stop. *See Adams v. Williams*, 407 U.S. 143, 145-146 (1972).

Second, constitutional protections include the right of a criminal defendant to defend the charges brought against him, *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); and the right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *See United States v. Gaudin*, 515 U.S. 506, 510 (1995); *see also Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to

constitute the crime with which he is charged)." *In re Winship*, 397 U.S. 358, 364 (1970). Moreover, a bedrock tenet of our criminal justice system is a defendant's right to defend the charges brought against him. *Crane*, 476 U.S. at 690.

Under these fundamental principles, governing search and seizure and the required proof beyond a reasonable doubt it follows that when a police officer orders someone to stop based solely on a hunch that criminal activity is afoot, the protections provided by the Fourth Amendment are being eroded to the point of non-existence. It also follows that a State should not be allowed to submit evidence of an alert by a narcotics-detection dog when the dog is trained to detect both legal and illegal substances without a confirming laboratory test as to the substances forming the basis of the alert because to do so deprives the criminal defendant of his right to confront the evidence proffered against him. This is especially true where the evidence is submitted as the proof offered to prove an essential element of the offense charged.

The Alaska Court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court and relevant decisions from other State Courts. Therefore, review by this Court is warranted under this Court's Rule 10(b) and 10(c).

## I. CONFLICT IS CREATED BETWEEN THE ALASKA COURT AND THIS COURT REGARDING THE FACTS REQUIRED TO SUPPORT AN INVESTIGATORY STOP AND SEIZURE.

*Terry v. Ohio*, 392 U.S. 1 (1968), was a landmark decision by the United States Supreme Court which held that the Fourth Amendment prohibition on unreasonable searches and seizures is not violated when a police officer stops a suspect on the street and frisks him or her without probable cause to arrest, if the police officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime and has a reasonable belief that the person "may be armed and presently dangerous." *Id.* at 30-31. Significantly, *Terry* does not provide blanket authority to intrude on an individual's right to be left alone, nor does it allow such intrusion based on a police offers inarticulate hunch that a crime is about to occur or is in progress. *Id.* at 27.

The Alaska Court has now held that an officer's gut feeling that there was a drug transaction of an unknown nature going on combined with startled expressions on the faces of the individuals encountered are sufficient to justify a stop and seizure even if there are no objective and articulable facts available at the time the officer decided to make the stop. In this case, the officer himself testified as follows:

> Q: But did you have any objective evidence that there was a narcotics transaction or narcotics consumption going on?

A: No, I did not.

The objective factors relied on by the Alaska Court to justify a conclusion that a commercial drug sale was taking place include: the location (a parking lot of a bar); the time of day (1 a.m. on a Saturday); and the odd stance of the two men. [App. 9]. The Court did not explain why people standing outside an open bar, that is not known to be in a high crime area and where most patrons go to smoke, is indicative of criminal behavior. Nor did the court explain why the odd stance of the men was somehow indicative of a commercial drug transaction. There was no testimony, apart from their odd stance, that raised a reasonable suspicion that a commercial drug sale was taking place (nothing visible in their hands, nothing passed between them, no items suggestive of drug use present, no money exchanged).

These objective factors inserted and then used by the Alaska Court are contrary to this Court's prior opinions that condemn reliance on a "hunch" to justify a stop and seizure. The Alaska Court's decision opens the door to allow a police officer to believe a commercial drug sale is taking place any time the officer sees individuals huddled together outside of an open bar, by the side entrance of a restaurant that is open 24 hours, or when the officer notices employees standing outside in the dark by any establishment. All the officer needs to add to justify the stop and seizure is to allege the individuals were engaging in what the officer would be free to call odd or unusual

behavior or that the individuals had a startled expression when they saw the officer.

The fact that the police officer described the looks on the faces of the two men as that of "sheer panic" does not support a stop and seizure because it is a completely subjective fact that is totally dependent on a police officer's personal interpretation or lay opinion of another person's facial expression. If all that was necessary to bump any of the scenarios previously described over into the category of objectively articulable facts that a commercial drug transaction is taking place, every law enforcement officer in Alaska will be receiving training about how to interpret facial expressions as showing "surprise," "panic," or "shock." The Alaska Court's holding allows a police officer at an evidentiary hearing to utter any of those words to describe an individual's response to being confronted and by doing so affirmatively establish that a commercial drug transaction is taking place.

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court decided that while a stop is a seizure and a frisk is a search, *id*. at 16, both can be reasonable on less than probable cause. *Id*. at 20-21, 24-27. The Court rejected the argument that mere "suspicion" could support a stop and seizure. *See id*. at 21-22. Instead an officer must "be able to point to specific and articulable facts which . . . reasonably warrant [the] intrusion[s]" effected by a stop. *Id*. at 21. The facts, "judged against an objective standard," must be sufficient to "'warrant a man of reasonable caution in the belief'" that a stop is warranted. *Id.* at 21-22. Official authority to

stop and seize based on "subjective good faith," "inchoate or unparticularized suspicion," or "inarticulate hunches" would result in the "evaporation" of Fourth Amendment rights and would leave us "'secure in [our] persons, houses, papers, and effects,' only in the discretion of the police." *Id.* at 22. Consequently, a command to stop is constitutional only when an officer has information that "leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous." *Id*. at 30.

In subsequent cases, the Court has labeled the requisite showing a "reasonable suspicion." *See Brown v. Texas*, 443 U.S. 47, 51 (1979). A reasonable suspicion of criminal activity is required for a stop and detention, *id*., while a reasonable suspicion that a detained person is armed and dangerous is needed to sustain a frisk. *Maryland v. Buie*, 494 U.S. 325, 331-332 (1990). Consistently, the Court has mandated an individualized showing of articulable, objective facts that give rise to a sufficient likelihood that a particular stop and detention will serve "society's legitimate interests" in crime prevention and community safety. *See Brown*, 443 U.S. at 51; *see also Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979).

Review is necessary in this case because the Alaska Court has strayed from the constitutionally-necessary, narrowly applied objective standard that must be applied to a warrantless stop and seizure. The Alaska Court now allows a stop and seizure

based on something less than reasonable suspicion and it has moved decidedly toward a subjective standard. The Alaska Court's reliance on facial expressions and individual reaction to the sudden appearance of a law enforcement officer is also contrary to this Court's decisions. "[I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Innocent men sometimes show surprise and sometimes show a desire to avoid legal authority for a variety of reasons. *See Alberty v. United States*, 162 U.S. 499, 511 (1896). Review by this Court is necessary to clarify that the narrow exception to the warrant requirement permitted under *Terry* and its progeny must be established with objective articulable facts that crime is being or is about to be committed.

## II. THE ALASKA COURT'S DECISION REGARDING ADMISSION OF THE DOG ALERT ABSENT LABORATORY ANALYSIS IS IN CONFLICT WITH DECISIONS FROM OTHER STATE COURTS.

This Court first addressed dog sniffs in *United States v. Place*, 462 U.S. 696, 707 (1983). In *Place*, police seized and detained a traveler's luggage at an airport, based on reasonable suspicion that it contained illegal drugs, so that it could be sniffed by a narcotics-detection dog. 462 U.S. at 697-698. The Court invalidated the seizure on the ground that the

detention was too lengthy to be justified on reasonable suspicion alone. *Id*. at 709. The Court addressed the dog sniff in dicta, even though the issue had not been raised by the parties, noting that the dog sniff "is much less intrusive than a typical search" and "discloses only the presence or absence of narcotics, a contraband item." *Id*. at 707. For those reasons, the Court concluded that "the canine sniff is sui generis" and that it was not a search under the Fourth Amendment. *Id.*

In *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) this Court invalidated a highway checkpoint using narcotics-detection dogs to sniff cars, on the ground that finding illegal drugs was insufficient justification for suspicionless seizures. In dicta, the Court again stated that the dog sniff did not "transform the seizure into a search" because it was "not designed to disclose any information other than the presence or absence of narcotics." 531 U.S. at 40.

More recently, in *Illinois v. Caballes*, 543 U.S. 405, 408 (2005), this Court held that reasonable suspicion was not required for a dog sniff of a car that had been lawfully seized. Noting that *Caballes* had conceded that properly conducted dog sniffs are likely to reveal only the presence of contraband, and that he did not suggest that even erroneous dog sniffs revealed any private information, the Court concluded that "the use of a well-trained narcotics-detection dog – one that 'does not expose noncontraband items that otherwise would remain hidden from public view' – during a lawful traffic stop, generally does not implicate

legitimate privacy interests." 543 U.S. at 409 (citation omitted).

The question whether dog sniffs truly reveal only the presence or absence of contraband was not squarely joined in any of the three cases discussed above. *Place* and *Edmond* addressed the issue only in dicta, and *Caballes* indicated that the issue was not meaningfully contested. This case thus provides an appropriate opportunity for this Court to recognize that a narcotics-detection dog may alert to both legal and illegal substances and to consider the question whether dog-alert evidence may be admitted at trial to prove an element of the offense charged without any laboratory confirmation as to the substance upon which the dog alerted.

The admissibility of dog handler testimony concerning suspected alerts has not previously been decided by the Court; however, it has been the subject of litigation in numerous state courts. *State v. Sharp*, 928 A.2d 165, 170 (N.J. Super. 2006); *State v. Schultz*, 58 P.3d 879, 885 (Utah App. 2002); *Farm Bureau Mutual Insurance Company v. Foote*, 14 S.W.3d 512, 519-510 (Ark. 2000); *Carr v. State*, 482 S.E.2d 314, 319 (Ga. 1997); *State v. Acri*, 662 N.E.2d 115, 116 (3rd Dist. App. ILL. 1996). Although these cases discuss the admissibility of unconfirmed canine alerts in the context of arson and the detection of accelerant, the reasoning applies equally in the context of a narcotics-dog alert where the narcotics-dog is trained to alert to both legal and illegal substances. The majority of these courts have determined that it is improper to

allow the testimony of a dog handler concerning those alerts made by a detection dog where there has been no laboratory confirmation of the substance upon which the dog allegedly alerted. *State v. Sharp*, 928 A.2d at 170.

The Alaska Court concluded that Petitioner's attack on the dog-sniff evidence did not really raise an issue of scientific validity under *Daubert*. Instead, admissibility was determined based on a weighing of the probative value of the evidence against its prejudicial effect. [App. 15, 35]. This is in direct conflict with decisions from other States where the dog-alert could have been to both legal and illegal substances and it is an important conflict of decisions because in Alaska, whether it be for personal use in the home or for medical use, it is legal to possess marijuana which was one of the substances upon which the narcotics dog in this case was trained to detect. *See* Alaska Statute, Sec. 17.37.030; *see also Ravin v. State*, 537 P.2d 494 (Alaska 1975) (possession of marijuana in the home); *and see Jason Brandeis, The Continuing Vitality of Ravin v. State: Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of their Homes; 29 Alaska L. Rev. 175 (December 2012)*.

The Alaska Court has authorized the admission of a dog-handler's testimony and rejected any notion of a *Daubert* hearing requirement or a requirement that a confirming laboratory test be performed to determine if the dog alerted to a legal or illegal substance. Other States have excluded canine handler

testimony on precisely the grounds argued here. In *Farm Bureau Mutual Insurance Company v. Foote* for example, the Supreme Court of Arkansas affirmed the trial court's exclusion of a canine handler who sought to testify about "the alleged superior ability of his canine partner, Benjamin, to detect the presence of accelerants after a fire," that he could "discriminate between different types of chemicals," and that he had an accuracy rate of "100%." The court held:

> [W]e conclude that the proffered testimony concerning the dog's alleged superior ability to detect the presence of accelerants does not pass muster using either the *Daubert* or *Prater [v. State*, 820 S.W.2d 429 (Ark. 1991)] analysis. Farm Bureau simply did not make any showing regarding the scientific validity of the evidence. For instance, [the canine handler] did not produce the study allegedly conducted by [the director of the Florida State Crime Laboratory, cited by the canine handler], so there was no way of ascertaining the techniques used or the potential rate of error. *Id.* at 520 [Bracketed material added].

Likewise, another court, responding to just the kind of motion that was filed and rejected in this case excluded the testimony of a dog handler. It did so because the dog's alert was not confirmed by laboratory analysis. And without such confirmation, the dog's alert was in effect being used as substantive evidence of arson. The court noted:

> [T]he use of the dog alert as substantive evidence is beyond the accepted scope and

> application of the technique as described in the NFPA guide.[1] See § 16.5.4.7 (describing the role of canine investigation as "assisting in the location and collection of samples for laboratory analysis"). Use of expert testimony beyond its proper application and scope is neither relevant nor helpful to the trier of fact.

*United States v. Myers* (Unpublished), No. 3:10-00039, 2010 WL 2723196, at *3 (S.D.W.Va. July 8, 2010) (citations in original, footnote added). To be sure, this case presents different facts because this was not an arson case. However, it remains true that, like the arson cases cited, the dog in this case was trained to alert to both legal and illegal substances and there is no concession that the dog sniff only revealed the presence of contraband. What makes *Myers* analogous was the way in which the government in this case used the unconfirmed dog-alert as substantive evidence of guilt.

Clearly, Petitioner's right to a fair trial is at issue because the dog-alert was admitted through the dog handler's testimony and no laboratory confirmation existed or was proffered. Clearly, the dog at issue was specifically trained to alert to both legal (marijuana) and illegal substances (heroin and cocaine). [App. 13-14]. Without laboratory confirmation it is impossible to determine what substance the dog detected and the

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[1] National Fire Protection Association's Guide for Fire and Explosion Investigations.

evidence alert alone should not have been admitted to allow the State to connect the money and gold to the slip of cocaine found behind the trash dumpster.



## CONCLUSION

The Alaska Court has strayed from the constitutionally-necessary, narrowly applied objective standard adopted by this Court which must be applied to determine whether a warrantless stop and seizure violated the Fourth Amendment of the United States Constitution. The Alaska Court's decision will affect all future decisions by allowing a stop and seizure based on a hunch or a subjective belief.

Reliance on a dog alert to establish reasonable suspicion justifying a search differs substantially from admission of that dog alert to establish an element of the offense charged. An unconfirmed dog alert should never be admissible to establish an element of the offense unless the alert is confirmed by laboratory testing. The Alaska Court's decision is in direct conflict with well established constitutional norms established by this Court and in direct conflict with decisions from other State Courts.

Based on the above, it is respectfully requested that the Petition be granted on both questions presented.

Respectfully submitted,

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**NICHOLAS STEPOVICH, Appellant,**
**v. STATE OF ALASKA, Appellee.**

**Court of Appeals No. A-10668, No. 2391**

**COURT OF APPEALS OF ALASKA**

**299 P.3d 734; 2013 Alas. App. LEXIS 52**

**April 26, 2013, Decided**

**COUNSEL:** Marcia E. Holland, Missoula, Montana, under contract with the Stepovich and Vacura Law Office, Fairbanks, for the Appellant.

Diane L. Wendlandt, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and John J. Burns, Attorney General, Juneau, for the Appellee.

**JUDGES:** Before: Coats, Chief Judge, and Mannheimer and Bolger, Judges.

**OPINION BY: MANNHEIMER**

**OPINION**

MANNHEIMER, Judge.

Nicholas Stepovich appeals his convictions for fourth-degree controlled substance misconduct (possession of cocaine) and attempted evidence tampering.[1] He contends that the evidence against him was the unlawful fruit of an investigative stop that was not supported by reasonable suspicion of identifiable

[1] AS 11.71.040(a)(3)(A) and AS 11.56.610(a)(1), respectively.

criminal activity. Stepovich also argues that his trial was flawed by two mistaken evidentiary rulings. Finally, Stepovich argues that the evidence presented at his trial is insufficient to support his conviction for attempted evidence tampering.

For the reasons explained in this opinion, we conclude that the investigative stop was proper. With respect to the two challenged evidentiary rulings, we conclude that one ruling was proper and the other was harmless. Finally, we agree with Stepovich that the State's case was insufficient to support his conviction for attempted evidence tampering.

*Underlying facts*

Fairbanks Police Officer Kurt Lockwood was on patrol in downtown Fairbanks in the early morning hours of November 8, 2008. He decided to check the parking lot located behind the Big I Bar because there had been problems with homeless people and transients sleeping near the residences in that area.

As Lockwood was driving past the back entrance to the Big I, he saw two men standing near a Dumpster. The men were facing each other and standing very close together – perhaps 18 inches apart. Their heads were bent forward, toward each other. The men's hands were cupped, at approximately chest level, and their hands were either touching or nearly touching. The men were staring intently downward, toward their hands.

As soon as Lockwood spotted the men, he hit the brakes of his patrol car. Both men looked up, and Lockwood observed that they had expressions of "sheer panic", as if they had been "caught in a cookie jar". The men immediately separated from each other, and they put their hands in their pockets.

One of these men (the man who was initially facing in Lockwood's direction) was Nicholas Stepovich.

As the men separated, Lockwood got out of his patrol car and directed both men to stop. When they continued walking, he repeated this directive several times, using words to the effect of, "Fairbanks police: Stop; hold it right there. . . . Don't go in the bar. Stop right there; hold on."

Stepovich's companion eventually stopped walking, but Stepovich did not. Stepovich kept walking away from Lockwood, toward the Dumpster, and then he circled around the Dumpster to the other side (*i.e.*, out of Lockwood's sight). He had his hands in the front pockets of his jacket.

As Stepovich rounded the Dumpster, Lockwood saw him pull his hands out of his jacket and extended them in front of him. A few moments later, when Stepovich emerged from behind the Dumpster (and into Lockwood's sight again), he was holding his hands in plain view.

Stepovich now appeared relaxed, and he spoke to Lockwood, saying, "What's the big deal? I was just urinating," or "I was just taking a leak."

Lockwood summoned a backup officer, and after this officer arrived, Lockwood went around to the other side of the Dumpster, where Stepovich had been. There, Lockwood found a paper slip of cocaine lying on top of the fresh snow. Based on this discovery, Stepovich was arrested.

Incident to this arrest, Lockwood searched Stepovich's pockets. He discovered and seized $865 in cash and a small plastic jar full of gold nuggets. The gold nuggets weighed slightly more than 307 grams (*i.e.*, a little less than 11 ounces); this amount of gold was worth between $8,000 and $9,000.

After Stepovich was transported to the Fairbanks police station, Lockwood had a drug-detection dog sniff the cash and the gold nuggets that had been seized from Stepovich. This dog, who was named Argo, was trained to detect the odor of four controlled substances: cocaine, marijuana, methamphetamine, and heroin. Argo alerted when he smelled the cash and the nuggets; that is, he apparently detected the odor of at least one of these four controlled substances.

Stepovich was ultimately charged with possession of cocaine and attempted tampering with evidence (for dropping the slip of cocaine to the ground behind the Dumpster).

*The State's rationale for the investigative stop, and the superior court's ruling*

After Stepovich was indicted, he filed a motion asking the superior court to suppress all evidence stemming from his encounter with Officer Lockwood after the officer directed him to stop.

The superior court ruled that when Officer Lockwood directed Stepovich not to walk away, but to stay so that the officer could make contact with him, Lockwood subjected Stepovich to an investigative stop. The State does not challenge this portion of the superior court's ruling. Instead, the State argues that this investigative stop was justified by a reasonable suspicion of criminal activity, under the test formulated by this Court in *State v. G.B.*, 769 P.2d 452, 456 (Alaska App. 1989).

At the evidentiary hearing in the superior court, Officer Lockwood offered this explanation of why he made the investigative stop:

> *Lockwood*: Based on my training and experience, when I pulled up [and] saw these [two] individuals standing as close as they were together, . . . both [of them with] their hands . . . cupped[, and] very intently looking down at something[, and] given . . . the hour of the day, [and] the location, . . . it was [immediately apparent] to me that these men [were] involved in either a narcotics use [or a narcotics] transaction of some sort.
>
> . . .

I've spent the majority of my ten years [in law enforcement] working [the] midnight shift. The bar scene is not something new to me. I contact people quite often out behind their cars, [because the] restrooms are full, [or] for whatever reason, urinating, whatever. . . . Buddies don't stand face-to-face urinating. They don't stand face-to-face with their hands in that position smoking a cigarette.

And I've seen all of the above hundreds of times, you know, two guys out sharing a cigarette in the fresh air, two guys urinating next to each other behind a car, or out of sight somewhere like that. . . . [But this case was different because of] where [the two men] were at, [and because] they looked up [in] sheer panic – guilty [conscience], if you will.

Because . . . guys that are urinating behind their cars [at] the bars, oftentimes, you know, they see [an officer] and . . . they'll wave, . . . or they kind of scurry behind their car – but their hands are different, their actions are different. You know, they're not really trying to hide anything; they're not – they don't have that look of, "Gee, I'm busted." It's more [a look of] slight[] embarrassment at the time.

Guys smoking a cigarette will wave at you; guys just out talking to their buddy will wave at you. . . . It was . . . the combination of events, of where they were placed, how

> they were placed, where their hands were, and [their] immediate first reaction of . . . sheer panic: "Oh my gosh, there's . . . the cops, and now we have to scurry."

Superior Court Judge Mark I. Wood adopted this reasoning when he ruled that, given the circumstances, Officer Lockwood acted properly:

> *The Court*: [It was] about one o'clock in the morning [on a Saturday], . . . behind the Big I Bar. This . . . officer . . . [was] driving behind the Big I Bar, [and] he [saw] two individuals who [were] located . . . behind the Dumpster that's behind the Big I Bar. Now, they [were] visible [from] the alley, but they [were] . . . not really visible [from] the Big I.
>
> And when [the officer saw] them, . . . they [were] not . . . standing by a car. Instead, they [were] behind a Dumpster at this hour. And . . . their heads [were] bowed, looking down, looking at their hands. [Their hands were] up by their chest, their hands [were] touching, and . . . [in] almost a cupped position.
>
> Now, . . . our law enforcement officers [can properly take steps to] find out what's going on in that type of a situation. And . . . Officer Lockwood testified that he . . . wanted to ask them questions. [But] when he stopped [his patrol car] and started to get out of the car, and they looked up [and] saw a police car . . . – well, there was a panic[ked] expression, there was sudden activity, there

was movement, there was undirected movement of their feet; I think the word was "scurrying". . . . [From the testimony], it sounded like they were going back and forth, not knowing which way to go, and then they place[d] their hands in [their] pockets and walk[ed] quickly back to the Big I.

[The two men] weren't smoking anything; they weren't urinating; [it] didn't look like there was any conversation going on. Whatever they were doing involved this examination of whatever was in their hands. A reasonable officer with Officer Lockwood's training could assume that there was illegal activity afoot, [and] particularly, . . . drug activity – given the location, the time, and the nature of the conduct, and [the men's] reaction when they realized that a police officer was watching them do it. That fits all of the grounds that *Newsom* talks about.

. . .

[The officer's suspicion was] more than a hunch because of the [men's] reaction, [and] because of their location, and the time of night. . . . [And] this was a minimally intrusive stop. He asked them to stop, [but] he didn't chase them. He went . . . in the direction where Mr. Stepovich was heading, and . . . Mr. Stepovich went [behind] the Dumpster, and then he went around the Dumpster and[, within] moments[, he] came back out with a completely different [demeanor].

. . .

> So I'm not going to suppress the evidence from the stop[.] I'm going to deny the motion to suppress. . . . [The officer] had a right to ask them to stop.

*Why we conclude that the investigative stop was proper*

The encounter between Stepovich and Officer Lockwood essentially has two parts. The first part consisted of Lockwood's observation of Stepovich and the second man standing close together, face-to-face, beside the dumpster, with their hands cupped in front of them.

Given the location (the parking lot behind a bar) and the time of day (one o'clock in the morning), we agree with Judge Wood that the circumstances were unusual, and that it was reasonable for Officer Lockwood to "[take steps to] find out what [was] going on" by stopping his patrol car and asking questions.

The issue in this case arises from the fact that Lockwood did not merely ask questions; rather, he exerted his authority as a law enforcement officer, commanding Stepovich and his companion to remain where they were while he investigated what was going on. Thus, the encounter became a "seizure" for Fourth Amendment purposes.[2]

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[2] *See Majaev v. State*, 223 P.3d 629, 632 (Alaska 2010): "A seizure [occurs] when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."

Lockwood's investigative stop of Stepovich would be justified only if the officer had a "reasonable suspicion" that "imminent public danger exist[ed] or [that] serious harm to persons or property [had] recently occurred." *Coleman v. State*, 553 P.2d 40, 46 (Alaska 1976). *See also State v. G.B.*, 769 P.2d 452, 455-56 (Alaska App. 1989) (interpreting the *Coleman* test).

This Court has held that the illicit sale of drugs qualifies as an "imminent public danger" for purposes of the *Coleman* test,[3] so the question here is whether the facts known to Lockwood supported a reasonable inference that he had just interrupted a drug transaction.

We have already quoted Lockwood's description of what he saw – the location (an empty alley behind a bar), the time of day (one o'clock in the morning on a Saturday), and Lockwood's explanation of why he concluded that he was probably witnessing a drug transaction rather than witnessing two men sharing a cigarette, or two men who had gone outside to urinate.

Lockwood's suspicion was heightened by the reaction of the two men when he stopped his patrol car in their vicinity. As Lockwood described in his testimony, Stepovich and his companion reacted with "sheer panic"; both men had facial expressions as if they had

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[3] *Skjervem v. State*, 215 P.3d 1101, 1106 (Alaska App. 2009); *LeMense v. State*, 754 P.2d 268, 272-73 (Alaska App. 1988).

been "caught in a cookie jar". Stepovich and his companion immediately broke away from each other, and they put their hands in their pockets.

We conclude that these circumstances, taken together, gave rise to the articulable suspicion required by *Coleman* – a reasonable suspicion that Lockwood had just interrupted a drug sale. Accordingly, we affirm the superior court's denial of Stepovich's motion to suppress the cocaine.

*The admissibility of the evidence that the drug-detection dog alerted to the cash and the jar of gold nuggets found in Stepovich's pockets*

The major evidentiary problem facing the State was to prove that Stepovich was the person who dropped the slip of cocaine that Officer Lockwood found on the ground behind the bar. As Stepovich's attorney emphasized during his cross-examination of Lockwood, Lockwood did not see Stepovich throw or drop the slip to the ground. Moreover, Lockwood never saw cocaine (or any other controlled substance) in Stepovich's hands, nor did Lockwood find any cocaine-related paraphernalia in Stepovich's possession following his arrest.

To bolster its circumstantial case that the slip of cocaine belonged to Stepovich, the State introduced evidence (over Stepovich's objection) that Argo, the drug-detection dog, alerted to the cash and the jar of gold nuggets seized from Stepovich's pockets following his arrest.

This information was introduced through the testimony of Officer Lockwood and the testimony of Argo's handler, Trooper Brian Zeisel.

Lockwood testified that, following Stepovich's arrest, he searched Stepovich's pockets and found the cash and the jar full of gold. Lockwood explained that the jar of gold was discovered in one of the jacket pockets where Stepovich had thrust his hands when the officer approached.

Lockwood theorized that the jar of gold or the cash, or both, might have the odor of cocaine if they had been in the vicinity of cocaine long enough, so Lockwood decided to summon a drug-detection dog to smell these items. Lockwood hid the items out of sight in two different rooms of the police station – the cash in one of the mailboxes in the police mail room, and the jar of gold nuggets (with the lid of the jar removed) in a box in the police briefing room. Lockwood then called Zeisel and asked him to bring his dog, Argo, to the police station to see if the dog found anything.

Argo alerted to the cash in the mail room and to the jar of gold nuggets in the briefing room.

During Zeisel's testimony, he explained that Argo was trained to detect four different controlled substances: marijuana, cocaine, heroin, and methamphetamine. The fact that Argo alerted to the cash and to the jar of gold nuggets meant that both of these items gave off one of the four smells that Argo had been trained to detect.

(With respect to the jar of gold nuggets, Zeisel conceded that he did not know whether Argo alerted to the nuggets or to the jar itself.)

In the superior court, Stepovich's attorneys argued that the evidence pertaining to the dog sniff was not admissible unless and until the State established a valid scientific basis for this evidence under the *Daubert* test.[4] However, the defense attorneys did not attack the validity of the scientific premises of this evidence – for example, the premise that a dog can detect odors that are undetectable by humans, or the premise that a dog can be trained to react in a particular, identifiable fashion to one or more specific odors.

Instead, Stepovich's attack on the dog-sniff evidence focused on the arguable ways in which the evidence might not be probative of the factual assertion for which it was offered – to wit, the State's assertion that the cash and the jar of gold nuggets found in Stepovich's pockets had recently been in contact with, or in the close vicinity of, cocaine.

Stepovich's lawyers pointed out that the dog, Argo, had been trained to react in the same way to four different controlled substances (marijuana,

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[4] *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-95, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (announcing a new test for assessing the admissibility of scientific evidence); *State v. Coon*, 974 P.2d 386, 395-98 (Alaska 1999) (adopting the *Daubert* test under the Alaska Rules of Evidence).

cocaine, heroin, and methamphetamine), so the fact that Argo alerted to the cash and the jar of gold did not necessarily prove that these items smelled of cocaine, as opposed to one of the other three controlled substances.

Stepovich's lawyers also presented the testimony of a dog handler expert witness, Lieutenant Garry Gilliam of the Anchorage Police Department.

With respect to the fact that Argo alerted to the cash found on Stepovich, Gilliam testified that this fact had little probative value, because a large percentage of United States currency is contaminated with trace amounts of illegal drugs – in particular, cocaine.

Gilliam also testified that one of the major chemical ingredients of cocaine, methyl benzoate, dissipates over time. Thus, even if the cash and the jar of nuggets found in Stepovich's possession had been in contact with cocaine, the methyl benzoate might have dissipated by the time the police conducted the dog sniff. This would suggest that Argo might have been reacting to some substance other than cocaine.

After hearing this evidence (and the arguments of Stepovich's attorneys), Judge Wood concluded that Stepovich's attack on the dog-sniff evidence did not really raise an issue of scientific validity under *Daubert*. Rather, the judge concluded, Stepovich had offered potential reasons for doubting the probative value of the evidence.

Judge Wood acknowledged that if Argo had reacted solely to the cash, this "alert" might have little probative value. But the judge pointed out that Argo reacted to both the cash and the jar of gold nuggets.

Judge Wood further acknowledged that Stepovich's attorneys had raised other "legitimate concerns" about the probative force of this evidence. But the judge declared that the ultimate question was "whether those concerns [are so paramount] that I [sh]ouldn't submit [the issue] to the jury to [let them] figure it out."

Judge Wood concluded that Stepovich's concerns about the probative value of the dog-sniff evidence "[went] to weight, not admissibility", so the judge allowed the State to introduce this evidence. However, the judge declared that he would instruct the jury that the dog-sniff evidence "should be treated with caution", because it was important for the jury to understand "that they need to scrutinize [this] evidence". Judge Wood invited Stepovich's attorneys to submit such an instruction.

On appeal, Stepovich renews the arguments that he made in the superior court. But the record shows that Judge Wood understood the potential problems with this evidence, and the judge concluded that these problems affected the weight, rather than the admissibility, of the evidence.

The question is whether Judge Wood's resolution of this issue constitutes an abuse of discretion – *i.e.*, whether his decision was "clearly untenable or

unreasonable". *Gonzales v. State*, 691 P.2d 285, 286 (Alaska App. 1984). Our review of the record convinces us that Judge Wood did not abuse his discretion when he decided to admit this evidence, but to instruct the jurors to view the evidence with caution.

*The admissibility of the evidence concerning the value of the cash and the gold nuggets found on Stepovich's person when he was arrested*

As we have explained, Stepovich was found to be carrying $865 in cash and several thousand dollars' worth of gold nuggets when he was arrested. Before trial, Stepovich asked the superior court to prohibit the State from introducing evidence concerning the value of the cash and the gold. Stepovich's attorney argued that the value of the cash and the gold was irrelevant, and that admission of this evidence would simply encourage the jury to speculate that Stepovich was engaged in "some nefarious activity" apart from his alleged possession of the cocaine.

(The defense attorney was apparently referring to the possibility that the jurors might conclude that Stepovich was either selling drugs or was planning to purchase a much greater quantity of drugs in the near future.)

The prosecutor conceded that Stepovich's possession of such a large amount of cash and gold gave rise to a reasonable inference that Stepovich was "engaged in trafficking" – either buying or selling large amounts of drugs. But the prosecutor argued that,

even though the State had only charged Stepovich with simple possession of cocaine (and not possession for purposes of distribution), the State was nevertheless entitled to introduce evidence of how much cash and gold Stepovich was carrying – because if Stepovich *was* engaged in buying or selling cocaine in commercial quantities, this would be relevant to prove that he possessed the slip of cocaine at issue in this case.

Judge Wood declared that he would not "sanitize the facts [for] the jury", and so he allowed the State to introduce evidence of the value of the cash and the gold that Stepovich was carrying. However, the judge expressly prohibited the prosecutor from using this evidence to argue that Stepovich was engaged in the distribution of cocaine.

Judge Wood's ruling appears to be a reasonable effort to balance the probative value of the evidence against its potential for unfair prejudice, and to minimize that potential unfair prejudice.

But even assuming that this ruling was an abuse of discretion, any error was harmless under the facts of Stepovich's case. Stepovich's wife testified at trial that Stepovich was a restaurant owner, and that he regularly carried large amounts of cash on his person during the days leading up to his weekly deposit of funds into the bank. With respect to the jar of gold nuggets, Stepovich's wife explained that Stepovich had purchased the nuggets at her request, because

she intended to use the nuggets to make jewelry for friends and family.

When Stepovich designated the transcript in this case, he did not designate the summations of the parties to the jury at the end of the trial. However, we must assume that the prosecutor obeyed Judge Wood's directive, and that the prosecutor refrained from arguing that Stepovich's possession of the cash and the gold nuggets indicated that he was engaged in the distribution of drugs.

Given this record, we conclude that the evidence concerning the value of the cash and the gold nuggets did not appreciably affect the jury's verdict.[5]

*Why we conclude that the evidence presented at Stepovich's trial is not legally sufficient to support Stepovich's conviction for attempted tampering with evidence*

Under AS 11.56.610(a)(1), a person commits the offense of tampering with physical evidence if the person "suppresses or conceals" physical evidence with the intent to impair its availability in an official proceeding or a criminal investigation.

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[5] *See Love v. State*, 457 P.2d 622, 634 (Alaska 1969) (holding that, for instances of non-constitutional error, the test for harmlessness is whether the appellate court "can fairly say that the error did not appreciably affect the jury's verdict").

Based on evidence that Stepovich stepped behind a Dumpster when Officer Lockwood approached, and that Stepovich dropped or threw the slip of cocaine to the ground behind the Dumpster, the State charged Stepovich with attempted evidence tampering – that is, an attempt to suppress or conceal the cocaine.

We addressed an analogous situation in *Vigue v. State*, 987 P.2d 204 (Alaska App. 1999). In *Vigue*, a police officer contacted the defendant for urinating in public.[6] Vigue walked towards the officer, but he kept his hands behind his back.[7] Then the officer saw Vigue make a shaking motion, as if he had dropped something from his hands behind his back.[8] When Vigue arrived at the officer's patrol car, the officer examined the ground where Vigue had been standing, and he discovered five rocks of crack cocaine.[9]

Based on these facts, Vigue was convicted of tampering with physical evidence, on the theory that he "suppressed" or "concealed" the cocaine.[10] This Court reversed Vigue's conviction:

> The fact that Vigue intended to make it harder for [the officer] to detect the cocaine does not mean that Vigue actually succeeded in "suppressing or concealing" the cocaine

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[6] *Vigue*, 987 P.2d at 205.

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*

[10] *Id.* at 204.

> when he tossed or dropped it to the ground. Indeed, under the facts of this case, no suppression or concealment occurred: [the officer] observed Vigue's action and was alerted to the possibility that something might be on the ground at the spot where Vigue had been standing.

*Vigue*, 987 P.2d at 210.

After we concluded that Vigue's actions did not amount to the completed crime of evidence tampering, we then addressed – and rejected – the possibility that the facts of Vigue's case might support a conviction for the lesser offense of *attempted* evidence tampering:

> One could argue that, even if Vigue did not succeed in suppressing or concealing the cocaine, he nevertheless tried to do so, and so his conviction should be reduced to attempted evidence-tampering. Again, this would make sense if we interpreted the terms "suppress" and "conceal" broadly. But . . . we are persuaded to give a narrow interpretation to the terms "suppress" and "conceal." We are convinced that a broad reading of these terms would lead to results that are inexplicably harsh and probably not within the legislature's intent. . . . As [other state courts noted], if the words "suppress" and "conceal" are interpreted to cover actions such as tossing evidence to the ground, or tossing evidence out of a car window, or hiding evidence in one's clothing, then minor possessory offenses

> would often be converted to felonies with little reason.

*Vigue*, 987 P.2d at 210-11.

Thus, *Vigue* apparently rejects the State's theory of prosecution in Stepovich's case.

The State attempts to distinguish *Vigue* by noting that Stepovich discarded the slip of cocaine while he was standing behind a Dumpster, out of Officer Lockwood's direct view. The State analogizes Stepovich's case to a number of cases from other jurisdictions where courts upheld the evidence-tampering convictions of defendants who swallowed drugs or threw drugs down drains or into toilets.

But whether a defendant's conduct constitutes evidence tampering (or attempted evidence tampering) does not hinge on whether the defendant's conduct occurred in the direct view of the police. Rather, the question is the degree to which the defendant's conduct impaired the recovery or availability of the evidence.

This Court's opinion in *Anderson v. State*, 123 P.3d 1110 (Alaska App. 2005), is instructive on this point. In *Anderson*, the police were chasing the car in which Anderson was riding. During the chase, Anderson tossed a handgun, as well as ammunition and the magazine for the handgun, out of the car window.[11]

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[11] *Anderson*, 123 P.3d at 1117.

This Court held that Anderson's conduct did not constitute the offense of evidence tampering.

We first re-affirmed our holding in *Vigue* that a conviction for evidence tampering must be supported by more than proof that the defendant tossed away evidence while being approached or chased by the police.[12] We then explained that the test for whether a defendant's conduct constitutes evidence tampering is "whether the defendant disposed of the evidence in a manner that destroyed it or that made its recovery substantially more difficult or impossible."[13]

We then gave an example of conduct that might occur in full view of the police, but would nevertheless constitute evidence tampering: a defendant who poured a bag of powder cocaine out of the window of a moving car.[14]

To analyze the facts of Stepovich's case under our decisions in *Vigue* and *Anderson*, we must ask whether Stepovich's actions made it impossible or substantially more difficult for Officer Lockwood to recover the slip of cocaine. Even though Stepovich did step behind the Dumpster, out of Lockwood's direct view, Lockwood saw Stepovich do this. Moreover, Lockwood suspected – from the way that Stepovich held his hands when he went behind the Dumpster, and then

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[12] *Id.* at 1119.

[13] *Ibid.*

[14] *Ibid.*

when he emerged again – that Stepovich had discarded something. Lockwood, like the officer in *Vigue*, quickly went behind the Dumpster, observed the slip of cocaine, and recovered it.

True, Stepovich was only charged with attempt, and not the completed crime of evidence tampering. But in *Vigue* we explained why the law will not allow a conviction for attempt in these circumstances, and we now re-affirm what we said in *Vigue*.

Accordingly, the State's evidence is not sufficient to support Stepovich's conviction for attempted evidence tampering.

*Conclusion*

For the reasons explained here, we AFFIRM Stepovich's conviction for fourth-degree controlled substance misconduct (possession of cocaine), but we REVERSE Stepovich's conviction for attempted evidence tampering.

Screen for VRA Certification.

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

| | |
|---|---|
| State of Alaska,<br>Plaintiff,<br>vs.<br>Nicholas Stepovich,<br>Defendant. | CASE NO: 4FA-08-03726CR<br>**ORDER SUSPENDING IMPOSITION OF SENTENCE AND PROVIDING FOR PROBATION** |

DOB: 12/31/1957 APSIN: 0475294
DL/ST: 0475294 AK ATN: 110264112

Defendant came before the court for a jury trial on August 24, 2009, and was found and adjudged guilty of:

| Count | Offense | Date of Offense |
|---|---|---|
| 001: | AS11.71.040(a)(3)(A): MICS 4-Possess Any Amount IA, IIA | 11/08/2008 |
| 002: | AS11.56.610(a)(1): Tamper Phys Evid-Destroy/Alter/Suppress | 11/21/2008 |

DV offense per AS 18.66.990(3) and (5): No

Defendant came before the court on 12/29/09 with counsel, Allen Vacura, and James Fayette Assistant District Attorney, present. It appearing to the satisfaction of this court that the ends of justice and the best interests of the public, as well as the defendant,

will be served thereby, IT IS ORDERED that the sentencing of the defendant is suspended.

**CTN 001: Suspended Imposition of Sentence for a period of <u>eighteen (18) months</u>** concurrent with CTN 002, and the defendant is placed on probation to the Department of Corrections under the conditions of probation listed below.

**CTN 002: Suspended Imposition of Sentence for a period of <u>twelve (12) months</u>** concurrent with CTN 001, and the defendant is placed on probation to the Department of Corrections under the conditions of probation listed below.

POLICE TRAINING SURCHARGE: IT IS ORDERED that defendant pay to the court the following surcharge pursuant to AS 12.55.039 within 10 days:

> CTN 001: $100 due within ten (10) days, consecutive to CTN 002.
>
> CTN 002: $50 due within ten (10) days, consecutive to CTN 001.

INITIAL JAIL SURCHARGE. CTN 001: Defendant was arrested and taken to a correctional facility and is being sentenced to serve a term of imprisonment. Therefore, IT IS ORDERED that defendant pay within thirty (30) days a correctional facilities surcharge of <u>$100</u> to the Department of Law Collections Unit, 1031 W. 4th Ave., Suite 200, Anchorage, AK 99501 AS 12.55.041(b)(1).

SECOND JAIL SURCHARGE. IT IS ORDERED that the defendant pay a correctional facilities surcharge of $100 if defendant's probation is revoked and, in connection with the revocation, defendant is arrested and taken to a correctional facility or jail time is ordered served. AS 12.55.041(c).

FINE. 001: Pay a fine in the amount of $2,500, consecutive to CTN 002, due by March 31 2010.

002: Pay a fine in the amount of $1,000, consecutive to CTN 001, due by March 31, 2010.

IT IS ORDERED that the $865 cash seized at the time of arrest is forfeited and is to be applied to the fine(s).

IT IS FURTHER ORDERED that the gold seized at the time of arrest is to be returned to the defendant.

SPECIAL CONDITION OF PROBATION – IMPRISONMENT

CTN 001: Defendant shall serve the following term of imprisonment: Forty-five (45) days. In lieu of jail time, defendant may perform eight (8) hours of DOC-approved community work service for each day of jail time. Defendant is to be credited for one (1) day of jail time already served in this case. Defendant is to perform at least twenty (20) hours of community work service per month. If proof of 352 hours of community work service is not filed by January 2, 2011 at 6:00 p.m., defendant is to remand immediately.

GENERAL CONDITIONS OF PROBATION

1. Comply with all direct court orders listed above by the deadlines stated.

2. Report to the Department of Corrections Probation Office on the next business day following the date of sentencing, or, if time is to be served immediately after sentencing, then report to the Department of Corrections Probation Office on the next business day following release from an institution.

3. Secure the prior written permission of a probation officer of the Department of Corrections before changing employment or residence or leaving the region of residence to which assigned.

4. Make a reasonable effort to secure and maintain steady employment. Should you become unemployed, notify a probation officer of the Department of Corrections as soon as possible.

5. Report in person between the first day and the tenth day of each month, or as otherwise directed, to your assigned office of the Department of Corrections. Complete in full a written report when your probation officer is out of the office to ensure credit for that visit. You may not report by mail unless you secure prior permission to do so from your probation officer.

6. At no time have under your control a concealed weapon, a firearm, or a switchblade or gravity knife.

7. Do not knowingly associate with a person who is on probation or parole or a person who has a record of a felony conviction unless prior written permission to do so has been granted by a probation officer of the Department of Corrections.

8. Make a reasonable effort to support your legal dependents.

9. Do not consume intoxicating liquor **except at mass**. (See Special Condition # 3 below)

10. Comply with all municipal, state, and federal laws.

11. Report all purchases, sales, and trades of motor vehicles belonging to you, together with current motor vehicle license numbers for those vehicles, to your probation officer.

12. Upon the request of a probation officer, submit to a search of your person, personal property; residence, or any vehicle in which you may be found for the presence of <u>weapons, controlled substances, drug paraphernalia or alcohol</u>.

13. Abide by any special instructions given by the court or any of its duly authorized officers, including probation officers of the Department of Corrections.

<u>OTHER SPECIAL CONDITIONS OF PROBATION</u>

1. Obtain a substance abuse evaluation for alcohol and controlled substances and follow all recommendations from a DOC-approved

provider. Screening and evaluation must be completed within thirty (30) days of sentencing.

2. Actively participate in and successfully complete all treatment programs recommended by the evaluator, including up to 90 days of in-patient and/or residential treatment.

3. Until the treatment court is completed and until the treatment counselor and probation officer have met and discussed the defendant's situation after having completed a treatment program, may not consume or possess alcohol except in the sense of serving it in his restaurant or partaking of it at mass. This probation condition and the general condition may be amended to "do not consume intoxicating liquor **to excess**" after recommendation by the probation officer and treatment provider. (See General Condition # 9 above)

4. Actively participate and successfully complete a DOC-approved Cognitive Skills/Thinking Errors course if requested to do so by the probation officer.

5. Sign a release of information allowing DOC to monitor enrollment, attendance and progress in required programs and to receive enrollment, attendance, progress and discharge records and summaries. DOC may release information from its records to the programs.

6. Not to consume or possess illegal drugs or possess drug paraphernalia. Not to be present where illegal drugs are being sold or consumed. Not to have illegal drugs in his residence.

7. Not to be in any establishment, excluding restaurants, where the primary purpose is the sale of alcohol.

8. Submit immediately to a chemical test of blood, breath, urine or saliva at the request of a probation officer or at the request of a law enforcement officer or treatment person acting under the direction of a probation officer for the presence of drugs or alcohol.

9. May not leave the State of Alaska without written permission from the probation officer.

10. Not to consume or possess controlled substances unless prescribed by a physician. Notify the probation officer within 48 hours of all medication prescription and sign a release of information allowing the probation officer to verify the prescription. DOC may release information from its records to the prescribing physician.

THE PROBATION HEREBY ORDERED EXPIRES eighteen (18) months from the effective date. Any appearance or performance bond in this case is exonerated.

| 12/29/09 | /s/ | Mark I. Wood |
|---|---|---|
| Effective Date | | Judge |
| Clerk: bb | | Mark I. Wood |
| | | Type or Print Judge's Name |

**NOTICE TO DEFENDANT**

You are advised that according to the law, the court may at any time revoke your probation for cause or modify the terms or conditions of your probation. You are subject to arrest by a probation officer with or without a warrant if the officer has cause to believe that your have violated a condition of your probation. You are further advised that it is your responsibility to make your probation officer aware of your adherence to all conditions of probation set forth above.

*Sentence Appeal.* If you are ordered to serve more than two years in jail, you may appeal the sentence to the court of appeals on the ground that it is excessive. Your appeal must be filed within 30 days of the date of distribution stated below. If you are sentenced to serve two years or less in jail, you may seek review of your sentence by filing a petition for review in the supreme court. To do this, you must file a notice of intent to file a petition for sentence review within 10 days of the date of distribution stated below. See Appellate Rules 215 and 403(h) for more information on time limits, procedures and possible consequences of seeking review of your sentence.

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA AT FAIRBANKS

| | | |
|---|---|---|
| CD: 4FA4309-51 | **STATE OF ALASKA** | Judge: Wood |
| Date: August 20, 2009 | vs. | Clerk: McNavish |
| | **Nicholas Stepovich** | |

Case: **4FA-08-3725CR**

PROCEEDINGS: Trial Testimony
Oral Argument on Personal Records
Calendar Call

COUNSEL PRESENT
Plaintiff: Jay Fayette – Office of Special Prosecutions
Defendant: Kevin Fitzgerald
(Telephonic) 907-258-8750
Allen Vacura
Defendant: Present/Out of Custody

* * *

[25] We do quarterly training. Extra training 2.5 hrs per week. It's a constant training process, it never stops.

11/8/08 I arrived at FPD and Lockwood explained he seized gold and cash and he wanted to see if canine Argo could detect odor of narcotics. Officer Lockwood hid the cash in a bank of mail boxes.

I had Argo search and he alerted and indicated to the exact hole the money was in. There was no doubt that

was where the odor was coming from, his nose was right there.

* * *

Argo had no assistance when searching for the gold. I didn't know where the gold was. I didn't know where the cash was only that it was in the bank of mailboxes.

Argo indicated because he detected one of the four odors coming from those items, marijuana, meth, cocaine or heroine. He only reacts that way for those odors.

I've heard that currency is tainted w/ cocaine but I don't know the research about that.

I take Argo to public gatherings. He doesn't neck snap . . . this past week I was on foot patrol at the Fair. He never showed any alert behavior at all.

No, he didn't show any alert behavior Re: Officer Lockwood on 11/8.

* * *

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA AT FAIRBANKS

| | | |
|---|---|---|
| CD: 4FA4309-33 | **STATE OF ALASKA** | Judge: Wood |
| Date: May 20, 2009 | vs. | Clerk: McNavish |
| | **Nicholas Stepovich** | |

Case: **4FA-08-3726CR**

PROCEEDINGS: Trial Testimony
Oral Argument on Personal Records
Calendar Call

COUNSEL PRESENT
Plaintiff: Jay Fayette – Office of Special Prosecutions
Defendant: Kevin Fitzgerald (Telephonic) 907-258-8750
Allen Vacura
Defendant: Present/Out of Custody

* * *

[6] Doesn't explain Argo's alert on the gold nuggets.

If items are seized the investigation proves the items were connected to the drug crime. Again, dogs are trained for a number of odors. How do you know the indication was for cocaine. It could be for other drugs. They person in question could have gotten it from someone else.

Training and conflict training is horrendous. Benefit isn't worth the effort.

If the dog indicates on 2 items and there isn't anything visible telling me they are contaminated w/ drugs the dog is trained to detect . . . No, I can't say its unreliable/reliable. It's unknown right now,

* * *

**COURT'S FINDINGS AND RULINGS**

**This isn't a *Coon Daubert* problem, this is not a scientific problem. This is outside the scope and this has been a foundational hearing. While I might agree w/ Mr. Fitzgerald if just dealing w/ a dog alert on US currency, but there was also an alert on the jar of gold nuggets.**

**Only concern appears to be the fact that the nuggets weren't tested.**

**Issue isn't so much reliability as it is more of sufficiency of the evidence. We've got a dog trainer and former dog trainer Trooper Zeisel and Officer Lockwood, a dog that has tested well. There are a couple concerns but there are no perfect dogs.**

**The basic foundation to allow dog sniff evidence is there, but there are also legitimate concerns raised by Mr. Fitzgerald.**

[7] **Questions is whether those go to such a point that I couldn't' submit it to a jury to figure it out.**

**I would admit the evidence.**

**This is an alleged thrown down bindle of cocaine behind the dumpster case. Deft**

**claims no knowledge of the cocaine and certainly that he didn't possess it. The state's answer to that is that a dog alerted on 2 different things that could have been connected to the cocaine possessed. It rebuts argument that he didn't have any contact w/ the cocaine, that's relevant. I don't know if it's a strong argument. It will be up to the jury. It will go to weight. I will give a cautionary instruction and Mr. Fitzgerald should submit that. The dog sniff evidence should be treated w/ caution. I think that is appropriate that the jury needs to be told they need to scrutinize the evidence.**

* * *

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA AT FAIRBANKS

| | | |
|---|---|---|
| CD: 4FA4309-20 | **STATE OF ALASKA** | Judge: Wood |
| Date: March 18, 2009 | vs. **Nicholas Stepovich** | Clerk: McNavish |

Case: **4FA-08-3726CR**

PROCEEDINGS: Trial Testimony
Oral Argument on Personal Records
Calendar Call

COUNSEL PRESENT
Plaintiff: Jay Fayette – Office of Special Prosecutions
Defendant: Kevin Fitzgerald (Telephonic) 907-258-8750
Allen Vacura
Defendant: Present/Out of Custody

* * *

[6] Fayette: I was given 4 documents and heard reference to 3.

**COURT: Let's mark these for the witness to refer to.**

**Marked Exhibit(s) A,B,C,D photos**

The dumpster is probably 4 to 5' deep. My car was about 20' ish from the dumpster. Yes, I can see their eyes.

Fayette: Objection, compound question

Court: Sustained

I can't see their eyes when looking down.

When I pulled up there were looking down at their hands. If they were looking up as you are now I could have seen their eyes.

They appeared very focused, not moving, standing very still.

If sharing a cigarette they could have been moving. They weren't moving.

My first thought was what are they doing, what are they holding in their hands. I was thinking they were involved in a crime based on hour, location, where there were and how they were standing. It appeared to be narcotics related.

Fayette: Objection, argumentative

Court: Sustained

. . . As soon as Mr. Stepovich looked up, the look on his face . . . and the immediate scurrying and shoving hands in the pocket.

No, it's not unusual to put hands in your pockets.

They weren't smoking anything. No, I didn't see anything in their hands . . . yes, I thought this was narcotics related.

Re: kids caught in candy jar

I thought the analogy would say it well (explains). It was shear panic, blank stare. He was looking at me.

> I've never seen anyone looked this shocked for not doing nothing. I've seen it when they are doing something.

Fayette: Objection, argumentative, legal issue

Court: Sustained

> Yes, I had a hunch something was wrong. This was compounding . . . they clearly didn't want police contact. They didn't necessarily have a duty to stop.

Fayette: Objection, legal conclusion

Court: Could they have continued to walk away. You can ask that.

> They had the ability to walk and that would have been the end of that. They didn't tell me anything. They didn't want to talk [7] to me but they didn't.
>
> Re: Exhibit D photo
>
> They came around the dumpster and walked towards the back I'm walking slightly w/ him at an angle. I new Mr. Stepovich's last name.
>
> I normally fear people that are acting suspiciously and ignore my request to stop. Mr. Stepovich has never done anything to hurt me.
>
> I'm not treating one person differently just because he's a business owner. I have safety concerns. I asked him to stop. I had asked him to stop several times.

* * *

Re: training

No, I could not see in their hands. Never arrested anyone for cocaine possession before by what I saw (Vacura demonstrates cupped hands).

Correct, per the photos there is no snow falling.

Re: Exhibit B

Yes, there is a bindle somewhat folded in the snow.

Fayette: Objection

* * *

**[12] COURT'S FINDINGS AND RULINGS**

**Not talking about standing right now. This is what I think. About I am on a Saturday morning behind the Big I. This is an officer w/ his own personal observations.**

***A*s driving behind the Big I he sees two individuals located behind the dumpster behind the Big I.**

**When he sees them w/ heads bowed, hands touching in almost a cupped position. I want our law enforcement officers to find out what is going on. That is what Lockwood testified, he wanted to ask questions.**

**When they saw the police car they engaged in sudden activity, undirected movement, scurrying, then place their hands in pockets and went back to the Big I.**

**No smoking or urinating, what they were doing involved examination of what was in their hands. Reasonable officer w/ training would assume illegal activity given location, time and conduct.**

**That fits all grounds of *Newsom*. Were talking about a stop. Seizure isn't the right word. This stop was to simply ask questions.**

**More than a hunch because of reaction, location, time of night. Again it's behind a bar.**

**Re: personal use in *Joseph*. *Raven v State,***

**This case was minimally intrusive. He asked them to stop, didn't chase them. Went to where Towse stopped and went to the direction Stepovich headed. Stepovich went back to the dumpster and came back. Consistent w/ theory what was worrying him before was no longer worrying him.**

**Inference is that he dropped the bindle.**

**I'm not suppressing the evidence. I'm denying the motion to suppress.**

* * *

**In the Supreme Court of the State of Alaska**

| | |
|---|---|
| **Nicholas Stepovich**<br>Petitioner,<br>v.<br>**State of Alaska**,<br>Respondent. | Supreme Court<br>No. **S-15168**<br><br>**Order**<br>Petition for Hearing<br>Date of Order: **10/7/13** |

Trial Court Case No **4FA-08-03726CR**
Court of Appeals No **A-10668**

Before: Fabe, Chief Justice, Stowers, and Maassen, Justices
[Winfree, and Bolger, Justices, not participating.]

On consideration of the petition for hearing filed on **5/13/13**, and the response filed on **5/30/13**,

**IT IS ORDERED:**

The petition for hearing is **DENIED**.

Entered by the direction of the court.

Clerk of the Appellate Courts

/s/ Marilyn May
Marilyn May

*Alaska Statute*
*Sec. 11.71.040(a)(3)(A)*

Misconduct Involving a Controlled Substance in the Fourth Degree.

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person

(3) possesses

(A) any amount of a schedule IA or IIA controlled substance;

*Alaska Statute*
*Sec. 17.37.030*

Privileged Medical Use of Marijuana.

(a) A patient, primary caregiver, or alternate caregiver registered with the department under this chapter has an affirmative defense to a criminal prosecution related to marijuana to the extent provided in AS 11.71.090.

(b) Except as otherwise provided by law, a person is not subject to arrest, prosecution, or penalty in any manner for applying to have the person's name placed on the confidential registry maintained by the department under AS 17.37.010.

(c) A physician is not subject to any penalty, including arrest, prosecution, or disciplinary proceeding, or denial of any right or privilege, for

(1) advising a patient whom the physician has diagnosed as having a debilitating medical condition about the risks and benefits of medical use of marijuana or that the patient might benefit from the medical use of marijuana, provided that the advice is based upon the physician's contemporaneous assessment in the context of a bona fide physician-patient relationship of

(A) the patient's medical history and current medical condition; and

(B) other approved medications and treatments that might provide relief and that are reasonably available to the patient and that can be tolerated by the patient; or

(2) providing a patient with a written statement in an application for registration under AS 17.37.010.

(d) Notwithstanding the provisions of this section, a person, including a patient, primary caregiver, or alternate caregiver, is not entitled to the protection of this chapter for the person's acquisition, possession, cultivation, use, sale, distribution, or transportation of marijuana for nonmedical use.