Supreme Court No. 95881-5

(Court of Appeals No. 34765-6-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MEGAN LARES-STORMS,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

This Court granted review in *State v. Neth* "because the question of whether a dog sniff amounts to a search under article I, section 7 of the Washington Constitution has not yet been answered." 165 Wn.2d 177, 181, 196, P.3d 658 (2008). But the question remained unanswered, as the record did not present the issue after all. *Id.*

This case presents the issue. The Court should grant review to address whether application of a drug-detection dog to a person's car disturbs a private affair under article I, section 7, such that authority of law is required prior to the intrusion. This Court should answer the question in the affirmative, because our constitution provides strong protection of privacy in cars and prohibits pretextual searches.

This Court should also grant review of the other important constitutional question presented: When a dog's alert is used to support a warrant for additional searching, what information must be presented to the magistrate to demonstrate the reliability of the dog's alert? Article I, section 7 is more protective than the Fourth Amendment in the context of informants' tips, and this principle should apply to canines no less than to people. The Court of Appeals declined to address this issue, concluding it is "best reserved for our Supreme Court[.]" Slip Op. at 15.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Megan Lares-Storms, through her attorney, Lila J. Silverstein, asks this Court to review opinion of the Court of Appeals in *State v. Lares-Storms*, No. 34765-6-III (filed April 17, 2018). A copy of the opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The warrantless application of a drug-detection dog to the outside of a home violates both the Fourth Amendment and article I, section 7. The same is not true for a car under the Fourth Amendment, but article I, section 7 is much more protective of privacy in cars than the Fourth Amendment. Furthermore, unlike the Fourth Amendment, our constitution prohibits pretexual intrusions and does not depend upon "reasonable expectations of privacy." Does the application of a drug-detection dog to a person's car disturb a private affair, such that article I, section 7 requires a warrant or other "authority of law" prior to the intrusion? RAP 13.4(b)(3), (4).

2. This Court has held that article I, section 7 requires more robust proof of reliability than the Fourth Amendment when an informant's tip is proffered to support probable cause to issue a warrant. Dog alerts are treated as informant's tips in this context. Did the State fail to prove the reliability of the dog alert here, where it presented evidence that the dog

had participated in 400 searches where it detected the smell of drugs, but presented no evidence about the dog's track record of false positives and false negatives? RAP 13.4(b)(3), (4).

D. STATEMENT OF THE CASE

1. Megan Lares-Storms was convicted of drug crimes based on evidence found in her car following a warrantless inspection of the car by a drug-detection dog.

Megan Lares-Storms drove to a gas station in Walla Walla. CP 51. After she parked in the parking lot, police officers arrested her pursuant to a Department of Corrections warrant. CP 51. The officers permitted her to lock her belongings in her car and then they took her to jail. CP 51-52.

Without obtaining a search warrant, the officers then called for a K-9 unit, and another officer came to the parking lot and had a drug-detection dog inspect Ms. Lares-Storms's car. CP 52. The dog sniffed all around the car, and showed a change in behavior indicating it detected the odor of drugs. CP 52.

A detective applied for a warrant to further search the car. CP 28-38, 52. The detective averred there was probable cause to search the car based on the dog's alert, Ms. Lares-Storms's history of drug-related crimes, and the fact that her car had been present at a controlled buy a little over a month earlier. CP 50-52. On that previous occasion, the

confidential informant could not identify Ms. Lares-Storms as the person who sold him drugs, but "felt" it was her. CP 51-52.

The dog's credentials were attached to the warrant application. CP 31-35. The dog's handler asserted that the dog had successfully completed a 16-week training program and had "performed over 400 applications where controlled substances were discovered and/or the odors of controlled substances were present." CP 33-34. But no information was provided regarding the number of false positives (dog alerts but no drugs found) or false negatives (no alerts where drugs existed) – either in training or in the field.

Notwithstanding that (1) the canine inspection occurred without a warrant and (2) no measure of the dog's reliability was provided, a judge signed a warrant authorizing a further search of Ms. Lares-Storms's car. CP 38-39. Officers searched the car and found plastic baggies and other paraphernalia containing methamphetamine. CP 52. The State charged Ms. Lares-Storms with one count of possession of methamphetamine with intent to deliver, and one count of use of drug paraphernalia. CP 6-7.

Ms. Lares-Storms moved to suppress the evidence on the ground that it was obtained pursuant to an unconstitutional search. CP 9-15. She pointed out that citizens have a privacy interest in their vehicles under article I, section 7 of the Washington Constitution. CP 11 (citing *State v.*

Snapp, 174 Wn.2d 177, 187, 275 P.3d 289 (2012); *State v. Afana*, 169 Wn.2d 169, 176, 233 P.3d 879 (2010)). She argued that the State did not establish probable cause to obtain the search warrant under *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). CP 12.

The trial court denied the motion to suppress. It agreed with "most" of defense counsel's arguments, but concluded that the drug-detection dog's inspection of Ms. Lares-Storms's car was not a search that required a warrant, and that the dog's alert tipped the scales in favor of a finding of probable cause to support the warrant that was later issued. RP 4-6; CP 52-53.

Ms. Lares-Storms was found guilty as charged after a stipulated-facts bench trial. CP 54-57.

2. The Court of Appeals rejected both article I, section 7 arguments, applying a Fourth Amendment "reasonableness" analysis to one issue and stating the other was "best reserved for our Supreme Court".

On appeal, Ms. Lares-Storms argued that the application of a drug-detection dog to a person's car disturbs a "private affair" under article I, section 7, such that a warrant or exception is required prior to the invasion. Br. of Appellant at 8-16; Reply Br. at 1-15. She acknowledged that a dog sniff of a car is not a "search" for purposes of the Fourth Amendment (unlike a dog sniff of a house), but noted that this Court has repeatedly

held that article I, section 7 is more protective than the Fourth Amendment in the vehicle context. Br. of Appellant at 9-12; Reply Br. at 5-12. Ms. Lares-Storms also pointed out that a Division One case rejecting this argument was wrong because it was based on "reasonable expectations of privacy," which is a Fourth Amendment standard inconsistent with article I, section 7. Br. of Appellant at 12-14; Reply Br. at 12-15.

Ms. Lares-Storms argued in the alternative that the evidence should have been suppressed because, even assuming the initial canine inspection was not a search, the State failed to prove the reliability of the dog whose alert supported the warrant that was later issued. As with the first issue, Ms. Lares-Storms noted article I, section 7 provides greater protection than the Fourth Amendment in this context. Br. of Appellant at 17-24; Reply Br. at 16-21. The Korematsu Center filed an amicus brief in support of Ms. Lares-Storms's arguments.

The Court of Appeals rejected both arguments. After acknowledging article I, section 7's strong protection for privacy in vehicles, the court nevertheless followed Division One's dismissal of the issue under a Fourth Amendment "reasonable expectation of privacy" analysis. Slip Op. at 11-12 (citing *State v. Boyce*, 44 Wn. App. 724, 729, 723 P.2d 28 (1986); *State v. Hartzell*, 156 Wn. App. 918, 237 P.3d 928

(2010)).[1] The court also mischaracterized Ms. Lares-Storms's argument as depending on the specific facts of this case, even though Ms. Lares-Storms argued that a drug dog's inspection of a vehicle – as a general matter – implicates a private affair requiring authority of law. Slip Op. at 13.

As to the second issue, the Court of Appeals "recognize[d] recent studies and literature that question the reliability of dog sniffs." Slip Op. at 15. The court nevertheless declined to reach the issue because it wasn't raised in the trial court – even though the record contained all of the information relied on by the issuing magistrate. The court also claimed Ms. Lares-Storms cited no authority from other jurisdictions supporting her argument, even though she had cited cases from Florida and Tennessee. Br. of Appellant at 21-23. The court closed by stating, "the formulation of a new rule requiring disclosure of a police dog's record of reliability before the issuance of a warrant based on a sniff is a subject … best reserved for our Supreme Court[.]" Slip Op at 15.

[1] The court also cited dictum from the plurality opinion in *State v. Mecham*, 186 Wn.2d 128, 147, 380 P.3d 414 (2016).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The question of whether a drug dog's inspection of a car disturbs a private affair is a significant constitutional question this Court left open in *Neth* and should resolve now.

a. Drug dogs disturb private affairs because they reveal information people do not expose to public view.

There is no question that the warrantless application of a drug-detection dog to a person's *home* violates both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. *See Florida v. Jardines*, 569 U.S. 1, 133 S.Ct. 1409, 1417-18, 185 L.Ed.2d 495 (2013) (Fourth Amendment); *State v. Dearman*, 92 Wn. App. 630, 631, 962 P.2d 850 (1998) (article I, section 7). In *Dearman*, the Court of Appeals explained that "using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to see through the walls of the home." *Dearman*, 92 Wn. App. at 635. The court relied on *State v. Young*, in which this Court held use of an infrared device outside a home disturbs a private affair because, although "[t]he infrared device was targeted at the outside of the home[,]" it "allowed the officers to see more than what Mr. Young left exposed to public view." 123 Wn.2d 173, 183, 867 P.2d 593 (1994).

The U.S. Supreme Court has rejected such protection in the vehicle context, however, on the basis that citizens do not have a "reasonable expectation of privacy" in the smell of drugs in their cars. *Illinois v. Caballes*, 543 U.S. 405, 408-10, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). This reasoning is inapplicable under article I, section 7. Our state constitution provides greater privacy protection in the vehicle context than the Fourth Amendment, and article I, section 7 does not depend on notions of "reasonableness" but instead prohibits any disturbance of an individual's private affairs without authority of law. *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012); Const. art. I, § 7. Because a drug dog detects more than what a driver leaves exposed to public view, it disturbs a private affair under the state constitution, and a warrant or exception is required.

b. Article I, section 7 provides stronger privacy protection in the vehicle context than the Fourth Amendment and stronger protection against pretextual intrusions.

The Court of Appeals claimed *Young* and *Dearman* "lack relevance" because they involved homes, which are subject to heightened constitutional protection. Slip Op. at 12. But as Ms. Lares-Storms noted, this Court has repeatedly held that citizens of this state have a privacy

interest in their *cars* which they are entitled to hold safe from governmental trespass absent a warrant. Br. of Appellant at 10-12.

"From the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles." *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988). Thus, while there is an "automobile exception" to the warrant requirement under the Fourth Amendment, a warrant is required prior to disturbing a person's privacy interest in her car in Washington. *See Snapp*, 174 Wn.2d at 192; *State v. Tibbles*, 169 Wn.2d 364, 369, 236 P.3d 885 (2010).

In addition to rejecting the automobile exception under article I, section 7, this Court has refused to endorse invasions of the right to privacy in vehicles in other contexts. For example, sobriety checkpoints violate article I, section 7, even though they pass Fourth Amendment muster. *Mesiani*, 110 Wn.2d at 457-58; *contrast Michigan Department of State Police v. Sitz*, 496 U.S. 444, 455, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990). Under federal law, a car may be searched incident to arrest if there is reason to believe it contains evidence of the crime of arrest, but under Washington law, a warrant must be obtained in such circumstances. *Snapp*, 174 Wn.2d at 197. Finally, under the Fourth Amendment, police may stop cars based on pretext, while Washington prohibits vehicle

seizures unless the purported basis for the stop is the real reason for the intrusion. *Compare Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) *with Ladson*, 138 Wn.2d at 352-53; *accord State v. Chacon Arreola*, 176 Wn.2d 284, 294, 290 P.3d 983 (2012).

The pretext cases not only provide further evidence of Washington's strong privacy protection in cars, but also indicate this Court should be concerned about the specific issue presented here. Scholars have warned that the absence of constitutional protection against warrantless canine inspections "allow[s] law enforcement to conduct searches when they see fit and for reasons that do not establish probable cause, such as race." Taylor Phipps, *Probable Cause on A Leash*, 23 B.U. Pub. Int. L.J. 57, 73 (2014). Indeed, an attorney for the Mexican American Legal Defense and Education Fund suggests, "police are using dogs to target the Hispanic community." *Id.* Such practices are inconsistent with the Washington Constitution's guarantees of privacy and equality, and this Court should grant review. RAP 13.4(b)(3), (4).

c. Article I, section 7 does not depend on notions of "reasonableness".

The protections provided by article I, section 7 are not only more robust than those of the Fourth Amendment, they are also "qualitatively different[.]" *Snapp*, 174 Wn.2d at 187. The Fourth Amendment prohibits

government intrusion only where there is either a physical trespass or an invasion of a "reasonable expectation of privacy." *Young*, 123 Wn.2d at 181 (citing *Katz v. United States*, 389 U.S. 347, 351-52, 88 S.Ct. 507, 511-12, 19 L.Ed.2d 576 (1967)). "However, under the Washington constitution the inquiry focuses on 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" *Young*, 123 Wn.2d at 181 (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

The Court of Appeals ignored this Court's admonition that "article I, section 7 is not grounded in notions of reasonableness." *Snapp*, 174 Wn.2d at 194. It relied on Division One's opinions in *Boyce* and *Hartzell*, which held the application of drug-detection dogs to the outside of cars did not constitute a "search" because there was no "reasonable expectation of privacy." *Hartzell*, 156 Wn. App. at 929 (quoting *Boyce*, 44 Wn. App. at 729); Slip Op. at 11-12. This analysis is inappropriate under article I, section 7, which "prohibits any disturbance of an individual's private affairs without authority of law." *Snapp*, 174 Wn.2d at 194; *accord State v. Eisfeldt*, 163 Wn.2d 628, 636-37, 185 P.3d 580 (2008) ("We have repeatedly held the privacy protected by article I, section 7 survived where the reasonable expectation of privacy under the Fourth Amendment was destroyed.").

d. Other states have held that canine sniffs outside cars are "searches" under their state constitutions.

Although *Caballes* held that the application of a drug-detection dog to the exterior of a vehicle is not a "search" for purposes of the Fourth Amendment, some courts have reached contrary conclusions under state constitutions. For example, "[a] canine sniff is a search pursuant to Article I, Section 8 of the Pennsylvania Constitution." *Commonwealth v. Green*, 2017 PA Super 244, 168 A.3d 180, 185 (2017) (citing *Commonwealth v. Rogers*, 578 Pa. 127, 849 A.2d 1185, 1190 (2004)); *see also id.* at n.8 (contrasting *Caballes*, 543 U.S. at 409). Similarly, "[e]mploying a trained canine to sniff a person's private vehicle in order to determine whether controlled substances are concealed inside is certainly a search" under the New Hampshire Constitution. *State v. Pellicci*, 133 N.H. 523, 533, 580 A.2d 710, 716 (1990); *see also id.* at 531 (rejecting U.S. Supreme Court's analysis in *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983)).[2] Given our state constitution's exceptional protection of privacy, the same should be true under article I, section 7.

[2] In both the Pennsylvania case and the New Hampshire case, the courts held that "reasonable suspicion" constituted sufficient legal authority justifying the search. *Green*, 168 A.3d at 185; *Pellicci*, 580 A.2d at 716. If this Court decides a dog sniff disturbs a private affair under article I, section 7, it will then determine the requisite "authority of law." Const. art. I, § 7. Generally, a warrant or established exception is required. *See State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996).

In sum, this Court should grant review to address the question left open in *Neth* – whether the application of a drug-detection dog to the exterior of a person's vehicle disturbs a private affair, requiring authority of law prior to the intrusion. Other states have addressed the question and held their constitutions provide greater protection than the Fourth Amendment in this context. This Court has previously held that article I, section 7 does not depend on "reasonable expectations of privacy," prohibits pretextual intrusions, and provides much stronger protection for cars than the Fourth Amendment. It is important for this Court to address the canine issue and condemn the intrusive and embarrassing fishing expeditions that are incompatible with Washington's constitution.

2. The evidence of reliability required for a dog's alert to support a warrant is a significant question of constitutional law that the Court of Appeals stated is "best reserved for our Supreme Court".

This Court should also review the second issue in this case, and should hold that article I, section 7 provides greater protection against unreliable alerts than the Fourth Amendment.

A dog's alert is treated like an informant's tip in this context. *See Florida v. Harris*, 568 U.S. 237, 133 S.Ct. 1050, 1056, 185 L.Ed.2d 61 (2013). And, as in most contexts, article I, section 7 provides greater protection against unreliable tips than the Fourth Amendment. *Compare*

State v. Jackson, 102 Wn.2d 432, 435-38, 688 P.2d 136 (1984) *with Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Prior to *Gates*, both the Fourth Amendment and article I, section 7 required the government to satisfy the two-pronged "*Aguilar-Spinelli*"[3] test of reliability in order for an informant's tip to support probable cause. *See Jackson*, 102 Wn.2d at 435. Under this standard:

> For an informant's tip (as detailed in an affidavit) to create probable cause for a search warrant to issue: (1) the officer's affidavit must set forth some of the underlying circumstances from which the informant drew his conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information; and (2) the affidavit must set forth some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.

Id. Stated differently, the State must prove that both (1) the *informant* is reliable, and (2) the informant's *tip* is reliable. *State v. Hart*, 66 Wn. App. 1, 8, 830 P.2d 696 (1992).

The U.S. Supreme Court abandoned this standard for the Fourth Amendment in *Gates*, 462 U.S. at 238. It held that rather than imposing a "rigid demand that specific 'tests' be satisfied by every informant's tip[,]"

[3] *See Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

courts should evaluate the reliability of a tipster's alert under the totality of the circumstances. *Id.* at 230-31.

But this Court adhered to the "rigid demand" previously imposed. *Jackson*, 102 Wn.2d at 438. The Court held:

> We are not persuaded by the United States Supreme Court's rationale for departing from the *Aguilar-Spinelli* standard. Furthermore, it is inapplicable in the context of Const. art. 1, § 7 analysis.

Id. at 441. The Court emphasized that under article I, section 7, "unless it can be shown that the tip came from an honest or reliable person who acquired the information in the particular case in a reliable way, an arrest or search should not be permitted on the basis of the tip." *Id.* at 442.

Because Washington continues to apply the *Aguilar/Spinelli* test, the U.S. Supreme Court's recent decision in *Harris* does not apply here. In *Harris*, the Court relied on the rationale of *Gates* to reject the Florida Supreme Court's imposition of a reliability test for dog alerts. *Harris*, 133 S.Ct. at 1053.

Harris was charged with drug crimes based on evidence found in his truck following a dog's alert. *Id.* at 1054. He moved to suppress the evidence on the basis that the dog's alert did not provide probable cause for the search. *Id.* At the suppression hearing, the State presented evidence of the handler's and dog's trainings and certifications, but presented no

evidence of their performance history, including false positives. *Id.* at 1055. The Florida Supreme Court concluded that absent evidence of performance history, including "how often the dog has alerted in the field without illegal contraband having been found," the fact that "the dog has been trained and certified is simply not enough to establish probable cause." *Id.* (quoting *Harris v. State*, 71 So.3d 756, 767, 769 (Fla. 2011)). The U.S. Supreme Court reversed, ruling that the Florida court's "strict" reliability requirement was inconsistent with *Gates. Harris*, 133 S.Ct. at 1056 (citing *Gates*, 462 U.S. at 235).

But under Washington law, strict reliability requirements remain. *See Jackson*, 102 Wn.2d at 441 (rejecting *Gates*). Thus, this Court should accept the Court of Appeals' invitation to address the issue of how *Jackson* applies to the canine context. It should hold that the type of evidence presented in this case was insufficient to show reliability and provide probable cause.

The State presented evidence that the dog in question had been trained and certified, and that it had "performed over 400 applications where controlled substances were discovered and/or the odors of controlled substances were present." CP 33-34. But no information was provided regarding the number of false positives (dog alerts but no drugs found) or false negatives (no alerts where drugs existed) – either in

training or in the field. Indeed, the clause "and/or the odors of controlled substances were present" indicates that in some unrevealed percentage of cases, the dog alerted but controlled substances were *not* discovered. The lack of information regarding false positives and false negatives rendered the evidence insufficient to demonstrate reliability.

As the Florida Supreme Court explained in *Harris* before being reversed under the federal constitution, "[a] critical part of the informant's reliability is the informant's track record of giving accurate information in the past." *Harris*, 71 So.3d at 767. This Court agrees that it is important to "evaluate the informant's 'track record', i.e., has he provided accurate information to the police a number of times in the past?" *Jackson*, 102 Wn.2d at 437.

In the canine context, a "track record" analysis must "take into account the potential for false alerts, the potential for handler error, and the possibility of alerts to residual odors." *Harris*, 71 So.3d at 768.

> Information that merely tallies successes does not provide a complete picture. Well-presented data should include the number of failures, if any, and the conditions under which they occurred.

Id. at 769 n.8 (quoting Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 425 (1997)). The Tennessee Supreme Court agreed that in determining

reliability, courts should consider "the canine's training and the canine's 'track record,' with emphasis on the amount of false negatives and false positives the dog has furnished." *Harris*, 71 So. at 770 (quoting *State v. England*, 19 S.W.3d 762, 768 (Tenn. 2000)).

Courts must not assume that trained canines can reliably detect whether a motorist unlawfully possesses controlled substances because there are many potential pitfalls, including unconscious cueing by handlers, oversensitive noses, "or even the pervasive contamination of currency by cocaine." *Caballes*, 543 U.S. at 411-12 (Souter, J., dissenting). Indeed, one of the major problems with drug-detection dogs is that they are *too* good at their job, and can detect trace amounts of substances that may or may not have been left recently and may or may not have been illegally possessed by the current target of the intrusion. *See id.* (collecting cases and studies). A person's privacy should not be violated just because a dog "correctly" detected trace amounts of a substance long ago discarded by an unknown individual; rather, a person's privacy may be disturbed only if there is probable cause to believe that person is committing a crime. *Neth*, 165 Wn.2d at 182.

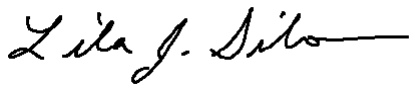
Here, no information was presented regarding the dog's track record of false positives and false negatives. Absent that data, it is impossible to assess reliability. Thus, the canine informant's tip should not

have been considered in the assessment of probable cause. This Court should accept the Court of Appeals' invitation to address this important issue. RAP 13.4(b)(3), (4).

F. CONCLUSION

For the reasons set forth above, Megan Lares-Storms respectfully requests that this Court grant review.

DATED this 16th day of May, 2018.



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APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. MEGAN CHERISSE LARES-STORMS, Appellant.	)	No. 34765-6-III UNPUBLISHED OPINION

FEARING, J. — Megan Lares-Storms appeals her convictions for possession of methamphetamine with intent to deliver and for use of drug paraphernalia by challenging the constitutionality of a police dog's sniff of her automobile. We uphold the constitutionality of the sniff and affirm Lares-Storms' convictions.

FACTS

This appeal concerns purported unlawful drug sales by appellant Megan Lares-Storms. Since Lares-Storms challenges, on appeal, the issuance of a search warrant, most of these facts arise from an affidavit of a law enforcement officer in support of the issuance of the warrant to search the car of Lares-Storms.

In early 2016, the County and City of Walla Walla Law Enforcement Drug Unit received information about Megan Lares-Storms selling methamphetamine. We do not know the origin or specifics of the information. Nevertheless, from past encounters with Lares-Storms, law enforcement officers earlier suspected her to sell narcotics.

The County and City Drug Unit also learned that Megan Lares-Storms drove a 2005 black four door Chevy Malibu with Washington license plate AWN-4415. Again, we do not know the source of the information. Walla Walla Police Department Detective Steve Harris perused Department of Motor Vehicle records and learned that Ines Moreno, not Lares-Storms, was the registered owner of the Malibu. The car's registration listed the vehicle as tan, not black, in color, so Detective Harris checked the vehicle identification number and confirmed the car was not stolen and the license plates had not been switched.

On February 25, 2016, the Walla Walla County and City Drug Unit, led by Detective Steve Harris, attempted a controlled buy, whereby a confidential informant would purchase methamphetamine from a known seller. When the informant met with the seller, the seller explained that he or she did not then possess the methamphetamine and asked the informant to journey to a location near the Border Tavern in west Walla Walla. The seller stated that he or she would rendezvous with his or her supplier at the location and procure methamphetamine to sell to the confidential informant. When law

enforcement officers arrived at the Border Tavern area to observe the drug transaction, they eyed a 2005 black Chevy Malibu with plate AWN-4415 occupied only by a female driver. Officers peered as the seller entered the Malibu, promptly exited the car, and delivered methamphetamine to the confidential informant. Officers later showed a picture of Megan Lares-Storms to the informant. The informant could not definitely identify Lares-Storms as the lady pictured in the photograph, but the informant "felt" that the photographed person drove the black Chevy Malibu to the location of the methamphetamine sale. Clerk's Papers (CP) at 36.

More than a month later and on March 30, 2016, Detective Steve Harris saw the black Chevy Malibu with Washington license plate AWN-4415 parked on Chestnut Street near a Walla Walla residence. Detective Harris then confirmed with police dispatch that the Department of Corrections had issued a warrant for Megan Lares-Storms' arrest. Harris spied Lares-Storms, while toting a bag and backpack, exit the residence and enter the Malibu. When Lares-Storms drove away, Harris followed as he called for backup. Lares-Storms later parked at a Taj gas station and food mart. Walla Walla Police Department Officer Nick Henzel responded to the request for assistance. Henzel and Harris situated their cars to block Lares-Storms from driving from the mart's parking lot.

Officer Nick Henzel walked to the driver's side of the Malibu and knocked on the window. Megan Lares-Storms did not respond to the knock, so Officer Henzel

opened the car door, grabbed Lares-Storms' arm, and forcibly removed her from the car. While Detective Steve Harris told Lares-Storms that she was under arrest, she dialed the cell phone in her hand. Detective Harris seized the cell phone from Lares-Storms' hand and laid the phone on the driver's seat of the vehicle. Unbeknownst to Harris, Lares-Storms maintained a blue tooth ear piece in her ear. Lares-Storms received a call and told the caller that a police officer arrested her, at which time Harris removed the blue tooth device from her ear and also laid it on the driver's seat of the vehicle.

Megan Lares-Storms expressed concern to Detective Steve Harris about her personal possessions in the Malibu and expressed a desire to lock the car doors. Detective Harris responded that her possessions would remain in the car, which law enforcement would lock. After this exchange, officers transported Lares-Storms to the county jail.

With Lares-Storms removed from the Taj parking lot, Walla Walla Police Detective Steve Harris summoned Officer Gunner Fulmer and his drug sniffing dog Pick to travel to the parking lot so the dog could sniff the Malibu. No officers could smell any odor of methamphetamine outside the car. After Pick's arrival, the dog sauntered around the vehicle. Pick purportedly changed behavior when he smelled a controlled substance. We do not know the nature of the alleged change in behavior. Based on Pick's alerting behavior, Detective Harris directed a towing company to tow

the vehicle to a secure storage facility where Harris locked the car and placed evidence tape on the doors and trunk.

On March 31, the next day, Detective Steve Harris applied for a warrant to search the Chevrolet Malibu. Harris signed and submitted an affidavit to support the warrant, which affidavit detailed the facts recited above. The affidavit attached an affidavit from Officer Gunner Fulmer, Pick's handler. In his affidavit, Officer Fulmer detailed his training and experience, including a course from Puget Sound Detection Dogs and his certification in drug detection with two dogs, including Pick, from the Pacific Northwest Detection Dog Association and the Pacific Northwest Canine Association. Fulmer's affidavit also noted that he attended a week's training with the Pacific Northwest Canine Association for drug concealment techniques and street level drug interdiction and a week's training with the same association for drug detection and dog health and first aid.

Officer Gunner Fulmer's affidavit continued with regard to Pick's training and experience and with Fulmer referring to himself in the third person:

> K9 "Pick" has successfully completed a 16 week course of training for the detection of odors emanating from Cocaine, Heroin, and Methamphetamine. This course of training was conducted at Puget Sound Security Detection Dogs, Arlington Washington; under the direction of trainer Christina Bunn. Further, K9 "Pick" and his handler Officer Fulmer successfully completed [indecipherable] 200 hours prior to be[ing] certified by Pacific Northwest Detection Dog Association on January 26, 2015. K9 "Pick" is a 2 year old, female black lab. K9 Pick will recertify every year she is in service.

> K9 "Pick" is trained to give a "Passive" alert to the presence of odors emanating from controlled substances. This alert is described as a change of behavior, characterized by a tail flag, intensive rapid sniffing and/or focusing on a specific area. This alert phase manifests itself by culminating into a specific alert where K9 "Pick" will passively sit/stand and stare at the source of the odor.
>
> K9 "Pick" and her handler, Officer Fulmer has performed over 400 applications where controlled substances were discovered and / or the odors of controlled substances were present. K9 "Pick" is Officer Fulmer's second service K9, following K9 "Rev" who has since retired from service after 6 1/2 years of serving the Walla Walla Community.
>
> K9 "Pick" and Officer Fulmer are regularly utilized by the Washington State Patrol, Oregon State Patrol, Umatilla County Sheriff, College Place PD, Walla Walla County Sheriff, Washington State Penitentiary, DEA, FBI, and the City of Walla Walla PD for their detection expertise.

CP at 33-34. The affidavit does not indicate whether Pick ever falsely reported the presence of controlled substances or whether he failed to detect the presence of controlled substances.

The Walla Walla District Court granted the search warrant. The warrant authorized law enforcement to enter the Chevy Malibu and seize any illegal narcotics, smoking devices, drug paraphernalia, packaging materials, weighing scales, money from controlled substances sales, written or electronically stored records of drug sales, cell phones, and documents indicating dominion over the Malibu. When officers searched the Chevy Malibu, they snatched a small electronic scale with residue thereon and five plastic sealed bags with suspected methamphetamine in each. Officers' field testing suggested the presence of methamphetamine. The methamphetamine inside the

bags weighed thirty grams. Officers discovered other empty plastic bags and $700 in cash.

PROCEDURE

The State of Washington charged Megan Lares-Storms with possession with intent to distribute methamphetamine and use of drug paraphernalia. Lares-Storms moved, under CrR 3.6, to suppress the evidence found inside her car. The trial court denied the motion after ruling that Pick's sniffing of the Malibu did not constitute a search under the Washington Constitution. The parties submitted stipulated facts to the trial court, with Lares-Storms reserving the right to appeal the suppression ruling. The stipulation included facts emanating from the execution of the search warrant. The trial court found Lares-Storms guilty of both charges.

LAW AND ANALYSIS

Megan Lares-Storms appeals the trial court's order denying her motion to suppress evidence seized from the Chevrolet Malibu with a search warrant obtained after a police narcotics dog sniffed the car to determine the presence of drugs. Lares-Storms focuses on whether a dog sniff constitutes a search. Lares-Storms characterizes the canine smell as an unreasonable governmental intrusion into her automobile and its contents. She argues that the dog sniff was an unconstitutional search and, absent the sniff, the remaining facts in the search warrant affidavit do not create probable cause.

The State contends that Officer Gunner Fulmer needed no warrant to direct Pick to

sniff the Malibu. The State characterizes the dog smell as reasonable and nonintrusive. Based on the circumstances of the case, we agree with the State.

Megan Lares-Storms challenges the dog smell only under the state constitution. According to federal law, a dog smell does not constitute a search under the United States Constitution's Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 409, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005); *United States v. Jensen*, 425 F.3d 698, 706 n.2 (9th Cir. 2005).

Washington's Constitution provides: "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7. The unique language of article I, section 7, generally provides greater protection to persons under the Washington Constitution than the Fourth Amendment of the federal constitution provides. *State v. Snapp*, 174 Wn.2d 177, 187, 275 P.3d 289 (2012). The Washington Constitution provides added safeguards, in part, because, unlike the Fourth Amendment, article I, section 7 clearly recognizes an individual's right to privacy with no express limitations. *State v. Ferrier*, 136 Wn.2d 103, 110, 960 P.2d 927 (1998). For example with regard to motor vehicles, the Fourth Amendment acknowledges an "automobile exception" to the warrant requirement, but Washington law recognizes no such exception. *State v. Snapp*, 174 Wn.2d at 192. Sobriety checkpoints pass Fourth Amendment muster, but violate Washington's article I, section 7. *City of Seattle v. Mesiani*, 110 Wn.2d 454, 457-58, 755 P.2d 775 (1988); *Michigan Department of State Police v. Sitz*, 496 U.S. 444,

455, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990). Under federal law, law enforcement may search a car incident to arrest if officers hold a reasonable belief that the vehicle contains evidence of the crime of arrest. *State v. Snapp*, 174 Wn.2d at 190-91. But, pursuant to Washington law, a warrant must be obtained in such circumstances. *State v. Snapp*, 174 Wn.2d at 197. Megan Lares-Storms emphasizes these strong protections afforded one's privacy inside one's motor vehicle.

The State of Washington preliminarily argues that Megan Lares-Storms did not provide a necessary *Gunwall* analysis when arguing that Washington Constitution article I, section 7 provides no greater protection against dog smells than the federal constitution. Washington appellate courts will generally not examine whether the Washington Constitution provides greater protection than the United States Constitution unless a party adequately briefs the *Gunwall* factors. *Sprague v. Spokane Valley Fire Department*, __ Wn.2d __, 409 P.3d 160, 172 (2018). Under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), we review six nonexclusive neutral criteria to help determine whether the state constitutional clause carries meaning different from its federal counterpart: (1) the textual language of the state constitution, (2) significant differences in the texts of parallel provisions of the federal and state constitutions, (3) state constitutional and common law history, (4) preexisting state law, (5) differences in structure between the federal and state constitutions, and (6) matters of particular state interest or local concern. *State v. Gunwall*, 106 Wn.2d at 61-62. Lares-Storms actually addresses two of these factors.

Nevertheless, the Washington Supreme Court previously announced that article I, section 7 bestows greater protection than the Fourth Amendment, such that a *Gunwall* analysis is no longer necessary. *State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217 (2003); *State v. Vrieling*, 144 Wn.2d 489, 495, 28 P.3d 762 (2001).

The State contends that Megan Lares-Storms must still provide the court with a full *Gunwall* analysis because no Washington decision has extended the protections of the state constitution from a dog smell beyond protections afforded by the federal Fourth Amendment. We read *Jackson* and *Vrieling*, however, as not requiring the *Gunwall* analysis no matter the context in which the accused asserts Washington Constitutional article I, section 7 protection.

Searches conducted without prior approval by a judge or magistrate are per se unreasonable under article I, section 7 of the Washington State Constitution, subject only to a few established exceptions. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Since Officer Gunner Fulmer garnered no search warrant before Pick's sniff of the Malibu, we must decide whether a dog's inhaling of odors from a car constitutes a search under the state constitution. Since the Washington Constitution does not employ the word "search," the more apt question is whether a dog sniff unreasonably disturbs a citizen's private affairs. *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990). Nevertheless, Washington cases still analyze dog smells based on the question of whether the sniff falls within the rubric of a search.

When a law enforcement officer can detect something by using one or more of his or her senses while being lawfully present at a vantage point, the detection does not constitute a search. *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). An officer's surveillance does not constitute a search if the officer observes an object or activity with an unaided eye from a nonintrusive location. *State v. Young*, 123 Wn.2d 173, 182, 867 P.2d 593 (1994). This means of surveillance does not expose a person's private affairs. *State v. Dearman*, 92 Wn. App. 630, 634, 962 P.2d 850 (1998). Nevertheless, a particularly intrusive method of viewing may constitute a search. *State v. Myers*, 117 Wn.2d 332, 345, 815 P.2d 761 (1991).

Any search by K9 Pick did not entail sight. Pick searched by her sense of smell. Officer Gunner Fulmer lacked the acuity of smell to detect controlled substances in the Malibu.

Unlike the United States Supreme Court, Washington courts, when applying Washington law, have not adopted any blanket rule rejecting a dog sniff as constituting a search. *State v. Boyce*, 44 Wn. App. 724, 729, 723 P.2d 28 (1986). Instead, in Washington, whether a dog sniff amounts to a search depends on the privacy rights at stake due to the intrusion. *State v. Boyce*, 44 Wn. App. at 729-30. A person lacks a reasonable expectation of privacy in the air outside of a car window. *State v. Mecham*, 186 Wn.2d 128, 147, 380 P.3d 414 (2016).

Megan Lares-Storms contends that Pick's inhalation of methamphetamine molecules unreasonably intruded in her privacy interest in the Malibu. In support of her contention, Lares-Storms cites *State v. Young*, 123 Wn.2d 173 (1994) and *State v. Dearman*, 92 Wn. App. 630 (1998). Nevertheless, both of these cases involve a police investigation into a defendant's home. The privacy implications of a person's home exceed the privacy implications of a person's vehicle. The Washington Constitution grants heightened protection of private dwellings. *State v. Dearman*, 92 Wn. App. at 633 n.5. As a result, *Young* and *Dearman* lack relevance.

We consider *State v. Hartzell*, 156 Wn. App. 918, 237 P.3d 928 (2010) controlling. *Hartzell* addressed whether a dog sniff of a motor vehicle constituted a search. This court held that a dog smelling through an open window of a vehicle from a lawful vantage point does not qualify as a search.

In *State v. Hartzell*, the police linked Charles Hartzell to an apartment shooting where a witness saw someone shoot from the sun roof of a vehicle. Later, when responding to a call reporting a man with a gun, a law enforcement officer waited for backup outside the house. Hartzell arrived in a sports utility vehicle. The officer noticed a bullet hole through the passenger door of the vehicle. A canine officer later arrived with his dog in order to look for the gun that shot the bullet through the passenger side door of the vehicle. The dog jumped on the car and sniffed the passenger door. The dog then wandered down the road and found a semiautomatic handgun one hundred yards distant.

On appeal, this court ruled that Charles Hartzell lacked a reasonable expectation of privacy in the air emerging from his vehicle. Hartzell stood outside the vehicle when the dog sniff occurred and the sniff was minimally intrusive. Accordingly, we held the dog sniff did not comprise a search requiring a warrant under article I, section 7 of the Washington Constitution.

Megan Lares-Storms distinguishes *State v. Hartzell* on the facts that Charles Hartzell had an open window and the window to Lares-Storms' Malibu was closed. Lares-Storms cites no decision, however, that makes such a distinction. No decision stands for the proposition that a car with an open window deserves less protection than a fully enclosed car. In both cases, the police dog merely smelled around the car, not inside the car.

We conclude that law enforcement did not unreasonably intrude on Megan Lares-Storms' private affairs by Pick sniffing the air surrounding the Malibu in a business's parking lot. Pick's sniff was less intrusive than the police dog smell in *Hartzell.* We have no facts that Pick jumped on the Malibu to smell air coming from the window. Pick merely sauntered around the car.

Megan Lares-Storms and amicus also challenge the reliability of canine sniffs. Lares-Storms in particular asks us to reject the credibility of Pick's sniff of the Malibu because the affidavit for the search warrant did not identify the accuracy of Pick's sense of smell. The affidavit disclosed that Pick identified controlled substances on four hundred

occasions, but the affidavit does not inform the reader as to how many times Pick mistakenly identified unlawful drugs or failed to detect the presence of drugs. Lares-Storms asks for a rule that demands police officers disclose the false positive rates of police canines in search warrant affidavits.

As part of this challenge, Megan Lares-Storms and amicus afford this court with literature questioning the trustworthiness of dog smells of contraband. According to one legal article, some dogs rarely err and possess a false positive rate of only eight percent, but others dogs react unreliably, with false positive rates reaching over fifty percent, meaning one of every two alerts constitutes a false positive. *See* Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735, 757 (2007). Since warrant applications typically omit the false positive rates of the investigating dog, a reviewing court does not know the range of false alerts that befall the subject police dog.

Lares-Storms observes that dogs alert to compounds inside a controlled substance, which compounds also comprise a lawful substance. For example, dogs do not smell heroin per se, but rather alert to the acetic acid in heroin, which acid is a common ingredient in pickles and glue. Katz & Golembiewski, *supra* at 754-55. Methyl benzoate, the chemical compound to which a dog alerts in cocaine, comprises many lawful products. Katz & Golembiewski, *supra* at 755-56. Evidence also shows that a dog's handler may influence the canine's response.

We recognize recent studies and literature that question the reliability of dog sniffs. Nevertheless, we decline to review Megan Lares-Storms' challenge to Pick's credibility. Lares-Storms did not challenge the reliability before the trial court. A party may not generally raise a new argument on appeal that the party did not present to the trial court. *In re Detention of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007).

Megan Lares-Storms asks us to address her contention despite her failure to raise the argument before the trial court because her contention addresses manifest constitutional error. Assuming any constitutional error, however, any error is not clear or manifest. This court previously held that law enforcement may premise the reliability of a dog's sniff solely on an attestation of the dog's training and certification. *State v. Gross*, 57 Wn. App. 549, 551, 789 P.2d 317 (1990). The court came to this conclusion by citing federal circuit decisions from the 1970s and 1980s. Lares-Storms cites no decision in American jurisdictions contrary to *Gross*. The rejection of the ruling in *State v. Gross* and the formulation of a new rule requiring disclosure of a police dog's record of reliability before the issuance of a search warrant based on a sniff is a subject best left to the trial court after a full exploration of the evidence supporting and opposing the reliability of a sniff or best reserved for our Supreme Court or the state legislature.

CONCLUSION

We affirm the trial court's denial of Megan Lares-Storms' motion to suppress evidence seized from the Malibu. We affirm her convictions for possession of a controlled substance with intent to deliver and for use of drug paraphernalia.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Korsmo, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MEGAN LARES-STORMS, Appellant.	)))))))))	COA NO. 34765-6-III

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