

63239-6

63239-6

No. 63239-6-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON, Respondent,**

**vs.**

**WINDY MICHELLE PLEADWELL, Appellant.**

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**BRIEF OF RESPONDENT**

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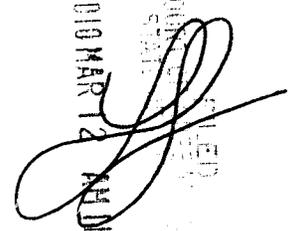


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**A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether Pleadwell waived her right to assert a canine sniff of the exterior of vehicle she was driving was an impermissible search under article I, section 7 of the Washington State Constitution when Pleadwell specifically advised the trial court below that she was not claiming she had a right to privacy in the air surrounding the vehicle.
2. Whether a canine sniff of the exterior area surrounding a vehicle lawfully stopped for a traffic infraction, if reviewed for the first time on appeal, constitutes a 'search' under article I, section 7 of the Washington State Constitution.
3. Whether Deputy Nyhus articulated an objectively reasonable basis to frisk Pleadwell's purse and check a mid sized pill container therein where Pleadwell was acting increasingly nervous and agitated and insisted on taking her large purse with her as she exited the vehicle after a canine had alerted to drugs in or near the vehicle and Nyhus was fearful because he had previously found weapons inside similar sized containers and it sounded to him as though the bottle contained non similar items.

**B. FACTS**

**1. Substantive facts**

On March 23<sup>rd</sup>, 2008 at approximately 7:30 p.m. in the evening, Sgt. Mede of the Whatcom County Sheriff's office observed a 1996 Audi speeding on Alderwood Avenue in Whatcom County. FF , CP 34-38. Sgt. Mede pulled behind the Audi in his marked patrol car and 'paced' the vehicle at going 35-40 mph in a 25 mph zone. FF 1, 1RP 8. Before

initiating a stop at 3300 Bennett Drive, Sgt. Mede also determined the registered owner of the Audi had a suspended driver's license. FF 1.

As Sgt. Mede approached the stopped car, the driver held her driver's license out of the vehicle window and shouted "I am not Josh." FF 3, 1RP 10. The driver then explained she had already been stopped six times because the registered owner, Joshua Williams, had a suspended driver's license. FF 3. The driver was identified as Windy Pleadwell. FF 4.

The 1996 Audi was stopped in a high crime area of Bellingham, at night and, the Audi contained multiple occupants. FF 2. Sgt. Mede immediately recognized one of the passengers as John Banuelos, whom Mede knew to have extensive narcotic contacts and history of violent offenses. FF 4. Concerned for his safety, Sgt. Mede requested back up and asked Pleadwell to exit the vehicle and go to the rear of the vehicle so he could complete the traffic stop in safe proximity from passenger Banuelos. FF 4. Mede did not frisk Pleadwell at this time because he did not see any furtive movements, she was not carrying anything with her and was not presenting as a threat at that time. 1RP 64. Pleadwell appeared agitated, shaky and nervous. FF 5, RP 12.

Pleadwell provided her driver's license and vehicle registration but could not provide proof of insurance. FF 5 Pleadwell alleged she had insurance and that she had written that information down earlier in the day but could not remember where that information was. Id. Pleadwell also claimed she was in the process of buying the Audi but had not completed the paper work and that's why Josh Williams was still the registered owner of the vehicle. FF 5. Pleadwell then offered to give Sgt Mede the registered owner's phone number off of her cell phone so Mede could confirm Pleadwell had permission to drive the Audi. FF 6. Sgt. Mede retrieved Pleadwell's cell phone from a vehicle passenger. FF 7. While waiting for the passengers to pass along Pleadwell's cell phone, the front passengers explained to Mede that they were on their way to the casino and that he'd known the driver since he moved to the area. FF 7. This information contradicted Pleadwell's statement that she was on her way to a friends and that she did not know the front passenger whom she claimed, she was just giving a ride to. FF 7. Pleadwell could not give any specific details about her passenger or her plans and, unlike most motorists engaged in a traffic stop appeared to be becoming more nervous as the contact continued. FF 5.

After retrieving the cell phone, Sgt. Mede spoke to someone who claimed to be Josh, who confirmed Pleadwell had permission to drive the Audi. FF 8. This 'Josh' seemed surprised at Pleadwell's name and after confirming she had permission to use his car, asked Sgt. Mede what the driver's name was again. FF 8. Pleadwell then asked if she could leave because she was 'running late.' Id. Pleadwell was told she could not leave but she could return to her car while Mede completed her no proof of insurance traffic ticket. 1RP 49.

While completing Pleadwell's traffic infraction, back up deputies arrived, including Deputy Nyhus and his K-9 Hawkeye, a certified narcotic detection dog. FF 9. Mede quickly briefed deputy Nyhus on the situation. 1RP 20-21, 81. Deputy Nyhus deployed Hawkeye around the outside of the Audi while Sgt. Mede was completing Pleadwell's traffic infraction. FF 9, 1RP 58. The dog alerted to the outside passenger door seam between the front and back seats of the Audi and above a storm drain. Id. Deputy Nyhus wanted to look in the storm drain after noticing the passenger window was rolled down. FF 9, 10.

Deputy Nyhus, however, was concerned for his safety. He noticed the occupants of the vehicle were acting very nervous, were moving around within the car and he recognized the driver and one occupant as

having previous law enforcement contacts. 1RP 80, 99. Then his dog Hawkeye 'alerted' that there were drugs in or near the vehicle. Consequently, Nyhus ordered all the vehicle occupants to step outside of the vehicle for safety purposes so he could safely examine the storm drain . FF 10, 1RP 58.

As Pleadwell exited the vehicle, she was carrying a large purse that could easily contain a weapon. FF 11. Deputy Nyhus attempted to frisk the purse for weapons based on safety concerns but could not feel the contents adequately by squeezing the outside of the purse due to its construction. FF 11, RP 84. Nyhus therefore opened the purse instead and observed a mid size Tylenol bottle. Id. When Nyhus rattled the pill bottle and heard a non uniform rattle that seemed to be from non similar sized objects. Nyhus was concerned based on prior experience, that the pill bottle could contain a small weapon-such as a razor blade or folding knife particularly in light of Pleadwell and the other occupants behavior, history and fact that his canine had just alerted positively for drugs in or near the vehicle. FF 11. Nyhus opened the pill bottle and found what appeared to be ecstasy pills mixed in with Tylenol and other sized pills. RP 98. Pleadwell was arrested and Hawkeye was dispatched to search the interior of the vehicle incident to the arrest. FF 12.

A search warrant was subsequently obtained after Hawkeye alerted to the locked glove box. Inside the glove box deputies found 131.6 grams of marijuana and in the center console of the vehicle, deputies found over \$7,000.00. FF 12. Only 15-17 minutes transpired between the initiation of the traffic stop to Hawkeye, the dog's alert. FF 9.

Prior to trial, Pleadwell moved to suppress evidence found in the mid sized pill bottle pursuant to Deputy Nyhus' frisk of her purse and in the vehicle glove box pursuant to the search warrant. Specifically, Pleadwell contended below that the officer's actions over the 15-17 minute encounter exceeded the lawful scope of the traffic stop. CP 93-97, 86-90. Pleadwell clarified during argument on her motion to suppress that she was not challenging the canine's sniff itself around the exterior of the vehicle. Specifically, Pleadwell stated "there is no claim there is a right to privacy in the air surrounding the vehicle." RP 148-49.

After hearing testimony the trial court denied Pleadwell's motion to suppress evidence concluding the stop was reasonable in scope and Deputy Nyhus' safety concerns and subsequent frisk of Pleadwell's purse, inclusive of the mid sized Tylenol bottle was warranted under the circumstances and previous experience of the deputy. CP .34-38. Pursuant to a stipulated bench trial, Pleadwell was subsequently found guilty of

unlawful possession of a controlled substance, marijuana, with intent to deliver. CP 29-33. Pleadwell timely appeals. CP 12-14.

**C. ARGUMENT**

**1. Pleadwell waived her right to challenge the canine sniff of the exterior of her vehicle by failing to assert this alleged error below.**

For the first time on appeal, Pleadwell asserts the canine sniff of the exterior of her vehicle, during a valid traffic stop, was an unlawful search under Article I, §7 of the Washington State Constitution.

Pleadwell, however, failed to raise this issue in the trial court as reflected in the trial court's findings of fact and conclusions of law and, as confirmed by Pleadwell at the conclusion of the suppression hearing below. CP 34-38, RP 148-149. This issue was not preserved and should not be reviewed on appeal for the first time.

Generally, Washington Courts do not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). However, an exception may apply when a party raises a manifest error affecting a constitutional right. RAP 2.5(a)(3); Id. at 333. While Pleadwell raises a constitutional search and seizure issue that she alleges is 'manifest', she nonetheless waived her right to challenge the legality of the canine sniff of the exterior area of her

vehicle by failing to preserve this particular alleged error below. State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). In Mierz, the Supreme Court reiterated that a defendant's failure to move to suppress evidence he contends was illegally gathered constitutes a waiver of any error associated with the admission of the evidence and the trial court properly considered the evidence." *See also*, State v. Tarica, 59 Wn.App. 368, 372-73, 798 P.2d 296 (1990), *overruled on other grounds by*, McFarland, 127 Wn.2d 322.

Pleadwell contends that she preserved this issue below because she filed two broad motions to suppress evidence below. See Br. of App. at 21. Pleadwell's motion to suppress however challenged the scope of the traffic stop and the protective frisk and did not address or challenge the circumstances of the canine sniff itself. Pleadwell affirmatively advised the trial court at the conclusion of the suppression hearing that she was not making a "claim that there is a right to privacy in the air surrounding the vehicle" in referencing the canine sniff. RP 148-149, CP 91-92 and 77-85. And in fact, the court's Findings of Fact and Conclusions of Law reflect the canine sniff of the exterior of the vehicle during this traffic stop was not challenged below. The court made only one Finding of Fact pertaining to the canine sniff as it related to the basis for Deputy Nyhus request for

the occupants to step out of the car and made no Conclusions of Law regarding whether the canine sniff, under the circumstance of this case, constituted a 'search' under our State Constitution. CP 34-38. Therefore, there is no CrR 3.6 Conclusion for Pleadwell to challenge regarding the canine sniff on appeal. Pleadwell failed to give the trial court the opportunity to fully develop the record on this issue and reach a conclusion one way or another and therefore should be precluded from asserting this error for the first time on appeal. Pleadwell may only assert error on appeal of the specific grounds raised in the trial court. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

**2. The canine sniff of the exterior of Pleadwell's vehicle during a lawful traffic stop, if reviewed for the first time on appeal, is not a search that implicates Article 1, §7 of our State Constitution.**

Pleadwell asserts, nonetheless, that the canine sniff of the exterior of the vehicle she was driving during a lawful traffic stop was an impermissible search under Article 1, §7 of our State Constitution. The trial court in this case, did not fully develop the record regarding the circumstances of the canine sniff or make conclusions pertaining to the lawfulness of it because it was not an issue before the court below. However, had the issue been properly raised and considered, a reasonable

trial court would have determined the canine's sniff of the exterior area of the vehicle during this valid traffic stop did not constitute a 'search' within the meaning of Article I, §7 of the Washington State Constitution.

The United States and Washington State Constitutions protect individuals against unreasonable government searches and seizures. Thus, a warrantless search is considered per se unreasonable under both the Federal and State Constitution unless they fall within one of the exceptions to the warrant requirement. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). These exceptions are narrowly drawn and jealously guarded. Id. The state bears the burden of demonstrating the search falls within an exception. Id.

The United State Supreme Court has determined pursuant to the Fourth Amendment that a canine sniff of the exterior of a defendant's vehicle during a lawful traffic stop does not violate the Federal Constitution. *See, Illinois v. Caballes*, 125 S.Ct. 834, 838, 160 L.Ed.2d 842 (2005). Pleadwell however, challenges the canine sniff for the first time on appeal pursuant to more protective provisions of Article I §7 of our State Constitution.

Article I, §7 of our State Constitution provides "no person shall be disturbed in his private affairs, or his home invaded, without authority of

law.” Article I, § explicitly protects the “home” and Washington courts have therefore traditionally given the homes heightened constitutional protection and treated the home as a highly private place. State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). Consequently, the ‘closer officers come to intrusion into a dwelling, the greater the constitutional protection.’ Id quoting, State v. Chrisman, 100 Wn.2d 814, 820, 676- P.2d 419 (1984).

The relevant inquiry in determining whether conduct constitutes a ‘search’ under Article I §7 of our State Constitution is “whether the state has unreasonably intruded into a persons home or ‘private affairs.’” State v. Young, 123 Wn.2d at 181. The term “Private affairs” has been found to encompass automobiles and their contents. State v. Parker, 139 Wn.2d at 496. The focus of the inquiry is not on the defendant’s actual or subjective expectation of privacy but instead whether the challenged conduct impermissibly invades a reasonably held privacy interest the determination of which is predicated on those reasonable privacy interests traditionally held by Washington citizens. Id.

Whether or not a canine sniff is a search under Article I §7 of the Constitution therefore depends on the circumstances of the search itself and the “nature of the intrusion into the defendant’s private affairs that is

occasioned by the canine sniff.” State v. Boyce, 44 Wn.App. 724, 730 P.2d 28 (1986); State v. Wolohan, 23 Wn.App. 813, 598 P.2d 28 (1979). A canine sniff of a defendant’s home, for example, has been determined to be unduly invasive, constituting a search. State v. Dearman, 92 Wn.App. 630, 635, 962 P.2d 850 (1998), *review denied*, 127 Wn.2d 1032 (1999). This is consistent with the heightened constitutional protection afforded to a person’s home. *See*, State v. Young, 123 Wn.2d at 181.

Whereas a canine sniff of a safety deposit box at a bank did not constitute an impermissible ‘search’ under our Constitution. State v. Boyce, 44 Wn.App. at 730. *See also*, State v. Stanphill, 53 Wn.App. 623, 631, 769 P.2d 861 (1989) (court held there was no search where canine sniff conducted on the exterior of a package.); State v. Wolohan, 23 Wn.App. at 820 (court held that a canine sniff of a package sent by carrier was not an illegal search because defendant had no reasonable expectation of privacy in the area in which the examined parcel was located).

These cases suggest that under the Washington Constitution, a canine sniff does not constitute an impermissible search so long as the canine sniffs the object from an area where the defendant does not have a reasonable expectation of privacy, and if the canine sniff itself is

minimally intrusive, then no search had occurred. State v. Boyce, 44 Wn.App. at 730.

As in Boyce, the canine sniff of the exterior area of the vehicle during this lawful traffic stop does not implicate Article 1 §7 of our State Constitution. As conceded below, Pleadwell had no reasonable privacy interest in the air surrounding the vehicle she had been driving while the vehicle was lawfully stopped. Pleadwell's vehicle was lawfully stopped on a public roadway at the time of the canine sniff. FF 9. And, nothing in the record suggests the canine sniff was more than minimally intrusive; there is nothing in the record to suggest the canine jumped onto the car, behaved in an intrusive manner or was alerted to a more 'protective' area of the vehicle as suggested by Pleadwell when it performed a cursory sniff of the air around the exterior of the stopped vehicle. This is further supported by the canine Deputies initial concern that narcotics may have been dropped into the storm drain immediately below an open passenger window of the vehicle. Finally, the traffic stop was not prolonged or extended in order to complete the canine sniff. FF 9. Under these circumstances the canine sniff of the exterior of the vehicle that gave the officer concern that drugs may have been dumped in a storm drain below

the vehicle or in the vehicle itself did not amount to a search and does not implicate Article I §7 of the State Constitution.

3. **The trial court did not otherwise err denying Pleadwell's motion to suppress evidence below; Deputy Nyhus reasonably feared for his safety when he frisked Pleadwell's purse for weapons and checked the contents of a mid sized pill bottle because it sounded like it contained non uniform items and he had previously found weapons in similar sized containers.**

Pleadwell next contends Deputy Nyhus safety concerns that the mid sized pill bottle may have contained a weapon was objectively unreasonable and the trial court therefore erred concluding otherwise. Br. of App. at 36.

A trial court's decision pursuant to a CrR 3.6 motion to suppress is reviewed on appeal to determine whether substantial evidence supports its findings of fact and then whether those findings of fact support the trial courts conclusions of law. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Uncontested findings are verities on appeal and not subject to further review. Id. Conclusions of law on the other hand, are reviewed de novo. State v. Carter, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

Warrantless searches are per se unreasonable under Article I §7 of the Washington State Constitution. State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005). When predicated on officer safety however, an

exception to the warrant requirement allows for a valid Terry stop to include a search for weapons. Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Broadnax, 98 Wn.2d 289, 293-4, 654 P.2d 96 (1982). Once Deputy Nyhus canine had alerted for narcotics on the exterior area of the vehicle, he had a reasonable basis to extend Pleadwell's traffic stop to a Terry investigation determine if drugs had been dumped in the storm drain below the open passenger window of the vehicle Pleadwell had been driving. Terry v Ohio, 392 U.S. at 21, State v. Wolohan, 23 Wn.App. at 813. Deputy Nyhus reasonably sought to do this in a safe manner by asking the occupants of the vehicle to step out and by conducting a limited frisk of Pleadwell for weapons.

An officer may frisk a person for weapons if the officer has reasonable grounds to believe the person may be armed and dangerous. Id. Such a frisk must be supported by objectively reasonable concern for officer safety based on the officer subjective perceptions of events. State v. Larson, 88 Wn.App. 849, 853-4, 946 P.2d 1212 (1997). The officer must be able to articulate particular facts from which the officer reasonably inferred that the person or item frisked was armed and dangerous. State v. Xiong, 164 Wn.2d 506, 511, 191 P.3d 1278 (2008). An officer may therefore frisk a person if he justifiably stopped the person

before the frisk, he has a reasonable concern for danger and the frisk's scope is limited to finding weapons. State v. Xiong, 164 Wn.2d at 510, *citing*, State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993).

Here, Deputy Nyhus' protective frisk of Pleadwell's purse, of which she insisted in carrying out of the vehicle with her when she was asked to step from the vehicle, and pill bottle was predicated on objective facts and was limited in its protective purpose. The trial court found Pleadwell, while nervous, acted unusually increasingly more nervous as the brief traffic stop continued. Then contrary to when she first exited her vehicle with Sergeant Mede, Pleadwell insisted on carrying her purse when she was asked to step from the vehicle by Deputy Nyhus. CP 34-38. Nyhus was aware at this point that Pleadwell had given officers contradictory information, was not the registered owner of the vehicle and was driving with at least one passenger whom he considered dangerous. Deputy Nyhus also was concerned because his canine Hawkeye had just 'alerted' to odor of narcotics and he perceived Pleadwell's purse as large enough to carry a "plethora of different types of weapons." CP 34-38. Under these circumstances Deputy Nyhus reasonably feared for his safety and was justified in conducting a protective frisk of Pleadwell and her purse.

When Deputy Nyhus could not determine, due to the construction of Pleadwell's purse, whether it contained a weapon, he was again warranted, predicated on the facts found by the trial court, to briefly look inside the purse to determine whether it contained a weapon. Upon seeing a mid sized pill bottle and shaking it for weapons, the trial court found Deputy Nyhus still reasonably feared for his safety because he had previously "discovered weapons" such as razor blades and knives in this size of a container and when he shook the bottle he could hear a non-uniform rattle from non similar sized objects. Id.

This case sits in stark contrast to State v. Horton, 136 Wn.App. 29, 146 P.3d 1227, *review denied*, 162 Wn.2d 1014 (2008), a case which Pleadwell claims is instructive. The deputy in that case articulated no factual basis to justify examining the contents of a soft cigarette case during a protective frisk for weapons and, the deputy acknowledged he was searching for both weapons and contraband during the protective frisk. Understandably, the court in Horton suppressed the evidence unlawfully obtained. The trial court in this case however, reasonably concluded based on the specific facts presented to Deputy Nyhus that the manner in which he frisked Pleadwell's purse was lawful and warranted. This Court should affirm the trial court's reasoned decision to deny

Pleadwell's motion to suppress the evidence found pursuant to the protective frisk.

An officer does not need to be absolutely certain an individual is armed, the question is whether a reasonably prudent person in the same circumstances would be warranted in the belief that his safety was in danger. State v. Collins, 121 Wn.2d at 173. Courts are reluctant to substitute their judgment for that of a police officer in the field. State v. Collins, 121 Wn.2d at 173. A 'founded suspicion' is all that is necessary, or some basis from which the court can determine that the frisk was not arbitrary or harassing. Id. at 173-174. Any "reasonable basis supporting an inference that the investigate or a companion is armed will justify a protective search for weapons." State v. Laskowski, 88 Wn.App. 858, 859, 950 P.2d 950 (1997), *citing* State v. Wilkinson, 56 Wn.App. 812, 818, 785 P.2d 1139, *review denied*, 114 Wn.2d 1015, 791 P.2d 534 (1990).

It is clear from the circumstances facing Deputy Nyhus, as outlined by the trial court below, that Deputy Nyhus did not exceed the lawful scope of a protective frisk when he opened the mid-sized Tylenol bottle. Deputy Nyhus reasonably feared there could be a small weapon in the mid sized pill bottle based on the circumstances of the stop, Pleadwell's

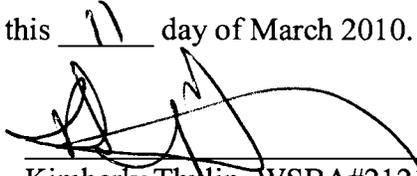
increasingly nervous behavior, the non similar sounds coming from within the pill bottle and his previous experience of finding weapons in similar sized objects. The trial court therefore did not err concluding the manner by which Deputy Nyhus frisked Pleadwell's purse was reasonable. Consequently, the suspected ecstasy pills were appropriately deemed admissible evidence. Where police, during the course of a protective search for weapons, happen across some other item that is "immediately recognizable" as incriminating, the item may be seized. State v. Hudson, 124 Wn.2d 107, 114, 874 P.2d 160 (1994). If the incriminating character of the item is immediately apparent, "there has been no invasion of the suspect's privacy beyond that already authorized by the search for weapons." State v. Hudson, 124 Wn.2d at 114.

The alert by Deputy Nyhus' properly certified drug identification dog, coupled with the circumstances of this case and suspected drugs found on Pleadwell's person provided probable cause to obtain a search warrant for the vehicle Pleadwell was driving and led to the discovery and admission of the \$7,000 found in the vehicle's console and 131 grams of marijuana found in the glovebox. This evidence was properly admitted and considered by the trial court. State v. Wolohan, 23 Wn.App. at 598.

**D. CONCLUSION**

The State respectfully requests that this court affirm Pleadwell's conviction for unlawful possession of a controlled substance, marijuana, within intent to deliver.

Respectfully submitted this 11 day of March 2010.

  
\_\_\_\_\_  
Kimberly Thulin, WSBA#21210  
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**CERTIFICATE**

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached to this Court, and appellant's counsel, Andrew Zinner, addressed as follows:

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Audrey A. Koss  
Legal Assistant

  
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Date