

NO. 39425-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

LAWRENCE HEMBD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-01032-3

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Eric Fong
Ste. A, 569 Division St.
Port Orchard, WA 98366

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED February 2, 2010, Port Orchard, WA 
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

 B. FACTS2

III. ARGUMENT7

 A. THE SEARCH WARRANT IN THE PRESENT CASE WAS SUPPORTED BY PROBABLE CAUSE (AS THE FACTS OFFERED IN SUPPORT OF THE WARRANT WOULD LEAD A REASONABLE PERSON TO CONCLUDE THAT THERE WAS A PROBABILITY THAT HEMBD WAS INVOLVED IN CRIMINAL ACTIVITY AND THAT EVIDENCE OF THE CRIMINAL ACTIVITY COULD BE FOUND IN HIS RESIDENCE) BECAUSE: (1) HEMBD HAD ADMITTED TO THE OFFICERS THAT HE HAD A MARIJUANA PIPE AND OFFERED TO RETRIEVE IT FROM THE RESIDENCE; AND, (2) HEMBD ADMITTED THAT HE HAD SMOKED MARIJUANA IN HIS RESIDENCE TWO DAYS EARLIER.....7

 B. HEMBD’S CLAIM THAT THE OFFICER’S USE OF A DRUG DOG EXCEEDED THE SCOPE OF A SEARCH INCIDENT TO ARREST SHOULD BE REJECTED BECAUSE: (1) HEMBD FAILED TO PROPERLY PRESERVE THIS ISSUE FOR APPEAL AS HE FAILED TO RAISE THIS ISSUE BELOW; AND, (2) HEMBD CANNOT DEMONSTRATE THAT HE HAD ANY EXPECTATION OF PRIVACY IN EVIDENCE THAT THE POLICE HAD LAWFULLY SEIZED FROM HIM DURING A SEARCH INCIDENT TO ARREST.13

IV. CONCLUSION18

TABLE OF AUTHORITIES
CASES

Lockhart v. Nelson,
488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988).....17

State v. Anderson,
105 Wn. App. 223, 19 P.3d 1094 (2001).....7

State v. Bauer,
98 Wn. App. 870, 991 P.2d 668 (2000).....8

State v. Baxter,
68 Wn. 2d 416, 413 P.2d 638 (1966).....14, 15

State v. Boyce,
44 Wn. App. 724, 723 P.2d 28 (1986).....16

State v. Cheatam,
150 Wash.2d 626, 81 P.3d 830 (2003).....17

State v. Clowes,
104 Wn. App. 935, 18 P.3d 596 (2001).....17

State v. Cole,
128 Wn. 2d 262, 906 P.2d 925 (1995).....7

State v. Dearman,
92 Wn. App. 630, 962 P.2d 850 (1998).....15

State v. Lowrimore,
67 Wn. App. 949, 841 P.2d 779 (1992).....10

State v. Maddox,
152 Wn. 2d 499, 98 P.3d 1199 (2004).....8, 10

State v. Mance,
82 Wn. App. 539, 918 P.2d 527 (1996).....7

State v. McFarland,

127 Wn. 2d 322, 899 P.2d 1251 (1995).....	13, 14
<i>State v. McKenna,</i> 91 Wn. App. 554, 958 P.2d 1017 (1998).....	10
<i>State v. Mierz,</i> 127 Wn. 2d 460, 901 P.2d 286 (1995).....	15
<i>State v. Millan,</i> 151 Wn. App. 492, 212 P.3d 603 (2009).....	13-15
<i>State v. Neeley,</i> 113 Wn. App. 100, 52 P.3d 539 (2002).....	9, 10
<i>State v. Perez,</i> 92 Wn. App. 1, 4, 963 P.2d 881 (1998).....	8, 9
<i>State v. Seagull,</i> 95 Wn. 2d 898, 632 P.2d 44 (1981).....	8
<i>State v. Stanphill,</i> 53 Wn. App. 623, 769 P.2d 861 (1989).....	16
<i>State v. Tarica,</i> 59 Wn. App. 368, 798 P.2d 296 (1990).....	15
<i>State v. Valladares,</i> 31 Wn. App. 63, 639 P.2d 813 (1982).....	15
<i>State v Wible,</i> 113 Wn. App. 18, 51 P.3d 830 (2002).....	8
<i>State v. Wolohan,</i> 23 Wn. App. 813, 598 P.2d 421 (1979).....	16
<i>State v. Young,</i> 123 Wn. 2d 173, 867 P.2d 593 (1994).....	8
<i>State v. Vickers,</i> 148 Wn.2d 91, 108, 59 P.3d 58 (2002).....	9

STATUTES

RCW 69.50.1029
RCW 69.50.4129, 10

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Search Warrant in the present case was supported by probable cause (that is, whether the facts offered in support of the warrant would lead a reasonable person to conclude that there was a probability that Hembd was involved in criminal activity and that evidence of the criminal activity could be found in his residence) when: (1) Hembd had admitted to the officers that he had a marijuana pipe and offered to retrieve it from the residence; and, (2) Hembd admitted that he had smoked marijuana in his residence two days earlier?

2. Whether Hembd's claim that the officer's use of a drug dog exceeded the scope of a search incident to arrest should be rejected when: (1) Hembd failed to properly preserve this issue for appeal as he failed to raise this issue below; and, (2) Hembd cannot demonstrate that he had any expectation of privacy in evidence that the police had lawfully seized from him during a search incident to arrest?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Lawrence Hembd was charged by amended information filed in Kitsap County Superior Court with one count of possession of methamphetamine with intent to manufacture or deliver (with a school zone enhancement). CP 93-96. A jury found Hembd guilty of the charged offense

and the trial court imposed a standard range sentence. CP 155-59, 187-97.
This appeal followed.

B. FACTS

On September 16, 2008, officers from the Kitsap County Sheriff's Office obtained a search warrant authorizing them to search Hembd's residence for evidence of the crimes of possession of marijuana and drug paraphernalia. CP 20, 47. The warrant was later expanded to include the crimes of possession of methamphetamine and possession of methamphetamine with intent to deliver. CP 59-60.

Prior to trial, Hembd challenged both the initial search warrant and the expanded warrant, but the trial court denied Hembd's motion. CP 104. On appeal, Hembd argues that the trial court erred in denying his motions to suppress the evidence found pursuant to the search warrant. App.'s Br. at 9.¹

As the trial court explained, the initial search warrant in the present case was a telephonic search warrant, and in the following information was supplied to Judge Roof by Sergeant Bergeron in the warrant application:

SERGEANT BERGERON: On September 16, 2008, I was working with the Kitsap County knock and talk team or special investigations unit. They had information from neighbors that the residence at 4580 Laguna Lane, Port Orchard, Washington had tons of short traffic stay, in and out, and this short traffic stay only went to the downstairs part of

¹ Hembd has not asserted that there were any errors in the actual jury trial below.

the residence. The residence is a split level house. We believe the resident there is a person named Lawrence Hembd. His date of birth is June 11, 1968. He is the person living in the downstairs part of the house.

When we arrived on the scene we had a couple of neighbors outside and we had asked them about the house and they told us they also thought it was a drug house and asked us to do something about it. So we arrived at the location about 1602 hours, walked up to the residence and saw a well worn path on the grass down the side of the house. The tip also had told us previously he lived in the downstairs and all the traffic goes to the downstairs part of the house. It was obvious from the foot traffic that the grass is dead from so much foot traffic.

We went around to the back side of the door which we believed was the main entrance for Lawrence. We knocked and a person by the name of Tony answered the door. We asked him to get Lawrence for us. Lawrence came to the door and I identified myself as a Kitsap County officer and showed him my ID and badge. I could tell his hands were shaking when he lit a cigarette and he was sweating profusely. I informed him that we had information of possible drug activity coming from his residence and told him he had a lot of traffic going in and out of his house. He told us he had lots of friends. I asked him if he owned a marijuana pipe. He said yes, then he said well maybe. Then I asked him if he had any marijuana inside. He said no, he did not. We had a small conversation and then I asked him when was the last time he had smoked because most people in Kitsap County smoke marijuana and then he said two days ago and smoked in his residence.

I talked to him again about the pipe and he was still ambiguous. I explained to him I needed to get the pipe out of the residence because that was what the neighbors were complaining about, the dope activity and so then he offered to go get the pipe and at that point, we didn't want him to go get the pipe because he had prior crimes of assaulting officers and he had already admitted to us that there was no guns in the house but there were multiple knives. There were several knives out on the back deck.

We asked him to clarify his statement again about the marijuana and he still wouldn't go maybe, but we explained to him that he already told us that he had a marijuana pipe in there. He still did not admit about the marijuana pipe other than that first time.

He asked if he needed a lawyer. We told him he was not under arrest and it was up to him if he needed a lawyer. We asked him if he would fail a UA test and he admitted that he probably would fail a UA test because he smoked marijuana two days ago. We asked if we could come in his residence and search voluntarily and he said no.

At that point, he was arrested for our DWLS warrant, a driving warrant. The two other persons in the house were asked to exit the residence. We did not enter the residence at all. Then later on his mother, Mary, arrived and she further advised that Lawrence only lived in the downstairs part of the residence.

JUDGE ROOF: Who owns the residence?

SERGEANT BERGERON: The mother owns the residence, but she lets her son, Lawrence, live in the basement. In the lower part of the residence. So, that is why we are limiting the search to only the lower part of the residence, and so I am asking to search for drug paraphernalia, a smoking pipe, any and all marijuana and dominion and control based on the statements that he smoked two days ago and him offering to get the pipe out of the residence for us.

CP 31-34. Judge Roof then granted the search warrant. CP 34.

Sergeant Bergeron later asked that the warrant be expanded to include the crimes of possession of methamphetamine and possession of methamphetamine with intent to deliver. CP 52. In support of the expanded warrant, Sergeant Bergeron explained to Judge Roof that while serving the initial warrant, the officers had located digital scales with white powder, a

glass vial containing a white substance, multiple smoking devices, and needles. CP 52. In addition, officers found \$707 in currency in Hembd's pockets, and a drug dog had alerted on this currency. CP 52. Judge Roof then authorized the expanded search warrant. CP 53.

Prior to trial, Hembd filed a motion to suppress, arguing that the State had failed to establish probable cause in support of the initial warrant. CP 13. Hembd also filed a second motion to suppress arguing that the expanded warrant should not have been issued because the officers did not perform a field test on the suspected methamphetamine, and that the officers were not allowed to open the locked safe found in the residence. CP 39-42.

A hearing was held on February 2, 2009 regarding the motions to dismiss. Although the issues regarding the search warrant and its expansion were capable of being resolved on the written records and the transcript of the application for the warrant, the State also presented testimony at the hearing from the officers involved, primarily to demonstrate that the methamphetamine related items were found in plain view while the officers executed the first search warrant and that the officers immediately recognized these items as contraband and/or evidence and thus would have seized them even if the initial warrant had not been expanded. See, RP (2/09/2009) at 17-25, 43, 48-52, 65, 80-81.

At the conclusion of the February 2 hearing the trial court denied the motions to suppress. RP (2/09/2009) at 97. The trial court first found that there was probable cause for the initial search warrant because Hembd had admitted to the officers that he had smoked marijuana in the residence a few days earlier and also admitted that he had a marijuana pipe in the house. RP (2/09/2009) at 93-94. The court then found that the officers properly executed the search warrant, entered the property, and found in plain view numerous items relating to methamphetamine. RP (2/09/2009) at 94. The trial court then upheld the expanded warrant and found that there was probable cause in support of the expansion. RP (2/09/2009) at 95-96. Finally, the trial court also held that the search of the safe was proper because locked containers found in a residence may be searched when the officers are executing a search warrant of the residence. RP (2/09/2009) at 96-97. The trial court later entered written findings of fact and conclusions of law to this effect. CP 104-08.

III. ARGUMENT

- A. **THE SEARCH WARRANT IN THE PRESENT CASE WAS SUPPORTED BY PROBABLE CAUSE (AS THE FACTS OFFERED IN SUPPORT OF THE WARRANT WOULD LEAD A REASONABLE PERSON TO CONCLUDE THAT THERE WAS A PROBABILITY THAT HEMBD WAS INVOLVED IN CRIMINAL ACTIVITY AND THAT EVIDENCE OF THE CRIMINAL ACTIVITY COULD BE FOUND IN HIS RESIDENCE) BECAUSE: (1) HEMBD HAD ADMITTED TO THE OFFICERS THAT HE HAD A MARIJUANA PIPE AND OFFERED TO RETRIEVE IT FROM THE RESIDENCE; AND, (2) HEMBD ADMITTED THAT HE HAD SMOKED MARIJUANA IN HIS RESIDENCE TWO DAYS EARLIER.**

An appellate court reviews a trial court's issuance of a search warrant for abuse of discretion, viewing the application for the warrant in a common sense manner and resolving any doubts in favor of the warrant. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). A search warrant may be issued only upon a determination of probable cause, based on facts from which a reasonable person could conclude that a crime has occurred and that there is evidence of the crime at the location to be searched. *Cole*, 128 Wn.2d at 286. The burden of proof is on the defendant moving for suppression to establish the lack of probable cause. *State v. Anderson*, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001); *State v. Mance*, 82 Wn. App. 539, 544, 918 P.2d 527 (1996).

Probable cause is established if the affidavit sets forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. *State v. Maddox*, 152 Wn.2d 499, 509-10, 98 P.3d 1199 (2004) citing *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). In determining probable cause, the magistrate makes a practical, commonsense decision, taking into account all the circumstances set forth in the affidavit and drawing commonsense inferences. *Maddox*, 152 Wn.2d at 509-10, citing *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Probable cause requires a probability of criminal activity, not a prima facie showing of criminal activity. *Maddox*, 152 Wn.2d at 509-10, citing *Gates*, 462 U.S. at 238, 103 S. Ct. 2317; *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981).

“Issuance of a search warrant is a matter of judicial discretion, and a great deference is accorded a magistrate’s determination of probable cause.” *State v. Perez*, 92 Wn. App. 1, 4, 963 P.2d 881 (1998); *State v. Wible*, 113 Wn. App. 18, 21, 51 P.3d 830 (2002); *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Affidavits for search warrants must be tested in a commonsense, practical manner rather than hypertechnically. *Perez*, 92 Wn. App. at 4; *Wible*, 113 Wn. App. at 21-22; *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994); *State v. Bauer*, 98 Wn. App. 870, 875-76, 991

P.2d 668 (2000). Any doubt is resolved in favor of the warrant. *Perez*, 92 Wn. App. at 4; *Young*, 123 Wn.2d at 195; *Vickers*, 148 Wn.2d at 108-09.

In the present case the telephonic application for the initial search warrant outlined that Hembd had admitted to the officers that he had smoked marijuana in his residence two days earlier. CP 33. In addition, Hembd admitted at first that he owned a marijuana pipe. CP 33. Although Hembd later stated that he “maybe” had a marijuana pipe, Hembd later offered to go back into the residence to get the pipe for the officers. CP 33. Thus, Hembd at first admitted that he had a pipe, then equivocated, but then offered to go and retrieve the pipe thereby confirming his initial admission that he had a marijuana pipe in the residence.

Given these facts, the trial court did not err in concluding that the warrant was properly issued since these facts would lead a reasonable person to conclude that there was a probability that the defendant was involved in criminal activity and that evidence of the criminal activity could be found at the place to be searched.

The State acknowledges that mere possession of drug paraphernalia alone is not a crime (and thus would not support a finding of probable cause).² See e.g., *State v. Neeley*, 113 Wn. App. 100, 107, 52 P.3d 539

² The use of drug paraphernalia is prohibited under RCW 69.50.412. That statute states in

(2002), *citing* RCW 69.50.412; *State v. McKenna*, 91 Wn. App. 554, 559, 563, 958 P.2d 1017 (1998); *State v. Lowrimore*, 67 Wn. App. 949, 959, 841 P.2d 779 (1992). However, the presence of other evidence indicating the drug paraphernalia had been used to ingest or inhale a controlled substance will support probable cause under RCW 69.50.412(1) (the use of drug paraphernalia statute). *Neeley*, 113 Wn. App. at 108.

In the present case, Hembd's admission that he had recently smoked marijuana in the residence combined with his admission that he had a marijuana pipe in the residence raised a reasonable inference that Hembd used the paraphernalia (the pipe) to ingest a controlled substance in violation of RCW 69.50.412. While it was possible that Hembd no longer had marijuana in the house or that the pipe he had admitted to having in the house had not been used to smoke marijuana, probable cause only requires a probability of criminal activity, not a prima facie showing of criminal activity or proof beyond a reasonable doubt. *Maddox*, 152 Wn.2d at 509-10. Thus,

relevant part:

It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

RCW 69.50.412(1). RCW 69.50.102 provides a detailed definition of the various types of drug paraphernalia. Subsection (b) of that statute lists a series of factors that may be considered in determining whether an object is drug paraphernalia which includes "Statements by an owner or by anyone in control of the object concerning its use."

the warrant in the present case was properly issued because the facts outlined in support of the warrant were sufficient, as they would lead a reasonable person to conclude that there was a probability that the officers would find evidence of the crimes of possession of marijuana or use of drug paraphernalia in the residence.

Hembd also argues that the trial court improperly relied on tips from anonymous neighbors who told the officers that there had been a high volume of short stay traffic going to and from Hembd's residence and the neighbors suspected Hembd's residence was a drug house. App.'s Br. at 16-17. While Sergeant Bergeron did mention these tips in the search warrant application, it is clear from the application that Sergeant Bergeron mentioned these facts only to describe why the officers had went to Hembd's residence. See CP. 32. Furthermore, it is clear that Sergeant Bergeron was not relying on these tips in any way in order to establish probable cause, rather, as Sergeant Bergeron clearly stated, the basis for the warrant was Hembd's admission that he had smoked marijuana in the residence and that a pipe was inside:

[A]nd so I am asking to search for drug paraphernalia, a smoking pipe, any and all marijuana and dominion and control based on the statements that he smoked two days ago and him offering to get the pipe out of the residence.

CP 34. In addition, it is clear that the anonymous tips were not a factor for the trial court, as the court explained that the finding of probable cause was

supported only by Hembd's admissions and not by any reference to the neighbor's statements, and the court stated specifically in its conclusions of law that,

Judge Roof properly found that the defendant's admissions that he had smoke marijuana in his house two days ago and had a marijuana pipe in his house established probable cause to issue the warrant. Judge Roof reasonably inferred that the pipe located inside of the residence was the one pipe used by the defendant two days prior to smoke marijuana.

CP 107-08.³

For all of these reasons, Hembd has failed to show that the trial court erred, and this Court should conclude that that the warrant was properly issued.

³ Hembd also argues that the trial court erred in finding that some of the individuals who went to Hembd's residence were known to be involved in narcotics. App.'s Br. at 12-13. Hembd argues that there were "no facts introduced in the 3.6 hearing or contained in the telephonic application for the search warrants which revealed the identity of anyone, aside from Mr. Hembd, suspected of going to Mr. Hembd's address." App.'s Br. at 13. This statement, however, is inaccurate, as the testimony at the 3.6 hearing showed that when the officers went to Hembd's residence they found another individual there (Mr. Shoengart) and at least one of the officers was familiar with Mr. Shoengart because the officer had previously arrested him for drug violations. RP (2/09/2009) at 52-53. As with the neighbor's tips, however, there is no evidence that the trial court relied on this information in its finding of probable cause, and probable cause in the present case was established with or without this evidence.

B. HEMBD’S CLAIM THAT THE OFFICER’S USE OF A DRUG DOG EXCEEDED THE SCOPE OF A SEARCH INCIDENT TO ARREST SHOULD BE REJECTED BECAUSE: (1) HEMBD FAILED TO PROPERLY PRESERVE THIS ISSUE FOR APPEAL AS HE FAILED TO RAISE THIS ISSUE BELOW; AND, (2) HEMBD CANNOT DEMONSTRATE THAT HE HAD ANY EXPECTATION OF PRIVACY IN EVIDENCE THAT THE POLICE HAD LAWFULLY SEIZED FROM HIM DURING A SEARCH INCIDENT TO ARREST.

Hembd next claims that the officers exceeded the permissible scope of a search incident to arrest when they used a drug dog to sniff currency that had been found on Hembd’s person during the search incident to his arrest. App.’s Br. at 22. This claim is without merit because it was not properly preserved for review and because, even if it had been, the officers’ actions did not exceed the permissible scope of a search incident to arrest.

Hembd did not object at trial to the evidence at issue. Washington appellate courts generally do not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Millan*, 151 Wn. App. 492, 499, 212 P.3d 603 (2009); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). But as an exception to these rules, a party may raise an issue for the first time on appeal if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. Under the exception, the appellant must do more than identify a constitutional error; he

must show that the asserted error is “manifest,” meaning the alleged error is apparent on the record and actually affected his rights. RAP 2.5(a); *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251 (citing *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *Millan*, 151 Wn. App. at 499, citing *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251.

In *Millan* for instance, this Court held that a defendant who claimed that evidence was obtained through an illegal search was precluded from raising this issue for the first time on appeal, and stated,

Here, *Millan* asserts a constitutional issue, but his failure to file a motion to suppress the evidence, CrR 3.6, or object to its admissibility at trial on the grounds that police obtained the firearm during an illegal search, constitutes a waiver of any error associated with the admission of the evidence at trial. This rule—that a defendant waives the right to challenge the trial court's admission of evidence gained by an illegal search or seizure by failing to move to suppress the evidence at trial—has roots in early Washington State Supreme Court cases. Even before RAP 2.5 was published in 1976, case law barred defendants from raising a search and seizure claim for the first time on appeal. See *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (“Error predicated upon evidence allegedly obtained by an illegal search and seizure cannot be raised for the first time on appeal.”), *cert. denied*, 389 U.S. 871, 88 S. Ct. 156, 19 L. Ed. 2d 152 (1967); *State v. Baxter*, 68 Wn.2d 416, 423, 413 P.2d 638 (1966) (“The exclusion of improperly obtained evidence is a privilege and can be waived.”).

The rule barring defendants from raising a search and seizure claim for the first time on appeal has not changed. In

State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995), our Supreme Court stated that 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, 899 P.2d 1251; *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982) (citing *Baxter*, 68 Wn.2d 416, 413 P.2d 638, with approval), *rev'd in part on other grounds*, 99 Wn.2d 663, 672, 664 P.2d 508 (1983).

Millan, 151 Wn. App. at 499-500.

In the present case Hembd failed to challenge the use of a drug dog and failed to either file a 3.6 motion on this issue or object to the evidence at trial. As in *Millan*, this Court should find that the Hembd's failure to raise this issue below precludes him from raising this issue for the first time on appeal.

Furthermore, even if this Court were to address the drug dog issue, Hembd has failed to show that the evidence from the use of the drug dog was obtained improperly.

The State concedes that, in some cases, a canine sniff may constitute a search that requires a warrant. For example, in *State v. Dearman*, 92 Wn. App. 630, 635, 962 P.2d 850 (1998), the court held that a warrant was required to use a canine sniff on a residence. In cases involving things other than a residence, however, Washington courts have held canine sniffs do not

violate privacy rights. *State v. Stanphill*, 53 Wn. App. 623, 631, 769 P.2d 861 (1989) (court held there was no search where a canine sniff was conducted on a package at the post office); *State v. Boyce*, 44 Wn. App. 724, 730, 723 P.2d 28 (1986) (court held that a canine sniff of a safety deposit box at a bank did not require a war-rant); *State v. Wolohan*, 23 Wn. App. 813, 820, 598 P.2d 421 (1979) (court held that a canine sniff of a package being sent by a common carrier was not an illegal search because the defendant had no reason-able expectation of privacy in the area in which the examined parcel was located).

The guiding principle emerging from Washington case law is that "[a]s long as the canine sniffs the object from an area where the defendant does not have a reasonable expectation of privacy, and the canine sniff itself is minimally intrusive, then no search has occurred." *Boyce*, 44 Wn. App. at 730.

In the present case, Hembd concedes that the officers could lawfully search him incident to his arrest and that the currency in question was found on Hembd's person during the search incident to arrest. App.'s Br. at 24. Given these facts, Hembd simply cannot demonstrate that he had any expectation of privacy in evidence that the police had lawfully seized from

him during a search incident to arrest.⁴ Rather, once an officer has lawfully seized an item, the item may be tested or examined since the defendant no longer has an expectation of privacy in an item that the police have lawfully seized.⁵ See, e.g., *State v. Cheatam*, 150 Wash.2d 626, 81 P.3d 830 (2003)(“Indeed, it is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest”), citing *United States v. Edwards*, 415 U.S. 800, 806, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974).⁶

⁴ Following Hembd’s logic, officers who lawfully discovered a baggie of suspected drugs in a defendant’s pocket during a search incident to arrest would be precluded from testing that substance to prove that it was in fact a controlled substance. The State is unaware of any Washington case that has required a search warrant in such a situation. Rather, Hembd himself argued below that the officers should have conducted a “field test” on some of the suspected narcotics before applying for the warrant. See CP 39.

⁵ Hembd also argues that if this Court finds that some of the evidence should have been suppressed, then the evidence at trial was insufficient and the case should be dismissed with prejudice. App.’s Br. at 21-26. This argument is without merit both because, as outlined above, the trial court did not err and because Hembd does not allege that the actual evidence presented to the jury was insufficient. Rather, he argues that the evidence in a hypothetical trial (where the challenged evidence is suppressed) would be insufficient. Even if this Court were to hold that the trial court should have granted Hembd’s suppression motion the proper remedy would be a remand for a new trial. See *Lockhart v. Nelson*, 488 U.S. 33, 38, 40-41, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988) (finding that evidence sufficient, including evidence later determined to be inadmissible, to support sentencing enhancement; Double Jeopardy Clause does not prohibit retrial where conviction set aside for trial error); *State v. Clowes*, 104 Wn. App. 935, 946, 18 P.3d 596 (2001). On remand Hembd could bring a *Knapstad* motion if the State is unable to produce evidence to support a finding of guilt, but the State must be given the opportunity to retry Hembd if it is able to do so.

⁶ Even in his dissent in *Cheatam*, Justice Sanders noted that, “[N]o one would dispute that the police may examine and scrutinize every piece of evidence lawfully seized and kept as evidence.” *Cheatam*, 150 Wash.2d at 662.

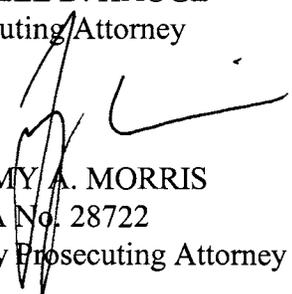
IV. CONCLUSION

For the foregoing reasons, Hembd's conviction and sentence should be affirmed.

DATED February 2, 2010.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

DOCUMENT1