

No. 347656

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

MEGAN LARES-STORMS,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

---

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

In the opening brief Ms. Lares-Storms argued her convictions should be reversed for two independent reasons, both based on settled law holding article I, section 7 is far more protective than the Fourth Amendment.

In response, the State ignores this settled law, falsely claims a *Gunwall*<sup>1</sup> analysis is necessary, and cites prosecutors' newsletters and briefs instead of the Court's opinions rejecting the very arguments made in those briefs.

This Court should reverse. The Supreme Court has made clear that article I, section 7 is more protective than the Fourth Amendment in both the vehicle context and the warrant context. The State's claims to the contrary should be rejected.

B. ARGUMENT IN REPLY

**1. The warrantless inspection of Ms. Lares-Storms's car by a drug-detection dog violated her right to privacy under article I, section 7, and the State's position is contrary to Supreme Court caselaw.**

As explained in the opening brief, a drug dog's warrantless inspection of a person's car violates the right to

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<sup>1</sup> *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

privacy guaranteed by article I, section 7. The Fourth Amendment does not prohibit the practice, but the state constitution provides much greater privacy protection in the vehicle context than the Fourth Amendment. Br. of Appellant at 7-17 (citing, inter alia, Const. art. I, § 7; *State v. Snapp*, 174 Wn.2d 177, 187, 275 P.3d 289 (2012); *State v. Tibbles*, 169 Wn.2d 364, 236 P.3d 885 (2010); *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1998)).

- a. It is well-settled that a *Gunwall* analysis is not necessary for article I, section 7; the State disregards the cases so holding and instead cites its own prior briefing as authority.

In response to the above argument, the State wrongly claims that a *Gunwall* analysis is required. Br. of Respondent at 7. The State cites two references for this proposition. The first is an inapposite case addressing article I, section 22, not article I, section 7. *See id.* (citing *State v. Mason*, 127 Wn. App. 554, 570, 126 P.3d 34 (2005)). The second is a prosecutors' amicus brief submitted in *Snapp*. Br. of Respondent at 7.

But the actual *opinion* in *Snapp* says no such thing, and the Court in *Snapp* does not perform a *Gunwall* analysis. The Court noted:

Also, as to whether a warrantless search of a vehicle for evidence of the crime of arrest is lawful under article I, section 7, the State would have us engage in a *Gunwall* analysis to determine the merits of the claims in this case. *See State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Whatever may have been the situation when *Ringer* and later *Gunwall* were decided, **it is now settled that a *Gunwall* analysis is unnecessary under article I, section 7 to determine whether it should be given independent effect.** *State v. Athan*, 160 Wn.2d 354, 365, 158 P.3d 27 (2007); *State v. McKinney*, 148 Wn.2d 20, 29, 60 P.3d 46 (2002). Rather, the only relevant question is what protection is provided in a particular context. *Athan*, 160 Wn.2d at 365, 158 P.3d 27; *McKinney*, 148 Wn.2d at 26–27, 60 P.3d 46.

*Snapp*, 174 Wn. 2d at 193 n.9 (emphasis added).<sup>2</sup>

*Snapp*'s rejection of the prosecutors' claim was consistent with earlier cases. Fourteen years ago the Court declared, "It is now settled that article I, section 7 is more

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<sup>2</sup> Although it is perplexing that the State repeatedly cites its own briefing in a prior case instead of actual authority, if this Court is inclined to read that briefing, Ms. Lares-Storms asks that the Court also read Mr. Snapp's Answer to the WAPA amicus brief. The Court ultimately agreed with the Answer, not the WAPA brief. It is available at: <http://www.courts.wa.gov/content/Briefs/A08/842230%20answer%20to%20WAPA%20amicus.pdf>.

protective than the Fourth Amendment, and a *Gunwall* analysis is no longer necessary.” *State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217, 222 (2003). In an earlier article I, section 7 case, the Court similarly stated, “Although the parties have engaged in a *Gunwall* analysis, no *Gunwall* analysis is necessary.” *State v. Vrieling*, 144 Wn.2d 489, 495, 28 P.3d 762 (2001) (internal citation omitted).

Other cases are in accord. In *State v. Eisfeldt*, 163 Wn.2d 628, 636 n.5, 185 P.3d 580 (2008), the Court rejected the Fourth Amendment’s private search doctrine as incompatible with article I, section 7, and noted no *Gunwall* analysis was necessary. In *State v. Morse*, 156 Wn.2d 1, 12, 123 P.3d 832 (2005), the Court declined to adopt the Fourth Amendment’s “apparent authority” doctrine in context of consent to search home. Rejecting a concurring justice’s opinion that a *Gunwall* analysis was required, the Court stated, “We have ... repeatedly held that article I, section 7 provides greater protection of individual privacy than the Fourth Amendment.” *Id.* at 10; *compare id.* at 16 n.1 (Fairhurst, J., concurring). And in *State v. White*, 135 Wn.2d

761, 768-69, 958 P.2d 982 (1998), the Court held that the warrantless search of a vehicle trunk violated article I, section 7, and no *Gunwall* analysis was required.

In sum, it is well-settled that article I, section 7 provides much stronger privacy protection than the Fourth Amendment, and no *Gunwall* analysis is necessary. The State's argument to the contrary, citing its own prior briefing rather than legal authority, should be rejected.

- b. The State fails to appreciate article I, section 7's strong privacy protection for vehicles.

On the merits of the issue, the State makes the same mistake. It relies on the prosecutors' amicus brief in *Snapp* for the proposition that article I, section 7 protects nothing more than "papers and business affairs" and that "there is no textual difference between the Washington and federal constitution as to this provision to support an interpretation that Washington drafters intended extra protections of privacy." Br. of Respondent at 8-9.

The Supreme Court has rejected this position on countless occasions, beginning decades ago. In *Gunwall*, for example, the Court held:

[T]he language of the federal constitution is substantially different from that of the parallel provision of our state constitution. This is particularly true in that unlike the federal constitution, our state constitution expressly provides protection for a citizen's "private affairs". In a number of cases, this court has held that this difference in language is material and allows us to render a more expansive interpretation to article 1, section 7.

*Gunwall*, 106 Wn.2d at 65 (holding article I, section 7, unlike the Fourth Amendment, guarantees a right to privacy in the telephone numbers called). Numerous cases followed recognizing privacy in items other than papers and business affairs. *E.g. State v. Boland*, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990) (unlike Fourth Amendment, article I, section 7 protects privacy in personal garbage); *State v. Young*, 123 Wn.2d 173, 183, 867 P.2d 593 (1994) (use of infrared device invades private affair even though it only revealed heating patterns, not papers or business affairs); *Jackson*, 150 Wn.2d at 262 (GPS tracking intrudes into private affairs protected by article I, section 7).

Article I, section 7 is particularly protective of the right to privacy in cars. In *Snapp* itself, the Court disagreed with the brief the State repeatedly cites here, and once again held that article I, section 7 is more protective in the vehicle context than the Fourth Amendment. *Snapp*, 174 Wn.2d at 182.

Daniel Snapp was arrested for possession of drug paraphernalia, among other things. *Snapp*, 174 Wn.2d at 184. Officers then searched his car without a warrant and found evidence of additional crimes for which Mr. Snapp was charged and convicted. *Id.* Mr. Snapp lost a motion to suppress and Division Two affirmed on the ground that the officers were permitted to search the car for evidence related to drug paraphernalia. *Id.* The court relied on a federal Fourth Amendment case holding that officers who arrest a person from a car may search that car without a warrant any time there is reason to believe evidence of the crime of arrest will be found in the car. *Snapp*, 174 Wn.2d at 184-85

(citing *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)).<sup>3</sup>

The Supreme Court reversed. *Snapp*, 174 Wn.2d at 197. It noted, “[t]he protections guaranteed by article I, section 7 are qualitatively different from those under the Fourth Amendment.” *Id.* at 187. Under the Fourth Amendment, the warrantless search of Mr. Snapp’s car was permissible because of “circumstances unique to the vehicle context.” *Id.* at 191 (quoting *Gant*, 556 U.S. at 332). Those same circumstances justify the “automobile exception” to the warrant requirement under the Fourth Amendment, whereby officers may search a car based on probable cause alone. *Snapp*, 174 Wn.2d at 191. But the automobile exception does not exist under article I, section 7, which provides much stronger protection of privacy in automobiles than the Fourth Amendment. *Id.* at 192; *Tibbles*, 169 Wn.2d at 369.

Thus:

“[W]hen a search can be delayed to obtain a warrant without running afoul of” concerns for the safety of the officer or to preserve evidence of the crime of arrest from concealment or

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<sup>3</sup> Another defendant’s case was consolidated and raised the same issue. See *Snapp*, 174 Wn.2d at 185-87.

destruction by the arrestee “(and does not fall within another applicable exception), the warrant **must be obtained.**”

*Snapp*, 174 Wn.2d at 195 (quoting *State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009)) (emphasis in *Snapp*). The Court concluded the officers violated article I, section 7 when they searched Mr. Snapp’s car for evidence related to drug paraphernalia without first obtaining a warrant. *Snapp*, 174 Wn.2d at 197.

*Snapp* is one of many cases holding article I, section 7 is more protective than the Fourth Amendment in the vehicle context. See Br. of Appellant at 10-12 (citing *Snapp*, 74 Wn.2d at 192; *Tibbles*, 169 Wn.2d at 369; *Ladson*, 138 Wn.2d at 352-53; *Mesiani*, 110 Wn.2d at 456-57). The State acknowledges these opinions, as it must, but protests that the issue in each of these cases was slightly different than the issue here. Br. of Respondent at 7-8. This is obviously true, but misses the point. The point is that our Supreme Court has repeatedly held that article I, section 7 is more protective of the right to privacy in cars than the Fourth Amendment. Consistent with these cases, this Court should

hold that article I section 7 prohibits the police from using a drug-detection dog to inspect a car without a warrant.<sup>4</sup>

Another relevant case is *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004). There, the Supreme Court addressed two consolidated appeals in which officers had requested or demanded identification from passengers after stopping cars, without any individualized suspicion that the passengers had committed crimes. *Id.* at 692-93. The encounters led to the discovery of drugs and criminal charges. *Id.* The defendants argued that the officers' demands for their identification violated article I, section 7. *Id.* at 694.

In addressing the issue, the Supreme Court recognized that some courts in other states had held such conduct did not violate the Fourth Amendment. *Id.* at 698. But it noted:

It is well-settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution. Therefore, we need not engage in

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<sup>4</sup> The State is wrong in stating that *Tibbles* is inapposite because "here the car was not subject to a warrantless search." Br. of Respondent at 8. Contrary to the State's claim, the car was subject to a warrantless search by a drug-detection dog. That is the very issue before the Court.

an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

*Rankin*, 151 Wn.2d at 694 (internal citations omitted).

The Court also acknowledged its prior holding that officers may request identification from pedestrians without invading a “private affair.” *Id.* at 697 (citing *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998)). But it emphasized that article I, section 7 provides stronger privacy protection in the automobile context than in the pedestrian context. *Id.* Thus, the Court rejected the State’s contention that no “seizure” occurred for constitutional purposes and instead determined that the defendants had been “unconstitutionally detained[.]” *Id.* at 695. The Court concluded, “under article I, section 7, law enforcement officers are not permitted to request identification from a passenger for investigatory purposes unless there is an independent basis to support the request.” *Rankin*, 151 Wn.2d at 699.

Similarly here, this Court should reject the State’s claim that no “search” occurred for constitutional purposes, and should hold that under article I, section 7, officers are

not permitted to inspect a car with a drug-detection dog absent a warrant or an exception to the warrant requirement.

- c. The State wrongly relies on a Fourth Amendment “reasonableness” analysis, which is inapplicable under article I, section 7.

In the opening brief, Ms. Lares-Storms acknowledged Division One’s opinion in *Hartzell*, but urged this Court to part company with Division One in light of the numerous Supreme Court cases discussed above and in the opening brief, as well as the holding in *Dearman* forbidding warrantless dog sniffs of homes. Br. of Appellant at 12-15 (discussing *State v. Hartzell*, 156 Wn. App. 918, 928-30, 237 P.3d 928 (2010); *State v. Dearman*, 92 Wn. App. 630, 631, 962 P.2d 850 (1998)). The State concedes that *Dearman* held a warrantless canine sniff of a home violates article I, section 7. Br. of Respondent at 11 n.1. But the State relies on cases upholding warrantless canine sniffs of packages and safety deposit boxes to argue the same should be true for cars. Br. of Respondent at 5-6. The State is wrong, because cars are different from packages. *Cf. Rankin*, 151 Wn.2d at 697

(article I, section 7 provides stronger protection for passengers than for pedestrians); *State v. Parker*, 139 Wn.2d 486, 495, 987 P.2d 73 (1999) ("preexisting Washington law indicates a general preference for greater privacy for automobiles ... than the Fourth Amendment.").

The State is also wrong because, as discussed in the opening brief, the cases it relies on employed a Fourth Amendment "reasonableness" analysis instead of an article I, section 7 "private affair" analysis. Br. of Appellant at 12-14 (citing *Snapp*, 174 Wn.2d at 194; *Eisfeldt*, 163 Wn.2d at 636-37; *Boland*, 115 Wn.2d at 580). The Response Brief's single-sentence response to this problem does not make sense. Br. of Respondent at 12 ("This does not mean reasonableness does not enter into a *Gunwall* analysis, but only that the rule resulting from such an analysis will be a bright line.").

The State improperly implies the Supreme Court endorsed *Hartzell* in *State v. Mecham*, 186 Wn.2d 128, 147, 380 P.3d 414 (2016). Br. of Respondent at 5-6. The Court did no such thing. *Mecham* was a 4-1-2-2 opinion, and the sentence the State extracts came from a minority of four

justices. *See Mecham*, 186 Wn.2d at 130-31 (explaining split).

Furthermore, the issue in the case was not whether dog sniffs of vehicles implicate private affairs, but whether a field sobriety test is a search or seizure subject to constitutional protection. Five justices held such tests *are* seizures that must be justified by reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1, 9, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). *Mecham*, 186 Wn.2d at 130. Ms. Lares-Storms similarly urges this Court to conclude that a drug-detection dog's inspection of a car is a search that must be authorized by a warrant or an exception to the warrant requirement. Br. of Appellant at 7-17.

Finally, the State erroneously claims that Ms. Lares-Storms asks for "reversal of a significant body of case law[.]" The opposite is true. Ms. Lares-Storms asks this Court to disagree with one Division One opinion and instead follow *numerous* Washington Supreme Court cases holding that article I, section 7 is far more protective of privacy than the Fourth Amendment, especially in the context of automobiles.

Ms. Lares-Storms asks this Court to apply *Dearman* to the vehicle context in light of this significant body of Supreme Court caselaw. The State asks this Court to disregard these Supreme Court cases interpreting article I, section 7. This Court should decline the request.

In sum, Ms. Lares-Storms asks this Court to hold that under article I, section 7, a drug-detection dog's inspection of a car must be authorized by a warrant or an exception to the warrant requirement.

d. Absent the dog's alert, the State lacked probable cause to support the warrant; the State's failure to respond to this issue should be considered a concession.

As explained in the opening brief, after excising the unconstitutional dog alert from the warrant application, the remaining information is insufficient to support the search warrant. Br. of Appellant at 16-17 (citing *State v. Neth*, 165 Wn.2d 177, 179, 196 P.3d 658 (2008)).

The State does not respond to this argument. The omission should be considered a concession that the remaining evidence does not rise to the level of probable cause. See *United States v. Caceres-Olla*, 738 F.3d 1051,

1054 n. 1 (9th Cir. 2013). Accordingly, this Court should reverse the convictions and remand with instructions to suppress the evidence and dismiss the charges with prejudice. *See State v. Gatewood*, 163 Wn.2d 534, 542, 182 P.3d 426 (2008).

**2. The State failed to prove the dog could reliably detect the unlawful presence of controlled substances.**

As explained in the opening brief, even if this Court disagrees that the warrantless inspection of Ms. Lares-Storms's car by a drug-detection dog violated article I, section 7, it should nevertheless reverse. The dog's alert should have been disregarded because the State failed to prove reliability.

Just as article I, section 7 is more protective than the Fourth Amendment in the automobile context, it is also more protective in the warrant context. Washington adheres to strict standards of reliability using a two-part test, while the federal Fourth Amendment applies a less-rigorous totality-of-circumstances analysis. Under article I, section 7's stricter standard, the State failed to prove the reliability of the dog in

this case, providing an independent basis for reversal. Br. of Appellant at 17-25 (citing, inter alia, *Florida v. Harris*, 568 U.S. 237, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013); *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984)).

- a. The issue is properly before this Court because it is a manifest error affecting a constitutional right.

The State first asserts that because this precise issue was not argued below, it is waived. Br. of Respondent at 12-13. The State is wrong, because the issue presented is a manifest error affecting a constitutional right. RAP 2.5(a)(3). So long as the record is sufficient to review the issue, an appellant may raise a constitutional violation that was not raised at trial. *State v. Kirwin*, 165 Wn.2d 818, 823-24, 203 P.3d 1044 (2009) (addressing merits of article I, section 7 issue not raised in trial court pursuant to RAP 2.5(a)(3)); *State v. Jones*, 163 Wn. App. 354, 359, 266 P.3d 886 (2011) (same); *State v. Contreras*, 92 Wn. App. 307, 313-14, 966 P.2d 915 (1998) (same). Here, because there was a CrR 3.6

hearing, the record contains the search warrant and the affidavit and request for search warrant, and therefore the issue is properly before this Court. CP 28-40.

- b. The State does not dispute that article I, section 7 is more protective in this context.

As noted, our Supreme Court adhered to stricter standards of reliability under article I, section 7 even after the U.S. Supreme Court weakened the standards applicable under the Fourth Amendment. *Jackson*, 102 Wn.2d at 438, 441-42. Br. of Appellant at 17-21. The State does not dispute this point. It argues only that it did, in fact, prove that its dog could reliably detect contraband. Br. of Respondent at 13-16. The State is wrong.

The police presented no evidence that their dog could reliably detect contraband *without* alerting to residue on currency, prescription drugs, or other scents unrelated to a driver's potential criminal activity. Stated differently, the detective failed to present the dog's track record of false positives (not to mention false negatives). Without such information, the claim that the dog "performed over 400

applications where controlled substances were discovered and/or the odors of controlled substances were present” is meaningless. Br. of Appellant at 21-24; *see Illinois v. Caballes*, 543 U.S. 405, 411-12, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) (Souter, J., dissenting). This is common sense; the State’s claim that expert testimony is required on this issue is without merit. Br. of Respondent at 14. *See Harris v. State*, 71 So.3d 756, 767, 669 (Fla. 2011)<sup>5</sup>; *State v. England*, 19 S.W.3d 762, 768 (Tenn. 2000); Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 425 (1997)).

The State complains that “false positive” is a misnomer because “[t]he absence of contraband does not indicate the absence of a scent.” Br. of Respondent at 15. Appellant agrees that the failure to find contraband following a dog’s

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<sup>5</sup> The State complains that Ms. Lares-Storms cited the Florida Supreme Court’s opinion in *Harris* even though it was withdrawn in light of the reversal by the U.S. Supreme Court. Br. of Respondent at 15-16. Ms. Lares-Storms understands and already acknowledged that the U.S. Supreme Court reversed the Florida Supreme Court under the Fourth Amendment. But because article I, section 7 is *more* protective than the Fourth Amendment, the Florida Supreme Court’s thorough analysis of the issue – and its application of stricter standards of reliability – is persuasive authority and provides relevant guidance.

alert does not necessarily mean the *dog* did something wrong. But this is not the point. The point is that if, in a nontrivial percentage of encounters, the dog is alerting to a scent *other* than current possession of contraband, then the dog is not a reliable informant of criminal activity. Indeed, the State concedes that “[a] dog may alert to an odor when the substance which left the odor is long gone or present in an inconsequential amount.” Br. of Respondent at 15.

Washington citizens must not be subject to violations of their privacy based on such alerts.

In sum, the State failed to prove the dog’s reliability under the strict standards required by article I, section 7. For this independent reason, the convictions should be reversed and the case remanded for suppression of the evidence and dismissal of the charges. Br. of Appellant at 17-25.

C. CONCLUSION

For the reasons set forth above and in the opening brief, Ms. Lares-Storms asks this Court to reverse her convictions and remand with instructions to suppress the evidence and dismiss the charges with prejudice.

Respectfully submitted this 31<sup>st</sup> day of August, 2017.

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

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

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, NINA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF AUGUST, 2017, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF AUGUST, 2017.

x 

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# WASHINGTON APPELLATE PROJECT

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