

No. 68422-1-I

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

---

STATE OF WASHINGTON,

Respondent

v.

EDWARD IVAN KOHLWES,

Appellant.

---

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

---

APPELLANT'S REPLY BRIEF

---

RABI LAHIRI  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 JUN -6 PM 4:43

**TABLE OF CONTENTS**

A. ARGUMENT ..... 1

1. Mr. Kohlwes's extended detention cannot be justified by suspicion of driving under the influence, because the record shows that it was based only on the suspicion of possessing an illicit substance. .... 1

2. Whether a dog sniff is a search under article I, section 7 depends on the totality of the circumstances, and the sniff was a search in this case because it invaded Mr. Kohlwes's private affairs. .... 2

3. The validity of a search warrant may be challenged for the first time on appeal. .... 4

4. The search warrant was not supported by probable cause because the supporting affidavits failed to establish that the allegations were based on reliable information. .... 5

B. CONCLUSION ..... 6

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

*State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999) ..... 1

*State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993)..... 4

*State v. Woodall*, 100 Wn.2d 74, 666 P.2d 364 (1983) ..... 6

*State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994)..... 3

**Washington Court of Appeals Decisions**

*State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986) ..... 2, 3

*State v. Dearman*, 92 Wn. App. 630, 962 P.2d 850 (1998)..... 2, 3

<i>State v. Hartzell</i> , 153 Wn. App. 137, 221 P.3d 928 (2009).....	3
<i>State v. Stanphill</i> , 53 Wn. App. 623, 769 P.2d 861 (1989) .....	5
<i>State v. Wolohan</i> , 23 Wn. App. 813, 598 P.2d 421 (1979) .....	3

**United States Supreme Court Decisions**

<i>Illinois v. Caballes</i> , 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005).....	1
----------------------------------------------------------------------------------------------	---

**Decisions of Other Jurisdictions**

<i>United States v. Diaz</i> , 25 F.3d 392 (6th Cir. 1994) .....	5
<i>United States v. Lingenfelter</i> , 997 F.2d 632 (9th Cir. 1993) .....	5
<i>United States v. Spetz</i> , 721 F.2d 1457 (9th Cir.1983) .....	5

**Constitutional Provisions**

Const. art. I, § 7 .....	1, 2, 3
--------------------------	---------

**Rules**

RAP 2.5(a)(3) .....	4
---------------------	---

**A. ARGUMENT**

- 1. Mr. Kohlwes's extended detention cannot be justified by suspicion of driving under the influence, because the record shows that it was based only on the suspicion of possessing an illicit substance.**

The State claims that Deputy Phillips was entitled to detain Mr. Kohlwes while awaiting a drug-detection dog because the presence of drugs inside the car would have had evidentiary value in a prosecution for driving under the influence, for which Deputy Phillips had developed a reasonable suspicion. Br. of Resp't at 3-4. This contention is incorrect.

The permissible scope of an investigative detention is limited by the justification for that detention. *Illinois v. Caballes*, 543 U.S. 405, 407-08, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005). Under article I, section 7 of the Washington Constitution, a detention that is conducted for an unlawful reason is unconstitutional, even if the detention might have been permissible if based on some other grounds. *State v. Ladson*, 138 Wn.2d 343, 353, 979 P.2d 833 (1999). Deputy Phillips specifically testified that he detained Mr. Kohlwes to wait for the K-9 unit in order to investigate possible possession of a controlled substance, not driving under the influence. RP 22-23. Because Deputy Phillips' testimony left

no question that the actual justification for the detention was to investigate possession of drugs, the detention was permissible only if he had a reasonable suspicion that Mr. Kohlwes currently possessed an illicit substance. Whether the presence of drugs would have been relevant to a prosecution for driving under the influence is irrelevant, because that was not the crime Deputy Phillips was investigating.

**2. Whether a dog sniff is a search under article I, section 7 depends on the totality of the circumstances, and the sniff was a search in this case because it invaded Mr. Kohlwes's private affairs.**

The State next contends that the drug dog's sniff was not a search because in prior Washington cases, "when drug dogs did not intrude into the area near a residence, the use of such dogs did not constitute a 'search.'" Br. of Resp't at 7. This statement, however, incorrectly implies that Washington courts have held that such sniffs are only searches when conducted in an area near a residence. They have not. Rather, the courts have held that the key question is whether a sniff "unreasonably intrude[s] into the defendant's private affairs." *State v. Boyce*, 44 Wn. App. 724, 729-30, 723 P.2d 28 (1986); *see also State v. Dearman*, 92 Wn. App. 630, 635-36, 962 P.2d 850 (1998).

In considering whether a dog sniff invaded this interest, courts have considered the totality of the circumstances, including factors

such as whether the defendant was present at the time, the nature of the object searched, whether the object was seized in order to conduct the search, whether the object was near the defendant at the time of the search, and whether the defendant was seized in order to facilitate the search. *Boyce*, 44 Wn. App. at 730; *State v. Wolohan*, 23 Wn. App. 813, 820 n. 5, 598 P.2d 421 (1979); *State v. Hartzell*, 153 Wn. App. 137, 146-47, 221 P.3d 928 (2009).

As noted in Mr. Kohlwes's opening brief, Washington courts have consistently held that people have a heightened privacy interest in the contents of their vehicles.<sup>1</sup> *See* Appellant's Opening Br. at 14-15. In this case, Mr. Kohlwes's detention was extended solely to wait for the dog and he was forced to exit his vehicle and wait outside, in public and in the rain. Even if any one of these intrusions, standing alone, might not have qualified as a search in other cases, their cumulative effect in this case was to unreasonably intrude upon Mr. Kohlwes's private affairs. The sniff was therefore a search under article I, section 7.

---

<sup>1</sup> It is no answer to claim that the sniff was only of the outside of the vehicle, and thus that Mr. Kohlwes had no privacy interest in the area searched. Our Supreme Court rejected an identical argument in the context of a thermal scan of the outside of a home in *State v. Young*, 123 Wn.2d 173, 183, 867 P.2d 593 (1994), and this Court acknowledged that the reasoning of *Young* applies equally to dog sniffs in *Dearman*, 92 Wn. App. at 635.

**3. The validity of a search warrant may be challenged for the first time on appeal.**

The State claims that Mr. Kohlwes may not challenge the constitutionality of the search warrant because "[i]n general, claims of unlawful search and seizure cannot be raised for the first time on appeal." However, under RAP 2.5(a)(3), a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. The constitutional sufficiency of a search warrant is, by definition, an issue that affects a constitutional right. Whether the issue is "manifest" within the meaning of RAP 2.5(a)(3) turns on whether there are sufficient facts in the record to allow effective appellate review. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

The record in this case adequately supports appellate review. The claim of error—that the supporting affidavits failed to establish probable cause—may be fully evaluated by examining the face of the affidavits, which are in the record. Thus, Mr. Kohlwes has identified a manifest error affecting a constitutional right that he is entitled to raise for the first time on appeal. RAP 2.5(a)(3).

**4. The search warrant was not supported by probable cause because the supporting affidavits failed to establish that the allegations were based on reliable information.**

The State argues that the dog's alert was sufficient to provide probable cause because the affidavits established that both he and his handler had received training in drug detection. Br. of Resp't at 10-12. But in order to properly rely on a dog's alert, the affidavit must establish not only that the dog has received training, but also that the dog is reliable. *See State v. Stanphill*, 53 Wn. App. 623, 632, 769 P.2d 861 (1989) (holding that a dog's alert may provide probable cause when his credibility *and* reliability have been established); *United States v. Lingenfelter*, 997 F.2d 632 (9th Cir. 1993) ("A canine sniff alone can supply the probable cause necessary for issuing a search warrant *if the application for the warrant establishes the dog's reliability.*") (emphasis added) (citing *United States v. Spetz*, 721 F.2d 1457, 1464 (9th Cir.1983)); *United States v. Diaz*, 25 F.3d 392 (6th Cir. 1994) ("For a positive dog reaction to support a determination of probable cause, the training *and reliability* of the dog must be established.") (emphasis added).

In this case, the affidavits provided information about the dog's training, but the only information given about his reliability was that

his "success rate" was "in the nineties." CP 58. As discussed in the opening brief, this "success rate" is utterly meaningless without defining how it is measured. *See* Appellant's Opening Br. at 23-26. Even if it might be possible in some circumstances to establish a dog's reliability without relying specifically on the rates of false positives and false negatives, it is impossible to do so in a case like this, where the dog's purported reliability is established only by an undefined "success rate." Without disclosing the underlying error rates, the affidavit's claim of reliability in this case is no more than a conclusory assertion by the officer that his "informant"—the dog—is reliable. Our Supreme Court has long held such an assertion inadequate to support probable cause, because it deprives the issuing magistrate of any independent basis on which to assess the reliability of the factual allegations. *State v. Woodall*, 100 Wn.2d 74, 75-77, 666 P.2d 364 (1983). Because the affidavits therefore failed to establish the reliability of the information on which the factual allegations were based, the search warrant was issued without probable cause.

## **B. CONCLUSION**

For the reasons stated above and those in the opening brief, Mr. Kohlweh asks this Court to hold that the search warrant was issued

without probable cause, suppress the evidence gained in reliance on the warrant, and vacate his conviction.

DATED this 6th day of June, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Lahiri', written over a horizontal line.

Rabi Lahiri, WSBA No. 44214  
Washington Appellate Project  
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68422-1-I
	)	
EDWARD KOHLWES,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6<sup>TH</sup> DAY OF JUNE, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |                                                                                                               |                                                          |
|---------------------------------------------------------------------------------------------------------------|----------------------------------------------------------|
| <p>[X] SETH FINE, DPA<br/>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br/>3000 ROCKEFELLER<br/>EVERETT, WA 98201</p> | <p>(X) U.S. MAIL<br/>( ) HAND DELIVERY<br/>( ) _____</p> |
| <p>[X] EDWARD KOHLWES<br/>5021 RIVERSIDE AVE.<br/>EVERETT, WA 98201</p>                                       | <p>(X) U.S. MAIL<br/>( ) HAND DELIVERY<br/>( ) _____</p> |

FILED  
 COURT OF APPEALS DIV 1  
 STATE OF WASHINGTON  
 2013 JUN -6 PM 4:43

**SIGNED** IN SEATTLE, WASHINGTON, THIS 6<sup>TH</sup> DAY OF JUNE, 2013.

x \_\_\_\_\_ *grub*