

EMP

NO. 63239-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

WINDY PLEADWELL,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION ONE  
STATE OF WASHINGTON  
2010 APR 12 PM 3:54

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

The Honorable Ira J. Uhrig, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY<sup>1</sup>

PLEADWELL DID NOT WAIVE HER CHALLENGE TO THE WARRANTLESS DOG SNIFF.

Windy M. Pleadwell argues on appeal the marijuana found inside her car should have been suppressed because police unlawfully obtained evidence through the warrantless dog sniff of the exterior of the vehicle. Brief of Appellant (BOA) at 7-21. Pleadwell anticipated the state would claim she waived the issue by failing to raise it at trial and argued against the waiver claim. BOA at 21-23.

Predictably, the state has argued Pleadwell waived the issue. Brief of Respondent (BOR) at 7-9. In support, the state relies in part on State v. Mierz, 127 Wn.2d 460, 901 P.2d 286 (1995). The Court found Mierz waived a suppression argument, made for the first time on appeal, because he had not filed a motion to suppress evidence or argue for suppression at all during trial proceedings. Mierz, 127 Wn.2d at 468. The Supreme Court cited the appellate court's following reasoning in support of its unremarkable holding:

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<sup>1</sup> Pleadwell replies only to the state's claim she waived her challenge to the dog sniff by not adequately raising it in the trial court. She rests on her Brief of Appellant with respect to whether the dog sniff constituted a search under the Washington Constitution and whether the officer exceeded the limited scope of a protective frisk by opening a pill bottle and finding illegal drugs.

As a preliminary matter, we note that it is not clear from the parties' briefs whether Mierz' original trial counsel moved to suppress evidence obtained as a result of the agents' entry into his yard. Mierz argues that the trial court should have granted a motion to suppress the evidence as the fruits of an unlawful entry, suggesting that his counsel did move to suppress this evidence. The State asserts his attorney never moved to suppress this evidence. We find no indication in the record that a motion to suppress was brought, and we treat this issue as one raised for the first time on appeal.

State v. Mierz, 72 Wn. App. 783, 789, 866 P.2d 65 (1994). This Court held a "trial court does not err in considering evidence that the defendant has not moved to suppress." Mierz, 72 Wn. App. at 789.<sup>2</sup>

Pleadwell agrees that where a party files no motion to suppress evidence at trial, she cannot be heard to contend the trial court erred by sue sponte failing to suppress evidence. Aside from being an obvious statement of the waiver rule, this assertion summarizes CrR 3.6(a), which requires a litigant to file a written motion to suppress evidence in order to raise the issue in the trial court.

As set forth in the Brief of Appellant at 21-23, Pleadwell not only filed a written motion to suppress, but the trial court held an evidentiary

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<sup>2</sup> The other case the state cites is State v. Tarica, 59 Wn. App. 368, 798 P.2d 296 (1990), overruled on other grounds, State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). This Court held "there was no *error* in the trial court proceedings below" because Tarica did not move to suppress evidence in the trial court at all. Tarica, 59 Wn. App. at 372-73. Tarica is therefore distinguishable from Pleadwell's case for the same reason.

hearing and made written findings of fact and conclusions of law in support of its denial of the motion. Contrary to the state's assertion at page 9 of its Brief, the record – including the dog's entry onto the scene and exterior sniff -- was fully developed.

Even if this Court concludes Pleadwell did not specifically preserve the "dog sniff" argument, it should review the issue nonetheless because Pleadwell has raised a manifest error affecting a constitutional right. Courts have held an issue involving an unlawful search is of manifest constitutional error and therefore reviewable for the first time on appeal. State v. Harris, 154 Wn. App. 87, 94, 224 P.3d 830 (2010); State v. Littlefair, 129 Wn. App. 330, 338, 119 P.3d 359 (2005); State v. Contreras, 92 Wn. App. 307, 313-14, 966 P.2d 915 (1998) (where adequate record exists, appellate court can review suppression issue, even in absence of motion or trial court ruling thereon).

Pleadwell therefore urges the Court to reject the state's assertion she waived the "dog sniff" issue in this Court.

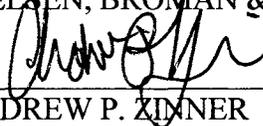
B. CONCLUSION

For the reasons cited herein and in her Brief of Appellant, Pleadwell requests this Court to reverse the trial court's denial of her motion to suppress evidence and remand for dismissal with prejudice.

DATED this 12 day of April, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
\_\_\_\_\_  
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WSBA No. 18631

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	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12<sup>TH</sup> DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE  
WHATCOM COUNTY COURTHOUSE  
311 GRAND AVENUE  
BELLINGHAM, WA 98227
  
- [X] WINDY PLEADWELL  
P.O. BOX 2340  
FERNDALE, WA 98248

**SIGNED** IN SEATTLE WASHINGTON, THIS 12<sup>TH</sup> DAY OF APRIL, 2010.

x *Patrick Mayovsky*