68335-7

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No. 68335-7-I

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

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**STATE OF WASHINGTON, Respondent,**

**vs.**

**TERESA MARIE RUSSELL, Appellant.**

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## BRIEF OF RESPONDENT

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## A. ASSIGNMENTS OF ERROR

None.

## B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether any additional remedy is necessary where the findings of fact/conclusions of law regarding pretrial motions were initially signed by a judge who hadn't heard the pretrial motions, but where the findings and conclusions have now been signed and entered by the judge who did hear the motions and the findings and conclusions do not differ substantially from those originally signed.

2. Whether an erroneous finding as to when the passenger gave her purse to the deputy and whether the erroneous written findings that the passenger testified at the CrR 3.6 hearing substantially affect the trial court's conclusions where the court concluded that the passenger's consent to search was voluntary and defendant on appeal does not contest the consensual nature of the search and where the trial court's ruling at the time was not predicated on the trial testimony of the passenger and the relevant substance of the findings was otherwise testified to in the CrR 3.6 hearing.

3. Whether the trial court's denial of the motion to suppress can be upheld on the court's alternative ruling that the passenger voluntarily consented to the search of her purse and person where defendant didn't contest the voluntariness of the passenger's consent below and does not contest it on appeal.

4. If the appellate court does not affirm on the alternative ruling for the suppression motion, whether the defendant had automatic standing to contest the search of the passenger's purse and person where the passenger removed her purse from the defendant's car, had been told she was free to leave, the defendant was handcuffed in the back of the patrol car at the time of the search and the defendant

disavowed possessing the drugs or drug paraphernalia at the scene.

5. Whether the sentencing judge categorically refused to consider defendant's request for sentencing alternatives where the judge stated before sentencing that he didn't know if he'd be inclined to sentence outside the standard range since he hadn't heard the trial testimony but where the judge subsequently considered the sentencing memoranda and indicated that given defendant's long criminal history a mid-standard range sentence would be appropriate.

## C. FACTS

### 1. Procedural.

Appellant Teresa Russell was initially charged with Unlawful Possession of a Controlled Substance, to-wit: Cocaine, but ultimately went to trial on the unlawful possession charge as well as one count of bail jumping, one count of intimidating a witness, and one count of tampering with a witness. CP 89-91, 118-19. Russell filed pretrial motions to dismiss the case and for suppression of evidence, which were heard and denied by Judge Snyder. CP 121-30; SRP 97-98, 115-120.[1] At trial the jury found her guilty only of the unlawful possession of a controlled substance and the bail jumping counts. CP 49.

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[1] The verbatim report of proceedings for pretrial motions and the trial are referenced by "RP" and for sentencing as "SRP."

## 2. Substantive[2].

On January 9, 2010, Russell was observed by Whatcom County Sherriff deputies driving away from a gas station. RP 11-13, 35. The deputies were aware that there was probable cause to arrest her for rendering criminal assistance. RP 12. One of the deputies activated his lights, and while Russell slowed the car down, she did not pull over and stop, despite room to do so. RP 13, 36. That deputy, Dep. Gervol, saw Russell lean over to the right and furtively move her arm around in the passenger side of the car. RP 14. Once Russell finally pulled over, Dep. Gervol approached the car and arrested Russell for rendering criminal assistance. Supp. CP ___, Sub Nom. 117 (hereinafter "FF"), FF 1; RP 15, 37.

Russell waived her Miranda rights and told the deputies that she needed her methadone which was in the car, or she would get sick.[3] FF 2; RP 16, 37-40. Russell voluntarily consented to a search of her car. FF 2; RP 17. Helen Kluck, who had been a passenger in the car, was asked to exit the car so that the canine could search the car for drugs and was told

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[2] As Russell does not challenge any of the evidence submitted at trial or any rulings therein, the State addresses only the facts regarding the CrR 3.6 hearing here, some of which she does dispute. Facts regarding the sentencing hearing are addressed in that section of the brief.

[3] Russell also told the deputy that she had other pills that weren't unlawful in the car. RP 17.

that she was free to go. FF 4; RP 18, 41-42. Kluck moved away from the car but remained in the area and spoke voluntarily with Dep. Taddonio. FF 5; RP 18, 42. Russell asked the deputies to ask Helen if she would be willing to take her car so that it wouldn't be impounded. FF 5; RP 18-19, 44.

The drug dog alerted to the car but no drugs were found inside the car. FF 6. Given the dog's alert, Dep. Taddonio asked Kluck whether she was aware if there were any drugs in the car, and she immediately became nervous. RP 43-44. Kluck initially denied having any drugs on her person and started to pat herself down. RP 45. Dep. Taddonio asked her if he could search her purse, and she picked it up, opened it, and started sifting through its contents for the deputy. RP 45, 61, 63. Dep. Taddonio said something to her about wanting to look through the purse himself, and she gave the purse to him. RP 45, 63. Kluck said something about preferring he not look at the personal items in her purse, because she had tampons in it. RP 46, 63. He told her it didn't matter to him, and asked again if he could search her purse. RP 46, 63. Kluck told him she'd rather he didn't, and the deputy said he understood that she would rather he didn't, but asked again if he could search her purse, and this time she said he could. RP 46, 63.

Dep. Taddonio found a glass pipe used to smoke cocaine inside the purse, and Kluck told him Russell had given him the pipe. RP 47. Kluck appeared to be deceitful and was still acting nervous, so the deputy asked her how much narcotics she had on her, and she admitted she had some and began to reach for her pocket. RP 47. Inside her front pocket was a bindle of cocaine. RP 49. Dep. Taddonio asked if there were any other drugs and she denied any other items. RP 49. Dep. Taddonio arrested Kluck and started to place her into the patrol car. RP 49-50. While doing so, Kluck told him she had to get something for him and pulled another pipe out of her pants. RP 50. Dep. Taddonio then asked her if she had any other drugs concealed on her, and she admitted she had more cocaine in her underwear. RP 50-51. Later while she was being booked into jail, she voluntarily retrieved the cocaine and gave it to the deputy. RP 51.

At some point after her arrest, Kluck admitted to the deputy that the pipe in her purse and the cocaine in her pants pocket were hers, but the pipe and drugs inside her pants were Russell's. RP 53, 71. Kluck said that Russell had given her the items to hide when the deputies had been trying to stop them. RP 53, 71. Kluck said that they had gotten the bindles of cocaine in Burlington in Russell's car, and that it was Russell's contact from whom they had gotten the drugs. RP 53-54. Kluck said they were

headed to Russell's house to use the drugs when they were stopped. RP 54.

Once Dep. Gervol became aware that Helen had been found to have drugs on her, he told Russell that. RP 21. Russell admitted to Gervol that was true, that she herself, however, did not possess the drugs, but that they had picked the drugs up in Burlington and had intended to smoke the drugs together at her house while watching television. FF 11; RP 21-22, 55.

Russell testified at the 3.6 hearing that Kluck was an acquaintance of hers, that Kluck had asked her to drive Kluck to Burlington to pick up something someone owed Kluck. RP 74-75. Russell testified that on the way back from the grocery store, where Kluck had met up with the person, Russell told Kluck she was going home to watch movies and invited Kluck to join her. RP 75-76. Russell testified that Kluck told her that Kluck had a surprise for her, but didn't say what it was. RP 76-77. Russell testified that she didn't stop when the police tried to pull her over because she didn't realize they were behind her, there was no place to pull over in the area and she knew there was a church nearby, so she drove there so the car wouldn't have to be towed. RP 77-78. Russell testified she knew she was going to be arrested about having rendered criminal assistance to a friend, and that she may have been reaching for a cigarette in her purse or

to get the registration before she pulled over. RP 78-79. Russell denied giving any drugs or paraphernalia to Kluck and denied knowing that Kluck had drugs on her. RP 79-80. She also denied telling the deputy that Kluck had drugs on her or that they were going to share any, but testified that she did give consent for her car to be searched. RP 81.

## D. ARGUMENT

### 1. The findings of fact and order regarding the pretrial motions should have been entered by the judge who heard the motions, and the fact that they now have remedies that error.

The State concedes that the findings of fact and conclusions of law were originally signed off on by a judge who had not heard the suppression hearing and pretrial motions and who therefore could not lawfully enter the written findings of fact and conclusions of law. *See*, State v. Bryant, 65 Wn. App. 547, 829 P.2d 209 (1992) (commissioner was without authority to enter findings orally made by judge who had heard the disposition hearing). However, subsequently the judge who did hear the pretrial motions signed off on the suppression hearing findings and conclusions. The State moved pursuant to RAP 7.2(e) to permit entry of those findings, Russell did not object, and this Court granted entry of those findings and conclusions. See Supp. CP ___, Sub Nom. 117, 118, 119. As noted in the State's RAP 7.2 motion, the findings and conclusions

signed off on by Judge Snyder, the judge who heard the pretrial motions, did not differ substantively or significantly from those previously entered. Therefore, the entry of those findings by Judge Snyder remedies the previous error and no further remedy is required due to that error.

**2. Any errors the trial court made regarding the findings of fact were not significant and do not adversely affect the trial court's denial of the motion to suppress.**

Russell asserts that some of the written findings regarding the CrR 3.6 hearing are erroneous. While there are some errors in the findings, none of them substantively impact the court's conclusions of law. Russell fails to demonstrate how the errors affect the court's conclusions.[4]

In general a trial court's conclusions of law on a motion to suppress are reviewed de novo. State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2010). A trial court's decision regarding a CrR 3.6 motion is reviewed on appeal to determine whether substantial evidence supports the findings of fact, and then whether those findings of fact support the trial court's conclusions of law. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d

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[4] Furthermore, the errors contained in findings of fact no. 7, 8, 9 and 10 have no affect whatsoever on the validity of the issue of whether Russell had standing to assert a violation of Kluck's constitutional rights regarding the search of her purse. Therefore, while Russell contends the trial court erred regarding the automatic standing issue, if this Court reaches the standing issue and the trial court's ruling is affirmed, then the effect of any errors within findings of fact no. 7, 8, 9 and 10 is moot.

313 (1994). Unchallenged findings are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Challenged findings of fact supported by substantial evidence are binding. O'Neill, 148 Wn.2d at 571. Substantial evidence is evidence in the record sufficient "to persuade a fair-minded, rational person of the truth of the finding." Hill, 123 Wn.2d at 644. A court's oral findings can be used to supplement the court's written findings as long as they don't contradict the written findings. State v. Bynum, 76 Wn. App. 262, 266, 884 P.2d 10 (1994), *rev. den.*, 126 Wn.2d 1012 (1995).

*a. finding of fact no. 7*

Russell asserts that finding of fact 7 is not supported by substantial evidence in the record in that it indicates that Kluck handed the deputy her purse after the deputy asked for clarification about whether he could search it. Russell is correct that Kluck gave her purse to the deputy before the deputy ultimately clarified with Kluck as to whether or not she would consent to his searching her purse. RP 45-46, 63-64. However, whether the clarification to search came before or after Kluck gave the deputy the purse, does not change the fact that Kluck consented to the search of her purse. Moreover, Russell's CrR 3.6 motion was not predicated upon Kluck's consent to search her purse, but upon whether Kluck had been

illegally detained pursuant to State v. Larson[5] and State v. Grande[6], and whether Kluck's statements to the police were involuntary and therefore should be suppressed. RP 98-106; CP 96-106.

Russell does not contest on appeal the voluntariness of Kluck's consent. While Russell has asserted error regarding the trial court's conclusion of law no. 3, that "The search of Helen Kluck's purse, revealing used drug paraphernalia was voluntary as a product of consent and the productions of the cocaine bindle in her pocket was voluntary," Russell did not assign error to Conclusion of Law no. 1 that, "The Defendant did not possess any of the drugs at the time Helen Kluck consented to the search of her purse and person at a location well away from the Defendant and her car." Russell does not argue on appeal that the Kluck's consent was not voluntary. Therefore, the error of finding of fact in no. 7 as to when Kluck gave her purse to the deputy does not affect the validity of the trial court's conclusion that Kluck consented to the search of her purse.

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[5] State v. Larson, 93 Wn.2d 638, 611 P.2d 771 (1980).
[6] State v. Grande, 164 Wn.2d 135, 187 P.3d 248 (2008).

*b. findings of fact 8, 9 and 10*

Russell also contends there is no substantial evidence in the CrR 3.6 testimony to support findings of fact 8, 9 and 10 since Kluck did not testify at the CrR 3.6 hearing. Russell is correct that Kluck did not testify at the suppression hearing, and thus, those findings are incorrect in that they reflect that Kluck testified to certain information. However, most of what is stated to have been Kluck's testimony was in the record at the CrR 3.6 hearing based on the deputy's testimony regarding what Kluck told him, and any errors do not affect the court's conclusions regarding the denial of the motion to suppress.

While Kluck's testimony at trial did confirm the deputy's account regarding the search of her purse at the CrR 3.6 hearing, Kluck did not testify at the CrR 3.6 hearing, and as such, findings of fact no. 8, 9 and 10 are erroneous to that extent. However, the deputy's account of Kluck's voluntary consent is otherwise contained in finding of fact no. 7. Similarly, the deputy otherwise testified to much of the relevant substance contained in findings no. 9 and 10.

The deputy testified at the hearing that after he placed Kluck into the patrol car, she complained about the cuffs being too tight, so he permitted her to get out of the patrol car and took one cuff off her arm. RP 50. When he did so, Kluck pulled her arm quickly to the front, so the

deputy grabbed it. Kluck told him she had to get something for him and pulled the pipe out of her pants. RP 50. When he asked her if she had any other drugs concealed on or in her pants, she admitted that she had some more cocaine in her underwear, which she subsequently produced at the jail. RP 50-51. The deputy testified that Kluck told him that Russell had given her Russell's pipes and drugs to hide on her person when the police were trying to stop them and that was the reason for the delay in the car stopping, that Kluck told him they had obtained the drugs in Burlington from a contact of Russell's, that they had gone there in Russell's car and they had been going to Russell's residence to use the drugs when they were stopped. RP 49, 53-54.

While Kluck didn't testify at the CrR 3.6 hearing about how she produced the second pipe and drugs for the deputy and what she said after being arrested as set forth in findings of fact 9 and 10, the deputy did. Therefore, while it is erroneous that Kluck testified to those things at the CrR 3.6 hearing, the majority of what is stated in the finding no. 9 and 10 was testified to by the deputy.[7] While Kluck's trial testimony should not

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[7] The deputy did not testify that Kluck had secreted the cocaine "in her vagina," and he testified that she told him about the additional cocaine after he asked her if she had any other drugs. The deputy did not testify that Kluck told him she gave Russell her money and that Kluck had "selected the bindle from Defendant's hand." The other deputy testified that Russell told him they were going to Russell's house to watch television and to consume the drugs. RP 22.

have been included in the findings of fact for the suppression hearing, Kluck's testimony, if it had been produced at the suppression hearing, merely would have corroborated the deputy's. Furthermore, it's clear that Kluck's testimony was not before the court when it made its oral decision and obviously was not dispositive of the court's ruling on the suppression motion. Russell argues that the findings are erroneous and therefore reversal is warranted. She has failed to demonstrate how any errors in the findings render the related conclusion(s) erroneous.

### 3. This Court need not reach the issue of automatic standing because the trial court alternatively determined that the passenger's consent to search the purse was voluntary and her production of the bindle of cocaine was voluntary.

Russell also challenges the court's determination that she did not have automatic standing to contest the search of Kluck's purse and person. As noted above, the court also determined, however, that the search of the purse was not unlawful because Kluck voluntarily consented to the search and subsequently voluntarily produced the bindle of cocaine from her pocket. Arguably, Russell waived any issue regarding the search of Kluck's purse based on consent because below she only asserted that the search of the purse was unlawful as a product of Kluck's illegal detention

and her unlawfully obtained statements. RP 98-106; CP 96-106; *see*, State v. Garbaccio, 151 Wn. App. 716, 731, 214 P.3d 168 (2009), *rev. denied*, 168 Wn. 2d 1027 (2010) (defendant waives ability to assert an issue on appeal if he failed to move for suppression *on that basis* in the trial court) (emphasis added).

Setting aside the issue of waiver, Russell still has failed to demonstrate on appeal why the trial court erred in determining that Kluck voluntarily consented to the search of her purse and that her production of the cocaine was otherwise voluntary. While Russell assigned error to the court's conclusion, she does not provide any argument on appeal as to why the court's conclusion was erroneous or unsupported by the findings and therefore has abandoned the ability to contest the court's conclusion that the Kluck voluntarily consented to the search. *See*, Valley View Industrial Park v. Redmond, 107 Wn.2d 621, 630, 733 P.2d 182 (1987) (failure to brief issue to which error was assigned in opening brief abandons it on appeal); *accord*, State v. Grewe, 59 Wn. App. 141, 145, 796 P.2d 438 (1990), *rev'd in part on other grounds*, 117 Wn.2d 211 (1991) ("A party abandons assignments of error if they are not argued in its brief").

Also, as noted above, while the court's written finding about when Kluck gave the deputy her purse was erroneous, the rest of the finding of

fact no. 7 is uncontested, and the timing of the production of the purse does not provide a basis to overturn the court's ruling that the search of the purse was pursuant to Kluck's voluntary consent and the subsequent production of the first bindle of cocaine was voluntary. Moreover, while Kluck was under arrest at the time she produced the second drug pipe and second bindle of cocaine, it's clear from the facts that her production of those were voluntary: she produced the second pipe from her underwear when the deputy let her out of the patrol car to assist her with her cuffs, and she produced the second bindle at the jail prior to being searched there and after informing the deputy at the scene that she had more cocaine concealed on her person.

The trial court's conclusion that the search of Kluck's purse was pursuant to her voluntary consent and that the bindles of cocaine were voluntarily produced by Kluck should be upheld. Therefore, even if Russell could assert automatic standing to contest the search of Kluck's purse and/or person, Kluck's voluntary consent provides an independent basis for affirming the trial court's denial of the suppression motion.

a. *If the Court decides to address the automatic standing issue, the trial court did not err in determining that the automatic standing doctrine did not apply to Russell's circumstances because Russell was not in possession of the drugs at the time of the contested search.*

Russell also asserts the trial court erred in finding that she could not avail herself of the automatic standing doctrine in seeking to suppress evidence of drugs that were found on the body of her passenger and of drug paraphernalia found in her purse. No drugs or paraphernalia were found on Russell's person. Russell did not have automatic standing to assert Kluck's constitutional rights regarding the search of her person and purse because Russell was not in actual or constructive possession of the drugs *at the time of the contested search*. Moreover, the purpose of the automatic standing doctrine is to permit a defendant not to have to choose between asserting possession of the contraband at a suppression hearing and testifying at trial when his suppression testimony could be used to impeach him. Russell was not placed in this position and cannot assert a privacy interest in Kluck's purse or person. Therefore, she did not have standing to contest the search.

In general, a defendant does not have standing to assert that evidence was illegally obtained based on the violation of a third party's constitutional rights. State v. Smith, 104 Wn.2d 497, 509, 707 P.2d 1306

(1985) (defendant has no standing to object to improper search or seizure of co-defendant or third party or any evidence gained as a result thereof); State v. Pittman, 49 Wn. App. 899, 902, 746 P.2d 846 (1987), *rev. den.*, 110 Wn.2d 1015 (1988) (defendant may not "successfully object to evidence obtained directly or indirectly from an illegal stop of" other defendant). Automatic standing is an exception to a court's inquiry as to whether the defendant had a legitimate expectation of privacy in the item or place searched when a defendant challenges a search as unlawful. State v. Zakel, 119 Wn. 2d 563, 570-71, 834 P.2d 1046, 1050 (1992).

The purpose of the automatic standing doctrine is to address the potential conflict a defendant faces in exercising his Fourth and Fifth Amendment rights. State v. Williams, 142 Wn. 2d 17, 23, 11 P.3d 714 (2000). The doctrine does not apply where the defendant does not face the risk that statements he makes at a suppression hearing could be used against him via impeachment at trial. Id.; *accord*, State v. Jones, 146 Wn. 2d 328, 334, 45 P.3d 1062 (2002).

> [W]ithout automatic standing, a defendant will ordinarily be deterred *from asserting a possessory interest in illegally seized evidence* because of the risk that statements made at the suppression hearing will later be used to incriminate him albeit under the guise of impeachment. For a defendant, the only solution to this dilemma is to relinquish his constitutional right to testify in his own defense.

Jones, 146 Wn. 2d at 334-35 (*quoting* State v. Simpson, 95 Wn.2d 170, 180, 622 P.2d 1199 (1980) (emphasis added). However, if the defendant's ability to contest the challenged police action does not depend upon his or her admission to possession of the contraband, then the automatic standing doctrine does not come into play. Williams, 142 Wn.2d at 23. Even under the automatic standing doctrine, a defendant still must assert a violation of his or her own rights. State v. Shuffelen, 150 Wn. App. 244, 255, 208 P.3d 1167, *rev. den.*, 220 P.3d 210 (2009). "Automatic standing is not a vehicle to collaterally attack every police search that results in a seizure of contraband or evidence of a crime." Williams, 142 Wn.2d at 23.

In order to assert automatic standing, in addition to being charged with an offense for which possession is an element of the crime, a person must be in possession of the item *at the time of the challenged search or seizure*. Jones, 146 Wn. 2d at 333 (emphasis added); Zakel, 119 Wn.2d at 569-70. For purposes of standing, possession may be actual or constructive. Jones, 146 Wn.2d at 333. Constructive possession exists when the person has dominion and control over the item such that the person *can immediately convert* the item to their actual possession. Id. (emphasis added). Mere proximity to the item is not enough. Id.

The contested search here is the search of Kluck's purse which led to Kluck's voluntary production of the first bindle of cocaine. There was

no search that produced the second bindle of cocaine. Kluck voluntarily produced the second drug pipe and then informed the deputy that she had more cocaine on her. She voluntarily produced the second bindle of cocaine when she was at the jail. Therefore, the only search that is at issue is the one of her purse that led to the discovery of the drug pipe and her production of the first bindle.

The evidence elicited at the CrR 3.6 hearing was that Kluck claimed ownership of the drug pipe found in her purse and the bindle of cocaine in her pants pocket, and contended that the pipe and cocaine she had secreted on her person were the ones that Russell had given her. RP 53. At the time Kluck's purse was searched, Kluck was outside of Russell's car, which she had voluntarily left when the deputies asked her to so the canine could search the car. Uncontested FF no. 4. She had been told she was free to leave and was standing somewhere between 30 to 100 feet from the car and had remained in the area because Russell wanted to know if Kluck could take her car so it wouldn't be impounded. Uncontested FF no. 4, 5. Kluck handed her purse to the deputy after he noticed she was acting nervous while the drug dog was searching the car and had asked her if he could search her purse. FF No. 7. Russell was located in the back of the patrol car in restraints at this point in time. Uncontested FF no. 1; RP 15-16, 18, 115, 116. According to what Kluck

told the deputy, Russell had given her the drugs while inside the car to conceal on her person, and Russell clearly denied that she possessed the drugs at the scene. Uncontested FF no. 11; RP 22, 53. The court found that Russell didn't have possession of the purse at the time of the search and that she couldn't rely on automatic standing where she was not in possession of Kluck's purse at the time of the search and where Kluck consented to the search. RP 116-118.

At the time of the contested search, Russell was not in actual possession of Kluck's purse or of the drugs and was not in any position to immediately convert either to her possession. No drugs were found in Kluck's purse and the purse had been voluntarily removed from the car by Kluck. Time had passed from Kluck's exiting the car with her purse to the time that the deputy searched the purse, enough time for the dog to search the car. Additional time passed from when Kluck voluntarily went to produce the cocaine in her pocket[8] to the time that Kluck produced the second drug pipe after she was arrested and the second bindle of cocaine after she had been transported to the jail, both of which had been concealed in/on her person. Russell also maintained at the hearing that the drugs were not hers and denied knowing there were any drugs in the car.

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[8] The deputy stopped her and retrieved it himself due to safety concerns. RP __.

RP 79-81. At the time of the search of Kluck's purse Russell was not in actual or constructive possession of the purse or drugs, therefore she is not entitled to assert automatic standing.

Moreover, the underlying rationale for permitting a defendant to assert automatic standing would not be served in the context of this case. First, there was no need for Russell to take the stand to assert one way or another whether or not she possessed the drugs in order to contest the search of the purse or the person of Kluck. Russell could have called Kluck to testify at the suppression hearing regarding the search of the purse. Whether or not Russell testified as to her possession of the drugs at some point during the stop, she couldn't testify that she possessed them at the time of the contested search. They were physically on Kluck's person and Russell cannot demonstrate an expectation of privacy in another person's person. Even if she had asserted ownership of the drugs at the suppression hearing, that testimony would not have been sufficient to assert a privacy interest in the place searched. *See e.g.,* Zakel, 119 Wn.2d at 570 (defendant's claim that he "possessed" car because he had been living in it and kept his personal belongings there was insufficient to demonstrate that he possessed the car at the time of the search); State v. White, 40 Wn. App. 490, 699 P.2d 239, *rev. den.*, 104 Wn.2d 1004 (1985) (defendant's claimed ownership of gun found in back passenger

compartment of codefendant's car did not provide requisite personal privacy interest to assert an expectation of privacy in the car and was insufficient to demonstrate possession at the time of the search for automatic standing because defendant was only a passenger in car when arrested and did not own car which had been impounded by police). In other words, Russell's ability to demonstrate an expectation of privacy in the place searched, Kluck's purse and person, did not depend upon her testifying at the CrR 3.6 hearing that she possessed the drugs or purse.

Jones, cited by Russell, is distinguishable because the purse was no longer in the car at the time of the contested search and had been voluntarily removed by Kluck before the search. In Jones the court determined that the defendant was entitled to automatic standing to contest the search of the passenger's purse in which his gun was found. Jones, 146 Wn.2d at 334. In that case, the defendant denied ownership of the purse and therefore lacked standing to contest the search unless he was entitled to assert automatic standing. Id. at 332. The court determined that the defendant had constructive possession of the purse because it was his car that he had been driving in which the purse was found, he stored his gun in the purse and admitted the gun was his. Id. at 331, 333. The passenger to whom the purse belonged had exited the car and had been directed to return her purse to the car. Id at 331. The purse was then

searched during the search of defendant's car. Id. The court reasoned that automatic standing applied:

> Because Jones must choose to either admit he possessed the gun to assert a privacy interest, thereby admitting the essential element in the case against him, or claim that he did not possess the weapon, thereby losing his ability to challenge the search, he is entitled to assert automatic standing to challenge the search.

In Russell's situation, however, at the time of the search she was not in actual or constructive possession of Kluck's purse. Kluck had voluntarily removed the purse from the car and the purse was never returned to the car. Nor was Russell facing the dilemma about admitting the drugs were hers in order to assert a privacy interest – she had no privacy interest in Kluck's purse or in Kluck's person.

Russell refers to the court's ruling on her Knapstad motion to support her argument, asserting that the court's ruling on the automatic standing issue is inconsistent with the court's Knapstad ruling: *i.e.*, that it had decided in the context of the *Knapstad* motion that there was sufficient evidence that Russell had actually or constructively possessed the drugs, while in the context of the suppression motion, it decided that Russell's guilt had to be based on accomplice liability. Appellant's Brief at 12-13.

Contrary to Russell's contention, the Court did not rule inconsistently. First, the court denied the Knapstad motion because the State indicated it would present the additional testimony of Kluck regarding Russell's giving Kluck the drugs and their driving together to get drugs and bring them back to Whatcom County, which was sufficient evidence for a jury to find the facts to support the charge. RP 97. Specifically regarding possession, the court stated that there was evidence of direct possession and that there was also "evidence of complicity to the possession," both of which the jury could consider. RP 97-98. Similarly, in addition to ruling that Russell did not have automatic standing to contest the search because she was not in possession of the purse at the time of the search,[9] the court addressed the accomplice liability theory:

> I think, also, when the element of the offense is that Miss Russell is an accomplice to this possession by virtue of providing the instrumentality for Miss Kluck to go to Skagit County to purchase the drugs and bringing her back to this area, and also, when looked at in the fact that Miss Russell has made some statements that they intended to use these drugs together, the Court would have to find under those circumstances that it is the element of constructive possession – or I'm sorry, not constructive possession. It is the element of being an accomplice to Miss Kluck's possession, allowing her to get those, that is the crux of the offense here, not that Miss Russell possessed them.

[9] There was evidence though of *prior* actual possession based on Kluck's statements.

RP 119. The court did not rule that the only theory of guilt the State could proceed on was an accomplice liability theory, but specifically addressed that theory given that the State had indicated that was a basis of liability it was pursuing.[10] The court's ruling on the suppression motion was not inconsistent with its Knapstad ruling.

**4. The sentencing judge did not refuse to consider Russell's request for a sentencing alternative that would impose no incarceration, but given her lengthy criminal history felt that a standard range sentence was appropriate.**

Russell next contends that the sentencing judge, who was not the trial judge, refused to consider her request for the sentencing alternative(s) she requested. While the sentencing judge indicated a reluctance to impose a sentence other than the standard range given that he had not been the trial judge, he did not categorically refuse to consider Russell's request. Russell provided no legitimate basis for the sentencing judge to impose any alternative, and given Russell's criminal history, the judge appropriately imposed a standard range sentence after considering the sentencing memoranda of both parties.

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[10] In response to the *Knapstad* motion, in addition to a theory of liability premised on actual possession based on Kluck's expected trial testimony that Russell had given the drugs to her to secrete on her body, the State also advanced a theory of liability based on Russell's accomplice liability for facilitating obtaining the drugs by driving Kluck to Skagit County to buy the drugs, knowing that was the reason for the trip, and driving Kluck back to her house so that they could share the drugs. RP 96.

In general a standard range sentence cannot be appealed. RCW 9.94A.585; State v. Osman, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). A court's decision to deny a sentencing alternative and to impose a standard range sentence is likewise not subject to review. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). Limited review is available, however, "if the sentencing court failed to comply with procedural requirements of the Sentencing Reform Act ("SRA") or constitutional requirements." Osman, 157 Wn.2d at 481-82. Limited review is also permitted where a court refused to exercise any discretion at all or relied upon an impermissible basis. Grayson, 154 Wn.2d at 342. Russell's ability to appeal her standard range sentence is limited to the issue of whether the judge categorically refused to consider her request for a sentencing alternative.

A sentencing judge is not limited to the statutory factors when exercising its discretion not to impose a sentencing alternative. Osman, 126 Wn. App. 575, 581, 108 P.3d 1207 (2005), *aff'd,* 157 Wn.2d 474 (2006); State v. Frazier, 84 Wn. App. 752, 753, 930 P.2d 345, *rev. den.*, 132 Wn. 2d 1007 (1997). In addition, there is no requirement that the court make specific findings regarding the statutory criteria or to state its reasons for its determination to grant or not to grant a sentencing alternative. *See,* State v. Hays, 55 Wn. App. 13, 15-16, 776 P.2d 718

(1989) (court not required to make any specific findings on record in its decision not to impose a Special Sex Offender Sentencing Alternative).

In considering whether to impose a mitigated exceptional sentence, a sentencing judge may not rely upon a defendant's personal circumstances:

> In enacting RCW 9.94A.340 the legislature restricted sentencing courts' exercise of discretion in implementing the SRA; explicitly prohibiting reliance on "any element that does not relate to the crime or the previous record of the defendant." Our cases considering this statute's effect on the imposition of exceptional sentences hold that this nondiscrimination provision prohibits considerations of factors unrelated to the crime and of factors personal in nature to a particular defendant.

State v. Law, 154 Wn. 2d 85, 103, 110 P.3d 717, 725 (2005); *see e.g.*, State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993) (drug addiction directly related to crime insufficient to justify exceptional sentence downward); State v. Allert, 117 Wn.2d 156, 164, 815 P.2d 752 (1991) (defendant's alcoholism insufficient to justify exceptional sentence downward); State v. Pennington, 112 Wn.2d 606, 610-11, 772 P.2d 1009 (1989).

Here, the State, relying upon its sentencing memorandum[11], requested the sentencing judge to impose an exceptional sentence upward

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[11] The deputy who handled the trial was unavailable for sentencing although he had been available the day before. SRP 3.

due to Russell's lengthy criminal history and the aggravating factor under RCW 9.94A.535(2)(c) that Russell's high offender score, a 12, would result in some of the convictions going unpunished.[12] Supp CP __, Sub Nom. 81. Russell also relied upon her sentencing memorandum at sentencing. SRP 9. In addition to reciting facts from the trial and Russell's personal and medical circumstances, the memorandum set forth two bases for requesting a sentence that "avoids incarceration." CP 35-48. Russell requested an exceptional sentence, but never set forth any legitimate factor upon which the court could base a mitigated exceptional sentence. She also relied upon RCW 9.94A.680 in seeking a sentence with an alternative to total confinement, but the statute requires that the offender be facing a sentence of less than one year. RCW 9.94A.680. Russell was not eligible for sentencing under RCW 9.94A.680 because she faced a standard range sentence of 51-68 months. CP 14. Russell provided the court with no legitimate basis to impose any sentence other than a standard range sentence.

Here, Judge Snyder, who had heard the trial, was unavailable on the day of sentencing. Apparently he had been available the day before,

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[12] The State also relied upon RCW 9.94A.535(2)(b) and (d) in seeking an exceptional sentence upward, but those aggravating factors would require jury findings that were not made by the jury.

but because of a scheduling snafu, it hadn't been calendared and/or arrangements hadn't been made for Russell's transportation from the hospital. SRP 3, 7. Judge Snyder wasn't going to be available for another month, and Russell had failed to appear at her first sentencing court date. SRP 7. Judge Mura decided to go forward with sentencing given the circumstances, after having read the sentencing memoranda.[13] SRP 3, 5-8. While the judge had indicated that he didn't know if he would be inclined to impose a sentence outside the standard range since he hadn't heard the trial, the judge's first comment after reviewing the sentencing memoranda and hearing from Russell herself was, "Ms. Russell, you have a long history." SRP 9. The court then stated:

> While I certainly understand your medical conditions, these medical conditions are not by themselves justification in the court's mind, Mr. Ransom, to say we should give her some alternative like drug treatment. She's had an opportunity for drug treatment over the years for a long time. And she just continues to violate. Then when it comes time for sentencing, you might find that funny, Ms. Russell, but the court doesn't, then when it comes up for sentencing she doesn't even bother to appear and gets the bail jumping.

SRP 9. At the time he imposed a mid-standard range sentence, Judge Mura indicated that he wasn't comfortable, despite her criminal history,

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[13] There is no constitutional requirement that the trial judge be the one to impose sentence, a judge other than the one who presided at trial may impose sentence. State v. Sims, 67 Wn. App. 50, 57, 834 P.2d 78 (1992).

imposing an exceptional sentence up without having personally heard the aggravating factors or the case. SRP 10. Contrary to Russell's contention, Judge Mura did consider Russell's request for something other than a standard range sentence, found there was no basis for it, and determined that given her criminal history, a standard range sentence was appropriate.

## E. CONCLUSION

The State requests that the Court deny Russell's appeal and affirm her conviction and sentence.

Respectfully submitted this 5th day of February, 2013.

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## CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, Christopher Gibson, addressed as follows:

NIELSEN, BROMAN & KOCH, PLLC
1908 E. Madison Street
Seattle, WA 98122

Sydney P. Koss — 02/05/2013

NAME DATE