

ORIGINAL

NO. 36542-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DENISE OWENSBY,

Appellant.

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DIVISION II  
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STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 07-1-00229-2

BRIEF OF RESPONDENT

RUSSELL D. HAUGE  
Prosecuting Attorney

RANDALL AVERY SUTTON  
Deputy Prosecuting Attorney

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

SERVICE

Thomas Weaver  
P.O. Box 1056  
Bremerton, WA 98337

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 January 28, 2008, Port Orchard, WA RBurdue  
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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## **I. COUNTERSTATEMENT OF THE ISSUES**

Whether the trial court properly ruled that the methamphetamine was found pursuant to a search incident to arrest where it was found during a search of Owensby's pockets after she was told or overheard that she was under arrest for possession of marijuana, was not told she would be free to leave, and the search took place immediately after the officers were done searching the car in which she was found smoking the marijuana?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Denise Owensby was charged by first amended information filed in Kitsap County Superior Court with possession of methamphetamine and possession of marijuana. CP 38.

Owensby moved to suppress the methamphetamine, arguing that it was seized during an illegal search. CP 6, 22. The trial court, after an evidentiary hearing, denied the motion. CP 37, RP (4/26) 108-09.

The case proceeded to trial, after which a jury found her guilty as charged. CP 98.

**B. FACTS**

The following testimony was adduced at the CrR 3.6 suppression hearing.<sup>1</sup>

Bremerton Police Detective Sergeant Randy Plumb testified that he and Detective Meador were parked in the parking lot at the restaurant. RP (4/26) 41. Detective May showed up shortly afterwards. RP (4/26) 41.

Plumb got out of his car and walked around the back of it, waiting for Meador to get out of his own vehicle. RP (4/26) 41. While standing there he could clearly detect the odor of marijuana coming from the vehicle parked next to his. RP (4/26) 42. It was parked on the right side of his car. RP (4/26) 42. The driver's window was down and Owensby was seated in the car smoking a marijuana cigarette. RP (4/26) 42.

Once Meador joined him, they approached, Plumb on the left side and Meador on the right side of the car. RP (4/26) 42. The window was half-way to fully open. RP (4/26) 43. Plumb identified himself as a police officer because he was in plain clothes. RP (4/26) 43. He immediately asked her to step out of the vehicle because he could smell the smoke and could see the marijuana cigarette in her hand. RP (4/26) 43. As she was getting out of the car, she handed the cigarette to him. RP (4/26) 44.

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<sup>1</sup> Owensby has not raised any issues regarding the trial itself, and the trial proceedings are accordingly not discussed.

He escorted her to the rear of the car. RP (4/26) 44. May showed up at that point, and Plumb asked May to watch Owensby while he searched the car. RP (4/26) 44. May asked if she was under arrest and Plumb stated that she was. RP (4/26) 44. May arrived about a minute after Plumb did. RP (4/26) 45.

Owensby was less than two feet away when Plumb told May she was under arrest. RP (4/26) 45. They were all standing at the rear of the vehicle. RP (4/26) 45. Meador was on the opposite side of the car with the passenger, verifying his identity. RP (4/26) 45.

Plumb then began a search incident to arrest. RP (4/26) 45. During that time Owensby told him where to find the rest of the stuff. RP (4/26) 45. The search took ten minutes at most. RP (4/26) 46. Once he was done with the passenger, Meador assisted Plumb with the search of the car, which was very cluttered. RP (4/26) 46. The passenger would have been removed from the car before the search. RP (4/26) 46.

After searching the car, he had a stack of evidence, which he took to his car to secure it. RP (4/26) 47. After that, he rejoined May and Owensby and was informed that they had found methamphetamine in her pocket. RP (4/26) 47.

Plumb secured the methamphetamine as well. RP (4/26) 47. He did the field test on the methamphetamine. RP (4/26) 48. Up to this point Plumb, Meador and May were the only officers present. RP (4/26) 48. At no point before the methamphetamine was found did Plumb ever advise Owensby that she was free to leave. RP (4/26) 48. He had not released her, and if she had attempted to leave, he would have physically stopped her. RP (4/26) 48.

On cross, Plumb conceded that it was not unheard of for a person to be released for possession of marijuana. RP (4/26) 49. However, it was also not unheard of for them to go to jail. RP (4/26) 49. It depended on the situation and manpower issues – *i.e.* whether there was someone to transport them to the jail. RP (4/26) 49. Plumb never walked toward the restaurant until after she left in the squad car. RP (4/26) 50. Plumb did not recall if he ever specifically told Owensby that she was under arrest. RP (4/26) 50.

In response to questioning by the court, Plumb stated that he recalled using the words “Yes, she is under arrest.” RP (4/26) 53-54. He did not recall specifically telling Owensby that. RP (4/26) 54.

Detective Floyd May testified that Meador and Plumb were already with Owensby and the passenger, Brittner, when he arrived at the restaurant. RP (4/26) 58. Plumb asked May to stay with the two people while he and

Meador searched the vehicle. RP (4/26) 60. He asked Plumb if Owensby was under arrest, and he said she was. RP (4/26) 60. Plumb walked to the back of the car and pointed at her and told her she was under arrest. RP (4/26) 61. He specifically recalled Plumb telling Owensby she was under arrest. RP (4/26) 61.

May asked whether she was under arrest so he could know whether or not he could search her. RP (4/26) 61. May began to search her pockets to make sure she did not have any contraband. RP (4/26) 61. He could feel something in the coin pocket but was not sure what it was. RP (4/26) 61.

May stopped searching at that point, because the passenger was still there, and with the other officers searching the car, "there were too many things going on at the same time." RP (4/26) 61. He decided to stop searching and wait for his own safety: he wanted another officer present in case anything went wrong. RP (4/26) 61.

May did not remove the object from the coin pocket himself because he did not want to be too intrusive. RP (4/26) 62. He was going to let her take it out herself. RP (4/26) 62. It was his intent to have her pull it out once the other officers were done. RP (4/26) 62.

After they were done searching the car, May asked Owensby to pull the object out of her pocket. RP (4/26) 63. She responded that it was sewn

shut, which May knew was not true, because he had just had his finger in it. RP (4/26) 63. Then she put her finger in it and said it was stuck. RP (4/26) 63. May told her take her hand out and he retrieved the object himself. RP (4/26) 63. It was a plastic wrapper containing white powder that field-tested positive for methamphetamine. RP (4/26) 64.

May did not tell Owensby at any time before he found the methamphetamine that she was free to leave. RP (4/26) 64. The passenger was released at some point, but at no point did they release Owensby. RP (4/26) 64. They cuffed her after they found the methamphetamine. RP (4/26) 65.

There were maybe ten minutes between the two searches. RP (4/26) 67. He may have searched her coat, which was sitting on top of the car. RP (4/26) 67. He was not searching to try to find more marijuana. RP (4/26) 67. He was searching her because she was under arrest. RP (4/26) 67. He searched her incident to arrest. RP (4/26) 68. It was standard procedure. RP (4/26) 68.

Meador testified that he arrived at the restaurant planning to have lunch with Plumb. RP (4/26) 71. They smelled marijuana. RP (4/26) 71. Plumb contacted the driver, and Meador contacted the passenger. RP (4/26)

72. He ran the passenger's identification, and it came back clear, so he was eventually released. RP (4/26) 72.

Plumb asked the driver about the marijuana, and she stated that she had smoked a joint, but only a joint. RP (4/26) 72. He heard Plumb advise her she was under arrest. RP (4/26) 73.

The passenger was extremely cooperative. RP (4/26) 73. They determined he was not involved in the offense. RP (4/26) 73. Brittner was told he was free to go after he was released. RP (4/26) 74. They asked him to wait away from the immediate area. He went over to a store where there was a pay phone, and waited there. RP (4/26) 74. He came back a time or two, and eventually went away. RP (4/26) 74.

After releasing the passenger, Meador searched the passenger side of the car. RP (4/26) 74. After that Owensby was searched and some methamphetamine was found, although Meador was not involved in that process. RP (4/26) 74.

May, who had arrived shortly after their initial contact with Owensby and Brittner, did the search. RP (4/26) 75. After they found the methamphetamine, Meador placed her in hand cuffs and *Mirandized* her. RP (4/26) 75. He never told her she was free to leave at any time before the methamphetamine was found. RP (4/26) 75. Meador did not recall ever

taking the handcuffs off of Owensby. RP (4/26) 78. He doubted it was possible that he did. RP (4/26) 78. It would have been hard for her to pull her pockets out with handcuffs on. RP (4/26) 78. She was not wearing cuffs at the time the methamphetamine was found. RP (4/26) 79. The only time he saw her with handcuffs was after the methamphetamine was found. RP (4/26) 80.

Owensby and her passenger, Mark Brittner gave a very different account of the transaction. Owensby testified that she was sitting in her car in the parking lot of the Badda Boom Badda Bing restaurant in Bremerton. RP (4/26) 6-7. Mark Brittner was seated in the car with her. RP (4/26) 6.

Three officers approached. RP (4/26) 6. There was one on each side of the car. RP (4/26) 6. The officer did not identify himself. RP (4/26) 7. He said he smelled the pungent odor of marijuana. RP (4/26) 7. He did not identify himself as a police officer "until it was all done." RP (4/26) 7. She assumed they were officers. RP (4/26) 7. He asked her to get out of the car, which she did. RP (4/26) 7. He asked for identification, which she gave him. RP (4/26) 7.

When she first got out of the car, the first thing he asked her to do was to get up against the car. RP (4/26) 8. She began having a menopause-related hot flash and she asked if she could sit or lean against the car because

she felt dizzy. RP (4/26) 8. He “was very much against that” and “pretty much slammed me against the vehicle and told me to stay there.” RP (4/26) 8. Then he asked for ID and then began searching the Jeep. RP (4/26) 8. He searched her person when she gave him the ID. RP (4/26) 8. He had her pull her pockets out. RP (4/26) 9. She had taken her ID out of her back pocket and he put his hand in the pocket to see if anything else was in it. RP (4/26) 9. He removed her coat and checked it. RP (4/26) 9. He did not frisk her. RP (4/26) 9. She asked to sit down again when he was going through her coat, and he said no and pulled her to the back of the Jeep and told her to lean against it. RP (4/26) 9. But it was slimed with mud, so she asked if she could lean against something else so she would not ruin her clothes. RP (4/26) 9-10. He said no, so she leaned against the Jeep. RP (4/26) 10.

The officer who went to the passenger side of the vehicle sat and spoke to her while Plumb searched the vehicle. RP (4/26) 10. The search took between five and ten minutes. RP (4/26) 10. He asked where additional contraband was, and she told him she would have to show him because it was in a hidden inside pocket of her purse and he would not be able to find it. RP (4/26) 10. He brought the purse so she could show him. RP (4/26) 11. He pulled out her pipe and rolling papers and asked if there was anything else. RP (4/26) 11. She said that there was not. RP (4/26) 11.

By this time there “was a slew” of officers, who had come “out of the woodwork from everywhere.” RP (4/26) 11. There were at least five standing around the car. RP (4/26) 11. They were all plainclothes and came out of the restaurant. RP (4/26) 11. They “just kept coming out of the restaurant, it seemed like, the whole entire time that I was detained by the officers.” RP (4/26) 11. There were at least six. RP (4/26) 11. The others did not talk to her, they only interacted with each other. RP (4/26) 12. Three of them talked to the officer that was with her while Plumb searched the car. RP (4/26) 12.

May was not the one who handcuffed her; he just stood around and walked back and forth. RP (4/26) 13. Plumb gave May the coat and the contents of her pockets. RP (4/26) 13. May went through the coat. RP (4/26) 13. He did not search her person until the very end. RP (4/26) 13.

Owensby then changed her testimony and stated that May searched her while Plumb was searching the car. RP (4/26) 13. May was “the one who found the – in my pocket.” RP (4/26) 13. Her pockets were already inside-out, but he checked them again and made her stand there with her pockets hanging out “like rabbit ears.” RP (4/26) 14. He also searched the coat several times. RP (4/26) 14. He went through each of her pockets and patted her down. RP (4/26) 14.

The third officer was the one who handcuffed her. RP (4/26) 14. She was handcuffed the entire time. RP (4/26) 14. It was probably about half an hour for the entire process. RP (4/26) 14.

She did not have any further contact with Plumb, except when he asked her if he could break open the glove box. RP (4/26) 14. She tried to explain that she had never been able to open it since she got it. RP (4/26) 14. He did not seem to believe her, and asked if he could break it. RP (4/26) 14. She told him if he could get it open that was all right, but she did not want him to break it. RP (4/26) 14. Plumb and the third officer tried to open it for quite a while. RP (4/26) 14. They were unsuccessful. RP (4/26) 15. Plumb did not have any further interaction with her until the squad car came. RP (4/26) 15.

She asserted that at no point before the methamphetamine was found did any of the officers actually tell her she was under arrest. RP (4/26) 15. At no point did they say whether they would be taking her to jail or not. RP (4/26) 15. At no point did anyone read her rights. RP (4/26) 15. They did not say anything about whether she was going to be charged or not. RP (4/26) 15. She overheard dispatch say she had a non-extraditable warrant for failing to appear. RP (4/26) 16.

Plumb then told her that they could unhandcuff her because they were going to let her go. RP (4/26) 16. He told her they would turn the evidence over to the prosecutor's office and she would hear within about 14 days whether they would charge her or not. RP (4/26) 16. His exact words were that she was clear and they were going to release her. RP (4/26) 16. He told her not to leave Kitsap County. RP (4/26) 17. Plumb then went inside to eat. RP (4/26) 17.

Through the whole transaction he was getting radio calls about his order and what salad dressing he wanted. RP (4/26) 17. Then the third officer took the handcuffs off her. RP (4/26) 17. She believed at that point that she was free to go. RP (4/26) 17. When she started to leave, May said he wanted to search her again. RP (4/26) 17. He still had her coat and the contents of her pockets. RP (4/26) 18. He searched the coat again and then put his hands in her front and back pockets. RP (4/26) 18. He then said he wanted to search her little coin pocket. RP (4/26) 18. He put his hand in it and said he thought there was something in it and asked her to pull it out. RP (4/26) 18. She put her hand in and it did feel like something was in there. RP (4/26) 18. It was stuck and she could not get it out. RP (4/26) 18.

Then he reached in and pulled out "whatever was in the pocket." RP (4/26) 19. She saw it after he pulled it out. RP (4/26) 19. It looked like a Band-Aid inside of cellophane. RP (4/26) 19. May said it was drugs. RP

(4/26) 19. She said "bull," and denied it was hers. RP (4/26) 19. She said the only thing she had was marijuana. RP (4/26) 19.

May called to Plumb, who was about to enter the restaurant. RP (4/26) 19. Plumb came back and sent another officer for a test kit, and they determined it was methamphetamine. RP (4/26) 19. Right after May pulled it out of the pocket, they again handcuffed her. RP (4/26) 20. Four officers came back to the car. RP (4/26) 20. They did not give her any further information about her status. RP (4/26) 20.

The third officer tried to talk her into doing controlled buys, and put his phone number in her coat pocket. RP (4/26) 20. At the very end they called a squad car. RP (4/26) 20. As he went to return to the restaurant Plumb asked if anyone had read her her rights or placed her under arrest. RP (4/26) 21. The officers said they had not, and Plumb said they better do that before the squad car arrived. RP (4/26) 21. The third officer was beginning to read her her rights when the squad car arrived. RP (4/26) 21. This was after the methamphetamine was found. RP (4/26) 21. Somebody then read her her rights. RP (4/26) 21. They told her she was under arrest just before they put her in the squad car. RP (4/26) 21. Then they took her to jail. RP (4/26) 22.

On cross Owensby conceded that she had already ingested marijuana when the officers arrived. RP (4/26) 22. It was still in her hand when Plumb approached the car. RP (4/26) 23. She gave it to him just before she got out of the car. RP (4/26) 23. The dizzy feeling came and went for about ten minutes. RP (4/26) 24. She was cuffed just before she was taken to the back of the car. RP (4/26) 24.

On redirect Owensby conceded that she might not recall the precise order of everything that occurred. RP (4/26) 25.

Brittner testified that when they pulled into the parking lot and the next thing they knew their doors were opened. RP (4/26) 30. They did not know who it was at first because they did not show badges until after he was pulled out of the car. RP (4/26) 30. There were two officers at first, and then a third, and African-American came out of the restaurant dressed in cook's garb. RP (4/26) 30.

They removed Owensby from the car first. RP (4/26) 30. They had just pulled in and turned the car off when it happened. RP (4/26) 31. He did not hear the conversation between Owensby and the officer. RP (4/26) 31. He thought they were being mugged until he saw the badge. RP (4/26) 31. They kept him in the car and took her to the rear of it. RP (4/26) 31. They searched him and put him back in the car. RP (4/26) 31.

Then they released Brittner and he went in and used the rest room, and then came back out and stood there. RP (4/26) 32. When he came back they were searching the car, and one of the officers had Owensby detained at the back of the car. RP (4/26) 32. The black officer got into his car at the edge of the parking lot. RP (4/26) 32. He did not recall seeing any other officers. RP (4/26) 32. They told him to leave or they would arrest him. RP (4/26) 33. He never heard them read Owensby her rights. RP (4/26) 33. He assumed she was under arrest because of the way they had her detained. RP (4/26) 33. He did not hear anyone say she was under arrest. RP (4/26) 33.

Brittner asked one of the officers if they were going to arrest her and he said they were. RP (4/26) 33. It was the officer who came to his side of the car. RP (4/26) 34. This was after they found the methamphetamine. RP (4/26) 34. After they told him to leave, he went around the side of the building and peeked around the corner and watched the whole thing. RP (4/26) 34. He did not see a squad car come. RP (4/26) 34.

On cross, Brittner claimed not to have been aware that Owensby had marijuana in her hand when they approached. RP (4/26) 35. He did not have any marijuana. RP (4/26) 35. He was in the car for 15 minutes before they released him. RP (4/26) 37. He came and asked them what they were doing after peeking around the side of the building and they said they were arresting her. RP (4/26) 37.

### III. ARGUMENT

#### **THE TRIAL COURT'S FINDING THAT OWENSBY WAS UNDER ARREST AT THE TIME SHE WAS SEARCHED IS SUPPORTED BY THE TESTIMONY IT HEARD AT THE SUPPRESSION HEARING.**

Owensby argues that the search of her pocket and the discovery therein was not a proper search incident to arrest. This claim is without merit because the trial court's finding that she was under arrest for the possession of marijuana at the time of the search is fully supported by the officers' live testimony at the suppression hearing. Owensby would have this Court substitute its credibility determinations for those of the trier of fact, which is not this Court's function. Nor is her alternative claim, raised for the first time on appeal, that the search was too attenuated from the initial arrest, worthy of consideration.

#### ***1. Owensby was properly searched incident to her arrest for possession of marijuana.***

This Court reviews the denial of a suppression motion to determine whether substantial evidence supports the trial court's findings of fact and whether those findings support the conclusions of law. *State v. Dempsey*, 88 Wn. App. 918, 921, 947 P.2d 265 (1997); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Although the trial court's factual findings are entitled to great deference, whether those facts constitute a seizure is a question of law that we review de novo. *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d

108 (1996), *overruled on other grounds, State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003).

The Washington Constitution mandates that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. In contrast to the Fourth Amendment to the United States Constitution, the article I, section 7 provision “recognizes a person’s right to privacy with no express limitations.” *State v. O’Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). A warrantless search is per se unreasonable unless it falls within one of the few narrowly drawn exceptions. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

“[T]he search incident to arrest exception to the warrant requirement is narrower” under article I, section 7 than under the Fourth Amendment. *O’Neill*, 148 Wn.2d at 584. Under the Washington Constitution, a lawful custodial arrest is a constitutional prerequisite to any search incident to arrest. *O’Neill*, 148 Wn.2d at 587, 62 P.3d 489. The lawfulness of an arrest stands on the determination of whether probable cause supports the arrest. *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006). Probable cause exists when the arresting officer has “knowledge of facts sufficient to cause a reasonable [officer] to believe that an offense has been committed” at the time of the arrest. *Potter*, 156 Wn.2d at 840.

Under RCW 10.31.100(1), police officers may arrest a person without a warrant if they have probable cause to believe the person is “has committed or is committing a misdemeanor or gross misdemeanor ... involving the use or possession of cannabis.” Here Detective Sergeant Plumb directly observed Owensby smoking (and possessing) marijuana; indeed she handed the joint to him on getting out of her car. RP (4/26) 42-44. Plumb thus clearly had probable cause to arrest her.

Nevertheless, an actual arrest must precede a search incident to an arrest. *O’Neill*, 148 Wn.2d at 587. Thus, whether Owensby was in fact under arrest at the time she was searched is the central question presented both here and below.

The proper standard for determining whether a person was under arrest at the time they were searched has been subject to some dispute in the appellate courts. *State v. Radka*, 120 Wn. App. 43, 49, 83 P.3d 1038 (2004). It nevertheless appears this Court does not consider the arresting officer’s subjective intent to be determinative; rather, the determination of custody hinges upon the “manifestation” of the arresting officer’s intent. *Id*; *see also State v. Clausen*, 113 Wn. App. 657, 660-61, 56 P.3d 587 (2002); *State v. Craig*, 115 Wn. App. 191, 196, 61 P.3d 340 (2002). The test is thus “whether a reasonable detainee under these circumstances would consider himself or herself under full custodial arrest.” *Radka*, 120 Wn. App. at 49. Telling the

suspect that she is under arrest indicates a custodial arrest, unless the suspect is also told that she is free to go as soon as the citation is issued *Id.* (*citing Craig*, 115 Wn. App. at 196).

Here, well before Detective May retrieved the methamphetamine from her pocket, Plumb either said directly to Owensby or in her immediate presence (while pointing at her) that she was under arrest. The trial court so found. CP 34 (Findings XX to XXV). These findings are fully supported by the testimony of Plumb and May. RP (4/26) 44-45, 60-61. Although not noted in the findings, the trial court did not in its oral ruling that Detective Meador also testified that he heard Plumb tell Owensby she was under arrest. RP (4/26) 103. Meador did in fact testify to that effect. RP (4/26) 73.

At no point before the methamphetamine was found did Plumb ever advise Owensby that she was free to leave. RP (4/26) 48. He had not released her, and if she had attempted to leave, he would have physically stopped her. RP (4/26) 48. May did not tell Owensby at any time before he found the methamphetamine that she was free to leave. RP (4/26) 64. Meador never told her she was free to leave before the search. RP (4/26) 75. In its oral findings, the court specifically found that there was no manifestation of any intent to release Owensby at any time. RP (4/26) 109; *also* CP 36 (Findings XLII, L & LI).

Considering this evidence, the trial court properly concluded that “under the totality of the circumstances and using the reasonable detainee test, a reasonable person in the Defendant’s situation would have believed they were under arrest.” CP 37 (Conclusion II). Regardless of the dispute Owensby notes over when she was handcuffed (which the trial court did not attempt to resolve) and that she was not placed into the *undercover* officers’ vehicles before the search, the evidence found by the trial court showed that Owensby was or should have been aware that she was under arrest and was not going to be released at the time she was searched. The trial court properly applied *Radka*.

Misperceiving the standard of review, Owensby nonetheless urges this Court to reject the trial court’s factual findings and reweigh the evidence. The trial court, however, as finder of fact, is the sole judge of the weight to be given conflicting testimony in a suppression hearing. Such findings are not subject to review on appeal. *State v. Haack*, 88 Wn. App. 423, 435, 958 P.2d 1001 (1997), *review denied*, 134 Wn.2d 1016 (1998). The reason for this rule is that the trial court is in a better position to assess the credibility of the witnesses. *State v. Dykstra*, 84 Wn. App. 186, 190, 926 P.2d 929 (1996).

The central factual question was whether or not Owensby had been advised or otherwise made aware that she was under arrest and not free to leave. The trial court found that she was, based primarily on the testimony of

the officers that she had been told that she was under arrest and never told that she was free to leave.

Owensby essentially argues that issues over when she was in handcuffs, and when she was placed in the police vehicle should override that credibility determination.<sup>2</sup> Clearly, however, actually being informed that one is under arrest is far more probative of what a reasonable detainee would perceive than other, more equivocal indicia.

Owensby also attempts to hang her hat on Plumb's "concession" that police had the discretion to not always arrest for possession of marijuana. While Plumb did concede that point, he was equally adamant that there was no "general rule" in this regard. RP (4/26) 49. This point is plainly irrelevant to the issue at hand.

Finally, and perhaps relatedly, Owensby also baldly asserts that there "is not a significant dispute that once the search of the car was complete and only marijuana was found, Ms. Owensby was going to be released." Brief at 8. This astonishing claim is unsupported by citation to the record. Since all three officers testified to the contrary, and the trial court so found, this is not surprising. For the same reason, this Court should disregard it as well.

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<sup>2</sup> She nevertheless concedes that the finding was supported by substantial evidence. Brief of Appellant at 10.

**2. Owensby fails to show manifest constitutional error with regard to her claim that the search was too attenuated from her arrest to be valid.**

RAP 2.5(a) provides that a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *State v. Kirkpatrick*, 160 Wn.2d 873, 161 P.3d 990 (2007) (quoting *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988)). The Supreme Court has noted, however, that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.” *Id.* (quoting *Scott*, 110 Wn.2d at 687) (internal quotation marks omitted).

Whether RAP 2.5(a)(3) should allow the new argument on appeal is determined after a two-part analysis. *Kirkpatrick*, 160 Wn.2d at 8. First, the Court determines whether the alleged error is truly constitutional. *Id.* Second, the Court determines whether the alleged error is “manifest,” i.e., whether the error had ‘practical and identifiable consequences in the trial of the case.’” *Id.* (quoting *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)).

An error will not be deemed “manifest” where, as a result of the appellant’s failure to raise the issue at trial, this Court would have to engage in fact-finding an appellate “court is ill equipped to perform.” *Kirkpatrick*,

160 Wn.2d at 11.

Here, this issue was not raised below, and consequently no evidence directed toward the issue was elicited and no factual findings were made. This court should decline to step into that role at this late date.

Moreover, what evidence there is shows that *State v. Valdez*, 137 Wn. App. 280, 152 P.3d 1048 (2007), upon which Owensby relies, is utterly distinguishable from the present case:

But before Dennison called for a K-9 unit he had placed Valdez in the patrol car; there was another officer on the scene; and he had completed his search of the passenger compartment of the vehicle for weapons or destructible evidence. Unlike the officer in *Boursaw*, he found no weapons, destructible evidence, or evidence of drugs or illegal activity other than loose plastic paneling under the dash. At that point, concerns about officer safety *and destruction of evidence* did not provide on-going exigent circumstances allowing another warrantless search.

*Valdez*, 137 Wn. App. at 288-89.

Here, on the other hand, May testified that although he had felt something in Owensby's pocket, he had ceased searching her because he felt uncomfortable with the situation since the passenger was still around and the other two officers were searching the car. As soon as that was done, and officer safety thus permitted him to continue the search, less than ten minutes later, May resumed it. Thus both officer safety and concern for destruction of evidence (May felt the object before he stopped searching) were present.

This claim, even had it been raised below, would be without merit. Since Owensby fails to show manifest constitutional error, this claim should also be rejected.

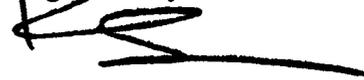
#### IV. CONCLUSION

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

DATED January 28, 2008.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney



RANDALL AVERY SUTTON  
WSBA No. 27858  
Deputy Prosecuting Attorney

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