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41850-9

WASHINGTON STATE COURT OF APPEALS, DIVISION II

State of Washington
Respondent

v.

DANITA K. OSTER
Appellant

41850-9

Lewis County Superior Court Cause Number 10-1-00515-8

The Hon. Nelson Hunt

REPLY BRIEF

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II. **STATEMENT OF THE CASE**

Appellant, Danita K. Oster, was arrested on a public street in Chehalis, Washington, at six o'clock in the evening of September 8, 2010. RP 5, 9. The police contacted her in response to an anonymous report of a suspicious female on the street. In response to police questioning, Oster denied ownership of a purse on the steps of a house where she had been sitting, but when officers moved to search the purse, Oster unambiguously stated it was indeed hers and that they could not search it. She grabbed the purse from the officer and tried to walk away. The police ordered her to stop. After a scuffle over the purse, officers handcuffed Oster and put her in the back of a patrol car. RP 8-9.

Only after Oster was handcuffed and in the patrol car was her purse actually searched. RP 9. Inside, the officers found a glass pipe which they had not seen before. RP 12. After the discovery of the pipe, the police for the first time told Oster she was under arrest. The sole charge was possession of drug paraphernalia. RP 9. Oster was transported to the Lewis County jail. During booking, she was subjected

to a strip search. Inside her brassiere was a baggie containing a substance that was later identified as methamphetamine. RP 10-11, 63.

Oster was then charged with possession of methamphetamine. CP1.

Pretrial, Oster moved under CrR 3.6 to suppress all the physical evidence because it was obtained by warrantless search and seizure. CP 5-6; RP 3-25. The trial court denied the motion. CP 23; RP 19. The police thought Oster was not in custody until she was handcuffed and put in the car. RP 11. The trial court concluded as a matter of law that Oster had already been seized by the time she attempted to leave. Concl. 2.1, CP 23. Ultimately, the court concluded Oster was lawfully searched incident to a lawful arrest and that she was again lawfully searched incident to being lawfully booked into jail. CP 22-23.

At Oster's bench trial, the court admitted the bundle of meth from Oster's bra. RP 54, 63; 64-65. Oster was convicted and received a standard range sentence of 30 days. CP 31, 33.

III. ARGUMENT

1. AN ANONYMOUS REPORT OF A SUSPICIOUS PERSON IS NOT GROUNDS TO VIOLATE THE PRIVACY OF ANY CITIZEN WHO HAPPENS TO BE PRESENT WHEN THE POLICE ARRIVE.

Article I, section 7 provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The Fourth Amendment says: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....” U.S. Const. amend. IV. Article I, section 7 of our state constitution grants greater protection to individual privacy rights than the Fourth Amendment. *State v. Harrington*, 167 Wn.2d, 656, 663, 222 P.3d 92 (2009).

An officer has lawful grounds to seize a Washington citizen only if the officer knows of facts sufficient to cause a reasonable person to believe an offense has been committed. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). An informant’s tip can furnish reasonable grounds to seize someone only if the basis of the information and the informant’s credibility are reliable. *Gaddy*, 152 Wn.2d at 71.

Here, the State had to show at minimum that the informant gave a name, address, phone number, and other background information. *State v. Wakeley*, 29 Wn. App. 238, 241, 628 P.2d 835 (1981).

The State made no such showing. The record of the CrR 3.6 hearing established only two pertinent facts regarding the initial police seizure of Oster: (1) the police received an anonymous report of a “suspicious” female on the street; and (2) the officers targeted Oster because she was the only person on the street when they arrived to investigate. These were the sole grounds on which the police questioned Oster and tried to search her purse. RP 5.

The State clearly recognizes that these were not sufficient grounds to interfere with Oster’s privacy or freedom of movement because they persist in embellishing the facts. In the CrR 3.6 findings, the prosecutor added the word “disorderly” to the anonymous report. Finding 1.1, CP 21. The State now concedes that this is fiction. Respondent’s Brief (BR) at 18 (admitting that many of the CrR 3.6 findings are exaggerated, inaccurate, or simply false.) Nevertheless, the State continues to embroider the facts in its responding brief to this Court by stating that the anonymous caller said the female was “acting in a bizarre manner.” BR 3. This is simply false. The CrR 3.6 record shows merely that Officer Henderson said that the dispatch officer said that an anonymous caller said that “a suspicious

female was wandering around.” RP 5.¹ This was not a reason to interfere with Ms. Oster.

The facts here are virtually identical to those of *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982). There, police responded to a call that a suspicious, “greasy-haired” person was hanging around a neighborhood. This was not sufficient to justify detaining White. *White*, 97 Wn. 2d. at 97. Stopping a citizen on the street on such flimsy grounds “can result in disturbing intrusions into an individual’s right to privacy and can implicate other rights specifically enumerated in the Bill of Rights. *Id.* “It is fundamental that no law may unnecessarily interfere with a person’s freedom, whether it be to move about or to stand still. The right to be let alone is inviolate; interference with that right is to be tolerated only if it is necessary to protect the rights and welfare of others.” *Id.* at 99.

Disturbing Oster’s privacy was unlawful for the same reason.

Any evidence derived from a violation of art. 1, § 7 or the Fourth Amendment is fruit of the poisonous tree and is inadmissible in any Washington court for any purpose. *See, State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

¹ Wandering around, without further elaboration, is not unlawful. *Bellevue v. Miller*, 85 Wn.2d 539, 536 P.2d 603 (1975); *State v. Smith*, 111 Wn.2d 1, 5, 7, 759 P.2d 372 (1988).

That is the case here, and the sole remedy is to reverse Oster's conviction.

2. THE POLICE INTERACTION WITH OSTER WAS A SEIZURE, NOT A SOCIAL CONTACT.

The State has the burden to show that a warrantless search and seizure was justified by an applicable exception. *State v. Afana*, 169 Wn.2d 169, 177-78, 233 P.3d 879 (2010). The determination of whether police conduct constitutes a seizure is one of law that is reviewed de novo. *Harrington*, 167 Wn.2d at 662.

The State originally justified detaining Oster based on what Officer Henderson perceived as her sweaty and nervous appearance and evasive demeanor. RP 6. The State has now abandoned that argument. Instead, the State claims that Henderson's interaction with Oster was merely a social contact. BR at 7. The State claims that an initial social contact with Oster did not mature into a seizure until after Oster started to walk away. BR 11. This is wrong. Ms. Oster was not free to end the contact by walking away and had been seized from the outset.

A seizure under Const. art.1, § 7 occurs when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority. *Harrington*, 167

Wash.2d at 664; *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004), citing *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003).

In *Harrington*, a single officer approached the defendant at 11:00 p.m. and requested permission to speak with him. *Harrington*, 167 Wn.2d at 665. Here, by contrast, two officers approached Ms. Oster at 6:00 p.m., and began questioning her without asking her if it was okay to talk to her. According to the *Harrington* Court, the arrival of a second officer increases the appearance that the citizen is not free to leave. *Harrington*, 167 Wn.2d at 666. Nothing in the record suggests that the officers were concerned that Ms. Oster was potentially armed or a threat to their own safety, as might justify the type of search officers made of Mr. Harrington. See *id.* at 667. Moreover, a request to search is inconsistent with a social contact. *Id.* at 669. Once police manifest an intent to search a suspect, as here with Ms. Oster's purse, contact has matured into an intrusion substantial enough to constitute a seizure. *Id.* at 669-70.

The State concedes that the *Harrington* contact matured into a seizure when a second officer became involved and the police asked if they could search the detainee. That is what happened here. Accordingly, as in *Harrington*, all evidence obtained after that was subject to the

exclusionary rule and must be suppressed. *Harrington*, 167 Wn.2d at 670.²

The difference between a seizure and a social contact is whether the subject is free to terminate the encounter and walk away. *O'Neill*, 148 Wn.2d at 574. The legitimacy of any claim by the State that Ms. Oster was not seized evaporated when she was unable to walk away from her unwelcome encounter with the two officers. The officers ordered her to stop, physically restrained her, handcuffed her, locked her in a patrol car, and took her purse. Officer Henderson testified that he believed Ms. Oster was already in custody at the point when she tried to leave. The trial court correctly concluded that this was the case. Concl. 2.1, CP 23.

Thus, Ms. Oster was seized throughout the encounter, because at no point after the officers' initial contact with her was she free to walk away or terminate the "social" encounter.

"If police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence whenever there is a meaningful causal connection between the State's unlawful activity and the acquisition of evidence, because such evidence is "the fruit of the

² Our Supreme Court in *Harrington* recognized the inherent compulsion people feel to comply with authority figures and that most people would not feel free to leave when questioned by a police officer on the street. *Harrington*, 665, n.4, quoting David K. Kessler, FREE TO LEAVE? AN EMPIRICAL LOOK AT THE FOURTH AMENDMENT'S SEIZURE STANDARD, 99 J. Crim. L. & Criminology 51, 73 (2009).

poisonous tree.” *Harrington*, 167 Wn.2d at 664; *Wong Sun*, 371 U.S. at 487-88. That is the case here and reversal is required.

3. THE POLICE SEIZURE OF OSTER
WAS NOT A LAWFUL TERRY STOP.

If Oster was not seized at the outset, she certainly was seized when she started walking and the officers ordered her to stop. Finding 1.10, CP 22; RP 8. The State concedes this, but erroneously claims Oster was seized in the course of a lawful *Terry* stop. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). BR 12.

An investigative detention constitutes a seizure, and must therefore “be reasonable under the Fourth Amendment.” *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986), citing *Terry*, 392 U.S. at 10. An investigative stop is not reasonable unless the police can point to “specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity.” *Armenta*, 134 Wn.2d at 10, quoting *State v. Gleason*, 70 Wn. App. 13, 17, 851 P.2d 731 (1993). The *Terry* stop is a brief investigatory seizure that is an exception to the warrant requirement. It is unquestionably a seizure. *Kennedy*, 107 Wn.2d at 4. It is less intrusive than an arrest, but the person is nevertheless is not free to leave. *Id.*

Moreover, a *Terry* stop must be reasonable from its inception. *Kennedy*, 107 Wn.2d at 4. The State must point to specific and articulable facts, known at to the officer at the inception of the stop, which together with rational inferences from those facts, reasonably warranted a particular intrusion. *Kennedy*, 107 Wn.2d at 4; *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); *Terry*, 392 U.S. at 21.

Oster Did Not Voluntary Abandon Her Purse: The State first claims it was lawful for the police to seize Oster to investigate the contents of her purse because she abandoned it by equivocating as to her ownership. This is wrong.

Law enforcement officers do not need either a warrant articulable grounds to retrieve and search voluntarily abandoned property. *State v. Reynolds*, 144 Wn.2d 282, 287-288, 27 P.3d 200 (2001). But a defendant's privacy interest in the property may be abandoned voluntarily or involuntarily. And property is not voluntarily abandoned if the person abandoned it because of unlawful police conduct. *State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004), citing *State v. Nettles*, 70 Wn. App. 706, 709, 855 P.2d 699 (1993), and *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

Merely denying ownership is not sufficient by itself to establish abandonment. *State v. Evans*, 159 Wn.2d 402, 407-409, 150 P.3d 105

(2007). To establish voluntary abandonment the State must show both an act and intent. 1 Wayne R. LaFave, SEARCH AND SEIZURE § 2.6(b), at 574 (3d ed.1996). Unless a person voluntarily and intentionally relinquishes her reasonable expectation of privacy, the search is invalid. *State v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577 (2001), quoting *United States v. Hoey*, 983 F.2d 890, 892-93 (8th Cir.1993); *see also United States v. Nordling*, 804 F.2d 1466 (9th Cir.1986). Abandonment is not voluntary and a police search is unlawful if the item was abandoned as a result of illegal police behavior. *Reichenbach*, 153 Wn.2d at 137.

Here, Oster did not voluntarily abandon her purse based solely on a momentary denial of ownership in response to an unlawful police intrusion upon her privacy while she was lawfully standing on a public street.

Oster's Resistance Did Not Constitute Obstructing: Next, the State wrongly claims Oster provided grounds sufficient to justify a *Terry* investigative seizure by resisting Renshaw's attempt to take her purse.

"A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020(1). When a citizen resists a police incursion upon her privacy, however, the question is not whether she obstructed the officer but

whether she legally obstructed the officer in reliance upon her state and federal constitutional right to resist a warrantless search. *State v. Bessette*, 105 Wn. App. 793, 797, 21 P.3d 318 (2001).

Here, as in *Bessette*, the dispositive question is whether exigent circumstances justified searching Oster's purse without a warrant. If not, Oster's conduct did not constitute obstruction as a matter of law. *Id.*

State v. Little, 116 Wn.2d 488, 806 P.2d 749 (1991), is illustrative. There, a group of juveniles was reported to be loitering on the grounds of an apartment complex. When the police arrived, the juveniles fled. *Little*, 116 Wn.2d at 496. This was grounds for an investigative stop and also constituted obstruction. *Id.* Here, by contrast, Oster was not on private property but a public street, and she made no attempt to flee at the approach of the officers. The police had no grounds to stop her and she was within her rights to resist being violated.

Any Obstructing Arose After the Inception of the Stop: The State next claims the seizure was justified by an articulable suspicion that Oster was obstructing them. But, even if Oster did obstruct Renshaw, this did not happen until the seizure was well under way.

Police may arrest a person without a warrant for committing a misdemeanor committed in an officer's presence. RCW 10.31.100.

The State claims the police somehow lawfully arrested Oster for a misdemeanor that occurred in their presence *after* they initiated the arrest and that the police reasonably suspected Oster of the having committed the gross misdemeanor of obstructing by resisting the stop and trying to prevent the warrantless search of her purse. BR 13-14.

But, just as an arrest must precede the incident search to trigger the warrant exception, and articulable suspicion that a crime is about to occur must precede the inception of an investigatory stop, by the same logic a misdemeanor cannot justify a warrantless arrest unless it precedes the arrest. The trial court erroneously concluded that the officers had a reasonable suspicion at the inception of the stop that Oster was committing the crime of obstructing. Conclusion 2.2, CP 23. This is insupportable. The seizure came first, manifested by the attempt to grab the purse. Then Oster's resistance followed.

The obstructing statute criminalizes obstructing a law enforcement officer in the discharge of official powers or duties. RCW 9A.76.020(1). That is, the police must be exercising a lawful duty. Here, that means the attempt to search the purse had to be based on a lawful right to investigate some reasonable suspicion of criminal activity. *State v. Barnes*, 96 Wn. App. 217, 224, 978 P.2d 1131 (1999). Otherwise, the State cannot argue that the officer was discharging his lawful police duties. *Id.*

This Court should decline the State's invitation to extend the exceptions to the warrant requirement to accommodate anticipatory detention or arrest for conduct that happens after the inception of a warrantless intrusion or in the course of the arrest.

Moreover, Oster's initial equivocation about owning the purse cannot constitutionally be construed as constituting the offense of obstructing. The crime of obstructing requires some conduct in addition to making a false statement. *State v. Williams*, 171 Wn. 2d 474, ___, 251 P.3d 877, 879 (2011). Otherwise, "law enforcement officers, without probable cause or even reasonable suspicion that a crime is being committed, may engage citizens in conversation, arrest them for obstruction based upon false statements, and then search incident to the arrest," thus making an 'end run' around constitutional limitations on searches and seizures." *Williams*, 251 P.3d at 883 -884, citing *White*, 97 Wn.2d at 106-07.

That is exactly what these officers did to Ms. Oster.

4. OSTER WAS UNLAWFULLY ARRESTED FOR POSSESSION OF PARAPHERNALIA AND THE STRIP SEARCH EVIDENCE MUST BE SUPPRESSED.

Oster was subjected to custodial arrest solely for possession of paraphernalia. The State here concedes that this was not a lawful ground to arrest Oster. BR 16. It is well-established that possession of drug paraphernalia is not a crime. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). Therefore, any evidence resulting from the unlawful arrest must be suppressed, and the conviction based on that evidence must be vacated and dismissed with prejudice.

Therefore, Oster's conviction for possession of methamphetamine must be reversed and the prosecution dismissed with prejudice.

5. THE ERRONEOUS FINDINGS ARE SUFFICIENTLY SERIOUS TO CONSTITUTE REVERSIBLE MISCONDUCT.

The State concedes that the CrR 3.6 Findings consistently misrepresent the evidence by stating that Oster was disorderly, that she was in front of a vacant house, that she was breathing rapidly, that she struggled with police before they unlawfully seized her, that she was read her Miranda warnings at the jail, that a crystal substance was found inside her bra when she was strip searched, and that the substance tested positive for methamphetamine. The facts also include fictitious descriptions of Oster's purse and a glass pipe found inside it. BR 18-23.

The State characterizes these errors as merely academic, formal or trivial. BR 23. They are not. The State concedes that the erroneous findings resulted from the prosecutor's misrepresenting as sworn testimony mere allegations from the State's memorandum of authorities that were not supported by the evidence. BR 25-26.

The purpose of a memorandum in support of a motion to suppress is to assist the court with authorities of law to be applied to facts the moving party expects will be established by sworn testimony at the hearing. CrR 8.2, Cr 3.6(a). The responding memorandum is limited to authorities of law. *Id.* Neither side's memorandum is a substitute for testimony. The Information is where the State presents its allegations. CrR 2.1(a)(1). The Findings of Fact must be based on the evidence presented at the hearing. CrR 3.6(b).

The State argues that the false findings reflect mere incompetence, rather than deliberate misconduct. BR 26. But misconduct does not have to be deliberate. The term "prosecutorial misconduct" really means "mistakes made by the prosecutor during trial." *State v. Fisher*, 165 Wn.2d 727, 740 n.1, 202 P.3d 937 (2009). Neither must misconduct be evil or dishonest; simple mismanagement is sufficient. *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). The reviewing court does not distinguish between prosecutorial "error" and "misconduct." *State v. Ish*,

170 Wn.2d 189, 195 n.6, 241 P.3d 389 (2010). If prosecutorial mistakes are not harmless and deny the defendant a fair trial, then the remedy is to reverse the conviction. *Fisher*, 165 Wn.2d at 740 n.1. Where the trial court relies on bald allegations that were mistakenly substituted for sworn testimony, the error cannot be deemed harmless.

Moreover, Oster stands by her claim that the court contributed to the misconduct by failing to enter its findings at the close of the hearing while the judge retained some independent recollection of the evidence, as required by CrR 3.6(b). If “at the conclusion of the hearing” does not mean immediately or very shortly after the hearing ends, then it is meaningless, since the court could not possibly enter findings before the hearing.³ This Court does not interpret statutes or court rules so as to render any part meaningless or superfluous. *State v. Marohl*, 170 Wn.2d 691, 699, 246 P.3d 177, 180 (2010).

Prosecutorial misconduct requires reversal if there is a substantial likelihood it affected the outcome of the trial. *Fisher*, 165 Wn.2d at 747, citing *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Defense counsel is expected to object to misconduct unless it is too

³ Generally speaking, that is. The Oster findings could have been entered without a hearing, because they were based on pre-hearing allegations, not evidence.

“flagrant and ill-intentioned” to be curable. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006); *Fisher*, 165 Wn.2d at 747.

Here, the defense counsel was not allowed to address the objectionable findings earlier. By trial date, counsel — like the judge — was not in a position to meaningfully object to the prosecutor’s spurious version of the evidence. Therefore, counsel was not able to request a cure, and the court could not have granted relief had counsel done so.

Oster was prejudiced by these spurious findings because the court relied on them in concluding the serial invasions of her privacy rights were unobjectionable. This is grounds to reverse Oster’s conviction.

IV. CONCLUSION

For the foregoing reasons, Danita Oster asks this Court to reverse her conviction and vacate the judgment and sentence.

Respectfully submitted this 17th day of August, 2011.


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CERTIFICATE OF SERVICE

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